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IN THE SUPREME COURT OF FLORIDA

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

vs.

MMB PROPERTIES, a Florida general partnership,
Respondent.
_____/

Case No. SC15-1655

5th DCA Case No. 5D14-2920

Osceola Case No. 14-CA-1636-OC

RESPONDENT MMB PROPERTIES' ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

Table of Authorities iv

Statement of the Case and of the Facts 1

A. Background and Initial Trial Court Activity 2

B. The Hearing 4

C. The Temporary Injunction and PPGO's Response 7

D. Proceedings in the Fifth District Court of Appeal 11

Summary of the Argument 15

Argument 16

I. Respectfully, Jurisdiction Was Improvidently Granted, and Should Be Discharged 16

A. PPGO Waived Argument on the Merits of Its Motion 17

B. The Conflict Question is Moot Between the Parties 18

C. The Conflict Question, If Answered, Would Not Be Dispositive 19

D. The Policy of Maintaining The Status Quo Is Maintained By Both The Majority and Minority Positions 22

II. The Fifth District Is Correct That A Showing Of Changed Circumstances Should be Made Prior To Dissolving Or Modifying A Temporary Injunction Entered After Notice And Evidentiary Hearing 24

A. The Only District Not Requiring A Showing Of Changed Circumstances Appears To Be The Fourth District 24

B. The Majority Position Supports Trial Court Discretion 27

C. Foreign Jurisprudence Overwhelmingly Favors The Majority Position 30

III. The Temporary Injunction Was Supported By Competent And Substantial Evidence 34

A. The Fifth District Properly Analyzed The Restrictions Using Their Common And Ordinary Meanings 35

B. The Question of Whether PPGO's Then-Intended Activities Are Those Of An Outpatient Surgical Center Was A Contested Question Of Fact That Was Properly Resolved In MMB's Favor 40

C. The Lower Court Applied The Proper Injunction Jurisprudence Concerning Enforcing Recorded Restrictions Running With Land 47

Conclusion 48

Certificate of Service ix

Certificate of Compliance x

TABLE OF AUTHORITIES

I. Primary Sources

Agemy v. Health Business Solutions, LLC,
117 So. 3d 896 (Fla. 4th DCA 3013) 21

Barbieri v. Muller,
124 So. 3d 320 (Fla. 5th DCA 2013) 24

Bay N Gulf, Inc. v. Anchor Seafood, Inc.,
971 So. 2d 842 (Fla. 3d DCA 2007) 26, 28

Brock v. Brock,
667 So. 2d 310 (Fla. 1st DCA 1995) 23, 24

Canakaris v. Canakaris,
382 So. 2d 1197 (Fla. 1980) 41

Canal Auth. v. Callaway,
489 F.2d 567 (5th Cir. 1974) 33

Charlotte Cnty. v. Vetter,
863 So. 2d 465 (Fla. 2d DCA 2004) 40

Chicago Title Ins. Agency of Lee County, Inc. v. Chicago Title Ins.,
560 So. 2d 296 (Fla. 2d DCA 1990) 23

Clark v. Kreidt,
199 So. 333 (Fla. 1940) 19

Cohen v. Zidon,
994 So. 1163 (Fla. 3d DCA 2008) 27

Cottrell v. Miskove,
605 So. 2d 572 (Fla. 2d DCA 1992) 37

Cripe v. Atlantic First Nat. Bank,
422 So. 2d 820 (Fla. 1982).....34

Favia v. Ind. Univ. of Pa.,
7 F. 3d 332 (3d Cir. 1993).....33

Ferry-Morse Seed Co. v. Hitchcock,
426 So. 2d 958 (Fla. 1983).....43

Fong v. Courvoisier Courts Condo. Ass'n, Inc.,
81 So. 3d 562 (Fla. 3d DCA 2012).....26

Gem Estates Mobile Home Village Ass'n v. Visconti Family,
885 So. 2d 436 (Fla. 2d DCA 2004).....38

Goldstein v. Occidental Life Insurance Co.,
273 A. 2d 318 (R.I. 1971).....38

Gonzalez v. Secretary of Dept. of Homeland Sec.,
678 F. 3d 254 (3d Cir. 2012).....38

Hunter v. Dennies Contracting Co.,
693 So. 2d 615 (Fla. 2d DCA 1997)..... 21, 24, 27, 28

J.A.B. Enterprises v. Gibbons,
596 So. 2d 1247 (Fla. 4th DCA 1992).....17

Killearn Homes Ass'n v. Visconti Family,
21 So. 3d 51 (Fla. 1st DCA 2009).....38

Kraft v. Solon,
336 N.E. 2d 577 (Ill. Ct. App. 1975).....30

Marshall v. Adams,
447 S.W. 2d 57 (Ky. App. 1969).....43

Minty v. Meister Financial Group, Inc.,
132 So. 3d 373 (Fla. 4th DCA 2014)..... 23-26, 40

Montgomery v. Dep't of Health & Rehab. Servs.,
468 So. 2d 1014 (Fla. 1985).....18

Moore v. Stevens,
90 Fla. 879 (1925).....44

Morgan v. State,
337 So. 2d 951 (Fla. 1976).....34

Movie Sys., Inc. v. MAD Minneaolis Audio Distribs.,
717 F.2d 427 (8th Cir. 1983) 33

Pecora v. Pecora,
697 So. 2d 1267 (Fla. 5th DCA 1997).....22

Peltz v. Dist. Court of Appeal, Third Dist.,
605 So. 2d 865 (Fla. 1992).....29

Precision Tune Auto Care, Inc. v. Radcliff,
731 So. 2d 744 (Fla. 4th DCA 1999)..... 20, 22, 25-27, 29, 34

Publix Supermarkets, Inc. v. Santos,
118 So. 3d 317 (Fla. 3d DCA 2013).....37

Real Estate Favlue Co., Inc. v. Carnival Corp.,
92 So. 3d 255 (Fla. 3d DCA 2012)..... 36-37

Sacred Family Invs., Inc. v. Doral Supermkt., Inc.,
20 So. 3d 412 (Fla. 3d DCA 2009).....40

Sanislo v. Give Kids the World Inc.,
157 So. 3d 256 (Fla. 2015).....17

Santa Rosa Cnty. v. Admin. Com'n, Div. of Admin. Hearings,
661 So. 2d 1190 (Fla. 1995).....18

Silvestrone v. Edell,
721 So. 2d 1173 (Fla. 1998).....28

Stephl v. Moore,
114 So. 455 (Fla. 1927)..... 14, 47

Tamiami Trail Tours, Inc. v. Greyhound Lines, Inc.,
212 So. 2d 365 (Fla. 4th DCA 1968).....22

Thomas v. Osler Medical, Inc.,
963 So. 2d 896 (Fla. 5th DCA 2007)..... 22, 24, 27, 28

Tibbs v. State,
397 So. 2d 1120 (Fla. 1981).....19

Wekiva Springs Reserve Homeowners v. Binns,
61 So. 3d 1190 (Fla. 5th DCA 2011).....40

Williamson v. Lee Optical of Okla. Inc.,
348 U.S. 483 (1955).....40

Winfield v. St. Joe Paper Co.,
663 F.2d 1031 (11th Cir. 1981) 34

Winn-Dixie Stores v. 99 Cent Stuff-Trail Plaza,
811 So. 2d 719 (Fla. 3d DCA 2002).....37

Wood v. Dozier,
464 So. 2d 1168 (Fla. 1985)..... 14, 47

II. Other Authorities

Fla. R. App. P. 9.130(a)(3)(B) 26

§390.011(2), Fla. Stats. 39, 46

§395.002, Fla. Stats.....38

§400.9905(4)(a), Fla. Stats..... 39

§408.07, Fla. Stats.....39

§408.801, Fla. Stats. 39

STATEMENT OF THE CASE AND OF THE FACTS

This appeal arises from MMB PROPERTIES' ("MMB") action against PLANNED PARENTHOOD OF GREATER ORLANDO, INC. ("PPGO")[1] to enforce commercial real estate restrictions governing the Oak Commons Medical Park in Osceola County ("Oak Commons"). MMB obtained a temporary injunction enjoining the performance of surgical abortions, the provision of sonograms, and the general violation of the restrictions. (R. 165)[2] The Fifth District reversed the injunction against sonograms and any unspecified restrictions, but affirmed the injunction against abortions. The final opinion contained a footnote "acknowledg[ing]" an interdistrict conflict regarding whether a movant must show sufficiently changed circumstances to dissolve or modify a temporary injunction.[3] *Final Op.* 171 So. 3d at 128 n.3. PPGO has relied on that conflict to obtain review of the injunction against abortions in this Court.

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[1] Planned Parenthood of Southwest and Central Florida, Inc. is successor by merger with PPGO. This brief shall reference the entity, before and after merger, as PPGO.

[2] This Court's record shall be cited as "R. [pg.]." The revised transcript from the evidentiary hearing below, located at R. 639, shall be cited as "Tr. [pg.]." Similarly, the temporary injunction itself, found at R. 165, shall be cited as T.O. [pg.]."

[3] The Fifth District issued two reported opinions below, and both are styled *Planned Parenthood of Greater Orlando v. MMB Properties*. The first, issued on Sept. 24, 2014, is located at 148 So. 3d 810 and R. 1288 and shall be referred to as the "Stay Op." The second, issued on May 22, 2015, is located at 171 So. 3d 125 and R. 1305 and shall be referred to as the "Final Op."

A. Background and Initial Trial Court Activity.

Oak Commons is an approximately eleven acre medical complex located across the street from Osceola Regional Medical Center. (R. 54; Tr. 5, 48) In 1986, the developer of Oak Commons executed a Declaration of Restrictions that was duly recorded and expressly ran with the land. (R. 52-53) It contained the following passage at the focus of the underlying suit:

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

(R. 52 (emphasis added, typographical errors in original)) The terms in this passage are not otherwise defined in the declaration, but the parties have agreed the restrictions are clear and unambiguous. *Final Op.*, 171 So. 3d at 129.

MMB is a general partnership which has owned the building located at 601 Oak Commons Boulevard since 1998. (Tr. 11) Dr. Johnston Massey, the

managing general partner of MMB, and six other cardiologists practice in the building. (Tr. 8) The practice has abided by the restrictions and has not provided surgical procedures which it might otherwise offer, such as cardiac catheterizations. (Tr. 13)

PPGO purchased the property located at 610 Oak Commons ("PPGO Property") in December 2013. (Tr. 31) PPGO applied for and received an abortion clinic license. (Tr. 17, 30) PPGO also submitted a "Zoning Verification Letter" to the City of Kissimmee inquiring whether it could operate an "Out Patient Surgical Center" at the premises. (Tr. 16, 17)

News of PPGO's purchase spurred protests in and around Oak Commons, which caused several disruptions to the cardiology practice. (Tr. 10) A bomb threat forced a road closure that prevented patients from attending their appointments. (Tr. 10.) The trial court found MMB became aware of PPGO's intended use of the property because of the disturbances. (T.O. p. 2) MMB filed a single count Complaint seeking a permanent injunction to enforce the use Restrictions against PPGO. (R. 46) PPGO later stipulated that MMB had authority to maintain the suit. (Tr. 12)[4]

MMB moved for a temporary injunction to maintain the status quo pending

[4] The Restrictions provide: "any owner" may bring an action "at law or in equity against any person or persons violating or attempting to violate any covenants … by an injunction, either prohibitive or mandatory." (R. 71)

final resolution on the merits. (R. 85, 88) The motion was supported by an affidavit from Dr. Massey. (R. 92) PPGO filed an answer with affirmative defenses to the Complaint and a fifteen-page response to the motion for temporary injunction. (R. 96, 144) The response included an affidavit from PPGO's then-CEO, Jenna Tosh. (R. 159) An evidentiary hearing was coordinated for July 14, 2014, before Hon. John E. Jordan. (R. 640)

B. The Hearing.

MMB began by calling Dr. Massey. (Tr. 8) In addition to the facts provided above, Dr. Massey testified that Osceola Regional's consent is required to perform surgical procedures in Oak Commons. (Tr. 13) He also explained how and why surgical abortions are indeed surgical procedures. (Tr. 12) Dr. Massey testified he considered outpatient surgical procedures to be a violation of the Restrictions, and therefore he does not perform procedures in Oak Commons, testifying as follows:

```
Q.   Can you have and conduct cardiac catheterizations
     out of your facility --

A.   No.
Q.   -- in light of the -- the covenants and
     restrictions?

A.   No, we cannot.
Q.   What [sic] not?
A.   Because it's a surgical procedure, more where the
     hospital has to approve that procedure to be able
     to do that.
```

(Tr. 13)

There was no testimony or evidence at the hearing that any entity performed

or intended to perform outpatient surgical procedures in Oak Commons without permission from the hospital, with the exception of PPGO. Dr. Massey specifically testified an obstetrics practice which previously occupied the property purchased by PPGO had abided by the Restrictions. (Tr. 20)

MMB then called Ms. Tosh. (Tr. 27) She testified she had no formal medical training. (Tr. 29) Ms. Tosh agreed PPGO intended to perform surgical abortions at the Oak Commons facility, although it had not performed any as of that date. (Tr. 29, 30) She testified, as she did in her affidavit, that "surgical abortions" are not "what is usually thought of as surgery." (R. 160; Tr. 37-38, 42-43) Ms. Tosh offered that PPGO intended to perform vasectomies and sonograms and she was "exploring the possibility" of providing other surgical procedures in Oak Commons. (Tr. 33, 34, 45) Ms. Tosh also testified PPGO had applied for and obtained an abortion clinic license from the Agency for Health Care Administration. (Tr. 29-30)

Ms. Tosh continued that its primary doctor, Dr. Morris, split time between its Orlando facilities and a separate PPGO affiliate in Jacksonville. (Tr. 35-36) In an effort to establish the "ancillary or incidental" exception in the restrictions, Ms. Tosh maintained "[a]bortions have constituted less than 1% of the total number of services provided at the two existing Orlando PPGO health centers during the past year." (R. 160; Tr. 31) However, she also testified an injunction against surgical

abortions "would be a substantial burden on our practice." (Tr. 31)

Ms. Tosh's testimony included discussion of unrelated deed restrictions applicable only to the PPGO Property, and not to the remainder of Oak Commons. (Tr. 41) Ms. Tosh agreed that when PPGO "acquired the property in Oak Commons here" she "negotiate[d] with the hospital to remove a restriction against performing abortions at that facility." (Tr. 41) She also concurred "the hospital agree[d] to remove that restriction." (Tr. 41) However, on redirect, MMB's counsel established this line of testimony referenced negotiations with Florida Hospital, which had included a restriction against all elective abortions (including those ancillary and incidental to a physician's practice) in a previously recorded deed in the PPGO Property's chain of title only, and not the Restrictions encompassing all of Oak Commons and Osceola Regional, the hospital across from Oak Commons. (Tr. 47-48, R. 211)

MMB then presented Dr. Jose Fernandez, a family physician who practices at Osceola Regional. (Tr. 49-50) Similar to Dr. Massey, he testified surgical abortions are surgical procedures. (Tr. 49-50) MMB rested after Dr. Fernandez stepped down. (Tr. 53)

PPGO called only one witness, its treasurer, Martha O. Haynie. (Tr. 55-56) Ms. Haynie testified primarily to establish the appropriate amount of any injunction bond (Tr. 53-54), but her testimony also spoke to the merits of the

injunction. She opined an injunction against surgical abortions would cause PPGO to relocate, and such relocation would cost upwards of $1,500,000. (Tr. 58) She estimated moving would take roughly eighteen months and cause a loss of $700,000 in revenue. (Tr. 59) After MMB's counsel posed several questions related to PPGO's position that abortions constitute less than 1% of its services, PPGO's counsel asked the following question on redirect:

> Q. Ms. Haynie, breaking out the abortions is a – is a false premise, is that correct, because the **abortions are central to the rest of the practice** that you perform – or that Planned Parenthood of Greater Orlando performs in its facility?
>
> A. That's correct.

(Tr. 827)(emphasis added) The parties presented significant legal argument, and the trial court took the matter under advisement. (Tr. 66-94)

C. The Temporary Injunction and PPGO's Response.

On July 23, 2014, the trial court issued a detailed, 12-page temporary injunction order. Its key factual findings included:

- Drs. Massey and Fernandez "credibly" testified surgical abortions are surgical procedures;
- PPGO is not a "physician's practice of medicine" as defined in the Restrictions ; and
- Even if PPGO was a physician's practice of medicine, abortions are neither "ancillary nor incidental" to that practice.

(T.O. pp. 4-6) The trial court accordingly found, as a question of fact, that MMB

had a substantial likelihood of obtaining a permanent injunction against abortions. (T.O. p. 4) The order also found MMB had a substantial likelihood of obtaining a permanent injunction against the performance of sonograms. (T.O. p. 4)

The order continued with sixteen paragraphs of legal conclusions. (T.O. pp. 7-10) Bond was set at $24,000 (T.O. pp. 11-12), and PPGO has never challenged the sufficiency of that amount. MMB posted the requisite bond. (R. 177-79)

PPGO filed the post-injunction motion that gave rise rise to this Court's jurisdiction four days after the order. (R. 194) The motion was titled "Defendant's Motion to Reconsider, Dissolve, or Modify Order Granting Motion for Temporary Injunction" ("Motion"). (R. 194) The essence of the Motion is provided in its fourth paragraph:

> The Court should reconsider and dissolve its Order. That Order is based on an erroneous reading of the Declarations, and includes several additional errors of law and fact. At a minimum, the Order should be modified to permit Defendant PLANNED PARENTHOOD to provide sonograms or other diagnostic imaging services as Plaintiff MMB never sought any relief precluding rendition of those services, either in its Complaint or in Plaintiff's Motion for Temporary Injunction.

(R. 195-96) Accordingly, the request for *dissolution* was coextensive with the request to *reconsider* the injunction as a whole. The request for *modification*, on the other hand, only sought relief from the portion of the injunction against sonograms or other diagnostic imaging services. The argument within the Motion raised four points: (1) the PPGO facility is not an "outpatient surgical center" as

the term is defined in the Declarations; (2) the activities of surgical abortions and ultrasounds are "ancillary and incidental to a physician's practice of medicine"; (3) the injunction against diagnostic imaging was not specifically pled, and (4) the "including but not limited to" language left PPGO unsure of its rights. (R. 196-202)

While the Motion referenced four post-hearing affidavits, no transcript of the hearing was submitted. Furthermore, the Motion did not attempt to explain why the evidence in the affidavits could not have been presented at the properly noticed and coordinated hearing. (R. 204) Nowhere did the Motion or affidavits suggest the existence of "changed circumstances" or claim the purpose of the Motion was to better promote the status quo.

The first affiant, attorney Thomas R. Harbert, had advised PPGO during its acquisition of the subject property and shared his legal opinion. (R. 206-08) The second affiant, Mr. Matthew Harkins, is the general contractor who performed the build-out of the PPGO facility. (R. 216-17) He admitted he used the specific phrase "outpatient surgical center" in a zoning verification submission to the City of Kissimmee, and provided his opinion about how that term is defined. (R. 217-18)

Dr. Merri Beth Morris, PPGO's medical director, was the third affiant. (R. 220) Dr. Morris testified she split time among the three Orlando and separate Jacksonville Planned Parenthood facilities, though she intended to devote more

time to the Kissimmee facility when it "begins its full range of patient services." (R. 221) Dr. Morris offered "some procedures that will be provided at the Kissimmee health center might be characterized as surgical in nature, such as Essure tubal sterilizations and colposcopies." (R. 224) Notably, Dr. Morris never asserted the anticipated surgical abortions were ancillary and incidental to any physician's practice of medicine. (R. 221)

Finally, PPGO offered the "supplemental" affidavit of Ms. Tosh. (R. 226) Despite her earlier testimony that surgical abortions constituted "less than 1%" of PPGO's intended services, Ms. Tosh now testified the "surgical abortion and diagnostic imaging services that [the trial court] enjoined are *part and parcel* …" with its overall services (R. 227), and the injunction will cause PPGO to "lose quite a significant amount of revenue." (R. 227)(emphasis added) The affidavit continued "Revenue from all of the other associated or subsequent services we would likely provide for those patients will thus be lost." (R. 227) Ms. Tosh effectively testified PPGO would be forced to close its doors if it were unable to provide abortions. (R. 230)

MMB filed a response to the Motion on August 4, 2014. (R. 239) The Motion was denied on August 9 without any reference to changed circumstances. (R. 239) No subsequent requests for findings of fact or law were made by either party.

PPGO twice moved to stay the injunction pending appeal, both prior to filing its notice of appeal, one on an emergency basis. (R. 232, 248, 256) PPGO again argued it would lose revenue from other associated services if it could not provide abortions. (R. 236) The trial court denied the emergency motion (R. 271), while the other motion was never noticed or adjudicated.

D. Proceedings in the Fifth District Court of Appeal.

PPGO began the appellate process with another "emergency motion for stay of injunction." (R. 888) The motion was accompanied by an independent appendix containing, among other things, a purported hearing transcript. (R. 1154-1222) However, while preparing the response to the appellate stay motion and its answer brief, MMB recognized the transcript did not include substantial testimony elicited at the hearing. MMB timely filed a response to the motion (R. 607), but it was forced to file a motion for an extension of time over objection to prepare the brief so that a full hearing transcript could be obtained. (R. 603)[5]

The Fifth District granted PPGO's motion and issued the Stay Order on September 24, 2014. (R. 1288) The Stay Order was therefore supported by a transcript which did not accurately reflect the hearing before Judge Jordan. The Stay Order rendered the entirety of the temporary injunction unenforceable

[5] The court reporter's original transcript omitted over twenty pages of closing argument, and the revised transcript included *hundreds* of edits to syntax and non-substantive errors in the testimony. Many of these errors were highlighted in MMB's answer brief in the Fifth District and can be found at R. 531-32.

pending resolution of the appeal.

No oral argument was held. The Final Op. was issued May 22, 2015. (R. 1305) It noted the findings in the Stay Order, inherently interlocutory, were not binding on the merits panel. *Final Op.*, 171 So. 3d at 128 n.2. The Final Op. reversed the temporary injunction to the extent it enjoined the provision of diagnostic services because that relief had not been sought in MMB's motion, and it ordered the trial court to strike the "including but not limited to" language as impermissibly vague. *Id.* at 127. PPGO has therefore been afforded full relief as to those two requests for modification, and those issues are now moot. The temporary injunction against abortions was affirmed. *Id.*

Before beginning its substantive analysis, the Fifth District recognized PPGO's post-injunction trial court motion was actually two motions. *Id.* at 127 n.1. The motion sought to both <u>reconsider</u> the temporary injunction and to <u>dissolve or modify</u> the temporary injunction. *Id.* The Fifth District reasoned that orders on motions to reconsider non-final orders are not appealable, *id.*, a point of law PPGO does not appear to dispute. Orders on motions to dissolve or modify injunctions, on the other hand, are directly appealable under Rule 9.130(a)(3)(B). *Id.*

The net result is the Fifth District found it had jurisdiction to review (1) the temporary injunction itself, and (2) the order denying PPGO's motion to dissolve or modify the injunction to the extent it was actually a motion to dissolve or

modify and not simply a motion for reconsideration. The post-hearing affidavits were not considered in reviewing the temporary injunction itself "for the basic reason that they were not presented to the court until after issuance of the order and therefore could not have been considered by the court when it made its ruling." *Id.* at 128. The appellate court later returned to this point, concluding:

> Thus, while Planned Parenthood timely appealed the injunction order and can therefore challenge the sufficiency of the evidence presented at the injunction hearing, it cannot rely on evidence submitted after the injunction hearing in support of that challenge.

Id. at 128.

The Final Op. Observed that the First, Second, and Fifth Districts require a party to show a sufficient change in circumstances to modify or dissolve a previously entered temporary injunction. *Id.* at 128 n.3. This showing is not required in the Third or Fourth Districts, and the Final Op. included a footnote to this effect. *Id.* The Final Op. pointed out, however, "[i]n its initial brief, Planned Parenthood does not challenge the denial of its motion to dissolve or modify the injunction, much less argue that it established changed circumstances." *Id.* at 128.

The Fifth District identified the four factors which ordinarily must be met to secure a temporary injunction: "(1) a substantial likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) the unavailability of an adequate remedy at law; and (4) that a temporary injunction will serve the public interest." *Id.* The court conducted an exhaustive construction of the Restrictions and

concluded they "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." *Id.* at 128-30. Following this determination, the court "readily" found substantial, competent evidence supported Judge Jordan's factual findings "that abortions are outpatient surgical procedures; PPGO's facility is not a physician's practice of medicine; and, 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.*

The court next considered the "irreparable harm" requirement, and held this showing is not necessary when enforcing restrictive covenants on real property. *Id.* at 131. The opinion identified a host of decisions for this position, reaching as far back as *Stephl v. Moore*, 114 So. 455 (Fla. 1927). Finally, the Fifth District found public interest would be served by "protect[ing] the hospital from certain types of development and uses being conducted nearby," *Id.* at 132 *citing Wood v. Dozier*, 464 So. 2d 1168 (Fla. 1985). Contrary to the description in Petitioner's brief, nowhere did the Final Op. reference "competition." (*See* Pet. Br. on the Merits at pp. 15, 16, 45) Judge Evander dissented in an opinion citing no authority. *Id.* at 133.

The Fifth District denied PPGO's series of post-decisional motions. (R. 1305, 1356, 1394) In accepting jurisdiction, five Justices of this Court stayed all

activity below. (*Order of Nov. 2, 2015* (Canady and Polston, JJ., dissenting)) PPGO has treated the stay as a de facto reversal of the temporary injunction pending the conclusion of these proceedings. (*See* Pet. Br. on the Merits at p. 13 ("[T]his Court, in a 5-2 order, granted PPGO's stay motion, allowing surgical abortions to again be provided at the Kissimmee health center.")).

SUMMARY OF THE ARGUMENT

Jurisdiction in this case was predicated on a footnote regarding a changed circumstances requirement for post-hearing movants requesting modification or dissolution of an injunction. Jurisdiction should be withdrawn because the issue of changed circumstances was not raised by Petitioner in its post-hearing motion to the trial court nor in its initial brief to the Fifth District. The issue is also moot, as Petitioner was afforded the modification relief requested by the Fifth District's treatment of the injunction itself. Finally, the issue is non-dispositive to the adjudication of the injunction order or the Final Op., because the conflict concerns only trial court discretion to *grant* modifications of temporary injunctions. At issue in the underlying litigation was the trial court's discretion to *deny* modification of a temporary injunction without a showing of changed circumstances. That discretion is not questioned, and is without conflict, in the district courts.

Rather than to resolve a conflict question, the objective of PPGO's petition to this Court is revealed in another footnote. PPGO admits in footnote ten of its

initial brief that its hopes to prevail on the merits at final hearing rest with this Court: "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*." *See* Pet. Br. on the Merits at p. 28 (emphasis added). Read through the lens of the Final Op., PPGO has little confidence it can prove—at a final evidentiary hearing—that surgical abortions are ancillary and incidental to its practice of medicine. In fact, since the hearing on the temporary injunction, PPGO has done everything in its power to avoid returning to the trial court for a final hearing. If this Court determines it does, in fact, have jurisdiction, the Court should approve the Final Opinion. The Final Opinion is supported by the overwhelming majority of state and federal authorities on the question, and best serves trial court discretion and judicial economy.

Finally, if this Court determines it does, in fact, have jurisdiction, the trial court was well within its discretion to grant the temporary injunction and the trial court and Fifth District applied the controlling law when doing so.

ARGUMENT

I. RESPECTFULLY, JURISDICTION WAS IMPROVIDENTLY GRANTED, AND SHOULD BE DISCHARGED.

While academic for the reasons that follow, the conflict concerns the discretionary standard of review given to trial court orders *granting* motions to

modify or dissolve a temporary injunction, absent a showing of changed circumstances. The First, Second, and Fifth districts represent a majority position, holding a trial judge should be afforded discretion where the movant makes a showing of changed circumstances, whereas the minority districts afford that discretion even absent that showing of changed circumstances.

A. PPGO Waived Argument on the Merits of Its Motion.

Argument raised for the first time after the initial brief are irrelevant. *Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256, 261 n.2 (Fla. 2015) (citation omitted)("an argument not raised in the initial brief is barred.") *See also J.A.B. Enterprises v. Gibbons*, 596 So.2d 1247, 1250 (Fla. 4th DCA 1992) (citation omitted) ("[A]n issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief.")

PPGO made no argument concerning its Motion to the Fifth District until its reply brief, and therefore that argument was waived. Accordingly, the Fifth District did not consider the post-hearing affidavits on review of the denied motion to <u>modify or dissolve</u> for the simple reason "Planned Parenthood does not challenge the denial of its motion to dissolve or modify the injunction." *Final Op.*, 171 So. 3d at 128. While PPGO argued in its reply brief to the Fifth District that the injunction itself was a "changed circumstance," that argument, although unreasonable, was not raised in the Motion, or in its initial brief to the Fifth

District.

B. The Conflict Question is Moot Between the Parties.

Jurisdiction should be withdrawn where the conflict question is moot. *See e.g., Santa Rosa Cnty. v. Admin. Com'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995)(discharging jurisdiction where question of great public importance was moot between the parties); *see also Montgomery v. Dep't of Health & Rehab. Servs.*, 468 So. 2d 1014, 1017 (Fla. 1985)(it is not the role of courts to "give opinions on moot questions, or to declare principles or rules of law which cannot effect the matter in issue.") Any opinion on a moot question would therefore be an impermissible advisory opinion.

First, the conflict question is moot because PPGO has already received the very remedies it sought in the modification portion of its Motion—reversal of the injunction against sonograms and the "including but not limited to" language. The remainder of the Motion was in actuality an unappealable motion for reconsideration.

Second, the conflict question is moot because the trial court considered the four late-filed affidavits. Petitioner is simply unhappy with the results. Petitioner never requested clarification of whether the trial court considered the late-filed affidavits when denying its Motion in its entirety. Indeed, PPGO's primary policy argument is that courts of equity "should not be shackled by rigid rules of

procedure." *See* Pet. Br. on the Merits at p. 19. On the contrary, the trial court was not "shackled" by any procedure—it denied the post-injunction motion even though it had been provided the affidavits, and indicated it was fully advised in the premises when doing so. (R. 270)

PPGO in effect asked the appellate court to *reweigh* the evidence supporting the entry of the temporary injunction itself in light of the post-hearing affidavits in support of post-hearing motions, which is generally anathema to appellate procedure. *See e.g.*, *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981)("As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact.") The post-hearing affidavits were not considered in the appeal from the temporary injunction itself "for the basic reason that they were not presented to the court until after issuance of the order and therefore could not have been considered by the court when it made its ruling." *Final Op.*, 171 So. 3d at 128. Reviewing the affidavits in conjunction with the appeal from the injunction would be tantamount to reviewing affidavits submitted after a jury renders a verdict and the losing party challenges the sufficiency of the evidence. Under no circumstance is that permitted.

C. The Conflict Question, If Answered, Would Not Be Dispositive.

Even under the minority's review, the trial court did not abuse its discretion by *denying* the Motion when changed circumstances were not proven. Therefore,

the conflict was not dispositive to the decision below. Again, while framed as a concern for trial court discretion and the avoidance of "rigid rules," Petitioner's position on the conflict actually falls within neither the majority nor minority positions. Instead, Petitioner's position effectively aims to both award the trial court greater discretion to grant modifications when changed circumstances have *not* been proven, and also diminish the trial court's discretion to deny modifications when those circumstances have not been proven, or ostensibly even alleged. In other words, Petitioner has implicitly requested this Court hold that Florida's trial courts do not have inherent discretion to deny a motion to dissolve a temporary injunction entered after notice and a hearing, regardless of whether the movant has established changed circumstances in its motion.

Petitioner frames the conflict regarding "changed circumstances" as an impingement on the inherent authority of trial courts. Petitioner cites the Fourth District decision in *Precision Tune Auto Care, Inc. v. Radcliff*, 731 So. 2d 744 (Fla. 4th DCA 1999), for the proposition a changed circumstances requirement limits trial court discretion. *See* Pet. Br. on the Merits at pp. 18-19. However, *Precision Tune* cannot be stretched to afford Petitioner the result it desires. The *Precision Tune* opinion concluded that when reviewing a motion to dissolve, a trial court had discretion to reconsider or alternatively *not reconsider*, evidence that could have been provided at the hearing on the temporary injunction. *Id.* at 745-46 ("We

conclude that a trial court's decision *as to whether to reconsider*, on a motion to dissolve, a temporary injunction entered after notice and a hearing, is discretionary, regardless of whether the arguments or evidence could have been brought to the attention of the court at the hearing on the injunction.”)(emphasis added) That court, accordingly, affirmed the trial court decision denying the motion to dissolve the temporary injunction. *Id.* at 746. Following the holding and reasoning of *Precision Tune*, the trial court in this case would not have been required to consider the supplemental evidence provided by Petitioner in its Motion, but rather would have had the *option* to do so. *See also Agemy v. Health Business Solutions, LLC*, 117 So. 3d 896, 899 (Fla. 4th DCA 2013)(“[T]rial courts do not abuse their discretion in denying motions to modify where there is no change in circumstances and the enjoined party merely raises arguments it could have raised at the evidentiary hearing on the injunction.”) Similarly, the Fifth District would have been required to afford the trial court discretion to deny the motion, which is exactly what the district court did. *Final Op.*, 171 So. 3d at 128 *citing Hunter v. Dennies Contracting Co.*, 693 So. 2d 615, 616 (Fla. 2d DCA 1997)(“Additionally, although trial courts have inherent authority to reconsider non-final rulings, they are not required to do so — meaning that a trial court's decision not to reconsider a nonfinal ruling is generally not reviewable.”)

By acknowledging the trial court’s discretion in whether to consider

evidence that could have been provided at the initial hearing, the Fourth District's *Precision Tune* decision actually does not conflict with the Fifth District's opinion in *Thomas v. Osler Medical, Inc.*, holding "If the matters raised in the motion to dissolve either were raised or could have been raised during the contested hearing to determine the initial request for the injunction, a trial court does not abuse its discretion in denying the motion." 963 So. 2d 896, 899 (Fla. 5th DCA 2007) *citing Pecora v. Pecora*, 697 So. 2d 1267, 1269 n. 3 (Fla. 5th DCA 1997).

The only real conflict concerns whether the trial court should be afforded an abuse of discretion standard of review on appeal when it elects to *grant* a motion to modify or dissolve, despite the fact changed circumstances were not proven. That conflict question, if answered, would clearly have no bearing on this case. Ultimately, Petitioner's implicit goal is to assault the very discretion for which it expressly crusades. Because all five district courts have consistently held they will not interfere with the discretion of the trial courts to *deny* motions to modify or dissolve absent changed circumstances, and because there is no conflict in that regard, this Court respectfully should discharge jurisdiction.

D. The Policy of Maintaining The Status Quo Is Maintained by Both The Majority and Minority Positions.

The policy purpose of a temporary injunction entered after notice and hearing is merely to "preserve the status quo until full relief can be granted following a final hearing." *Tamiami Trail Tours, Inc. v. Greyhound Lines, Inc.*, 212

So. 2d 365, 366 (Fla. 4th DCA 1968). The *Minty* court, while asserting changed circumstances were not required, found the trial court abused its discretion in modifying an injunction when that modification was contrary to the original purposes of the temporary injunction. *Minty v. Meister Financial Group, Inc.*, 132 So. 3d 373, 375-76 (Fla. 4th DCA 2014). The First District opinion cited in the *Minty* conflict analysis similarly emphasized "[t]he function of a temporary injunction is to preserve the status quo pending the final outcome of a cause. *Brock*, 667 So. 2d at 311 (citation omitted). *Minty* and *Brock*, although purportedly on opposite sides of the "changed circumstances" issue, nevertheless both support retaining a temporary injunction issued—as in the instant case—to preserve the status quo pending final hearing.

MMB reminds the Court that the PPGO Property was not used for the enjoined activity of surgical abortion until after MMB filed its lawsuit. *Chicago Title Ins. Agency of Lee County, Inc. v. Chicago Title Ins. Co.*, 560 So. 2d 296, 297 (Fla.2d DCA 1990)("The purpose of a preliminary injunction is to preserve *the status quo which existed before the controversy*, not to take sides).

Because PPGO did not even timely raise its Motion to the Fifth District, because the conflict question is moot to these parties and non-dispositive, and because the fundamental policy of maintaining the status quo was supported by the temporary injunction at issue, MMB respectfully requests this Court discharge

jurisdiction and allow the parties to proceed to final hearing.

II. THE FIFTH DISTRICT IS CORRECT THAT A SHOWING OF CHANGED CIRCUMSTANCES SHOULD BE MADE PRIOR TO DISSOLVING OR MODIFYING A TEMPORARY INJUNCTION ENTERED AFTER NOTICE AND EVIDENTIARY HEARING.

A. The Only District Not Requiring a Showing of Changed Circumstances Appears to be the Fourth District.

A showing of changed circumstances has been applied to temporary injunctions entered after notice and hearing in the First, Second, and Fifth Districts. *See, e.g.*, *Thomas v. Osler Med., Inc.*, 963 So. 2d 896, 900 (Fla 5th DCA 2007); *Hunter*, 693 So. 2d at 616 (Fla. 2d DCA 1997) (holding it was incumbent upon the enjoined party to prove "some change of circumstance" that would justify dissolution despite the fact the movant made a "persuasive argument that the evidence submitted at the initial temporary injunction hearing was legally insufficient to support issuance of the temporary injunction"); *Brock v. Brock*, 667 So. 2d 310, 312 (Fla. 1st DCA 1995). *See also Barbieri v. Muller*, 124 So. 3d 320, 320 (Fla. 5th DCA 2013)("She correctly argues that the trial court abused its discretion in dissolving the injunction by reweighing the evidence supporting the initial injunction rather than finding a change in circumstances since the injunction was issued."), *rev. den.*, 133 So. 3d 527 (Fla. 2014).

The *Minty* footnote, referenced in the Final Op.'s footnote, asserts the Third and Fourth Districts agree changed circumstances are not required. 132 So. 3d at

376 n.4; *Final Op.*, 171 So. 3d at 128 n.3. However, the status of the law in those districts is far from clear. The Fourth District's 1999 decision in *Precision Tune* appears to be the first Florida decision reasoning, in dicta, that changed circumstances are not required. *Precision Tune* justified its reasoning on two general principles: (1) the granting and continuing of injunctions lies within a trial court's discretion, and (2) courts have inherent authority to revisit non-final orders. *Id.* at 745. As discussed in Section I, *infra*, the *Precision Tune* opinion concluded that when reviewing a motion to dissolve, a trial court had discretion to reconsider or alternatively *not reconsider*, evidence which could have been provided at the hearing on the temporary injunction. *Id.* at 745-46 ("We conclude that a trial court's decision *as to whether to reconsider*, on a motion to dissolve, a temporary injunction entered after notice and a hearing, is discretionary, regardless of whether the arguments or evidence could have been brought to the attention of the court at the hearing on the injunction.")(emphasis added) That court, accordingly, affirmed the trial court decision denying the motion to dissolve the temporary injunction. *Id.* at 746. *Precision Tune*, therefore, in dicta, potentially ushered in a conflict of law regarding the degree of a trial court's discretion to *grant* motions to dissolve, although that analysis was not even required to resolve that appeal.

Later, and without elaboration, the Fourth District reaffirmed *Precision Tune*'s rejection of the changed circumstances requirement in *Minty v. Meister*

Financial Group, Inc., 132 So. 3d 373 (Fla. 4th DCA 2014), although the *Minty* court, nevertheless, reversed the trial court order modifying an injunction. The Third District's alleged alignment with the Fourth District is based solely on *Bay N Gulf, Inc. v. Anchor Seafood, Inc.*, 971 So. 2d 842 (Fla. 3d DCA 2007). However, *Bay N Gulf*'s decision in affirming the trial court order was based on a finding the beneficiary of the injunction had an adequate remedy at law. *Id.* at 843. *Bay N Gulf* repeated the same two broad principles provided in *Precision Tune*. *Id*. Because of the court's positive reference to *Precision Tune*, Judge Shepherd authored a comprehensive dissent, discussed below, explaining why his Honor "believe[d] *Precision Tune* is flawed and should not be followed by this Court." *Id.* at 844 (Shepherd, J., dissenting).

Despite Judge Shepherd's concern, *Bay N Gulf* does not appear to have been followed in any subsequent appellate decisions in the Third District for its discussion of changed circumstances. In *Fong v. Courvoisier Courts Condo. Ass'n, Inc.*, 81 So. 3d 562, 563 (Fla. 3d DCA 2012), the Fongs were temporarily enjoined from certain uses of their condominium property. *Id.* The Third District actually agreed the initial injunction was improperly entered. *Id.* Regardless, the court affirmed the order denying the motion to dissolve the injunction because, in part, "the standard regarding a motion to dissolve a temporary injunction, entered after notice and a hearing, <u>required the Fongs to demonstrate a change in</u>

circumstances." *Id.* (emphasis added) The court cited its earlier decision in *Cohen v. Zidon*, 994 So. 1163, 1164 (Fla. 3d DCA 2008), which held "Where, as here, an enjoined party moves to dissolve a temporary injunction that was issued **after** notice and a hearing, the moving party 'must establish that a change in conditions justifies the dissolution.'" (emphasis in original)(citing the Fifth District's *Thomas*, 963 So. 2d at 899). *Cohen* continued "When a trial court issues a temporary injunction **after** the parties receive notice and a hearing is conducted, a party seeking review of the propriety of the injunction should file a direct appeal." *Id.* at 1164-65 (emphasis in original) Of course, that is precisely what PPGO did, and the propriety of the injunction order was affirmed by the Fifth District.

Thus, it would appear the Third District is actually aligned with the First, Second, and Fifth Districts. The aggregate jurisprudence therefore reveals *Precision Tune* is a classic outlier, establishing a point of law that was not required to resolve its immediate controversy. If the Court determines it has properly exercised jurisdiction in this case, then it should disapprove *Precision Tune* and its limited progeny for reasons the reasons below.

B. The Majority Position Supports Trial Court Discretion.

Precision Tune itself cited the Second District's *Hunter* opinion in support of broad trial court discretion, recognizing that although *Hunter* required changed circumstances, it supported trial court discretion. *Precision Tune*, 731 So. 2d at

745-46. The *Hunter* court, after acknowledging the failure to show changed circumstances, affirmed the trial judge's decision, "[b]ecause the trial judge was not provided with any such proof, we cannot say that he abused his discretion by, in effect, simply declining to revisit his initial ruling." *Hunter*, 693 So.2d at 616. The *Hunter* court continued "… the court is not required to exercise that authority, and its decisions to do so generally are not reviewable." This Court, in *Silvestrone v. Edell*, 721 So.2d 1173, 1175 (Fla. 1998) also relied on *Hunter*, albeit in another context, in recognizing a trial court's inherent authority to reconsider non final rulings prior to final judgment or termination of action. Recognizing the inherent authority of a trial court is not inconsistent with placing burdens on movants and limitations on appellate review.

Hunter distinguished cases of temporary injunctions issued without prior notice, where motions to dissolve must be heard, from those injunctions entered after notice and hearing, where discretion is warranted. *Id.* at 616. It was this "failure to appreciate the differences between an injunction entered ex parte, and one, like that here, entered with prior notice and an opportunity to be heard" that led to the *Bay N Gulf* opinion, per Judge Shepherd's articulate dissent in the same. *Bay N Gulf*. 971 So. 2d at 844 (Shepherd, J., dissenting). Judge Shepherd continued by quoting Judge Sawaya's opinion in *Thomas*, 963 So. 2d at 900, emphasizing the entire following passage:

> To summarize, a motion to dissolve is necessary only where an ex parte temporary injunction was issued. If proper notice was provided and an evidentiary hearing conducted prior to issuance of the temporary injunction, an appeal should be filed to review the propriety of the temporary injunction; in this instance, a motion to dissolve is limited to raising only new matters and a trial court will not abuse its discretion in denying the motion if the enjoined party does not establish that a change in conditions justifies dissolution.

Id. at 845.

Judge Shepherd also recognized not requiring a change in circumstances when considering motions to dissolve injunctions entered after notice and hearing would obliterate the thirty day appellate window following the entry of an injunction. *Id.* at 844 ("Under *Precision Tune*, it quickly becomes apparent that it is the enjoined party, rather than this Court (or the Florida Rules of Appellate Procedure), who has control of the rule concerning when, prior to final judgment, an appeal from an injunction entered after notice may be brought to us for plenary review.") After all, following PPGO's reasoning, a temporarily enjoined party could move to dissolve an injunction <u>at any time</u> for the same reasons argued at the initial hearing, procure an order denying the motion, and then appeal. The appellate court would then be required to fully revisit the initial injunction regardless of how much time had passed. The thirty day *jurisdictional* deadline to appeal would have no meaning if that were the law. *See Peltz v. Dist. Court of Appeal, Third Dist.*, 605 So. 2d 865, 866 (Fla. 1992)("The untimely filing of a notice of appeal precludes the appellate court from exercising jurisdiction.")

Temporary injunctions would afford nominal assurances to the affected parties. Doing away with the requirement would necessarily increase the time, cost, and burden of injunctive litigation. As a practical matter, sanctioned serial temporary injunction motions for modification would divert parties' efforts from preparing a case for final resolution. This case exemplifies the ramifications of continuous temporary injunction litigation. The injunction below has been enforceable, stayed, enforceable, and stayed again over the course of multiple "emergency" motions and motions revisiting the merits of other orders. Consequently, the case remains far from final resolution despite Judge Jordan's estimation the case would have otherwise concluded in July 2015. (R. 175)

Moreover, Rule 9.130 interlocutory appellate redress is absolutely sufficient to ensure the propriety of injunctions. PPGO availed itself of that procedure in this case. Although dissatisfied with the outcome, PPGO must now live with the presentation of its opposition to the temporary injunction pending full trial.

C. Foreign Jurisprudence Overwhelmingly Favors the Majority Position.

In its brief, PPGO offers only one foreign state court authority, *Kraft v. Solon*, 336 N.E.2d 577, 580 (Ill. Ct. App. 1975). Interestingly, *Kraft* actually reversed the dissolution of a temporary injunction for its failure to maintain the status quo, holding "power and propriety require separate considerations. There must be sufficient basis in the record to support the action taken by the court." *Id*.

Meanwhile, approving the Fifth District below would place Florida in the unquestionable national majority of jurisdictions which have decided the issue.[6]

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[6] *Accord Floyd v. Ind. Dev. Bd.*, 442 So. 2d 927, 929 (Ala. 1983) ("[W]hen a preliminary injunction has been issued after a full hearing on the matter, as in this case, a motion to dissolve is inappropriate unless circumstances have changed since the granting of the preliminary injunction ..."); *Nu-Tred Tire Co. v. Dunlop Tire & Rubber Corp.*, 577 P.2d 268, 271 (Ariz. Ct. App. 1978) ("[A] motion pursuant to Rule 65(c), relied upon by Nu-Tred to bring before us all of the issues underlying the issuance of the preliminary injunction, serves the much more limited purpose of providing a means to show that changed circumstances or changes in the law require the modification … Any other reading of Rule 65(c) would mean that the adverse party could attack the original basis for the injunction at any time after its rendition on any ground which was available when it was first heard. This would fly in the face of logic."); *Union Interchange, Inc. v. Savage*, 342 P.2d 249, 250-51 (Cal. 1959) ("When it can be shown that circumstances have so changed that a[] [temporary] injunction is no longer necessary or desirable, the trial court has power to amend it in the interest of providing justice for all parties in interest." (citations omitted); *Bishop v. Patton*, 706 S.E.2d 634, 612 (Ga. 2011) ("[A]n interlocutory injunction may be dissolved or modified as the case develops. [citations] Likewise, the denial of an interlocutory injunction does not preclude a party from filing another request later if new evidence becomes available or the circumstances change such that there is a greater need for preliminary relief."), *disapproved on other grounds, SRB Inv. Servs., LLLP v. Branch Banking & Trust Co.*, 709 S.E.2d 267, 271 n.7 (Ga. 2011); *Helmkamp v. Clark Ready Mix Co.*, 249 N.W.2d 655, 657 (Iowa 1977) ("We caution the defendant, however, that just as an injunction will be vacated on changed conditions, so another injunction will be issued on changed conditions."); *Nat'l Elec. Serv. Corp. v. Dist. 50*, 279 S.W.2d 808, 812 (Ky. 1995) ("An injunction, whether permanent or temporary, is an equitable process … over which the equity court necessarily retains jurisdiction in order to do equity. This includes power to modify or vacate it, if the law has changed or present considerations of equity demand it."); *Kelly v. Terrebonne Parish Police Jury*, 449 So. 2d 568, 571 (La. Ct. App. 1984) ("[W]hen on account of changed circumstances [an injunction] has served its intended purpose and is no

longer needed, he should in all fairness have recourse to the very court which has enjoined him, and in the same proceeding.") (citation omitted); *Walker Properties of Woodbury II, LLC v. City of Woodbury*, 2010 WL 5156116, *2 (Minn. Ct. App. Dec. 21, 2010) ("The traditional reasons for modifying or vacating a temporary injunction are changes in the relevant facts or changes in the relevant law.") (citing *Jacobson v. Cnty. Of Goodhue*, 539 N.W.2d 623, 625 (Minn. Ct. App. 1995); *Butte Consol. Min. Co. v. Frank*, 62 P. 922, 924 (Mont. 1900) (holding that a trial court need not modify a temporary injunction when facts were identical to those at the time of the hearing with notice); *Wash. Deluxe Bus, Inc. v. Sharmash Bus Corp*., 47 A.D.3d 806, 807 (N.Y. App. Div. 2008) ("[The court] providently denied the appellants' motion to modify the preliminary injunction, as they failed to allege facts showing compelling or changed circumstances that would render continuation of the injunction in its present form inequitable."); *Altemose Constr. Co. v. Building & Constr. Trades Council*, 337 A.2d 277, 278 (Pa. 1975) ("One whose motion to dissolve a preliminary injunction is denied ... may continue to move to dissolve the injunction based on a change in circumstances, or may proceed to a final hearing upon the issue of whether the injunction shall be made permanent."); *Crystal Rest. Mgmt. Corp. v. Calcagni*, 732 A.2d 706, 711 (R.I. 1999) ("[I]njunctive decrees may be modified where changed circumstances require modification in order to achieve the purposes underlying the initial grant of relief.") (puncutation omitted); *Brady v. Anders*, 364 S.E.2d 467, 468 (S.C. 1988) ("A continuing injunction is subject to modification upon a showing of significantly changed factual circumstances or substantive changes in the statutory or decisional law."); *Sjomeling v. Stuber*, 615 N.W.2d 613, 616-17 (S.D. 2000) ("Generally, an injunction may be modified only on a showing of changed conditions. … It is clear that a strong showing is required before an injunction or other prospective judgment will be modified."); *Tober v. Turner of Texas, Inc.*, 668 S.W.2d 831, 834-36 (Tex. App. 1984) (explaining the impropriety of modifying a temporary injunction issued upon notice and hearing, without showing changed circumstances.); *Condura Constr. Co. v. Milwaukee Building & Constr. Trades Council*, 99 N.W.2d 751, 755 (Wis. 1959) ("Where the grounds and reasons for which the injunction was granted no longer exist by reason of changed conditions, it may be necessary to alter the decree to adopt it to such changed conditions. … However, the injunction, whether right or wrong, cannot on such a hearing be impeached in its application to the conditions that existed at its making.") (citing

Approving the Fifth District below would also be consistent with federal jurisprudence on the issue.

PPGO's two federal authorities hold that temporary injunctions may be modified or dissolved "in light of subsequent changes in the facts or the law, or for any other good reason." *Movie Sys., Inc. v. MAD Minneapolis Audio Distribs.*, 717 F.2d 427, 430 (8th Cir. 1983); *Canal Auth. v. Callaway*, 489 F.2d 567, 578 (5th Cir. 1974). The rule stated in *Movie Systems* and *Callaway* provides some "good reason" must be provided to revisit a temporary injunction. It does not state an initial temporary injunction order may be relitigated for no reason at all.

Nor do *Movie Systems* and *Callaway*, in a vaccuum, represent the federal jurisprudence. Instead, the Third Circuit has held:

> In order to prevail on a motion to modify [a preliminary injunction], the movant must establish a change in circumstances that would make the original preliminary injunction inequitable:
>
> The purpose of a motion to modify an injunction is to demonstrate that changed circumstances make the continuation of the order inequitable. The motion does not force the trial judge to permit relitigation of his original determination of the injunction and should not serve as an avenue of untimely review of that determination.

Favia v. Ind. Univ. of Pa., 7 F.3d 332, 340 (3d Cir. 1993) (citation omitted). The Third District's rule is consistent with federal jurisprudence as a whole.[7] The

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28 Am.Jur., Injunctions, pp. 830-31, § 316).

[7] *See e.g.*, *Concilio de Salud Integral de Loiza, Inc. v. Perez-Perdomo*, 551 F.3d 10, 16 (1st Cir. 2008); *Sprint Communications Co. v. CAT Communications*

Eleventh Circuit dismissed for lack of jurisdiction the appeal in *Winfield v. St. Joe Paper Co.*, 663 F.2d 1031, 1032 (11th Cir. 1981), where the denied motion for a preliminary injunction was "simply a refiling of a motion which had been denied two years earlier." After noting a "total absence of additional factual submissions to the record or even allegations of changed circumstances," the court observed that "what we are confronted with here is a device to extend the period for filing an appeal from thirty days to two years." *Id.* (emphasis added) That precise subversion of the appellate process would become Florida law if *Precision Tune* were approved.

III. THE TEMPORARY INJUNCTION WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE.

District courts of appeal are intended to be courts of last resort. *Morgan v. State*, 337 So. 2d 951, 953 n.6 (Fla. 1976). An appellate court "may not re-weigh evidence and substitute its judgment for that of the trier of fact." *Cripe v. Atlantic First Nat. Bank*, 422 So.2d 820, 821 (Fla. 1982)(citations omitted). Consideration by this Court of the underlying merits would devolve these proceedings into pure

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Int'l, Inc., 335 F.3d 235, 242 (3d Cir. 2003); *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 414 (6th Cir. 2012) ("To obtain modification or dissolution of an injunction, a movant must demonstrated significant changes in fact, law, or circumstance since the previous ruling.") (citation omitted); *Sierra Club v. U.S. Army Corps of Eng'rs*, 732 F.2d 253, 256 (2d Cir. 1984) ("But a court may modify a final or permanent injunction only where conditions have so changed as to make such relief equitable; *i.e.*, a significant change in the law or facts.")

second-tier review of the Fifth District's legal conclusions. Respectfully, the underlying merits should not be entertained. Regardless, the trial court and Fifth District properly interpreted the Restrictions.

A. The Fifth District Properly Analyzed the Restrictions Using Their Common and Ordinary Meanings.

The Fifth District construed the Restrictions *de novo* and concluded, "… while the restriction is rather poorly drafted, it is not unclear. It prohibits 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*." *Final Op.*, 171 So. 3d at 130 (emphasis added.) The Fifth District concurred with the trial court that the words in the Restrictions should be given their "plain and ordinary meaning." (T.O. 8; *Final Op.*, 171 So. 3d at 130)

The Final Op. properly rejected Petitioner's position that "center" suggests a quantitative requirement that such activities be the "primary purpose" of the location rather than a location where such activities occur. *Id*. While evidence was presented that the primary purpose of the facility at the PPGO Property is indeed surgical, the Restrictions allow surgeries on a narrower basis. Applying the rule an entire document must be read in context, the district court agreed with MMB that PPGO's suggested reading would render the Restriction meaningless:

> In addition, the restriction provides an exception for such activities when they are "ancillary and incidental to a physician's practice of medicine." MMB is correct that adopting Planned Parenthood's statutory definition would render this exception meaningless because if an outpatient surgical center is defined as a facility the primary purpose of which is to provide out-patient surgical procedures, then such procedures could not be "ancillary and incidental" to a physician's practice of medicine. However, if it is merely a facility where outpatient surgical procedures are performed along with other procedures, then it would not prohibit abortions if they were ancillary and incidental to a physician's practice of medicine. Thus, the exception strongly suggests that any outpatient surgical procedures beyond those that are "ancillary and incidental" to a physician's medical practice are prohibited, even if the primary purpose of the location is not to provide outpatient surgical procedures.

Id.

Recognizing the plain language does not support its desired result, Petitioner continues to argue for application of extrinsic statutory definitions of inexact terms which are defined only for purposes of licensing.[8] However, fundamental contract interpretation provides language must first be deemed ambiguous before looking to extrinsic sources for clarity. *Real Estate Value Co., Inc. y. Carnival Corp.*, 92 So.

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[8] Predictably, each authority relied upon by Petitioner for the assertion statutory definitions should be utilized first "when determining the meaning of a term …" (*See* Pet. Br. on the Merits at p. 31) is an opinion *interpreting the very statute* whose definitions are being utilized. *See Reform Party of Fla. v. Black*, 885 So.2d 303 (Fla. 2004)(determining whether there was a failure to comply with the requirements of § 103.021(4)(a), Fla. Stat.); *State v. Debaun*, 129 So.3d 1089 (Fla. 3d DCA 2013)(defining statutory term to determine whether criminal defendant violated § 384.24(2), Fla. Stat.); *Grohs v. State*, 944 So.2d 450 (Fla. 4th DCA 2006)(defining statutory term to determine whether criminal defendant violated § 847.0135(3), Fla. Stat.); *Jones v. Williams Pawn & Gun, Inc.*, 800 So.2d 267 (Fla. 4th DCA 2001)(defining statutory term to determine whether party violated §790.17, Fla. Stat., which utilized that term.)

3d 255, 262 (Fla. 3d DCA 2012). Petitioner's Brief improvidently cites *Winn-Dixie Stores v. 99 Cent Stuff-Trail Plaza*, 811 So. 2d 719, 722 (Fla. 3d DCA 2002) for the proposition that in the absence of a definition, a court should look to outside sources, such as a statute, to determine the meaning of a restrictive covenant. However, *Winn-Dixie Stores* specifically rejected a narrow interpretation of a restrictive covenant to a definition found in an unrelated source (in that case, a Florida administrative code). *Winn-Dixie Stores*, 811 So. 2d at 721. That court determined, in the absence of contractual definitions, the plain and ordinary meaning of a term may be ascertained *through the use of a dictionary*.[9] *Id.* at 721. *See also Cottrell v. Miskove*, 605 So.2d 572, 573 (Fla. 2d DCA 1992) and *Publix Supermarkets, Inc. v. Santos*, 118 So. 3d 317, 320 (Fla. 3d DCA 2013).

Florida courts interpreting private deed restrictions have uniformly criticized reliance on extrinsic statutory definitions. For example, the Second District called such reliance misplaced:

> The trial court's reliance on the statutory definition — which is found in the Florida Mobile Home Act — is entirely misplaced. The sole function of that definition is to demarcate — together with other pertinent provisions of chapter 723 — the type of properties to which the protections of the Mobile Home Act are applicable. The definition has no application outside the context of chapter 723. See § 723.003 ("Definitions — *As used in this chapter*, the following words and terms

[9] The Fifth District utilized the most sensible dictionary definitions to determine the common and ordinary meaning of the activity "Outpatient Surgical Center" as used in the Restrictions. *Final Op.* 171 So. 3d at 130-31.

> have the following meanings....") (emphasis supplied). The statutory definition thus has no relevance to the interpretation of the Gem Estate restrictions.

Gem Estates Mobile Home Village Ass'n v. Bluhm, 885 So. 2d 435, 438-39 (Fla. 2d DCA 2004). *See also Killearn Homes Ass'n v. Visconti Family*, 21 So. 3d 51, 54 (Fla. 1st DCA 2009)("Likewise, the sole function of the definition of 'building' in the Tallahassee Land Development Code is only to demarcate the types of buildings controlled by that code. Government regulation of land use does not control the meaning or application of a deed restriction.") Courts in other jurisdictions also recognize that basic principle of construction. *See e.g., Gonzalez v. Secretary of Dept. of Homeland Sec.*, 678 F.3d 254, 262 (3d Cir. 2012) ("Whether YGP and AGP fall outside the statutory definition is irrelevant … To assume such is to export a term of art from the statute into conventional usage, which invites *unnecessarily legalistic and absurd outcomes*.)(emphasis added); *Goldstein v. Occidental Life Insurance Co.*, 273 A.2d 318 (R.I. 1971)("A closer reading of the statute, however, shows that the Legislature did not intend thereby to provide a definition of 'accident and sickness' to be applicable to all contracts of insurance executed in this state. Rather this statutory definition is limited to its applicability 'as used herein' …")

Petitioner suggests application of similarly limited language in § 395.002 which provides, "*As used in this chapter* … (3) 'Ambulatory surgical center' or

'mobile surgical facility' means . . ." (emphasis added) and § 408.07, which states, "*As used in this chapter* … (18) 'Diagnostic-imaging center' means …" (emphasis added). The various statutory definitions desired by Petitioner are clearly intended to support the purposes of the "Health Care Licensing Procedures Act," enacted by the Legislature because of the confusion related to licensing. *See* § 408.801(2), Fla. Stat. ("It is the intent of the Legislature to provide a streamlined and consistent set of basic licensing requirements for all such providers in order to minimize confusion, standardize terminology [etc]…").

The impracticability of reference to the licensing scheme for all other purposes is reflected by the statutory definition of "clinic." Within Chapter 400, which licenses "clinics" as defined in the statute, abortion clinics are also specifically excluded from its definition. *See* § 400.9905(4)(a). Fla. Stat. Yet, in another section, Chapter 390, governing the licensing of facilities existing for the primary purpose of performing abortions, both "clinic" and "abortion clinic" are defined the same. *See* § 390.011(2), Fla. Stat.[10] The statutory definitional exceptions are carved out, presumably, exactly because under the plain and ordinary meaning of those terms, more than one statute could apply. States might

[10] Incidentally, the Florida Legislature considered abortion a surgical procedure when it directed the Agency for Health Care Administration to generate rules: "For clinics that perform abortions in the first trimester of pregnancy only, these rules shall be comparable to rules that apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of first trimester abortions." § 390.012(2).

treat various surgeries differently, but that does not make them non-surgical. *See Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955) ("There is no requirement, moreover, that a state legislature address all surgical procedures if it chooses to address one … States may select one phase of one field and apply a remedy there, neglecting the other.)

B. The Question of Whether PPGO's Then-Intended Activities Are Those of an Outpatient Surgical Center Was a Contested Question of Fact That Was Properly Resolved in MMB's Favor.

It is axiomatic that factual findings made by a trial court should not be reweighed on appeal. *Wekiva Springs Reserve Homeowners v. Binns*, 61 So. 3d 1190, 1191 (Fla. 5th DCA 2011). The standard of review for temporary injunctions is extremely deferential to the trial judge. *E.g.*, *Clark v. Kreidt*, 199 So. 333, 335 (Fla. 1940); *Minty*, 132 So. 3d at 376 (collecting cases). "A trial court is afforded broad discretion in granting, denying, dissolving or modifying injunctions, and unless a clear abuse of discretion is demonstrated, an appellate court must not disturb the trial court's decision." *Sacred Family Invs., Inc. v. Doral Supermkt., Inc.*, 20 So. 3d 412, 415 (Fla. 3d DCA 2009)(citations omitted). "On review of an order granting a temporary injunction, the trial court's findings of fact cannot be reversed if they are supported by competent, substantial evidence." *Charlotte Cnty. v. Vetter*, 863 So. 2d 465, 469 (Fla. 2d DCA 2004).

The Final Op. was correct in readily concluding the following trial court findings were supported by competent and substantial evidence: (1) PPGO intends to provide outpatient surgical procedures, namely surgical abortions; (2) PPGO does not operate as a "physician's practice of medicine," and, even if it does, (3) outpatient surgical abortions are not "ancillary and incidental" to PPGO's business. *Final Op.*, 171 So. 3d at 130. The trial court's findings were not "arbitrary, fanciful, or unreasonable."[11] *Canakaris v. Canakaris*, 382 So. 2d 1197 at 1203 (Fla. 1980). The trial court's findings similarly were not rendered such by the post-hearing affidavits. As shown below, the affidavits supported the trial court findings.

MMB's witnesses, Dr. John Massey and Dr. Jose Fernandez, credibly testified surgical abortions are outpatient surgical procedures. (Tr. 12, 49, 50) Dr. Massey testified he considered surgical procedures to be a violation of the Restrictions. (Tr. 13, 23-24) Ms. Tosh admitted PPGO intended to begin providing outpatient "surgical abortions" at the PPGO Property beginning in August 2014. (Tr. 28) In furtherance of that intention, PPGO inquired of the local zoning authority whether zoning was proper for both a medical clinic and an outpatient

[11] MMB notes although the injunction against sonograms was overturned because it was not pled, Petitioner evidenced an intent to violate the Restrictions by performing sonograms. Similarly, although the "including but not limited to" language was overturned because it was deemed vague, Petitioner brazenly evidenced an intent to violate the Restrictions by performing a number of surgical procedures. (Tr. 33, 34, 45.)

surgical center. (R. 134) The application specifically stated PPGO intended to operate an "Out Patient Surgical Center." (R. 134, 111) PPGO also applied for and obtained from the Agency for Health Care Administration, Hospital and Outpatient Services Unit, an abortion clinic license to perform surgical abortions at the PPGO Property. (R. 135)

While Ms. Tosh testified surgical abortions are not "surgery" because they do not involve incisions (Tr. 42), the trial court was within its discretion to reject that assertion, which has since been conceded by PPGO on appeal. Ms. Tosh has no formal medical training, (Tr. 29) and both medical doctor witnesses testified to the contrary. (Tr. 12, 49-50) In response to her own counsel's questioning, Ms. Tosh gratuitously offered PPGO has been "exploring the possibility of trying certain microscopic gynecological surgeries; specifically, microscopic tubal sterilization …" (Tr. 44), a panoply of surgical services in bald contradiction to the Restrictions. The trial judge undoubtedly weighed the credibility of this witness as the trier of fact.

Nor do the post-hearing affiants add anything of substance even before facing cross-examination. Attorney Harbert merely provided his *legal opinion* as to whether abortions would be permitted in Oak Commons. This testimony is fundamentally objectionable as an irrelevant legal conclusion. Mr. Harkins provided his lay interpretations of the governing *regulatory* language—language

the Fifth District construed de novo. It is difficult to see how Mr. Harkins' affidavit could have any impact on the dispositive issues even if it is not barred by the Rules of Evidence. *See e.g.*, *Marshall v. Adams*, 447 S.W.2d 57 (Ky. App. 1969)("Inasmuch as the language in the restrictive covenant is clear and unambiguous, the affidavit of the subdivider was incompetent and irrelevant.")

PPGO raised compliance with the exception as an affirmative defense to MMB's complaint (R. 99) As such, the burden rests with PPGO to prove its affirmative defense. *Ferry-Morse Seed Co. v. Hitchcock*, 426 So. 2d 958, 961 (Fla. 1983)(holding the burden of proof remains on the party raising the defense). After a review of the credible evidence, the trial court had good reason to reject PPGO's assertion. PPGO's assertion was also soundly belied by its own witness at the evidentiary hearing, Ms. Haynie, PPGO's Treasurer, who agreed with her counsel that "abortions are central" to PPGO's business.[12] (Tr. 64) Central is not a synonym of "ancillary and incidental." The centrality of outpatient surgical abortions to PPGO's business, the court was told, was ostensibly due to many customers coming primarily for its outpatient surgical abortion services, who might then later choose PPGO for other services (Tr. 65) and also because individuals who have chosen PPGO for its non-surgical services often then elect for outpatient surgical abortion with PPGO, which provides PPGO with significant revenue. (Tr. 64)

[12] Reference to the word "central" was among the erroneous omissions in the original transcript.

Ms. Tosh testified enjoining outpatient surgical abortions would "be a substantial burden on our practice." (R. at 31) Yet, Ms. Tosh attempted to shoehorn the "ancillary and incidental" exception into this case by maintaining abortions constitute less than one percent (1%) of PPGO's expected services. (R. 31)

If post-hearing affidavits are considered, this unsupported statistic's credibility is further diminished by the testimony that surgical abortion is "part and parcel" to PPGO's business (R. 1099) and that there is substantial revenue that would be lost should surgical abortion be enjoined, because "[r]evenue from all of the other associated or subsequent services we would likely provide for those patients will thus be lost." (R. 227) In fact, abortions are so "central" to PPGO's work Ms. Haynie anticipated a complete closure of the operation and sale of the property if abortions were enjoined by the court. (Tr. 58) Finally, and importantly, its "medical director" could not bring herself to agree in her post-hearing and post-injunction affidavit.[13]

This Court ruled in *Moore v. Stevens*, 90 Fla. 879, 886-87 (1925), an owner's use of his residence as a music studio was not incidental when he had designed the home with as much regard for its usefulness for music as for the residence. The fact PPGO testified to the immense importance of abortions to its business, and planning and use of the PPGO Property, confirms its use of the PPGO Property for

[13] Dr. Morris, in her post-hearing affidavit, instead swore outpatient surgical procedures were not her "primary" practice. (R. 224)

abortions is far from incidental. The trial court was reasonably unconvinced and the Fifth District was correct in concluding Judge Jordan's factual finding was not an abuse of discretion.

Regarding the "physician's practice of medicine" issue, the trial court relied on far more evidence than just the § 501(c)(3) classification in rendering its finding PPGO was not a physician's practice of medicine. First, PPGO never argued it was a physician's practice of medicine. Dr. Massey testified he did not consider PPGO to be a medical practice. (R. at 19) Dr. Morris, PPGO's medical director and only salaried doctor, splits time between PPGO's three facilities, and a separate Planned Parenthood affiliate in Jacksonville. (Tr. 33-36) Ms. Tosh agreed with MMB's counsel that Dr. Morris' practice was consistent with "traveling the circuit." (Tr. 34-35) The post-hearing affidavit further diminished the likelihood of finding a physician's practice of medicine, as it showed Dr. Morris split time with one additional entity.[14] To adopt PPGO's desired meaning that rotating physicians coming to perform surgery could comply with the exception, would render the Restrictions meaningless. Any business could be established and freely act in clear violation of the Restrictions, simply by rotating medical professionals in to perform the procedures and then claiming the medical professional's activities at

[14] Meanwhile, Dr. Morris' post-hearing affidavit failed to mention her supposed "full-time physician" contract (Tr. 34), but instead swore she has several jobs with several entities, one of which is Planned. (R. 221.)

the property were "ancillary and incidental" to his or her medical practice.[15]

Finally, as discussed earlier, PPGO impugned its argument that abortion is ancillary and incidental to a physician's practice of medicine, by arguing it has received a license to perform abortions. Such a license would be unnecessary under PPGO's argument, as § 390.011(2)(b), Fla. Stat. provides:

> Definitions.—As used in this chapter, the term:
>
> (1) "Abortion" means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.
>
> (2) "Abortion clinic" or "clinic" means any facility in which abortions are performed. The term does not include:
>
> (a) A hospital; or
>
> (b) *A physician's office, provided that the office is not used primarily for the performance of abortions*.

(emphasis added)

Because Petitioner has admitted it holds an abortion clinic license, the trial court could reasonably presume its facility is—by definition—either a physician's office used primarily for the performance of pregnancy terminations, or if the use is not primarily for abortions, then it is not a physician's office. Petitioner cannot have it both ways.

Whether Petitioner proved its affirmative defense is a factual question which should only be disturbed where the record is devoid of all support. In light of the

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[15] However, MMB reminds the Court "Planned's physician," Dr. Morris tellingly never swore or even implied surgical abortions are ancillary and incidental to her practice, which presumably is restricted to work at various abortion clinics.

evidence, such is not the case.[16] Neither does the evidence support a subsequent finding of error in denying dissolution.

C. The Lower Court Applied the Proper Injunction Jurisprudence concerning Enforcing Recorded Restrictions Running with Land.

The Fifth District properly held "irreparable harm" need not be shown when enforcing restrictive covenants on real property. *Id.* at 131. The Final Op. identified a host of decisions for this position, including *Stephl v. Moore*, 114 So. 455 (Fla. 1927). *Final Op.*, 171 So. 3d at 131. Similarly, the Opinion acknowledged the public interest would be served by "protect[ing] the hospital from certain types of development and uses being conducted nearby," *Id.* at 132 *citing Wood v. Dozier*, 464 So. 2d 1168 (Fla. 1985). Nowhere did the Final Op. reference "competition." *See* Pet. Br. on the Merits at pp. 15, 16, 45. Lastly, identifying a host of decisions for the position, the Final Opinion properly rejected Petitioner's argument it would suffer irreparable harm as "Planned Parenthood was aware of the restrictions and proceeded forward at its own peril."[17] *Id.* at 131 (citations omitted).

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[16] Remarkably, Planned effectively admits in footnote ten of its initial brief surgical abortions are not ancillary and incidental to its practice of medicine. ("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*.")(emphasis added) Read through the lens of the Final Op., Planned has little confidence it can prove—at a final evidentiary hearing—surgical abortions are ancillary and incidental to its practice of medicine.

[17] MMB also submits notwithstanding Planned's assertions of animus, which

CONCLUSION

Respectfully, for the reasons articulated above, MMB requests this Court discharge jurisdiction allowing MMB the benefit of the temporary injunction properly awarded pending final hearing. PPGO did not timely raise its Motion to the Fifth District, the conflict question is moot to these parties and non-dispositive, and the fundamental policy of maintaining the status quo is supported by the temporary injunction at issue.

If this Court retains jurisdiction to determine the conflict, Respondent respectfully requests the Court hold that absent a showing of changed circumstances in an application to modify or dissolve a temporary injunction, a trial court's decision to deny the application cannot be considered clearly erroneous.

If the merits are examined for a third time, MMB respectfully requests this Court agree with the two courts which have reviewed the temporary injunction at issue. The hearing on the temporary injunction afforded the trial court a clear snapshot of the Oak Commons medical community. It showed the status quo between the parties to be a community where owners and medical tenants regularly

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find no support in the record, MMB's motives for enforcing the Restrictions are irrelevant. *See e.g.*, *Sierra Club v. Union Electric Co.*, 2015 WL 9583394 *5 (E.D. Mo. 2015) *citing Pound v. Airosol Co., Inc.*, 498 F.3d 1089, 1097 (10th Cir. 2007)("Plaintiff's alleged motive for bringing this lawsuit is relevant neither to standing nor to the civil penalty or injunctive relief analysis.")

abided by the recorded Restrictions, which prohibited surgical procedures without first obtaining permission from Osceola Regional Hospital, unless ancillary and incidental to a physician's practice of medicine. The hearing revealed PPGO was an entity which brashly boasted of its intent to begin activities which violated the Restrictions and therefore necessarily disrupted the status quo at Oak Commons. The trial court was presented evidence of a clear picture of the nature of that entity's business—a business, which on one hand claimed surgery was not surgery, and then on the other claimed surgery was ancillary and incidental while also admitting surgical abortion was central to its practice and necessary for its solvency.

PPGO has invoked the appellate process to avoid the trier of fact. In doing so, PPGO has painted a distorted and unsupported picture of itself as the victim of private animus, and the victim of both an unreasonable trial court and a contriving district court. PPGO has used affidavits unburdened by cross-examination, a statement of facts presenting rebutted or rebuttable testimony as established facts, and arguments claiming facts supported by absolutely no evidence. The trial court, having received the snapshot at the preliminary hearing, was not moved by PPGO’s post-hearing motions and affidavits requesting it stay or dissolve the injunction. The Fifth District, upon review of the facts and law, was not moved

either. MMB respectfully requests this Court approve the lower courts, and permit the parties to proceed to a final hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Service through the District Court of Appeals and/or Florida E-Portal System to: **Donald E. Christopher, Esq.** and **Kyle A. Diamantas, Esq.**, *Baker, Donelson, Bearman, Caldwell & Berkowitz, PC*, SunTrust Center 200 South Orange Avenue Post Office Box 1549, Orlando, FL 32802; dchristoper@bakerdonelson.com; kdiamantas@bakerdonelson.com; fedcts@bakerdonelson; sdenny@bakerdonelson; and **Helene T. Krasnoff, Esq.** and **Maithreyi Ratakonda, Esq.**, *Planned Parenthood Federation of America*, 1110 Vermont Avenue NW, Suite 300, Washington, DC 20005, on this **15th** day of **February**, 2016.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Jurisdictional Brief conforms to the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that it was computer generated utilizing Times New Roman 14 point font.

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