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IN THE SUPREME COURT OF FLORIDA
Case No. SC10-631
DCA Case No.: 5D08-3383
Cir. Ct. Case No.: 2007-33166 - Div: 31

THE ESTATE OF ELLEN LUCILLE SMITH A/K/A ELLEN L. SMITH, by and through ROXANNE HORN, Personal Representative,

Petitioner,

v.

SOUTHLAND SUITES OF ORMOND BEACH, LLC; et al.,

Respondents.
_____/

RESPONDENTS' AMENDED ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

Other Authorities:

PRELIMINARY STATEMENT

Petitioner/Plaintiff in this case, The Estate of Ellen Smith, will be referred to will be referred to herein as "Petitioner." Ms. Smith will be referred to as "Ms. Smith," "Principal," or "donor." Ms. Smith's Personal Representative (and former Attorney-In-Fact), Roxanne Horn, will be referred to as "Ms. Horn," "attorney-in fact," or "donee." Petitioner's Initial Brief will be cited as "IB at ___." References to documents in Petitioner's Appendix or Respondents' Supplemental Appendix will be cited as "App. ___." or "Supp. App. ___.", respectively.

JURISDICTION

This Court has decided to review the decision of the District Court of Appeal in this case via the exercise of its Conflict Jurisdiction. Respondents respectfully assert there is no conflict between the opinion in *Smith* and the cases cited by Petitioner in support of its claim of conflict jurisdiction. In the alternative, Respondents respectfully assert that, to the extent there is a conflict between this case and any of the cases involving durable powers of attorney, arbitration, and the principle of strict construction, that conflict should be resolved in Respondents' favor. Given the terms of the DPOA (specific and general) at issue and the law that governed at all times relevant to this case, any other result would defeat Ms. Smith's clear intent; and would amount to a retroactive change in the law that Ms. Smith relied upon in creating that DPOA and that all the parties relied upon in

accepting that DPOA and allowing Ms. Horn to act pursuant to its terms by executing documents and contracts including the Arbitration Agreement at issue on Ms. Smith's behalf.

STANDARD OF REVIEW

The proper interpretation of a Power of Attorney is a question of law that the Court should review *de novo*. *See e.g. Alterra Healthcare Corp. v. Bryant,* 937 So.2d 263, 268 (4th DCA 2006), rev. denied, 967 So.2d 196 (Fla. 2007).

STATEMENT OF THE CASE AND FACTS

On June 22, 2001, Ellen Smith ("Ms. Smith") appointed her daughter, Virginia Horn ("Ms. Horn"), as her Attorney-in-Fact via the execution of a broad Durable Power of Attorney (the "DPOA") that included numerous specific and broad grants of express authority. A copy of the DPOA, which became effective immediately upon execution, is included in Respondents' Supplemental Appendix as *Supp. App. 1*. Based on the plain, unambiguous, and broad terms of the DPOA, the Circuit Court and District Court of Appeal determined that, via that instrument, Ms. Smith gave Ms. Horn power that was more than sufficiently broad to allow Ms. Horn to contractually agree to arbitration on Ms. Smith's behalf.

Pursuant to the plain, unambiguous, and broad terms of the DPOA, Ms. Smith gave Ms. Horn the power to deal with and dispose of Ms. Smith's real and personal

property, both tangible and intangible, in a number of ways. Via the DPOA, Ms. Smith specifically granted Ms. Horn the power:

- to collect "any and all sums of money or payments due or to become due to me; (Tab 14, Ex. A. p. 1, line 4)
- to deposit in my name in any banks . . . any and all monies collected or received; (Tab 14, Ex. A. p. 1, lines 4-5)
- to pay any and all bills; (Tab 14, Ex. A. p. 1, line 6)
- to draw checks or drafts upon any and all bank accounts; (Tab 14, Ex. A. p. 1, line 7)
- to enter any safe deposit box . . . and to remove any cash, documents or other property located therein; (Tab 14, Ex. A. p. 1, lines 7-10)
- to sell or dispose of . . . any stock . . . or shares in a mutual fund; (Tab 14, Ex. A. p. 1, lines 10-13)
- to receive the consideration money for the sale thereof; (Tab 14, Ex. A. p. 1, lines 13-14)
- to execute such transfers or assignments as shall be necessary to assign my said shares, bonds, or securities; (Tab 14, Ex. A. p. 1, lines 14-16);
- to sell and convey any and all land owned by me; (Tab 14, Ex. A. p. 1, lines 16-17).

> "and to sell and convey any and all land owned by me and generally to do and perform any matters and things, transact all business, make execute, and acknowledge all contracts, whether involving real property or not, orders, deeds, writings, assurances, and instruments which may be requisite or proper to effectuate any matter or thing apertaining [i.e. pertaining to] or belonging to me, and generally to act for me in all matters affecting my business or property including all power provided pursuant to Florida Statutes Section 709.08 and other Florida Statutes with the same force and effect for all intents and purposes as though I were personally present and acting for myself..."

In addition, by reference to and incorporation of the powers granted to attorneys-in-fact by Section 709.08, Florida Statutes (2001-2010) into the DPOA

Ms. Smith gave Ms. Horn additional specific powers including those conferred by Section 709.08(6), which states:

> "[u]nless otherwise stated in the durable power of attorney, the durable power of attorney applies **to any interest in property owned by the principal**, including, without limitation, the principal's interest in all real property, including homestead real property; all personal property, tangible or intangible; all property held in any type of joint tenancy, including a tenancy in common, joint tenancy with right of survivorship, or a tenancy by the entirety; all property over which the principal holds a general, limited, or special power of appointment; **choses in action**; **and all other contractual or statutory rights or elections**, including, but not limited to, any rights or elections in any probate or similar proceeding to which the principal is or may become entitled. Sec. 709.08(6), Fla. St. (1997-2010)

In addition, neither the DPOA nor the plain and unambiguous terms of Section 709.08, Florida Statutes (2001-2010), which the DPOA expressly incorporates by reference, contains any prohibition or limitation which would have prevented Ms. Horn from contracting on Ms. Smith's behalf to arbitrate any disputes that might arise between Ms. Smith and the Facility relating to her stay. In fact, the only limitations on the powers granted by the DPOA are contained in Section 709.08 (7)(b),which states:

> "[n]otwithstanding the provisions of this section, an attorney in fact may not: [1] Perform duties under a contract that requires the exercise of Personal services of the principal; [2] Make any affidavit as to the personal knowledge of the principal; [3] Vote in any public election on behalf of the principal; [4] Execute or revoke any will or codicil for the principal; [5] Create, amend, modify, or revoke any document or other disposition effective at the principal's death or transfer assets to an existing trust created by the principal unless expressly authorized by the power of attorney; [6] Exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary."

On January 7, 2008, Ms. Horn, acting as Personal Representative of and on behalf of The Estate of Ellen Smith ("Petitioner"), filed the original Complaint in this case in the Circuit Court in and for Volusia County, Florida. In that Complaint, Petitioner sought to recover damages for alleged violations of § 429.28, Florida Statutes, during Ellen Smith's residency at Southland Suites of Ormond Beach, an assisted living facility, from November 11, 2005 through June 29, 2006. *App 2.*

The filing of that complaint in the Circuit Court was improper because, at the time of Ms. Smith's admission to Southland Suites of Ormond Beach (hereinafter "Southland Suites" or "Facility") on November 7, 2005, Ms.Horn, acting as Ellen Smith's attorney-in-fact pursuant to authority granted to her pursuant to the terms of a the previously discussed and undeniably valid DPOA, executed a valid and binding Agreement for Arbitration ("Arbitration Agreement"), pursuant to which she contractually agreed on behalf of Ms. Smith, as her agent and attorney-in-fact, to arbitrate any future disputes that might arise between Ellen Smith or her successors and Southland Suites of Ormond Beach.

The Arbitration Agreement, a complete copy of which is included in the Appendix to this Brief at *Supp App. 2*, provides in pertinent part:

> The Resident and Southland Suites of Ormond Beach, on behalf of themselves and all others claiming by, through or under them, agree that they shall submit to binding arbitration all disputes against each other ... arising out of or in any way related or connected to the Resident's stay and care

> provided at this or any other Southland Suites Assisted Living Center, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care and disputes concerning whether or not any statutory provisions relating to the Resident's rights under Florida law were violated...

The Arbitration Agreement unambiguously provides that any claim or controversy arising out of Ms. Smith's residency at Southland Suites of Ormond Beach, including any statutory claim, must be submitted to binding arbitration. Accordingly, Respondents responded to the complaint by filing their respective Motions to Dismiss and Compel Arbitration. *App. 2-11.* A hearing on the motions was held on July 8, 2008. *App 12 and 13.* Following that hearing and review of a supplemental memorandum filed by Respondents (in direct response to certain arguments raised by Petitioner for the first time at the hearing), the trial court issued an order granting Respondents' motions to compel arbitration, on the ground that Ms. Smith's Attorney-In-Fact had the authority (actual or apparent) to agree to arbitration on her behalf. *App. 14.*

Petitioner's appeal to the Fifth District Court of Appeal followed. Following a full briefing of the issues and consideration of the arguments of the parties and the relevant case law the Fifth District issued an opinion and an Amended Opinion (which is now the subject of Petitioner's appeal to this Court). The only issue before the District Court of Appeal and now before this Court in this case is whether Ms. Horn, Ms. Smith's Attorney-In-Fact pursuant to a Durable Power of

Attorney, who executed and agreed to the Arbitration Agreement on her behalf, had the authority to do so pursuant to the terms of that instrument.

SUMMARY OF ARGUMENT

The decision of the Trial Court's and the District Court of Appeal should be affirmed because:

First, at the hearing on its Motion to Dismiss and Compel Arbitration, Respondents met its burden of establishing the existence of a binding agreement by presenting the trial court with a valid arbitration agreement, executed by Victoria Horn ("Horn") on behalf of Ellen Smith ("Smith"); and a valid Durable Power of Attorney that appointed Ms. Horn as Ms. Smith's Attorney-in-Fact and gave her authority that was more than sufficiently broad to allow her *amongst other things* to contract to resolve disputes via arbitration, on Ms. Smith's behalf.

Next, viewing the DPOA in its entirety, it is undeniably clear that that Ms. Smith, via the execution of the DPOA, intended to (and did) grant Ms. Horn broad power to act on her behalf as her Attorney-in-Fact. Amongst many other things, the DPOA expressly gave Ms. Horn authority including the authority to authority to agree to any contract and to exercise control over any property, tangible or intangible, including but not limited to "causes of action" or "choses in action" such as those alleged in the Complaint in this case. These express grants of authority necessarily included the authority to contractually agree to arbitrate any

claims arising out of her admission to a nursing home including statutory claims, even though the DPOA in this case does not expressly mention the term "arbitration." Moreover, it is clear that Ms. Smith did not expressly place any relevant limitation on Ms. Horn; and that Ms. Smith did not raise an objection to her daughter's execution of the admission or arbitration agreement on her behalf after she did so. Accordingly, both the statutes in effect at all times relevant to this case and the significant body of case law on this issue support the conclusion of the trial court and the District Court of Appeal that Ms. Horn had authority to agree to arbitration on Ms. Smith's behalf.

Petitioner appears to characterize the Fifth District's ruling and opinion in this case as an anomaly which is in conflict with the prevailing case law. However, the fact of the matter is that the Fifth District's ruling and opinion in this case is in line with a growing number of authorities that have addressed the same issue; and have found that DPOAs akin to the one at issue in this case are more than sufficiently broad, even when strictly construed, to authorize an attorney-in-fact, such as Ms. Horn, to act exactly as Ms. Horn did on behalf of her/their principal(s). Based on those cases and the rationale supporting them, this Court should find that there is no conflict between the Fifth District's decision in this case and the decisions cited by Plaintiff or, in the alternative, that any perceived conflict that exists should be resolved in favor of the decision of the Fifth District

in this case and the decisions of the other District Courts cited by the Fifth District in support of that decision.

Further, the terms of the DPOA at issue in this case are abundantly clear; as is Ms. Smith's intent to grant Ms. Horn very broad authority to act on her behalf. Given the clarity of the language used in the DPOA (i.e. the lack of ambiguity in that language), the plain meaning of that language should be applied to determine whether it is sufficiently broad to include the authority to enter an arbitration agreement. Stated another way, a Court may resort to rules of construction only if the language is ambiguous or unclear. Therefore, there is no need to employ the rule of narrow construction in this case or, more precisely, **there is no need to employ the rule of narrow construction in the manner suggested by Petitioner.**

Petitioner's suggested application of the rule of narrow construction (as an enhanced rule of narrow construction) would lead to an absurd result in this case; and, by extension, many other cases. In order to accept Petitioner's proposed application of the rule of narrow construction in this case, this Court would have to disregard the clear terms of the DPOA, disregard the clear intent of the Principal (Ms. Smith), and disregard the statute that was controlling at all times relevant to this case (i.e. at the time the DPOA was drafted and executed, at the time the Arbitration Agreement was entered on Ms. Smith's behalf, and the time the Fifth District issued its opinion in this case); and retroactively apply the terms of an

amended statute standard that was not enacted until years after the parties and the Fifth District acted in this case in reliance upon the correct statute.

Finally, the statute that was in effect at the time the DPOA at issue was drafted, executed by Ms. Smith, employed by Ms. Horn to contractually agree *inter alia* to arbitration on Ms. Smith's behalf and reasonably relied on in good faith by Respondents (who allowed Ms. Horn to act as Ms. Smith's Attorney-in-Fact in a manner allowed for by the plain terms of the DPOA and the statute), controlled all aspects of this case. This fact should not be affected by subsequent changes in the law which obviously could not have been taken into consideration when the DPOA in this case was drafted, executed, employed and relied upon by the parties in this case. Rather, the DPOA in this case should be read in conjunction with the statute in effect at all of the above mentioned, relevant times.

For these reasons, which are explained in further details below, Respondents respectfully submit that the decision of the Fifth District and the Circuit Court in this case should be affirmed; and that, in accordance with the decisions of those Courts, Petitioner should be compelled to arbitrate all of its claims in this case pursuant to the terms of the Arbitration Agreement between the parties.

ARGUMENT

This Court should affirm the rulings of the lower Courts and hold: that Ms. Horn, as Ms. Smith's Attorney-in-Fact, had actual and/or apparent authority to agree to arbitration on Ms. Smith's behalf; that there is no conflict between the Districts or, alternatively that any conflict that exists does not impact the lower Court's decision in this case or should be resolved in Respondents' favor; that the Arbitration Agreement at issue is valid and enforceable; and that the claims raised by Petitioner in this case should be resolved via arbitration pursuant to the terms of the Arbitration Agreement at issue.

I. THE DECISIONS OF THE LOWER COURTS SHOULD BE AFFIRMED BECAUSE THE DECISIONS OF THOSE COURTS WERE BASED ON A PROPER APPLICATION OF THE CONTROLLING LAW TO THE FACTS OF THIS CASE

At the hearing below, Respondents met their burden of establishing the existence of a valid Arbitration Agreement between the Ms. Smith and the Respondents by presenting the Circuit Court with true and correct copies of: (1) a facially valid DPOA, pursuant to which Ms. Smith granted Ms. Horn specific and general powers that were more than broad enough to give Ms. Horn the authority to contractually agree to arbitration on Ms. Smith's behalf (Supp. App. 1); and (2) a facially Arbitration Agreement between the Facility and Ms. Smith (assented to by her lawful Attorney-in-Fact) that applies to and is binding on all of the parties to this case (Supp. App. 2). *See Rocky Creek Retirement Properties, Inc. v. Estate of*

Fox, 19 So.3d 1105, 1109 (Fla. 2d DCA 2009). At that point, the burden shifted to Petitioner to Petitioner to present a valid legal challenge to the authenticity or validity of one or both of those documents. *Id.* That burden proved to be one Petitioner could not meet. Therefore, the Circuit Court ordered arbitration; and, the Fifth DCA, after considering Petitioners arguments on appeal, affirmed the Circuit Court's order. Both of those Courts ruled correctly and, for the reasons explained herein, this Court should affirm their rulings.

A. THE DURABLE POWER OF ATTORNEY AT ISSUE IN THIS CASE GRANTED MS. HORN AUTHORITY WHICH WAS MORE THAN SUFFICIENTLY BROAD TO GIVE HER THE POWER TO ENTER AN ARBITRATION AGREEMENT OR ANY OTHER LEGAL CONTRACT ON MS. SMITH'S BEHALF

A DPOA is a special form of agency that, unlike the usual agency, can continue to exist even if the principal is incapacitated. *See Section 709.08* (1997-2010). A person who is designated as an attorney-in-fact pursuant to a DPOA, as the actual agent of the principal, has full authority to perform, without prior court approval, every act authorized, specifically or implicitly (necessarily implied), in the durable power of attorney on behalf of the principal. *Id.* The force and effect of the agent's actions on behalf of her principal pursuant to the terms of a valid DPOA are the same as if the principal had taken those actions herself. *Id.* the only limitations on a durable power of attorney are those proscribed either by law or the express language of the DPOA itself. *Id.*

The DPOA at issue in this case, via both specific and general grants of power, conferred on Ms. Horn a broad scope of authority to act on Ms. Smith's behalf as her Attorney-in-Fact. These included "nine specific grants concerning Ms. Smith's tangible and intangible property rights" (IB at 20), and a combination of additional **specific and general** grants in the subsequent paragraph, which conferred on her attorney-in-fact the authority:

> "...generally to do and perform any matters and things, transact all business, **make execute, and acknowledge all contracts**, whether involving real property or not, orders, deeds, writings, assurances, **and instruments which may be requisite or proper to effectuate any matter or thing apertaining [i.e. pertaining to] or belonging to [Ms. Smith]**, and generally **to act for [Ms. Smith] in all matters affecting [Ms. Smith's] business or property including all power provided pursuant to Florida Statutes Section 709.08 and other Florida Statutes** with the same force and effect for all intents and purposes as though [Ms. Smith] were personally present and acting for [herself]... (emphasis added)

Reading the DPOA in conjunction with the Section 709.08, Florida Statutes (1997-2010), which controlled at all times relevant to this case and was even incorporated by reference into the instrument, the DPOA granted Ms. Horn the power to act for Ms. Smith in all matters affecting Ms. Smith's business or **property**, expressly gave her the power and authority to exercise control over:

> "**any interest in property owned by the principal**, including, without limitation, the principal's interest in all real property, including homestead real property; **all personal property, tangible or intangible ... choses in action**; and all other contractual or statutory rights or elections, including, but not limited to, any rights or elections in any probate or similar proceeding to which the principal is or may become entitled." Section 709.08(6)(1997-2010).

These broad, unambiguous, specific grants of authority combined to expressly and implicitly give Ms. Horn the authority to execute an arbitration contract ("Arbitration Agreement") on Ms. Smith's behalf; and, thereby, bind Ms. Smith and, by extension, her Estate and heirs to arbitrate any disputes with the Facility or the other Respondents, including all of the claims raised in this case. This is particularly true given that these grants of authority were not limited in any way by other language in the DPOA or any provisions of the Statute. *See* Section 709.08(7)(a)-(b) (1997-2010).

The foregoing analysis is unaffected by the fact the DPOA did not expressly mention "arbitration." While it is true that powers of attorney are to be strictly construed *and* closely examined in order to determine the intent of the principal, it is not true that a DPOA must expressly mention arbitration before it will be held to confer authority upon an attorney-in-fact to contractually agree to arbitration on behalf of her principal. *See e.g. Estate of Irons ex rel. Springer v. Arcadia Healthcare, L.C.,* 66 So.3d 396 (Fla. 2d DCA 2011). There is no legal requirement that a DPOA must include reference to arbitration before a court will find that an attorney-in-fact had the power to contractually agree to arbitration on behalf of her principal; and no legal authority that would allow the principle of strict construction to trump the intent of the principal, as evidenced by a close

examination of the terms of the DPOA (despite what Petitioner appears to suggest via the argument in her Initial Brief). *Id.*

On the contrary, the rule of strict construction of a power of attorney is not absolute and should not be applied to the extent of destroying the purpose of the instrument. *See* 3 Am. Jur. 2d Agency *§ 28. Rule of strict construction—Qualification with regard to purpose of power.* The rule does not call for a strained interpretation, and if the language will permit, a construction should be adopted which will carry out, instead of defeat, the purpose of the appointment. *Id.* Conflicting clauses in a power of attorney should be reconciled, if possible, so as to give an effect to the instrument in keeping with its general intent or predominant purpose. *Id.* The instrument should always be deemed to grant such powers as are essential or usual in effectuating the expressed powers.

Therefore, it is not surprising that Florida's District Court's of Appeal have held that broad grants of authority (specific and general), like those at issue here, are more than sufficient to establish that the intent of a principal (in this case Ms. Smith) was to allow her/his attorney-in-fact to (in this case Ms. Horn), to enter an arbitration agreement or exercise some other power necessarily implied by the language of a DPOA on her/his behalf. *See Schriver v. Schriver*, 441 So. 2d 1105 (Fla. 5th DCA 1983); *Jaylene, Inc. v. Moots*, 995 So.2d 566 (Fla. 2d DCA 2008); *Candansk, LLC v. Estate of Hicks,* 25 So.3d 580, 582 (Fla. 2d DCA 2009);

Sovereign Healthcare of Tampa, LLC v. Estate of Huerta, 14 So.3d 1033, 1034 (Fla. 2d DCA 2009); *LTCSP-St. Petersburg, LLC v. Robinson*, 96 So. 3d 986, 987, n.2 (Fla. 2d DCA 2012); *Estate of Irons ex rel. Springer v. Arcadia Healthcare, L.C.,* 66 So.3d 396 (Fla. 2d DCA 2011).

Schriver v. Schriver

In *Schriver v. Schriver*, 441 So. 2d 1105 (Fla. 5th DCA 1983), the Fifth DCA interpreted the provisions of a DPOA in conjunction with Section 709.08 and held that the DPOA authorized the attorney-in-fact make a binding election for the donor/principal to take an elective share of the principal's deceased husband's estate, even though the DPOA did not expressly grant the specific authority to make that specific statutory election. This case supports and in no way conflicts the Fifth District's decision in this case. In this case, the interpretation of the DPOA in conjunction with Section 709.08, is also necessary and appropriate. As explained previously, reading the two together, it is clear the DPOA in this case conferred on Ms. Horn the authority to agree to arbitration on behalf of Ms. Smith, even though the DPOA in this case did not expressly mention that specific type of dispute resolution.

Candansk, LLC v. Estate of Hicks

In Candansk, LLC v. Estate of Hicks, 25 So.3d 580, 582 (Fla. 2d DCA 2009), the Second DCA was presented with a power of attorney pursuant to which

Ms. Hicks specifically granted her attorney-in-fact the power to "act in my name, place and stead *in any way which I myself could do,* if I were personally present, with respect to ... [c]laims and litigation." (Emphasis added.) The Court noted that a power of attorney need not expressly refer to arbitration to confer the authority to agree to this method of dispute resolution; then reviewed the power of attorney and noted that it authorized the attorney-in-fact to do anything Ms. Hicks could have done personally with respect to claims and litigation.

Based on these facts, the Court reasoned that, because Ms. Hicks could have agreed to arbitration had she been able to act on her own behalf, her attorney-in-fact was likewise authorized to do so. Ultimately, the Court concluded that the language of the power of attorney unambiguously conferred on the attorney-in-fact the general power to act in any way the principal could act with respect to claims and litigation; and that that general power necessarily included the power to agree to submit to arbitration.

Furthermore, the Court analyzed and rejected an argument by the estate that the Court should construe this broad grant of authority to exclude the power to agree to arbitration because the power of attorney only granted the attorney-in-fact the power to act in matters concerning Ms. Hicks' "property rights," not her "personal constitutional rights." The Court stated that the estate's argument evinced "a fundamental misunderstanding of what constitutes property" and

overlooked the fact that the language used in the power of attorney was widely used and commonly understood to include the power to submit to arbitration.

The Court went on to state that the Estate's argument that the power of attorney was intended to provide the attorney-in-fact with authority only with respect to Ms. Hicks' property rights was unavailing because **her Estate's claim against the nursing home *was* property**. The Court explained that one form of intangible property is a *cause of action* or *chose in action,* a right grounded in tort, property or contract law to recover a judgment for money or property from another person whose conduct or activity is deemed by applicable law to have caused the claimant to suffer damage or a loss. *Id.* (internal citation omitted). Furthermore, the Court noted that section 709.08(6), Florida Statutes (2007), specifically identifies a "chose in action" as property to which a durable power of attorney may apply. This case supports the Fifth District's decision in this case.

This case resoundingly supports and in no way conflicts the Fifth District's decision in this case. In this case, as in *Candansk,* the DPOA granted the attorney-in-fact power to make execute, and acknowledge all contracts, and instruments which may be requisite or proper to effectuate any matter or thing pertaining to or belonging to Ms. Smith, and generally to act for Ms. Smith in all matters affecting Ms. Smith's business or property. Moreover, with regard to Ms, Smith's property, the POA gave her attorney-in-fact authority over **any interest in property owned**

by her, including, without limitation, her interest in all real property, including homestead real property; **all personal property, tangible or intangible,** including **"choses in action"** (i.e. over any causes of action including the causes of action alleged in the Complaint in this case.

Jaylene, Inc. v. Moots

In *Jaylene, Inc. v. Moots*, 995 So.2d 566 (Fla. 2d DCA 2008), the Second DCA held that a DPOA that granted "full power and authority" to "manage and conduct all of [the principal's] affairs and to exercise all of [her] legal rights and powers included, pursuant to its express grants or by the necessary implications thereof, the authority to agree to arbitration. This case further supports and in no way conflicts the Fifth District's decision in this case.

Five Points Health Care, Ltd. v. Mallory

In *Five Points Health Care, Ltd. v. Mallory*, 998 So.2d 1180 (Fla. 1st DCA 2008), the First DCA found that the existence of express, unambiguous, broad, general grants of authority to the attorney-in-fact contained in the DPOA that gave the attorney-in-fact the authority to "[p]rosecute, defend and settle all actions or other legal proceeding" touching resident's estate or any matter concerning her, and the broad general grant of authority to and to "[d]o anything" regarding resident's estate, property and affairs that he could do for himself" were sufficient to establish that it was the intent of the principal to grant his attorney-in-fact the

authority to, amongst other things, enter an arbitration agreement on his behalf. This case further supports and in no way conflicts the Fifth District's decision in this case.

Sovereign Healthcare of Tampa, LLC v. Estate of Huerta

In *Huerta,* the Second DCA held that, based on its review, the catch-all provision of the POA in that case (the verbiage of which was not recited in the opinion) set forth a broad and unambiguous grant of authority to Ms. Huerta's daughter-in-law; and that the authority granted by the other provisions of the POA include grants of authority to consent to hospitalization and "to sign any and all releases or consent required" to effectuate such hospitalization that instrument granted her attorney-in-fact the authority to agree to an arbitration clause contained in a the nursing home admissions agreement. This case further supports and in no way conflicts the Fifth District's decision in this case.

LTCSP-St. Petersburg, LLC v. Robinson

In *Robinson* the Second DCA held *inter alia* that DPOA that authorized attorney in fact to act on resident's behalf in broad terms and allowed him to "perform all and every act or acts, thing or things, in law needful and necessary to be done in and about the premises, as fully, completely, and amply, to all intents and purposes whatsoever as I might or could do if acting personally," and where 'the powers described within "the premises" of this power of attorney were

extensive, including "in general, to see that my needs are met and that I am provided for in the event I am unable to take care of myself,'" and that the powers were not restricted to specific types of transactions or tasks (as a limited POA would be, and recognizing these facts made the case distinguishable from the decision in McKibbin). This case, like the previously discussed cases, supports and in no way conflicts the Fifth District's decision in this case.

Estate of Irons ex rel. Springer v. Arcadia Healthcare, L.C.

In *Irons* the Second DCA recognized that a power of attorney need not expressly refer to arbitration to confer the authority to agree to that method of dispute resolution but held that the grants of authority in that case, which dealt solely with healthcare issues and were "strikingly similar to that used in the health care surrogate statute," and contained no other grants of authority that would demonstrate it was the intent of the principal to authorize agent to act with respect to **property rights** or litigation did not confer on agent the power to enter an arbitration agreement with a health facility. This case too supports the Fifth and in no way conflicts with the Fifth District's decision in this case. Moreover, this case (cited by Petitioner in her Brief) flies directly in the face of Petitioner's main argument on appeal.

Section Conclusion

All of the foregoing cases support Respondents' position in this case and completely undermine the Petitioner's position. Moreover, despite Petitioner's assertion to the contrary, the Fifth District's decision in this case does not conflict in any meaningful way with any of the cases cited by the Plaintiff. In the alternative, given the facts of this case and the soundness of the decision of the Fifth District in this case, to the extent this Court finds that a conflict exists between this and any of the cases cited by Petitioner, that conflict should be resolved in favor of the Fifth District and Respondents.

B. PETITIONER'S ARGUMENT PURPORTING TO EXPLAIN "THE PROPER INTERPRETATION OF A POWER OF ATTORNEY" IS ANYTHING BUT PROPER AND ITS ULTIMATE ASSERTION THAT A DPOA CANNOT CONFER THE AUTHORITY TO AGREE TO ARBITRATION UNLESS IT EXPRESSLY MENTIONS ARBITRATION IS WRONG

Petitioner begins her argument in that section by reciting several relatively straightforward principles of contract construction. For example, the principle that "[c]onstruction of a power of attorney is governed by contract law" and the principle that "powers of attorney are to be strictly construed" (ID at 11). However, from there, Petitioner rapidly ascends into an into a discussion that misstates and contorts those principles and certain interpretive case law in an effort to support its meritless position that that only powers of attorney that expressly mention arbitration by name can be held to confer on an agent the authority to

agree to that form of dispute resolution on behalf of her principal. During the course of this process, Petitioner takes unsupported and/or conflicting positions and engages in reasoning that exposes the fatal flaws in its argument. Those positions and errors in reasoning are discussed in the following paragraphs.

Judge Altenbernd's concurrence in *Falls at Naples*

Petitioner cites certain language from Judge Altenbernd's concurrence in *Falls at Naples, Ltd. v. Barnett Bank of Naples, N.A.*, 603 So. 2d 100, 102 (Fla. 2d DCA 1992) out of context and in a manner that appear to attempt to give the inaccurate impression that language supports its position that only powers of attorney that expressly mention arbitration by name can be held to confer on an agent the authority to agree to that form of dispute resolution on behalf of her principal. In reality, that language provides no support for Petitioner's position in this case.

In *Falls at Naples*, there were several limited powers of attorney that appointed a Mr. Levine as "attorney ... to do any and all acts that he, in his sole discretion, shall deem necessary or prudent with regards to the **acquisition of the property** ... including but not limited to executing any document or instrument affecting the interest in said property...." In his concurrence, Judge Altenbernd stated that, while these documents gave Mr. Levine broad powers to do every act "necessary to be done in and about the premises" (i.e. in relation to a certain real

estate acquisition) they **contained no language expressly authorizing him to borrow money on the credit of the individual partners or to execute personal guarantees on their behalf**; and went on to discuss the principle of strict construction in the narrow factual context of that case.

Judge Altenbernd's concurrence in *Falls at Naples* has no application in and does not support Petitioner's position in this case. Furthermore, in *LTCSP-St. Petersburg, LLC v. Robinson*, 96 So. 3d 986, 987, n.2 (Fla. 2d DCA 2012), a much more recent case involving facts much more similar to those in this case, Judge Altenbernd authored an opinion that supports Respondents' position in this case; and flies on the face of Petitioner's.

Petitioner's Contradictory Positions

Petitioner preliminarily discusses the principle of strict construction, the principle that a POA should be closely examined in order to ascertain the intent of the principle, and the principle that a POA should be interpreted in a way that gives meaning to all the provision of the instrument and not in a way that renders certain provisions meaningless. However, it then quickly turns to arguing for the application its own unique and enhanced brand of strict construction (which it would have trump all other considerations and apply even in the absence of ambiguous language); an application that, contrary to the rule of construction it began by discussing, would render certain provisions of the DPOA meaningless.

In short, Petitioner seeks to convince the Court to adopt a position that would: (1) ignore the broad and unambiguous grants of authority - specific and general - in the DPOA that evidence the intent of the principal in this case (to the extent those grants do not advance Petitioner's position in this case); and (2) to interpret the DPOA in a way that renders certain of those grants of authority meaningless and defeats the intent of the intent of the principal in this case because those grants do not advance Petitioner's position in this case). This would be extraordinary and highly improper; particularly given that the cases Petitioner cites as purported support for its position actually provide no such support.

James v. James

Petitioner labels the paragraph of the DPOA in this case (which contains specific and general grants of authority) as a "catchall" clause and cites *James v. James*, 843 So. 2d 304, 308 (Fla. 5th DCA 2003) in an effort to justify its proposed negation of the grants of authority in that paragraph. However, *James* is completely factually distinguishable from and inapplicable to this case. In *James*, the 5th DCA recognized and acknowledged the long established principle that an agent cannot make gifts of property to himself or others unless it is expressly authorized in the POA and that any such power would be construed strictly (citing *In re Estate of Bell,* 573 So.2d 57, 58 (Fla. 1st DCA 1990); *Vaughn v. Batchelder,*

633 So.2d 526 (Fla. 2d DCA 1994); and *Kotsch v. Kotsch,* 608 So.2d 879 (Fla. 2d DCA 1992)).

Paragraph 16 of the POA in *James* gave the attorney-in-fact power to make gifts to and on behalf of the decedent's four children in amounts up to $10,000 per year per child so long as the gifts were consistent with "prudent estate planning and financial management, and after consultation with Mellon Bank NA." Paragraph 17 of the POA empowered the attorney-in-fact to do any act in connection with the decedent's property he could do himself. The attorney-in fact in that case proceeded to make gifts of the property to his four adult children the value of which exceeded the amounts set forth in the POA ($10,000 per child) and did so without consulting with the Bank prior to making gifts as was required in the POA.

In an effort to justify his action in subsequent legal proceedings, the attorney-in fact later argued that the broad general statement in Paragraph 17 provided him with authority act in this manner, without regard to the express limitations of paragraph 16. It was in this limited factual context that the District Court of Appeal stated that, if it construed Paragraph 17 as granting the holder of the power of attorney such broad powers, there would be no meaning left for Paragraph 16, or area for its operation; and concluded the attorney-in-fact had exceeded his authority under the power of attorney by gifting the property involved

to his adult children. *James* at 307-308.

The factual situation in *James* was a far cry from the factual situation in this case; and the Court's ruling in that case clearly does not apply to and cannot be used in this case in the manner suggested by Petitioner. The *James* Court used the rules of construction and gave effect to the clear intent of the principal (discerned from the terms of the POA) to come to a decision in that case. Unlike the *James* Court, Petitioner would have this Court apply an enhanced rule of strict construction and ignore the intent of the principal (discerned from the terms of the POA). This should not be allowed.

Other cases similar to *James*

Petitioner also cites numerous cases in its Brief that, are very similar to *James* in that they deal with the narrow factual scenario of attorneys-in-fact *gifting property to themselves or others or transferring property without consideration to the principal. See e.g. Dingle v. Prikhdina*, 59 So. 3d 326, 328 (Fla. 5th DCA 2011); *Bloom v. Weiser*, 348 So. 2d 651, 653 (Fla. 3d DCA 1977); *Krevatas v. Wright*, 518 So. 2d 435, 436-37 (Fla. 1st DCA 1988); *In re Estate of Bell*, 573 So. 2d 57 (Fla. 1st DCA 1990). *Kotsch v. Kotsch*, 608 So.2d 879 (Fla. 2d DCA 1992). Petitioner presumably cites these case just as it cited *James*, in an effort to justify its above discussed position in this case; and the extraordinary action it is asking the Court to take. However, like *James*, all of those similar cases are completely

factually dissimilar to, distinguishable from, and inapplicable to this case. Moreover, those cases all involve efforts to by the Court to effect the intent of the principal not ignore it as Petitioner seeks to have the Court do here.

Emeritus Corp. v. Pasquariello

Petitioner also cites *Emeritus Corp. v. Pasquariello*, 95 So. 3d 1009, 1012 (Fla. 2d DCA 2012) for the proposition that "[t]o determine the scope of the power of attorney, we must examine the language of any catch-all provisions and provide "an interpretation which gives reasonable meaning to all the provisions of a contract is preferred to one which leaves part useless or inexplicable." *Id.* Petitioner further cites *Premier Ins. Co. v. Adams*, 632 So. 2d 1054, 1057 (Fla. 5th DCA 1994)(*citing First Nat'l Bank v. Savannah, F. & W. Ry. Co.*, 18 So. 345, 348 (Fla. 1895)); *Curtiss–Wright Corp. v. Exhaust Parts, Inc.*, 144 So. 2d 822, 823-24 (Fla. 3d DCA 1962) for the same proposition.

Petitioner presumably cited *Pasquariello* and these other cases as support for its above discussed position. This is interesting given that *Pasquariello* and these other cases fly directly in the face of Petitioner's position and support Respondents' position because it is Petitioner's position **not** Respondents' that, if accepted, will negate provisions of the DPOA in this case (and others); and render those provisions useless, inexplicable, and meaningless without regard to the intent of the principals that executed them.

Cases finding "nothing" in a POA to establish intent to grant legal authority to enter into an arbitration agreement

The DPOA in this case is vastly different than the POAs in the several cases where the Courts have found that there is "nothing" in a POA that would establish **expressly or by necessary implication** that it was the intent of a principal to grant her attorney-in-fact the legal authority to enter into an arbitration agreement on her behalf. *See Estate of Irons ex rel. Springer v. Arcadia Healthcare, L.C.,* 66 So.3d 396 (Fla. 2d DCA 2011); *Carrington Place of St. Pete, LLC v. Estate of Milo (In re Estate of Milo),*19 So.3d 340 (Fla. 2d DCA 2009); *In re Estate of McKibbin v. Alterra Health Care Corp.*, 977 So.2d 612 (Fla. 2d DCA 2008). In short, this case is completely, factually distinguishable from and, therefore, is not governed by the decisions in these cases.

By way of example, *McKibbin* is completely distinguishable from this case, something the Fifth District explained in detail in footnote one of its opinion in this case. As noted by the Fifth DCA:

> In *McKibbin,* the Second District held that an estate was not bound by an arbitration agreement signed by the decedent's attorney-in-fact because "[n]othing in that power of attorney ... gave ... [the attorney-in-fact] legal authority to enter into an arbitration agreement on behalf of [the principal]." [Petitioners] read *McKibbin* as holding that an attorney-in-fact is not authorized to execute an arbitration agreement on behalf of the principal unless the agreement expressly lists arbitration as a type of agreement within the attorney-in-fact's authority to enter for the principal. However, less than a year after *McKibbin* was decided, the Second District held in *Moots* that *McKibbin* was "not controlling" because it did not recite language of the DPOA in that case for comparison to other cases.

> Consistent with our holding in this case, *Moots* held that a broad, general grant of authority in a DPOA was sufficient to encompass arbitration. *Moots,* 995 So.2d at 570.
>
> Additionally, the *McKibbin* DPOA was included in the record below and in this appeal. A review of it makes clear the basis for the court's reasoning and its distinction from the instant DPOA. The document at issue in *McKibbin* began by granting the attorney-in-fact specific powers related to the donor's real estate, tangible personal property, intangible personal property, income taxes, and trust. Then it granted the power to "do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises." Black's Law Dictionary defines the term "premises" as "[t]hat which is put before, that which precedes, the forgoing statements." *Black's Law Dictionary,* 1180 (6th ed. 1990). Thus, the seemingly broad grant of authority in the *McKibbin* DPOA was limited to the areas that preceded it. The *McKibbin* DPOA also contained an "Appointment of Health Care Surrogate" clause, which granted authority to "authorize my admission to ... a health care facility" and "provide ... consent on my behalf." These powers took effect only in the event that the donor was "determined to be incapacitated." In contrast, the instant DPOA contains no similar limiting phrases and applies regardless of capacity. This would explain why the court in *McKibbin* focused on the lack of evidence of incapacity, which is not relevant in this case.

Estate of Irons ex rel. Springer v. Arcadia Healthcare, L.C., 66 So.3d 396 (Fla. 2d DCA 2011) and *Carrington Place of St. Pete, LLC v. Estate of Milo (In re Estate of Milo),* 19 So.3d 340 (Fla. 2d DCA 2009) are similarly distinguishable.

Petitioner's Necessary and Proper Argument

Further Petitioner argues that "the general broad grants within powers of attorney that also contain specific grants are not unlike the Necessary and Proper Clause in the United States Constitution," and asserts that general broad grants within all powers of attorney should be viewed as granting authority to perform

acts which would be necessary to carry out the specific grants. This represents yet another effort by Petitioner to undermine the intent of Ms. Smith (and others who drafted intentionally broad DPOAs under the version of the DPOA statute that controlled at the time); and should not be allowed.

There are already cases involving specific and general grants of authority which hold that the general grants of authority that confer full power and authority to do and perform every act and thing whatsoever necessary to be done "**in and about the premises**" of a POA which read the highlighted language as a limitation. *See e.g. Him v. Firstbank Florida*, 89 So. 3d 1126 (Fla. 5th DCA 2012). There is, however, no legitimate authority (case law or otherwise) for the creation and retroactive application of an across the board rule that would apply to and limit all POAs containing "general broad grants within powers of attorney that also contain specific grants" including POAs even where the principals that drafted those POAs intentionally omitted limiting "in and about the premises" language.

In sum, Petitioner's "necessary and proper" argument represents no more than another effort by Petitioner to undermine and override the intent of principals with intentionally broad DPOAs (created prior to 2011 and enforceable under the law in effect when they were created). Furthermore, the creation and retroactive application of such a rule to POAs (created prior to 2011) would be inequitable and unfairly prejudicial to the Facility and other Respondents **who accepted and**

reasonably, detrimentally relied on that DPOA and, based on its terms and appropriateness of the same under the law as it existed during the relevant time period, allowed Ms. Horn to sign the Arbitration Agreement on Ms. Smith's behalf. If there had been a rule like the on the Plaintiff is suggesting in place during the relevant time period, the Facility could have had Ms. Smith (rather than Ms. Horn) sign the Arbitration Agreement. However, at this point, many years after the fact, this is something the Facility cannot do.

Interestingly, in 2011, well after the time period relevant to this case, the Florida Legislature revised Chapter 709 substantially; and added to the statute *inter alia* a provision, § 709.2201(1), Fla. Stat. (2011), which states:

> [e]xcept as provided in this section or other applicable law, an agent may only exercise authority specifically granted to the agent in the power of attorney and any authority reasonably necessary to give effect to that express grant of specific authority. General provisions in a power of attorney which do not identify the specific authority granted, such as provisions purporting to give the agent authority to do all acts that the principal can do, are not express grants of specific authority and do not grant any authority to the agent. Court approval is not required for any action of the agent in furtherance of an express grant of specific authority.

Any DPOA created subsequent to 2011 will be subject to this provision and the other revised provisions of Chapter 709, Florida Statutes (2011), as it now exists and that, any principal who wishes to draft a DPOA will need to consult the revised statute when creating that DPOA to ensure that instrument will be as narrow or as broad as the drafter wishes it to be (within the limitations of the

DPOA statute). However, as discussed in the next section, this new statute should have no impact on the DPOA in this case or any other DPOA drafted prior to the effective date of the new statute.

C. *THE FIFTH DISTRICT'S DECISION IN THIS CASE IS NOT IN CONFLICT WITH THE REVISED VERSION OF CHAPTER 709, FLORIDA STATUTES, WHICH WAS ENACTED IN 20011 ALMOST A YEAR AFTER THAT COURT RENDERED ITS DECISION*

As explained previously herein, both the controlling statutes and case law applicable to this case support the conclusion that Ms. Horn had authority to contractually agree to arbitration on Ms. Smith's behalf. The foregoing is unaffected by the repeal and replacement of Section 709.06, Florida Statutes, or any other provision of Florida law relating to Durable Powers of Attorney including Section 709.2201(1), Florida Statutes in 2011. As stated in the previous section, that statute does not impact the DPOA in this case for several reasons.

First, Section 709.2201(5), Florida Statutes, provides that "[a]uthority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed and to property that the principal acquires later..." Thus, Section 709.2201(5), like Section 709.06, allows for an attorney-in-fact to exercise power over the property of a principal which, under Florida law included "causes or action" or "choses in action."

Next, the DPOA at issue in this case contains numerous specific grants and general grants of authority over contracts and all property of any kind which, by

definition, includes "choses in action" or "causes of action" such as those asserted in the Complaint in this case. Finally, Section 709.2402, Florida Statutes, a companion statute, titled "Effect on existing powers of attorney" states in subsection (3), "[w]ith respect to a power of attorney existing on October 1, 2011, this part does not invalidate such power of attorney and it shall remain in effect. **If a right was acquired under any other law before October 1, 2011, that law continues to apply to the right even if it has been repealed or superseded"** *See* Section 709.2402(3)(emphasis added) and, by extension, section 709.06.

D. NOTWITHSTANDING PETITIONER'S FOCUS ON LABELING THE GRANTS CONTAINED IN POWERS OF ATTORNEY (SPECIFIC, GENERAL. ETC,) AND RIGIDLY ASSIGNING THEM A CLASSIFICATION ON THE BASIS OF THOSE LABELS, IT IS THE TERMS OF AN INDIVIDUAL DPOA TAKEN AS A WHOLE AND THE INTENT OF THE PRINCIPAL THAT ARE PARAMOUNT AND ULTIMATELY CONTROL WHETHER THAT PARTICULAR DPOA SHOULD BE READ AS GRANTING AUTHORITY TO ENTER AN ARBITRATION AGREEMENT

Labels and classifications (which can fall short) are not ultimately controlling in determining the proper scope of a DPOA; **content and intent** are. To determine the scope of the power of attorney such as the one in this case, the Court must examine the language of any catch-all provisions and the relationship of that language to the types of interests over which the power of attorney specifically grants authority in order to ascertain and give effect to the intent of the principal. *See Emeritus Corp. v. Pasquariello*, 95 So.3d 1009 (Fla. 2d DCA 2012);

Sovereign Healthcare of Tampa, LLC v. Estate of Huerta ex rel. Huerta, 14 So.3d 1033, 1034 (Fla. 2d DCA 2009).

As explained previously, in this case, the DPOA granted the attorney-in-fact power to make execute, and acknowledge all contracts and instruments which may be requisite or proper to effectuate any matter or thing pertaining to or belonging to Ms. Smith, and generally to act for Ms. Smith in all matters affecting Ms. Smith's business or property. Moreover, with regard to Ms, Smith's property, the POA gave her attorney-in-fact authority multiple specific grants of authority over **any interest in property owned by her**, including, without limitation, her interest in all real property, including homestead real property; **all personal property, tangible or intangible,** including **"choses in action"** (i.e. over any causes of action including the causes of action alleged in the Complaint in this case).

Though Petitioner may try to downplay these grants of authority by assigning them one label or another, it cannot change the fact that these grants, taken together, were more than sufficient to necessarily grant Ms. Smith's attorney-in-fact the authority to enter an Arbitration Agreement on her behalf.

E. THERE IS NO MERIT TO PETITIONER'S ARGUMENT THAT CONSENT TO AN ARBITRATION AGREEMENT MUST BE "KNOWING AND VOLUNTARY" CONSENT AS OPPOSED TO THE STANDARD CONSENT REQUIRED UNDER FLORIDA LAW FOR THE FORMATION OF ANY CONTRACT

In light of the fact Ms. Horn had clear authority to act on Ms. Smith's behalf; and that Ms. Smith commanded that Ms. Horn's actions on her behalf would have the same force and effect as if she herself had acted, Plaintiff's argument that Ms. Horn could not bind Ms. Smith to arbitration agreement and thereby waive her right to a trial by jury is also without merit. Inherent in the authority to make execute, and acknowledge all contracts on Ms. Smith's behalf and to and generally to act for Ms. Smith in all matters affecting Ms. Smith's business or property including and exercise power over all Ms. Smith's property, including choses of action, is the authority to contract away rights Ms. Smith may have had just as Ms. Smith herself could have done.

It is well settled that waivers of both statutory and constitutional rights are enforceable under Florida law. See *Unicare Health Facilities v. Mort*, 553 So.2d 159, 161 (Fla. 1989) (holding in a Chapter 400 case similar to this one that "[c]learly, statutory rights can be waived."); *Bland,* 927 So.2d at 258 (holding that "as a general proposition, a party may waive statutory rights"); *In re Amendment to the Rules Regulating the Florida Bar—Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct,* 939 So.2d 1032 (Fla. 2006) (adopting amendment to Rules

Regulating the Florida Bar that provides for contractual waiver of constitutional cap on contingent fees in medical malpractice cases).

Thus, it is undeniable that Ms. Smith could have waived her right to jury trial and/or other rights including statutory rights under chapter 400. By extension, given the terms of the DPOA in this case, which allowed Ms. Horn to take any action Ms. Smith might have taken relating to Florida Statutes, it is similarly undeniable that Ms. Horn had the authority, acting in Ms. Smith's place and on her behalf, with the same force and effect as if Ms. Smith herself had acted, had the authority to contractually waive her right to jury trial and/or other rights including statutory rights under Chapter 429, Florida Statutes.

F. THERE IS NO MERIT PETITIONER'S ARGUMENT THAT A PARTIES CONSENT TO AN ARBITRATION AGREEMENT MUST BE "KNOWING AND VOLUNTARY" CONSENT AS OPPOSED TO THE STANDARD CONSENT REQUIRED UNDER FLORIDA LAW FOR THE FORMATION OF ANY OTHER TYPE OF CONTRACT

As a preliminary matter, this argument was raised by Petitioner for the first time on appeal and, therefore, should be deemed waived and should not be considered by this Court. In the alternative, to the extent this argument is considered by the Court, it should be soundly rejected. Petitioner suggests that a waiver of constitutional rights must be "knowing and voluntary" and cites to *DeJesus v. State*, 848 So.2d 1276, 1277 (Fla. 2d DCA 2003) for this proposition.

DeJesus is a criminal case, has no application in a civil case relating to waiver of rights via contract.

In spite of this, Petitioner appears to be suggesting to this Court that the "knowing and voluntary" standard set out in *DeJesus* and cases similar to it should be substituted in place of the prevailing standard under Florida and Federal law, which requires only standard consent to an arbitration agreement, in cases involving arbitration agreements and certain types of Durable Powers of Attorney (i.e. DPOAs that fall into certain of the rigid classifications Petitioner created and advocates the use of in her Initial Brief) are involved.

As a general matter, there is no legitimate basis for adopting the "knowing and voluntary standard" in cases involving arbitration agreements. In *Rocky Creek, supra*, the Plaintiff (represented by the same law firm that represents Petitioner in this case) argued that no one had explained the arbitration agreement to the resident (who chose not to read it) **and that even if the resident had read the agreement she would not have understood that she was waiving her right to jury trial.** On that basis, they argued the agreement was not valid and enforceable even though the resident signed it freely without reading it. In short, they argued that a heightened standard more stringent than a "standard consent" standard should apply and be used to invalidate the agreement. This previously

rejected proposed adoption of the "knowing and voluntary" at the heart of the argument Petitioner is making here.

The *Rocky Creek* Court rejected the argument stating, the alleged inability to understand the agreement did not "vitiate [the resident's] assent to [the arbitration agreement at issue in that case] in the absence of some evidence she was prevented from knowing its contents". *Rocky Creek* at 1108-09. It went on to reiterate the venerable principle that a party to a contract is "conclusively presumed to know and understand the contents, terms, and conditions of the contract" and held that "once [the resident] signed the Agreement she was presumed to know, understand, and agree to its contents" (i.e. there was "standard consent"). *Id.*

The 11th Circuit also rejected this argument in *Caley v. Gulfstream Aerospace Corp., supra.* The Appellants in *Caley*, who were pursuing claims under a number of federal statutes (similar to Appellee's state statutory claims here), claimed the arbitration agreement which expressly waived their rights to jury trial was subject to a "knowing and voluntary" standard in evaluating the enforcement of the waiver. The Court recognized that they (like Appellee's here) were advocating for the adoption of a standard that would require much more than "standard consent" (i.e. that the party had a general understanding that a binding agreement or contract was being entered into), the prevailing standard under Federal and State law.

The *Caley* Court considered that argument and rejected it on numerous grounds including the grounds that: (1) arbitration contracts covered by the FAA are "valid, irrevocable, and enforceable" contracts which a court must enforce absent a generally applicable principle of *contract* law under which the agreement could be invalidated; (2) a party agreeing to arbitration does not waive any substantive statutory rights; it only submits to their resolution in an arbitral, rather than a judicial, forum; (3) the Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case *once it is determined that the litigation should proceed before a court;* therefore, if claims are properly before an arbitral forum pursuant to an arbitration agreement, the party is not entitled to a jury trial or to a judicial forum for covered disputes; and (4) the FAA's plain language is clear that arbitration agreements are enforceable except for state-law grounds for ordinary revocation and, as such, unless Congress has clearly expressed an intention to preclude arbitration of a statutory claim, a party is bound by its agreement to arbitrate.

In sum, the 11th Circuit concluded that general contract principles govern the enforceability of arbitration agreements and that no heightened "knowing and voluntary" standard applies, even where the covered claims include statutory claims generally involving a jury trial right. The Court noted its conclusion was consistent with the decisions of many of its sister circuits. *Id.* at 1372-73 (citing

American Heritage Life Ins. Co. v. Orr, 294 F.3d 702, 711 (5th Cir.2002); *Sydnor v. Conseco Fin. Serv. Corp.,* 252 F.3d 302, 307 (4th Cir.2001); *Koveleskie v. SBC Capital Mkts., Inc.,* 167 F.3d 361, 368 (7th Cir.1999); *Seus v. John Nuveen & Co.,* 146 F.3d 175, 183-84 (3d Cir.1998), *abrogated on other grounds.*

Appellee in this case is advocating the adoption of a heightened "knowing and voluntary" standard to replace the normal "contract consent standard" that is the prevailing standard under Florida law (i.e. is advancing the same argument advanced by Appellants in *Caley*). Based on the rationale set out by Florida's Second DCA in *Rocky Creek*; and the rationale set out by the 11th Circuit in *Caley*, this Court should reject Appellee's argument and refuse to adopt the heightened "knowing and voluntary" standard as the new standard in Florida. **This is particularly true where Petitioner appears to be asserting that this heightened standard should apply only when a specific class or classes of DPOA (defined by Petitioner in their Initial Brief) is at issue in a case.** This application would treat arbitration agreements differently than other contracts in some instances; and would treat some arbitration agreements differently than other arbitration agreements in other cases based solely on the "classification" of the DPOA at issue in a case. This would be both unwieldy in terms of practical application; and, quite simply, wrong as a matter of law.

The foregoing notwithstanding, even if the heightened "knowing and voluntary" waiver standard were applicable (which it clearly is not), it would still not be sufficient to invalidate the Agreement in this case for one key reasons. The arbitration agreement in this case is written in simple terms that any reasonable person could or should have understood if she had read the agreement; and, if Ms. Horn had read the arbitration agreement, she would have been: alerted to the fact there was a binding arbitration agreement in the admission agreement; would have understood its significance which was explained in simple terms in the Agreement; and would have known she had the option of rejecting it on Ms. Smith's behalf.

II. IF MS. SMITH WAS COMPETENT TO SIGN THE ARBITRATION AGREEMENT AT THE TIME OF HER ADMISSION, AS PETITIONER SUGGESTS, THAT FACT WOULD FURTHER SUPPORT RESPONDENTS' POSITION BY ESTABLISHING THAT, IN ADDITION TO ACTUAL AUTHORITY, MS. HORN ALSO HAD "APPARENT AUTHORITY" TO ACT ON MS. SMITH'S BEHALF

If Ms. Smith was competent to sign the arbitration agreement at the time of her admission, as Petitioner appeared to suggest to the Fifth DCA, that fact would further support Respondents' position. By allowing Ms. Horn to handle all aspects of her admission to Southland Suites, with full knowledge of all that entailed and full knowledge that Ms. Horn possessed a DPOA the facility would rely on, Ms. Smith cloaked her daughter with the mantle of apparent authority.

Apparent authority is authority that the principal knowingly permits the agent to assume or, by her actions or words, holds the agent out as possessing.

Stiles v. Gordon Land Co., 44 So.2d 417 (Fla. 1950); *Taco Bell of California v. Zapone*, 324 So.2d 121 (Fla. 2d DCA 1975). Under the doctrine of apparent authority, an agency will arise when the principal allows or causes others to believe that an individual has authority to do an act, inducing their detrimental reliance. In other words, an agency can arise even in the face of the principal's silence when the principal by his or her actions creates a reasonable appearance of authority. *See Fla. Jur. 2d Agency and Employment* s. 55 (citing *Stiles v. Gordon Land Co.*); *Villazon v. Prudential Health Care Plan*, 842. So.2d 842 (Fla. 2003).

By allowing Ms. Horn to handle all aspects of her admission to Southland Suites, with full knowledge of all that entailed and full knowledge that Ms. Horn possessed a DPOA the facility would rely on, Ms. Smith held Ms. Horn out as possessing sufficient authority to act, and knowingly permitted her to have such authority. Southland Suites relied on this apparent authority and contracted with Ms. Horn under the belief that she was acting with authority on her mother's behalf. As this entire situation was caused by Ms. Smith's actions, her Estate (which ironically is being represented by Ms. Horn as Personal Representative) is estopped from now denying Ms. Horn's authority to act on her behalf. *See Fla. Jur. 2d Agency and Employment* s. 58 (citing *T.G. Bush Grocery Co. v. Conely*, 55 So. 867 (Fla. 1911).

In addition, if Ms. Horn did not have authority to act on her behalf, Ms. Smith should not have allowed the arbitration agreement she made and executed on her behalf to stand. Ms. Smith, if she had capacity as Petitioner implies, would have had the ability to object to the arbitration agreement Ms. Horn entered on her behalf. In fact, if she wished to avoid being bound by it, she would have had the duty to do so. However, she never did. Thus, Ms. Smith's Estate is estopped from now denying that Ms. Horn had authority to act on Ms. Smith's behalf in executing, amongst other things, the arbitration agreement at issue in this case. *Id.* (citing *Peace River Phosphate Mining co. v. Green*, 135 So. 825 (Fla. 1931).

CONCLUSION

Based on the foregoing, Respondents respectfully request that this Court affirm the decision of the District Court of Appeal and Circuit Court and hold that: Ms. Horn, as Ms. Smith's Attorney-in-Fact, had actual and/or apparent authority to agree to arbitration on Ms. Smith's behalf; that there is no conflict between the Districts or, alternatively that any conflict that exists does not impact the lower Court's decision in this case or should be resolved in Respondents favor; that the Arbitration Agreement at issue is valid and enforceable; and require that the claims raised by Petitioner in this case be resolved via arbitration pursuant to the terms of the Arbitration Agreement at issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to: Isaac Ruiz-Carus, Esquire and Megan L. Gisclar, Esquire, Wilkes and McHugh, P.A., One North Dale Mabry Highway, Tampa Commons, Suite 800, Tampa, Florida 33609 at IRuiz-Carus@wilkesmchugh.com; tpaIRCstaff@wilkesmchugh.com; Mgisclar@wilkesmchugh.com; and fl@wilkesmchugh.com on this 28th day of April 2014.

QUINTAIROS, PRIETO WOOD & BOYER, P.A.

/s/ - Thomas A. Valdez

Thomas A. Valdez, Esquire
Florida Bar Number: 114952

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure and is in the required font of Times New Roman 14.

/s/ - Thomas A. Valdez

Thomas A. Valdez, Esquire
Florida Bar Number: 114952