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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
REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS ii

INTRODUCTION 1

ARGUMENT 2

I. This Court properly accepted jurisdiction of this case. 2

A. Planned Parenthood did not waive argument regarding its motion to modify or dissolve the trial court's injunction. 2

B. The question giving rise to jurisdiction in this case is not moot. 3

C. The conflict question is dispositive of this case. 4

D. Temporary injunctions are equitable remedies. 6

II. This Court should hold that changed circumstances are unnecessary. 6

III. Planned Parenthood is likely to succeed on the merits. 10

A. The Kissimmee health center is not an outpatient surgical center. 10

B. Any outpatient surgeries are performed ancillary and incidental to Planned Parenthood's physicians' practice of medicine.....13

CONCLUSION 15

CERTIFICATE OF SERVICE 17

CERTIFICATE OF COMPLIANCE 17

TABLE OF CITATIONS

Cases

Bay N Gulf, Inc. v. Anchor Seafood, Inc.,
971 So. 2d 842 (Fla. 3d DCA 2007).....7

Bishop v. First Old State Bank,
194 So. 488 (Fla. 1940) 6

Brady v. Anders,
364 S.E.2d 467 (S.C. 1988).....8

Browning v. Fla. Hometown Democracy, Inc. v. PAC,
29 So. 3d 1053 (Fla. 2010) 10

Camji v. Helmsley,
602 So. 2d 617 (Fla. 3d DCA 1992).....6

Clipper Bay Invs., LLC v. State Dep't of Transp.,
117 So. 3d 7 (Fla. 1st DCA 2013).....12

Colonial Bank, N.A. v. Taylor Morrison Servs., Inc.,
10 So. 3d 653 (Fla. 5th DCA 2009).....14

Condura Constr. Co. v. Milwaukee Bldg. & Constr. Trades Council,
99 N.W.2d 751 (Wis. 1959) 8

Crystal Rest. Mgmt. Corp. v. Calcagni,
732 A.2d 706 (R.I. 1999).....8

Fla. Dep't of Transp. v. Clipper Bay Invs., LLC,
160 So. 3d 858 (Fla. 2015) 11, 12

Fla., Dep't of Envtl. Prot. v. Pringle,
743 So. 2d 1189 (Fla. 1st DCA 1999).....6

Fong v. Courvoisier Courts Condo. Ass'n, Inc.,
81 So. 3d 562 (Fla. 3d DCA 2012).....7

Godwin v. State,
593 So. 2d 211 (Fla. 1992) 4

Helmcamp v. Clark Ready Mix Co.,
249 N.W.2d 655 (Iowa 1977).....8

Hunter v. Dennies Contracting Co., Inc.,
693 So. 2d 615 (Fla. 2d DCA 1997).....7

Jacobson v. Cnty. of Goodhue,
539 N.W.2d 623 (Minn. Ct. App. 1995) 8

Kelly v. Terrebonne Par. Police Jury,
449 So. 2d 568 (La. Ct. App. 1984) 8

Kraft v. Solon,
336 N.E.2d 577 (Ill. App. 3d 1975).....8

Minty v. Meister Fin. Grp., Inc.,
132 So. 3d 373 n.4 (Fla. 4th DCA 2014) 7

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

Naegele Outdoor Advert. Co., Inc. v. City of Jacksonville,
659 So. 2d 1046 (Fla. 1995) 6

Nu-Tred Tire Co. v. Dunlop Tire & Rubber Corp.,
577 P.2d 268 (Ariz. Ct. App. 1978) 8

Planned Parenthood of Greater Orlando, Inc. v. MMB Props.,
148 So. 3d 810 (Fla. 5th DCA 2014) 13, 15

Planned Parenthood of Greater Orlando, Inc. v. MMB Props.,
171 So. 3d 125 (Fla. 5th DCA 2015) 4, 6, 7, 13

Pro Edge L.P. v. Gue,
411 F. Supp. 2d 1080 (N.D. Iowa 2006) 9, 10

Prof'l Eng'rs v. Dep't of Transp.,
936 P.2d 473 (Cal. 1997).....9

Reform Party of Fla. v. Black,
885 So. 2d 303 (Fla. 2004) 11

Rochester Buckhart Action Grp. v. Young,
887 N.E.2d 49 (Ill. App. Ct. 2008) 8

Sacred Family Invs., Inc. v. Doral Supermarket, Inc.,
20 So. 3d 412 (Fla. 3d DCA 2009) 5

Savoie v. State,
422 So. 2d 308 (Fla. 1982) 10

Sierra Club v. U.S. Army Corps of Eng'rs,
732 F.2d 253 (2d Cir. 1984) 8

Smith v. Coal. To Reduce Class Size,
827 So. 2d 959 (Fla. 2002) 10

State v. T.G.,
800 So. 2d 204 (Fla. 2001) 10

Uncle B's Bakery, Inc. v. O'Rourke,
938 F. Supp. 1450 (N.D. Iowa 1996) 9

Wash. Deluxe Bus, Inc. v. Sharmash Bus Corp.,
47 A.D. 3d 806 (N.Y. App. Div. 2008) 8

Rules

Fla. R. App. P. 9.210 17

COMES NOW Petitioner Planned Parenthood of Southwest and Central Florida, Inc. as successor by merger to Planned Parenthood of Greater Orlando, Inc. ("Planned Parenthood"), by and through its undersigned counsel, and files this its Reply Brief, and in support thereof states:

INTRODUCTION

In July 2014, Petitioner Planned Parenthood opened a health center in the Oak Commons medical park in Kissimmee, Florida, in order to offer a wide range of reproductive health care services to the community.[1] Oak Commons is, and has been, home to medical offices providing a variety of medical services and procedures. Some, such as gynecologists' offices have routinely offered sonograms to their patients, Hearing Tr. at 46; others provide outpatient surgical procedures such as endoscopies and colonoscopies, *id.* at 27. Only when Planned Parenthood bought property in Oak Commons did another tenant in the medical park, Respondent MMB Properties ("MMB"), attempt to enforce what appear to have been otherwise ignored and outdated land restrictions (the "Declarations").

Throughout this litigation, MMB has sought to stretch both the meaning and application of the Declarations to prohibit the reproductive health care services it opposes. However, the language and intent of the Declarations simply do not

[1] Consistent with Petitioner's Initial Brief, the complete transcript of the temporary injunction hearing is cited as "Hearing Tr. at [page number]." The record before this Court is cited as "R. [page number]."

encompass Planned Parenthood's provision of surgical abortion. The issue now before this Court involves the extent to which trial courts have the discretion to modify or dissolve a temporary injunction without a showing of changed circumstances. Authoritative guidance from this Court will spare future litigants from being subjected to the unnecessary and burdensome delay that Planned Parenthood has suffered in this case.

ARGUMENT

I. This Court properly accepted jurisdiction of this case.

Despite this Court's November 3, 2015 Order accepting jurisdiction, MMB argues again at length that jurisdiction was improvidently granted. MMB relies on the same arguments it already made in opposing jurisdiction.

A. Planned Parenthood did not waive argument regarding its motion to modify or dissolve the trial court's injunction.

MMB again wrongly claims, as it did in opposing jurisdiction, that Planned Parenthood waived argument on the merits of its Motion to Reconsider, Dissolve, or Modify Order Granting Motion for Temporary Injunction ("Post-Hearing Motion"). MMB erroneously asserts that Planned Parenthood did not contest the denial of that motion in its opening merits brief in the Fifth District Court of Appeals. Resp. MMB Properties' Answer Br. on the Merits ("Resp. Br.") at 17-18. From the inception of the appellate process Planned Parenthood made clear that it was appealing not only the trial court's temporary injunction order, but also that

court's denial of its Post-Hearing Motion. R. 873. In its initial merits brief in the Fifth District, Planned Parenthood again asserted that its appeal included the trial court's denial of the Post-Hearing Motion, and reiterated the arguments made in the Post-Hearing Motion, including frequent citation to the four affidavits filed with the Post-Hearing Motion ("Supplemental Affidavits"). R. 4-39. Despite this, MMB persists in its unfounded contention that Planned Parenthood waived argument on the Post-Hearing Motion.

B. The question giving rise to jurisdiction in this case is not moot.

Recycling another discredited argument from its jurisdiction brief, MMB alleges that the conflict question giving rise to this Court's jurisdiction – whether changed circumstances should be required before a trial court can modify or dissolve a temporary injunction – is moot. Resp. Br. at 18-19. MMB claims that Planned Parenthood already received the relief it sought in its Post-Hearing Motion: specifically, a reversal of the trial court's injunction against sonograms and a finding that the trial court's "including but not limited to" language was impermissibly vague. But MMB mischaracterizes the content of the Post-Hearing Motion. That motion was not limited to the sonogram and vague language issues; Planned Parenthood asked the trial court to reconsider, modify, or dissolve the injunction in its entirety. Planned Parenthood challenged the trial court's erroneous determinations that the Kissimmee health center is an outpatient surgical center

and that surgical abortions are not ancillary and incidental to its physicians' practice of medicine. R. 194-203. Both the trial court and the Fifth District panel determining the merits ("Merits Panel") ruled that Planned Parenthood could *not* provide the full range of medical services. Surgical abortions are offered at the Kissimmee health center today only because of this Court's stay. The case has not "been so fully resolved that a judicial determination can have no actual effect," *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992). The appeal is therefore not moot.

MMB also argues that the conflict question is moot, contending that the trial court considered the Supplemental Affidavits in denying the Post-Hearing Motion.[2] Resp. Br. at 18. This contention has no record support whatsoever. The Merits Panel explicitly recognized that due to the Fifth District's changed circumstances requirement, those Affidavits could *not* be considered. *Planned Parenthood of Greater Orlando, Inc. v. MMB Props.*, 171 So. 3d 125, 128 (Fla. 5th DCA 2015).

C. The conflict question is dispositive of this case.

As Planned Parenthood explained both in its jurisdiction and opening briefs, the question involving changed circumstances is dispositive here. Pet.'s Br. on Jurisdiction at 9; Pet./Def. Planned Parenthood's Br. on the Merits ("Pet. Br.") at 22. The district court panel that granted Planned Parenthood a stay pending appeal

[2] Yet, in the next paragraph, MMB claims that appellate courts cannot consider the Supplemental Affidavits because they were *not* considered by the trial court. Resp. Br. at 19. MMB cannot have it both ways. Regardless, if this Court determines that changed circumstances are not required, those Affidavits should be considered.

("Stay Panel") explicitly considered the Supplemental Affidavits. That resulted in a unanimous ruling that Planned Parenthood was likely to prevail on all issues. On the other hand, once the Merits Panel determined that it could not consider the Supplemental Affidavits, its divided opinion went against Planned Parenthood.

Ignoring this distinction, MMB argues that the conflict question is not dispositive because the trial court retains the discretion to *deny* motions to modify or dissolve, regardless of how this Court decides the conflict question. Resp. Br. at 19-22. This argument misses the point entirely. Current law in the First, Second, and Fifth Districts prevents trial courts from even *considering* a motion to modify or dissolve, unless there has first been a showing of changed circumstances. Under the existing Fifth District standard, the trial court, if it determined there were no changed circumstances, could not grant Planned Parenthood's Post-Hearing Motion even if the trial court deemed it meritorious. Should this Court hold that changed circumstances are unnecessary, and that the Supplemental Affidavits can be considered, it ought to reach the same result as the unanimous Stay Panel. Seemingly, it would be an abuse of discretion to do otherwise.[3]

[3] Contrary to MMB's suggestion that denial of a motion to modify or dissolve is not appealable, both a trial court's decision to *grant* and *deny* such a motion are subject to appellate review under the same standard. *See Sacred Family Invs., Inc. v. Doral Supermarket, Inc.*, 20 So. 3d 412, 415 (Fla. 3d DCA 2009).

D. Temporary injunctions are equitable remedies.

MMB emphasizes that the purpose of a temporary injunction is to maintain the status quo. Resp. Br. at 22-24. MMB also recognizes, of course, that the issuance of a temporary injunction rests on four factors: the likelihood of success on the merits, irreparable harm, unavailability of an adequate remedy at law, and service of the public interest. *Id.* at 13 (*citing Planned Parenthood of Greater Orlando, Inc.*, 171 So. 3d at 128). If a plaintiff does not meet its burden of establishing these factors, it is not entitled to a temporary injunction, even if the status quo is disrupted. *See, e.g.*, *Naegele Outdoor Advert. Co., Inc. v. City of Jacksonville*, 659 So. 2d 1046 (Fla. 1995); *Fla., Dep't of Envtl. Prot. v. Pringle*, 743 So. 2d 1189 (Fla. 1st DCA 1999); *Camji v. Helmsley*, 602 So. 2d 617 (Fla. 3d DCA 1992). More importantly, this Court has long recognized that a temporary injunction is an equitable remedy. *Bishop v. First Old State Bank*, 194 So. 488, 489 (Fla. 1940). As Planned Parenthood explained in its Initial Brief, and as is discussed below, the Third and Fourth District standard is unquestionably the more equitable one. *See* Pet. Br. at 18-22.

II. This Court should hold that changed circumstances are unnecessary.

After initially conceding that the Third and Fourth Districts do not require changed circumstances, *see* Resp. MMB Props.' Jurisdictional Br. at 5, MMB now argues that the Third District *does* require changed circumstances. Resp. Br. at 26-

27. But both the Merits Panel and a recent Fourth District opinion have said otherwise. *See Planned Parenthood of Greater Orlando, Inc.*, 171 So. 3d at 128 n.3; *Minty v. Meister Fin. Grp., Inc.*, 132 So. 3d 373, 376 n.4 (Fla. 4th DCA 2014) (*citing Bay N Gulf, Inc. v. Anchor Seafood, Inc.*, 971 So. 2d 842 (Fla. 3d DCA 2007)). Regardless of whatever confusion may exist in Third District caselaw on this issue, one of the two Third District cases MMB cites highlights the injustice of requiring changed circumstances. In *Fong v. Courvoisier Courts Condo. Ass'n, Inc.*, 81 So. 3d 562, 563-64 (Fla. 3d DCA 2012), the district court of appeals agreed with appellants that the trial court had abused its discretion in granting a temporary injunction. The Third District appellate panel nevertheless "felt compelled" to affirm the order denying appellants' motion to dissolve because, *inter alia*, appellants had not demonstrated a change in circumstances. *Id.* This is not the first time a district court of appeal was forced to uphold a wrongfully entered injunction because of the changed circumstances requirement. *See Hunter v. Dennies Contracting Co., Inc.*, 693 So. 2d 615, 616 (Fla. 2d DCA 1997) (explaining that even though appellant made "a persuasive argument that the evidence submitted at the initial temporary injunction hearing was legally insufficient," the district court had to affirm the trial court's denial of a motion to dissolve because there were no changed circumstances).

MMB claims that foreign jurisprudence in this area "[o]verwhelmingly [f]avors" its position. Resp. Br. at 30. As Planned Parenthood explained in its Initial Brief, however, numerous other jurisdictions support allowing trial courts discretion to modify or dissolve temporary injunctions even when there are no changed circumstances. Pet. Br. at 20-21. Indeed, some decisions in MMB's long list of citations, *see* Resp. Br. at 31-34, in fact *allow* courts to modify or dissolve temporary injunctions without changed circumstances. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 732 F.2d 253, 257 (2d Cir. 1984); *Nu-Tred Tire Co. v. Dunlop Tire & Rubber Corp.*, 577 P.2d 268, 270 (Ariz. Ct. App. 1978); *Wash. Deluxe Bus, Inc. v. Sharmash Bus Corp.*, 47 A.D. 3d 806, 807 (N.Y. App. Div. 2008).[4] These courts recognize that courts of equity must have the discretion to modify or dissolve injunctions without arbitrary restriction. *See also, e.g., Movie Sys., Inc. v. MAD Minneapolis Audio Distribs.*, 717 F.2d 427, 430 (8th Cir.1983); *Rochester Buckhart Action Grp. v. Young*, 887 N.E.2d 49 (Ill. App. Ct. 2008); *Pro*

[4] Many of the other cases cited by Respondent MMB involve permanent injunctions or final judgments, not temporary or preliminary injunctions. *Helmcamp v. Clark Ready Mix Co.*, 249 N.W.2d 655 (Iowa 1977); *Kelly v. Terrebonne Par. Police Jury*, 449 So. 2d 568 (La. Ct. App. 1984); *Jacobson v. Cnty. of Goodhue*, 539 N.W.2d 623 (Minn. Ct. App. 1995); *Crystal Rest. Mgmt. Corp. v. Calcagni*, 732 A.2d 706 (R.I. 1999); *Brady v. Anders*, 364 S.E.2d 467 (S.C. 1988); *Condura Constr. Co. v. Milwaukee Bldg. & Constr. Trades Council*, 99 N.W.2d 751 (Wis. 1959). As Planned Parenthood explained in its Initial Brief and as courts have recognized, trial courts should be allowed more discretion with regard to temporary injunctions, which often involve a limited record and no opportunity for a full trial on the merits. Pet. Br. at 18, 21 (*citing Kraft v. Solon*, 336 N.E.2d 577, 580 (Ill. App. 3d 1975)).

Edge L.P. v. Gue, 411 F. Supp. 2d 1080, 1091 (N.D. Iowa 2006); *Prof'l Eng'rs v. Dep't of Transp.*, 936 P.2d 473 (Cal. 1997) (recognizing state legislative authority allowing courts to modify or dissolve if "'the ends of justice would be served'"); *Uncle B's Bakery, Inc. v. O'Rourke*, 938 F. Supp. 1450 (N.D. Iowa 1996).

MMB claims that allowing trial court judges more discretion in modifying or dissolving temporary injunctions will increase the "time, cost, and burden of injunctive litigation," Resp. Br. at 30. MMB has not pointed to any evidence that such negative effects have in fact resulted in the Third and Fourth Districts or in other jurisdictions that support trial court discretion in this area. Moreover, as Planned Parenthood has previously emphasized, courts are well equipped to sanction parties who seek to abuse the judicial process. *See* Pet. Br. at 21. And, removing the requirement for changed circumstances will have no effect on the timeline for appeal, contrary to what MMB seems to claim. Resp. Br. at 29.

This Court should adopt the better position taken by the Third and Fourth Districts that changed circumstances are not required. This is well-supported in the caselaw. It has no practical disadvantages. Most significantly, it is more just. As one federal district court explained, "the focus of a court's inquiry when determining whether modification of a preliminary injunction is warranted" should not be on "whether a sufficient change in circumstances exists, but rather, whether

a modification is equitable, *for any reason*, in order to effectuate justice between the parties." *Pro Edge*, 411 F. Supp. at 1091.

III. Planned Parenthood is likely to succeed on the merits.

MMB, citing no case law, implores this Court not to reach the merits of the temporary injunction. Resp. Br. at 34-35. As this Court has previously held however, it has the authority to – and should – decide other dispositive issues in the case. This is especially true when those issues have been properly briefed and argued, as the merits have been in this appeal. *See State v. T.G.*, 800 So. 2d 204, 210 n.4 (Fla. 2001); *Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982). Considering this case on its merits – both before the trial court granted the injunction and after the filing of the Supplemental Affidavits – warrants holding that the temporary injunction was granted in error.

A. The Kissimmee health center is not an outpatient surgical center.

The Merits Panel's construction of the Declarations' use of the term "outpatient surgical center" is subject to this Court's *de novo* review. *Smith v. Coal. To Reduce Class Size*, 827 So. 2d 959, 961 (Fla. 2002), *superceded on other grounds as stated in Browning v. Fla. Hometown Democracy, Inc. v. PAC*, 29 So. 3d 1053 (Fla. 2010).[5] When this term is properly construed – whether under its

[5] MMB recognizes that the Merits Panel construed the Declarations *de novo*, Resp. at 35, yet inexplicably urges this Court not to perform a "second-tier review of the Fifth District's legal conclusions." *Id*. at 34-35.

plain language, by referring to relevant statutory definitions, or by referring to dictionaries – the Kissimmee health center cannot be characterized as an outpatient surgical center.

MMB argues that "language must first be deemed ambiguous before looking to extrinsic sources for clarity." Resp. Br. at 36. Because the Merits Panel based its construction on a dictionary definition provided by MMB, MMB is now constrained before this Court to attempt to differentiate statutory from dictionary definitions, claiming that the former are improper "extrinsic sources," and the latter are not. No support exists for this distinction. In fact, this Court has approved referring to a variety of sources to assist in construing specific terms, starting with statutory definitions, but also looking at dictionaries, text books, and legal authority from other jurisdictions. *See Reform Party of Fla. v. Black*, 885 So. 2d 303, 312-13 (Fla. 2004).

MMB also claims that a statutory definition cannot be used to construe the Declarations because: (1) Florida courts only reference statutory definitions in "*interpreting the very statute[s]* whose definitions are being utilized" and (2) the particular statutory definition Planned Parenthood relies upon is limited because the statute says: "As used in this chapter . . . ." Resp. Br. at 36 n.8, 38-39. Utilization of statutory definitions is not so restrictive, however, as exemplified by this Court's recent opinion in *Fla. Dep't of Transp. v. Clipper Bay Invs., LLC*, 160

So. 3d 858 (Fla. 2015). In *Clipper Bay*, this Court quashed a First District opinion regarding a land dispute. However, this Court affirmed the part of the opinion in which the district court interpreted a phrase in one statute by referencing a definition in a *separate* statute. *Id.* at 865. Significantly, the First District rejected the argument that the definition from one statutory section could only be used to interpret language in that section. This was so even though the other definition had the "when used in" that section limitation. *Clipper Bay Invs., LLC v. State Dep't of Transp.*, 117 So. 3d 7, 14-15 (Fla. 1st DCA 2013). Florida's statutory definition of "ambulatory surgical center" is therefore relevant and appropriate for use in construing the Declarations. *See* Pet. Br. at 31-32.

Even if that statutory definition could not be referenced, the Kissimmee health center is nevertheless not an outpatient surgical center under either any common meaning *or* the dictionary definitions upon which the Merits Panel and MMB relied.[6] Indeed, the health center is not accurately described as "a facility or place for, or for the purpose of, performing outpatient surgical procedures" which

[6] MMB argues, once again, that Planned Parenthood's zoning inquiry as to whether the Kissimmee health center might be zoned as an outpatient surgical center demonstrates that the health center *is* an outpatient surgical center. Resp. Br. at 41-42 (referencing R. 134). This is an unforgiveable misrepresentation of the evidence. Jenna Tosh, Planned Parenthood's former CEO, testified that while Planned Parenthood did so inquire, a surgical suite has never been added. All medical procedures performed at the health center, including surgical abortions, take place in the facility the way it was originally designed and built: as a medical office. Hearing Tr. at 45-46.

is the language the Merits Panel used, and which MMB cited in its brief. *Parenthood of Greater Orlando, Inc.*, 171 So. 3d at 130; Resp. Br. at 35.[7] Planned Parenthood operates its facility as a place for providing a wide range of reproductive health care services, a scant few of which have anything whatsoever to do with surgery. *See* Pet. Br. at 29-35.[8]

B. Any outpatient surgeries are performed ancillary and incidental to Planned Parenthood's physicians' practice of medicine.

As the Stay Panel explained, the trial court's findings that the Kissimmee health center is not a physician's practice and that surgical abortions are not ancillary and incidental to Planned Parenthood's physicians' practice of medicine both lack a basis in the record. *Planned Parenthood of Greater Orlando, Inc. v. MMB Props.*, 148 So. 3d 810, 812 (Fla. 5th DCA 2014). Perhaps because the trial court findings on these issues – accepted by the Merits Panel with no analysis

[7] MMB claims the Merits Panel construed "outpatient surgical center" using the "most sensible" dictionary definitions, but MMB makes no attempt to explain why this is the case. Resp. Br. at 37 n.9. In fact, the same dictionary upon which the Merits Panel relies better supports Planned Parenthood. *See* Pet. Br. at 33-34.

[8] In addition to the Kissimmee health center not being a facility where someone can get their knee replaced or have a colonoscopy (like in an outpatient surgical center), the common sense interpretation of the Declarations as permitting medical offices that do not *primarily* perform outpatient surgeries is supported by evidence in the record demonstrating that other medical offices in Oak Commons perform some surgical procedures. *See* Hearing Tr. at 27 (Dr. Massey conceded that at least one other provider in Oak Commons performs surgical procedures). MMB's assertion that "tenants regularly abided by the recorded Restrictions," Resp. Br. at 48-49, and do not perform any surgical procedures in Oak Commons is simply untrue.

whatsoever – are unsupportable, MMB attempts to shift the burden of proof. MMB asserts that Planned Parenthood must prove that it complies with the ancillary and incidental exception in the Declarations. Resp. Br. at 43. In fact, MMB, as the party seeking the extraordinary remedy of a temporary injunction, had the burden of proving that Planned Parenthood violated the Declarations, including that Planned Parenthood does not fall within the ancillary and incidental exception. *See, e.g.*, *Colonial Bank, N.A. v. Taylor Morrison Servs., Inc.*, 10 So. 3d 653, 655 (Fla. 5th DCA 2009).

MMB claims that the Kissimmee health center is not a physician's practice, pointing to the testimony of Dr. Massey. Resp. Br. at 45. However, as Dr. Massey himself testified, he knows little about the Kissimmee health center except that its physicians provide surgical abortions. Hearing Tr. at 18. Furthermore, the fact that Planned Parenthood's full-time salaried physician, Dr. Morris, spent time providing services at several health centers, including the Kissimmee health center, has no bearing on whether the services she provides there are part of her practice.[9] No restrictions preclude a physician from practicing out of more than one medical office.

[9] MMB suggests that there is no evidence that Dr. Morris works full-time for Planned Parenthood, Resp. Br. at 45, completely ignoring Ms. Tosh's contrary testimony on this issue. *See* Hearing Tr. at 35-36.

Finally, to bolster its assertion that surgical abortions are not ancillary and incidental to the medical practice of Planned Parenthood physicians, MMB mischaracterizes Ms. Tosh and Martha Haynie's testimony in the same way the trial court did. Resp. Br. at 43-44. Their testimony cannot fairly be so construed. *See* Pet. Br. at 39-40.[10] The undisputed record evidence is that abortions constitute less than 1% of the total medical services provided at the Kissimmee health center, R. 160-61, and thus undoubtedly fall within the ancillary and incidental exception. This Court should accordingly reach the same conclusion as the Stay Panel, holding that the trial court's finding that the surgical abortions performed at the Kissimmee health center are not ancillary and incidental to a physician's practice is "unsupported by the record." *Planned Parenthood of Greater Orlando, Inc.*, 148 So. 3d at 812.

CONCLUSION

Petitioner Planned Parenthood respectfully asks this Court to hold that changed circumstances are not required for a trial court to modify or dissolve a temporary injunction; and regardless of its holding on that question, the trial court's grant of a temporary injunction and the Merits Panel's partial affirmance of that injunction must be reversed.

[10] MMB also attempts to rely on a statute defining "abortion clinic," Resp. Br. at 46, despite its earlier protestations that reference to such definitions is improper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 14, 2016, 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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I HEREBY CERTIFY that the foregoing complies with the font requirements of Fla. R. App. P. 9.210.

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