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,

v.

SOUTHLAND SUITES OF ORMOND BEACH, LLC et al.

Respondents.

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

# RESPONDENTS' 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. is currently reported at 28 So. 3d 103 (Fla. 5th DCA 2010). References to the opinion 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. Specifically, Petitioner argued that the durable power of attorney under which Ellen Smith's daughter acted in executing Ellen Smith's nursing home admission contract did not authorize the daughter to consent to arbitrate claims arising from nursing home care. The Durable Power of Attorney ("DPOA") did not specifically reference arbitration agreements, but gave Ellen Smith's daughter broad authority regarding Ellen Smith's legal rights. Therefore, 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 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").[1] Pet. Jurisd. Br. at 2. Rather, 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. Because no grounds for jurisdiction exist, this Court should deny 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

[1] Petitioner's brief refers to this instrument as a durable family power of attorney ("DFPOA").

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 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. Jurisd. Br. at 2. In fact, Smith makes no such express statement.

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 other district courts of appeal interpreting and enforcing durable powers of attorneys

On its face, Smith contains no statement or citation effectively establishing a so-called "broad construction" principle for all DPOAs. Instead, 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 in a nursing home admission contract. The Fifth District's Smith opinion correctly states and applies the law based on the facts given. For these reason, 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.

Specifically, 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. Yet, 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 must not infer the existence of a conflict or misapplication of jurisdictional law where none exists.

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) [2]; 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).

In these cases, the courts, much like the Fifth District in Smith, 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

[2] 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.

of power within the instruments. See e.g., Three Keys, 28 So. 3d at 903 (conducting a "thorough analysis of [an Inter-Creditor] Agreement's overall terms" to hold the majority lender did not breach the implied covenant of good faith and fair dealing by liquidating real estate collateral without consulting minority lender); James, 843 So. 2d at 308 (acknowledging the preferred contract interpretation principle is to "give[] reasonable meaning to all provisions.")(Internal citations omitted); Vaughn, 633 So. 2d at 528 (finding that the attorney-in fact had neither actual nor apparent authority under the power of attorney to transfer certain funds); and Kotsch, 608 So. 2d at 880 (invalidating the attorney-in-fact's exercise of power and explaining, "The clearly implied and expressed intent of the durable power of attorney is to provide for the [principal's] maintenance and care."); Krevatas, 518 So. 2d at 438 ("We 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."). None of these cases expressly and directly conflicts with Smith on this point.

In fact, the point of law Petitioner cites 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 it that power expressly authorized in the instrument*. See e.g. Three Keys, 28 So. 3d 894, 903 (citing James, infra, 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)(internal citation omitted); James, 843 So. 2d 304 (Fla. 5th DCA 2003)(relying on the express limitations of the power of attorney to hold decedent's attorney-in-fact exceeded his power of attorney authority by gifting residence to his children); Vaughn, 633 So. 2d 526, 528 (Fla. 2d DCA 1994) (holding that a conflict of interest required removal of a personal representative "[s]ince the power of attorney here did not include the power to make gifts."); and Kotsch, 608 So. 2d 879 (Fla. 2d DCA 1992) (holding "that under the circumstances of this 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 document itself.")(Emphasis ours); 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).

Similarly, Smith does not expressly and 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), cases that also involved the First and Third District Court's review 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.

The Smith decision is consistent with decisional law from other districts. Much like its sister courts, the Smith court 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. Smith, 28 So. 3d at 104 (finding the DPOA granted Ms. Smith's daughter the power to enter into an arbitration agreement, even though the DPOA did not specifically reference arbitration agreements); see also Smith at 104 (citing as support for its holding that the DPOA did not specifically reference arbitration agreements, but gave Smith's daughter broad authority to effectuate Smith's legal rights determination the cases of Jaylene, Inc. v. Steuer ex rel. Paradise, 22 So. 3d 711 (Fla. 2d DCA 2009); see also, Sovereign Healthcare of Tampa, LLC v. Estate of Huerta ex rel. Huerta, 14 So. 3d 1033 (Fla. 2d DCA 2009); Five Points Health Care, Ltd. v. Mallory, 998 So.

2d 1180 (Fla. 1st DCA 2008); 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); and Schriver v. Schriver, 441 So. 2d 1105 (Fla. 5th DCA 1983); 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).

On this express issue, there is also no conflict Second District's opinion in Carrington Place of St. Pete, LLC v. Estate of Milo, 19 So. 3d 340 (Fla. 2d DCA 2009) and the Fourth District's decision in Alterra Healthcare Corp. v. Bryant, supra. To find, as Petitioner suggests, that this case expressly conflicts with other district court decisions this Court would have to read Smith as requiring Florida courts to "broadly construe" all powers of attorneys 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. See, 28 So. 3d at 104 n. 1. The Smith court did not directly or otherwise express a contrary point of law.

Likewise, this Court will find no conflict with Karlen v. Gulf & Western Industries, Inc., 336 So. 2d 461 (Fla. 3d DCA 1976) or Regency Island Dunes, Inc. v. Foley & Assoc., 697 So. 2d 217 (Fla. 4th DCA 1997) because these cases involve entities who did not sign the arbitration agreement at all. See Rocky Creek

Retirement Prop., Inc. v. The Estate of Virginia B. Fox, 19 So. 3d 1105, 1109 (Fla. 2d DCA 2009) (citing Karlen and Regency Island with authority in rejecting the proposition that a party that did not actually agree to arbitrate cannot be compelled to arbitrate).

### B. Smith correctly applied decisional law in its interpretation of Section 709.08 of the Florida Statutes

The court should not interpret a statute in a manner resulting in unreasonable, harsh, or absurd consequences. Fla. Dept. of Environmental Protection v. Contractpoint Florida Parks, LLC, 986 So. 2d 1260, 1270 (Fla. 2008) (citations omitted). To so find, as Petitioner suggests, this Court would have to require all powers of attorneys to conceive of every conceivable exercise of that power and expressly state it in the instrument. This is an unworkable and unreasonable interpretation of section 709.08(6) that is inconsistent with the public policy of this state. The Fifth District has not misapplied section 709.08(6) of the Florida Statutes.

## CONCLUSION

For the reasons discussed above, Respondents respectfully request that this Court decline discretionary review and deny the petition.

## CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of this motion has been sent by regular U.S. Mail to: Susan B. Morrison, Esquire, Law Offices of Susan B.

Morrison, P.A., 1200 W. Platt Street, Suite 100, Tampa, Florida, 33606; Isaac Ruiz-Carús, Esquire, Wilkes & McHugh, P.A., One North Dale Mabry - Suite 601, Tampa, Florida, 33609, this **3d** day of June 2010.

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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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