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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

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PRELIMINARY STATEMENT

The Fifth District Court's opinion in *Estate of Lucille Smith v. Southland Suites of Ormond Beach, LLC et al.* (hereinafter referred to as "Smith" or "this case") is reported at 28 So. 3d 103 (Fla. 5th DCA 2010). References to the opinion herein are by Southern Reporter citation and page number.

STATEMENT OF THE CASE AND FACTS

Petitioner, the Estate of Ellen Smith, appealed an order compelling arbitration to the Fifth District Court of Appeal. On appeal, Petitioner argued that the Durable Power of Attorney ("DPOA") pursuant to which Ms. Smith's daughter acted in executing the nursing home admission agreement and the arbitration agreement at issue in this case did not authorize her daughter to contractually agree (on her behalf) to arbitrate claims arising from or relating to her nursing home care because the DPOA does not expressly mention "arbitration."

The Durable Power of Attorney ("DPOA") did, however, give Ellen Smith's daughter broad authority to act on her behalf, including but not limited to the power "generally to do and perform any matters and things, transact all business, **make execute and acknowledge all contracts** ... and generally act for [Ms. Smith] in all matters affecting her business or property ... [including all power provided pursuant to any Florida Statutes]" (emphasis added).

Based on the language of the DPOA, the Fifth District Court of Appeal held that the DPOA was expansive enough in scope to authorize Ellen Smith's daughter to enter a binding arbitration agreement on her mother's behalf even though the DPOA did not expressly mention arbitration (as explained in great detail in the Fifth District Court of Appeal's opinion). *Estate of Lucille Smith v. Southland Suites of Ormond Beach, LLC et al.* is currently reported at 28 So. 3d 103 (Fla. 5th DCA 2010)(hereinafter referred to as "*Smith*" or "this case").

Dissatisfied with the Fifth District's application of long-standing law, the Petitioner seeks discretionary review in this Court on the basis that the Fifth District's opinion (I) expressly and directly conflicts with this Court's decision with numerous decisions from 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 jurisdiction in this case. There is no express and direct conflict in the Fifth District's *Smith* with the decisions other district courts on the issue of construction and enforcement of a durable power of attorney ("DPOA"). Pet. Am. Juris. Br. at 2. On the contrary, the Fifth District's decision is consistent with applicable case law from other district courts

of appeal; and correctly applies decisional law to the facts and issues presented to it. Based on the foregoing, this Court should deny Petitioner's request for review.

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 1980, the Legislature amended Article V to limit the Florida Supreme Court's discretionary jurisdiction in cases involving conflict. Rule 9.030 was also extensively revised to incorporate the constitutional amendment. The Committee Notes discussing the Rule 9.030 amendment attribute "[t]he impetus for these modifications" to "a burgeoning caseload and the attendant need to make more efficient use of limited appellate resources." Fla. R. App. P. 9.030 (2010), Committee Notes 1980 Amendment.

To invoke this Court's discretionary conflict jurisdiction, a conflict between decisions of the district courts of appeal or the Supreme Court on the same question of law must be express and direct. *See* Art. V, §3(b)(3), Fla. Const. (1980) and Rule 9.030(a)(2) of the Florida Rules of Appellate Procedure; *see also, Dept of Health & Rehab. Servs. v. Nat'l Adoption Counseling Serv.*, 498 So. 2d 888,889 (Fla. 1986)(determining review was improvidently granted where there is no direct

and express conflict of decisions and finding that an inherent or implied conflict is not sufficient to invoke discretionary jurisdiction).

The express and direct conflict between decisions must appear from the four corners of the opinion itself by containing 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) (citation omitted); *see also Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). While Petitioner attempts to invoke this Court's jurisdiction based on "express and direct conflict," this case fails to qualify on that ground.

Petitioner cites various district court decisions for the proposition that a "narrow and strict construction" must be given a DPOA. Petitioner alleges conflict on an unsupported reading of the Fifth District's decision: that the Fifth District has determined a "broad construction" principle is to be uniformly applied to all interpretations of durable powers of attorney. Pet. Am. Juris. Br. at 2. In fact, Smith makes no such statement (express or implied). Thus, in order to exercise jurisdiction on Petitioner's stated grounds, it would be necessary for this Court either find some inherent or implied conflict or to review the record itself in order to resolve this case favor of the Petitioner. As this Court explained in *Reaves*, *supra*, "[n]either course of action is available under the jurisdiction granted by article V, section 3(b)(3) of the Florida Constitution." 485 So. 2d 829, 830.

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

The Fifth District in *Smith* contains no statement or citation establishing a so-called "broad construction" principle for all DPOAs. In *Smith*, the Fifth District determined the express grant of power in the durable power of attorney *sufficiently broad* to confer authority on the attorney in fact to bind the principal to an arbitration provision or agreement. The Fifth District's opinion in *Smith* correctly states and applies the law based on the facts of this case. Accordingly, *Smith* does not present a proper context in which this Court may exercise discretionary conflict jurisdiction because no express and direct conflict or misapplication of decisional law exists.

Nonetheless, Petitioner argues that Smith expressly and directly conflicts with the principle that a narrow and strict construction must be given to the interpretation and enforceability of a DPOA under a court's consideration. In sum, Petitioner asks this Court to find an implied conflict where no express and direct conflict exists and where the court below has *correctly* applied decisional law. An implied conflict may not form the basis of an exercise of discretionary jurisdiction. This Court should not infer the existence of a conflict or misapplication of jurisdictional law where none exists.

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 these cases, the Fifth District and its sister courts, looked to the express language and to the overall terms of the instruments themselves to interpret whether a valid the exercise of power could be supported by the respective grants of power within the instruments; 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.* First, in *Three Keys*, the Fifth DCA, after conducting a "thorough analysis of [an Inter-Creditor] Agreement's overall terms" held the majority lender did not breach the implied covenant of good faith and fair dealing

[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.

by liquidating real estate collateral without consulting minority lender. In coming to 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*. Second, 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). Third, 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*, 633 So. 2d at 528. Fourth, 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]... *See Kotsch, supra*; *see also Connelly v. Special Road & Bridge Dist. No. 5*, 126 So. 794, 797 (Fla. 1930) ("Agent's efforts must be for principal's benefit, and he may not deal in agency business for own benefit.") (Internal citation omitted). 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 neither one expressly and/or directly conflicts 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 conflict between the decision in this case and the opinion of the Fourth District in *Alterra Healthcare Corp. v. Bryant, supra* or the Second District's opinion in *Carrington Place of St. Pete, LLC v. Estate of Milo*, 19 So.3d 340 (Fla. 2d DCA 2009). As will be explained in further detail in the following section, the decision in *Alterra Healthcare Corp. v. Bryant*, 937 So. 2d 263 (Fla. 4th DCA 2006), in which the 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, is not in conflict with the decision in *Smith*. Moreover, there is no conflict between the decision in this case and the decision of the Second District's opinion in *Carrington Place of St. Pete, LLC v. Estate of Milo*, 19 So.3d 340 (Fla. 2d DCA 2009). In *Milo*, the Second District held that 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. The decision in *Milo* applies the same rule applied in this case; it does not evidence a conflict between the Fifth District and the Second District. Neither do other decisions of the Second District. *See e.g. Jaylene, Inc. v. Moots,* 995 So.2d 566, 570 (Fla. 2d DCA 2008), *rev. denied,* 995 So.2d 566 (Fla. 2d DCA 2008) (holding that a "broad, general grant of authority" in a power of attorney authorized the attorney-in-fact to consent to arbitration on behalf of the principal)(cited by Fifth District in its opinion in this case). *See Smith* at 103 and fn1; *see also Candansk, LLC v. The Estate of Opal Irene Hicks*, 25 So. 3d 580 (Fla. 2d DCA 2009)(concluding 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).

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

In addition to the foregoing, the Fifth District's decision in this case is accord with and does not misapply the decisional law of the Fifth District or any of its sister Courts. 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)[2]; *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)(holding that a "broad, general grant of authority" in a power of attorney authorized the attorney-in-fact to consent to arbitration on behalf of the principal); *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).

3. Section Conclusion

[2] *Jaylene, Inc. v. Steuer ex rel. Paradise*, 22 So. 3d 711 (Fla. 2d DCA 2009) was abrogated by this Court in *Shotts v. OP Winter Haven, Inc.*, 86 So.3d 456 (Fla.2011) for reasons unrelated to the proposition for which that case was cited by the 5th District in *Smith*.

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 Smith 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.

The Fifth District's decision in this case, like the decisions in cases from the other districts dealing with this issue, only allows an attorney-in-fact to agree to arbitration on behalf of her principal where the terms of the DPOA at issue are "sufficiently broad" to confer authority on attorney-in-fact to bind principal to arbitration provision. Thus, Petitioner's claims to the contrary notwithstanding, the Fifth District properly applied the controlling decisional law in this case; and its decision cannot be said to conflict with or to be a misapplication of that controlling decisional law (or the relevant statute).

CONCLUSION

For the reasons discussed above, Respondents respectfully request that this Court deny Petitioner's request that this Court review the decision of the Fifth District Court of Appeal via an exercise of conflict jurisdiction because there is no

conflict that would support the Court's exercise of jurisdiction over this case on that basis.

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 July, 2013.

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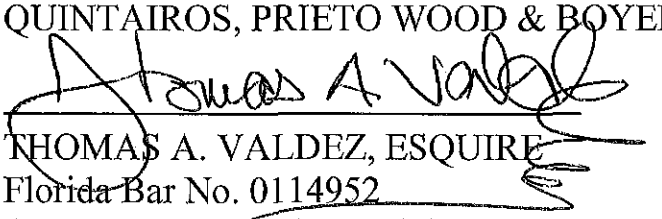

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this motion 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.

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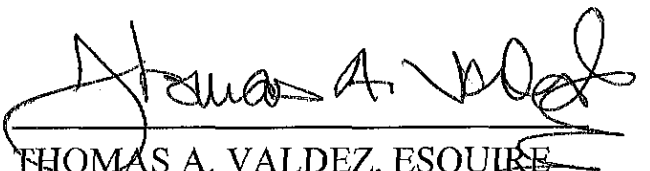

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