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

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.

PETITIONER'S JURISDICTIONAL BRIEF

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PRELIMINARY STATEMENT

This case presents an issue of statewide concern impacting a protected class of persons, namely, elderly, nursing home residents. The issues concern, first, whether a nursing home resident's personal, constitutional rights can be waived by an individual, without legal authority, who signs an arbitration agreement contained in an admission agreement; second, whether it is for the courts, or the arbitrator, to decide the enforceability of the arbitration agreement in the first instance when the issue of whether the agreement is void as violative of the public policy of this state has been raised; third, whether the issue of enforceability of provisions in an arbitration agreement which might be void as violative of public policy violate public policy is to be determined by the court or the arbitrator; and fourth, whether unenforceable arbitration provisions which defeat remedial remedies and violate public policy are severable.

The resolution of these issues by a panel of the Second District Court of Appeal in the instant case is in express and direct conflict with the decision of the other districts on these points.

Petitioner, the Estate of Edward Henry Clark, by and through Gayle Shotts, Personal Representative, shall be referred to herein as "the Estate." The Estate's decedent shall be referred to as "Mr. Clark.," and Mr. Clark's niece and Personal Representative, shall be referred to as "Ms. Shotts." The Respondents shall be

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

STATEMENT OF JURISDICTION

The Florida Constitution grants this Court discretionary jurisdiction to review a district court decision that expressly and directly conflicts with a decision of another district court. Art. V, §3(b)(3), Fla. Const. (1980). The Estate seeks further review of the decision on its cross-appeal based on the Second District's express and direct conflict with *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296 (Fla. 4th DCA 2005). Moreover, the Second District misapplied the decisional law of other districts. Misapplication of decisional law serves as the basis for conflict jurisdiction. *Aguilera v. Inservices, Inc.*, 905 So.2d 84, 87 (Fla. 2005) (misapplication of decisional law of Supreme Court is basis for conflict jurisdiction); *Spivey v. Battaglia*, 258 So.2d 815, 816 (Fla. 1972) (misapplication of decisional law of another district is basis for conflict jurisdiction).

STATEMENT OF THE CASE AND FACTS

Mr. Clark suffered from organic brain syndrome as the result of a car accident and he required 24 hour care. (App. p. 2). Ms. Shotts cared for Mr. Clark in her home for many years before admitting him to Tandem's nursing home. *Id.*

Ms. Shotts signed the admission agreement containing an arbitration clause on her uncle's behalf. (App. at p. 3).

The Estate filed suit against Tandem alleging violations of Mr. Clark's nursing home resident's rights and breach of fiduciary duties. (App. at p. 2). Tandem moved to compel arbitration and produced a durable power of attorney ("POA") signed by Mr. Clark and appointing Ms. Shotts as his attorney-in-fact, asserting that Ms. Shotts had authority to bind Mr. Clark to arbitrate. The Estate asserted that the POA was invalid, as it was signed seven years after Mr. Clark had been adjudicated legally incompetent, and because it was witnessed by only one witness. The trial court granted the motion. (App. p. 2).

The Estate appealed the order, asserting that (i) the POA was invalid, (ii) the arbitration agreement contained limitations which were void as against public policy because they defeated rights under a remedial statute and changed the burden of proof to clear and convincing evidence because arbitration was to be conducted in accordance with AHLA rules. The Second District, in a footnote, opined that "[a]lthough Ms. Shotts argued that the power of attorney was invalid, ***she failed to meet her burden."*** (App. at p. 3). *(emphasis added).* The Second District affirmed the arbitration order, ruling that it was not unconscionable, that it did not violate public policy, that the public policy issue was for the arbitrator, and

not the Court, to decide, and that the potentially unenforceable provisions were severable. (App. at pp. 3,8-9).

SUMMARY OF THE ARGUMENT

The *Shotts* decision is in direct and express conflict with decisions from the other district courts on the issue of enforcement of a POA, the issue of whether a Court should decide enforceability issues under the first prong of *Seifert v. v. U.S. Home Corp.*, 750 So.2d 633 (Fla. 1999), or whether the arbitrator should decide that issue, and whether provisions which violate public policy should be severed. These multiple conflicts justify resolution by this Court by its exercise of discretionary jurisdiction.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS CONFLICTS JURISDICTION BECAUSE THE *SHOTTS* DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF OTHER DISTRICTS.

The three issues on appeal to the Second District were that (i) Tandem failed to prove that Ms. Shotts had authority to bind Mr. Clark to the arbitration agreement, (ii) the agreement was unconscionable, and (iii) the agreement was void as against public policy.

The *Shotts* decision is in direct and express conflict with decisions from this Court on the issue of which party had the burden of proving the validity of the POA. In *Cat 'n Fiddle, Inc. v. Century Ins. Co.*, 213 So.2d 701 (Fla. 1968), and

Foye Tie & Timber Co. v. Jackson, 97 So. 517 (Fla. 1923), this Court held that it is the party relying on the POA that bears the burden of proving the agent's authority to bind the principal. Yet, the *Shotts* panel ruled that it was the agent, Mrs. Shotts,' burden to prove the invalidity of the POA. Florida law is clear that the person who intends to rely on a POA to bind another has the burden to prove the validity of same, as well as that the scope of the powers are broad enough to encompass the attorney in fact's acts.

The Panel misconstrued, and conflicts with, long-standing Florida law from the First District as well as its own Court that the authority granted to an attorney in fact pursuant to a POA is to be strictly construed. *Kotsch v. Kotsch,* 608 So.2d 879, 880 (Fla. 2d DCA 1992); *In re Estate of McKibbin v. Alterra*, 977 So.2d 612 (Fla. 1st DCA 2008).The *Shotts* Panel failed altogether to review the trial court's holding that the agreement was "properly executed" and that it was "supported by competent, substantial evidence." s legal adjudication seven (7) years earlier as being legally incompetent. The POA was signed by Mr. Clark when he was legally incompetent, and it was witnessed by a single witness-rather than the two witnesses required by Florida law.The Panel misconstrued the facts and misapplied the law in determining that the burden of proving Ms. Shotts' authority to bind her uncle to the arbitration agreement was the Estate's, and not Tandem's, and that the Estate failed to meet its burden. On the authority issue, the evidence before the

court consisted of the power of attorney ("POA") instrument itself, and the testimony of Ms. Shotts that her uncle had been adjudicated legally incompetent by a New Jersey court seven (7) years prior to his execution of the POA. There was *no evidence* submitted by Tandem to authenticate the POA or to disprove Ms. Shotts' testimony that Mr. Clark was adjudicated legally incapacitated. Indeed, notwithstanding that Ms. Shotts' put Tandem on notice of the incompetency adjudication in her deposition taken some time before the arbitration hearing, Tandem made no subsequent attempt to verify Mr. Clark's legal capacity at the time of Ms. Shotts' purported appointment as his attorney in fact and presented no evidence on the issue of authority other than the instrument itself. (App. Tab 6, pp. 23-24).

On the issue of authority under this POA, the *Shotts* decision is in direct conflict with the Fifth District's decisions in *Bamboo Garden of Orlando, Inc. v. Oak Brook Property and Casualty Co.*, 773 So.2d 81 (Fla. 5th DCA 2000), and *Borneman v. John Handcock Mutual Life Insurance Co.*, 710 So.2d 671 (Fla. 5th DCA 1998). A person who is legally stripped of his capacity to contract on his own behalf cannot thereafter appoint another to act in his stead. Only a court of competent jurisdiction can do that.

The *Shotts* decision misapplies Florida law, in overlooking the uncontroverted record evidence that the POA was witnessed by only one person,

as opposed to the two required pursuant to sections 709.02 and 709.08 of the Florida Statutes.

The *Shotts* decision is in direct and express conflict with a decision from the Fourth District on the issue of unconscionability under quite similar facts. The *Shotts* Panel stated that the agreement was "worded clearly, conspicuously and separate from other [admission] documents," and that the trial court correctly found that the agreement was not procedurally unconscionable. (App. at p. 4). The evidence showed that Ms. Shotts was rushed and felt pressured to sign, that she was not advised of the existence of the arbitration clause, and that she was told she needed to sign everything in order to have Mr. Clark admitted. The Panel noted that Ms. Shotts "was not prevented from asking for assistance from the admissions director before she signed the document." (App. pp. 3-4). This misconstrues the facts in evidence, as all parties unequivocally testified that the admissions director was *not even present* during the admissions process, and the coordinator who dealt with Ms. Shotts had no recollection of the process. Instead, Ms. Shotts was given the paperwork by a young girl who sat at a typewriter and told her that *all* of the admissions papers needed to be signed. She felt pressured and that she had no choice. These facts are remarkably similar to those before the Fourth District in *Romano v. Manor Care, Inc.*, 861 So.2d 59 (Fla. 4th DCA 2004), a case cited by the *Shotts* Panel, but not distinguished in any way. The *Romano* Court found a

quantum of procedural unconscionability, and then held that the limitations in remedial remedies made the agreement unenforceable. The *Romano* Court stated that the Fourth District applies a sliding scale approach to unconscionability analysis. In contrast, the Second District eschews the sliding scale approach and will not consider substantive unconscionability unless there has first been a substantial showing of procedural unconscionability. The Second District's unconscionability analysis is in direct and express conflict with the Fourth District's in *Romano.*

The *Shotts* decision is in direct and express conflict with the First, Fourth and Fifth Districts on the issue of who should decide the issue of an arbitration agreement's enforceability where the issue of voidness as against public policy is raised. Notwithstanding that *every other Florida district court* to consider the issue has refused to enforce similar arbitration agreements under the first prong of *Seifert v. v. U.S. Home Corp.*, 750 So.2d 633 (Fla. 1999), because they violate public policy and the remedial remedies provided under chapter 400, the *Shotts* Panel did not feel compelled to follow its sister courts and instead ruled that the arbitrator, and not the Court, has the authority and duty to decide the public policy issue. *See Lacey v. Healthcare & Retirement Corp. of America*, 918 So.2d 333, 334 (Fla. 4th DCA 2006); *Alterra v. Linton*, 953 So.2d 574 (Fla. 1st DCA 2007)*; Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296 (Fla. 4th DCA 2005)*; SA-*

PG-Ocala, LLC v. Stokes, 935 So.2d 1242 (Fla. 5th DCA 2006); *Fletcher v. Huntington Place, L.P.*, 952 So.2d 1225(Fla. 5th DCA 2007); *Place at Vero Beach, Inc. v. Hanson*, 953 So.2d 773 (Fla. 4th DCA 2007). *See Lacey v. Healthcare & Retirement Corp. of America*, 918 So.2d 333, 334 (Fla. 4th DCA 2006); *see also Alterra v. Linton*, 953 So.2d 574 (Fla. 1st DCA 2007)*; Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296 (Fla. 4th DCA 2005)*; SA-PG-Ocala, LLC v. Stokes*, 935 So.2d 1242 (Fla. 5th DCA 2006); *and Fletcher v. Huntington Place, L.P.*, ___So.2d ___, 32 Fla. L. Weekly D863 (Fla. 5th DCA, March 30); *Place at Vero Beach, Inc. v. Hanson*, 953 So.2d 773 (Fla. 4th DCA 2007). The *Shotts* Panel's ruling that the arbitrator has authority to determine void as against public policy issues, is in direct conflict with the decisions of the other districts that the issue is a gateway issue which is to be decided by the courts, and not the arbitrators, under the first prong of *Seifert.*

The *Shotts* Panel distinguished all decisions from the remaining district courts based solely on each court's treatment of the issue of severability. *Slip Op.* at p. 8. The Second District's opinion on the issue of severability of unenforceable arbitration limitations (expressly referencing the agreements reference to AHLA arbitration rules and prohibitions on awards of punitive damages), is in direct and express conflict with decisions from the Fourth and Fifth District on this very same issue. The Fifth District in *Fletcher v. Huntington Place, L.P.*, 952 So.2d 1225

(Fla. 5th DCA 2007), and the Fourth District in *Place at Vero Beach, Inc. v. Hanson*, 953 So.2d 773 (Fla. 4th DCA 2007), both found that similar unenforceable AHLA rules and remedial limitations were void as against public policy and were *not severable* despite that the arbitration agreements both contained severance clauses. The Fifth District refused to sever the offending AHLA arbitration rules provision (which was identical to the AHLA procedures included in Mr. Clark's agreement and changed the standard of proof to clear and convincing evidence), reasoning that " [b]ased on our analysis of the agreement, however, it appears clear that the arbitration agreement reflects an intent that the parties arbitrate specifically with the AHLA." The Fourth District likewise refused to sever the offending AHLA rules and standards of proof, reasoning that "[t]he trial judge determined. . . he would have to rewrite the terms of the Agreement to give it effect. We find the trial court correctly refused to sever portions of the arbitration clause. While the Agreement did contain a severability clause, the clause allows *provisions, not portions of provisions,* of the Agreement to be severed."). *Id* at 775. The conflict of the Second District's *Shotts* decision and the decisions of the Fourth and Fifth Districts justifies invocation of this Court's conflicts jurisdiction.

CONCLUSION

Petitioner respectfully requests that this Court accept jurisdiction and resolve the conflict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been sent by [ ] Hand Delivery [ ] Facsimile [**X**] U.S. Mail to: **Antonio Cifuentes, Esq.**, Mancuso & Dias, P.A., 2002 N. Lois Ave., Suite 510, Tampa, Florida 33607, this ____ day of October, 2008.

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CERTIFICATE OF FONT COMPLIANCE

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

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