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 INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitution

Statutes

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 attached to a nursing home admission agreement; second, whether it is for the courts in the first instance, or for the arbitrator, to decide the enforceability of the arbitration agreement when the issue of whether the agreement is void as violative of the public policy of this state has been raised as an avoidance defense to the arbitration provision; and third, 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 decisions of this Court and 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, 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 shall be collectively referenced as "Tandem."

References to certain documents contained in the Record before this Court shall be followed by citations to the Index to the Record on Appeal as follows: "(R. Vol. __, pp.___)." However, the vast majority of Record references in Petitioner's Statement of the Case and Facts refer to documents contained within the Appendix to Appellant's Initial Brief filed in the Second District. According to the Index to the Record on Appeal, the Appendix documents are indexed in Volumes I through III, thereby spanning all three volumes of the Record. However, the Clerk of the Second District did not indicate in the Index which numbered Appendix documents are contained within each of the three Record Volumes. Nor did the Clerk assign page numbers to each of the numbered documents in the Appendix. Petitioner is therefore unable to accurately cite to the particular Record Volume that contains each such Appendix document. Accordingly, all references in this Initial Brief to the tabbed and numbered documents contained within the Appendix to Appellant's Initial Brief before the Second District shall be cited as follows:

"(R. Vols. I-III, A__, p. ____)."

STATEMENT OF JURISDICTION

By Order of this Court dated February 24, 2009, this Court accepted jurisdiction of this matter 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), *rehearing denied* August 11, 2008. (R. Vol. III, pp. 125-133).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 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 this Court and 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 STANDARD OF REVIEW

Findings of fact relating to the *Shotts* Panel's determination of the absence of procedural unconscionability is reviewed based upon the competent, substantial evidence standard. *Bay County v. Town of Cedar Grove*, 992 So.2d 164 (Fla. 2008). The *Shotts* Panel's conclusions of law are reviewed *de novo. Id.* The Court's interpretation of contracts, including the arbitration agreement and the power of attorney instrument, is reviewed *de novo.* *U.S. Fire Insur. Co. v.*

J.S.U.B., Inc., 979 So.2d 871 (Fla. 2007). Statutory interpretation is a question of law and is reviewed *de novo. Continental Cas. Co. v. Ryan Inc. Eastern,* 974 So.2d 368 (Fla. 2008).

STATEMENT OF THE CASE AND FACTS

Mr. Clark was admitted to Tandem Health Care of Winter Haven, a Florida nursing home, on May 23, 2003, and remained there until his death on November 23, 2003. (R. Vols. I-III, A 1, p. 2). Mr. Clark had been involved in a serious automobile accident in 1977 and among other debillatating injuries, he suffered from organic brain syndrome and required 24 hour care. (R. Vol. III, p.126, R. Vols. I-III, A 6, p. 14). "He couldn't fully bathe himself. He couldn't—somebody had to be there to give him his medicine because he couldn't self-medicate because he would forget or take too many or take not enough." (R. Vols. I-III, A 6, pp. 16-17). In 1987, Mr. Clark moved to the home of his niece, Ms. Shotts, in New Jersey so that she could provide him with care. (R. Vols. I-III, A 6, p. 15). In 1989, he moved with Ms. Shotts and her family to Florida. *Id.*

According to Ms. Shotts' testimony, Mr. Clark had been declared incompetent by a court in New Jersey in 1981. (R. Vols. I-III, A 6, pp. 23-24). His assets were placed in an irrevocable trust. Notwithstanding his adjudication of legal incompetence seven (7) years earlier, Ms. Shotts was requested in 1988 by the attorneys retained for the automobile accident to have Mr. Clark execute a

power of attorney, designating Ms. Shotts as her uncle's attorney in fact. (R. Vol. I-III, A 6, p. 17). The power of attorney ("POA") was signed by Mr. Clark in the State of New Jersey, and the document was witnessed by *only one (1) witness*- the attorney who prepared the POA. (R. Vols. I-III, A 2, p. 1).

Ms. Shotts first placed Mr. Clark in a nursing home called Meadowview Life Center. (R. Vols. I-III, A 6, p. 29). Ms. Shotts had concerns with about the poor care that Mr. Clark had received at Meadowview and notified the facility that she desired to move Mr. Clark to Tandem. (R. Vols. I-III, A 6, p. 31).

At all times between the accident and throughout his residency at Tandem, Mr. Clark was incapable of making decisions for himself. (R. Vol. I-III, A 6, pp. 23-24). Accordingly, Ms. Shotts admitted her uncle into the facility, and signed the admission documents purportedly as Mr. Clark's attorney-in-fact. Ms. Shotts had no legal training, and was a housewife with a tenth (10th) grade education. (R. Vol. I-III, A 6, pp. 6-7, 8, 30, 55, R. Vol. III, p. 127). On the morning of the admission, Mr. Clark had been discharged from Meadowview, had his things packed, and was waiting to be picked up, while Ms. Shotts completed the admission procedures at Tandem. (R. Vols. I-III, A 6, p. 31).

Ms. Shotts did not meet with the Director of Admissions at that time, whom she had met on prior occasions when touring the facility. Rather, she received the admissions paperwork to be filled out, and reviewed it with one person from the

facility present—a girl working in a corner of the room on a computer. (R. Vols. I-III, A 6, p. 39). Ms. Shotts was asked if she "knew anything about arbitration." (R. Vols. I-III, A 6, p. 48). She answered, "no." (R. Vols. A 6, p. 48). No one from the facility sat down with Ms. Shotts to explain the terms and conditions of the agreements she was asked to sign. (R. Vols. I-III, A 6, p. 57). The Admissions Director, Michele Clark, was not present when Ms. Shotts reviewed and signed the paperwork. (R. Vols. I-III, A 8, pp. 25-26). The Admissions Coordinator, Agatha Avril, was present when Ms. Shotts signed the paperwork, but she had only a vague recollection of the process. (R. Vols. I-III, A 7, pp. 69, 101). Ms. Avril had no specific recollection of Ms. Shotts signing the agreement, and she responded to repeated questions regarding execution of the documents by simply concluding that because a signature and initials appear on the documents, and "because she was there," that Ms. Shotts must have signed it. (R. Vols. I-III, A 7, pp. 99-101). She did not recall that Ms. Shotts daughter and granddaughter were with her during the admission process. (R. Vols. I-III, A 7, p.100). She had no recollection of Ms. Shotts crying or being upset during the admission process. (R. Vols. I-III, A 7, p. 92-93).

Ms. Shotts testified that when reviewing the arbitration agreement, she felt that "I didn't have a choice that day because all the times that I had talked to [a facility representative] and everything and we discussed everything about this

facility, this was never—the arbitration thing was never brought up until the day I was there filling out the paper and my uncle was sitting at Meadowview waiting to come." (R. Vols. I-III, A 6, p. 37). Ms. Shotts believed that "if I didn't fill out all the papers and sign them, then he would have nowhere to go." (R. Vols. I-III, A 6, p. 37).

Ms. Shotts could not explain the difference between mediation and arbitration. (R. Vols. I-III, A 6, p. 56). Ms. Shotts explained her understanding of the arbitration provision as "that by signing it and putting my uncle in that nursing home, that we were not releasing them from responsibility, because you wouldn't do that, especially coming from the nursing home that he was, it was just that it had to be brought in certain increments before it goes to court of to a trial." (R. Vols. I-III, A 6, p. 38).

Ms. Shotts described her emotional state the morning of admission as she was "upset and nervous." (R. Vols. I-III, A 6, p. 43). "I guess I could say I was in tears or almost in tears…I had seen [my uncle] that morning, and he did not want to stay there, he wanted to go home with me, but I couldn't take him home with a broken hip, a leg brace, and a wheelchair." (R. Vols. I-III, A 6, p. 58).

She recalls asking the facility representative who was in the office as she reviewed the documents whether "if we don't fill this out, he can't come here, and she said everything had to be filled out. And I was like, he couldn't come here, and

he's ready, and she said, she kept repeating the same thing, everything has to be filled out and signed." (R. Vols. I-III, A 6, p. 43).

This feeling of compulsion permeated Ms. Shotts' thoughts as she filled out the admission packet. Her understanding of the arbitration agreement was that "if we wanted him to go to Tandem, I had to sign it." (R. Vols. I-III, A 6, p. 44). "To me that's saying if I don't sign this, because this facility requests it, then I have to find another one." (R. Vols. I-III, A 6, p. 47).

Ms. Shotts was specifically asked if she was "under duress to sign these documents." (R. Vols. I-III, A 6, p. 54). Once she was explained what "duress" meant, she responded, "If I didn't sign these papers, my uncle would not have a place to go that night. He was already discharged from Meadowview, and everything else was settled with Tandem and waiting his arrival and his room was set and everything pending these papers. So if I didn't sign this paper, I was taking him home that night. Because there was no way I could find another facility in the same workday and go through the same thing that took me a week to do to set this one up in a matter of hours." (R. Vols. I-III, A 6, p. 54).

The arbitration agreement provides that it will be conducted in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules. (R. Vols. I-III, A 3, p. 10). The agreement also

expressly eliminates the availability of punitive damages. (R. Vols. I-III, A 3, p. 11).

While Mr. Clark resided at the facility, Tandem failed to act reasonably in his care by failing to prevent unexplained weight loss, by failing to prevent him from falls and injuries from those falls, by failing to properly assess and appropriately treat physical, mental and emotional problems, by failing to provide a safe environment, by failing to prevent delays in the provision of care, and by failing to provide consistent and appropriate documentation. (R. Vols. I-III, A 1, p. 5). As a consequence, Mr. Clark suffered multiple falls with injuries and weight loss. (R. Vols. I-III, A 1, p. 5).

The Estate filed a Complaint on January 27, 2005 against Tandem seeking damages for negligence, nursing home residents' rights violations, wrongful death, and breach of fiduciary duty. (R. Vols. I-III, A 1, p. 1). Tandem responded by filing a Motion to Compel Arbitration on February 25, 2005. (R. Vols. I-III, A 4, p. 1). The Estate filed a Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration on March 3, 2005. (R. Vols. I-III, A 5, p. 1). Thereafter, a hearing on the Motion to Compel Arbitration was held on April 10, 2007 before the Honorable Susan W. Roberts. (R. Vols. I-III, A 8, p. 1). At the hearing, the Estate argued as an initial matter that there were problems with the power of attorney, including an insufficient number of witnesses, if the instrument

were construed under Florida law. (R. Vols. I-III, A 8, pp. 83-84). The Estate therefore maintained that Ms. Shotts did not have the authority to sign the arbitration agreement on behalf of her uncle. (R. Vols. I-III, A 8, p. 85). **The** Estate asserted that the POA was not valid or enforceable in Florida, as it was signed seven years after Mr. Clark had been adjudicated legally incompetent, and because it was witnessed by only one (1) witness, whereas Florida law requires that two (2) witnesses must sign the POA as having witnessed the principal's signature. The Estate further argued that assuming *arguendo* that Ms. Shotts had the authority to sign the arbitration agreement, the arbitration agreement was not valid and enforceable because it violates public policy and is procedurally as well as substantively unconscionable. (R. Vols. I-III, A 8, pp. 84-85). The Estate argued that the arbitration agreement violates public policy because the agreement alters the benefits conferred by a remedial statute by incorporating the American Health Lawyers' Association ("AHLA") rules which involve a heightened burden of proof, and because the agreement purports to eliminate punitive damages altogether. (R. Vols. I-III, A 8, pp. 37-47).

Tandem responded that there was a signed arbitration agreement and that it was entered into voluntarily. (R. Vols. I-III, A 8, p. 55). Tandem argued that any deficiencies in the power of attorney were cured on account of the fact that Ms. Shotts was the third party beneficiary of the arbitration agreement. In Tandem's

words, “in the *Linton* case the court ruled that even when there was no power of attorney, that a third party beneficiary would be able to bind the resident.” (R. Vols. I-III, A 8, p. 89). Tandem further maintained that even though the agreement eliminates the statutory remedy of punitive damages, that “according to the Second DCA that’s okay.” (R. Vols. I-III, A 8, p. 58). Lastly, Tandem maintained that “procedurally the agreement is fair.” (R. Vols. I-III, A 8, p. 95).

The court found that the arbitration agreement was “enforceable, not severable and not repugnant to the public policy of the State of Florida.” (R. Vols. I-III, A 9, p. 1). The court further found that the AHLA rules will govern in arbitration (R. Vols. I-III, A 9, p. 2). Accordingly, the trial court entered an Order Granting Defendants’ Motion to Compel Arbitration. (R. Vol. I, pp. 4-5, R. Vol. III, A 9, p. 1).

The Estate timely appealed the order, (R. Vol. I, pp.1-5), asserting (i) that the POA was invalid because it was executed by Mr. Clark after his adjudication of legal incompetence and because it contained the signature of only one (1) witness rather than the two (2) witnesses as required by Florida law; (ii) that the arbitration agreement was unenforceable because it was procedurally and substantively unconscionable, (iii) that 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; and (iv) that the offending arbitration clauses were integral to the agreement and went to its essence, and therefore were incapable of being severed.(R. Vol. I, pp. 12-49).

Tandem asserted (i) that the POA was valid, (ii) that Ms. Shotts signed the arbitration agreement as attorney-in-fact, (iii) that the record was insufficient to support a finding of unconscionability, and (iv) that the repugnant clauses could be severed from the agreement, but that the arbitrator, rather than the court, should have been the one to rule on the public policy issue and to sever the clauses. (R. Vol. III, pp. 56-71).

The Second District held that the trial court properly found that there was no procedural unconscionability. The Panel stated that because a showing of *both* procedural and substantive unconscionability is required to support a finding of unconscionability, the Court did not need to analyze the issue of substantive unconscionability. (R. Vol. III, p. 129).The Court failed to resolve the issue of whether the offending arbitration provisions were void as against public policy, instead deferring resolution of the matter to the arbitrators. "[I]f the arbitrators find any portion of the arbitration clause to be unenforceable or invalid, the arbitrators will have the ability to sever the improper provisions from the remaining provisions and enforce the remainder of the agreement according to its terms."(R. Vol. III, p. 134).

With regard to the Estate's issue regarding the invalidity (or at least the lack of enforceability in Florida) of the POA due to Mr. Clark's legal incapacity and the fact that the POA contained only one (1) witness signature and was therefore violative of section 708.02 of the Florida Statutes, the Panel rejected the Estate's argument and opined, in a footnote, that "[a]lthough Ms. Shotts argued that the power of attorney was invalid, *she failed to meet her burden."* (R. Vol. III, p. 128). *(emphasis added).*

SUMMARY OF THE ARGUMENT

The *Shotts* decision is in direct and express conflict with decisions from this Court and the other district courts on the issue of which party bears the burden of proving authority under a POA, and the issue of how a POA is to be interpreted and enforced. The decision is in direct and express conflict with decisions from other districts on the issue of whether a Court in the first instance should decide enforceability issues under the first prong of *Continental Cas. Co. v. Ryan Inc. Eastern,* 974 So.2d 368 (Fla. 2008).

, 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's exercise of discretionary jurisdiction.

ARGUMENT

I. THE *SHOTTS* DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE OTHER DISTRICTS ON THE ISSUE OF AUTHORITY UNDER THE POA.

The *Shotts* decision is in direct and express conflict with a decision from this Court on the issue of which party has the burden of proving the agent's authority. The *Shotts* Panel rejected the Estate's challenge to Ms. Shotts' lack of authority under the POA, by opining that "[a]lthough Ms. Shotts argued that the power of attorney was invalid, *she failed to meet her burden."* (R. Vol. III, p. 128). *(emphasis added).* In *Foye Tie & Timber Co. v. Jackson*, 97 So. 517 (Fla. 1923), this Court held that "when a plaintiff in a civil action seeks to recover upon a contract alleged by him to have been made with the defendant through the latter's agent, the burden of proof is upon the [person relying on the agent's authority] to show the authority of the agent for making the contract." In the instant case, Tandem asserted that Ms. Shotts had authority to bind her uncle to arbitration because she signed the agreement as an attorney-in-fact under a POA. Tandem filed the POA with the court as evidence of Ms. Shotts' authority.

The Estate challenged that authority in two ways: first, by the deposition testimony of Ms. Shotts that her uncle had been adjudicated legally incompetent years before by a New Jersey court; and second, by asserting that a POA which is witnessed by a single witness is contrary to Florida law and is therefore

unenforceable in Florida. Although Ms. Shotts did not produce any court order to substantiate the first claim, which, of course, would have been the best evidence of Mr. Clark's incompetency adjudication, her testimony on this point was uncontroverted by Tandem. Nor did Tandem object and move to strike this evidence based upon the best evidence rule.

Tandem had clearly been put on notice well before the hearing on their motion to compel arbitration of the possibility that the POA was invalid. Despite being put on notice of the legal incompetency issue at Ms. Shotts' deposition, Tandem made no subsequent effort to refute this evidence, and apparently failed to do any due diligence to determine whether, in fact, Mr. Clark had been adjudicated legally incompetent, or whether a court had reinstated his competency. (App. Tab 6, pp. 23-24). A simple court records search would have confirmed (or refuted) Ms. Shotts' testimony about Mr. Clark's legal incompetency adjudication.

Based on the unrefuted testimony of Ms. Shotts on this issue, Tandem bore the burden of proving that Ms. Shotts had authority under a potentially invalid POA. When faced with evidence that Mr. Clark had been adjudicated incompetent and that an irrevocable trust had been established in 1981 to manage his affairs, Tandem simply shirked its obligation to prove Mr. Clark's competency to appoint Ms. Shotts as his attorney in fact in 1987, and instead suggested that "[w]e have no record evidence, other than Ms. Shotts' assertion, that a court in New Jersey in fact

came to this [incompetency] conclusion." (R. Vol. III, p. 61). In order to execute a valid power of attorney under both Florida and New Jersey law, the principal must be competent—that is, capable of understanding the nature and effect of his act. *In re Estate of Zaolino*, 1998 WL 34001287 (N.J. Super. A.D. 1998); 15 Fla. Prac., Elder Law §25:3 (2007 ed.). If 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 the authority to bind Mr. Clark to arbitration.

On the issue of authority under this POA, the *Shotts* decision is also 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 Estate's second attack on Ms. Shotts' lack of authority under the POA challenged the enforceability of the POA in Florida by reference to the POA itself, which on its face was witnessed by only a single witness, contrary to Florida law. Mr. Clark's POA qualifies as a durable family power of attorney, as the POA includes the qualifying subsequent disability language required by section 709.08(1) of the Florida Statutes (2008) that the power of attorney is not affected

by the principal's subsequent incapacity. "This Power of Attorney is effective now and remains in effect even if I become disabled. . . ." (R. Vols. I-III, A2, p. 7) 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 ignored that the POA, on its face, did not appear regular because it failed to comport with Florida law. The Panel erred in failing to note that the POA was not effective in Florida due to its noncompliance with section 709.08(1)'s two (2) subscribing witnesses requirement, and in ruling, contrary to this Court's opinion in *Foye,* that it was the agent, Mrs. Shotts,' burden to prove the lack of authority based upon invalidity of the POA, and that she had failed to prove same.

As stated, Florida law is clear that the person who intends to rely on an agent's authority 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. In order for Tandem to rely upon the New Jersey POA to establish Ms. Shotts' authority at the evidentiary hearing on their motion to compel, Tandem was required to prove that the POA comports with Florida law. Tandem was unable to prove same. Section 709.01(2) provides that "[i]f the exercise of the power requires the execution and delivery of a recordable instrument, the power of attorney shall be executed with the same formalities as required of the instrument itself and recorded pursuant to the laws of Florida." The POA was recorded, but due to the single witness acknowledgement on the POA, it cannot be said that it appeared regular on its face.

The Court's opinion, which shifted the burden of proving authority to the agent, is likewise in direct and express conflict with decisions from the other districts including *Font v. Stanley Steemer International, Inc.*, 849 So.2d 1214, 1216 (Fla. 4th DCA 2003) ("The party alleging the agency relationship bears the burden of proving it, just as the party moving for summary judgment has the burden to prove the absence of material fact issues."), and *Robbins v. Hess,* 659 So.2d 424, 427 (Fla. 1st DCA 1995) ("The party alleging the agency relationship bears the burden to prove it, just as the party moving for summary judgment has the burden to prove the absence of material fact issues."). *Accord, Kobel v. Schlosser*, 614 So.2d 6, 7 (Fla. 4th DCA 1993).

II. THE *SHOTTS* OPINION IS IN DIRECT CONFLICT WITH DECISIONS FROM ITS OWN COURT AND ANOTHER DISTRICT ON THE CONSTRUCTION AND INTERPRETATION OF THE GRANTS OF AUTHORITY IN A POA.

The *Shotts* opinion conflicts with long-standing Florida law from the First District as well as its own Second District 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). *Kotsch* stands for the proposition that in the Second District, grants of powers under a POA are to be *strictly construed*, granting only those powers *expressly specified*, and that the POA must be *closely examined to ascertain the intent of the principal.* The *Kotsch* Panel cited with approval Judge Altenbernd's special concurrence in *Falls at Naples, Ltd. v. Barnett Bank of Naples, N.A.*, 603 So.2d 100 (Fla. 2d DCA 1992), thus making the concurrence binding law in the Second District. Judge Altenbernd explained that notwithstanding a broad power in the POA, the absence of an *express grant* meant that the POA had to be strictly construed as not authorizing the agent to act.

The *Shotts* Panel ignored or misconstrued the foregoing precedent from its own Court and misconstrued the plain and unambiguous language of the POA in determining that Ms. Shotts had authority to waive her uncle's personal constitutional rights of access to the courts and to a jury trial. Contrary to

Tandem's suggestion that the POA conveyed broad powers, the POA was limited to real estate and tangible property, and did not provide Ms. Shotts with the authority to waive her uncle's punitive damages rights or constitutional jury trial rights. (R. Vols. I-III, A 2).

Tandem argued that even if the trial court found "the power of attorney to be invalid because of some technicality, in the *Linton* case the court ruled that even where there was no power of attorney, that a third party beneficiary would be able to bind a resident." (R. Vols. I-III, A 8, p. 89). Thus, Tandem maintained that Ms. Shotts was a third party beneficiary, and that Mr. Clark was bound by her action. (R. Vols. I-III, A 8, p. 89). Tandem, however, completely misstates the holding of *Alterra Healthcare Corp. v. Linton*, 953 So.2d 574 (Fla. 1st DCA 2007). Under *Linton*, a third party beneficiary does not bind the resident, as Tandem suggests, but rather a resident is a third party beneficiary of a contract in which the signatory is treated as the contracting party. *Id*. at 579. Mr. Clark, not Ms. Shotts, would be the third party beneficiary under *Linton*. Ms. Shotts is not a named intended third party beneficiary, nor is it clear that the contract was drafted for her benefit.

The trial court did not rule on the third party beneficiary issue, nor did Tandem properly raise the *Linton* argument. However, if this Court should nonetheless consider this argument on discretionary review, Tandem still has not proven that Ms. Shotts had the authority to waive her uncle's personal,

constitutional rights. *Linton* was wrongly decided on the issue of authority and conflicts with the Fourth District's holding in *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296 (Fla. 4th DCA 2005). Moreover, the facts and terms of the agreements in the instant case are distinct from *Linton* and are not appropriate for application of the third party beneficiary argument.

By holding that Mrs. Linton was bound to arbitrate as a third party beneficiary without finding that Mr. Linton had the authority to waive his mother's constitutional rights, the *Linton* Panel departed from centuries of power of attorney and agency law. Arbitration provisions are personal covenants that bind only the parties thereto. *Regency Isl. Dunes, Inc. v. Foley & Assocs. Contr. Co., Inc.*, 697 So.2d 217, 218 (Fla. 4th DCA 1997). Therefore, anyone who has not agreed expressly or implicitly to be bound by an arbitration agreement cannot be compelled to arbitrate. *Karlen v. Gulf & W. Indus., Inc.*, 336 So.2d 461, 462 (Fla. 3d DCA 1976). If a party has not signed an agreement to arbitrate themselves, the question presented is whether the signatory had the authority to bind the nonsignatory. *See Global Travel Marketing, Inc. v. Shea*, 908 So.2d 392 (Fla. 2005) (the Court reviewed whether a parent has the authority to bind a nonsignatory minor child to an arbitration agreement); *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla. 1999).

Mr. Linton did not have the authority to waive his mother's personal constitutional rights. 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.

In *Blankfeld*, 902 So.2d at 299-301, the Fourth District in an *en banc per curiam* decision held that a son, as health care proxy, signing a nursing home admission, agreement did not have the authority to bind his mother to arbitration. The Court directly took up the authority issue in the nursing home context, and determined that the signatory did not have the authority to bind a nonsignatory to arbitration in a case involving residents' rights and personal injury. Accordingly, the *Linton* opinion is in direct conflict with the *en banc* decision of the Fourth District in *Blankfeld,* on the issue of a family member's authority to bind the resident to arbitration. The Third District came to a similar conclusion in a previously issued citation opinion. *IHS of Florida No. 5, Inc. v. Zielonka*, 823 So.2d 304 (Fla. 3d DCA 2002).

The Residency Agreement states that the parties are Tandem and Mr. Clark, and that Mr. Clark is the "Responsible Party." (R. Vols. I-III, A 3, p. 1). However, Ms. Shotts signed the agreement on the line titled "signature of responsible party." (R. Vols. I-III, A 3, p. 7).

The arbitration agreement does not make any mention of the "responsible party." Instead, the agreement refers to the "resident's designee." The resident's designee is not acknowledged as having any rights or obligations under the arbitration agreement. Ms. Shotts simply signed the agreement as the resident's designee. (R. Vols. I-III, A 3, p. 13).

The instant case is distinct from *Linton* because the responsible party does not even have 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.

Assuming that the POA does not support the Panel's erroneous finding of authority, Ms. Shotts would also lack authority to bind her uncle to arbitration in the event she were merely acting as her uncle's next of kin proxy. The Panel's decision is in conflict with the Fourth District's decision in *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296, 300 (Fla. 4th DCA 2005), on this point. In

Blankfeld, the Court held that "health care decisions" authorized under section 765.101(5) do not include "waiving the right to sue for damages in the courts for violations of the Act or common law negligence…." *Id*. The Court further stated that "[i]n our opinion, a proxy is not authorized to waive the right to trial by jury, to waive common law remedies, or to agree to modify statutory duties applicable generally to all persons receiving health care services." *Id*. at 301. The Third District came to a similar conclusion in a previously issued citation opinion. *IHS of Florida No. 5, Inc. v. Zielonka*, 823 So.2d 304 (Fla. 3d DCA 2002).

III. THE PANEL'S DECISION IS IN CONFLICT WITH DECISIONS FROM EVERY OTHER DISTRICT ON THE ISSUE OF WHETHER THE ARBITRATION AGREEMENT WAS UNENFORCEABLE AS CONTRARY TO PUBLIC POLICY.

The Estate challenged the arbitration agreement as void as against public policy. (R. Vols. I-III, A 5, p. 8). The arbitration agreement violates public policy because it eviscerates the rights provided under a remedial statute. In particular, the agreement precludes the recovery of punitive damages, and applies the AHLA Rules to arbitration. (R. Vols. I-III, A 3, pp. 10-11). This Court has yet to rule on the issue of whether the presence of remedial limitations in an arbitration agreement makes the agreement void as contrary to public policy. However, every district court to rule on the issue has held that such provisions are void as against public policy.

The First, Third, Fourth and Fifth Districts have all struck nursing home arbitration agreements that contain remedial limitations because these limitations abrogate rights specifically conferred upon nursing home residents by the Florida legislature. Thus, the Fourth District in a similar case concluded, "that the trial court erred in ordering arbitration, because this arbitration agreement violates public policy by defeating the purposes of Florida's remedial Nursing Home Resident's Act." *Lacey v. Healthcare & Retirement Corp. of America*, 918 So.2d 333, 334 (Fla. 4th DCA 2006); *see also 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); *and Fletcher v. Huntington Place, L.P.*, 952 So.2d 1225 (Fla. 5th DCA 2007).[1]

In adopting the Nursing Home Residents' Act, Chapter 400, the Florida legislature was responding to widespread elder abuse. *Romano v. Manor Care, Inc.*, 861 So.2d 59, 62-63 (Fla. 4th DCA 2003). One of the primary purposes of enacting remedial legislation is to correct or remedy a problem or redress an injury. *Campus Communs., Inc. v. Earnhardt*, 821 So.2d 388, 396 (Fla. 5th DCA 2002). Accordingly, remedial statutes should be given their intended purposes, and as a

[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).

result receive "special" treatment such as retroactive application. *City of Orlando v. Desjardins*, 493 So.2d 1027, 1028 (Fla. 1986). This Court in *Knowles v. Beverly Enterprises Florida, Inc.*, 898 So.2d 1 (Fla. 1994), opined that Chapter 400 was a remedial act. The legislature ***clearly and explicitly*** created a remedial statute under its police power in order to protect institutionized Floridians and to discourage neglect and abuse.

The Florida Supreme Court has demonstrated an unwillingness to allow a judicially created rule from abrogating remedies conferred under a remedial statute. *Comptech International, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219, 1222 (Fla. 1999). ("Courts do not have the right to limit and, in essence, to abrogate, as the trial court did in this case, the expanded remedies granted…under this legislatively created scheme.") Similarly, the Court would likely be unwilling to abrogate the remedies conferred on elderly nursing home residents under Chapter 400 to enforce a contract drafted by one of the very entities for whose conduct the remedial statute was drafted to redress.

Because the rights abrogated by the arbitration agreement are based on a remedial statute, which is a declaration of public policy, 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.

In *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296, 297 (Fla. 4th DCA 2005), the Fourth District held *en banc* that arbitration provisions which limit the remedies available under the Act are void as contrary to public policy. The arbitration agreement in *Blankfeld* just as the agreement in the instant case provided that the AHLA Rules applied to arbitration. *Id*. at 297-298. The AHLA Rules provide that the arbitrator may not award punitive damages unless there is "clear and convincing evidence that the party against whom such damages are awarded is guilty of conduct evincing an intentional or reckless disregard for the rights of another party or fraud, actual, or presumed." *Id*. at 298. In striking the provision as contrary to public policy, the Court concluded that, "the remedies provided in the legislation would be substantially affected and, for all intents and purposes, eliminated." *Id*.

In *SA-PG-Ocala, LLC*, the Fifth District adopted the *Blankfeld* rationale. 935 So.2d at 1242. The arbitration provisions in *SA-PG-Ocala* also raised the burden of proof needed in order for punitive damages to be awarded. *Id*. at 1242-1243. The Court held that such a provision was contrary to public policy. *Id*. at 1243. "It would be against public policy to permit a nursing home to dismantle the protections afforded patients by the Legislature through the use of an arbitration agreement." *Id*.

In two very recent decisions, the Fourth and Fifth Districts have reaffirmed the reasoning of *Blankfeld* and *SA-PG-Ocala*. In *Fletcher v. Huntington Place, L.P.*, 952 So.2d 1225 (Fla. 5th DCA 2007) and in *The Place at Vero Beach, Inc. v. Hanson*, 953 So.2d 773 (Fla. 4th DCA 2007), the Courts expressly held that an arbitration agreement which required that the arbitration be administered by the AHLA rendered it unenforceable. In particular, the Courts found that "the inclusion of certain provisions in the [AHLA Rules] were void as against public policy because they had the effect of superseding or dismantling the protections afforded patients by the legislature in the Nursing Home Resident's Act, Chapter 400." *Fletcher*, 952 So.2d at 1226.

The facts here are even stronger here than in *Blankfeld*, *Fletcher*, *The Place at Vero Beach* and *SA-PG-Ocala*. The arbitration provisions at issue in this case do not merely raise the burden of proof in order for punitive damages to be awarded, but instead punitive damages are completely eliminated. (R. Vols. I-III, A 3, p. 11). The purpose of the remedial legislation which expressly provides for punitive damages in order to achieve remedying elder abuse is quashed. The remedy provided in the legislation is eliminated. For these reasons, this Court should hold that the arbitration agreement is void as contrary to public policy.

Further, the arbitration clause provides that disputes shall be resolved by binding arbitration to be conducted in accordance with the AHLA Procedures.(R.

Vols. I-III, A 3, p. 3). However, AHLA has amended its rules to provide that it will no longer accept the administration of health care liability cases involving individual patients without a post-dispute agreement to arbitrate.[2] The agreement containing the arbitration provision was executed at the time of Mr. Clark's admission to the nursing home and ***prior*** to any dispute related to his care. Moreover, AHLA is specifically designated as the sole arbitral forum of choice in the contract.

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[2] "**Important Announcement Related to Health Lawyers' ADR Service** (from AHLA website; http://www.healthlawyers.org/adr/announcement.cfm)

> The American Health Lawyers Association's Alternative Dispute Resolution Service [the Service] has amended its rules for cases filed with the Service after January 1, 2004. The Service will only administer consumer health care liability claims if an agreement to arbitrate was entered into by the parties in writing after the alleged injury occurred.
>
> The term "consumer health care liability claim" means a claim in which a current or former patient or a current or former patient's representative (including his or her estate or family) alleges that an injury was caused by the provision of (or the failure to provide) health care services or medical products by a health care provider or the manufacturer, distributor, supplier, or seller of a medical product.
> Health Lawyers' ADR Service will continue to administer all other kinds of claims whether the agreement to arbitrate or mediate was entered into pre or post alleged injury. The ADR Service is an important service offered by the Association, and we encourage attorneys to use this Service to resolve conflicts that may arise in interpreting agreements entered into by healthcare providers, professionals, plans, vendors, and service providers. The Service's rules contain sample arbitration and mediation provisions to use in agreements in case of a dispute."

The *Shotts* Panel referenced *Blankfeld, Place at Vero Beach, Fletcher, SA-PG-Ocala* and *Lacey,* but curiously made no attempt to distinguish the *Shotts'* Panel's refusal to rule (and deferral to the arbitrator) on the public policy issue, from the Courts' findings in each of the aforementioned cases, wherein each of the First, Third, Fourth and Fifth Districts ruled, consistent with the first prong of *Seifert,* that the arbitration agreements were unenforceable and void because they defeated the remedial remedies available under chapter 400 and were against public policy.

III. THE *SHOTTS* DECISION IS IN CONFLICT WITH THIS COURT'S DECISION IN *SEIFERT*, THAT IT IS FOR THE COURT TO DECIDE, AS A THRESHHOLD MATTER, WHETHER AN ARBITRATION AGREEMENT IS ENFORCEABLE.

In *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla. 1999), this Court established that "[t]here are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration has been waived." The issue of whether the limitations in the instant agreement are void as against public policy falls under the first prong of the *Seifert* test. *Seifert* mandates that the Court, in the first instance, must determine this issue in order to satisfy the Court's duty of determining "whether a valid written agreement to arbitrate exists."

Yet, rather than resolve the public policy issue under the first prong of *Seifert*, as did the Courts in the foregoing decisions from the other districts, the *Shotts* Panel instead took a 'pass' and deferred the matter to the arbitrator to decide, noting in a footnote, *dicta* from *Bland v. Health Care and Retirement Corp. of America*, 927 So.2d 252, 256 (Fla. 2d DCA 2006), which distinguished *Blankfeld* by noting that in that case the finding of voidness as against public policy was based upon a shifting of the burden of proof "which effectively precluded recovery of negligence. The [*Bland*] Agreement contains no such restrictions. . . . The parties, in effect, have empowered the arbitrator to address Mrs. Bland's public policy concerns. The arbitrator may exercise that authority and determine whether the Agreement's remedial limitations are unenforceable." (R. Vol. III, p. 132).

Because it was cited in *Shotts*, Tandem will no doubt raise the Second District's decision in *Bland* in response to the Estate's argument on public policy. First, this Court should note that *Blankfeld* , *Fletcher, The Place at Vero Beach* and *SA-PG-Ocala* were all decided after *Bland*, as was a case not cited in the *Shotts* opinion, *Alterra Health Care Corp. v. Bryant*, 937 So.2d 263, 266 (Fla. 4th DCA 2006), which cited *Blankfeld, Romano,* and *Lacey* as authority, and held that the waiver of the right to appeal contained in the AHLA rules, which is contrary to the limited right to appeal found in section 682.20 of the Florida Arbitration Code,

was contrary to public policy and rendered the arbitration agreement void. In fact, the Fourth District found that *Bland* did not address the public policy issue in a precedent setting way. *Bryant*, 937 So.2d at 268-269.

The *Bland* Panel first addressed the issue of procedural unconscionability. *Bland*, 927 So.2d at 256. The *Bland* Panel found that the opportunity the appellant had to review the agreement coupled with the fact that the resident's stay at the home was not conditioned on signing the agreement meant that there was no procedural unconscionability. *Id*. The appellant in *Bland* failed to properly preserve the public policy issue for appellate review. *Id*. at 257. As a result, the *Bland* Panel addressed the public policy issue in a nonprecedent setting way.

The *Bland* Panel found that the Act is a remedial statute, and that "the legislature enacted the statute to protect some of Florida's most vulnerable residents." *Id*. at 258. The Court stated that, "[a]rguably, therefore, the Agreement's remedial limitations undermine the statute's salutary purposes." *Id*. The Court went on to recognize the general policy in Florida favoring arbitration. *Id*. The Court hinted at a possible balancing of these interests by putting the opposing policies in sequential paragraphs. However, the *Bland* Panel did not complete the balance, or enunciate a test. Rather, the Court addressed the situation of when the *Seifert v. U.S. Home Corp.*, 750 So.2d 633 (Fla. 1999), three-prong analysis is complete: "Once the trial court completes its three-prong task under

Seifert, 750 So.2d at 636, we see no reason why the arbitrator, in the first instance, cannot decide whether to enforce the remedial limitations." *Id*. Once the trial court's job is done, the Panel stated that "the arbitrator can assess the public policy concerns in the context of a fully developed factual record." *Id*.

The *Bland* decision should not be read as suggesting that the trial court is without authority to reach the public policy issue. Under Judge LaRose's analysis in *Bland*, the trial court has concluded the three-prong *Seifert* test before the case goes to the arbitrator. *Id*. The *Bland* Panel found that the arbitration agreement was valid *before* the case could be shipped off to the arbitrator. However, when public policy is raised as a contract avoidance defense, it falls within the first prong of *Seifert*, that is, the public policy defense is properly within the trial court's authority as it examines the validity of the agreement. The trial court rather than the arbitrator must consider public policy when it is raised as a contract avoidance defense in accordance with the first prong of *Seifert.*

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 did not address the public policy/voidness issue under the first prong of *Seifert* as to the validity of the arbitration agreement. If public policy

concerns are raised as a contract defense with respect to the initial validity of the arbitration agreement, the court has not yet completed its *Seifert* analysis. This Court should determine that *Shotts* is in conflict with *Seifert* as well as the holdings of the other districts in the above-referenced cases finding similar arbitration agreements void as against public policy.

V. THE *SHOTTS* DECISION IS IN CONFLICT WITH DECISIONS FROM THE OTHER DISTRICTS REGARDING THE SHOWING REQUIRED TO SUPPORT A FINDING OF UNCONSCIONABILITY.

As an initial matter, consideration of unconscionability likewise falls under the first prong of *Seifert*, namely, whether a valid written agreement to arbitrate exists. *Seifert*, 750 So.2d at 636; *Powertel, Inc. v. Bexley*, 743 So.2d 570, 574 (Fla. 1st DCA 1999). In fact, unconscionability is a gateway issue. *Martin v. Teletech Holdings*, 2006 WL 3794324 (9th Cir. December 19, 2006). "The threshold question of whether an arbitration agreement is unconscionable is a question for the court to decide." *Id*.; *see Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)(stating that "a gateway dispute about whether the parties are bound by a given arbitration clause raised a question of arbitrability for a court to decide); *First Options of Chicago*, 514 U.S. at 944 (stating that "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability) courts generally should apply ordinary state law principles that govern the formation of contracts").

In considering whether an arbitration agreement is unenforceable due to 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. *See Shotts* (R. Vol. III, p. 129). 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. In *Romano v. Manor Care, Inc.,* 861 So.2d 59 (Fla. 4th DCA 2004) the Court determined that an arbitration agreement was substantively unconscionable because it defeated remedies available under the nursing home resident's rights statute, which is a remedial statute. The Court noted that while both procedural and substantive unconscionability must be present before an agreement will be deemed unenforceable, both elements of unconscionability do not have to be present to the same degree. "Most courts take a "balancing approach" to the unconscionability question, and to tip the scales in favor of unconsicionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability." *Id* at p. 63. The Court cited to its earlier opinion in *Kohl v. Bay Colony Club Condo., Inc.,* 398 So.2d 865, 867 (Fla. 4th DCA 1981), that "we conclude that some quantum of procedural unconscionability is shown. Because of the egregious substantive unconscionability of the terms of the agreement, the test

of *Kohl* and *Powertel* is met, the agreement is unconscionable and thus unenforceable. *Id* at p. 64.

The Second District analysis of unconscionability 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. In *Bland*, the Second District noted the different approaches to unconscionability, noting that:

> *Romano* employed a "**sliding scale**" approach to testing the **unconscionability** of an arbitration agreement. *Romano,* 861 So.2d at 62. Under this standard, a high degree of substantive unconscionability coupled with even scant evidence of procedural unconscionability renders an arbitration agreement unenforceable. *Id. Romano* concluded that the limitations on the remedies available to the nursing home resident abrogated statutory rights and, consequently, rendered the arbitration agreement a contract of "egregious substantive unconscionability." *Id.* at 64.
>
> ***This court, however, eschews the "sliding scale" approach. Rather, we assess procedural unconscionability and substantive unconscionability independently***. *Petsch*, 872 So.2d at 265 (citing *Eldridge v. Integrated Health Servs., Inc.*, 805 So.2d 982 (Fla. 2d DCA 2001)). Having concluded that the trial court properly determined that the Agreement was not procedurally unconscionable, we need not address the issue of substantive unconscionability. *(emphasis added).*

Id. at p. 257.

Applying this sliding scale approach, the *Shotts* Panel considered the Estate's showing of procedural unconscionability to be insubstantial, allowing the Court to bypass the issue of substantive unconscionability altogether. The unconscionability analysis employed by the *Shotts* Court,

and before it by the *Bland* Court, is in direct and express conflict with the unconscionability analyses utilized in the Fourth District. This Court has yet to rule on the issue of unconscionability and whether both types of nconscionability must be shown in every case. Accordingly, this Court's guidance is needed to clarify the issue of (i) 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, (ii) whether a sliding scale approach should be employed such that where an agreement is shown to be significantly substantively unconscionable, only a modicum of procedural unconscionability need be shown, or (iii) whether, as in the instant case, the Court is free to ignore the substantive unconscionability of the agreement altogether by first determining that the showing of procedural unconscionability is insubstantial. The Estate respectfully suggests that the latter method leads to arbitrary application of the *Seifert* analyses and regularly results in inconsistent holdings in arbitration cases.

A. The Arbitration Agreement Is Procedurally Unconscionable.

Analysis of procedural unconscionability is based in part on factual findings and thus presents a mixed question of fact and law. As correctly noted by the *Shotts* Court, review of the factual findings is limited to determining whether they

are supported by competent, substantial evidence. *Shotts*, (R. Vol. 3, p132). In its consideration of procedural unconscionability, the *Shotts* Panel stated that "the arbitration agreement was separate from the remainder of the admission paperwork." *Id.* at p. 2. This finding is not supported by competent, substantial evidence. The admission agreement itself states that the arbitration agreement is "attached hereto" [to the admission papers]. The Court stated that Ms. Shotts was not rushed. . . .and she was not prevented from asking for assistance . . .before she signed the agreement." *Id.* at p. 128). These statements are likewise not supported by competent evidence.

Ms. Shotts ability to know and understand the arbitration agreement was extremely limited. She had no legal training. (R. Vols. I-III, A 6, p. 55). She was a housewife with a tenth grade education. (R. Vols. I-III, A 6, pp. 6-7). Moreover, she was distraught at the time of signing the contract. (R. Vols. I-III, A 6, p. 43). She described her emotional state as "upset and nervous." (R. Vols. I-III, A 6, p. 43). She recounted, "I guess I could say I was in tears or almost in tears…I had seen [my uncle] that morning, and he did not want to stay there, he wanted to go home with me, but I couldn't take him home with a broken hip, a leg brace, and a wheelchair." (R. Vols. I-III, A 6, p. 58).

The arbitration agreement bears the hallmark of a contract of adhesion. Tandem was in a strong bargaining position, and Ms. Shotts was only in a position

to take the agreement or leave it. Tandem drafted the contract. Tandem presented the agreement to Ms. Shotts. This is the archetype of an adhesion contract wherein, "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Seaboard Fin. Co. v. Mutual Bankers Corp.*, 223 So.2d 778, 782 (Fla. 2d DCA 1969). The contract was offered as one with accepted in its entirety, or rejected in its entirety.

Ms. Shotts testified that when reviewing the arbitration agreement, she felt that "I didn't have a choice that day because all the times that I had talked to [a facility representative] and everything and we discussed everything about this facility, this was never—the arbitration thing was never brought up until the day I was there filling out the paper and my uncle was sitting at Meadowview waiting to come." (R. Vols. I-III, A 6, p. 37). Ms. Shotts believed that "if I didn't fill out all the papers and sign them, then he would have nowhere to go." (R. Vols. I-III, A 6, p. 37). She recalls asking the facility representative who was in the office as she reviewed the documents whether "if we don't fill this out, he can't come here, and she said everything had to be filled out. And I was like, he couldn't come here, and he's ready, and she said, she kept repeating the same thing, everything has to be filled out and signed." (R. Vols. I-III, A 6, p. 43).

Ms. Shotts felt compelled to sign the agreement and accept its terms in their entirety. Her understanding of the arbitration agreement was that "if we wanted him to go to Tandem, I had to sign it." (R. Vols. I-III, A 6, p. 44). "To me that's saying if I don't sign this, because this facility requests it, then I have to find another one." (R. Vols. I-III, A 6, p. 47).

Ms. Shotts was specifically asked if she was "under duress to sign these documents." (R. Vols. I-III, A 6, p. 54). Once she was explained what "duress" meant, she responded, "If I didn't sign these papers, my uncle would not have a place to go that night. He was already discharged from Meadowview, and everything else was settled with Tandem and waiting his arrival and his room was set and everything pending these papers. So if I didn't sign this paper, I was taking him home that night. Because there was no way I could find another facility in the same workday and go through the same thing that took me a week to do to set this one up in a matter of hours." (R. Vols. I-III, A 6, p. 54).

The conditions surrounding the signing of the arbitration agreement, the imbalance in bargaining power, and the nature of the agreement as a contract of adhesion compel the conclusion that the arbitration agreement is procedurally unconscionable.

B. The Arbitration Agreement Is Substantively Unconscionable.

For many of the same reasons that the agreement is unenforceable as contrary to public policy, the agreement is substantively unconscionable. The arbitration agreement that Tandem seeks to enforce restricts the statutory rights afforded to the Estate under the remedial Act, and is therefore unenforceable. In considering whether the agreement is substantively unconscionable, this Court should focus on the four corners of the instrument, and whether, by its terms, the agreement requires the Estate to give up statutory rights and remedies.

The impact of the arbitration agreement, if enforced, is to defeat the remedial purpose of the Act, as it strips the Estate of its right to recover punitive damages. (R. Vols. I-III, A 3, p. 11). Moreover, the agreement limits the rights and remedies of the Estate by requiring the application of the AHLA Rules to arbitration. (R. Vols. I-III, A 3, p. 10). The agreement is incapable of being arbitrated using AHLA arbitrators due to impossibility of performance, since AHLA's own procedures preclude arbitration of consumer health care claims which arose after execution of the arbitration agreement. The agreement is also substantively unconscionable because the waiver of a right to appeal is inconsistent with the limited appeal rights afforded under the Florida Arbitration Code.

The arbitration agreement effectively insulates Tandem from any liability whatsoever for punitive damages, regardless of the egregiousness of their neglect. Therefore, the arbitration clause, as enforced, would defeat the remedial purpose of the Act. In the Act, the legislature expressly provided residents with the right to seek punitive damages, an important tool to deter the type of conduct the statute was promulgated to protect. §400.023(1)("Any resident whose rights as specified in this part are deprived or infringed upon shall have a cause of action against any licensee responsible for the violation … The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and **punitive damages**.…")(*emphasis added)*. The legislature found that residents, as private attorneys general, would be more effective in enforcing the statute than governmental agencies. *See* Section 400.0061 Fla. Stat. (2000). A resident's right to seek punitive damages is crucial to effectuate the remedial purposes of the statute.

The arbitration agreement that Tandem seeks to enforce restricts this important statutory right. Under Florida law, "punitive damages may not be awarded by an arbitrator absent an *express* provision authorizing relief in the arbitration agreement." *Complete Interiors v. Behan*, 558 So.2d 48 (Fla. 5th DCA 1990). The arbitration agreement in the instant case expressly provides that the arbitrator may not award punitive damages. (R. Vols. I-III, A 3, p. 11). The

agreement completely abrogates an important statutory remedy that the legislature specifically intended to provide the resident plaintiff. In a bevy of cases presented in the preceding section on public policy, the Fourth and Fifth Districts refused to enforce arbitration provisions that limited or abrogated the right to seek punitive damages: "[b]ecause the arbitration agreement contained provisions that defeat the remedial purposes of the statute…." *Romano v. Manor Care, Inc.*, 861 So.2d 59, 61 (Fla. 4th DCA 2004); *Blankfeld*, 902 So.2d 297; *SA-PG-Ocala, LLC v. Stokes*, 935 So.2d 1242 (Fla. 5th DCA 2006); *Lacey v. Health Care and Retirement Corp. of America*, 918 So.2d 333 (Fla. 4th DCA 2005).

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. (R. Vol.III, p. 128). 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." (R. Vols. I-III, A 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 only a vague and questionable 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 Second District's unconscionability analysis is in direct and express conflict with the Fourth District's in *Romano.*

VI. *SHOTTS* IS IN DIRECT AND EXPRESS CONFLICT WITH DECISIONS FROM OTHER DISTRICTS REGARDING WHETHER CONTRACT PROVISIONS WHICH ARE VOID AS BEING VIOLATIVE OF PUBLIC POLICY ARE SEVERABLE.

The *Shotts* Panel distinguished decisions from the other district courts that considered arbitration provisions which were void as a against public policy by defeating remedial remedies, based solely on each court's treatment of the issue of severability. (R. Vol. III p. 133). 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 Districts 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 requires resolution by this Court through its conflicts jurisdiction.

CONCLUSION

The *Shotts* decision is in conflict with a Florida statute applicable to durable family powers of attorney, which requires two subscribing witnesses before the POA will be deemed enforceable. The decision conflicts with long standing bedrock law that powers of attorney must be strictly construed. he decision in *Shotts* is in conflict with this Court's decision in *Seifert* as the *Shotts* Panel failed to discharge its duty to ascertain whether the agreement was enforceable under the first prong of *Seifert.* The decision is in direct conflict with the decisions of other districts on the issue of whether arbitration provisions which defeat the remedies available under the remedial nursing home statute render the entire agreement unenforceable because the offending provision are incapable of being severed.

For the foregoing reasons, the Estate respectfully urges this Court to resolve the foregoing 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, this ____ day of April, 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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