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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-1655
L.T. CASE NO.'S: 5D14-2920; 492014CA001636OCXXXX

PLANNED PARENTHOOD OF GREATER ORLANDO, INC.
n/k/a PLANNED PARENTHOOD OF SOUTHWEST
AND CENTRAL FLORIDA, INC.,
a Florida non-profit corporation,

Petitioner,

v.

MMB PROPERTIES,
a Florida general partnership,

Respondent.

PETITIONER/DEFENDANT PLANNED PARENTHOOD'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal from a temporary injunction order issued by the Circuit Court in Osceola County. A panel of the Fifth District Court of Appeals affirmed in part that order, which prohibits Petitioner Planned Parenthood of Southwest and Central Florida, Inc., as successor by merger with Planned Parenthood of Greater Orlando, Inc. ("Planned Parenthood") from performing surgical abortions at its Kissimmee health center. The injunction was issued at the request of Respondent MMB Properties ("MMB").

II. Course of the Proceedings

Planned Parenthood is a not-for-profit corporation that operates several health centers in Florida. The health center at issue in this lawsuit, its Kissimmee health center, is located at 610 Oak Commons Boulevard in the Oak Commons Medical Park ("Oak Commons") in Kissimmee, Florida.[1] A.13, Tosh Aff., ¶¶ 3-4.[2]

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[1] Planned Parenthood of Greater Orlando, Inc. operated the Kissimmee health center until its July 1, 2015 merger with Planned Parenthood of Southwest and Central Florida, Inc., which successor corporation now operates the Kissimmee health center. All references to "Planned Parenthood" in this brief include actions taken with respect to the Kissimmee health center by either entity.

[2] Citations to documents in the record will be to items as numbered in the Appendix submitted to the Fifth District Court of Appeals and will take the form A.__, __. Citations to documents not in the Appendix will include a descriptive designation and pincite. The transcript of the temporary injunction hearing

MMB is a general partnership that also owns property in Oak Commons. A group of cardiologists, some of whom are partners in MMB, have their practice at that property. Hearing Tr., at 8.

Planned Parenthood purchased its property in Oak Commons in December 2013. Hearing Tr., at 29. After necessary renovations, Planned Parenthood opened the Kissimmee health center on July 10, 2014 and began offering medical services to patients at that location. A.22, Tosh Supp. Aff., ¶ 2. At the Kissimmee health center, much like a gynecologist's office, physicians or other medical staff under their supervision provide a wide range of reproductive health care services. These include medical exams, FDA-approved methods of contraception, testing and treatment for certain sexually transmitted diseases, breast and cervical cancer screening, blood pressure screening, and medication and surgical abortions. A.13, Tosh Aff., ¶ 5.

The Oak Commons office park, which includes the Kissimmee health center, MMB's property, and other medical offices, is subject to a set of restrictions contained in a Declaration of Restrictions and in a Declaration of Covenants,

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initially filed with the appellate court included some errors and omissions by the transcription service. A revised and complete transcript was submitted to the Fifth District with Planned Parenthood's reply brief, and is the version cited to in this brief.

Conditions, and Restrictions (together, the "Declarations"). A.1, Compl., Ex. A. The Declarations state in relevant part:

> The property described herein shall not be used for the following activities without the prior written permission of AMERICAN MEDICORP DEVELOPMENT CO., a Delaware corporation, which shall be granted only in its sole and unfettered discretion, unless ancillary and incidental to a physician's practice of medicine:
>
> 1. An OutPatient Surgical Center.
> 2. An Emergency Medical Center.
> 3. A Diagnostic Imaging Center which includes the following radiographic testing: Fluroscopy [sic], Plane Film Radiography, Computerized Tomography (CT), Ultrasound, Radiation Therapy, Mamography [sic] and Breast Diagnostics, Nuclear Medicine Testing and Magnetic Reasonance [sic] Imaging (MRI).

Id. The Declarations also prohibit "activity or use . . . that is obnoxious to or out of harmony with other developments on the Property." *Id.* at Ex. B at 10.

A. Initial proceedings in front of the trial court.

On June 9, 2014, MMB filed a single-count Complaint alleging that Planned Parenthood's use of its property violates the Declarations. MMB's Complaint claims that:

- Planned Parenthood provides abortions, thus violating the Declarations' prohibition against using the property as an outpatient surgical center and as an emergency medical center. *Id.* at ¶¶ 27-28.
- It also provides emergency contraception, violating the emergency medical center restriction. *Id.* at ¶ 29.

- Planned Parenthood's zoning application to determine whether it can operate an outpatient surgical center violates the outpatient surgical center restriction. *Id.* at Ex. C.

- Providing abortions and the consequent presence of protestors violate the obnoxious use restriction. *Id.* at ¶¶ 30-31.

Soon after, MMB moved for a temporary injunction, requesting that Planned Parenthood be temporarily enjoined from "performing abortions, performing outpatient surgical procedures, performing emergency medical care, and performing emergency contraception." A.4, Mot. for Temp. Inj., at 3.

Planned Parenthood timely filed its answer and affirmative defenses and a memorandum of law in opposition to MMB's motion, along with an affidavit from its then-CEO, Jenna Tosh. On July 14, 2014, the trial court held a hearing on MMB's motion for a temporary injunction. At the hearing, Ms. Tosh testified, offering further evidence that Planned Parenthood had not violated the Declarations. Collectively, this evidence established that:

- Surgical abortion is but one of a large number of medical services that the Kissimmee health center offers to its patients. Physicians and other medical staff provide a number of family planning and primary and preventative care services to both male and female patients. A.13, Tosh Aff., ¶ 5; Hearing Tr., at 33-34.

- Those medical services are provided by or under the supervision of physicians. Hearing Tr., at 34-35, 43.

- Surgical and medication abortions together will constitute less than one percent of the total number of services provided at the Kissimmee health center. A.13, Tosh Aff., ¶¶ 8, 13.

- While the Kissimmee health center operates as a medical office (and has done so since its opening), Planned Parenthood had submitted an application in order to clarify whether the applicable zoning would allow it to expand and include an outpatient surgical suite at some point in the future. *Id*. at ¶ 14.

With respect to MMB's claims about emergency contraception, Planned Parenthood offered evidence that emergency contraception is hormonally no different from birth control pills and is only "emergent" in that the medication must be taken within a certain time after unprotected sex in order to be effective. A.13, Tosh Aff., ¶¶ 12-13. Moreover, providing emergency contraception will constitute but six-tenths of one percent of the total number of services to be provided at the Kissimmee health center. *Id*. at ¶¶ 8, 13.[3] Finally, Martha Haynie, a board member and treasurer of Planned Parenthood, testified to the harm that would result from issuance of a temporary injunction and the amount of bond that would be appropriate if the court were to enjoin the Kissimmee health center from providing certain medical services. Hearing Tr. at 55-65.

At the hearing, Dr. Johnston Massey, one of the cardiologists at Oak Commons and a partner in MMB, testified on its behalf. Dr. Jose Fernandez, a local family physician who has been active in opposing abortion services in the

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[3] In its memorandum of law, Planned Parenthood cited to the "heckler's veto" concept in case law to explain that the presence of protestors could not result in the obnoxious use provision being enforced against it. A.12, Defs.' Memorandum of Law, at 5, 11.

area, *id.* at 50-51, testified as well. Relevant to the issues in this appeal, both Drs. Massey and Fernandez, who are not obstetrician/gynecologists and who have never performed an abortion, testified that surgical abortions are surgical procedures. *Id.* at 12-13; 23-26; 49-50. Dr. Massey admitted that MMB had never sought to enforce the Declarations against other medical providers in Oak Commons, even though he knew that at least one of them performed surgical procedures. *Id.* at 27.

Approximately a week after the hearing, on July 23, 2014, the trial court issued an order granting MMB's motion for temporary injunction in large part (the "Order"). A.14, Order. The trial judge held that MMB had a substantial likelihood of showing that performing surgical abortions at the Kissimmee health center would violate the outpatient surgical center prohibition. *Id.*, Findings of Fact, ¶¶ 15-16; Conclusions of Law, ¶ 6. The trial court determined that Planned Parenthood's performance of surgical abortions could not fall under the "ancillary and incidental" exception of the Declarations because Planned Parenthood is not a "physician's practice," reasoning that "[i]t is instead a § 501(c)(3) tax-exempt nonprofit organization." *Id.*, Findings of Fact, ¶ 21. Without referring to any evidence in the record, the trial court's order went on to observe that "many of [Planned Parenthood]'s services fall well beyond the traditional ambit of a 'physician's practice of medicine'" because Planned Parenthood "is heavily involved with various educational, advocacy, and community outreach in

furtherance of its mission as a non-profit organization." *Id.*, Findings of Fact, ¶ 23. The trial court dismissed the undisputed evidence provided by Planned Parenthood that abortions would constitute only one percent of the total number of services provided at the Kissimmee health center saying that the statistic was "offered out of context in light of the totality of the evidence." *Id.*, Findings of Fact, ¶ 25.

Even though MMB had not sought any relief with respect to the "Diagnostic Imaging Center" restriction contained in the Declarations, the trial court nevertheless ruled that Planned Parenthood's performance of ultrasounds (also sometimes called sonograms) would violate that restriction. Moreover, the relief granted by the trial court was not limited to abortions and ultrasounds. The trial court's order additionally prohibited Planned Parenthood:

> from directly or indirectly violating the Declaration of Restrictions at 610 Oak Commons, Kissimmee, Florida, *including but not limited to* the performance of surgical abortions and the provision of sonographic or other diagnostic imaging services.

Id. at 12 (emphasis added).[4] The resulting injunction arguably prevented Planned Parenthood from providing not only surgical abortions but also other procedures that may be deemed surgical, as well as medical procedures that may require

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[4] The trial court did hold that Planned Parenthood likely had not violated the emergency medical center or obnoxious use provisions of the Declarations, both of which holdings MMB has never challenged on appeal. *Id.*, Findings of Fact, ¶¶ 18, 20.

sonograms such as endometrial biopsy, insertion and removal of IUDs, evaluation of pelvic pain, evaluation of abnormal bleeding, and medication abortions. A.21, Morris Aff., ¶ 14.

B. Post-injunction proceedings in front of the trial court

Less than a week after the trial court's Order, Planned Parenthood filed a motion, on July 28, for the court to reconsider, dissolve, or modify the injunction Order ("Post-Hearing Motion"). It also filed a motion to stay the trial court's temporary injunction pending appeal. In support of these motions, Planned Parenthood offered four additional affidavits (the "Supplemental Affidavits") from Ms. Tosh; Dr. Merri Morris, a physician and then-medical director of Planned Parenthood; Thomas Harbert, an attorney with whom Planned Parenthood had consulted when buying the property at Oak Commons; and Matthew Harkins, a licensed general contractor responsible for having planned and overseen the renovation of the Kissimmee health center. The new affidavits were directed both at the obvious errors in the trial court's order with respect to its ruling on surgical abortion as well as its ruling enjoining diagnostic imaging and other "including but not limited to" services. The latter were matters about which Planned Parenthood had not presented evidence because they were not included among the relief sought in MMB's pleadings and were not otherwise raised by MMB at the hearing. Shortly thereafter, the trial court denied both the Post-Hearing Motion and the

motion for a stay without any explanation or analysis. A.25, Order Denying Defs.' Mot. to Reconsider, Dissolve, or Modify Order Granting Mot. for Temp. Inj.; A.29, Order Denying Defs.' Emergency Mot. for Stay of Temp. Inj. Pending Appeal.

C. Proceedings in front of the Fifth District Stay Panel.

On August 13, 2014, Planned Parenthood filed its notice of appeal, both on the trial court's order granting MMB's motion for injunction as well as the order denying Planned Parenthood's Post-Hearing Motion. A.27, Not. of Appeal. About a week later, Planned Parenthood filed an emergency motion in the Fifth District Court of Appeal to stay the trial court's injunction. After the stay motion was fully briefed, on September 24, 2014, a unanimous three-judge panel of the Fifth District Court of Appeals ("Stay Panel") issued a stay of the temporary injunction in its entirety. *Planned Parenthood of Greater Orlando v. MMB Props.*, 148 So. 3d 810 (Fla. 5th DCA 2014). The Stay Panel held that Planned Parenthood was entitled to the stay because:

- The trial court erred as a matter of law by enjoining Planned Parenthood from providing diagnostic imaging services when MMB had not requested this relief.
- The "including but not limited to" language in the trial court's Order did not give adequate notice as to what the Order prohibited.
- Planned Parenthood is likely to succeed on the merits by demonstrating either that it is not an outpatient surgical center or that

any surgeries it performs are ancillary and incidental to a physician's practice.

- The trial court's finding that the Kissimmee health center is not a physician's practice is not supported by the record.
- Planned Parenthood had sufficiently shown that it would suffer harm absent a stay.

Planned Parenthood, 148 So. 3d at 811-12. The Stay Panel made clear that it was considering all of the evidence submitted, including the Supplemental Affidavits. *Id.* at 812. After the Stay Panel issued its order, Planned Parenthood was able to resume offering the full range of health care services at its Kissimmee health center, including surgical abortions and diagnostic imaging procedures.

D. Proceedings in front of the Fifth District Merits Panel.

On May 22, 2015, a different three-judge panel of the Fifth District Court of Appeal ("Merits Panel") issued a divided opinion partially affirming the trial court's temporary injunction.[5] *Planned Parenthood of Greater Orlando v. MMB Props.*, 171 So. 3d 125 (Fla. 5th DCA 2015). Like the Stay Panel, the Merits Panel held that the trial court erred in enjoining Planned Parenthood from providing diagnostic imaging procedures because "that relief was not sought by MMB in its pleadings and was not, in our view, tried by consent." *Planned Parenthood*, 171

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[5] The dissenting judge on the Merits Panel, Judge Evander, was one of the three judges on the unanimous Stay Panel. The two judges that made up the majority opinion of the Merits Panel were not on the Stay Panel.

So. 3d at 127. Also, in conformity with the decision of the Stay Panel, the Merits Panel ordered the trial court to strike its vague "including but not limited to" language. *Id.*

The Merits Panel, contrary to the Stay Panel, affirmed the part of the trial court's Order enjoining Planned Parenthood from performing surgical abortions. *Id.* In doing so, the Merits Panel refused to consider the Supplemental Affidavits, because, "to the extent that the affidavits were submitted in support of Planned Parenthood's motion to dissolve or modify the injunction, it needed to establish changed circumstances, which it did not do." *Id.* at 128 (citation omitted). In refusing to consider the Supplemental Affidavits, the Merits Panel explicitly acknowledged a conflict in law with the Third and Fourth District Courts of Appeal. *Id*. at 128 n.3. Neither of those courts requires a showing of changed circumstances.

The Merits Panel recognized that the Declarations are "rather poorly worded," as they prohibit "the property from being 'used' for the 'following *activities*' but then list[] three '*centers*' as prohibited *activities*." *Id.* at 129. However, the court ultimately held that the "focus of this restriction is on prohibited activities" and that the use of the word "center" refers to the "location where such activities occur." *Id.* at 130. The Merits Panel thus construed the Declarations to prohibit "a facility or place for, or for the purpose of, performing

outpatient surgical procedures." *Id.* The opinion went on to summarily affirm the trial court's findings without citation to any record evidence whatsoever. In particular, it affirmed the trial court's findings that the Kissimmee health center "is not a physician's practice of medicine; and, that even if the facility is operated as a physician's practice of medicine, its performance of abortions was not ancillary or incidental to that practice." *Id.*[6] The dissenting judge on the Merits Panel disapproved, stating "I cannot agree that MMB met its burden of showing a substantial likelihood of success on the merits." *Id.* at 133 (Evander, J., concurring in part, dissenting in part).

Following the Merits Panel's opinion, Planned Parenthood moved for rehearing and/or rehearing en banc and asked the appellate court to stay issuance of the mandate pending appeal to this Court. Both of these motions were denied without analysis. *See* App. Ct. Order Den. Reh'g and/or Reh'g En Banc; App. Ct. Order Den. Emergency Mot. to Stay Issuance of the Mandate. When the mandate issued on August 28, 2015, Planned Parenthood was effectively prevented from

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[6] The Merits Panel also held that MMB does not have to prove the irreparable harm or adequate remedy at law prongs of the temporary injunction standard and rejected Planned Parenthood's arguments on the public interest prong. *Id.* at 131-32. Finally, the court held that neither party was entitled to attorney's fees under the Declarations. *Id.* at 132.

providing the surgical abortion services on which its patients in the community had come to rely.

E. Proceedings in front of this Court.

Anxious to resume offering the full range of reproductive medical services to its patients, Planned Parenthood promptly invoked this Court's jurisdiction. Planned Parenthood sought review of the inter-district conflict that was explicitly recognized by the Fifth District. Sup. Ct. Jurisdictional Br., at 6-9. Planned Parenthood also requested a stay from this Court. On November 2, 2015, this Court, in a 5-2 order, granted Planned Parenthood's stay motion, allowing surgical abortions to again be provided at the Kissimmee health center. *See* Sup. Ct. Am. Order (Nov. 2, 2015). For more than two months following issuance of the Fifth District's mandate, Planned Parenthood had not been able to offer these services. The day following its grant of a stay, this Court accepted jurisdiction. *See* Sup. Ct. Order (Nov. 3, 2015).

SUMMARY OF ARGUMENT

Planned Parenthood has not violated the Declarations, and the trial court's issuance of an injunction and the subsequent appellate court partial affirmance were in error. First, this Court must settle the inter-district conflict. Changed circumstances should not be required in order for a trial court to modify or dissolve a temporary injunction. This unnecessary obstacle to judicial review can lead to

unjust results and delayed remedies, as is exemplified in this case. Second, this Court should review the full merits of this case and hold that the trial and appellate courts erred in preventing Planned Parenthood from providing surgical abortions to its patients. Planned Parenthood did demonstrate changed circumstances and the Supplemental Affidavits should have been considered. Even if this Court holds that changed circumstances are required and Planned Parenthood did not establish changed circumstances, Planned Parenthood nevertheless submitted sufficient evidence prior to the temporary injunction Order. That evidence showed that its Kissimmee health center is not an outpatient surgical center so as to violate the Declarations. Moreover, the temporary injunction record fails to support the lower courts' findings that the Kissimmee health center is not a physician's practice. Planned Parenthood's undisputed evidence confirms that any outpatient surgical procedures performed at the Kissimmee health center are ancillary and incidental to its physicians' practice of medicine. If this Court declines to reach the merits, then the trial court's plainly incorrect rulings will stand and the Kissimmee community will be denied access to critical and constitutionally protected medical services.[7]

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[7] As noted above, MMB has not appealed the trial court's refusal to grant an injunction based on violations of the "Emergency Medical Center" or obnoxious use provisions. Nor has MMB challenged the Merits Panel's reversal of the trial

ARGUMENT

Oak Commons was developed for use as "medical office[s]," as well for "commercial and other medically-related uses." A.1, Compl., Ex. B at 1. Due to the office park's proximity to a hospital, which is now Osceola Regional Medical Center, restrictive covenants were added to thwart direct competition with certain hospital departments, namely preventing freestanding outpatient surgical centers, emergency medical centers, and diagnostic imaging centers.[8] Notwithstanding the Declarations, for years medical providers have performed outpatient surgeries (as well as diagnostic imaging) at corporate medical offices in Oak Commons without complaint or question. Hearing Tr., at 27 (Dr. Massey testified that he is aware that medical providers at Oak Commons perform endoscopies and colonoscopies, which are surgical procedures, yet MMB has not sued any provider other than Planned Parenthood).

Only when Planned Parenthood moved in did MMB seek to enforce the Declarations. Correctly construed, however, the Declarations do not bar Planned

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court's Order on the diagnostic imaging center and vague language grounds. These issues are thus not before this Court.

[8] Indeed, the property was also subject to another restrictive covenant imposed by a different hospital, Florida Hospital. That covenant precluded abortions, but Planned Parenthood recorded a waiver of that covenant prior to purchasing in Oak Commons. Hearing Tr. at 41-42.

Parenthood from providing abortions any more than they bar any of the other Oak Commons land owners from providing limited surgeries and diagnostic imaging procedures. This Court should reject MMB's claims. MMB does not seek to avoid competition with the services it offers nor does it seek to realize the Declarations' purpose of avoiding competition with the nearby hospital. Instead, MMB's actions arise from an animus toward abortion, in the guise of a conventional restrictive covenants case. The restrictive covenants were imposed to ward off unwanted competitors of the nearby hospital, not to preclude physicians from offering surgical abortions.

I. Standard of review

"[A] temporary injunction constitutes extraordinary relief." *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So. 2d 481, 485 (Fla. 2001). An injunction may be granted only if the party seeking relief has sufficiently demonstrated a likelihood of success on the merits, irreparable harm, unavailability of an adequate remedy at law, and that the public will be served by granting the injunction. *Colonial Bank, N.A. v. Taylor Morrison Servs., Inc.*, 10 So. 3d 653, 655 (Fla. 5th DCA 2009). A reviewing court examines legal determinations of a lower court de novo. *Smith v. Coal. to Reduce Class Size*, 827 So. 2d 959, 961 (Fla. 2002), *superseded by constitutional amendment on other grounds as stated in*

Browning v. Fla. Hometown Democracy, Inc., PAC, 29 So. 3d 1053 (Fla. 2010). Purely factual matters are reviewed under the abuse of discretion standard. *Id.*

II. This Court should not require changed circumstances before trial courts can modify or dissolve temporary injunctions.

As this Court recognized in granting jurisdiction, there is currently a deep split among the District Courts of Appeal on the issue of whether, after an injunction has been entered following notice and a hearing, changed circumstances must be demonstrated before a trial court can modify or dissolve a temporary injunction. The First, Second, and Fifth Districts require a showing of changed circumstances. *See, e.g.*, *Thomas v. Osler Med., Inc.*, 963 So. 2d 896, 899 (Fla. 5th DCA 2007); *Hunter v. Dennies Contracting Co., Inc.*, 693 So. 2d 615, 616 (Fla. 2d DCA 1997); *Brock v. Brock*, 667 So. 2d 310, 312 (Fla. 1st DCA 1995). In these districts, if a moving party does not establish changed circumstances, a trial judge has no discretion to modify or dissolve an injunction, even if the decision to enjoin is shown to be clearly wrong. The Third and Fourth Districts, on the other hand, do not require changed circumstances. In these districts, trial courts retain discretion whether to grant such relief. *Minty v. Meister Fin. Grp., Inc.*, 132 So. 3d 373, 376 n.4 (Fla. 4th DCA 2014); *Bay N Gulf, Inc. v. Anchor Seafood, Inc.*, 971 So. 2d 842, 843 (Fla. 3d DCA 2007).

A. The changed circumstances requirement is unjust and unnecessary.

The changed circumstances requirement imposed in the First, Second, and Fifth District Courts of Appeal is an unnecessary obstacle that can thwart timely and efficient correction of unjust results. The nature of the injunction in such cases as this – temporary, provisional relief – justifies allowing trial courts the discretion and flexibility to modify their orders. At the temporary injunction stage, the parties have not had a full trial on the merits. Trial courts typically order or deny temporary relief on the presentation of limited evidence. In such circumstances, it is not surprising that a court, such as the trial court in this case, can misapprehend some of the evidence presented and make errors of law. *See infra*, Argument Section II.B. Allowing trial courts discretion to modify or dissolve temporary injunctions and quickly correct such errors will improve judicial efficiency and further serve to increase public confidence in the judiciary.

This Court has long held that trial courts should retain "[w]ide judicial discretion . . . in the granting, denying, dissolving, or modifying [of] injunctions." *Shaw v. Palmer*, 44 So. 953, 954-55 (Fla. 1907). Placing limitations upon a trial court's ability to modify or dissolve erroneously granted injunctions is contrary to this principle. Indeed, the Fourth District explicitly held that the changed circumstances requirement should not be imposed because it limits a trial court's discretion:

> We do not agree with appellees that a trial court cannot grant a motion to dissolve a temporary injunction where the arguments or evidence in support of the motion to dissolve could have been raised at the hearing on the temporary injunction. Such a bright line rule would, in our opinion, be inconsistent with two well-established principles. First, the "granting and continuing of injunctions rests in the sound discretion of the Court, dependent upon surrounding circumstances." *Davis v. Wilson*, 139 Fla. 698, 190 So. 716, 718 (1939) and cases cited. Second, a trial court has the inherent authority to reconsider a non-final order and modify or retract it. *Hunter v. Dennies Contracting Co.*, 693 So.2d 615 (Fla. 2d DCA 1997). *See also North Shore Hosp., Inc. v. Barber*, 143 So.2d 849 (Fla.1962).

Precision Tune Auto Care, Inc. v. Radcliff, 731 So. 2d 744, 745 (Fla. 4th DCA 1999).

This Court has also recognized that cases involving injunctive relief are by their nature cases in equity. *Wilson v. Sandstrom*, 317 So. 2d 732, 736-737 (Fla. 1975). Adhering to a strict rule that limits trial courts from modifying or dissolving injunctions when they have good reason to do so is not consistent with principles of equity. *See, e.g.*, *Wicker v. Bd. of Pub. Instruction of Dade Cnty.*, 106 So. 2d 550, 558 (Fla. 1958) (holding that "a court of equity is a court of conscience; it 'should not be shackled by rigid rules of procedure and thereby preclude justice being administered according to good conscience.'" (citing *Degge v. First State Bank of Eustis*, 199 So. 2d 564, 565 (Fla. 1941)); *Hedges v. Lysek*, 84 So. 2d 28, 31 (Fla. 1955) ("Historically, courts of equity came into being in order to provide a forum for the granting of relief in accordance with the broad principles

of right and justice in cases where the restrictive technicalities of the law prevented the giving of relief. Inherent in equity jurisprudence is the doctrine that equity will always move to prevent an injustice engendered by fraud, accident or mistake."). Adhering to a changed circumstances requirement and ignoring any unjust consequences that may result is to be "shackled by rigid rules of procedure" and "restrictive technicalities of the law," and is directly contrary to foundational principles of equity jurisprudence.

Many other courts, both federal and state, agree with the flexibility that the holdings of the Third and Fourth Districts offer. *See, e.g.*, *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 578 (5th Cir. 1974) ("There is no doubt that the district court has continuing jurisdiction over a preliminary injunction. In the exercise of that jurisdiction, the court is authorized to make any changes in the injunction that are equitable in light of subsequent changes in the facts or the law, or *for any other good reason*." (emphasis added and citations omitted)); *see also Movie Sys., Inc. v. MAD Minneapolis Audio Distribs., a Div. of Smoliak & Sons, Inc.*, 717 F.2d 427, 430 (8th Cir. 1983) ("In modifying a preliminary injunction, a district court is not bound by a strict standard of changed circumstances but is authorized to make any changes in the injunction that are equitable in light of subsequent changes in the facts or the law, or for any other good reason." (citing 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 65.07 (2d ed. 1982); [Interim

Binder] *Federal Procedure, Lawyers Edition* § 47.61 (1981)); *Kraft v. Solon*, 336 N.E.2d 577, 580 (Ill. App. 3d 1975) (differentiating between a trial court's authority to modify or dissolve a temporary versus permanent injunction, and not requiring changed circumstances to modify or dissolve a temporary injunction because such "provisional remedies" are "grounded in equity").

Limiting a trial court's discretion can lead to injustice, as exemplified in this case, *see infra*, Argument Section II.B. But affording the court discretion to modify or dissolve its injunctions without restriction has not resulted in judicial inefficiency, burden, or other such harms. In the Third and Fourth Districts, there is no indication that the courts in those districts have been negatively impacted by being afforded the opportunity to modify or dissolve injunctive orders without restriction. Should parties begin to abuse the process and file repetitive or harassing motions to modify or dissolve injunctions, the courts are well equipped to sanction such behavior, as they would in any other instance of abuse of process. *See Sibley v. Fla. Judicial Qualifications Comm'n*, 973 So. 2d 425, 426 (Fla. 2006) (holding that courts have, "when deemed necessary, exercised the inherent judicial authority to sanction an abusive litigant"). Furthermore, finality cannot possibly be a significant consideration in the case of a *temporary* injunction, which by definition is provisional, not final, relief. This Court should encourage a trial

court's wide discretion in dissolving and modifying temporary injunctions and reverse the decision below.

B. Requiring changed circumstances led to unjust results and delayed relief in this case.

As this case demonstrates, whether changed circumstances are required can drastically alter the outcome for the litigants. The Stay Panel explicitly considered the Supplemental Affidavits and unanimously ruled in Planned Parenthood's favor, allowing women in the community to access surgical abortions. The Merits Panel, however, refused to consider the Supplemental Affidavits and ruled against Planned Parenthood. In fact, before reaching a conclusion on the surgical abortions issue, it went to great lengths to explain why it would not consider the Supplemental Affidavits. *Planned Parenthood*, 171 So. 3d at 128. Notably, the Merits Panel did not go on to state that even if the Supplemental Affidavits were considered, its holding would remain the same. This omission is telling. There is little question that the failure to consider the Supplemental Affidavits – because of the changed circumstances rule – was outcome determinative. Thus, the changed circumstances requirement, rather than the actual evidence, is what prevented Planned Parenthood from providing needed medical care.

Moreover, the type of evidence submitted in the Supplemental Affidavits shows why the changed circumstances requirement and its application in this case

are unwise and unjust. In its Post-Hearing Motion, Planned Parenthood, necessarily for the first time, had to present evidence to address the new issues on which the trial court had granted relief. Those issues had never been raised by MMB. For example, Planned Parenthood had to explain in its Post-Hearing Motion why the Kissimmee health center did not violate the diagnostic imaging center restriction. *See, e.g.*, A.17, Post-Hearing Mot., at 7-8; A.21, Morris Aff., ¶ 14; A.19, Harbert Aff., ¶ 7; A.22, Tosh Supp. Aff., ¶ 4. Planned Parenthood could not have anticipated having to present this evidence at the hearing. MMB had not alleged a violation of the diagnostic imaging center provision in its pleadings. MMB had neither sought an injunction barring those services nor did it press the issue at the hearing. *See Planned Parenthood*, 148 So. 3d at 812; *Planned Parenthood*, 171 So. 3d at 127.

In its Supplemental Affidavits, Planned Parenthood also focused upon and further explained certain evidence already presented at the hearing, evidence the trial court had seemingly overlooked or misconstrued. This was necessary to give the trial court an opportunity to correct what were clear errors in its temporary injunction Order. For example, in finding that the Kissimmee health center was not a physician's practice, the trial court stated that Planned Parenthood had only recently hired a medical director, A.14, Order, Findings of Fact, ¶ 22. Ms. Tosh had testified however that Planned Parenthood had always had a salaried medical

director on its staff, but the medical director had only recently transitioned from part-time to full-time status. Hearing Tr., at 34-36, 43. Planned Parenthood thus clarified this issue in its Supplemental Affidavits. *See* A.22, Tosh Supp. Aff., ¶ 11; A.21, Morris Aff., ¶ 3.

Similarly, the trial court held that the Kissimmee health center was not a physician's practice because Planned Parenthood is "heavily involved with various educational, advocacy, and community outreach activities." A.14, Order, Findings of Fact, ¶ 23. However, it is clear from the hearing transcript that the extremely limited discussion of "advocacy" was in reference to the national Planned Parenthood organization, and not the affiliate that operates the Kissimmee health center. Hearing Tr., at 39-40. Ms. Tosh testified that the affiliate is an independent organization with its own staff and budget and that it does not receive money from the national organization. *Id.* at 43-44. Dr. Morris's affidavit attached to the Post-Hearing Motion therefore stressed the fact that physicians at the Kissimmee health center do not engage in educational, advocacy, or community outreach activities. Their focus is on treatment and care of their patients. A.21, Morris Aff., ¶ 13. Dr. Morris's affidavit also explained how the Kissimmee health center operates in a way that is very similar to how she conducted her previous practice as a private physician. *Id.* at ¶¶ 8-12. Thus, the trial court's unanticipated holdings and incorrect recollection of the hearing

evidence necessitated Planned Parenthood's Post-Hearing Motion and Supplemental Affidavits.

Indeed, both the Stay and Merits Panels held that the trial court erred in granting relief that MMB did not request and by including vague language in its Order. *Planned Parenthood*, 148 So. 3d at 812 & n.1; *Planned Parenthood*, 171 So. 3d at 127.[9] The propriety of these holdings is not now in question. Had the trial court been able to modify its injunction on at least these two points, without Planned Parenthood being required to first establish changed circumstances, the patients at Planned Parenthood's Kissimmee health center would have been able to receive sonograms and outpatient surgical procedures, other than surgical abortions, much more quickly without invoking the delays inherent in the appellate process. Indeed, despite promptly filing the necessary motions, two months elapsed following the trial court's issuance of its injunction before the Stay Panel could review the case and provide relief to Planned Parenthood.

The requirement of changed circumstances precluded the trial judge in this case from acting expeditiously and efficiently to correct his errors. This in turn led to considerable harm to both Planned Parenthood and the patients it serves. And,

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[9] These errors by the trial court – in enjoining conduct beyond that requested – satisfy the changed circumstances requirement, justifying consideration of the Supplemental Affidavits under the holdings of any of the District Courts of Appeal. *See* Argument Section IV.B, *infra*.

as can be seen from the many times every District Court of Appeal has been presented with this issue, Planned Parenthood is unlikely to be the first or the last litigant to suffer harm as a result of the changed circumstances rule. In order to eliminate this real possibility for injustice, this Court should adopt the rulings of the Third and Fourth Districts, reverse the court below, and hold that trial courts are empowered, without a showing of changed circumstances, to modify or dissolve a temporary injunction as may be necessary.

III. This Court should reach the merits of this case.

Even after it resolves the issue giving rise to jurisdiction, this Court has the authority to reach and decide other issues in this case. *See State v. T.G.*, 800 So. 2d 204, 210 n.4 (Fla. 2001) (citing *Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982)). In many instances, this Court has previously chosen to go beyond any issue giving rise to jurisdiction and to reach the merits where the other issues in the case "have been properly briefed and argued and are dispositive of the case." *Savoie*, 422 So. 2d at 312. This approach "will avoid a piecemeal determination of the case." *Id*; *see also Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 596 (Fla. 1961) ("Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the almost universal command of constitutions that justice should be administered without 'sale, denial or delay.' Piecemeal determination of a cause by our appellate court should be avoided and when a case is properly lodged here

there is no reason why it should not then be terminated here.”). The merits in this case ought to be reached on those issues that have been fully briefed and are dispositive. The piecemeal litigation cautioned against in *Savoie* and *Zirin* can then be avoided.

Moreover, should this Court allow the Merits Panel opinion to remain as the law of the case, it will unjustly result in Planned Parenthood’s patients losing access to surgical abortions. Abortions are constitutionally protected medical services that patients of the Kissimmee health center are entitled to receive. As this Court observed, “[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy than a woman’s decision . . . whether to end her pregnancy.” *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) (citation and internal quotation marks omitted). If this Court does not reach the merits, the Kissimmee community will, at a minimum, temporarily lose access to surgical abortions until the case can be fully tried and until the trial court decides whether to grant a permanent injunction. It will likely be many months before the parties proceed through discovery, trial, and receive a final ruling from the trial court. As a result of that delay, Planned Parenthood may be forced to incur the expense and disruption necessary to relocate its health center. In that event, the Kissimmee community will lose access to all of the health care services Planned Parenthood offers. *See* Hearing Tr., at 58 (where Ms. Haynie testified that

depending on the length of the injunction, Planned Parenthood may have to seek a different location to provide services).[10]

The impact of letting the lower courts' errors stand uncorrected will not be limited to Planned Parenthood. For example, the Merits Panel construed the Declarations to prohibit a location where any outpatient surgical procedures occur. *Planned Parenthood*, 171 So. 3d at 130. This error of law will prevent Planned Parenthood, as well as all of the other medical providers of Oak Commons, from performing any procedures that could be deemed surgical, thereby disrupting how the office park has operated for years. Often, temporary injunction rulings are meant to preserve the status quo. If the Fifth District's ruling is left uncorrected, however, it will in fact disrupt the status quo. To avoid such an unfortunate result, this Court must reach the merits of the case.

IV. MMB has failed to establish a likelihood of success on the merits because the Kissimmee health center does not violate the Declarations' outpatient surgical center restriction.

Providing surgical abortions at the Kissimmee health center does not violate the Declarations. This remains true even if this Court holds that a party has to establish changed circumstances in order for a trial court to modify or dissolve an

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[10] The Merits Panel's contorted interpretation of the Declarations, which the trial court cannot disregard when it decides whether to permanently enjoin surgical abortions from being provided, may make it difficult for Planned Parenthood to succeed at the permanent injunction stage as well.

injunction. Planned Parenthood *did* establish changed circumstances (thereby allowing for consideration of the Supplemental Affidavits), but even if this Court considers only the evidence presented before and at the temporary injunction hearing, the lower courts' factual findings and legal conclusions are nevertheless erroneous. If this Court eliminates the need to establish changed circumstances, then the Supplemental Affidavits may be considered. Thus, regardless of whether it requires changed circumstances, this Court, like the unanimous Stay Panel, ought to conclude that Planned Parenthood has not violated the Declarations.

A. The evidence before the trial court prior to its Order demonstrates that Planned Parenthood's performance of surgical abortions does not violate the Declarations.

Even ignoring the evidence offered in the Supplemental Affidavits, MMB has not demonstrated a "clear legal right" to an injunction prohibiting Planned Parenthood from performing surgical abortions and has not established a likelihood of success on the merits. *Colonial Bank, N.A.*, 10 So. 3d at 656. If this Court's review is confined to the limited record prior to the temporary injunction order, this Court should nevertheless set aside the trial court and Merits Panel's rulings. Offering surgical abortions at the Kissimmee health center does not violate the Declarations. First, the Kissimmee health center is not an "outpatient surgical center." Second, even if it could somehow be considered a surgical center,

surgical abortions are ancillary and incidental to the practice of medicine by its physicians who work there.

1. The Kissimmee health center is not an outpatient surgical center so as to violate the Declarations.

The Declarations prohibit an "OutPatient Surgical Center" without any further definition. A.1, Compl., Ex. A. "Florida adheres to the general rule that a reasonable, unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms." *Barrett v. Leiher*, 355 So. 2d 222, 225 (Fla. 2d DCA 1978). As the trial court recognized, the Declarations' intent is to prevent medical offices in Oak Commons from competing for services and patients with the hospital facilities located across the street. A.14, Order, Conclusions of Law, ¶ 7. There is no evidence that surgical abortions are provided at that hospital; indeed, it is almost certain that abortions are *not* provided at the hospital. Nor is there a "clear" or "ordinary" meaning of the term "outpatient surgical center" that would sweep within it the Kissimmee health center. An orthopedist would be unable to do an arthroscopic knee surgery or fix a bunion at the facilities available at the Kissimmee health center. A gastroenterologist could not perform a colonoscopy there. At the Kissimmee

health center, a general surgeon could not repair a hernia.[11] Instead, the Kissimmee health center offers a range of reproductive health care services, almost none of which are surgical in nature. *See* A.13, Tosh Aff., ¶ 5; Hearing Tr. at 32-33.

Frequently, when definitions are lacking, as they are in the Declarations, Florida courts have turned to outside sources to determine the meaning of key terms. *See, e.g.*, *Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza, LLC*, 811 So. 2d 719, 722 (Fla. 3d DCA 2002). This Court and others have repeatedly looked to statutory authority when determining the meaning of a term. *See, e.g.*, *Reform Party of Fla. v. Black*, 885 So. 2d 303, 312 (Fla. 2004) (turning first to Florida legal authority, including statutes, to define a term, before referencing dictionary definitions); *State v. Debaun*, 129 So. 3d 1089, 1092 (Fla. 3d DCA 2013); *Grohs v. State*, 944 So. 2d 450, 456 (Fla. 4th DCA 2006); *Jones v. Williams Pawn & Gun, Inc.*, 800 So. 2d 267, 270 (Fla. 4th DCA 2001).

Here, Florida law contains a definition of an ambulatory or outpatient surgical center. The legislature has said it is "a facility the primary purpose of

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[11] According to data from the federal government, these are some of the surgical procedures performed most frequently at ambulatory surgical centers in Florida on patients insured by Medicare. *See* Ctrs. for Medicare & Medicaid Servs., Ambulatory Surgical Ctrs., available at https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/HealthCareConInit/ASC.html (last accessed Dec. 11, 2015).

which is to provide elective surgical care."[12] § 395.002(3), Fla. Stat. (2013). Planned Parenthood offered undisputed evidence prior to the temporary injunction ruling that definitively established that providing surgical abortions is not the primary purpose of the Kissimmee health center. *See* A.13, Tosh Aff., ¶ 8 (explaining that all abortions will constitute less than one percent of the total services to be provided to patients at the Kissimmee health center). MMB submitted no evidence whatsoever that disputes or calls in question this one percent figure. Additionally, Ms. Tosh's affidavit and her testimony at trial explained and illustrated the many other medical services provided at the Kissimmee health center. *Id.* at ¶ 5; Hearing Tr., at 32-33. Similar services are typically offered at any gynecologist's office, unlike the almost exclusively surgical procedures available at outpatient surgical centers. For this reason, the Kissimmee health center does not fall within the Florida statutory definition of an ambulatory surgical center or any common understanding of the term "outpatient surgical center", as its *primary* purpose is not to provide elective surgical care.[13]

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[12] As the Merits Panel recognized, the relevant statutory language is the same as that which was in effect in 1986, when the Declarations were signed. *Planned Parenthood*, 171 So. 3d at 129 n.5.

[13] Even if providing surgical abortions was the primary purpose of the Kissimmee health center, which it is not, providing abortions does not fall within the statutory definition of an ambulatory surgical center because that definition

The Merits Panel refused to apply the statutory definition, instead finding that the Declarations "prohibit[] the property from being used as an outpatient surgical center, the common and ordinary meaning of which is a facility or place for, or for the purpose of, performing outpatient surgical procedures." *Planned Parenthood*, 171 So. 3d at 130. The Merits Panel curiously held that "the focus of this restriction is on prohibited activities" rather than on the term the Declarations actually use – "center." *Id.* Using this contrived interpretation, the Merits Panel found that a facility does not have to have the primary purpose of performing outpatient surgeries to violate the Declarations. The restrictions can be violated by performing *any* outpatient surgeries.[14]

To justify the Merits Panel's conclusions, which are neither supported by the Declarations' plain meaning nor Florida statutes, that Panel relied upon a Merriam-Webster dictionary definition of "center" which MMB had offered.[15] *See id.* at 129 (defining "center" as "a facility providing a place for a particular activity or

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expressly excludes abortion clinics. *See* § 395.002(3), Fla. Stat. (2013) ("However, a facility existing for the primary purpose of performing terminations of pregnancy . . . shall not be construed to be an ambulatory surgical center . . . .").

[14] The Merits Panel's construction of the Declarations is subject to de novo review by this Court. *See Smith*, 827 So. 2d at 961.

[15] Apparently unable to find a definition of "outpatient surgical center," MMB provided three separate definitions, for "outpatient," "surgical," and "center." App. Ct. Answer Br., at 19.

service"). The Merits Panel conveniently cherry picked this dictionary definition in order to arrive at its desired result. Alternatively, Merriam-Webster also defines "center" as "a point, area, person, or thing *that is most important or pivotal in relation to* an indicated activity, interest or condition." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/center (last accessed Dec. 11, 2015) (emphasis added). This alternate definition clearly comports with the relevant Florida statutory definitions. Applying this Merriam-Webster definition, the Kissimmee health center is not a place "most important or pivotal in relation to" outpatient surgery.

The dictionary definition relied on by the Merits Panel is misaligned with the wording and intent of the Declarations.[16] The Merits Panel construed the Declarations to prohibit any facility where outpatient surgical procedures might occur. In holding that any medical office that provides outpatient surgeries is an outpatient surgical *center*, the Merits Panel has necessarily disregarded the "ancillary and incidental" exception entirely. Indeed, the Merits Panel effectively read "center" out of the term outpatient surgical center. The Declarations are

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[16] The Merits Panel admitted that the Declarations are "rather poorly drafted." *Planned Parenthood*, 171 So. 3d at 130. Indeed, the prohibition of an outpatient surgical *center* in connection with the Declarations' reference to *activities* has forced MMB to perform such verbal contortions as declaring that the Declarations "prohibit the activities Outpatient Surgical Center and Diagnostic Imaging Center." App. Ct. Answer Br. at 11.

consistent in proscribing an outpatient surgical *center*, an emergency medical *center*, and a diagnostic imaging *center*.

Contrary to the Merits Panel's conclusion, the Declarations do not prohibit medical offices that might perform *some* outpatient surgical procedures or provide *some* radiological testing or ultrasound, such as the Kissimmee health center. The Merits Panel therefore erred in finding that the "outpatient surgical center" restriction prohibits Planned Parenthood from performing surgical abortions.

2. All surgical abortions provided are ancillary and incidental to Planned Parenthood's physicians' practice of medicine.

Even if this Court were to agree with the lower courts that the Kissimmee health center operates as an outpatient surgical center, the Declarations allow outpatient surgical procedures to be performed so long as they are "ancillary and incidental to a physician's practice of medicine." A.1., Compl., Ex. A. The record in this case contains undisputed evidence that any surgical abortions provided at the Kissimmee health center are ancillary and incidental to Planned Parenthood's physicians' practice of medicine. Ms. Tosh testified about the broad range of medical services provided at the Kissimmee health center by or under the supervision of its physician medical director. Hearing Tr. at 32-33. Abortions constitute less than one percent of the broad range of services provided to patients. A.13, Tosh Aff., ¶ 8.

Despite the contrary evidence in the record, the Merits Panel "readily f[ou]nd that the trial court's factual findings as to this issue are supported by competent, substantial evidence." *Planned Parenthood*, 171 So. 3d at 130. The unanimous Stay Panel which considered the Supplemental Affidavits held, however, that the trial court's findings were "unsupported by the record." *Planned Parenthood*, 148 So. 3d at 812; *see also Planned Parenthood*, 171 So. 3d at 133 (Evander, J., dissenting in part) ("[B]ased on the limited evidence presented at the temporary injunction hearing, I cannot agree that MMB met its burden of showing a substantial likelihood of success on the merits."). The Stay Panel got it right. There is no evidence to support the trial court's findings that the abortions performed at the Kissimmee health center are not ancillary and incidental to its physicians' practice of medicine.

The trial court justified its conclusion that Planned Parenthood is not a "physician's practice" with three purported reasons. A.14, Order, Findings of Fact, ¶ 21. First, it held that the Kissimmee health center cannot be a physician's practice because Planned Parenthood is a 501(c)(3) nonprofit organization. *Id*. However, as the Stay Panel succinctly stated, "[s]imply because an organization chooses to obtain nonprofit status does not mean that it is not a physician's practice." *Planned Parenthood*, 148 So. 3d at 812. Nowhere in the Declarations or Florida law is the term "physician's practice" defined. Certainly physicians are

not barred in Florida, or elsewhere, from providing medical services because they are employees of nonprofit organizations or corporations. Nor are Planned Parenthood's physicians unique in this respect. The physicians who provide cardiology services at MMB's property do so under the umbrella of a corporate entity, Cardiovascular Associates, Inc. So do other medical providers at Oak Commons. There is no evidence to justify the trial court's contrary reasoning.

Second, the trial court held that the Kissimmee health center is not a physician's practice because Planned Parenthood only recently hired a physician as a medical director who is not at the health center every day. A.14, Order, Findings of Fact, ¶ 22. This is based upon a misapprehension of the record. Ms. Tosh testified at the temporary injunction hearing that Planned Parenthood had always had a salaried medical director on its staff who is responsible for the medical services offered to patients. Hearing Tr., at 34-36, 43. There are also three other licensed physicians who provide medical services at the Kissimmee health center. *Id.* at 35.

Finally, the trial court claimed that because Planned Parenthood is "heavily involved with various education, advocacy, and community outreach activities," it cannot be a physician's practice. A.14, Order, Findings of Fact, ¶ 23. As discussed in Argument Section II.B, *supra*, the only actual evidence about "advocacy" referred to the national Planned Parenthood organization, not the

defendant in this case, which is Planned Parenthood of Southwest and Central Florida, Inc., the independent local organization that provides health care services at the Kissimmee health center. Hearing Tr., at 39-40, 43-44.

Even if there was evidence in the record to support these findings, the assertions of the trial court as to what can or cannot constitute a physician's practice are illogical on their face. The fact that physicians are not present at a health center all day, every day, or that they might occasionally choose to exercise their constitutional right to free speech does not necessarily mean they are not engaged in the practice of medicine at the Kissimmee health center. For instance, a partially retired physician who works at a medical practice a few days a week, but who has a physician's assistant or a nurse practitioner staff the office and see patients on other days, would, under the trial court's criteria, not be practicing medicine. A physician who exercises his or her First Amendment right to speak on issues of public concern could not be engaged in the practice of medicine either. Such a facile determination would undermine the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The Fifth District's summary affirmance of the trial court's finding that the Kissimmee health center is not a physicians' practice of medicine is unjustified.

Not only are the surgical abortions provided at the Kissimmee health center part of Planned Parenthood's physicians' practice, but they are also an ancillary and incidental part of that practice because abortions constitute less than one percent of Planned Parenthood's services. The trial court paid no regard to Ms. Tosh's testimony on this point except to offer the caveat that the "asserted statistic [wa]s offered out of context in light of the totality of the evidence." A.14, Order, Findings of Fact, ¶ 25. There simply was no other evidence, however, on that issue.

Despite this lack of evidence, the trial court concluded that the performance of surgical abortions by Planned Parenthood physicians is a "substantial" or "central component" of its activities, citing to the testimony of Ms. Tosh and Ms. Haynie. *Id.*, Findings of Fact, ¶ 25, Conclusions of Law, ¶ 6. But their testimony fails to provide that justification. For instance, Ms. Tosh never stated, either in her affidavit or at the hearing, that surgical abortions or any outpatient surgeries are a "substantial" service provided by Planned Parenthood. In fact, at the hearing, Ms. Tosh discussed at length the many other health care procedures and services that patients routinely receive from Planned Parenthood. Hearing Tr., at 32-33. She did testify that because Planned Parenthood "believe[s] in providing comprehensive reproductive health-care to our patients . . . any interference in our ability to comprehensively care for our patients, will be a substantial burden on our

practice." Hearing Tr., at 31. Stating that *any* interference with Planned Parenthood's offering of comprehensive care will impose a real burden upon it is not a concession that surgical abortions constitute a substantial component of the services provided.

Similarly, Ms. Haynie, in explaining what would be required for a sufficient bond, pointed out that because abortion patients typically receive other gynecological services during their visit, prohibiting surgical abortion services would negatively affect revenue in a way that is difficult to quantify. *Id.* at 64-65. The trial court mischaracterized this testimony as well. Ms. Haynie's testimony cannot properly be construed to support the conclusion that surgical abortions are central to the Kissimmee health center or that they are the primary purpose of the Kissimmee health center.

The trial court's surprising finding, that surgical abortions are not ancillary and incidental to the practice of medicine by physicians at Planned Parenthood, lacks evidentiary support. The Merits Panel therefore erred in holding that these findings were "supported by competent, substantial evidence," *Planned Parenthood*, 171 So. 3d at 130. To the contrary, as the unanimous Stay Panel observed, the trial court's findings are "unsupported by the record." *Planned Parenthood*, 148 So. 3d at 812.

B. The Supplemental Affidavits offer additional evidence that the Kissimmee health center does not violate the outpatient surgical center restriction.

The Supplemental Affidavits, along with the Post-Hearing Motion, provide even further evidence conclusively showing that the Kissimmee health center does not violate the Declarations. Those affidavits should be considered by this Court for two reasons: (1) changed circumstances should not be not required for their consideration, *see* Argument Section II, *supra*; and (2) even if changed circumstances are required, Planned Parenthood in fact demonstrated that such changed circumstances existed.[17] As explained in Argument Section II.B, *supra*, prior to the trial court's Order, Planned Parenthood could never have anticipated that diagnostic imaging procedures would be enjoined or that the injunction would include vague language that did not adequately inform Planned Parenthood of the parameters of the procedures enjoined. *See* App. Ct. Reply Br. at 3-4. These unanticipated rulings of the trial court are necessarily "new matters." *See Thomas*, 963 So. 2d at 900. They could not "have been raised at the contested hearing," and should therefore qualify as changed circumstances. *Spaulding v. Estate of Frey*,

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[17] Contrary to the Merits Panel's assertion that Planned Parenthood did not challenge the denial of its Post-Hearing Motion, *Planned Parenthood*, 171 So. 3d at 128, Planned Parenthood did indeed make clear that it was challenging this denial throughout the appellate process and argued that there were changed circumstances. *See* A.27, Not. of Appeal; App. Ct. Initial Br. at 7; App. Ct. Reply Br. at 3-5.

666 So. 2d 935, 936 (Fla. 5th DCA 1995). The trial judge unexpectedly fashioned these findings on his own out of whole cloth.

While, as the Argument in Section IV.A, *supra*, makes clear, the Supplemental Affidavits are not necessary for this Court to rule in favor of Planned Parenthood, they do provide considerable additional support that Planned Parenthood was not in violation of the Declarations. For example, Dr. Morris, Planned Parenthood's then-medical director, explained how she personally provided and supervised the performance of medical services at the Kissimmee health center. A.21, Morris Aff., ¶¶ 3-5. The focus of the physicians at the health center, according to Dr. Morris, is to provide treatment and medical care to their patients, not advocacy or outreach. She further confirmed that surgical abortion is but one type of the many medical services offered. *Id.* at ¶¶ 13-14. Most medical services provided at the Kissimmee health center do not involve surgery. *Id.* at ¶ 15. Dr. Morris also explained how the way she practices medicine at the Kissimmee health center is virtually indistinguishable from the way most physicians in private practice provide care to their patients. *Id.* at ¶ 10. She herself had practiced this way in the past when she was a solo practitioner. *Id.* at ¶¶ 11-12.

Mr. Harkins, the general contractor responsible for planning and overseeing renovation of the Kissimmee health center before it opened, has over twenty years of experience building medical offices and outpatient surgical centers in Florida.

A.20, Harkins Aff., ¶ 3. He explained in his affidavit that the Kissimmee health center was not designed or licensed as an outpatient surgical center.[18] *Id.* at ¶ 11. In fact, the general understanding in Florida is that the term "outpatient surgical center" means medical facilities that have been licensed as such by AHCA. *Id.* at ¶ 5. To be an outpatient surgical center in Florida, a facility must have its construction plans reviewed and approved by AHCA. *Id.* at ¶ 6. The facility must also contain certain specified electrical, mechanical, and plumbing components. *Id.* at ¶ 10. The Kissimmee health center, in contrast, was never planned as an outpatient surgical center. Its renovations therefore do not include such components. AHCA did not review and approve the plans used by Planned Parenthood to renovate the facility and the facility has neither applied for nor received a license to operate as an ambulatory surgical center. *Id.* at ¶¶ 10-11. The Merits Panel's de novo construction of the term "outpatient surgical center" not only ignores applicable Florida statutes but also completely disregards the way in which the term is commonly used and understood in the state.

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[18] Indeed, if the Kissimmee health center were an outpatient surgical center, Planned Parenthood would not have had to inquire as to whether it can, in the future, build and operate an outpatient surgical suite. A.13, Tosh Aff., ¶ 14; A.20, Harkins Aff., ¶¶ 12-15. As was made clear to the trial court before it issued its temporary injunction Order, while Planned Parenthood inquired as to whether they could build an outpatient surgical suite, they have not in fact built such a suite. A.13, Tosh Aff., ¶ 14.

In sum, the Supplemental Affidavits reinforce what was clear to the unanimous Stay Panel: the Kissimmee health center is not an outpatient surgical center. Even if it were, providing surgical abortions is ancillary and incidental to its physicians' practice of medicine. The surgical abortions provided at the Kissimmee health center do not violate the Declarations. The contrary ruling of the Merits Panel should be reversed.

V. The remaining temporary injunction factors also counsel finding in favor of Planned Parenthood.

In addition to establishing a likelihood of success on the merits, MMB must also show a likelihood of irreparable harm, no adequate remedy at law, and that the public will be served by granting the injunction. *Colonial Bank*, 10 So. 3d at 655. MMB has argued in front of the trial and appellate courts that it does not have to establish a likelihood of irreparable harm and that it lacks an adequate remedy at law because a restrictive covenant is at issue. *See, e.g.*, App. Ct. Answer Br. at 34-38 (citing to, *inter alia*, *Autozone Stores, Inc. v. Ne. Plaza Venture, LLC*, 934 So. 2d 670, 674 (Fla. 2d DCA 2006). However, the *Autozone* case expressly acknowledged an earlier holding in *Liza Danielle, Inc. v. Jamko, Inc.*, 408 So. 2d 735, 738 (Fla. 3d DCA 1982), which reinstated the irreparable harm and no adequate remedy at law requirements where a restrictive covenant affected use of a parcel of land. The *Autozone* court distinguished *Liza Danielle* because the latter

case "'was more in the nature of a no-competition clause.'" *Autozone*, 934 So. 2d at 674 (quoting *Jack Eckerd Corp. v. 17070 Collins Ave. Shopping Ctr., Ltd.*, 563 So. 2d 103, 105 (Fla. 3d DCA 1990)).

This case is analogous to *Liza Danielle* because, as noted in the trial court's Order, the Declarations were formed to preclude competition. The trial court correctly observed that the purpose of the Declarations is to "limit[] the sort of medical services that can be offered in facilities which are located directly across the street from a hospital." A.14, Order, Conclusions of Law, ¶ 7. Given this fact, MMB should have been required to establish these two prongs of the temporary injunction standard.

MMB did not do so. Mere generalized allegations of irreparable harm are insufficient. *See* A.4, Mot. for Temp. Inj., ¶ 10(a)-(b); *see also First Nat'l Bank v. Ferris*, 156 So. 2d 421, 423-24 (Fla. 2d DCA 1963). The only specific allegation of harm that MMB made is that protestors twice in the eight preceding months occupied a parking lot, interfering with patients' access to Cardiology Associates. Hearing Tr., at 22. The presence of protestors however cannot justify restricting Planned Parenthood from providing lawful medical procedures. *See* A.14, Order, Findings of Fact, ¶ 20 (refusing to find a violation of the Declarations because of protestors). Planned Parenthood, on the other hand, sufficiently described the

monetary and reputational harm to be caused by the injunction. *Planned Parenthood*, 148 So. 3d at 812.

Finally, the injunction does not serve the public interest. Enjoining Planned Parenthood from providing surgical abortions cannot further the intent of the Declarations, as surgical abortions do not duplicate or compete with the medical procedures provided at the nearby hospital. Moreover, other types of outpatient surgeries are offered by other medical offices in Oak Commons. *See supra*, Statement of the Case Section II.A. The trial court's finding that the temporary injunction serves the public interest is not supported by any evidence in the record. A.14, Order, Conclusions of Law, ¶ 7.[19] Women in Florida have a fundamental right to have an abortion. *See In re T.W.*, 551 So. 2d 1186. Since September 2014, with the exception of the approximately two-month period that the Fifth District's mandate was in effect, women have come to rely on the physicians at the Kissimmee health center to provide this service for them. The Declarations were never intended to prevent surgical abortions as part of the practice of Planned Parenthood's physicians. Undoubtedly an injunction is contrary to the public interest in that it would allow MMB to use the Declarations for the unintended

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[19] Even if the hospital provided surgical abortions, it cannot possibly serve the public interest to limit the number of legal and high quality medical providers available to the community.

purpose of advancing MMB's animus towards women's exercise of their constitutional rights.

CONCLUSION

For all of the foregoing reasons, Planned Parenthood respectfully asks this Court to hold that a moving party does not have to show changed circumstances in order to have a trial court modify or dissolve a previously entered temporary injunction. This Court should then proceed to address the merits of the case and reverse that part of the Fifth District's ruling affirming the trial court's temporary injunction, which unjustifiably prevented Planned Parenthood from providing surgical abortions to its patients at the Kissimmee health center.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 14, 2015 a true and correct copy of the foregoing has been e-filed with the Florida Courts E-Filing Portal which will serve a copy via electronic mail to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the font requirements of Fla. R. App. P. 9.210.

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