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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,

v.

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

Respondents.

Case No.: SC10-631
Fifth DCA Case No.: 5D08-3383
L.T. Case No.: 2007 33166 Div. 31

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

I. In Opposition to Southland's Arguments in Section I(B) of its Answer Brief, the Estate's Interpretation of the Power of Attorney at Issue Would Not Render Any of the Provisions Meaningless

Southland claims in its Answer Brief that applying the interpretation outlined in the Estate's Initial Brief to powers of attorney would leave the broad provision within the instant Power of Attorney ("POA") meaningless. (AB, pp. 24-31).[1] Southland's claim is without merit. As explained in the Estate's Initial Brief, a broad "catch-all" provision within a power of attorney has meaning when interpreted as a power conferred upon the agent to take all acts necessary to effectuate the specific grants within the power of attorney. *In re Estate of McKibbin*, 977 So. 2d 612, 613 (Fla. 2d DCA 2008); *Falls at Naples, Ltd. v. Barnett Bank of Naples, N.A.*, 603 So. 2d 100, 101 (Fla. 2d DCA 1992); *Bloom v. Weiser*, 348 So. 2d 651, 653 (Fla. 3d DCA 1977); *James v. James*, 843 So. 2d 304, 306 (Fla. 5th DCA 2003); *Him v. Firstbank Florida*, 89 So. 2d 1126, 1127-28 (Fla. 5th DCA 2012); *Emeritus Corp. v. Pasquariello*, 95 So. 3d 1009, 1012 (Fla. 2d DCA 2012); *Candansk, LLC v. Estate of Hicks ex rel. Brownridge*, 25 So. 3d 580, 582 (Fla. 2d DCA 2009).

[1] References to Southland's Answer Brief shall be cited as "(AB, p. ___)." References to the Estate's Initial Brief shall be cited as "(IB, p. ___)." All emphasis has been supplied unless otherwise noted.

Contrary to Southland's claim, interpreting a power of attorney's broad provision within the context of the specific grants does not render the broad provision meaningless since the broad provision is interpreted to grant power to the agent to take any acts necessary to effectuate any of the specific grants. Conversely, if a broad provision was construed as an unbridled grant of power – as suggested by Southland – the specific grants within the power of attorney would be rendered useless because if the agent can do absolutely anything under the broad grant, there would be no need for the specific grants. *See James*, 843 So. 2d at 308 (finding that if a broad provision was construed to grant the agent unbridled power, "there would be no meaning left for [the specific power], or area for its operation.")

In the present matter, in order for each provision within the POA to not be rendered "useless or inexplicable", the *Smith* Panel should have found that the broad provision only granted authority to Ms. Horn to perform acts necessary to carry out the nine specific grants contained in the POA; not as an unbridled grant of authority to Ms. Horn to waive Ms. Smith's constitutional rights.[2] *Premier Ins. Co. v. Adams*, 632 So. 2d 1054, 1057 (Fla. 5th DCA 1994) (*citing First Nat'l Bank*

[2] Additionally, Southland repeatedly states that the Estate is wrong in claiming that a power of attorney must specifically refer to arbitration in order for an agent to consent to arbitration. (AB, pp. 14, 22-23). A review of the Initial Brief makes clear that the Estate has not made this claim and as a result, Southland's argument will not be addressed herein. (IB, pp. 9-31).

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)).

II. In Opposition to Southland's Arguments in Section I(B)-(C) of its Answer Brief, the *Smith* Decision is in Conflict with the Legislature's Intent on the Proper Scope of Authority Granted in Powers of Attorney

Southland also claims that the revised Florida Power of Attorney Act should have no impact on the POA in this case. (AB, pp. 31-33). In support of this claim, Southland relies upon Section 709.2402, Florida Statutes (2011), which provides in pertinent part:

> Except as otherwise provided in this part:
>
> (1) With respect to formalities of execution, this part applies to a power of attorney created on or after October 1, 2011.
>
> (2) With respect to all matters other than formalities of execution, this part applies to a power of attorney regardless of the date of creation.
>
> (3) With 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.

Based upon the plain language of Section 709.2402, it is clear that the Florida Legislature intended for the new Act, other than the new provisions relating to formalities of execution, to retroactively apply to powers of attorney existing before the new Act went into effect. § 709.2402, Fla. Stat. (2011). Further,

the Power of Attorney Committee, created by the Real Property, Probate and Trust Law Section of the Florida Bar and charged with the task to evaluate and recommend revisions to the former Power of Attorney Act, explicitly stated in its Chapter 709 White Paper that "the [new] Act applies retroactively."[3]

Southland's attempt to rely upon the phrase "[i]f 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" does not change this result. (AB, p. 33). Southland fails to explain what "right was acquired" under the instant POA or who acquired such a right. In fact, no right was acquired in the present case. Instead, Ms. Smith's constitutional rights were unlawfully forfeited.

Based upon Section 709.2201, which retroactively applies to the POA in this case, the broad grant of authority within the POA cannot confer authority upon Ms. Horn to waive Ms. Smith's constitutional rights. *See* § 709.2201(1), Fla. Stat. (2011) (stating "provisions purporting to give the agent authority to do all acts that the principal can do … do not grant any authority to the agent.") (*See* IB, pp. 26-29). Accordingly, this Court should find that Southland's claim on this basis lacks merit and that the new Power of Attorney Act applies retroactively to the POA in this case.

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[3] *See* Real Property, Probate and Trust Law Section of the Florida Bar, Executive Council Meeting Agenda (Sept. 25, 2010), Chapter 709 White Paper, at 218, http://www.rpptl.org/images/RPPTL_ExCouncil_09_25_10_AGENDA.pdf.

III. In Opposition to Southland's Arguments in Section I(A) and (D) of its Answer Brief, the Power of Attorney at Issue Did Not Grant Ms. Horn Any Power Over Ms. Smith's "Choses in Action"

Southland mistakenly claims throughout its Answer Brief that the instant POA granted Ms. Horn power to act in regard to Ms. Smith's "choses in action" and as a result, this power is sufficient to confer authority upon Ms. Horn to execute the arbitration agreement on behalf of Ms. Smith. (AB, pp. 13, 34-35).[4] Specifically, Southland claims that the instant POA incorporated by reference Section 709.08(6) "***Property*** Subject to Durable Power of Attorney", which states:

> ***Unless 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

[4] In support of its argument that the broad provision coupled with the phrase "choses in action" confers authority upon Ms. Horn to waive Ms. Smith's constitutional rights, Southland attempts to analogize the instant case to *In re Estate of 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 (Fla. 2d DCA 2009); *Sovereign Healthcare of Tampa, LLC v. Estate of Huerta*, 14 So. 3d 1033 (Fla. 2d DCA 2009); and *LTCSP-St. Petersburg, LLC v. Robinson*, 96 So. 3d 986 (Fla. 2d DCA 2012). As explained in the Estate's Initial Brief, these cases are in conflict with numerous cases and the Florida Legislature's intent on the proper interpretation of a power of attorney. (IB, pp. 16-19, 24-26).

> elections in any probate or similar proceeding to which the principal is or may become entitled.

§ 709.08(6), Fla. Stat. (1998). A review of the instant POA, however, confirms that Section 709.08(6) "***Property*** Subject to Durable Power of Attorney" has not been incorporated by reference into the instant POA, much less even mentioned. (Tab 14, Ex. A).

The POA at issue only refers to Florida's Power of Attorney Act once and it is in reference to the ***powers*** of Ms. Horn (as opposed to the ***property*** of Ms. Smith), stating that Ms. Horn shall have "all the ***powers*** provided pursuant to Florida Statutes Section 709.08…" (Tab 14, Ex. A, p. 1). Section 709.08 contains subsection (7), which specifically refers to the "***Powers*** of the Attorney in Fact and Limitations" as opposed to Section 709.08(6), which refers to "***Property*** Subject to Durable Power of Attorney". *Cf*. § 709.08(7) with 709.08(6), Fla. Stat. (1998).

Based upon the plain language of the instant POA and Florida's Power of Attorney Act, there is no merit to Southland's claim that the POA incorporated by reference Section 709.08(6) which in turn gave Ms. Horn authority over Ms. Smith's "choses in action."[5]

[5] Moreover, the Power of Attorney Committee explained in its Chapter 709 White Paper that as a general rule, there should be no incorporation by reference in a power of attorney. *See* Chapter 709 White Paper, at 231 ("The Committee's reason for prohibiting [incorporation by reference] rests with the competing concern that incorporation creates an undesirable risk that principals will execute instruments

In addition, assuming *arguendo* that Section 709.08(6) was incorporated by reference into the instant POA, this Court should still find that Ms. Horn did not have any authority over Ms. Smith's "choses in action" for the simple reason that the instant POA "otherwise stated" the property rights of Ms. Smith subject to the POA. Section 709.08(6) states: "***Unless otherwise stated in the durable power of attorney***, the durable power of attorney applies to any interest in property owned by the principal…" § 709.08(6), Fla. Stat. (1998). The POA at issue here stated nine specific grants of authority over Ms. Smith's property rights, including the rights:

- to "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)

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containing less than obvious terms which they either do not intend or that they do not fully appreciate and understand.")

- 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).

Thus, based upon the plain language of the POA and Florida's Power of Attorney Act, it is clear that Ms. Horn had no authority over Ms. Smith's "choses in action."

Lastly, Southland's argument regarding Ms. Horn's authority over Ms. Smith's "choses in action" is an argument Southland is raising for the first time on appeal before this Court. (*See* Tabs 2-11, 13-14, 18). Consequently, this Court should disregard this argument, as the Court is precluded from considering on appeal an issue that was not raised or considered below. *Sunset Harbour Condominium Association v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005); *Williams v. State*, 892 So. 2d 1185, 1187 (Fla. 5th DCA 2005).

IV. In Opposition to Southland's Arguments in Section I(F) of its Answer Brief, Waiver of Constitutional Rights Must be Knowing and Voluntary

Southland also claims in its Answer Brief that a "contract consent standard" should be applied to waivers of fundamental rights in the context of an arbitration agreement instead of the knowing and voluntary standard articulated by the Estate

in its Initial Brief.[6] Once again, Southland's claim lacks merit.

Without any supporting authority or explanation, Southland asserts that since *DeJesus v. State*, 848 So. 2d 1276 (Fla. 2d DCA 2003) is a criminal case, it is inapplicable to the instant case. (AB, p. 37). This assertion is incorrect as there is no prohibition in applying a rule articulated in a criminal case, such *DeJesus*, to a civil case. Further, this Court – in a civil case – has stated that waivers of constitutional rights "must be knowing, intelligent, and voluntary." *Chames v. DeMayo*, 972 So. 2d 850, 861 (Fla. 2007). *See also Jells v. Ohio*, 498 U.S. 1111, 1113 (1991) (finding waiver of right to a jury trial must be "made knowingly and voluntarily.") Accordingly, the rule that waivers of constitutional rights, such as access to the courts and trial by jury, must be knowing and voluntary is applicable to the instant matter. *De Jesus*, 848 So. 2d at 1277.

In addition, this Court very recently issued an opinion concerning arbitration agreements and the "contract consent standard" Southland urges this Court to adopt. In *Basulto v. Hialeah Automotive*, this Court stated:

[6] Southland also claims the Estate waived its argument that waiver of constitutional rights must be knowing and voluntary. (AB, pp. 37-41). However, counsel for the Estate explicitly stated at the July 8, 2008 evidentiary hearing that arbitration involves the waiver of certain fundamental rights such as "due process rights, access to courts and trial by jury", which must be specifically expressed, i.e., knowing and voluntary. (Tab 13, p. 11:10-25). Furthermore, this Court has found that denial of these "constitutional rights constitutes fundamental error" which may be raised on appeal at any time. *Wood v. State*, 544 So. 2d 1004, 1006 (Fla. 1989).

> Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. *In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld*.

Basulto, No. SC09–2358, 2014 WL 1057334, *12 (Fla. March 20, 2014) (emphasis in original, citation omitted). Based upon this Court's decision in *Basulto*, it is clear that a "contract consent standard" does not apply across the board to arbitration agreements as suggested by Southland.

In any event, Southland appears to misunderstand the Estate's argument in regard to the waiver of Ms. Smith's constitutional rights, as Southland spends a section of its Answer Brief explaining that constitutional rights may be waived. (AB, pp. 35-36). To be clear, the Estate does not contest that constitutional rights may be waived. The Estate is asserting that the broad provision in the POA cannot be construed as a knowing and voluntarily relinquishment of Ms. Smith's rights and thus cannot confer any authority upon Ms. Horn to waive Ms. Smith's constitutional rights.[7] This is because there would be no way to ascertain the intent

[7] The cases cited by Southland are thus not applicable to the instant matter. *See, e.g., Rocky Creek Retirement Properties, Inc. v. Estate of Fox ex rel. Bank of*

of Ms. Smith or to know if Ms. Smith contemplated that Ms. Horn would have power to relinquish her constitutional rights. (IB, pp. 19-20).

V. In Opposition to Southland's Argument in Section II of its Answer Brief, Southland has Failed to Produce Any Evidence that Ms. Horn had Apparent Authority to Waive Ms. Smith's Constitutional Rights

As expected, Southland claims that Ms. Horn had apparent authority to waive Ms. Smith's constitutional rights. (AB, pp. 41-43). Southland's argument regarding Ms. Horn's apparent authority is an issue Southland improperly raised for the first time on appeal before the Fifth District Court of Appeal. (*See* Tabs 2-11, 13-14, 18). Consequently, this Court should disregard this argument as the Court is precluded from considering on appeal, an issue which was not raised or considered below. *Sunset*, 914 So. 2d at 928; *Williams*, 892 So. 2d at. Nonetheless, even if Southland had properly raised and preserved its apparent authority argument for appellate review, for the reasons articulated in the Estate's initial Brief, it is inapplicable to the instant case. (IB, pp. 29-31).

CONCLUSION

For the foregoing reasons, the Estate respectfully requests that this Court determine that powers of attorney are to be strictly construed and only those powers which are specified will be granted to an attorney-in-fact. Accordingly, the

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America, N.A., 19 So. 3d 1105 (Fla. 2d DCA 2009) (resident, not power of attorney, signed admissions paperwork); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005) (continued employment constituted acceptance of employer's dispute resolution policy).

Estate requests that this Court find that the instant POA does not confer authority upon Ms. Horn to waive Ms. Smith's constitutional rights, reverse *Smith*, and remand the matter to the trial court with instructions to deny Southland's motions to compel arbitration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been sent via electronic mail to: **Thomas A. Valdez, Esq.,** of Quintairos, Prieto, Wood, & Boyer, P.A., 4905 W. Laurel Street, Suite 200, Tampa, Florida 33607 at tvaldez.pleadings@qpwblaw.com; tvaldez@qpwblaw.com; and acruz@qpwblaw.com this 29th day of April, 2014.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this response is printed in the Times New Roman 14-point font, and otherwise complies with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Isaac R. Ruiz-Carus
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