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 REPLY BRIEF ON THE MERITS

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ARGUMENT

Several times throughout Respondent's Answer Brief, they suggest that this Court should 'dismiss' Petitioner's 'appeal' [*sic* Petition], because "there is no ***certified conflict*** between *Shotts* and other decisions, " (Answer Brief p. 11), and because "Petitioner has not properly ***certified conflict*** on [the issue of severability]." (Answer Brief p. 46) (*emphasis added).* Respondents fail to explain these remarks, but it is abundantly clear that they confuse the Court's jurisdiction to review express and direct conflicts of district court decisions pursuant to Article V, section 3(b)3 of the Florida Constitution, with the Court's jurisdiction under Article V, section 3(b)4 to review cases which are ***certified by a district court*** to be in conflict with another district's decision. This Court accepted this case for review based upon section 3(b)3 conflicts jurisdiction, which does not require or permit a litigant to *certify conflict.*

I. THE *SHOTTS* PANEL IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF ON THE ISSUE OF AUTHORITY FROM TANDEM TO *MS. SHOTTS* IN EXPRESS AND DIRECT CONFLICT WITH BEDROCK FLORIDA JURISPRUDENCE.

Respondents include a lengthy factual analysis of this Court's opinion in *Foye Tie & Timber Co. v. Jackson,* 97 So.2d 517 (Fla. 1923), and conclude that the case is inapposite because of differing facts. Petitioner asserted that *Shotts* is in express and direct conflict with *Foye's holding* on the issue of which party bears the burden of establishing an agent's authority to bind his purported principal. The

holding in *Shotts*, insofar as the Panel concluded that it was Ms. Shotts' burden to prove lack of authority under the durable family power of attorney or invalidity thereof, rather than Tandem's burden to prove her authority. "Although Ms. Shotts argued that the power of attorney was invalid, ***she failed to meet her burden of proof"*** *Shotts* at 640. (*emphasis added),* is in direct and express conflict with the holding in *Foye,* that the party seeking to bind a nonparty to a contract has the burden of proof to establish that authority. "Mr. Van Dusen's authority from the defendant company to make the contract alleged in the declaration or the offer testified to by Mr. Lynn had to be shown. ***The burden of this proof was upon the plaintiffs, and the acts and declarations of Mr. Van Dusen alone were not sufficient to establish the authority***." *Foye* at 519. *(emphasis added).*

Indeed, this legal maxim has been firmly entrenched in Florida jurisprudence for decades, and *Shotts'* holding on this point is in conflict with a plethora of decisions on this point from this Court and from the other districts. *See Miller v. Chase & Co.*, 102 So. 553 (Fla. 1924)(the burden of proving agency rests upon the party affirming it); *Robbins v. Hess,* 659 So.2d 424 (Fla. 1st DCA 1995) (party alleging agency bears the burden to prove it, just as a party moving for summary judgment has the burden to prove the absence of material fact issues); *Enic, PLC v. F.F. South & Co., Inc.*, 870 So.2d 888 (Fla. 5th DCA 2004) (existence of agency is

a question of fact and the burden is on the party asserting it to establish a prima facie case.); *accord Costello v. Adams,* 654 So.2d 601 (Fla. 3d DCA 1995).

The invalidity or at least unenforceability of this particular POA in Florida was evident from the face of the instrument. It was witnessed by a *single* witness. Section 709.08 of the Florida Statutes (2008) provides that a durable family power of attorney "must be executed with the ***same formalities required for the conveyance of real property by Florida law***. . . ." *(emphasis added).* Florida law requires that real estate deeds be acknowledged and witnessed by ***two (2) subscribing witnesses***. *See* section 689.01, Fla. Stat. (2008). Section 92.08 of the Florida Statutes (2008) provides that "the recitals in any deed or . . . power of attorney. . . shall be admissible when offered in evidence . . .as prima facie proof of the truth of the facts therein recited, provided . . .the power of attorney ***appears regular on its face***, and has been recorded as required by law." *(emphasis added)*.

On this point, the trial court and the *Shotts* Panel ignored that the POA, on its face, did not appear regular because it failed to comport with Florida law. Despite this flaw which was brought to the trial court's attention by Ms. Shotts and fully briefed in the Second District, the Second District disregarded this obvious defect in the instrument and instead concluded the Ms. Shotts, *and not Tandem,* had the burden of proving invalidity of the POA, and had failed to do so. The Panel further impermissibly shifted the burden of proving authority to Ms. Shotts,

when, despite Ms. Shotts' unrefuted testimony that her uncle had been adjudicated legally incompetent in New Jersey seven years prior to his execution of the POA, and despite that Tandem made no effort to corroborate or discredit the incompetency adjudication, the Panel ruled that *Ms. Shotts* failed to meet her burden of proving invalidity of the POA.

Respondents utterly failed to address the issue of the single witness problem with the POA, and cavalierly suggest that Ms. Shotts had the burden of producing incompetency papers (as if to suggest that Tandem's sole burden was to do no more than present the irregular-on-its-face instrument to the Court). Indeed, Respondents' retort to the issue of lack of authority, is to repetitiously suggest that if they didn't have the right to rely on the POA, then *all* documents signed by Ms. Shotts for her uncle over the past years should be invalidated, regardless of where they were signed, and even suggesting that Ms. Shotts' engagement of Wilkes & McHugh to file a negligence action on behalf of Mr. Clark's Estate was likewise 'invalid.' Again, Respondents seem to overlook legal precedent that an attorney-in-fact's authority ends with the death of the principal. Obviously, Ms. Shotts was appointed to serve as her deceased uncle's Personal Representative in the instant action.

Respondents then take issue with Petitioner's citation to *Bamboo Garden of Orlando, Inc. v. Oak Brook Property and Casualty Co.*, 773 So.2d 81. 83 (Fla. 5th

DCA 2000), which Petitioner cites for the proposition that it is the person relying on a POA's duty to prove the attorney-in-fact's authority under the instrument to bind the principal, and that burden cannot be satisfied where the POA instrument is defective on its face, and in the absence of further evidence establishing authority. Respondent overlooks the fact that in *Bamboo Garden*, the trial court entered an order denying Oak Brook's motion for summary judgment because "***the document which purportedly gives authority*** to Premium Assignment Corporation to cancel the insurance policy in question for nonpayment of premium ***is defective***...." *Id* at 83. *(emphasis added).* Instead, Respondents attempt to ignore the holding in *Bamboo,* asserting that it is distinguishable merely because the Mr. Clark's POA was admitted into evidence, whereas Respondents' assert that *Bamboo Garden's* was apparently not. (Answer Brief p. 20). A close reading of the case does not support Respondent's conclusion. It is clear from the opinion that two separate trial judges inspected the POA instrument and found it to be ***defective***. *Bamboo Garden* at 85. The district court thereafter concluded that it was Oak Brook's burden to prove authority under the POA, and that because the instrument was defective in that it was not executed by Bamboo Garden, summary judgment was improperly granted. *Bamboo Garden* is cited for its conflict with *Shotts* on the issue that it is the proponent's burden of proof to establish authority under a POA, and not the

person seeking to avoid the POA's application to prove the instrument's invalidy. On this point, *Shotts* is in direct conflict with *Bamboo Gardens* on this point.

Respondents also attempt to distinguish *Borneman v. John Handcock Mutual Life Insurance Co.*, 710 So.2d 671 (Fla. 5th DCA 1998), which was cited by Petitioner for the proposition that 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. Respondent explains in great detail that the facts in *Borneman* are distinguishable from *Shotts*, and the case is inapposite because "[w]hen Ms. Shotts agreed to arbitration . . .no legal proceeding was pending regarding the competency of Mr. Clark, therefore, authority was not suspended." (Answer Brief p. 21).

This argument overlooks the unrefuted testimony of Ms. Shotts, that her uncle had been adjudicated legally incompetent by a New Jersey court in 1981, seven years prior to his execution of a POA, and that he suffered from organic brain syndrome. As stated, in view of this evidence, it was Tandem's burden to prove the validity of the POA, not Ms. Shotts, and the Panel erred in ruling contrary to bedrock Florida law on this point. The Fourth District in *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296, 300 (Fla. 4th DCA 2005) faced a similar issue when Mrs. Blankfeld was readmitted to a nursing home several times by her son, who had served only as her health care proxy. Three days before her

last admission to the nursing home, Mrs. Blankfeld signed a durable family power of attorney designating her son as her attorney-in-fact. The *En Banc* Blankfeld Court opined that the POA did not confer authority to consent to arbitration, because Mrs. Blankfeld's physician's note indicated that she suffered from organic rain syndrome and dementia, and that her son's status as health care proxy likewise failed to confer authority. Thus, based on a single physician's note in her nursing home chart, the Court ruled that the nursing home could not rely on the POA as authority. Likewise in the instant case, the irregularity of the POA on its face, coupled with Ms. Shotts' testimony that her uncle had been legally adjudicated incompetent, coupled with the nursing home's own records which indicated that he suffered from chronic organic brain syndrome, placed a heavy burden of proof on Tandem to prove authority—one that it utterly failed to do. The burden of proving Ms. Shotts' authority rested squarely with Tandem, yet Respondents' shirk their burden by merely suggesting that because Ms. Shotts acted as her uncle's agent over a number of years, and that "Ms. Shotts relied upon the representation that she was the authorized agent to legally bind others, that the agent's actions, standing alone, are sufficient to satisfy Tandem's burden of proof." This reasoning is unsubstantiated, illogical, and contrary to Florida law.

The construction of a POA is an issue of law for the Court, except to the extent it is necessary for the Court to make a determination of fact regarding the

intent of the parties to be gleaned from the language contained therein. As stated in the Initial Brief, the *Shotts'* Panel disregarded long standing precedent from its own district and others that a POA must be strictly construed, granting only those powers *expressly specified,* and that the POA must be *closely examined to ascertain the intent of the principal. Kotsch v. Kotsch,* 608 So.2d 879, 880 (Fla. 2d DCA 1992); *In re Estate of McKibbin v. Alterra*, 977 So.2d 612 (Fla. 2d DCA 2008); *Bloom v. Weiser*, 348 So.2d 651 (Fla. 3d DCA 1977); *Alterra Healthcare Corp. v. Bryant,* 937 So.2d 263 (Fla. 4th DCA 2006).

In an attempt to avoid discussion of the Panel's misapplication of the foregoing authorities in the construction of the POA, Respondents instead suggest that even if the POA was invalid, Mr. Clark should still be bound to the arbitration agreement as a third party beneficiary. Relies heavily on *AlterraHealthcare Corp. v. Linton,* 953 So.2d 574 (Fla. 1st DCA 2007), in support of their theory that, even if the POA was invalid, Mr. Clark is nevertheless bound to arbitrate as a third party beneficiary of the admission agreement signed by Ms. Shotts. As stated in the Initial Brief, the *Linton* Panel did not find that he was his mother's attorney-in-fact or agent, rather, it jumped to the conclusion that as the contracting party, or promisee, Mr. Linton could bind his mother as a third party beneficiary.The instant case is distinct from *Linton* because the resident's designee, Ms. Shotts, has no responsibilities whatsoever under the free-standing arbitration agreement, in

contrast to the limited obligations that the responsible party had in *Linton* to pay for third party providers. The agreement in the instant case refers to the resident's designee so sparingly, that it cannot be argued that the contracting party is in fact Ms. Shotts. Only the resident is named throughout the contract provisions as having rights and obligations under the arbitration agreement, and the resident did not personally consent to waive his constitutional rights. Thus, Ms. Shotts, who only signed the agreement in a representative capacity, was not personally bound to the arbitration of her rights and contract duties, nor could she possible bind her uncle to agreements to which she herself was not bound.

II. *SHOTTS* IS IN DIRECT CONFLICT WITH CASES FROM EACH OF THE OTHER DISTRICTS ON THE ISSUE OF WHETHER PROVISIONS WHICH ARE CHALLENGED AS VIOLATIVE OF PUBLIC POLICY ARE GATEWAY ISSUES FOR THE COURT TO DECIDE UNDER *SEIFERT*, OR ARE FOR THE ARBITRATOR TO RULE UPON.

Respondents continue to insist, as the *Shotts* Panel did, that *Shotts* is not in conflict with any other district court decision on the issue of whether an arbitration agreement which contains provisions which eliminate remedies under a remedial statute is void as violative of public policy, is for the court or the arbitrator to decide. However, there are numerous decisions which expressly conflict with the *Shotts* on this issue, wherein all other district courts to have addressed the issue have determined that these issues are gateway, threshold issues

to be decided by the courts under the first prong of *Seifert v. U.S. Homes*, 750 So.2d 633, 636 (Fla. 1999) (the "*Seifert* test"), and not by the arbitrator.

All district courts to consider these issues, except for the Second District, ruled that it is for the courts to decide under the first prong of *Seifert*, whether offending arbitration limitations and provisions are void and unenforceable as defeating the remedial remedies available under chapter 400. Each of these cases is discussed in the Initial Brief, and again cited here without discussion due to page restraints. *See Lacey v. Healthcare & Retirement Corp. of America*, 918 So.2d 333, 334 (Fla. 4th DCA 2006); *Alterra Healthcare Corp. 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); *Place at Vero Beach, Inc. v. Hansen,* 953 So.2d 773 (Fla. 4th DCA 2007); and *Fletcher v. Huntington Place, L.P.*, 952 So.2d 1225 (Fla. 5th DCA 2007). [1]

The *Shotts* decision is in express and direct conflict with every other district in the State of Florida on this important gateway issue. By shirking its responsibility to determine if the agreement (or offending clause) is enforceable or void as against public policy, the Second District is impermissibly delegating to the arbitrator its judicial obligation to determine whether a valid, enforceable

[1] The Third District has held that remedial limitations in a nursing home agreement are substantively unconscionable—a holding tantamount to finding the provision void as contrary to public policy. *Prieto v. Healthcare & Ret. Corp. of Am.*, 919 So.2d 531, 533 (Fla. 3d DCA 2005).

agreement to arbitrate exists under the first prong of *Seifert.* Under *Shotts,* once the arbitrator is faced with deciding the voidness issue, if the arbitrator 'gets it wrong,' the litigant against whom a void as against public policy clause or agreement will be enforced will have no recourse whatsoever to remedy the legal injustice. Certainly, that is not what this Court contemplated in the plethora of cases wherein the Court has repeatedly said that parties cannot by contract agree to provisions which defeat remedial remedies and protections available under a remedial statute, as such would be violative of the public policy of this state.

The *Shotts* Panel attempted to 'distinguish' all of the aforementioned cases with which *Shotts* is in conflict, by briefly noting how each court dealt with the issue of severability. For example, the Panel noted that *Lacey* and *SA-Ocala Partners* struck the entire arbitration agreement because they contained no severance clauses; *Fletcher,* and *Place at Vero Beach* had severability clauses, but the courts found the void provisions too integral to be severed, and *Blankfeld* didn't address severability at all. *Shotts* at 644.

Respectfully, the *Shotts* Panel has muddied the distinction between validity and enforceability in the context of public policy under the first prong of *Seifert,* with a separate, discrete, but related issue of, assuming an arbitration provision has been determined by the district court to be void and unenforceable, whether it is severable, or whether it is so integral to the heart of the agreement as to render the

entire agreement void and unenforceable. Petitioner respectfully suggests that this issue also falls under the first prong of *Seifert,* and it is for the court, and not the arbitrator, to decide. Stated simply, if the court were to pass on the issue of severability, and the arbitrator later determined that the void provisions were so integral as to render the entire agreement unenforceable, then in essence, the arbitrator would have been performing the court's duty (*albeit*, after-the-fact) to determine whether a valid, enforceable agreement existed under the first prong of *Seifert.* Alternatively, if the arbitrator were to 'get it wrong,' severing out an offending provision which was, indeed, integral to the parties' agreement to arbitrate, and allowing an arbitration agreement which truly defeats public policy to go forward, the aggrieved litigant would again have no recourse to right this injustice. Both the issue of who decides the gateway issue of voidness for public policy, and who decides whether void provisions are severable or so essential to the agreement so as to void the entire arbitration clause, are issues for the court to decide under the first prong of *Seifert*, as ***they are integral to the determination of whether the arbitration agreement is valid and enforceable.***

III. NEITHER THE ESTATE, NOR TANDEM, ARGUED APPLICATION OF THE FEDERAL ARBITRATION ACT, NOR DID THE *SHOTTS* PANEL CONSIDER OR ADDRESS SAME. *AMICUS'* INTRODUCTION OF A NEW ISSUE IS NEITHER PROPER NOR INTENDED TO ASSIST THE COURT IN RESOLUTION OF THE CONFLICTS BEFORE IT.

Subsection (a) of Rule 9.370 requires the motion for leave to file an amicus

brief to identify the particular issue(s) to be addressed in the amicus brief. These issues must be ***derived from the briefs*** of the parties to the litigation, since an ***amicus does not have standing to address issues not raised*** by the parties. *See Acton II v. Fort Lauderdale Hospital*, 418 So. 2d 1099, 1100-01 (Fla. 1st D.C.A. 1982); *Turner v. Tokai Financial Services, Inc.*, 767 So. 2d 494, 496, n.1 (Fla. 2d D.C.A. 2000). Here, the entirety of *Amicus Curiae* Heartland of Zephyrhills FL, LLC's ("Heartland's") brief, is devoted to a discussion of the Federal Arbitration Act ("FAA"), and the federal decisional authorities interpreting same.

While the arbitration agreement states that it is governed by the FAA, neither party sought to enforce that particular provision of the agreement. Indeed, neither party argued or asserted that the FAA applied, nor did either party argue or rely upon any federal decisional authorities in support of, or in opposition to, the motion to compel arbitration. Indeed, the Panel did not address application of federal statutory or decisional law to the matter before the Court (other than a footnote discussing a different case altogether). Because the parties' briefs, and the Panel's opinion, failed to address application of the FAA and federal decisions altogether, Heartland lacks standing to raise these entirely new issues in its *amicus curiae* brief.

As stated in Petitioners' opposition to Heartland's motion for leave to file an *amicus brief*, once granted leave of Court to appear as an *amicus*, Heartland

intended, and now has, utilized its *amicus* status to " attempt to inject interest-group politics into the ... appellate process by flaunting the interest of a trade association or other interest group in the outcome of the appeal." Such a motivation is not a proper ground upon which to seek *amicus* status. *See National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000).

Analysis of the federal decisional authorities cited by Heartland, which interpreted a federal statute which was neither considered nor applied in the instant case, does nothing to assist this Court in the resolution of conflicts in Florida district court cases *applying Florida law*. Further, Florida's Arbitration Code, and the procedures and remedies available to litigants thereunder, differ substantially from that applicable to cases governed and interpreted under the FAA. Because Heartland lacks standing to inject these unbriefed issues, they will not be addressed further.

IV. *SHOTTS'* APPROACH TO ANALYZING UNCONSCIONABILITY IS IN EXPRESS AND DIRECT CONFLICT WITH THE SLIDING SCALE APPROACH APPLIED IN THE FOURTH DISTRICT.

Shotts is in express and direct conflict with cases from the Fourth District which apply a 'sliding scale approach" or "balancing test," to assessments of unconscionability. The Second District requires a substantial showing of procedural unconscionability, before it will even consider reviewing the agreement to determine if it substantively unconscionable. In contradistinction, the Fourth

District employs a 'sliding scale' approach to unconscionability, requiring only a minimal quantum of unconscionability when it is clear to the Court that the agreement is substantively unconscionable. *See Romano v. Manor Care, Inc.*, 861 So.2d 59, 63 (Fla. 4th DCA 2004); *accord Kohl v. Bay Colony Club Condo., Inc.*, 398 So.2d 865, 867 (Fla. 4th DCA 1981). The analysis in *Shotts,* and before it *Bland v HCR Corp,* 927 So.2d 252 (Fla. 2d DCA 2006), is completely at odds and in conflict with the method employed in the Fourth District, thus leading to inconsistent results within the state on the same issue of law.

> ***This court, however, eschews the*[Romano Court's] *"sliding scale" approach. Rather, we assess procedural unconscionability and substantive unconscionability independently***. . . the trial court properly determined that the Agreement was not procedurally unconscionable, we need not address the issue of substantive unconscionability.

Bland at 257. *(emphasis added).*

The *Shotts* Panel cited *Bland* as authority on this point, thus adopting the *Bland* test for unconscionability, which is in direct conflict with *Romano.*

CONCLUSION

The *Shotts* decision is in conflict with a Florida statute applicable to durable family powers of attorney, and with numerous district court decisions. For the foregoing reasons, Petitioners respectfully request that this Court resolve the conflicts by disapproving *Shotts.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been sent by [ ] Hand Delivery [ ] Facsimile [ ] U.S. Mail [X] FeEx to: **Antonio Cifuentes, Esq.**, Mancuso & Dias, P.A., 5102 W. Laurel St., Suite 700, Tampa, Florida 33607, and **Sylvia H. Walbolt, Esq., Matthew J. Conigliaro, Esq., and Annette Marie Lang, Esq.,** Carlton Fields, P.A., P.O. Box 2861, St. Petersburg, FL 33731, this ____ day of August, 2009.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Motion complies 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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