

**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. NO.: 53-2005CA000421

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.

---

**RESPONDENT’S JURISDICTIONAL ANSWER BRIEF**

---

**Antonio A. Cifuentes, Esq.**  
Florida Bar No.: 0034605  
Mancuso & Dias, P.A.  
5102 West Laurel Street  
Suite 700  
Tampa, FL 33607  
**Attorneys for Respondents**

**Daniel E. Dias, Esq.**  
Florida Bar No: 0099030  
Mancuso & Dias, P.A.  
5102 West Laurel Street  
Suite 700  
Tampa, FL 33607  
**Attorneys for Respondents**

**TABLE OF CONTENTS**

	<b><u>Page(s)</u></b>
Table of Authorities.....	3
Statement of the Case and Facts.....	4
Summary of the Argument.....	4
Argument.....	4-7
Conclusion.....	7
Certificate of Service.....	8
Certificate of Compliance.....	8

**TABLE OF AUTHORITIES**

---

<b>Cases</b>	<b>Page (s)</b>
<i>Cat ‘n Fiddle, Inc. v. Century Ins. Co.</i> , 213 So.2d 701 Fla. 1968).....	4
<i>Fonte v. AT&amp;T Wireless Servs.</i> , 903 So. 2d 1019, 1027 (Fla. 2005).....	6
<i>Foye Tie &amp; Timber Co v. Jackson</i> , 97 So.2d 517 (Fla. 1923).....	4
<i>Kyle v. Kyle</i> 139 So. 2d 885, 887 (Fla. 1962) .....	4-5
<i>Reaves v. State</i> , 485 So.2d 829 (Fla. 1986 ).....	5
<i>Romano v. Manor Care, Inc.</i> 861 So.2d 59 (Fla. 4 <sup>th</sup> DCA 2004).....	6
<i>Persuad v. State</i> 838 So. 2d 529 (Fla. 2003).....	5
<b><u>Constitution</u></b>	
Article V, Section 3(b)(3), Fla. Const. (1980).....	4

## **STATEMENT OF FACTS AND CASE**

Respondents defer to the Second District Court of Appeal's recitation of the facts and case.

## **SUMMARY OF ARGUMENT**

This Court does not have a basis to exercise jurisdiction under Article V, Section 3(b)(3), Fla. Const. (1980) as it is clear there is no direct and express conflict with decisions of this Court or District Courts on the same question of law. Petitioners have failed to identify a single case that meets the criteria for conflict review. Instead, Petitioners have reargued the facts of the case below in violation of the "four corners" rule in an attempt to invoke the jurisdiction of this Court.

## **ARGUMENT**

Petitioner's first argues that the Shott's decision is in direct and express conflict with decisions from this Court *Cat 'n Fiddle, Inc. v. Century Ins. Co.*, 213 So.2d 701 Fla. 1968) and *Foye Tie & Timber Co v. Jackson*, 97 So.2d 517 (Fla. 1923) on the issue of which party has the burden of proving the validity of a power of attorney. A review of these two cases show that neither specifically address a power of attorney but instead focus on issues related to agency principles in contract related disputes. These cases are factually and legally distinguishable and cannot form the basis of "holding conflict" jurisdiction. *Kyle v. Kyle*, 139 So.2d

885 (Fla. 1962) (if controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise).

Next, the Petitioner argues that the Second District “misapplied” decisional law of other districts related to the authority granted to an attorney in fact pursuant to a power of attorney and that it ignored the requirements imposed by F.S. Sections 709.02 and 709.08. While the Second District found that the Estate had failed to meet its burden on whether the power of attorney was valid, the Court provided no factual or legal basis for its decision. The only facts relevant to the Court's decision to accept or reject jurisdiction are those facts contained within the four corners of the decision allegedly in conflict with others. *Reaves v. State*, 485 So.2d 829 (Fla. 1986). This Court's discretionary review jurisdiction can be invoked only from a district court decision that expressly addresses a question of law within the four corners of the opinion itself by containing a statement or citation effectively establishing a point of law upon which the decision rests. *Persaud v. State*, 838 So. 2d 529 (Fla. 2003). The *Shotts* decision provides a very limited statement on the power of attorney issue and that issue has already been addressed by Respondent *supra*. In order to engage in a jurisdictional analysis in this case, this Court will be required to go beyond the “four corners” of the *Shotts* decision and make a decision based on the facts provided by Petitioner in her brief in derogation of Supreme Court precedent.

The Respond next argues that the *Shotts* decision is in direct and express conflict with *Romano v. Manor Care, Inc.* 861 So.2d 59 (Fla. 4<sup>th</sup> DCA 2004). The Second District found *Romano* to be factually distinguishable. In *Romano*, the testimony of the resident's husband told the administrator that the admission paperwork which included an arbitration agreement had to be signed was not rebutted by the nursing home. The Arbitration Agreement in this case clearly states that its signing was not required before admission and which goes to the heart of the procedural unconscionability argument and was lacking in *Romano*. Any further reading of the facts surrounding the signing of the agreement would again violate this Court's "four corners" rule.

The Estate also argues that *Shotts* directly conflicts with the *Romano*'s "sliding scale" approach to unconscionability. However, the Fourth District in *Fonte v. AT&T Wireless Servs.*, 903 So. 2d 1019, 1027 (Fla. 2005) receded from this approach and the value of *Romano* on this particular issue is questionable at best. ("As we have found a lack of procedural unconscionability, which is necessary before we could decline to enforce a contract as unconscionable, we need not address substantive unconscionability"). This Court cannot find that *Shotts* conflicts with a decision carrying little or no precedential value within its own district. Further, this Court cannot find jurisdiction based on intradistrict conflicts.

Lastly, the Petitioner argues that Shotts is in direct and express conflict with First, Fourth and Fifth District decisions on whether similar offending provisions in the arbitration agreement can be severed and the issue of their validity decided by an arbitrator. Once again, the Second District factually distinguished all of these decisions by noting that the arbitration agreements on those cases either contained no arbitration clauses or the courts determined that the offending provisions were not severable or the court did not reach the issue of severability. If controlling factual elements are not the same there simply is no conflict.

### **CONCLUSION**

Upon the foregoing, there is no express or direct conflict between Shotts and the opinions of the other Districts cited by Petitioner. The Court must respectfully decline jurisdiction.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail to: Isaac R. Ruiz-Carus, Esquire, Wilkes & McHugh, P.A., One North Dale Mabry, Suite 800, Tampa, Florida 33609, on this \_\_\_\_\_ day of November, 2008.

MANCUSO & DIAS, P.A.  
Attorney for Defendant  
2002 N. Lois Avenue, Suite 510  
Tampa, FL 33607  
Phone: (813) 769-6280  
Fax: (813) 769-6281

BY: \_\_\_\_\_  
ANTONIO A. CIFUENTES, ESQ.  
Florida Bar No: 0043605

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the foregoing complies with the Florida Rules of Appellate Procedure 9.2 10 requiring the font size of the type herein to be at least fourteen points if in Times New Roman format.

\_\_\_\_\_  
ANTONIO A. CIFUENTES, ESQ.  
Florida Bar No: 0043605



