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**IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
STATE OF FLORIDA**

PLANNED PARENTHOOD OF GREATER ORLANDO, INC. n/k/a PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA, INC., a Florida non-profit corporation,	)	CASE NO.: 5D14-2920
	)	L.T. Case No.: 2014-CA1636 OC On Appeal from the Ninth Judicial Circuit Court in and for Osceola County, Florida
Petitioner/Defendant,	)	
-vs-	)	NOTICE TO INVOKE DISCRETIONARY JURISDICTION
MMB PROPERTIES, a Florida general partnership,	)	
Respondent/Plaintiff.	)	

NOTICE IS GIVEN that Petitioner/Defendant Planned Parenthood of Southwest and Central Florida, Inc., successor by merger to Planned Parenthood of Greater Orlando, Inc. ("Planned Parenthood"), invokes the discretionary jurisdiction of the Florida Supreme Court to review the decision of the Fifth District Court of Appeal docketed May 22, 2015, as to which a motion for Rehearing and/or Rehearing En Banc was timely filed on June 8, 2015, which motion was denied August 11, 2015. The decision of the Fifth District Court of Appeal is within the Supreme Court's jurisdiction because that decision, as acknowledged in footnote 3 of the Fifth District's opinion, at p. 4, explicitly and

I hereby certify that the above and foregoing is a true copy of instrument filed in my office.
JOANNE P. SIMMONS, CLERK
DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT 9/4/15
Per [signature]
Deputy Clerk

directly conflicts with decisions of other district courts of appeal, *see* Fla. Const., Art. V, § 3(b)(3), Fla. R. App. P. 9.030(a)(2)(A)(iv).

Copies of the Fifth District's decision, Planned Parenthood's motion for Rehearing and/or Rehearing En Banc, and the Fifth District's order denying Rehearing and/or Rehearing En Banc are attached to this notice as Exhibits "A", "B", and "C", respectively.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail on September 4, 2015 to:

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EXHIBIT "A"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

PLANNED PARENTHOOD
OF GREATER ORLANDO, ETC.,

Appellant,

v. Case No. 5D14-2920

MMB PROPERTIES, ETC.,

Appellee.

________________________________/

Opinion filed May 22, 2015.

Non-Final Appeal from the Circuit Court
for Osceola County,
John E. Jordan, Judge.

Donald E. Christopher and Kyle A. Diamantas, of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC., Orlando, for Appellant.

Derek J. Angell and Dennis R. O'Connor, of O'Connor & O'Connor, LLC, Winter Park and Maureen A. Arago and Keith P. Arago, of Arago Law Firm, Kissimmee, for Appellee.

LAWSON, J.

Planned Parenthood of Greater Orlando, Inc. ("Planned Parenthood") appeals a nonfinal order granting a temporary injunction to MMB Properties ("MMB"), a cardiology practice, prohibiting Planned Parenthood from performing abortions or sonograms in

violation of a restrictive covenant in the medical park where both parties own property.[1] The restriction at issue prohibits Planned Parenthood's property from being used as an "Out Patient Surgical Center" or a "Diagnostic Imaging Center" "unless ancillary and incidental to a physician's practice of medicine." We reverse that part of the order temporarily enjoining Planned Parenthood from performing sonograms because that relief was not sought by MMB in its pleadings and was not, in our view, tried by consent. *See Cortina v. Cortina*, 98 So. 2d 334, 337 (Fla. 1957) ("It is fundamental that a judgment upon a matter entirely outside of the issues made by the pleadings cannot stand; and where, as here, an issue was not presented by the pleadings nor litigated by the parties during the hearing on the pleadings as made, a decree adjudicating such issue is, at least, voidable on appeal."); *We're Assoc. VI, Ltd. P'ship v. Curzon Dev. Corp.*, 738 So. 2d 440, 441 (Fla. 4th DCA 1999) (noting that relief granted in injunction must be specifically requested). On remand, we also order the trial court to strike the vague language prohibiting Planned Parenthood from performing other unspecified procedures. *See* Fla. R. Civ. P. 1.610(c) ("Every injunction . . . shall describe in reasonable detail the act or acts restrained without reference to a pleading or another

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[1] We have jurisdiction to review an order granting a temporary injunction pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(B). Planned Parenthood also appeals an order denying its Motion to Reconsider, Dissolve, or Modify Order Granting Motion for Temporary Injunction. This motion was actually two motions. *See Anesthesia Grp. of Miami, Inc. v. Hyams*, 693 So. 2d 673, 674 (Fla. 3d DCA 1997) (noting that motion to dissolve temporary injunction was, in part, a motion to reconsider). To the extent this second order simply denied a motion to reconsider a previous non-final order, it was not appealable. *Agere Sys. Inc. v. All Am. Crating, Inc.*, 931 So. 2d 244, 245 (Fla. 5th DCA 2006). To the extent the second order denied the motion to dissolve or modify the injunction, it was appealable under the above rule. None of Planned Parenthood's appellate arguments, however, relate to the second order.

document . . . ."); *Pizio v. Babcock*, 76 So. 2d 654, 655 (Fla. 1954) ("Injunctive orders like this should be confined within reasonable limitations and cast in such terms as they can, with certainty, be complied with. The one against whom it is directed should not be left in doubt about what he is to do."). We affirm that part of the order temporarily enjoining Planned Parenthood from performing abortions at the property, and write further to expressly address several points relating to our affirmance.

"Generally, a trial court is afforded 'wide discretion to either grant, deny, dissolve, or modify a temporary injunction, and an appellate court will not intercede unless the aggrieved party clearly shows an abuse of discretion.'" *Avalon Legal Info. Servs., Inc. v. Keating*, 110 So. 3d 75, 80 (Fla. 5th DCA 2013) (quoting *Meyers v. Club at Crystal Beach Club, Inc.,* 826 So. 2d 1086, 1089 (Fla. 5th DCA 2002)). The trial court's factual determinations must be accepted if supported by competent, substantial evidence. *Charlotte Cnty. v. Vetter*, 863 So. 2d 465, 469 (Fla. 2d DCA 2004). However, when its rulings pertain to purely legal matters, review is de novo. *Avalon Legal*, 110 So. 3d at 80 (citing *Suggs v. Sw. Fla. Water Mgmt. Dist.,* 953 So. 2d 699, 699 (Fla. 5th DCA 2007)).

Four elements are generally required for 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. *DePuy Orthopaedics, Inc. v. Waxman*, 95 So. 3d 928, 938 (Fla. 1st DCA 2012). Before addressing Planned Parenthood's challenges to the trial court's findings on these elements, we will first discuss the evidence properly

considered under our scope of review. We will address each of these elements after briefly discussing the evidence properly considered on appeal and our scope of review.

This court previously, by order, granted a stay of the injunction pending appeal, and expressly considered "the record as a whole, *including the affidavits Planned Parenthood filed in support of its motion for rehearing.*" (emphasis added).[2] MMB also notes that Planned Parenthood relies heavily on these affidavits to support its arguments for reversing the temporary injunction. However, we find that the affidavits filed in connection with the motion to reconsider should not be considered in our review of the injunction order 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. Additionally, although trial courts have inherent authority to reconsider nonfinal 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. *Hunter v. Dennies Contracting Co.*, 693 So. 2d 615, 616 (Fla. 2d DCA 1997). Thus, to the extent that the affidavits were submitted in support of the motion to reconsider, the trial court's decision not to revisit its original order is beyond this court's scope of review. Finally, to the extent that the affidavits were submitted in support of Planned Parenthood's motion to dissolve or modify the injunction, it needed to establish changed circumstances, *id.*, which it did not do.[3] In its initial brief, Planned Parenthood does not challenge the

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[2] Preliminary orders entered by an appellate court in the same appeal are not binding on the court. *Clevens v. Omni Healthcare, Inc.*, 83 So. 3d 1011, 1011 n.1 (Fla. 5th DCA 2012); *Hialeah Hotel, Inc. v. Woods*, 778 So. 2d 314, 315 (Fla. 3d DCA 2000).

[3] We acknowledge conflict with the Third and Fourth District Courts of Appeal, as noted in *Minty v. Meister Financial Grp., Inc.*, 132 So. 3d 373, 376 n.4 (Fla. 4th DCA 2014).

denial of its motion to dissolve or modify the injunction, much less argue that it established changed circumstances. 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.

With respect to the "substantial likelihood of success" element, Planned Parenthood first argues that the trial court erred by enjoining it from performing abortions because the restriction at issue does not prohibit the *activities* of performing abortions; rather, it prevents the operation of outpatient surgical *centers*. The restriction states:

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

(Emphasis added). Interestingly, the trial court did not find that performing abortions would transform Planned Parenthood's facility into an outpatient surgical *center*. Instead, it found that MMB had a substantial likelihood of success in proving that abortions are outpatient surgical *procedures*.[4] This distinction highlights a rather poorly

[4] Although Planned Parenthood argued below that abortions were not surgical procedures, it has abandoned that argument on appeal. There was also ample evidence to support the trial court's conclusion that a "surgical abortion" is a surgical procedure. Nor does Planned Parenthood challenge the trial court's finding that abortions are

worded restrictive covenant that prohibits the property from being "used" for the "following *activities*" but then lists three "*centers*" as prohibited *activities*. In short, it uses names of locations where activities occur rather than naming the activities themselves. It does not define the terms "outpatient surgical center."

Both parties argue that the term "outpatient surgical center" is clear and unambiguous, but offer differing definitions. MMB relies on a dictionary definition of "center" as "a facility providing a place for a particular activity or service." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/center (last visited April 6, 2015). Thus, an "outpatient surgical center" would be a facility providing a place for performing outpatient surgical procedures. Planned Parenthood relies on the statutory definition of "ambulatory surgical center," in section 395.002(3), Florida Statutes (2013), which is defined as follows:

> (3) “Ambulatory surgical center” or “mobile surgical facility” means *a facility the primary purpose of which is to provide elective surgical care*, in which the patient is admitted to and discharged from such facility within the same working day and is not permitted to stay overnight, and which is not part of a hospital. *However, a facility existing for the primary purpose of performing terminations of pregnancy, an office maintained by a physician for the practice of medicine*, or an office maintained for the practice of dentistry *shall not be construed to be an ambulatory surgical center*, provided that any facility or office which is certified or seeks certification as a Medicare ambulatory surgical center shall be licensed as an ambulatory surgical center pursuant to s. 395.003. Any structure or vehicle in which a physician maintains an office and practices surgery, and which can appear to the public to be a mobile office because the structure or vehicle operates at more than one address, shall be construed to be a mobile surgical facility.[[5]]

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conducted on an outpatient basis.

[5] Planned Parenthood correctly notes that a substantially similar definition was in

Id. (emphasis added). Assuming that the terms "ambulatory" and "outpatient" are synonymous, this definition requires that the "primary purpose" of such a facility is to provide elective surgical care.

"Florida adheres to the general rule that a reasonable, unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms." *Barrett v. Leiher*, 355 So. 2d 222, 225 (Fla. 2d DCA 1978). "If it is necessary to construe a somewhat ambiguous term, the intent of the parties as to the evil sought to be avoided expressed by the covenants as a whole will be determinative." *Id*.; *see also Killearn Homes Ass'n v. Visconti Family Ltd. P'ship,* 21 So. 3d 51, 53 (Fla. 1st DCA 2009) ("It was improper for the court to look to an outside source to determine the meaning of the word 'building' as used in the restriction, rather than first considering the language of the deed restriction as a whole." (citations omitted)).

The restriction in question prohibits certain "activities," namely outpatient surgical centers, emergency medical centers, and diagnostic imaging centers. Although it does not further specify the activities included in the first two categories, it does in the third category, stating that such activities included "the following radiographic testing," with a list of specific imaging procedures. Thus, the focus of this restriction is on prohibited activities. In this light, the use of the word "center" does not necessarily suggest a quantitative requirement that such activities be the "primary purpose" of the location. Rather, it is merely a location where such activities occur.

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effect when this restrictive covenant was executed in 1986. *See* § 395.002(2), Fla. Stat. (1986).

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 outpatient 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.

We conclude that, 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. Having construed, de novo, the restrictive covenant, we readily find that the trial court's factual findings as to this issue are supported by competent, substantial evidence. The trial court's findings were that abortions are outpatient surgical procedures; that Planned Parenthood's facility is not a physician's practice of medicine; and, that even if the facility is operated as a physician's practice of medicine, its performance of abortions was not ancillary or incidental to that practice. Accepting these findings, we affirm the trial court's ultimate finding that MMB had a

substantial likelihood of success in proving that Planned Parenthood's performance of abortions at the facility would violate the restrictive covenant.

Next, Planned Parenthood argues that MMB failed to prove irreparable harm, which is normally required to obtain an injunction. However, MMB correctly argues that when injunctions enforce restrictive covenants on real property, irreparable harm is not required. *See, e.g.*, *Stephl v. Moore*, 114 So. 455 (Fla. 1927) (holding complainant not required to allege irreparable harm in seeking injunction to prevent violation of restrictive covenant restraining free use of land; complainant only needed to allege violation of covenant); *Autozone Stores, Inc. v. Ne. Plaza Venture, LLC*, 934 So. 2d 670, 673 (Fla. 2d DCA 2006) ("Florida law has long recognized that injunctive relief is available to remedy the violation of a restrictive covenant without a showing that the violation has caused an irreparable injury—that is, an injury for which there is no adequate remedy at law."); *Jack Eckerd Corp. v. 17070 Collins Ave. Shopping Ctr., Ltd.,* 563 So. 2d 103, 105 (Fla. 3d DCA 1990) ("Where an injunction is sought to prevent the violation of a restrictive covenant, appropriate allegations showing the violation are sufficient and it is not necessary to allege, or show, that the violation amounts to an irreparable injury."); *Coffman v. James*, 177 So. 2d 25, 31 (Fla. 1st DCA 1965) ("It is well established in this jurisdiction that even in the absence of a showing of irreparable [sic] injury injunctive relief is grantable as a matter of right, subject only to sound judicial discretion, to restrain the violation of a restrictive covenant affecting real estate.").

Planned Parenthood argues that the trial court erred in relying on *Autozone* and in failing to follow a case that *Autozone* distinguished: *Liza Danielle, Inc. v. Jamko, Inc.,* 408 So. 2d 735 (Fla. 3d DCA 1982). In *Liza Danielle*, a shoe store leasing space

in a shopping center had an exclusivity provision in its lease prohibiting the lessor from leasing any other space in the shopping center to another shoe store. When the lessor violated this provision, the first shoe store sued and obtained an injunction barring the second shoe store from operating. The appellate court reversed the injunction in part because of the availability of an adequate legal remedy and the failure to prove irreparable harm. However, as *Autozone* and *Jack Eckerd* both point out, *Liza Danielle* did not involve a restrictive covenant running with the land. It involved an exclusivity provision in a lease for which damages were available. Accordingly, Planned Parenthood's reliance on it in this case is misplaced. MMB was not required to establish irreparable harm.

Moreover, the trial court properly rejected Planned Parenthood's argument that it would suffer irreparable harm if the injunction were granted. As the court correctly noted, Planned Parenthood was aware of the restrictions and proceeded forward at its own peril. *See Daniel v. May*, 143 So. 2d 536, 538 (Fla. 2d DCA 1962) (noting that courts do not ordinarily consider amount of injury suffered if injunction granted except where violation of covenant is minute); *Chick-Fil-A, Inc. v. CFT Dev., LLC*, 652 F. Supp. 2d 1252, 1263 (M.D. Fla. 2009) (noting that defendants were aware of restrictive covenant when they purchased property and thus, "[w]hatever hardship may accrue to Defendants by virtue of a permanent injunction could easily have been avoided"), *aff'd,* 370 F. App'x 55 (11th Cir. 2010). "Where a purchaser of land intends to use it for a purpose not allowed by a restrictive covenant, he should seek to have the deed restriction removed before purchasing the property." *Wood v. Dozier*, 464 So. 2d 1168, 1170 (Fla. 1985).

Similarly, Planned Parenthood argues that no evidence supported the trial court's finding that an injunction would serve the public interest "by limiting the sort of medical services that can be offered in facilities which are located directly across from a hospital." Specifically, it argues that MMB failed to show that Planned Parenthood's services would duplicate those provided by the hospital, and even if they did, it is not in the public interest to limit such services. However, testimony was elicited from one of the witnesses that the purpose of the restrictive covenants at issue was to protect the hospital from certain types of development and uses being conducted nearby, and the *Wood* case, 464 So. 2d at 1170, states that this purpose serves the public interest.

Both parties seek appellate attorneys' fees under an attorneys' fee provision in the 1988 Covenants. Neither party fully quotes that provision. It states:

> These restrictions shall be construed as covenants running with the land and shall inure to the benefit of, be binding upon and enforceable by Declarant, the Association or any Owner. *Enforcement shall be by proceedings at law or in equity* against any person or persons violating or attempting to violate any covenants, *either to restrain or prevent such violation or proposed violation by an injunction*, either prohibitive or mandatory, or to obtain any other relief authorized by law. Such enforcement may be by the owner of any Lot or by Declarant or by the Association. *If Declarant, the Association or any owner shall seek to remedy a violation of these Restrictions through obtaining an order from a court of competent jurisdiction enabling it to enter upon the portion of the Lot upon or as to which such violation exists, and shall summarily abate or remove the same, then in such event the*
> *Owner committing such violation shall pay on demand the cost and expense of such abatement or removal, which shall include attorneys' fees and other costs (including fees and costs upon appeal)* in connection with seeking the court order, together with interest thereon at the highest rate allowed by law from date of disbursement to date to date of recovery. . .

(Emphasis added).

"Contractual provisions concerning attorney's fees are to be strictly construed." *Williams v. Williams*, 892 So. 2d 1154, 1155 (Fla. 3d DCA 2005) (citations omitted). The above provision does not authorize attorneys' fees in this case. Although the first part of the provision permits enforcement by injunction, the attorneys' fee provision is more narrowly worded. It authorizes fees for "obtaining an order from a court of competent jurisdiction enabling it to enter upon the portion of the Lot upon or as to which such violation exists, and shall summarily abate or remove the same." The injunction in this case does not enable MMB to enter upon Planned Parenthood's Property. As such, we find that neither party is entitled to attorneys' fees.

AFFIRMED IN PART; REVERSED IN PART; REMANDED; ATTORNEYS' FEES MOTIONS DENIED.

PALMER, J., concurs.
EVANDER, J., concurs in part, dissents in part with opinion.

Case No. 5D14-2920

EVANDER, J., concurring in part, dissenting in part.

I concur in the majority's opinion to the extent it: (1) reverses the trial court's decision to temporarily enjoin Planned Parenthood from performing sonograms; (2) strikes the vague language in the trial court's order prohibiting Planned Parenthood from performing other unspecified procedures; and (3) denies attorney's fees to both parties. However, based on the limited evidence presented at the temporary hearing, I cannot agree that MMB met its burden of showing a substantial likelihood of success on the merits. Accordingly, I dissent from that aspect of the majority's opinion.

EXHIBIT "B"

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IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
STATE OF FLORIDA

PLANNED PARENTHOOD OF GREATER ORLANDO, INC. a Florida non-profit corporation,

Appellant,

-vs-

MMB PROPERTIES, a Florida general partnership,

Appellee.

CASE NO.: 5D14-2920

L.T. Case No.: 2014-CA1636 OC
On Appeal from the Ninth Judicial Circuit Court in and for Osceola County, Florida

APPELLANT PLANNED PARENTHOOD OF GREATER ORLANDO, INC.'S MOTION FOR REHEARING AND/OR REHEARING EN BANC

Appellant Planned Parenthood of Greater Orlando, Inc. ("Planned Parenthood"), by and through undersigned counsel, hereby files this its Motion for Rehearing and/or Rehearing En Banc pursuant to Fla. R. App. P. 9.330 and 9.331.

INTRODUCTION

Planned Parenthood owns a health center located in the Oak Commons Medical Park ("Oak Commons") in Kissimmee, which is subject to certain restrictive covenants on the land. At Planned Parenthood's Kissimmee health center (the "Center"), physicians licensed to practice medicine in Florida provide and supervise the provision of reproductive health care similar to that available at a gynecologist's office. This includes all FDA-approved forms of contraception,

breast and cervical cancer screening, HPV screening, HIV testing and counseling, screening and treatment for other STDs, and blood pressure screening, as well as abortions. A.13, Tosh. Aff. ¶5.

Another landowner in Oak Commons, Appellee MMB Properties ("MMB"), brought this lawsuit claiming to enforce the restrictive covenants. MMB sought a temporary injunction to prevent Planned Parenthood from, *inter alia*, performing abortions at the Center. The relevant restriction that MMB contends is violated by Planned Parenthood's performance of abortions "prohibits Planned Parenthood's property from being used as an 'Out Patient Surgical Center' . . . 'unless ancillary and incidental to a physician's practice of medicine.'" Opinion Affirming Temp. Inj. (May 22, 2015) at 2 ("App. Op.").[1]

Approximately two months after the trial court entered the requested temporary injunction, *see* A.14, Order, a unanimous three-judge panel of this Court ("Stay Panel") stayed that injunction, *see* Order Granting Stay of Temp. Inj. (Sept. 24, 2014) ("Stay Order"). The Stay Panel "examin[ed] the record as a whole," including affidavits Planned Parenthood filed before the trial court in support of its Motion to Reconsider, Dissolve or Modify Order Granting Motion for Temporary Injunction ("the Motion"). Significantly, the Stay Panel concluded that providing

[1] Planned Parenthood provides both surgical and non-surgical (i.e., medication) abortions in Kissimmee. Medication abortions – which use only pills to induce an abortion – could never be barred by the outpatient surgical center restriction.

abortions at the Center likely does not violate this restriction because the Center "is not an Outpatient Surgical Center or, even if it is, the surgeries it performs are ancillary to a 'physician's practice.'" *Id.* at 3. Following the Stay Order, Planned Parenthood's physicians have been providing the full range of health care services, including surgical abortions, at the Center.

On May 22, in a two-to-one decision, a panel of this Court ("the Panel") refused to consider the affidavits filed in support of the Motion and instead looked only at the evidence presented prior to and at the temporary injunction hearing. Based on that limited record, the Panel "affirm[ed] the trial court's ultimate finding that MMB had a substantial likelihood of success in proving that Planned Parenthood's performance of abortions at the facility would violate the restrictive covenant." App. Op. at 8-9.[2] In doing so, the Panel nevertheless acknowledged the existence of a conflict between this Court and the Third and Fourth District Courts of Appeal as to whether evidence presented after the entry of a temporary injunction in support of a motion to dissolve or modify an injunction, such as Planned Parenthood's affidavits, may be considered. *Id.* at 4 n.3.

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[2] The third Panel judge disagreed, explaining that even "based on the limited evidence presented at the temporary hearing, I cannot agree that MMB met its burden of showing a substantial likelihood of success on the merits." App. Op. at 13 (Evander, J., dissenting).

Planned Parenthood seeks rehearing because the Panel misapprehended not only the procedural posture of the case, but also the evidence presented to the trial court prior to and at the temporary injunction hearing. If not corrected, these errors will directly affect women's ability to receive necessary and constitutionally protected medical services. *See In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) ("Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy.") (citation and internal quotation marks omitted).

Alternatively, should the Panel decline to rehear the case on this basis, Planned Parenthood seeks rehearing en banc. The question of when a court can consider evidence submitted in support of a motion to modify or dissolve an injunction may be outcome-determinative of this case and is one of exceptional importance to Florida jurisprudence. Aside from this important legal question, the Panel's decision not only implicates Planned Parenthood, but also has consequences for other health care providers at Oak Commons and women in the Kissimmee area seeking to exercise their fundamental constitutional rights.

ARGUMENT

I. The Panel should grant rehearing.

A. Standard to grant a motion for rehearing

Pursuant to Fla. R. App. P. 9.330, a motion for rehearing "shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding." *See also Cleveland v. State*, 887 So. 2d 362, 364 (Fla. 5th D.C.A. 2004). Planned Parenthood moves for rehearing because it respectfully believes that the Panel overlooked and misapprehended several previously briefed issues in this case.

B. The Panel overlooked that Planned Parenthood pled and established changed circumstances.

While, as is discussed in Section II.B., *infra*, there is a split amongst the district courts of appeal as to whether a motion to modify or dissolve an injunction requires changed circumstances before a court may consider new evidence, prior opinions from this Court, applied by the Panel, hold that such evidence should be considered when there *are* changed circumstances. *See, e.g.*, *Thomas v. Osler Med., Inc.*, 963 So. 2d 896, 899 (Fla. 5th DCA 2007).[3] The Panel refused,

[3] While an appellate court may not review a trial court's decision to deny reconsideration, it does have authority to review the denial of a motion to modify

however, to consider Planned Parenthood's affidavits filed in support of its Motion, stating that "[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." App. Op. at 4-5; *see also id*. at 2 n.1 ("None of Planned Parenthood's appellate arguments, however, relate to" the motion to dissolve or modify the injunction). The Panel nonetheless concluded that Planned Parenthood did not establish changed circumstances. *Id*. at 4. These statements by the Panel fundamentally misapprehend the procedural history of this case. The Panel overlooked that Planned Parenthood did indeed allege and establish changed circumstances. Planned Parenthood's additional affidavits should therefore have been considered.

Planned Parenthood made clear that it was appealing the denial of the Motion, which includes the additional affidavits, in its Notice of Appeal, Initial Brief, and Reply Brief. A.27, Not. of Appeal (stating that Planned Parenthood "appeals to the Florida Fifth District Court of Appeal the Order of this Court rendered on July 23, 2014, granting Plaintiff's Motion for Temporary Injunction, and the Order of this Court rendered on August 6, 2014, denying Defendant's Motion to Reconsider, Dissolve, or Modify Order Granting Motion for Temporary

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or dissolve an injunction. *See, e.g.*, *Suggs v. S.W. Fla. Water Mgmt. Dist.*, 953 So. 2d 699, 699 (Fla. 5th DCA 2007).

Injunction"); Initial Br. at 7 (stating the instant appeal sought "interlocutory review of the circuit court's Order granting the temporary injunction and the circuit court's denial of Planned Parenthood's motion to reconsider, dissolve, or modify that Order."); Reply Br. at 3-5 (explaining why the Panel should consider all of the evidence before it, including the additional affidavits, as Planned Parenthood established changed circumstances). The Panel erred in its statement that "Planned Parenthood does not challenge the denial of its motion to dissolve or modify the injunction." App. Op. 4-5. From the moment Planned Parenthood filed its Notice of Appeal, both this Court and MMB were on notice that Planned Parenthood was appealing the denial of the Motion as well the trial court's injunction order.

Moreover, after MMB questioned in its Answer Brief the inclusion of the additional affidavits, Planned Parenthood clearly explained why these affidavits were properly in front of the trial court and why the Panel must consider them. Changed circumstances were highlighted:

> Planned Parenthood had no way of anticipating that it must present evidence about ultrasounds or other 'including but not limited to' procedures. Both of these rulings by the trial court constitute conditions that could not have been anticipated or addressed prior to the court's order. Planned Parenthood's motion was thus justified, as was the additional evidence it submitted in support of the motion.

Reply Br. at 4-5. The Panel, therefore, erred in concluding that Planned Parenthood did not claim changed circumstances.

Indeed, circumstances changed in this case because the trial court's vague order addressed several topics that were never mentioned either in MMB's briefing of the temporary injunction or at the hearing. *See* Reply Br. at 3-5; *see also* *Riverside Bank v. Maxa*, 45 So. 2d 678, 680-81 (Fla. 1950) (citing *Seaboard Air Line R. Co. v. Tampa So. R. Co.*, 134 So. 529, 533 (1931)) (explicitly encouraging parties faced with vague injunction orders to move for modification of those orders), reversed on other grounds by *Warren Fin., Inc. v. Barnett Bank of Jacksonville*, 552 So. 2d 194 (Fla. 1989).

Given that the Stay Panel – which considered the additional affidavits – reached a starkly different conclusion about the propriety of the temporary injunction than did the merits Panel, the additional affidavits are likely outcome determinative on the issue of whether Planned Parenthood is able to provide, and its patients are able to access, surgical abortions at the Center. Rehearing should be granted to address and rectify this error.

C. The Panel misapprehended the record evidence supporting the trial court's findings that Planned Parenthood's provision of abortion is not "ancillary and incidental to a physician's practice of medicine"

In its opinion, the Panel devoted several pages of analysis to its determination that the restrictions bar the performance of outpatient surgical *procedures* rather than outpatient surgical *centers*, as that term is commonly understood. *See* App. Op. at 5-8. However, with respect to the trial court's

findings that "Planned Parenthood's facility is not a physician's practice of medicine" and that even if it is, "its performance of abortions was not ancillary or incidental to that practice," the Panel stated only that those findings "are supported by competent, substantial evidence," without further analysis. *Id.* at 8. The Panel seems to have misapprehended the record evidence because "the limited evidence presented at the temporary hearing," *id.* at 13 (Evander, J., dissenting), simply fails to support those findings.

The trial court offered three reasons that Planned Parenthood's health center is not a physician's practice of medicine: (1) Planned Parenthood is a § 501(c)(3) tax-exempt nonprofit organization; (2) Physicians are not present at the Center on a full-time basis; and (3) Planned Parenthood is "heavily involved with various educational, advocacy, and community outreach activities." A.14, Order, ¶¶ 21-23. None of these can be properly considered "competent, substantial evidence" to support the trial court's conclusion.

Providing healthcare through a corporation does not mean that a health care provider cannot be a physician's practice. As the Stay Panel declared, "[s]imply because an organization chooses to obtain nonprofit status does not mean that it is not a physician's practice." Stay Order at 3. Indeed, at MMB's own property (like most of the other health care providers in Oak Commons), the physicians group that offers cardiology services does so under the umbrella of a corporate entity –

Cardiovascular Associates, Inc. But under the trial court's reasoning, those doctors, like Planned Parenthood's full time medical director, who devote their professional time to providing medical care to patients, have no "practice of medicine" at all merely because they work for corporations. *See* A.30, Hearing Tr. at 34-35, 43 (all medical services at Planned Parenthood are provided by or under the supervision of physicians including its salaried medical director).

Similarly, the fact that physicians are not present at a health center all day, every day, or that they choose to exercise their constitutional right to free speech does not necessarily preclude them from engaging in a physician's practice at the Center. For instance, a partially retired physician who works at a medical practice a few days a week, but has a physician's assistant or a nurse practitioner staff the office on other days, under the trial court's criteria, would not be practicing medicine. A physician who exercises his or her First Amendment right to speak on issues of public concern could not have a practice of medicine either. Such a facile determination would undermine the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The trial court's finding on the issue of whether abortions are ancillary and incidental to Planned Parenthood's physicians' practice of medicine is similarly unsupported. The *only* record evidence on this question prior to the entry of the

temporary injunction was submitted by Planned Parenthood. That unrefuted evidence showed abortion services (which include both surgical and nonsurgical abortions) to constitute less than 1% of the total number of services provided at its health centers. A.13, Tosh Aff., ¶ 8.[4] MMB submitted no evidence to the contrary. Yet the trial court held, citing no evidence and offering no explanation, that "this asserted statistic is offered out of context." A.14, Order, ¶ 25.[5] The trial court's unfounded conclusory ruling on these issues was not based on "competent, substantial evidence," App. Op. at 8, or adequately examined by the Panel. Rehearing is necessary to correct these errors.

[4] This affidavit from Planned Parenthood's then-CEO was submitted along with Planned Parenthood's Memorandum in Opposition to Plaintiff's Motion for Temporary Injunctive Relief. There is, therefore, no dispute that it was properly before and should have been considered by the Panel.

[5] The trial court also stated that Planned Parenthood witnesses called abortions a "substantial" and "central" service, A.14, Order, ¶ 25, but a review of their testimony reveals no such characterizations. Planned Parenthood's then-CEO testified that because Planned Parenthood "believe[s] in providing comprehensive reproductive healthcare to our patients . . . any interference in our ability to comprehensively care for our patients, would be a substantial burden on our practice." A.30, Hearing Tr., p. 31. She never stated that surgical abortions are a "substantial" service at the Center. Similarly, Planned Parenthood's Treasurer, testifying as to the necessary amount of a bond, explained that because abortion patients receive other gynecological services during their visit to the health center, prohibiting abortions would adversely impact revenue in a way that is difficult to quantify. *Id.* at 64-65.

II. The Fifth District Court of Appeal should rehear this case en banc.

A. Standard to grant a motion for rehearing en banc

This case is of exceptional importance, and thus Planned Parenthood is entitled to rehearing en banc. *See* Fla. R. App. P. 9.331. "[T]he panel's decision expressly and directly conflicts with a rule of law announced in decisions . . . of other district courts of appeal." *State v. Diamond*, 553 So. 2d 1185, 1199 (Fla. 1st DCA 1988) (Ervin, J., concurring); *see also Ortiz v. State*, 24 So. 3d 596, 618 (Fla. 5th DCA 2009) (Cohen, J., dissenting) ("Some judges contend a case is exceptionally important when the original panel opinion expressly and directly conflicts with a rule of law announced by either the supreme court or another district court of appeal.") (internal quotation marks omitted). Because this case also raises "issues that impact a larger share of the community or the jurisprudence of the state" it is of exceptional importance. *In re Doe,* 973 So. 2d 548, 556 (Fla. 2d DCA 2008) (Casanueva, J., concurring). Rehearing en banc is therefore appropriate and necessary.

B. This case involves an issue on which district courts of appeal conflict

As already noted above, Planned Parenthood requested the trial court to reconsider, modify, or dissolve its injunction. In support of its motion seeking that

relief, Planned Parenthood, submitted several affidavits.[6] The Stay Panel considered that evidence and held that Planned Parenthood was likely to succeed on the merits. The Panel which decided the case, however, found no changed circumstances, refused to consider the additional affidavits, and reached an opposite conclusion. Stay Order at 3; App. Op. at 4-5, 8-9. Therefore, the issue of whether Planned Parenthood should be required to establish changed circumstances is thus outcome determinative in this case.

Finding, *inter alia*, that Planned Parenthood did not establish changed circumstances as is required under current Fifth District precedent, the merits Panel refused to consider the affidavits.[7] *See, e.g.*, *Thomas*, 963 So. 2d at 899 (when a party moves for a motion to modify or dissolve an injunction after notice and hearing, it must establish a change in circumstances). The First and Second District Courts of Appeal agree with this Court on the issue. *See, e.g.*, *Hunter v. Dennies Contracting Co., Inc.*, 693 So. 2d 615, 616 (Fla. 2d DCA 1997); *Brock v. Brock*, 667 So. 2d 310, 312 (Fla. 1st DCA 1995). However, the Third and Fourth

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[6] The trial court summarily denied Planned Parenthood's motion without any analysis. *See* A.25, Order Denying Planned Parenthood's Mot. to Reconsider.

[7] As is explained in Section I.B., *supra*, Planned Parenthood maintains that the Panel should consider the additional affidavits because Planned Parenthood appealed the denial of the Motion and in fact established changed circumstances. Whether Planned Parenthood *must* establish changed circumstances is a separate issue.

Districts have held that modification or dissolution of a temporary injunction after notice and hearing does not require a showing of changed circumstances. *See, e.g.*, *Minty v. Meister Fin. Grp., Inc.*, 132 So. 3d 373, 376 & n.4 (Fla. 4th DCA 2014) (noting agreement with Third District Court of Appeal and conflict with First, Second, and Fifth District Courts of Appeal on this issue); *Bay N Gulf, Inc. v. Anchor Seafood, Inc.*, 971 So. 2d 842, 843 (Fla. 3d DCA 2007).

Indeed, the Panel acknowledged the conflict between its ruling and those of the Third and Fourth District Courts of Appeal in a brief footnote. App. Op. at 4 n.3. This direct conflict between the district courts of appeal – present and of significance in the instant case – creates an issue of exceptional importance meriting en banc review. *See Diamond*, 553 So. 2d at 1199 (Ervin, J., concurring).

Planned Parenthood, therefore, urges this Court to grant rehearing en banc and join the Third and Fourth District Courts of Appeal in holding that a motion to modify or dissolve an injunction should not require changed circumstances. After all, the "granting *and continuing* of injunctions rests in the sound discretion" of the trial court. *Davis v. Wilson*, 190 So. 716, 718 (Fla. 1939) (emphasis added). Moreover, a trial court "has the inherent authority to reconsider a non-final order and modify or retract it." *Precision Tune Auto Care, Inc. v. Radcliff*, 731 So. 2d 744, 745 (Fla. 4th DCA 1999) (holding that a bright line rule limiting the trial court's ability to grant a motion to dissolve is inconsistent with these two "well-

established principles" about the trial court's powers); *see also Coastal Unilube, Inc. v. Smith*, 598 So. 2d 200, 201 (Fla. 4th DCA 1992) ("A motion to dissolve an injunction involves the sufficiency of the equities of the complaint to justify the injunction in the first instance; thus, if it appears that the injunction should not have been granted, it should be dissolved."). The district courts of appeal should therefore be careful in placing limitations on a trial court's ability to modify and dissolve injunctions.[8]

In this case, both the Stay Panel and the merits Panel agreed that in certain respects the trial court's order unquestionably went too far – improperly barring Planned Parenthood from performing diagnostic imaging and other undefined services. *See* App. Op. at 2-3; Stay Opp. at 2-3 & n.1. As a result, women were improperly barred from accessing needed medical services. Planned Parenthood lost revenue while it waited for the appellate court to act. This improper ruling by the trial court could not have been anticipated or addressed by Planned Parenthood prior to the issuance of the injunction. Only after the injunction order was entered did it become possible for Planned Parenthood to properly raise the issues with the trial court. Planned Parenthood should not have to establish changed circumstances in order to have the courts correct clear errors. *Cf. Riverside Bank*,

[8] A trial court's discretion in reconsidering or staying an injunction contains no such limitation. *See, e.g.*, *Mitchell v. State*, 911 So. 2d 1211, 1219 (Fla. 2005); *Seigler v. Bell*, 148 So. 3d 473, 479 (Fla. 5th DCA 2014).

45 So. 2d at 680-81. This Court should grant rehearing en banc to squarely address this question which has resulted in harm to Planned Parenthood and its patients. The issue is likely to recur in future cases, harming other litigants by requiring them to brief issues before an appellate panel and waiting to secure a stay, when a properly informed trial judge could have acted expeditiously and efficiently to prevent harm.

C. This case involves issues that affect a larger share of the community

En banc review is warranted here for yet another reason. This case involves issues that affect the larger community in at least two ways. First, the restrictions apply not only to Planned Parenthood, but also to all of the other medical providers in Oak Commons. Those medical providers routinely provide, and for years have provided at Oak Commons, outpatient surgeries and diagnostic imaging procedures (i.e., activities barred by the restrictions) under the name of a corporation and/or with physicians not present at the facility every day. While this is now true for Planned Parenthood, it has also been the case for Cardiovascular Associates (the corporation under which physicians practice at MMB's property). And it is true for other providers in that medical office park as well.[9] Under the logic of the trial court and Panel opinions, each and every one of those providers may be barred

[9] While the trial court recognized that Planned Parenthood had offered evidence that other health care providers at Oak Commons performed outpatient surgeries, it found that evidence to be irrelevant. A.14, Order, ¶ 26.

from those activities, even though the activities may constitute a very small percentage of their medical practice. *See* Section I.C., *supra*. This ruling, therefore, has implications for all of the health care providers in Oak Commons, beyond just the parties to this case.[10]

Second, if it is left untouched, the Panel opinion will affect the ability of women in Florida to exercise their fundamental constitutional rights. *See In re T.W.*, 551 So. 2d at 1192 (recognizing that the explicit right to privacy in the Florida Constitution is "clearly implicated in a woman's decision of whether or not to continue her pregnancy"). It is no surprise that the other Oak Commons providers have for years provided outpatient surgeries and diagnostic imaging procedures at corporate medical offices without complaint or question. Only when abortion became one of the outpatient surgeries offered by Planned Parenthood did Appellee MMB seek to enforce those restrictions. This lawsuit is about little more than animus towards abortion. Unquestionably, if the state attempted to selectively enforce land use restrictions in this way, it would be patently unconstitutional. *See, e.g.*, *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 336 (5th Cir. Unit B 1981) (closely scrutinizing city's zoning decision affecting abortion

[10] Indeed, to the extent that other legal documents in Florida use the undefined terms in the restrictive covenants that these rulings now implicate, including "outpatient surgical center" and "physician's practice," this ruling could have implications far beyond Oak Commons.

clinic); *Planned Parenthood of N. New England v. City of Manchester*, 2001 WL 531537, at *2 (D.N.H. Apr. 27, 2001) ("[I]t is by now clear that personal opposition to abortion or personal disapproval of Planned Parenthood's activities cannot serve as a lawful basis for denying a variance or making other zoning decisions"). Letting this unfounded ruling stand, therefore, implicates important issues and has consequences that extend far beyond the parties to this action. En banc review is warranted.

As required by Rule 9.331, undersigned counsel express a belief, based on a reasoned and studied professional judgment, that the case or issue is of exceptional importance.

CONCLUSION

For the reasons stated above, Appellant Planned Parenthood respectfully requests that this Court grant its motion for rehearing and/or rehearing en banc.

Respectfully submitted this 8th day of June, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail on June 8, 2015 to:

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CERTIFICATE OF COMPLIANCE

Counsel for Appellant, Planned Parenthood of Greater Orlando, Inc. certifies that the foregoing document complies with the font and spacing requirement of Rule 9.210, Fla. R. App. P.

/s/ Donald E. Christopher
Donald E. Christopher

EXHIBIT "C"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

PLANNED PARENTHOOD OF
GREATER ORLANDO, ETC.,

Appellant,

v. CASE NO. 5D14-2920

MMB PROPERTIES, ETC. ,

Appellee.
_________________________/

DATE: August 11, 2015

BY ORDER OF THE COURT:

ORDERED that Appellant's Motion for Rehearing and/or Rehearing En Banc, filed June 8, 2015, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

JOANNE P. SIMMONS, CLERK

Authorized by: 5DCA Judges

cc:

Donald Edward Christopher	Maureen Ann Arago	Dennis R. O'Connor
Derek J. Angell	Keith Patrick Arago	Kyle A. Diamantas

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

PLANNED PARENTHOOD
OF GREATER ORLANDO, ETC.,

Appellant,

v. Case No. 5D14-2920

MMB PROPERTIES, ETC.,

Appellee.

________________________________/

Opinion filed May 22, 2015.

Non-Final Appeal from the Circuit Court
for Osceola County,
John E. Jordan, Judge.

Donald E. Christopher and Kyle A. Diamantas, of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC., Orlando, for Appellant.

Derek J. Angell and Dennis R. O'Connor, of O'Connor & O'Connor, LLC, Winter Park and Maureen A. Arago and Keith P. Arago, of Arago Law Firm, Kissimmee, for Appellee.

I hereby certify that the above and foregoing is a
true copy of instrument filed in my office.
JOANNE P. SIMMONS, CLERK
DISTRICT COURT OF APPEAL OF
FLORIDA, FIFTH DISTRICT
Per ________ Deputy Clerk
9/4/15

LAWSON, J.

Planned Parenthood of Greater Orlando, Inc. ("Planned Parenthood") appeals a nonfinal order granting a temporary injunction to MMB Properties ("MMB"), a cardiology practice, prohibiting Planned Parenthood from performing abortions or sonograms in

violation of a restrictive covenant in the medical park where both parties own property.[1] The restriction at issue prohibits Planned Parenthood's property from being used as an "Out Patient Surgical Center" or a "Diagnostic Imaging Center" "unless ancillary and incidental to a physician's practice of medicine." We reverse that part of the order temporarily enjoining Planned Parenthood from performing sonograms because that relief was not sought by MMB in its pleadings and was not, in our view, tried by consent. *See Cortina v. Cortina*, 98 So. 2d 334, 337 (Fla. 1957) ("It is fundamental that a judgment upon a matter entirely outside of the issues made by the pleadings cannot stand; and where, as here, an issue was not presented by the pleadings nor litigated by the parties during the hearing on the pleadings as made, a decree adjudicating such issue is, at least, voidable on appeal."); *We're Assoc. VI, Ltd. P'ship v. Curzon Dev. Corp.*, 738 So. 2d 440, 441 (Fla. 4th DCA 1999) (noting that relief granted in injunction must be specifically requested). On remand, we also order the trial court to strike the vague language prohibiting Planned Parenthood from performing other unspecified procedures. *See* Fla. R. Civ. P. 1.610(c) ("Every injunction . . . shall describe in reasonable detail the act or acts restrained without reference to a pleading or another

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[1] We have jurisdiction to review an order granting a temporary injunction pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(B). Planned Parenthood also appeals an order denying its Motion to Reconsider, Dissolve, or Modify Order Granting Motion for Temporary Injunction. This motion was actually two motions. *See Anesthesia Grp. of Miami, Inc. v. Hyams*, 693 So. 2d 673, 674 (Fla. 3d DCA 1997) (noting that motion to dissolve temporary injunction was, in part, a motion to reconsider). To the extent this second order simply denied a motion to reconsider a previous non-final order, it was not appealable. *Agere Sys. Inc. v. All Am. Crating, Inc.*, 931 So. 2d 244, 245 (Fla. 5th DCA 2006). To the extent the second order denied the motion to dissolve or modify the injunction, it was appealable under the above rule. None of Planned Parenthood's appellate arguments, however, relate to the second order.

document . . . ."); *Pizio v. Babcock*, 76 So. 2d 654, 655 (Fla. 1954) ("Injunctive orders like this should be confined within reasonable limitations and cast in such terms as they can, with certainty, be complied with. The one against whom it is directed should not be left in doubt about what he is to do."). We affirm that part of the order temporarily enjoining Planned Parenthood from performing abortions at the property, and write further to expressly address several points relating to our affirmance.

"Generally, a trial court is afforded 'wide discretion to either grant, deny, dissolve, or modify a temporary injunction, and an appellate court will not intercede unless the aggrieved party clearly shows an abuse of discretion.'" *Avalon Legal Info. Servs., Inc. v. Keating*, 110 So. 3d 75, 80 (Fla. 5th DCA 2013) (quoting *Meyers v. Club at Crystal Beach Club, Inc.*, 826 So. 2d 1086, 1089 (Fla. 5th DCA 2002)). The trial court's factual determinations must be accepted if supported by competent, substantial evidence. *Charlotte Cnty. v. Vetter*, 863 So. 2d 465, 469 (Fla. 2d DCA 2004). However, when its rulings pertain to purely legal matters, review is de novo. *Avalon Legal*, 110 So. 3d at 80 (citing *Suggs v. Sw. Fla. Water Mgmt. Dist.*, 953 So. 2d 699, 699 (Fla. 5th DCA 2007)).

Four elements are generally required for 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. *DePuy Orthopaedics, Inc. v. Waxman*, 95 So. 3d 928, 938 (Fla. 1st DCA 2012). Before addressing Planned Parenthood's challenges to the trial court's findings on these elements, we will first discuss the evidence properly

considered under our scope of review. We will address each of these elements after briefly discussing the evidence properly considered on appeal and our scope of review.

This court previously, by order, granted a stay of the injunction pending appeal, and expressly considered "the record as a whole, *including the affidavits Planned Parenthood filed in support of its motion for rehearing.*" (emphasis added).[2] MMB also notes that Planned Parenthood relies heavily on these affidavits to support its arguments for reversing the temporary injunction. However, we find that the affidavits filed in connection with the motion to reconsider should not be considered in our review of the injunction order 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. Additionally, although trial courts have inherent authority to reconsider nonfinal 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. *Hunter v. Dennies Contracting Co.*, 693 So. 2d 615, 616 (Fla. 2d DCA 1997). Thus, to the extent that the affidavits were submitted in support of the motion to reconsider, the trial court's decision not to revisit its original order is beyond this court's scope of review. Finally, to the extent that the affidavits were submitted in support of Planned Parenthood's motion to dissolve or modify the injunction, it needed to establish changed circumstances, *id.*, which it did not do.[3] In its initial brief, Planned Parenthood does not challenge the

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[2] Preliminary orders entered by an appellate court in the same appeal are not binding on the court. *Clevens v. Omni Healthcare, Inc.*, 83 So. 3d 1011, 1011 n.1 (Fla. 5th DCA 2012); *Hialeah Hotel, Inc. v. Woods*, 778 So. 2d 314, 315 (Fla. 3d DCA 2000).

[3] We acknowledge conflict with the Third and Fourth District Courts of Appeal, as noted in *Minty v. Meister Financial Grp., Inc.*, 132 So. 3d 373, 376 n.4 (Fla. 4th DCA 2014).

denial of its motion to dissolve or modify the injunction, much less argue that it established changed circumstances. 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.

With respect to the "substantial likelihood of success" element, Planned Parenthood first argues that the trial court erred by enjoining it from performing abortions because the restriction at issue does not prohibit the *activities* of performing abortions; rather, it prevents the operation of outpatient surgical *centers*. The restriction states:

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

(Emphasis added). Interestingly, the trial court did not find that performing abortions would transform Planned Parenthood's facility into an outpatient surgical *center*. Instead, it found that MMB had a substantial likelihood of success in proving that abortions are outpatient surgical *procedures*.[4] This distinction highlights a rather poorly

[4] Although Planned Parenthood argued below that abortions were not surgical procedures, it has abandoned that argument on appeal. There was also ample evidence to support the trial court's conclusion that a "surgical abortion" is a surgical procedure. Nor does Planned Parenthood challenge the trial court's finding that abortions are

worded restrictive covenant that prohibits the property from being "used" for the "following *activities*" but then lists three "*centers*" as prohibited *activities.* In short, it uses names of locations where activities occur rather than naming the activities themselves. It does not define the terms "outpatient surgical center."

Both parties argue that the term "outpatient surgical center" is clear and unambiguous, but offer differing definitions. MMB relies on a dictionary definition of "center" as "a facility providing a place for a particular activity or service." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/center (last visited April 6, 2015). Thus, an "outpatient surgical center" would be a facility providing a place for performing outpatient surgical procedures. Planned Parenthood relies on the statutory definition of "ambulatory surgical center," in section 395.002(3), Florida Statutes (2013), which is defined as follows:

> (3) "Ambulatory surgical center" or "mobile surgical facility" means *a facility the primary purpose of which is to provide elective surgical care*, in which the patient is admitted to and discharged from such facility within the same working day and is not permitted to stay overnight, and which is not part of a hospital. *However, a facility existing for the primary purpose of performing terminations of pregnancy, an office maintained by a physician for the practice of medicine*, or an office maintained for the practice of dentistry *shall not be construed to be an ambulatory surgical center*, provided that any facility or office which is certified or seeks certification as a Medicare ambulatory surgical center shall be licensed as an ambulatory surgical center pursuant to s. 395.003. Any structure or vehicle in which a physician maintains an office and practices surgery, and which can appear to the public to be a mobile office because the structure or vehicle operates at more than one address, shall be construed to be a mobile surgical facility.[5]

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conducted on an outpatient basis.

[5] Planned Parenthood correctly notes that a substantially similar definition was in

Id. (emphasis added). Assuming that the terms "ambulatory" and "outpatient" are synonymous, this definition requires that the "primary purpose" of such a facility is to provide elective surgical care.

"Florida adheres to the general rule that a reasonable, unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms." *Barrett v. Leiher*, 355 So. 2d 222, 225 (Fla. 2d DCA 1978). "If it is necessary to construe a somewhat ambiguous term, the intent of the parties as to the evil sought to be avoided expressed by the covenants as a whole will be determinative." *Id.*; *see also Killearn Homes Ass'n v. Visconti Family Ltd. P'ship,* 21 So. 3d 51, 53 (Fla. 1st DCA 2009) ("It was improper for the court to look to an outside source to determine the meaning of the word 'building' as used in the restriction, rather than first considering the language of the deed restriction as a whole." (citations omitted)).

The restriction in question prohibits certain "activities," namely outpatient surgical centers, emergency medical centers, and diagnostic imaging centers. Although it does not further specify the activities included in the first two categories, it does in the third category, stating that such activities included "the following radiographic testing," with a list of specific imaging procedures. Thus, the focus of this restriction is on prohibited activities. In this light, the use of the word "center" does not necessarily suggest a quantitative requirement that such activities be the "primary purpose" of the location. Rather, it is merely a location where such activities occur.

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effect when this restrictive covenant was executed in 1986. *See* § 395.002(2), Fla. Stat. (1986).

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 outpatient 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.

We conclude that, 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. Having construed, de novo, the restrictive covenant, we readily find that the trial court's factual findings as to this issue are supported by competent, substantial evidence. The trial court's findings were that abortions are outpatient surgical procedures; that Planned Parenthood's facility is not a physician's practice of medicine; and, that even if the facility is operated as a physician's practice of medicine, its performance of abortions was not ancillary or incidental to that practice. Accepting these findings, we affirm the trial court's ultimate finding that MMB had a

substantial likelihood of success in proving that Planned Parenthood's performance of abortions at the facility would violate the restrictive covenant.

Next, Planned Parenthood argues that MMB failed to prove irreparable harm, which is normally required to obtain an injunction. However, MMB correctly argues that when injunctions enforce restrictive covenants on real property, irreparable harm is not required. *See, e.g.*, *Stephl v. Moore*, 114 So. 455 (Fla. 1927) (holding complainant not required to allege irreparable harm in seeking injunction to prevent violation of restrictive covenant restraining free use of land; complainant only needed to allege violation of covenant); *Autozone Stores, Inc. v. Ne. Plaza Venture, LLC*, 934 So. 2d 670, 673 (Fla. 2d DCA 2006) ("Florida law has long recognized that injunctive relief is available to remedy the violation of a restrictive covenant without a showing that the violation has caused an irreparable injury—that is, an injury for which there is no adequate remedy at law."); *Jack Eckerd Corp. v. 17070 Collins Ave. Shopping Ctr., Ltd.*, 563 So. 2d 103, 105 (Fla. 3d DCA 1990) ("Where an injunction is sought to prevent the violation of a restrictive covenant, appropriate allegations showing the violation are sufficient and it is not necessary to allege, or show, that the violation amounts to an irreparable injury."); *Coffman v. James*, 177 So. 2d 25, 31 (Fla. 1st DCA 1965) ("It is well established in this jurisdiction that even in the absence of a showing of irreparable [sic] injury injunctive relief is grantable as a matter of right, subject only to sound judicial discretion, to restrain the violation of a restrictive covenant affecting real estate.").

Planned Parenthood argues that the trial court erred in relying on *Autozone* and in failing to follow a case that *Autozone* distinguished: *Liza Danielle, Inc. v. Jamko, Inc.*, 408 So. 2d 735 (Fla. 3d DCA 1982). In *Liza Danielle*, a shoe store leasing space

in a shopping center had an exclusivity provision in its lease prohibiting the lessor from leasing any other space in the shopping center to another shoe store. When the lessor violated this provision, the first shoe store sued and obtained an injunction barring the second shoe store from operating. The appellate court reversed the injunction in part because of the availability of an adequate legal remedy and the failure to prove irreparable harm. However, as *Autozone* and *Jack Eckerd* both point out, *Liza Danielle* did not involve a restrictive covenant running with the land. It involved an exclusivity provision in a lease for which damages were available. Accordingly, Planned Parenthood's reliance on it in this case is misplaced. MMB was not required to establish irreparable harm.

Moreover, the trial court properly rejected Planned Parenthood's argument that it would suffer irreparable harm if the injunction were granted. As the court correctly noted, Planned Parenthood was aware of the restrictions and proceeded forward at its own peril. *See Daniel v. May*, 143 So. 2d 536, 538 (Fla. 2d DCA 1962) (noting that courts do not ordinarily consider amount of injury suffered if injunction granted except where violation of covenant is minute); *Chick-Fil-A, Inc. v. CFT Dev., LLC*, 652 F. Supp. 2d 1252, 1263 (M.D. Fla. 2009) (noting that defendants were aware of restrictive covenant when they purchased property and thus, "[w]hatever hardship may accrue to Defendants by virtue of a permanent injunction could easily have been avoided"), *aff'd,* 370 F. App'x 55 (11th Cir. 2010). "Where a purchaser of land intends to use it for a purpose not allowed by a restrictive covenant, he should seek to have the deed restriction removed before purchasing the property." *Wood v. Dozier*, 464 So. 2d 1168, 1170 (Fla. 1985).

Similarly, Planned Parenthood argues that no evidence supported the trial court's finding that an injunction would serve the public interest "by limiting the sort of medical services that can be offered in facilities which are located directly across from a hospital." Specifically, it argues that MMB failed to show that Planned Parenthood's services would duplicate those provided by the hospital, and even if they did, it is not in the public interest to limit such services. However, testimony was elicited from one of the witnesses that the purpose of the restrictive covenants at issue was to protect the hospital from certain types of development and uses being conducted nearby, and the *Wood* case, 464 So. 2d at 1170, states that this purpose serves the public interest.

Both parties seek appellate attorneys' fees under an attorneys' fee provision in the 1988 Covenants. Neither party fully quotes that provision. It states:

> These restrictions shall be construed as covenants running with the land and shall inure to the benefit of, be binding upon and enforceable by Declarant, the Association or any Owner. *Enforcement shall be by proceedings at law or in equity* against any person or persons violating or attempting to violate any covenants, *either to restrain or prevent such violation or proposed violation by an injunction*, either prohibitive or mandatory, or to obtain any other relief authorized by law. Such enforcement may be by the owner of any Lot or by Declarant or by the Association. *If Declarant, the Association or any owner shall seek to remedy a violation of these Restrictions through obtaining an order from a court of competent jurisdiction enabling it to enter upon the portion of the Lot upon or as to which such violation exists, and shall summarily abate or remove the same, then in such event the*
> *Owner committing such violation shall pay on demand the cost and expense of such abatement or removal, which shall include attorneys' fees and other costs (including fees and costs upon appeal)* in connection with seeking the court order, together with interest thereon at the highest rate allowed by law from date of disbursement to date to date of recovery. . .

(Emphasis added).

"Contractual provisions concerning attorney's fees are to be strictly construed." *Williams v. Williams*, 892 So. 2d 1154, 1155 (Fla. 3d DCA 2005) (citations omitted). The above provision does not authorize attorneys' fees in this case. Although the first part of the provision permits enforcement by injunction, the attorneys' fee provision is more narrowly worded. It authorizes fees for "obtaining an order from a court of competent jurisdiction enabling it to enter upon the portion of the Lot upon or as to which such violation exists, and shall summarily abate or remove the same." The injunction in this case does not enable MMB to enter upon Planned Parenthood's Property. As such, we find that neither party is entitled to attorneys' fees.

AFFIRMED IN PART; REVERSED IN PART; REMANDED; ATTORNEYS' FEES MOTIONS DENIED.

PALMER, J., concurs.
EVANDER, J., concurs in part, dissents in part with opinion.

Case No. 5D14-2920

EVANDER, J., concurring in part, dissenting in part.

I concur in the majority's opinion to the extent it: (1) reverses the trial court's decision to temporarily enjoin Planned Parenthood from performing sonograms; (2) strikes the vague language in the trial court's order prohibiting Planned Parenthood from performing other unspecified procedures; and (3) denies attorney's fees to both parties. However, based on the limited evidence presented at the temporary hearing, I cannot agree that MMB met its burden of showing a substantial likelihood of success on the merits. Accordingly, I dissent from that aspect of the majority's opinion.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

PLANNED PARENTHOOD OF
GREATER ORLANDO, ETC.,

Appellant,

v. CASE NO. 5D14-2920

MMB PROPERTIES, ETC. ,

Appellee.
_______________________/

DATE: August 11, 2015

BY ORDER OF THE COURT:

ORDERED that Appellant's Motion for Rehearing and/or Rehearing En Banc, filed June 8, 2015, is denied.

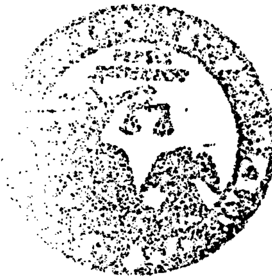
I hereby certify that the foregoing is
(a true copy of) the original Court order.

JOANNE P SIMMONS, CLERK

Authorized by: 5DCA Judges

cc:

Donald Edward Christopher
Derek J. Angell
Maureen Ann Arago
Keith Patrick Arago
Dennis R. O'Connor
Kyle A. Diamantas



I hereby certify that the above and foregoing is a true copy of instrument filed in my office.
JOANNE P. SIMMONS, CLERK
DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT
9/4/15
Per ___________
Deputy Clerk

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL OR BY PETITION, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION OR DECISION;

YOU ARE HEREBY COMMANDED THAT FURTHER PROCEEDINGS AS MAY BE REQUIRED BE HAD IN SAID CAUSE IN ACCORDANCE WITH THE RULING OF THIS COURT ATTACHED HERE TO AND INCORPORATED AS PART OF THIS ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE C. Alan Lawson, CHIEF JUDGE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT, AND THE SEAL OF THE SAID COURT AT DAYTONA BEACH, FLORIDA ON THIS DAY.

DATE: August 28, 2015

FIFTH DCA CASE NO.: 5D 14-2920

CASE STYLE: PLANNED PARENTHOOD OF GREATER ORLANDO, ETC. v. MMB PROPERTIES, ETC.

COUNTY OF ORIGIN: Osceola

TRIAL COURT CASE NO.: 2014-CA-1636-OC

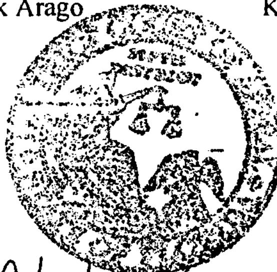
I hereby certify that the foregoing is
(a true copy of) the original Court mandate.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

cc:

Donald Edward Christopher
Derek J. Angell
Clerk Osceola
Maureen Ann Arago
Keith Patrick Arago
Dennis R. O'Connor
Kyle A. Diamantas

I hereby certify that the above and foregoing is a true copy of instrument filed in my office.
JOANNE P. SIMMONS, CLERK
DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT



Per Heather Blake
Deputy Clerk 9/4/15

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

PLANNED PARENTHOOD OF
GREATER ORLANDO, ETC.,

Appellant,

v. CASE NO. 5D14-2920

MMB PROPERTIES, ETC. ,

Appellee.
______________________/

DATE: August 26, 2015

BY ORDER OF THE COURT:

ORDERED that Appellant's Emergency Motion to Stay Issuance of the Mandate, filed August 14, 2015, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

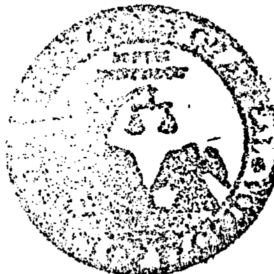
JOANNE P. SIMMONS, CLERK

cc:

Donald Edward Christopher	Maureen Ann Arago	Dennis R. O'Connor
Derek J. Angell	Keith Patrick Arago	Kyle A. Diamantas

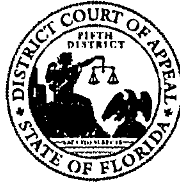
I hereby certify that the above and foregoing is a true copy of instrument filed in my office.
JOANNE P. SIMMONS, CLERK
DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT 9/4/15

Per ______________
Deputy Clerk



C. ALAN LAWSON
CHIEF JUDGE

THOMAS D. SAWAYA
WILLIAM D. PALMER
RICHARD B. ORFINGER
VINCENT G. TORPY, JR
KERRY I. EVANDER
JAY P. COHEN
WENDY W. BERGER
F. RAND WALLIS
BRIAN D. LAMBERT
JAMES A. EDWARDS
JUDGES



JOANNE P. SIMMONS
CLERK

CHARLES R. CRAWFORD
MARSHAL

DISTRICT COURT OF APPEAL
FIFTH DISTRICT
300 SOUTH BEACH STREET
DAYTONA BEACH, FLORIDA 32114
(386) 947-1500 COURT
(386) 255-8600 CLERK

September 4, 2015

Hon. John A. Tomasino, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32399-1927

Re: Planned Parenthood of Greater Orlando v. MMB Properties
Appeal No. 5D14-2920
Trial Court No: 2014-CA-1636-OC
Trial Court Judge: Scott Polodna

Dear Mr. Tomasino:

Attached is a certified copy of the Notice invoking the discretionary jurisdiction of the Supreme Court pursuant to Rule 9.120, Florida Rules of Appellate Procedure. Attached also is this Court's opinion or decision relevant to this case.

- ☐ The filing fee prescribed by Section 25.241(3), Florida Statutes, was received by this court and is also attached.
- ☒ The filing fee prescribed by Section 25.241(3), Florida Statutes, was not received by this Court. **Check being sent directly to SC FED EX**
- ☐ Petitioner/Appellant has been previously determined insolvent by this Circuit Court or our court.

No filing fee is required because:

- ☐ Summary Appeal (Rule 9.141)
- ☐ Unemployment Appeals Commission
- ☐ Habeas Corpus
- ☐ Juvenile case
- ☐ Other ____________

If there are any questions regarding this matter, please do not hesitate to contact this Office.

Sincerely,

JOANNE P. SIMMONS, CLERK

By:
Deputy Clerk

Attachments
cc: Donald E Christopher, Esq - Kyle Diamantas, Esq - Derek Angell, Esq - Dennis O'Connor, Esq - Maureen Arago, Esq and Keith Arago, Esq

FAX NUMBER (386) 947-1562
E MAIL ADDRESS 5dca@flcourts.org