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THE SUPREME COURT OF FLORIDA

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

Petitioner,

CASE NO.: SC 10-631
DCA CASE NO.: 5D08-3383
L.T.C. NO.: 2007 33166 Division 31

v.

SOUTHLAND SUITES OF ORMOND BEACH, LLC et al.

Respondents.

_____/

**RESPONDENTS' BRIEF IN RESPONSE TO PETITIONER'S AMENDED JURISDICTIONAL BRIEF**

*QUINTAIROS, PRIETO, WOOD & BOYER, P.A.*

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Florida Cases**

**Other Authorities**

## STATEMENT OF THE CASE AND FACTS

In this case, Petitioner argued the Durable Power of Attorney ("DPOA") under which Ellen Smith's daughter acted in executing Ms. Smith's nursing home admission contract did not authorize the daughter to consent to arbitrate claims arising from Ms. Smith's nursing home care; based largely on the fact the DPOA did not specifically reference arbitration agreements. The Fifth District rejected this argument based on a review of the entire DPOA which led it to conclude and hold the DPOA was expansive enough to authorize Ellen Smith's daughter to enter a binding arbitration agreement on her mother's behalf.

Dissatisfied with the Fifth District's application of long-standing law, the Petitioner seeks discretionary review in this Court based on a claim that the opinion in this case: (I) expressly and directly conflicts with the decisions of this Court and numerous other districts on the issues of interpretation and enforceability of a durable power of attorney; or (II) misapplied decisional law. Neither basis has merit. For the reasons discussed below, this Court should decline discretionary review and deny the petition.

## SUMMARY OF ARGUMENT

This Court should not exercise discretionary (conflict) jurisdiction in this case. The Fifth District's opinion in this case does not expressly and directly conflict with the decisions other appellate courts of this state on the issue of

construction and enforcement of a durable power of attorney ("DPOA"). On the contrary, the Fifth District's decision is consistent with applicable case law from the other Districts and thus Court; and correctly applies decisional law to the facts and issues presented to it. Thus, there is no basis for the exercise of jurisdiction.

## ARGUMENT

### THIS COURT SHOULD DECLINE TO EXERCISE ITS CONFLICT JURISDICTION BECAUSE SMITH *DOES NOT* CONFLICT WITH NUMEROUS DECISIONS OF THE OTHER DISTRICTS ON THE ISSUES OF THE INTERPRETATION AND ENFORCEABILITY OF A DURABLE POWER OF ATTORNEY

In order to legitimately invoke this Court's discretionary conflict jurisdiction, a petitioner must establish the existence of an **express and direct conflict** between decisions of the District Courts of Appeal or the Supreme Court on the same question of law. *See* Art. V, §3(b)(3), Fla. Const. (1980) and Rule 9.030(a)(2) of the Florida Rules of Appellate Procedure. This express and direct conflict must be apparent from the four corners of the opinion itself (i.e. the opinion must contain a statement or citation effectively establishing a point of law in which the decision rests). *See Persud v. State*, 838 So. 2d 529, 532 (Fla. 2003); *Reaves v. State*, 485 So.2d 829 (Fla. 1986). An inherent or implied conflict is not sufficient to trigger the Court's discretionary conflict jurisdiction. *Dept of Health & Rehab. Servs. v. Nat'l Adoption Counseling Serv.*, 498 So.2d 888 (Fla. 1986).

Petitioner asserts that it seeks to invoke this Court's jurisdiction based on "express and direct conflict." Unfortunately for Petitioner, this case fails to qualify for discretionary conflict review on that basis because there is no express and direct conflict between this case and any other relevant case evident on the face of the decision (i.e. no statement or citation in the opinion in this case establishing a point of law on which the decision rests that is in conflict with any other relevant case). Petitioner, recognizing this fact, attempts to create one.

Specifically, Petitioner cites various district court decisions for the proposition that a "narrow and strict construction" must be given a DPOA. Petitioner then alleges conflict based on the unsupported claim that, via the decision in this case, the Fifth District announced a new "broad construction" principle to be uniformly applied to all interpretations of durable powers of attorney. The problem for Petitioner is that the opinion in this case announces no such principle (i.e. does not conflict with any other relevant case); and, as a result, there is no legitimate basis for Petitioner's efforts to invoke this Court's jurisdiction under Article V, section 3(b)(3) of the Florida Constitution in this case.

### A. *Smith* consistently applies decisional law from the Fifth District and other district courts of appeal interpreting and enforcing durable powers of attorney

#### 1. The opinion in *Smith* does not conflict with existing decisional law

Petitioner claims several cases conflict with the *Smith* opinion on the "strict

construction" principle: *Three Keys, Ltd. v. Kennedy Funding, Inc.*, 28 So. 3d 894 (Fla. 5th DCA 2009) [1]; *James v. James*, 843 So. 2d 304 (Fla. 5th DCA 2003); *Vaughn v. Batchelder*, 633 So. 2d 526 (Fla. 2d DCA 1994); *Kotsch v. Kotsch*, 608 So. 2d 879 (Fla. 2d DCA 1992); and *Krevatas v. Wright*, 518 So. 2d 435 (Fla. 1st DCA 1988). However, none of these cases expressly and directly conflict with *Smith*. In each of these cases, the appellate courts looked to the all relevant express terms of the contract/instrument at issue to determine whether the contract/instrument was sufficient to evidence an intent by the principal to allow an agent the authority to exercise a certain power on behalf of the principal; just as the Fifth District did in *Smith*.

In these five cases, the point of law Petitioner claims in conflict, is examined through the lens of a fundamental principle of agency law, which requires an agent to avoid conflicts of interests and *prohibits an agent from making gifts of his principal's property to himself or others unless that power is expressly authorized in the instrument.* In *Three Keys*, the Fifth DCA, after conducting a thorough analysis of the overall terms of the contract at issue in that case, held a majority lender did not breach the implied covenant of good faith and fair dealing by liquidating real estate collateral without consulting minority lender. In coming to

[1] *Three Keys* does not involve the interpretation of a durable power of attorney. In that case, the Fifth District Court examined an Inter-Creditor Agreement that defined the relationship between co-lenders.

its decision, the *Three Keys* Court cited *James, supra,* for the **general rule that an agent cannot make gifts of his principal's property to himself or others unless it is expressly authorized** and distinguishing the grant of authority in *Three Keys* in which a majority lender had sole discretion under the agreement to dispose of the property from that in *James.* In *James*, the Fifth DCA relied on the express limitations in a power of attorney to hold that decedent's attorney-in-fact exceeded the authority granted to him by a POA by gifting a residence to his children. In *Vaughn*, the Second District found that an attorney-in-fact had no authority to use a power of attorney to effectively transfer his principal's property to himself "[s]ince the power of attorney here did not include the power to make gifts." *Vaughn* at 528. In *Kotsch*, the Second District held, "that under the circumstances of [that] case [the attorney-in-fact's] transfers of property as gifts to her husband and the appropriation to her own use the funds in the checking account were in violation of her fiduciary capacity in absence of clear language to that effect in the [DPOA allowing such transfers/gifts]..." Finally, in *Krevatas*, the First District stated "[w]e found no language in the power of attorney which expressly or impliedly indicates an intention to authorize gift of [the principal's] money. Neither the text of the document nor the evidence revealing the circumstances surrounding the execution of the document, support a conclusion that [the principal] intended [the attorney-in-fact] *to use the power of attorney for his personal gain*")(emphasis added). **All**

**of these cases are completely factually distinguishable from *Smith*; and none of them expressly and/or directly conflict with *Smith*.**

Similarly, the Fifth District's decision in this case does not expressly or directly conflict with *Estate of Bell v. Johnson*, 573 So. 2d 57 (Fla. 1st DCA 1990) or *Bloom v. Weiser*, 348 So. 2d 651 (Fla. 3d DCA 1977). Those two cases similarly involved reviews by the First and Third District Court's of a power of attorney to determine whether the instrument contained language sufficient to authorize the attorney-in-fact to make gifts or convey real estate for the power of attorney's benefit. **These cases are also completely factually distinguishable from *Smith*; and do not expressly and/or directly conflict with *Smith*.**

Likewise, the Fifth District's decision in this case does not expressly or directly conflict with *Karlen v. Gulf & Western Industries, Inc.*, 336 So. 2d 461 (Fla. 3d DCA 1976)(holding a shareholder was not bound by an arbitration agreement signed by a second shareholder – who executed the arbitration as part of a personal covenant and had no authority to execute such a contract on behalf of the first shareholder) or *Regency Island Dunes, Inc. v. Foley & Assoc.*, 697 So. 2d 217 (Fla. 4th DCA 1997)(holding that a parent corporation that was not a party to an arbitration agreement could not be compelled, based on alter ego theory, to arbitrate claims under agreement to which its subsidiary was party, absent evidence in record to support finding that parent was alter ego of subsidiary). In sum, these

two cases are different than *Smith* because these cases involved entities who did not enter an arbitration contract at all (either directly or via an agent such as an attorney-in-fact acting with authority). *See Rocky Creek Retirement Prop., Inc. v. The Estate of Virginia B. Fox*, 19 So. 3d 1105, 1109 (Fla. 2d DCA 2009)(discussing *Karlen* and *Regency Island* and rejecting an argument virtually identical to the argument Petitioner seeks to assert by citing *Karlen* and *Regency Island).* **These cases are also completely factually distinguishable from *Smith*; and neither one expressly and/or directly conflicts with *Smith*.**

Finally, there is no express or direct conflict between the decision in this case and the decision in *Alterra Healthcare Corp. v. Bryant,* 937 So. 2d 263 (Fla. 4th DCA 2006)(case in which Fourth District cited approvingly to the Fifth District's decision in *Schriver* and held that a similarly broad grant of authority included the power to consent to arbitration) or the decision in *Carrington Place of St. Pete, LLC v. Estate of Milo*, 19 So.3d 340 (Fla. 2d DCA 2009)(case in which Second District held a DPOA did not give any attorney-in-fact the authority to enter an arbitration agreement on behalf of her principal because the language of the DPOA did not "unambiguously make ... a broad, general grant of authority" to the attorney-in-fact in that case). These decisions apply the same rule applied in this case; and do not evidence a conflict between the Fifth District and the Fourth District or Second District.

### 2. The Fifth District's opinion in *Smith* is in accord with and properly applies existing decisional law

The Fifth District's decision in this case is consistent and absolutely in harmony with the decisional law from the Fifth District and other districts. In this case, the Fifth District, like its sister courts, examined the general and specific grants of power in the DPOA at issue to determine whether Ms. Smith's daughter engaged in a valid exercise of power when she executed a nursing home admission contract on her mother's behalf and consented to arbitrate claims arising from nursing home care rendered to Ms. Smith. Ultimately, the Fifth Circuit came to the well reasoned decision that the broad grant of authority conferred by the DPOA at issue granted Ms. Smith's daughter the power to enter into an arbitration agreement, even though the DPOA did not specifically reference arbitration. *Smith* at 104. In support of its reasoning and holding, the *Smith* Court cited a number of cases that supported and were consistent with its ruling. Thus, it is clear from the face of the Fifth District's opinion in this case that its decision is in harmony with – as opposed to being in conflict with – its prior decisions and the prior decisions of its sisters Courts.

In this case, the Fifth District cited longstanding Fifth District precedent in support of its decision. *See Schriver v. Schriver*, 441 So. 2d 1105 (Fla. 5th DCA 1983)(interpreting a DPOA authorizing the donor's daughter to "execut(e) ... any

instrument which may be requisite ... to effectuate any ... thing pertaining ... to me" as "obviously meant to be all-inclusive to allow the donee to do any legal act the donor could do on her own," including "signing documents which secure and protect any legal interest of the donor"). Additionally, in this case, the Fifth District cited precedent from the other Districts in support of its decision. *See Jaylene, Inc. v. Steuer ex rel. Paradise*, 22 So. 3d 711 (Fla. 2d DCA 2009)(concluding that a DPOA was "sufficiently broad" to confer authority on attorney-in-fact to bind principal to arbitration provision in a nursing home admission agreement); *Sovereign Healthcare of Tampa, LLC v. Estate of Huerta ex rel. Huerta*, 14 So. 3d 1033 (Fla. 2d DCA 2009)(same); *Five Points Health Care, Ltd. v. Mallory*, 998 So. 2d 1180 (Fla. 1st DCA 2008) (same); *Jaylene, Inc. v. Moots*, 995 So. 2d 566 (Fla. 2d DCA 2008), *rev. denied*, 995 So. 2d 566 (Fla. 2d DCA 2008); (*Alterra Healthcare Corp. v. Bryant*, 937 So. 2d 263 (Fla. 4th DCA 2006)(citing approvingly to *Schriver* in holding a similarly broad grant of authority included the power to consent to arbitration).

In sum, to find, as Petitioner suggests, that this case expressly conflicts with other district court decisions this Court would have to read the opinion in this case as requiring Florida courts to "broadly construe" all powers of attorney to grant specific powers *where nothing in the power of attorney under consideration actually gives the attorney-in-fact authority to act according to those powers.*

*Smith* does no such thing (either expressly or implicitly). This is not what the decision in this case requires at all; and Petitioner's suggestion that it does represents a tortured and ultimately inaccurate interpretation of the Fifth District's decision in this case which does not properly invoke this Court's jurisdiction.

## CONCLUSION

For the reasons discussed above, Respondents respectfully request that this Court deny Petitioner's request for discretionary review in this case.

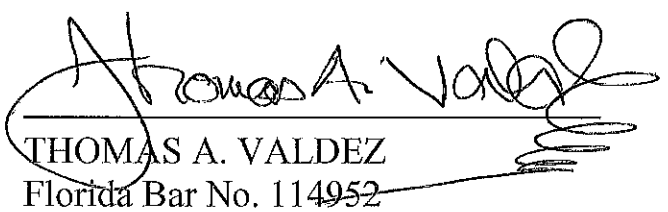
## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the above Respondents' Brief In Response To Petitioner's Amended Jurisdictional Brief has been furnished via Electronic Mail only to: Isaac Ruiz-Carus, Esquire, Wilkes & McHugh, P.A., One North Dale Mabry, Suite 800, Tampa, FL 33609, Iruiz-carus@wilkesmchugh.com; on this 5th day of August 2013.

## CERTIFICATE OF COMPLIANCE

**I HEREBY FURTHER 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.

QUINTAIROS, PRIETO WOOD & BOYER, P.A.



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