SUPREME COURT OF FLORIDA

THE ESTATE OF EDWARD HENRY CLARK,
by and through GAYLE SHOTTS, Personal
Representative,

Petitioner,

CASE NO.: SC08-1774
D.C.A.CASE NO.: 2D07-2635
L.T.C. CASE NO.: 53-2005CA000421

v.

OP WINTER HAVEN, INC.;
RE WINTER HAVEN, INC.;
TANDEM REGIONAL MANAGEMENT
OF FLORIDA, INC.; TANDEM HEALTH
CARE, INC.; GAIL WARD a/k/a GAIL LURIE
WARD; NANCY C. THOMPSON; MICHAEL
BRADLEY; and IRENA BLACKBURN a/k/a
IRENA TARRAN BLACKBURN (as to
TANDEM HEALTH CARE OF WINTER HAVEN),

Respondents.
_____/

RESPONDENTS' ANSWER BRIEF

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INTRODUCTION

The Petitioner is the Estate and may be referred to as either "Petitioner" or "Estate." Edward Henry Clark, the Estate's decedent, shall be referred to as "Mr. Clark." The Personal Representative of the Estate, Gayle Shotts, shall be referred to as "Ms. Shotts." The Respondents will be referred to collectively as "Tandem." The Admissions Coordinator for Tandem, Agatha Avril, will be referenced as "Ms. Avril." Because the record was not prepared pursuant to the Court's Order, Tandem has submitted an Appendix containing the documents, with Bates stamp, referred to herein that are also contained within Volumes I through III of the record before the Court. References in the Answer Brief to the numbered documents in the Appendix shall be cited as follows: "(R. Vols. I-III, A. , p.)."

STATEMENT OF JURISDICTION

This Court accepted jurisdiction for discretionary review of the opinion of the Second District Court of Appeals in Shotts v. OP Winter Haven, Inc., 988 So. 2d 639 (Fla. 2d DCA 2008). Tandem reasserts, respectfully, that it is evident there is neither direct nor express conflict with decisions of this Court or District Courts. As such, this Court does not have a basis to exercise jurisdiction under Article V, Section 3(b)(3), of the Florida Constitution. Instead of identifying a case that merits conflict review, Petitioner has improperly reargued facts in violation of the "four corners" rule in an attempt to invoke jurisdiction of this Court.

It appears that Petitioner did not seek to certify issues of conflict; as such, there is no bona fide conflict and the appeal should be dismissed. The Second District made the correct ruling based upon the facts of this case and same should not be disturbed. None of the issues presented by Petitioner warrant the time of the Florida Supreme Court.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Facts is incomplete and inaccurately portrays critical information. Therefore, pursuant to Florida Rule of Appellate Procedure 9.210(c), Tandem has included the following Supplemental Statement of the Case and Facts.

Ms. Shotts testified that on May 4, 1988, Mr. Clark signed the subject power of attorney and that Mr. Clark knew and understood, at that time, that he was authorizing Ms. Shotts to manage his affairs. (R. Vols. I-III, A. 9, p. 102). At no time between May 4, 1988 and November 23, 2003, Mr. Clark's date of death, was this power of attorney challenged. (R. Vols. I-III, A. 9, p. 102,103).

Mr. Clark was admitted to Tandem Health Care of Winter Haven ("Tandem") on May 23, 2003. (R. Vols. I-III, A. 3, p.30-37; A. 9, p.108,109). Pursuant to the authority granted within the power of attorney, Ms. Shotts decided to transfer Mr. Clark to Tandem from another nursing home and prior to his arrival, she filled out the admission paperwork at Tandem. (R. Vols. I-III, A. 9, p.

108-109). According to the subject power of attorney presented to Tandem, Ms. Shotts was authorized to admit Mr. Clark to any medical, nursing or similar facility and she exercised those powers when she signed the admission papers to admit Mr. Clark to Tandem. (R.Vols. I-III, A.2, p. 21-28, A. 9, p.106). Ms. Shotts indicated on the admission information that she was the "Responsible Party…acting as Power of Attorney." (R. Vols. I-III, A.3, p. 36-37).

Ms. Avril, a former admissions coordinator of Tandem, testified that Ms. Shotts was the individual who signed the admission paperwork (R. Vols. I-III, A. 10, p. 160, 242). Based upon the subject power of attorney, Ms. Avril determined that Ms. Shotts was the person authorized to sign on behalf of/admit Mr. Clark. (R. Vols. I-III, A. 10, p. 162,172). Tandem relied upon the representations of Ms. Shotts that she had power of attorney. (R. Vols. I-III, A. 10, p. 173,174).

During the week prior to May 23, 2003, Ms. Shotts visited Tandem two or three times and was in communication regarding the admission of Mr. Clark. (R. Vols. I-III, A. 9, p. 112-113). Ms. Shotts testified that on May 23, 2003, prior to the transfer of Mr. Clark to Tandem, she "skimmed" through the admissions agreement and asked her adult daughter to read it and provide an explanation. (R. Vols. I-III, A. 9, p. 112,113). Her daughter explained that they "weren't signing away responsibility, that anybody could be held responsible, we were just agreeing to have it settled somewhere." (R. Vols. I-III, A. 9, p. 112,113). Ms. Shotts

testified that she understood that she was not releasing Tandem from any responsibility if something happened to Mr. Clark and that it was "just a different technicality and a different way of doing things." (R. Vols. I-III, A. 9, p. 135).

Ms. Shotts testified that she signed and initialed every page of the Binding Arbitration Agreement as an indication that she understood the terms. (R. Vols. I-III, A. 9, p. 118a). Ms. Shotts did not ask specific questions about the admission agreement. (R. Vols. I-III, A. 9, p. 119). Most of her questions were whether Mr. Clark could be protected from falls. (R. Vols. I-III, A. 9, p. 118).

Ms. Shotts was provided a document titled "Explanation of Binding Arbitration Agreement" ("Explanation") and she initialed each individual page confirming that she either read the information on the respective page or that it had been explained to her. (R. Vols. I-III, A.4, p. 39). The Explanation advises that arbitration is an alternate dispute resolution method used to resolve disputes, without involving the court, and that parties could agree to arbitration in writing. (R. Vols. I-III, A. 4, p. 39).

It also concisely explained the arbitration process, *sans* legalese, and Ms. Shotts was advised that the parties would be bound by the decision of the arbitrators, which is final and non-appealable, and that "[b]y entering into the Binding Arbitration Agreement, the parties are giving up and waiving their right to have any claim decided in a court of law before a judge and/or jury." (R. Vols. I-

III, A.4, p. 39). The Explanation advised Ms. Shotts that she had the right to consult with her choice of attorney prior to signing the Binding Arbitration Agreement, that other long term care providers may or may not request such an agreement, and that the resident may select the long term care provider of his/her choice. (R. Vols. I-III, A. 4 , p. 39).

The "Acknowledgments" section of the Binding Arbitration Agreement clearly states that signing the agreement is **not** a precondition to receiving medical treatment or for admission to Tandem, that the Resident has the right to seek legal counsel regarding the Agreement, that the Agreement can be rescinded by written notice to the facility within thirty (30) days of signature.[1] (R. Vols. I-III, A. 5, p. 43). A separate paragraph conspicuously states as follows "EACH PARTY AGREES TO WAIVE THE RIGHT TO A TRIAL, BEFORE A JUDGE AND/OR JURY, FOR ALL DISPUTES INCLUDING THOSE AT LAW OR IN EQUITY, SUBJECT TO BINDING ARBITRATION UNDER THIS AGREEMENT." (R.

[1] The first paragraph of the Binding Arbitration Agreement states that "[t]he following is an agreement to arbitrate any dispute that might arise during Ed Clark's, "Resident" or "Resident's Legal Representative", "Resident's Designee" (hereinafter collectively the "Resident"), stay at Tandem Health Care of Winter Haven ("Facility"). (R. Vol. I-III, A.5, p.41).

Vols. I-III, A. 5, p. 43). Ms. Shotts initialed each page thereby confirming her comprehension of the terms therein. (R. Vols. I-III, A. 5, p. 41-45).

Ms. Shotts testified that she chose to not read the agreement language that advised her that signing the agreement was not a precondition to receiving medical treatment or admission to the facility. (R. Vols. I-III, A. 9, p. 123). She chose not to because "I was signing to get him in there." (R. Vols. I-III, A. 9, p. 123). Ms. Shotts testified that she was not forced to sign the documents and that she understood that she did not have to sign the document as a precondition to having Mr. Clark admitted to Tandem. (R. Vols. I-III, A. 9, p. 121).

Ms. Shotts was provided, and accepted, a copy of the Binding Arbitration Agreement. (R. Vols. I-III, A. 9, p. 120). Ms. Shotts testified that she did not rescind the agreement, she did not ask about rescission during the admission of Mr. Clark, and, even though she had retained Wilkes & McHugh on behalf of Mr. Clark prior to May 23, 2003 regarding legal action against the former nursing home, she did not seek advice from her legal counsel regarding the ability to rescind the agreement with Tandem.[2] (R. Vols. I-III, A. 9, p. 124-127).

Ms. Avril testified that she did not recall Ms. Shotts crying or that she appeared rushed or depressed during the admissions process. (R. Vols. I-III, A. 10,

[2] On behalf of Mr. Clark, Ms. Shotts retained Wilkes & McHugh pursuant to the same power of attorney that Petitioner now contends is invalid. (R. Vols. I-III, A. 9, p.128).

p. 235, 236). She did not recall Ms. Shotts presenting a problem/question regarding the execution of the documents or that the admission of Mr. Clark was in any way out of the ordinary. (R. Vols. I-III, A. 10, p. 238). According to Ms. Avril, residents could be and were admitted without signing the arbitration agreement. (R. Vols. I-III, A. 10, p.226).

On February 25, 2007, in response to the Complaint filed by the Estate on January 27, 2005, Tandem served a Motion to Compel Arbitration. (R. Vols. I-III, A. 1). On March 3, 2005, the Estate, by and through Ms. Shotts, served a Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration and Stay Litigation. (R. Vols. I-III, A. 7). This was the first time since its execution in 1988 that the power of attorney was contested.

On April 10, 2007, a hearing on the Motion to Compel Arbitration was held before the Honorable Susan Roberts. (R. Vols. I-III, A. 11). During the hearing, the Estate argued, (1) the power of attorney that Ms. Shotts presented to Tandem was not valid or enforceable in Florida, thereby precluding her from having the authority to sign the arbitration agreement related to the admission of Mr. Clark to the Tandem facility; and (2) assuming *arguendo* that Ms. Shotts was authorized to sign the arbitration agreement, the agreement itself violates public policy due to the alteration of benefits conferred by a remedial statute via incorporation of rules of the American Health Lawyers' Association ("AHLA") that increase the burden of

proof and because the agreement purports to eliminate punitive damages. (R. Vols. I-III, A. 11) .

During the hearing, Tandem contended that the issue of remedial limitations and the interpretation of the AHLA rules were for the arbitrator(s) to decide, that the agreement was not unconscionable, and subsequently offered to stipulate that damages available under Chapter 400 (Florida Statutes) would be available in arbitration. (R. Vols. I-III, A. 11, p. 94).

The Order Granting Defendant's Motion to Compel Arbitration dated May 2, 2007, reflects that arguments presented by the parties were taken into consideration, as well as the items entered into evidence, including the "Admission Agreement" prepared by the Defendant and executed by the Defendant and Plaintiff as the "Responsible Party." (R. Vols. I-III, A. 12, p. 363-364). The trial court ruled that Ms. Shotts executed the Binding Arbitration Agreement and acknowledged understanding the ramifications of her actions, i.e., regarding a waiver of right to any Judge and/or jury trial to resolve any dispute. (R. Vols. I-III, A. 12, p. 363).

The trial court held that the arbitration agreement was "enforceable, not severable and not repugnant to the public policy of the State of Florida" and that the issues raised within the Estate's Complaint were contractual in nature and included in the Admission Agreement. (R. Vols. I-III, A.12, p. 363). Ms. Shotts,

as Personal Representative of the Estate, subsequently filed an appeal to the Second District Court of Appeal.

Based upon the record evidence, the Second District Court determined that Ms. Shotts had not been rushed to sign the arbitration agreement and that although she testified she did not fully understand the agreement, she was not prevented from seeking assistance prior to signing. Shotts v. OP Winter Haven, Inc. et al., 988 So. 2d 639 (Fla. 2d DCA 2008). The Second District Court held that the trial court properly determined that the arbitration agreement was not unconscionable and to the extent it contains limitations that may be unenforceable, the arbitrators have the power to restrict the agreement through the use of its severability clause. Id.

The Second District noted that the Complaint filed by the Estate alleged negligence, breach of fiduciary duty, wrongful death, and a claim for injuries not resulting in death, and that the Estate had neither presented a claim for punitive damages nor sought leave of court to do so. Id. at 641. The arbitration agreement was separate from other admission documents and the language was "clear and conspicuous" therefore, the evidence did not compel a finding of procedural unconscionability. Id. In order to grant the relief sought by the Estate, a court would have to find both procedural and substantive unconscionability. Id. Since there was no evidence of procedural unconscionability, a review of the issue of

substantive unconscionability was moot. Id. 641,642. The ruling of the trial court was affirmed.

Petitioner's Jurisdictional Brief was served in October 2008 and the Jurisdictional Answer Brief of the Respondents was served in November 2008. In an Order dated February 24, 2009, the Court accepted jurisdiction, but postponed its decision regarding oral argument.

SUMMARY OF THE ARGUMENT

This Court should dismiss the appeal of the Petitioner whereas it is not properly before the Court. In the brief, Petitioner presents arguments that were not before the trial court and therefore not properly preserved. In the alternative, if the Court is not inclined to dismiss the appeal, then Tandem respectfully requests that the ruling of the Second District Court of Appeal be affirmed based upon the authority Ms. Shotts presented to bind Mr. Clark to the terms of the agreement, pursuant to the power of attorney executed by Mr. Clark, who was competent at the time of his execution of same. There is a substantial amount of record evidence to support the contention that the agreement was enforceable and it was not procedurally unconscionable, thereby rendering the issue of substantive unconscionability moot. Even if this Court finds the agreement procedurally deficient, the subject power of attorney authorized Ms. Shotts to "…submit to arbitration any debt, demand or other right or matter due…" Mr. Clark and there is

nothing in Florida's Nursing Home Act that suggests that a party cannot agree to waive statutory rights. As such, the Court should hold that the agreement does not present any substantive unconscionability problems. In accordance with this Court's precedent, the public policy issue regarding remedial limitations and AHLA provisions should be decided by the arbitrator. Lastly, as the arbitration agreement contains a severance clause, the Court should find that the arbitrator has the ability to strike any offending provisions without impacting the arbitration of the underlying dispute.

ARGUMENT

I. THERE IS NO CERTIFIED CONFLICT BETWEEN *SHOTTS* AND OTHER DECISIONS

The Petitioner/Estate argues that the Shotts decision of the Second District Court of Appeal expressly and directly conflicts with the decisions of this Court as well as decisions of other district courts regarding the issue of authority under the subject power of attorney. In support, Petitioner cites to Foye Tie & Timber Co. v. Jackson, 97 So. 2d 517 (Fla. 1923) (Petitioner's Initial Brief, p. 14.) The quote attributed to the Foye decision does not exist therein.

Foye is a breach of contract action in which plaintiff/seller entered into evidence two (2) slightly different contracts regarding the terms of the sale and purchase of crossties. Id. at 518. The buyer (defendant/corporation) contended the following: there was insufficient evidence to establish the existence of a contract

between the parties, it had not promised as alleged, there was no written memorandum of the transaction signed by the defendant, no goods were accepted by defendant/corporation, there was nothing in earnest to bind the bargain nor was any note or memorandum in writing of said contract made and signed by the parties to be charged or their agents thereunto lawfully authorized. Id. at 517, 518. The issues on appeal related to the sufficiency of evidence to establish the contract sued upon and the exclusion of evidence of defendant's custom and procedure when entering into such contracts. Id.

The Foye court determined that neither claim of plaintiff was supported by the evidence. Id. The court agreed there was no evidence of the alleged agreement(s) between the parties; there was no memorandum made and signed by the party to be charged; and there was evidence that the person with whom the plaintiffs engaged had the authority to make the agreement. Id.

The court ruled there was no evidence in the record that the defendant/corporation knew of an offer by its agent or of the alleged contract, and that the improperly excluded evidence tended to establish a variance between the contract declared upon and the one sought to be established via evidence. Id. at 519, 520. The court reversed the judgment for the plaintiffs/sellers, in part, on the grounds that the evidence did not support the existence of either agreement, there was no signed agreement between the parties, and the plaintiffs/sellers did not

present any evidence that the employee of the defendant/corporation was authorized to contract on its behalf. Id.

Foye is not applicable. In contrast to Foye, there is substantial record evidence in this case to prove that Ms. Shotts believed she was, and acted as, the agent of Mr. Clark. The evidence further proves she admitted him to Tandem pursuant to the power of attorney, and that she signed the Arbitration Agreement. Both of these documents are in the record and the contents of these documents are uncontroverted. (R. Vols. I-III, A. 2, p.21-28; A. 5, p. 41-45).

Petitioner, through Ms. Shotts as personal representative, contests only the authority of Ms. Shotts to sign the Arbitration Agreement, but does not contest her authority to admit Mr. Clark to Tandem using the same power of attorney. Further, Petitioner argues that the power of attorney signed by Mr. Clark in 1988 in New Jersey is invalid because (1) Ms. Shotts stated that Mr. Clark had been adjudicated incompetent in New Jersey in 1981, prior to the execution of the power of attorney, and (2) according to New Jersey and Florida law, the principal must be competent at the time of execution of the document, in order to execute a valid power of attorney.

Petitioner contests the validity of the power of attorney on the basis that the testimony of Ms. Shotts that Mr. Clark had been adjudicated "legally incompetent" was "unrefuted." There is no evidence that a court of law adjudicated Mr. Clark

legally, mentally incompetent, in a manner acceptable to Florida courts. Ms. Shotts stated that he was "proven incompetent" and that an irrevocable trust fund was created to protect his assets. (R. Vols. I-III, A. 9, p. 100, 101). The evidence alone is insufficient to support that the power of attorney was invalid, especially when contrasted with the other overwhelming evidence that Mr. Clark had no mental incapacity or incompetency at the time he executed the power of attorney.

According to Ms. Shotts, in 1977, Mr. Clark was in a car accident that caused his digression "…from being a healthy 29-year-old man to being in a wheelchair for a while and rehabilitation." (R.Vols.I-III, A. 9, p.92). Subsequently he needed 24 hour care whereas he was unable to cook for himself, fully bathe himself, or take his medication properly. (R. Vols. I-III, A. 9**,** p. 93, 94). Her testimony focuses primarily on physical inabilities and/or limitations of Mr. Clark.

The power of attorney contains the following Definition of Disability:

> A principal shall be under a disability if the principal is unable to manage his or her property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power or disappearance. (N.J.S.A. 46:2B-8b). (R. Vols. I-III, A. 2, p. 27).

The next paragraph states that "[t]his Power of Attorney is effective now and remains in effect even if I become disabled (as defined above.)" (R. Vols. I-III, A. 2, p.27). This language supports the contention that Mr. Clark was competent on May 4, 1988, when he executed the power of attorney.

Additionally, Ms. Shotts testified that Mr. Clark was competent when he signed the power of attorney in 1988, as well as subsequently, when he signed other legal documents. Record evidence reflects that in 1987, Mr. Clark had sufficient capacity to understand that his interests were not being looked after and that this prompted him to telephone Ms. Shotts and request her assistance. (R. Vols. I-III, A. 9, p. 94). Further record evidence reflects that Mr. Clark understood the nature and effect of his act and that he had the requisite mental capacity to execute the power of attorney that remained in effect for the duration of his life. (R. Vols. I-III, A. 9, p. 95-96). Subsequent to his accident in 1977, Mr. Clark retained legal counsel in New Jersey who obtained proceeds for a trust fund set up on Mr. Clark's behalf and to which Ms. Shotts gained access via the power of attorney. (R. Vols. I-III, A. 9, p. 103).

Ms. Shotts personally transported Mr. Clark to the New Jersey attorney's office to execute the power of attorney and she, her husband, and several other people were present. (R. Vols. I-III, A. 9, p. 98, 103). Mr. Clark agreed that a power of attorney was necessary to control who could come in and out of his home and he understood what he was signing as well as why, and that he was able to express his desires. (R. Vols. I-III, A.9, p. 94-95, 102).

Ms. Shotts testified that she only transported Mr. Clark to appointments during which "…the doctors talked to him and he talked to them, and the same

with the mortgage." (R. Vols. I-III, A. 9, p. 99). Ms. Shotts relied upon the power of attorney to conduct banking transactions, to control access of prospective visitors, to sell his New Jersey home, to move him to Florida and to secure a mortgage and purchase a home in both her name and that of Mr. Clark. (R. Vols. I-III, A. 9, p. 98, 100). The mortgage company required the signature of Mr. Clark so she transported Mr. Clark to execute those legal documents. (R. Vols. I-III, A.9, p.98, 100).

Ms. Shotts cooperated with legal counsel and Mr. Clark in New Jersey to make arrangements for his care. (R. Vols. I-III, A. 9, p. 92-95). For over fifteen (15) years, Ms. Shotts exercised her powers as attorney-in-fact, pursuant to the subject power of attorney that the Petitioner now places at issue in this case.

Prior to Tandem, Ms. Shotts admitted Mr. Clark to another nursing home facility. (R. Vols. I-III, A. 9, p.106). Unhappy with his care, Ms. Shotts contacted Tandem, presented the power of attorney, and arranged to have Mr. Clark transferred from the other facility. (R. Vols. I-III, A. 9, p. 106-108). Also in May 2003, prior to admitting Mr. Clark to Tandem, Ms. Shotts relied upon the power of attorney to retain the law firm of Wilkes & McHugh to pursue legal action against the former nursing home. (R. Vols. I-III, A. 9, p. 128).

Since May 4, 1988, Ms. Shotts has benefited from the authority granted by the power of attorney, by means of a mortgage, a home, medical care and

residential care for Mr. Clark, and legal representation for Mr. Clark. Petitioner cannot now, in good faith, try to avoid the arbitration to which she knowingly consented. Having caused Tandem to rely on the very same legal document from which she has benefitted, Ms. Shotts, as personal representative of the Estate, cannot now be heard to complain of its effect(s). (R. Vols. I-III, A. 9, p. 107). To allow her to do so would run afoul of long standing principles of equitable estoppel. Ryan v. De Gonzalez, 921 So. 2d 572 (Fla. 2005).

On page 16 of the initial brief, Petitioner submits that "[i]f Mr. Clark was not competent at the time the power of attorney was executed, then the power is not valid, and Ms. Shotts did not have authority to bind Mr. Clark to arbitration. (Petitioner's Initial Brief, p. 16). Petitioner does not contest Ms. Shotts' authority to admit Mr. Clark to either nursing home, to obtain a mortgage, to sell and purchase homes, or to retain legal counsel on behalf of Mr. Clark. Instead, Petitioner only contests her authority in relation to her agreement to submit to arbitration. This argument ignores the substantial amount of record evidence of the contrary, specifically the language of the power of attorney and the testimony of Ms. Shotts regarding exercise of the authority, and therefore has not been made in good faith.

Presumably the Petitioner is not suggesting that Ms. Shotts knowingly committed numerous fraudulent acts over a fifteen (15) year period, and as such,

based upon an extensive history of Ms. Shotts having benefited from the use of the power of attorney and the authority granted therein, the Court should accept the power of attorney as valid.

Petitioner contends that the Shotts decision conflicts with two cases out of the Fifth District Court of Appeal: Bamboo Garden of Orlando, Inc. v. Oak Brook Property and Casualty Co., 773 So. 2d 81 (Fla. 5th DCA 2000) and Borneman v. John Hancock Mutual Life Insurance Co., 710 So. 2d 671 (Fla. 5th DCA 1998).

The issues in Bamboo Garden of Orlando, Inc. v. Oak Brook Property and Casualty Co., 773 So. 2d 81 (Fla. 5th DCA 2000) concerned the cancellation of an insurance policy and whether a valid power of attorney existed that authorized the financing company to cancel the Bamboo Garden policy of insurance. Oak Brook issued a policy of insurance to Bamboo Garden. Id. at 82. Premium Assignment Corporation (PAC) paid the premium and Bamboo Garden agreed to pay PAC monthly installments. Id. Bamboo Garden missed a payment in October 1995, PAC sent a notice of cancellation effective November 20, 1995, and on November 20, 1995, Oak Brook cancelled the policy. Id. Subsequently, Bamboo Garden paid amounts owed and PAC requested reinstatement on December 7, 2005. Id. Five days later, prior to reinstatement, fire damaged Bamboo Garden. Id. Oak Brook determined that the previously cancelled policy was not in effect at the time and denied coverage. Id. at 83.

Both Bamboo Garden and Oak Brook moved for summary judgment and the trial court determined that the document which allegedly authorized PAC to cancel the policy for nonpayment was defective and denied Oak Brook's motion. Id. at 83. Oak Brook filed another motion for summary judgment in which Oak Brook asserted that it was entitled to rely upon the representations of PAC and that the policy had been cancelled prior to the fire loss. Id. The trial court subsequently ruled that there were genuine issues of fact regarding the authority of PAC to request the cancellation of the policy and denied Bamboo Garden's motion for partial summary judgment. Id. Several months later, the trial court *sua sponte* issued an order granting the Oak Brook motion for summary judgment. Bamboo Garden of Orlando, Inc. v. Oak Brook Property and Casualty Co., 773 So. 2d 81, 83 (Fla. 5th DCA 2000).

It seems that Petitioner is relying upon the issue regarding whether Oak Brook was required to establish that PAC had a valid power of attorney from Bamboo Garden that gave PAC legal authority to cancel the policy. Id. The Fifth District concluded that a valid power of attorney was a condition precedent to cancellation of the policy and that Oak Brook was required to inquire about the existence of the document prior to cancellation. Id. at 84. The appellate court ruled that since the record did not include a power of attorney executed by Bamboo

Garden, summary judgment in favor of Oak Brook based upon cancellation was improper. Id. at 85.

The case *sub judice* can be distinguished primarily because the power of attorney was admitted into evidence. (R. Vols. I-III, A. 2, p. 21-28). There is substantial record evidence that Ms. Shotts conducted business on behalf of Mr. Clark over a period fifteen (15) years; in Bamboo Garden, there was no record evidence of same. Bamboo Garden has no relevance and is not applicable to Shotts.

Petitioner's reliance upon Borneman v. John Hancock Mutual Life Insurance Co., 710 So. 2d 671 (Fla. 5th DCA 1998) is also misguided. In Borneman, Ingrid Allard obtained a durable power of attorney from Herbert Allard on December 14, 1994; the next day a guardian filed a petition to determine Mr. Allard's capacity and the court entered a temporary order and appointed an emergency temporary guardian on behalf of Mr. Allard. Id. at 673. On December 16, 1994, acting as donee of Mr. Allard's durable power of attorney, Ingrid Allard faxed Mr. Allard's life insurance company with instructions to change the beneficiary from Judith Marr to Ingrid Allen. Id. Mr. Allard died on December 19, 1994, prior to a hearing to determine his capacity and while the temporary guardianship order was in effect; Ingrid Allard died two (2) months later. Id.

The personal representative of Ingrid Allard's estate appealed the trial court's ruling that Ingrid Allard lacked authority to change the beneficiary of the life insurance policy and that she was not entitled to the proceeds. The Fifth District Court affirmed the trial court ruling that pursuant to the statute, a petition to determine a donor's capacity temporarily suspends a durable power of attorney until the petition is (1) withdrawn, (2) dismissed, or (3) the donor is adjudged competent. Borneman at 674. Since none of these conditions occurred, Ingrid Allard's authority under the power of attorney was never reinstated. Id.

Borneman does not support Petitioner's position, but rather lends credence to the contention of Respondents that Ms. Shotts was authorized to consent to the arbitration agreement. When Ms. Shotts agreed to arbitration pursuant to the power of attorney, no legal proceeding was pending regarding the competency of Mr. Clark; therefore, the authority granted was not suspended. Ms. Shotts testified that neither her authority pursuant to the power of attorney nor the issue of Mr. Clark's competency had been challenged until Respondents filed the Motion to Compel Arbitration in February 2005. (R. Vols. I-III, A. 9, p. 102-103).

Petitioner argues that the lower courts improperly shifted the burden to Ms. Shotts to prove the lack of authority based upon the invalidity of the power of attorney and that it was Respondents' burden to prove the agency relationship between Mr. Clark and Ms. Shotts. (Initial Brief, p. 17, 18). The record evidence,

specifically the testimony of Ms. Shotts, substantiates that over the course of at least fifteen (15) years, Ms. Shotts represented herself as the agent of Mr. Clark and acted accordingly. Ms. Shotts relied upon the authority provided by the power of attorney to bind others. The record evidence reflects that Ms. Shotts and Respondents agree that she acted as the agent of Mr. Clark and that Ms. Shotts relied upon the representation that she was the authorized agent to legally bind others. Having bound others, Ms. Shotts has bound herself.

If the Court agrees that Mr. Clark was incompetent and the power of attorney is invalid, then it would follow that every legal document Ms. Shotts has executed pursuant to the power of attorney would have to be invalidated. If the Court chooses, it could find that Ms. Shotts is bound by the Arbitration Agreement since there is sufficient record evidence to validate her actions. The required elements for apparent authority are: (1) a representation by the purported principal; (2) a reliance on that representation by a third party; and (3) a change in position by the third party in reliance on the representation. Robbins v. Hess, 659 So. 2d 424 (Fla. 1st DCA 1995). The record supports a finding that these elements have been met.

II. THE SECOND DISTRICT COURT OF APPEAL PROPERLY INTERPRETED THE AUTHORITY GRANTED BY THE POWER OF ATTORNEY

Petitioner blatantly misrepresents that the authority granted by the subject power of attorney was narrowly "limited to real estate and tangible property." (Initial Brief, p.20; R.Vol. I-III, A. 2, p. 21-28). As the agent of Mr. Clark, Ms. Shotts was given very broad powers, such as to conduct financial transactions on his behalf, including borrowing money "on whatever terms and conditions deemed advisible"; to make loans and invest in his name; to vote at shareholder meetings; to continue the operation of any business he may have owned; to address state, local and federal tax issues; and to make and substitute agent(s) under her for all the purposes described within the power of attorney. (R. Vols. I-III, A. 2, p. 21-28). Ms. Shotts was given authority "[t]o employ lawyers, investment counsel, accountants, physicians and other persons for me or my estate…" (R. Vols. I-III, A. 2, p. 24).

Paragraph 13 of the subject power of attorney authorizes Ms. Shotts

> [t]o commence, prosecute, discontinue or defend all actions or other legal proceedings pertaining to me or my estate or any part thereof; to settle, compromise, **or submit to arbitration any debt, demand or other right or matter due me** or concerning my estate **as you, in your sole discretion, shall deem best and for such purpose to execute and deliver such releases, discharges or other instruments as you may deem necessary and advisable.** (Emphasis added.) (R. Vols. I-III, A. 2, p.23-24).

Paragraph 20 of the power of attorney allowed Ms. Shotts

> [t]o authorize my admission to a medical, nursing, residential or similar facility and **to enter into agreements for my care**; and to authorize, arrange for, consent to, waive and terminate any and all medical surgical procedures on my behalf, including the administration of drugs or to withhold such consent. (Emphasis added.) (R. Vols. I-III, A.2, p. 25).

The power of attorney itself contradicts Petitioner's argument that Ms. Shotts was not authorized to waive the rights of Mr. Clark to punitive damages or jury trial.[3] Ms. Shotts was specifically authorized to submit to arbitration any demand or other right due to Mr. Clark as Ms. Shotts, in her sole discretion, deemed best and for such a purpose, she was authorized to deliver such release, discharges or other instruments that she deemed necessary and advisable. (R. Vols. I-III, A. 2, p. 23-24). It also gave her the authority to admit Mr. Clark to a nursing facility and to enter into agreements for his care. There is substantial record evidence to support a finding that Ms. Shotts had complete authority and discretion to execute and deliver any instrument she deemed necessary and advisable. The record also reflects that Ms. Shotts knowingly acted upon this authority by signing the arbitration agreement, thereby agreeing to the terms and conditions contained therein.

[3] The Complaint did not include a claim for punitive damages and Petitioner has yet to file a motion pursuant to Fla.R.Civ.P. 1.190(f) seeking to amend the Complaint. As such, for purposes of this appeal, any argument regarding possible waiver of punitive damages is premature and therefore not ripe.

Over a course of years, Ms. Shotts worked with attorneys in relation to Mr. Clark and days prior to May 23, 2003, she had retained counsel on his behalf. She was familiar with legal documents and could access legal counsel regarding any of the documents if she desired. According to the record, Ms. Shotts was in contact with legal counsel at Wilkes & McHugh between May 23, 2003 and June 27, 2003 whereas on June 27, 2003, she signed a HIPAA Compliant Medical Authorization authorizing Tandem to disclose to counsel all protected health information regarding Mr. Clark to Wilkes & McHugh. (R. Vols. I-III, A.6, p.47).

Ms. Shotts testified that she chose to not seek advice of counsel regarding the arbitration agreement and that she chose to not rescind/revoke her agreement to submit to arbitration within the thirty (30) day revocation period. The record confirms that the power of attorney that granted Ms. Shotts the discretion to release medical records to counsel, also granted her the authority to waive the right to jury trial and submit to arbitration. (R. Vols. I-III, A.2, p. 23-24).

Petitioner cites several black letter rules of law to support the argument that arbitration provisions bind only the parties thereto. (Initial Brief, p. 21). In Regency Island Dunes, Inc. v. Foley and Associates Construction Company, Inc., 697 So. 2d 217, 218 (Fla. 4th DCA 1997), the trial court ruled that the parent corporation of one of the parties to the arbitration agreement was bound by the agreement as an alter ego. The Fourth District Court ruled that one that did not

agree, expressly or implicitly, to be bound by an arbitration agreement could not be compelled to arbitrate and reversed the lower court. Id. at 218. The Fourth District Court explained that the ruling of the trial court was based on the theory that the parent corporation was an alter ego of the subsidiary corporation that had signed the agreement and that even assuming that the alter ego could be compelled to arbitrate, there was no record evidence to support the trial court's finding that the parent was an alter ego of the subsidiary. Id.

In Karlen v. Gulf & Western Industries,Inc., 336 So. 2d 461 (Fla. 3d DCA 1976), Karlen attempted to initiate a second arbitration proceeding. Appellees sued to enjoin the proceedings to all but one appellee for alleged claims that arose subsequent to the termination of the initial arbitration. Id. at 462. The Third District Court held that a personal covenant to arbitrate did not bind successor parties in interest without written evidence of such an undertaking and affirmed the lower court's ruling.

In Global Travel Marketing, Inc. v. Shea, 908 So. 2d 392 (Fla. 2005), a mother signed a commercial travel contract, on behalf of herself and her minor son, for an African safari. During the trip, the minor was dragged from his tent by hyenas and mauled to death. Id. at 395. The father filed a wrongful death suit on behalf of the estate and for both parents as survivors; in response, the travel company moved to stay the proceedings and compel arbitration. Id. The father

argued that the mother did not have legal authority to contract away the son's substantive rights through a release of liability and arbitration clauses. Id. The issue regarding waiver of liability was not presented to the trial court, the court ruled that the estate was bound by the arbitration provision and entered the staying proceedings and compelling arbitration. Id. The Fourth District Court ruled that the arbitration agreement was unenforceable as to the child on public policy grounds and that the child's estate could not be bound to arbitrate, and reversed the lower court.

The narrow issue before the Florida Supreme Court was whether a parent's agreement in a commercial travel contract to binding arbitration on behalf of a minor child with respect to prospective tort claims arising in the course of such travel is enforceable as to the minor. Global Travel Marketing, Inc., 908 at 394. The competing interests for the court's consideration were the interest of the state, as *parens patriae*, to protect children and that of parents in raising their children. Id. at 398. The court ruled that parents have the authority to determine what activities are appropriate for their children and thus may agree in advance to arbitrate a resulting tort claim if the risks of the activities are realized. Id. at 404. The decision of the Fourth District was quashed and the case remanded. Id. at 405.

The case at bar can be distinguished from all of the above cases. Unlike in Regency Island Dunes, Inc. v. Foley and Associates Construction Company, Inc.,

697 So. 2d 217(Fla. 4th DCA 1997), in which there was no evidence that the nonparty parent corporation agreed to be bound by the arbitration agreement and there was no record evidence that the parent corporation was an "alter ego" corporation for purposes of binding that entity to an arbitration agreement signed by the actual parties, in the case before the Court, neither party is seeking to compel a nonparty to participate and be bound by an arbitration agreement not agreed upon. The record evidence substantiates that Ms. Shotts exercised her authority to enter into the Arbitration Agreement and having done so, should be bound to that agreement.

Unlike the case of Karlen v. Gulf & Western Industries,Inc., 336 So. 2d 461 (Fla. 3d DCA 1976), this case does not involve successor parties in interest, but rather only involves Ms. Shotts exercising the discretion and authority granted to her under the power of attorney to execute documents waiving litigation in favor of seeking resolution of claims via arbitration.

Further, this case can also be distinguished from Global Travel Marketing, Inc. v. Shea, 908 So. 2d 392 (Fla. 2005) since in this case, there are no conflicting interests between the state and Ms. Shotts related to protecting the interests of Mr. Clark. The similarity between this case and Global is that the mother of the minor child in Global was determined to have the authority to agree, in advance, to arbitrate claims that would result from participating in risky activities. Here, the

record evidence before this Court supports the contention that Mr. Clark intended to grant Ms. Shotts the specific authority as outlined in the power of attorney.

In support of the argument that Ms. Shotts lacked authority to agree to arbitration, Petitioner's reliance upon Blankfeld v. Richmond Health Care, Inc., 902 So.2d 296 (Fla. 4th DCA 2005) is mistaken. In Blankfeld, the son, as proxy, signed his mother's readmission agreement. Three days prior to her readmission, the mother had purported to sign a power of attorney, appointing her son as attorney-in-fact. Id. at 299. According to physicians' notes in the record, the mother had been determined to be incompetent years earlier due to senile dementia. Id. at 300.

The son did not advise the facility that he had been given power of attorney, but the trial court ruled that the power of attorney authorized the son to bind the mother to arbitration. Id. The Fourth District Court determined that with no evidence that the mother's incompetency had changed, the trial court improperly relied upon the power of attorney. Blankfeld at 300. The court also concluded that as proxy, the son was limited by statute and could only make health care decisions on behalf of his mother. Id. The purpose of a proxy is to consent to health care services that the patient would likely choose if able to do so. Id. The statute does not reflect legislative intent to authorize a proxy to contract for things not strictly related to health care. Id. at 301.

In this case, Ms. Shotts was not a health care proxy nor did she present this alternate theory to the trial court. The power of attorney presented by Ms. Shotts specifically authorized her to conduct other activities beyond the scope of health care issues, including submit to arbitration if she determined it would be in the interest of Mr. Clark. The authority granted Ms. Shotts by the power of attorney exceeds the statutory authority of a health care proxy.

Ms. Shotts indicated on the Admission paperwork that she was the Responsible Party and she was acting as Power of Attorney. (R. Vols. I-III, A.3, p. 36-37). For the Binding Arbitration Agreement, there are two (2) signature pages signed by Ms. Shotts. (R. Vols. I-III, A.5. p. 44, 45**).** The first page states "THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ THIS ENTIRE AGREEMENT AND UNDERSTANDS THAT BY SIGNING THIS AGREEMENT EACH HAS WAIVED HIS/HER OR ITS RIGHTS TO A TRIAL, BEFORE A JUDGE AND/OR JURY, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO ALL OF THE TERMS OF THIS AGREEMENT." (R. Vols. I-III, A.5, p.44).

The subsequent Acknowledgment page states that "Resident (as defined in this Agreement) acknowledges that Resident was advised of his/her right to seek legal advice concerning the execution of this Agreement, but knowingly and willingly chose not to consult with an attorney." (R. Vols. I-III, A. 5, p. 45). As

previously explained, the term "Resident" collectively refers to "Resident" or "Resident's Legal Representative" or "Resident's Designee." (R. Vols. I-III, A.5, p. 41.) Ms. Shotts signed both as power of attorney and she testified that she signed pursuant to the subject power of attorney. (R. Vols. I-III, A.5, p. 44, 45).

Petitioner has cited no legal authority to support the invalidation of the arbitration agreement. The record evidence reflects that Ms. Shotts was authorized to submit to arbitration and that she voluntarily and knowingly signed the agreement. She was aware that she had the right to seek advice from legal counsel and that she could rescind the agreement, in writing, within the thirty (30) day revocation period and she testified that she chose not to do either. Based upon the record evidence, Respondents respectfully request that the findings of the lower court be affirmed and that the Petitioner's brief be dismissed.

III. THERE IS NO CONFLICT REGARDING WHETHER THE ARBITRATION AGREEMENT WAS UNENFORCEABLE AS CONTRARY TO PUBLIC POLICY

If the Court determines that the power of attorney is valid, then respectfully, based upon the facts of this case, it cannot find that the Arbitration Agreement is unenforceable. If the Court determines that the subject power of attorney is invalid, thereby nullifying the Arbitration Agreement, then it follows that every legal contract, instrument, document, etc., signed by Ms. Shotts pursuant to the power of attorney, is also invalid.

Petitioner argues that the Arbitration Agreement violates public policy because the Agreement would preclude recovery of punitive damages. In order to seek punitive damages, Petitioner has to seek leave of court at the trial level by filing a motion seeking to amend the Complaint, and there must be an evidentiary hearing to determine Petitioner's entitlement to punitive damages. To be entitled, the trier of fact must find, by clear and convincing evidence, that Respondents were personally guilty of intentional misconduct or gross negligence. Fla. Stat. 768.72 (2003); Fla.R.Civ.P.1.90(f). Whereas Petitioner has yet to seek entitlement to punitive damages from the trial court, this cannot be an issue for which Petitioner now seeks appellate relief. Unless Petitioner requests punitive damages, is granted the right to seek them and then faces the possibility of being precluded

from the recovery of such, that issue is not ripe for purposes of appeal. It is not proper to raise on appeal an issue regarding a claim to which a party may or may not be entitled.

In Shotts, the Second District Court specifically addresses the issue of the application of AHLA rules to arbitration agreements. Shotts, at 643. The Second District Court considered the following language from the Agreement:

> The arbitration shall be conducted as a place agreed upon by the parties, or in the absence of such agreement, in Winter Park, Florida, in accdordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration (unless otherwise modified herein) which are hereby incorporated into this agreement, and not by a lawsuit or resort to court process.
>
> Unless otherwise agreed to by the parties, the arbitration hearing shall be conducted before a panel of three arbitrators, (selected from the AHLA Procedures Panel), one chosen by each side in the dispute with the third to be chosen by the two arbitrators previously chosen…The arbitration hearing and other proceedings relative to the arbitration of the claim, including discovery, shall be conducted in accordance with the AHLA Procedures that do not conflict with the FAA. The parties agree that damages awarded, if any, in an arbitration conducted pursuant to this Binding Arbitration Agreement shall be determined in accordance with the provisions of Florida law applicable to comparable civil action, except that the parties acknowledge that the arbitrators shall have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and the parties expressly waive their right to obtain such damages in arbitration or in any other forum. The arbitration panel shall have the authority to award equitable relief (i.e., relief other than monetary), should the arbitrators so decide. (R. Vols. I-III, A. 5, p. 41-42).

The subject Arbitration Agreement allows the application of Florida law and enforceable since it does not violate public policy. It states specifically that

"…any damages awarded shall be determined in accordance with Florida law applicable to comparable civil action" and the arbitrator cannot order any damages, including punitive damages, not measured by the prevailing party's actual damages. The agreement has a severability clause that allows the arbitration to proceed if any provisions are determined to be invalid or unenforceable. (Vol. I-III, R. 5, p. 43). If the entire agreement is found to be unenforceable or invalid, then the parties agreed to attend mandatory mediation and mandatory non-binding arbitration. (R. Vols. I-III, A. 5, P. 43).

The language of the Agreement precludes argument that it violates public policy and is therefore unenforceable. Florida law is applicable to the process; the Second District Court ruled correctly.

Petitioner cites numerous cases addressing the issue of arbitration agreements, remedial limitations, and alleged violations of public policy; all of them can be distinguished factually.

In Lacey v. Healthcare & Retirement Corp. of America, 918 So. 2d 333 (Fla. 4th DCA 2006) at issue was an "arbitration and limitation of liability agreement" that capped non-economic damages, contained a waiver of punitive damages and did not have a severance clause. Citing to Voicestream Wireless Corp.v. U.S. Commc'ns, 912 So. 2d 34 (Fla. 4th DCA 2005), the Fourth District Court discussed that the trial court found that because the arbitration agreement

contained a damages limitation, a provision excluding the right to appeal and a severability clause, it was unconscionable. Id. at 335. The court applied the severability clause, rendering the damages limitation and the appeal waiver unenforceable, but enforced the remaining agreement. Id.

According to the court, the title of the arbitration agreement suggested that the "offensive limitations of liability" went to the "essence" of the contract. Id. Additionally, the arbitration agreement in Lacey did not contain a severability clause, thereby precluding severance of offending provisions. Because there was no severance clause, the agreement as a whole was invalid. Id.

The Arbitration Agreement between Tandem and Ms. Shotts contains a severability clause. The Second District Court concurred with the trial court that the arbitration agreement was not unconscionable, but to the extent it contained any unenforceable limitations, the severability clause would allow the arbitrators to restrict the agreement as needed. Shotts at 640, 641.

In Alterra Healthcare Corp. v. Linton, 953 So. 2d 574 (Fla. 1st DCA 2007), opposing the defendants' motion to compel arbitration, plaintiff alleged that the resident (Mrs. Linton) never signed the residency agreement and that although her son did, he lacked the requisite authority to do so. Id. at 576. Plaintiff contended that even if the son had authority to sign the residency agreement, it was unenforceable because the agreement was procedurally and substantively

unconscionable and that the agreement was void whereas it violated public policy regarding a cap on non-economic damages and a waiver of punitive damages. Id. The trial court granted the motion to compel arbitration but ruled that the provisions within the agreement that limited punitive and compensatory damages were void and unenforceable. The trial court ruled that the remainder of the agreement could proceed to arbitration since it had a severability clause. Id.

The First District Court rejected the argument that because Mrs. Linton was not a signatory, there was no valid arbitration agreement binding her. Id. at 579. Concluding that while in general arbitration agreements are personal covenants that only bind the parties thereto, the court affirmed the trial court's ruling that Mrs. Linton was an intended third-party beneficiary of the agreement and that "[a] nonsignatory third-party beneficiary is bound by the terms of a contract containing an arbitration clause." Id. at 579 *See* Germann v. Age Inst. Of Fla., Inc. 912 So. 2d 590, 592 (Fla. 2d DCA 2005); Gottfried, Inc. v. Paulette Koch Real Estate, Inc., 778 So. 2d 1089, 1090 (Fla. 4th DCA 2001); Terminix Int'l Co., LP v. Ponzio, 693 So. 2d 104, 109 (Fla. 5th DCA 1997); Zac Smith & Co., Inc. v. Moonspinner Condo. Ass'n, Inc., 472 So. 2d 1324, 1324-25 (Fla. 1st DCA 1985).

Because the agreement contained a severability clause, First District Court affirmed the severance of the limitation of liability provision and the enforcement of the remaining portions of the agreement. Id. at 579. The court also affirmed

that the arbitration agreement was not unconscionable since the plaintiff failed to demonstrate procedural unconscionability, thereby rendering the issue of substantive unconscionability moot. Id.

In Shotts, the Admission Agreement, the Explanation of Binding Arbitration Agreement, and the Binding Arbitration Agreement were all signed by Ms. Shotts having noted specifically that she was doing so as power of attorney. As discussed above, the power of attorney granted Ms. Shotts the authority to admit Mr. Clark to the facility and to submit any matter, debt or demand or other right to arbitration and to execute whatever instrument she deemed necessary and advisable.

Although there is no genuine issue of conflict to present to the Court for review, if after consideration this Court determines that the power of attorney is/was valid, then Ms. Shotts was authorized to bind Mr. Clark to arbitration. If this Court determines that the power of attorney was invalid, the application of Linton results in a finding that even though Mr. Clark was a nonsignatory, he was a third party beneficiary and therefore would also be bound.

In Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296, 297 (Fla. 4th DCA 2005), the resident, who was senile, was readmitted to the facility by her son who signed the admission agreement that disputes would by resolved via arbitration administered by the National Health Lawyers Association. Litigation was initiated while the resident was alive and continued by her son, as personal

representative, subsequent to her death. Id. at 297. The Complaint alleged that defendant violated the resident's statutory rights pursuant to Fla. Stat. Section 400.022 and that defendant had negligently cared for the resident. Id. The trial court granted defendant's motion to compel arbitration.

On appeal, the Fourth District Court found that the inclusion of the NHLA rules into the arbitration agreement was void against public policy whereas the rules created a higher burden that would eliminate recovery for negligence. Blankfeld at 298. The Panel did not address severability of the offensive provisions specifically because it concluded that the son, acting as proxy, lacked the authority to bind the resident to arbitration. Id. at 299.

The court found the son was acting as the resident's health care proxy and was therefore, pursuant to statute, was only permitted to make "health care decisions." Id. at 300. Section 765.101(5), Florida Statutes, defines health care decisions as:

> (a) Informed consent, refusal of consent, or withdrawal of consent to any and all health care, including life-prolonging procedures.
>
> (b) The decision to apply for private, public, government, or veterans' benefits to defray the cost of health care.
>
> (c) The right to access all records of the principal reasonably necessary for a health care surrogate to make decisions involving health care and to apply for benefits.
>
> (d) The decision to make an anatomical gift pursuant to part X of chapter 732.

A proxy is "a last and limited resort whose purpose is simply to consent to health care services" that the patient would likely choose if able. Blankfeld at 298. The court concluded that a proxy would not have the authority to enter into contracts to anything not strictly related to health care, such as waiver of trial rights, common law remedies, etc. Id.

Petitioner also cites to SA-PG-Ocala, LLC v. Stokes, 935 So. 2d 1242 (Fla. 5th DCA 2006). In Stokes, the patient signed an arbitration agreement that provided for dispute resolution through arbitration via the Alternative Dispute Resolution Service Rules of Procedure for Arbitration of the American Health Lawyers Association (AHLA.) The trial court concluded that the agreement was void as contrary to public policy and that the offending provisions could not be severed because the agreement did not contain a severability clause and denied the defendant's motion to compel. Id.

Referencing Blankfeld, the Fifth District Court opined that negligence actions would be substantially impaired if a party was required to prove intentional or reckless misconduct by clear and convincing standard. Id at 1243. The court concluded that because the agreement did not contain a severability clause, the offending provisions tainted the entire agreement, rendering it unenforceable. Id.

In Fletcher v. Huntington Place Limited Partnership, 952 So. 2d 1225 (Fla. 5th DCA 2007), the issue was whether the arbitration agreement was void as

against public policy and whether the manner of execution of agreement precluded enforcement thereof. Id. The court ruled that the daughter of the resident had not signed the agreement as her mother's personal representative, but only related to an inquiry specifically regarding a person who controls assets that could be used to pay the resident's charges and who wanted to receive financial notices. Id. at 1227. Therefore, enforcement was precluded. The court declined to apply the severability clause and ruled that arbitration could not be compelled.

Petitioner asserts that "[b]ecause rights abrogated by the arbitration agreement are based on a remedial statute…the limitations contained in the agreement are void. On these facts with virtually identical arbitration agreements, district courts have held that the arbitration agreements are void as against public policy." (Petitioner's Initial Brief, p. 26). Such a statement is misleading.

As the analysis above reflects, in order to determine the enforceability of an arbitration agreement, courts consider a number of facts including who signed the agreement and in what capacity, the circumstances surrounding the consent to the agreement, and even whether the agreement was separate from or part of the admission paperwork. Petitioner has yet to address the multitude of opinions in which various courts determined that certain provisions of an arbitration agreement that were found to violate public policy could be severed from agreements that

contained a severability clause. The cases cited by Petitioner must be read in their entirety.

IV. THERE IS NO CERTIFIED CONFLICT BETWEEN *SHOTTS* AND S*EIFERT*

By signing the Arbitration Agreement, the parties expressly agreed that it would be governed by the Federal Arbitration Act, 9 USC Section 1-16 ("FAA"). (R. Vols. I-III, A.5, p. 41). Rulings by the Supreme Court reflect that with the FAA, Congress established a federal policy in favor of arbitration and created a body of substantive law that is applicable in state and federal court. Rollins, Inc. v. Lighthouse Bay Holdings, Ltd., 898 So. 2d 86,87 (Fla. 2d DCA 2005). According to Rollins, "[t]he FAA expresses Congress's intent to reverse "centuries of judicial hostility to arbitration agreements"' and to make them equivalent to contracts. Id. at 87.

Subsequent to a thorough analysis which included the consideration of Congressional intent and Federal decisions (cited within the opinion), the Rollins court properly ruled that the arbitrator should first decide the validity of the remedial restrictions in an arbitration agreement. Id. at 89. The Fourth District Court has held that "…all doubts as to the scope of an arbitration agreement are to be resolved in favor of arbitration rather than against it." Advantage Dental Health Plans, Inc. v. Beneficial Administrators, Inc., 683 So. 2d 1133,1134 (Fla. 4th DCA 1996).

Public policy in Florida favors non-judicial, alternative dispute resolutions such as mediation, appraisal, and arbitration. These processes allow parties an opportunity to resolve matters in a timely fashion without the stress and burden of long, drawn out litigation. There is an abundance of legal authority that supports the finding that issues related to enforceability of remedial limitations are properly submitted to the arbitrator. To hold otherwise would eviscerate the public policy behind non-judicial proceedings as well as the proceedings themselves.

V. THERE IS NO CONFLICT REGARDING THE NECESSITY OF FINDING BOTH PROCEDURAL UNCONCIONABILITY AND SUBSTANTIVE UNCONSCIONABILITY

Petitioner seeks the jurisdiction of this Court by alleging there is conflict between the decision in Shotts and other districts regarding the elements required to support a finding of unconscionability and asks for "clarification" as to whether it is necessary to have a showing of *both* procedural and substantive unconscionability in order to support a determination that the agreement is unenforceable due to unconscionability. (Initial Brief, p. 37.) Petitioner then asks that the "sliding scale" approach of the Fourth District Court be applied. Even under the sliding scale approach the need to find some level of procedural unconscionability is not eliminated.

This is not a proper use of this Court's review process. In spite of volumes of case law that make it clear that courts must consider both elements prior to

determining whether said agreements are unconscionable, Petitioner has improperly requested that this Court eliminate the need to evaluate and determine procedural unconscionability.

During the April 2007, hearing before the trial court, Petitioner did not contest the necessity of having to address both procedural and substantive unconscionability, but rather agreed that "[i]f you're going to show unconscionability, the plaintiff needs to show both procedural and substantive. *I recognize that fact.* Procedural is the underlying facts in this case, what makes this unfair. Substantive is the terms of the contract." (Emphasis added.) (R. Vols. I-III, A. 11, p. 337, 345). Petitioner did not properly preserve for appeal this request/ issue of eliminating a required element and therefore it should be dismissed.

Petitioner misstates that in Shotts "…the Second District requires a substantial showing of procedural unconscionability, before it will even consider reviewing the agreement to determine if it is substantively unconscionable." As correctly stated in Shotts v. OP Winter Haven, Inc. et al, 988 So. 2d 639 (Fla. 2d DCA 2008), the rule of law regarding the determination of unconscionability is that

> [i]n order to succeed on a claim of unconscionability, a party must establish both procedural and substantive unconscionability. Where the evidence does not compel the trial court to find procedural unconscionability, because the trial court must find both procedural and substantive unconscionability in order to grant relief to a complaining party, an appellate court will not further review the issue to determine

> whether there was competent, substantial evidence of substantive evidence of substantive unconscionability. Id. at 639.

In Shotts, the Second District held that in order to prevail on a claim of unconscionability, a party must establish both procedural and substantive unconscionability, and that the evidence before the trial court did not compel a finding of procedural unconscionability. Id. at 641. Whereas the trial court would have had to find both procedural and substantive unconscionability in order to grant the relief sought by the Petitioner, because the trial court properly determined that there was no evidence of procedural unconscionability, there was no reason for the Second District to review the issue of substantive unconscionability. Shotts at 641, 642.

Petitioner alleges that Ms. Shotts "was only in a position to take the agreement or leave it" and that "[t]he contract was offered as one with accepted in its entirety, or rejected in its entirety." (Initial Brief, p. 39). The record evidence contradicts these statements.

According to Petitioner, Ms. Shotts could not have understood what she was signing because she has a tenth grade education, she was upset and nervous, and she has no legal training. Petitioner fails to address that Ms. Shotts is co-owner of a construction company, she has worked with attorneys numerous times in relation to Mr. Clark, she has signed other complex legal documents including those required to obtain a mortgage and for the sale and purchase of homes, that she

understood the authority she was granted in the power of attorney, and that she had previously admitted Mr. Clark to a nursing home. Ms. Shotts testified that she initialed the agreement that she understood Mr. Clark's admission to Tandem was not predicated upon whether she signed the arbitration agreement and that she understood that she was not releasing Tandem from responsibility, but rather that any disputes would be handled in some manner other than through the court system.

Petitioner also has not addressed the evidence that Ms. Shotts retained Wilkes & McHugh on behalf of Mr. Clark days prior to his admission to Tandem, she signed a HIPPA release form on behalf of Mr. Clark for Wilkes & McHugh, that she testified that she chose to not seek advice from counsel and that she chose not to rescind the agreement even though she had thirty (30) days to do so, and that she has been deemed qualified to be the executor of a trust/estate worth in excess of $400,000.00.

Even if the Court finds that the agreement fails on procedural unconscionability grounds, and wishes to address substantive unconscionability, it must consider that Florida public policy favors arbitration. Bland v. Health Care and Retirement Corp. of America, 927 So. 2d 252 (Fla. 2d DCA 2006). Citing to Unicare Health Facilities, Inc. v. Mort, 553 So. 2d 159, 161 (Fla. 1989), the Second District Court further noted that nothing prevents a party from waiving

statutory rights, Id. at 258. Absent a legislative restriction, the courts should honor a party's decision to contract away statutory protections. Id.

The Arbitration Agreement at issue has a severability clause and if any provisions are found to violate public policy, etc., they can be severed. The legal authority cites reflects that no actual conflict exists. Having lost in the lower courts and having failed to properly preserve this issue for appeal, Petitioner is simply trying to create a conflict where none exists. Whereas this matter is not properly before the Court, Respondents respectfully request the Court dismiss the appeal.

VI. THERE IS NO CONFLICT REGARDING SEVERABILITY

Petitioner has not properly certified conflict regarding this issue and therefore the Court should dismiss this matter. However, if the Court should consider the Petitioner's argument, it should consider that the majority of districts allow severance when available. The agreement in question contains a severability clause. If the holdings from various federal courts as well as Florida courts are applied, the arbitrator will have the task of deciding whether the allegedly offending provisions of the agreement, in this case the AHLA rules and the punitive damages limitation, violate public policy. Further, as the agreement in this case contains a clause allowing for severance of any offending provisions, the arbitrator is also capable of addressing this issue. Rollins at 89, citing Anders v.

Hometown Mortgage Services, Inc., 346 F.3d 1024, 1031 (11th Cir. 2003) (concluding that because any invalid provisions were severable, the underlying claims should be arbitrated regardless of the validity of remedial restrictions). See also Wilderness Country Club v. Groves, 458 So. 2d 769 (Fla. 2d DCA 1984) (contract provision will be severed from the remainder of the contract if it is possible to do so without leaving the remainder of the contract meaningless); Alterra Healthcare Corp. v. Estate of Linton, 953 So. 2d 574, 579 (Fla. 5th DCA 2007).

CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal of the Petitioner. The Petitioner did not properly certify conflict for the issues presented and the record contains a substantial amount of evidence to support the contention that Ms. Shotts had authority to bind Mr. Clark to the arbitration agreement. Based upon public policy in support of extra-judicial proceedings, the parties should proceed to arbitration with directions to the arbitrator to rule on the public policy and severance issues raised by the Estate below. As the party seeking to avoid the arbitration provision on the grounds of unconscionability and public policy, the burden was on the Estate to present evidence sufficient to support that claim. Gainesville Health Care Ctr., Inc. v. Weston, 857 So. 2d 278, 288 (Fla. 1st DCA 2003). The evidence presented by Estate to the Court on these issues is insufficient

as matter of law. Accordingly, Tandem respectfully requests that this Court dismiss the appeal or, in the alternative, affirm the ruling of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Facsimile and U.S. Mail to: **Isaac R. Ruiz-Carus, Esquire**, Wilkes & McHugh, P.A., One North Dale Mabry, Suite 800, Tampa, Florida 33609, and **Susan B. Morrison, Esquire**, 1200 W. Platt Street, Suite 100, Tampa, FL 33606, on this _ day of June, 2009.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this Answer Brief 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.

BY:_____
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