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.

PETITIONER'S JURISDICTIONAL BRIEF

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In accordance with Rule 9.120(d), the Appendix to this Brief contains a copy of the decision entered by the Fifth District. References to the Appendix shall be cited as: (App., p.___).

STATEMENT OF JURISDICTION

The Florida Constitution grants this Court discretionary jurisdiction to review a district court decision that expressly and directly conflicts with a decision of another district court. Art. V, §3(b)(3), Fla. Const. (1980).

STATEMENT OF THE CASE AND FACTS

The Estate filed suit against Southland alleging negligence and violations of Ms. Smith's ALF resident's rights pursuant to section 400.429 of the Florida Statutes. Southland moved to compel binding arbitration and to stay proceedings, which motion was granted, based upon a consent to arbitrate signed by Ms. Smith's daughter and attorney-in-fact. The Estate appealed and the Fifth District affirmed, rendering its opinion on January 8, 2010 (App. 1.). Ms. Smith's durable family power of attorney ("DFPOA") contained nine (9) specific grants of authority over Ms. Smith's tangible and intangible *property rights.*

SUMMARY OF THE ARGUMENT

The *Smith* decision is in direct and express conflict with decisions from all of the other district courts on the issue of construction and enforcement of a

DFPOA. The Estate seeks this Court's discretionary review of the *Smith* decision, which ***broadly construed*** a DFPOA to grant authority to arbitrate where the instrument contained no such express grant, because *Smith* expressly and directly conflicts with decisions of the First, Second, Third, and Fourth Districts on the ***narrow and strict construction*** to be given a DFPOA in regards to the scope of authority granted to an attorney-in-fact pursuant thereto.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS CONFLICTS JURISDICTION TO BRING CLARITY AND UNIFORMITY TO FLORIDA DECISIONAL LAW BECAUSE THE *SMITH* DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH NUMEROUS DECISIONS OF THE OTHER DISTRICTS ON THE ISSUES OF THE INTERPRETATION AND ENFORCEABILITY OF A DURABLE FAMILY POWER OF ATTORNEY.

In the instant case, this Court's resolution of the aforementioned conflicts between *Smith* and decisions from the other districts is necessary to definitively resolve these conflicts, bring clarity to this area of law, and avoid duplicative and unnecessary appeals with differing outcomes in future cases.

The *Smith* decision ***broadly construed*** a DFPOA to grant authority to arbitrate where the instrument contained no such express grant. *Smith* expressly and directly conflicts with decisions of the First, Second, Third, and Fourth Districts, as well as decisions from its own Court on the ***narrow and strict***

construction to be given a POA in regards to the interpretation of the scope of authority granted to an attorney-in-fact pursuant thereto. Florida district courts, including the Fifth District recently in *Three Key, Ltd. v. Kennedy Funding, Inc.*, 28 So.3d 894 (Fla. 5th DCA 2009), have repeatedly acknowledged that power-of-attorney instruments are to be strictly construed to confer only those powers expressed therein. In *Three Key*, the Fifth District cited with authority the Court's prior opinion on the POA strict construction issue in *James v. James*, 843 So.2d 304 (Fla. 5th DCA 2003). The *James* Court acknowledged that as a general rule, attorneys-in-fact are prohibited from gifting the principal's assets to himself or third parties unless the POA instrument expressly contains such a grant of power, and acknowledged that POAs must be strictly construed.

Other district court decisions have consistently applied the strict construction rule in such cases, uniformly holding that the POA should be interpreted to protect the legal rights of the principal. *See Vaughn v. Batchelder*, 633 So.2d 526 (Fla. 2d DCA 1994); *Kotsch v. Kotsch*, 608 So.2d 879 (Fla. 2d DCA 1992). *Smith* is in direct conflict with the foregoing cases on the issue of the proper standard of legal construction to be utilized in interpreting POAs and DFPOAs.

Despite the legislature's intent that DFPOAs be used as vehicles to protect and aid disabled and incapacitated Floridians in the handling of their affairs, the recent trend in Florida district courts has been to establish a new, 'second standard

of interpretation' of the powers granted to attorneys-in-fact under DFPOAs. As shown by *Smith* and the recent decisions from other districts cited therein, there now appears to be an arbitrary and capricious set of conflicting standards for interpreting DFPOAs. The long-standing 'strict construction' standard is apparently to be applied *to protect the interests of the principal* only when the attorney-in-fact seeks to make gifts or seeks to exercise the principal's elective share. The newly fashioned 'broad construction standard' is to be applied where the attorney-in-fact consents to arbitrate claims of nursing home resident's rights violations and waivers of the resident's rights to recover punitive damages and the full measure of remedial remedies afforded by chapter 400.

The Florida legislature surely did not contemplate such an unfair use of a DFPOA to deprive, rather than aid, assist and facilitate the exercise of the principal's constitutional and statutory rights. The *Smith* decision is in conflict with the other districts on the appropriate standard of construction of the powers granted under a POA, thus warranting this Court's acceptance of the case for discretionary review. Florida's Durable Family Power of Attorney statute was enacted as a means to protect elder and incapacitated Floridians from financial exploitation and to facilitate transactions in their property and business affairs during their periods of incapacity. It was intended as an expeditious and economical alternative to a guardianship proceeding so as to avoid delay and

unnecessary expense in the transaction of a principal's affairs during periods of incapacity.

The statute was meant to have a *beneficial effect.* It is meant to *help* in the handling of the incapacitated person's affairs. The *Smith* Panel's interpretation of Ms. Smith's DFPOA has the opposite effect of that which the legislature sought to accomplish. Rather than benefitting or helping Ms. Smith in the handling of her property rights transactions, the *Smith* Panel's broad interpretation of her DFPOA harmed Ms. Smith by bestowing upon her attorney-in-fact the right to waive and forfeit her personal constitutional rights despite that the express language of the DFPOA contained no such grant of power.

The effect of the *Smith* decision is far reaching. Not only has Ms. Smith's Estate been forced to relinquish her constitutional rights of access to the courts and to a jury trial in favor of arbitration, but the *Smith* decision is extremely likely to have a profound chilling effect on the population of aging, frail and disabled Florida citizens that would otherwise have had no hesitation in appointing attorneys-in-fact pursuant to DFPOAs, for fear of arbitrary and inconsistent interpretations of their DFPOAs by varying Florida courts. Such a result would be completely contrary to the intent of the legislature to encourage Florida's most frail citizens to execute DFPOAs so as to protect their assets and properties. Due to the vast implications of the broad construction standard employed by the *Smith* Panel,

which is at odds with decisional precedent throughout the state which mandates strict construction of such instruments, this Court should accept jurisdiction and resolve the conflict on the issue of the proper legal construction standard to apply to a DFPOA in the context of an attorney-in-fact's consent to arbitrate nursing home claims and such agent's consent to waivers of the principal's constitutional rights.

Smith is in direct conflict with the Second District's opinion in *Carrington Place of St. Pete, LLC v. Estate of Milo*, 19 So.3d 340 (Fla. 2d DCA 2009), *rev. denied*, 26 So.2d 581 (Fla. 2010), where the Second District ruled that a DFPOA which was principally a ***property powers instrument*** (as is the one at issue in the instant case)**,** was insufficient to authorize the attorney-in-fact to consent to arbitration. *Smith* is in direct conflict with *Milo* on this issue thus warranting an order from this Court certifying resolution of the question of the appropriate standard of legal interpretation as a matter of great public importance.

Finally, the *Smith* Panel misconstrued and thus misapplied section 709.08(6) of the Florida Statutes (2009), in support of its conclusion that the general language of the DFPOA was broad enough to include the power to consent to arbitration. Although the cause of action for nursing home resident's rights violation is a property right, Ms. Smith's constitutional right to court access and a jury trial are not-they are personal rights inuring only to Ms. Smith, and they are

not encompassed by section 709.08(6). Moreover, the Panel overlooked the plain language of the following statutory subsection, section 709.08(7) entitled, "POWERS OF THE ATTORNEY IN FACT AND LIMITATIONS," which states in pertinent part, that "the attorney in fact has full authority to perform . . .every act ***authorized and specifically enumerated*** in the durable power of attorney." *(emphasis added).* This latter section clearly shows that the instrument is to be strictly and narrowly construed, conferring only those rights which are expressly enumerated in the instrument.

Despite that there are numerous reported decisions from each of the district courts which stand for the proposition that the powers granted under a POA will be *strictly construed*, and will be held to grant only those powers which are *expressly specified*, the *Smith* Panel disregarded decades of bedrock Florida jurisprudence on this issue, and interpreted the Smith DFPOA *broadly,* inferring a power which was neither specified, nor obviously intended by Ms. Smith, *to wit,* the attorney-in-fact's purported power to waive her constitutional court access and jury trial rights in favor of binding arbitration.

The Estate respectfully urges this Court to accept jurisdiction of this cause in order to clear up the confusion and conflict caused by the numerous reported decisions which are irreconcilable on the issue of construction of the grants of power bestowed upon an attorney-in-fact under a DFPOA in the context of nursing

home admissions agreements containing an arbitration clause. *See Crossley v. State*, 596 So.2d 447, 449 (Fla. 1992).

This Court's guidance and precedent is urgently needed to resolve this broad legal issue and to clarify the public policy of this state to protect Florida's frail, elder nursing home residents from unknowing and nonconsensual usurpations of their constitutional rights to court access and jury trials. It has long been the law in Florida that POA's will be strictly construed to only authorize powers which have been expressly granted, *see Kotsch v. Kotsch*, 608 So.2d 879, 880 (Fla. 2d DCA 1992); *accord Vaughn v. Batchelder*, 633 So.2d 526 (Fla. 2d DCA 1994). The *Smith* Panel ignored this precedent and rendered an opinion which conflicts with decisions from every district court, including its own.

The *Smith* decision directly and expressly conflicts with the Fourth District's opinions in *Regency Island Dunes, Inc. v. Foley & Assocs. Constr. Co.*, 697 So.2d 217, 218 (Fla. 4th DCA 1997) ("[o]ne who has not agreed, expressly or implicitly, to be bound by an arbitration agreement cannot be compelled to arbitrate)," and *Alterra Healthcare v. Bryant*, 937 So.2d 263 (Fla. 4th DCA 2006)(the POA was broad enough to waive court access and jury trial rights because it *expressly authorized* the attorney-in-fact *to agree to arbitration). Id* at 269. *Smith* is in direct and express conflict with the Fifth District's own opinion in *James v. James*, 843 So.2d 304 (Fla. 5th DCA 2003)(the scope of an agent's authority is

limited to *specific grants* of authority and such powers are *strictly construe*), and *Smith* also conflicts with the First District's opinions in *In re Estate of Bell v. Johnson*, 573 So.2d 57, 59 (Fla. 1st DCA 1990) (holding that the court must look to the language of the instrument to determine the scope of the agent's authority), and *Krevatas v. Wright,* 518 So.2d 435 (Fla. 1st DCA 1988) (POA will not be construed to grant authority to make gifts where there is no express language in the POA which expressly or impliedly indicates an intention to authorize a gift.

Further, the *Smith* opinion is in direct and express conflict with the Third District's decisions in *Bloom v. Weiser,* 348 So.2d 651 (Fla. 3d DCA 1977) (that a POA must be strictly construed and will be held to grant only those powers which are expressly specified.), and *Karlen v. Gulf & Western Indus., Inc.*, 336 So.2d 461, 462 (Fla. 3d DCA 1976) (that anyone who has not agreed whether expressly or implicitly to be bound by an arbitration agreement cannot be compelled to arbitrate).

In the event the Court does not perceive the aforementioned cases to be in direct and express conflict with *Smith*, the Court can still grant discretionary review, as misapplication of decisional law serves as the basis for conflict jurisdiction. *Aguilera v. Inservices, Inc.*, 905 So.2d 84, 87 (Fla. 2005); *Spivey v. Battaglia*, 258 So.2d 815, 816 (Fla. 1972).

CONCLUSION

Petitioner respectfully requests that this Court accept jurisdiction and resolve the conflict. This Court's guidance is urgently needed to bring clarity and precedence to an issue of sweeping significance to Florida's nursing home residents as well as to all Florida citizens that have appointed attorneys-in-fact to assist them in the conduct of their daily business. Constitutional rights cannot be unknowingly waived, and in the instant case, the DFPOA lacks any specific power to arbitrate and waive court access and jury trial rights.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been sent by [ ] Hand Delivery [ ] Facsimile [**X**] U.S. Mail to: **Thomas A. Valdez, Esq.,** Quintairos, Prieto, Wood, & Boyer, P.A., 4905 W. Laurel Street, Suite 200, Tampa, Florida 33607, this ___ day of April, 2010

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the Florida Rules of Appellate Procedure 9.210 requiring the font size of the type herein to be at least fourteen points if in Times New Roman format.

_____

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