THE NEXT CASE ON THE COURT'S AGENDA IS SHOTTS V. OP WINTER HAVEN.
>> MAY I PLEASE THE COURT, ISAAC RUIZ-CARUS.
HAVE A CHANCE TO PASS MY REBUTTAL.
THIS CASE PRESENTS A RECONCILABLE CONFLICT TO THE SECOND DISTRICT COURT OF APPEAL IN THE FOURTH AND FIFTH DISTRICT COURT OF APPEAL ON A NEW ISSUE OF LAW AND THAT IS WHETHER THE INCLUSION OF THE AMERICAN HEALTH LAWYERS ASSOCIATION RULES AN ARBITRATION AGREEMENT BETWEEN THE NURSING HOME RESIDENT IN A NURSING HOME LICENSEE VIOLATES PUBLIC POLICY AND IS NOT SEPARABLE IN SPITE OF THE PRESENCE OF A SEVERABILITY CAUSE IN THE ARBITRATION AGREEMENT.
>> DOES THIS CASE PRESENT THE ISSUE OF WHETHER -- BECAUSE I KNOW WE HAVE THE COMPANION CASE I THINK YOU'RE ARGUING AS TO WHETHER THE DECISION IS ONE FOR THE JUDGE TO MAKE OR THE ARBITRATORS?
>> IT DOES, YOUR HONOR.
>> AND IN THE RECORD I WAS SEARCHING FOR IT, SPECIFICALLY WHETHER THE AMERICAN HEALTH LAWYERS ASSOCIATION RULES?
AND THIS ONE DOESN'T -- THIS CASE DOESN'T HAVE THE LIMITATION OF COMPENSATORY DAMAGE.
DO WE HAVE ANYTHING IN THE RECORD AS TO WHAT THOSE RULES ARE ABOUT?
>> WE DO.
I THINK IT'S IN THE LOWER COURT.

THE RULE WAS RULE 606 HAS NOW
BEEN RENUMBERED IN RULE 4.12.
WITH THAT DOZENS THIS INCREASES
THE THE BURDEN OF PROOF TO CLEAR
AND CONVINCING EVIDENCE FOR
SPECIAL OR CONSEQUENTIAL
DAMAGES.
IN ADDITION, THIS ARBITRATION
AGREEMENT ALSO INCLUDES THE
ELIMINATION OF THE RIGHT TO SEEK
PUNITIVE DAMAGES.
>> SO ON THE RULE THAT CHANGES
THE BURDEN OF PROOF?
AT THE MINIMAL SAYING -- I KNOW
YOU'VE RAISED IN THIS CASE
UNCONSCIONABILITY IN A POSITION
TO PUBLIC POLICY AND I'D REALLY
ASK THIS TO YOUR CLOSING
COUNSEL, HOW WOULD SOMEBODY
READING THIS DOCUMENT, WITH THIS
ARBITRATION CLAUSE THE OPERATION
CAUSED IN THE STATEMENT THAT IT
SHOULD BE EXAMINED BY THE
AMERICAN HEALTH LAWYERS
ASSOCIATION RULES KNOW WHAT THE
LIMITATION WOULD EVEN BE ABOUT?
DID YOU MAKE THAT ARGUMENT?
NOT THAT JUST THE PROCEDURAL
SUBSTANTIVE UNCONSCIONABILITY?
>> THE ARGUMENT THAT WAS RAISED
BASED ON THE RECORD BECAUSE THE
RECORD EVIDENCE IS THAT
TESTIMONY OF MS. SHOTTS WHO IS
THE NIECE HERE, WHO WAS SIGNING
HER UP GOING TO A NURSING HOME
AND NONE OF THIS WAS EXPLAINED.
AND WHAT SHE HAS QUESTIONS ABOUT
THE ARBITRATION AGREEMENT THAT
WHAT WAS TOLD THURSDAY TO SEND
THESE DOCUMENTS.
>> I THOUGHT IT WAS SAID THAT
SHE DID NOT HAVE TO SIGN THIS

AGREEMENT IN ORDER TO GET A PATIENT INTO THE NURSING HOME.
IT SEEMS TO ME THAT YOUR ARGUMENT IS THAT I FELT COMPELLED TO DO THIS WHILE SHE WASN'T COMPELLED TO DO IT, WAS SHE?
>> WHILE THE LANGUAGE OF THE AGREEMENT DOES STATE THAT THIS IS A VOLUNTARY AGREEMENT.
BUT THEN THE IMPRESSION FROM THE FACTS AND CIRCUMSTANCES WHICH IS WHAT THE COURT SHOULD LOOK AT IN INVOLVING PROCEDURAL UNCONSCIONABILITY IS THE DISTRICT COURT OF APPEAL OF HAS INSTALLED THE ISSUE.
IT BEGS THE QUESTION OF WHETHER THAT'S A DIRECT ANALYSIS OF LOOKING AT JUST THE FACTS AND CIRCUMSTANCES SURROUNDING THE MAKING OF THE AGREEMENT, THE IMPRESSION THAT WAS LEFT FROM THE EMPLOYEE OF THE NURSING HOME WAS THAT THIS HAD TO BE SIGNED.
AND THAT WAS THE TESTIMONY OF THE NEICE REPEATEDLY HER DEPOSITION, THIS HAD TO BE SIGNED CONTRARY TO WHAT THE EXPRESSED LANGUAGE OF THE AGREEMENT WAS.
>> WHAT IS THE ARGUMENT IS ITS VOID AGAINST OF PUBLIC POLICY WE DON'T HAVE TO GET TO THE UNCONSCIONABILITY?
>> THAT'S CORRECT.
>> IT SEEMS AS YOU READ THE COURT AND THEIR ATTENDANT TO EXPLAIN UNCONSCIONABILITY WHICH IS SORT OF DIFFERENT FROM WHAT I REMEMBER FROM LAW SCHOOL -- I DON'T REMEMBER THESE TWO PARTS

OF SUBSIDENCE NULL DICHOTOMY,
BUT IT'S YOUR ARGUMENT THAT VOID
AGAINST PUBLIC POLICY THAN TO
TRY TO GO THROUGH THE
INDIVIDUALIZED DECISION IN EACH
CASE.
IS YOUR ARGUMENT ON THIS FIRST
ONE IS REALLY BROUGHT AGAINST
PUBLIC-POLICY?
>> THAT'S RIGHT.
ON THE UNCONSCIONABILITY
ANALYSIS WE WOULD AGREE IN FACT
THE 11th CIRCUIT WE ASKED THIS
CERTIFIED THE QUESTION ABOUT
UNCONSCIONABILITY BECAUSE THERE
IS A CONFLICT BETWEEN ITS
DISTRICT COURT OF APPEAL SECOND
WHICH APPLIED IN THIS CASE, TO
TEST THE CHECK OUT BOTH
INDEPENDENTLY PROCEDURAL
UNCONSCIONABILITY AND
SUBSTANTIVE UNCONSCIONABILITY.
ALL OF THE OTHER DISTRICT COURT
OF APPEAL APPLIED SLIDING SCALE
APPROACH WORKERS SOME QUANTUM OF
ONE IN AMOUNTS OF ANOTHER THAT'S
SUFFICIENT.
THE REASON WHY YOU MAY NOT
REMEMBER IS BECAUSE THIS
DIVISION WASN'T DEVISED UNTIL --
[INAUDIBLE]
[LAUGHTER]
>> DON'T GO THERE.
>> THIS COURT HAS ADDRESSED THE
ISSUE.
>> ON THE CONFLICT QUESTION NOW
TO GET THERE, IF THE CONFLICT
ISSUE IS AGAIN IN THIS CASE THAT
THE JUDGE VERSUS THE ARBITRATOR
ON WHO SHOULD DECIDE THESE
THRESHOLD QUESTIONS.
AND THEN IN THE THRESHOLD

QUESTION BOTH AVOIDING
PUBLIC-POLICY.
AND THE FIGURE WAS BEING
UNCONSCIONABILITY AND WHETHER
THEY APPLY TO DIFFERENT TYPES.
WE DECIDED YOU STILL URGE US TO
REACH THE UNCONSCIONABILITY, BUT
SHE SAID THEY SO I CONFLICT OUT
THERE?
>> IS THE CONFLICT BUT ON THE
MERE FACT IS THAT THIS CASE, THE
COURT CAN RESOLVE THIS ISSUE OF
PUBLIC POLICY.
>> ON THE UNCONSCIONABILITY
ISSUE, ALL THE DISTRICTS
BASICALLY SAY YOU HAVE TO HAVE
PROCEDURAL AND SUBSTANTIVE
UNCONSCIONABILITY.
IT'S JUST A MATTER OF DEGREE.
>> WELL, YOUR HONOR, IF I COULD
JUST FOR A SECOND, THE
UNCONSCIONABILITY IN 1981 WITH
THEIR DISTRICT CAME OUT WITH THE
DECISION INVOLVING APARTMENT
RENTALS, PRIOR TO THAT THIS
COURT FOLLOWED THE FORM BOOK
APPROACH ON AND THAT IS THE
UNCONSCIONABILITY IS THIS MONEY
COMES AT.
YOU MAY LOOK AT THE UNEQUAL
BARGAINING POWER OF THE PARTIES.
YOU MAY LOOK AT THE SUBSTANTIVE
TERMS, BUT THERE IS NO
REQUIREMENT THAT THEY ARE TWO
SEPARATE ELEMENTS.
THE THIRD DISTRICT CITED TO NO
PRIOR FOR DECADES.
IT CITED TO A FEDERAL NEW YORK
CITY DECISION WHICH HAD SOME
MENTION ABOUT TWO DIFFERENT
STANDARDS, PROCEDURAL AND
SUBSTANTIVE THAT DID NOT REQUIRE

IT.
THAT'S WHEN THEY STARTED
REQUIRING THE TWO ELEMENTS,
PROCEDURAL AND SUBSTANTIVE.
THE OTHER TCAs ADOPTED THAT.
NOW THAT.
NONFINITE COME IN THE FOURTH
DISTRICT MENTIONED THIS IS A
MIGHTY INVOLVING CONTACT AND
THERE MIGHT NOT EVOKE BE PROVEN.
BUT THERE IS AN OPEN QUESTION.
IT IS TRUE THAT NURSING HOME
CONTEXT OF DISTRICT CONTEXT OF
DISTRICT COURT OF APPEAL WHO
HAVE LOOKED AT UNCONSCIONABILITY
OF APPLIED SOME AMOUNT OF
UNCONSCIONABILITY.
THE ACTUAL TEST WHETHER IT'S
BALANCING FLIGHT OF SKILL FOR
THE FULL INDEPENDENT AMOUNT OF
BOTH, THAT'S WHAT THERE'S A
CLEAR CONFLICT THAT THIS COURT
COULD CLARIFY THE LAW OF
UNCONSCIONABILITY SINCE IT IS
NEVER SPOKEN ON THE ISSUE
CONCLUSIVELY AS TO WHETHER OR
NOT THERE HAS TO BE BOTH PROVEN.
AND I MAY BE SOMETHING THE COURT
CHOOSES TO ADDRESS.
FOR ME TO CHOOSE IN THE
QUESTION.
>> YOU AGREE THE FEDERAL
ARBITRATION ACT APPLIES TO THIS?
>> YOUR HONOR, IT APPLIES TO THE
FIRST QUESTION WHICH IS UNDER
BUCKEYE WHETHER OR NOT IF HE
CHALLENGES ME TO THE AGREEMENT
AS A WHOLE THAT'S WITH YOUR WORK
HARDER TO FIGHT.
IT CHALLENGES ME TO THE
ARBITRATION AGREEMENT THAT'S
WHERE THE CHILD COURT DECIDE.

THIS IS A CHALLENGE TO THE TRIAL COURT.
>> THE CONTEXT OF THE FEDERAL ARBITRATION ACT APPLIES NOT FOR ARBITRATION, CORRECT?
THAT'S WHAT IT SAYS.
>> IT ALSO SAYS FLORIDA LAW APPLIES.
>> OKAY.
AS FOR DETERMINING WHO DECIDES WHETHER IT'S THE COURT OR AN ARBITRATION PANEL, BUT IS HE BEFORE YESTERDAY.
WHAT LAW DECIDES THAT ISSUE?
IT'S A FEDERAL OR STATE LAW?

>> IT'S BOTH, YOUR HONOR.
IF I COULD EXPLAIN, UNDER BUCKEYE IS A FEDERAL QUESTION WHETHER OR NOT THE ARBITRATION AGREEMENT WHETHER IT'S EMBEDDED IN A LARGER AGREEMENT IS SEPARABLE.
>> UNDER THE FEDERAL ARBITRATION?
>> THAT'S COMPLETELY CORRECT IN THAT THUNDER JUSTICE SCALIA INTERPRETING SECTIONS 234.
ONCE YOU GET TO THE FIRST PART WHICH IS THE VALIDITY OF AN ARBITRATION AGREEMENT THERE IS UNIFORMITY IN THE U.S. SUPREME COURT AND THIS IS ALSO TRUE THAN AT THE CENTER ORAL ARGUMENT IN WHICH THE QUESTION OF UNCONSCIONABILITY WAS RAISED WHETHER THE THE ARBITRATOR OR THE TRIAL COURT TO DECIDE.
UNIFORMITY THAT THEY CONTRACTS APPLY TO WHAT GOES TO THE VALIDITY OF AN ARGUMENT.
IT'S TRUE THE INITIAL QUESTION IS NOT THE CASE IN A FEDERAL

SUBSTANTIVE LAW HERE BUT ONCE WE GET TO WHAT GOES TO THE VALIDITY OF AN ARBITRATION AGREEMENT WE APPLY STATE CONTRACT LAW PRINCIPLES.
>> THE DECISION IS WHO DECIDES WHETHER IT'S THE COURT OR THE ARBITRATION PANELS.
ISN'T THAT A MATTER OF FEDERAL SUBSTANTIVE LAW, APPLICABLE TO THE FEDERAL ARBITRATION ACT UNDER MOSES?
>> THE ANALYSIS THAT I'M SUGGESTION AND THAT JUSTICE SCALIA SUGGEST THAT IT CONSISTS ON THE SUPREME COURT PRESIDENT BUT ALSO THIS PRESIDENT UNDER SEIFERT UNDER GLOBAL VERSUS SHAPE AS THE QUESTIONS AS TO THE VALIDITY OF THE ARBITRATION AGREEMENT WHICH PUBLIC-POLICY WOULD WE QUESTION AS TO THE VALIDITY YOU UNCONSCIONABILITY WOULD BE A QUESTION AS TO THE VALIDITY OF AN ARBITRATION AGREEMENT OR FOR THE TRIAL COURT TO DECIDE THAT IS CONSISTENT WITH THE FEDERAL ARBITRATION ACT WITH SECTION TWO.
IT'S ALSO CONSISTENT WITH THE FLORIDA ARBITRATION COURT.
62..03 SUB ONE AND SUB FOUR.
>> LET ME TAKE YOU TO BUCKEYE.
YOU SEEM TO CONCEIVE THAT BUCKEYE IS SOMETHING WE HAVE TO DEAL WITH HERE.
WHERE BUCKEYE GOVERNS.
WELL IF WE LOOK AT BUCKEYE, BUT GUYS STEPPED UP TO DIFFERENT CATEGORIES OF CHALLENGES.
ONE IS THE CHALLENGE SPECIFICALLY TO THE VALIDITY OF

THE AGREEMENT TO ARBITRARY.
YOU CLAIM THAT WHAT WE'VE GOT HERE FALLS WITHIN THE CATEGORY.
>> THAT IS CORRECT.
>> THE OTHER CATEGORY ARE CHALLENGES TO THE CONTRACT AS A WHOLE, CORRECT?
>> OKAY WITH EXPLAIN CHALLENGES TO THE CONTRACT AS A WHOLE, THEY SEE IT ON THE GROUND THAT DIRECTLY AFFECTS THE ENTIRE AGREEMENT FOR INSTANCE THAT IT WAS FRAUDULENTLY INDUCED OR ON THE GROUND THAT THE ILLEGALITY OF ONE OF THE CONTRACT PROVISIONS RENDERS THE WHOLE CONTRACT IN BALLOT.
NOW IT SEEMS TO ME THAT WHAT YOU'RE ARGUING HERE SPECIFICALLY IS THAT ONE OF THE CONTRACTS PROVISIONS, BUT IT IS PROVISIONS RELATED TO REMEDIES INTO OTHER THINGS THAT COME IN TO GOVERN THE RESOLUTION OF THE CASE RENDER THE WHOLE CONTRACT INVALID.
EXPLAIN THAT TO ME.
EXPLAIN TO ME WHY THAT'S NOT SO.
>> BECAUSE IN BUCKEYE --
[INAUDIBLE]
TO CHALLENGE THAT WAS MADE AS THE CONTRACT AS A WHOLE WAS USED AND THEREFORE VOID AS A MATTER OF FLORIDA LAW.
THAT WAS THE CONSCIENCE, NOT THE ARBITRATION.
AFTER BUCKEYE THE NURSING HOME OPERATOR STARTED CHANGING.
>> THE FOCUS HERE IS NOT ON THE LANGUAGE OF THE AGREEMENT TO ARBITRATE.
IT'S ON THESE OTHER THINGS

RELATED TO THAT IT SEEMS TO ME.
>> NOT ALL, YOUR HONOR.
HERE'S THE EXPLANATION FROM THE RECORD.
[INAUDIBLE]
IS IN THE FIRST PARAGRAPH OF THE BINDING ARBITRATION.
THIS IS SPECIFICALLY A CHALLENGE DIRECTED TO THE ARBITRATION AGREEMENT.
THE PARTY'S AGREEMENT HERE WAS TO ARBITRATE SPECIFICALLY WITH THE AMERICANS HEALTH LAWYERS ASSOCIATION AND UTILIZE THEIR ROLES.
THAT IS A MATTER OF STATE LAW, NOT A MATTER OF FEDERAL LAW.
>> SO REALLY WHAT IT IS INTERTWINED WITH AND REALLY HAD MY NOTES OF THE OTHER OTHER CASE ABOUT THIS INSEPARABILITY BECAUSE YOU GO AND SAY LET'S ASSUME THIS IS INVALID, IS IT SEVERABLE?
IF IT'S SEVERABLE THE ARBITRATION AGREEMENT IS VALID.
SO IT IS ALMOST SOMETHING THE TRIAL COURT HAS TO PERFORM A TWO-PART ANALYSIS IN ORDER TO DECIDE IF THE ARBITRATION AGREEMENT IS INVALID.
WOULD YOU AGREE WITH THAT SAID IF THE TRIAL COURT FINDS IT'S AN ILLEGAL PROVISION IN THE AGREEMENT THAT IS SEPARABLE, IN THE CASE CAN GO TO ARBITRATION.
IF THEY DECIDE IT'S NOT SEVERABLE, THEN IT STAYS WITH THE TRIAL COURT.

AND IT SEEMS TO ME THAT'S WIDE ENOUGH TO BE DECIDED BY THE TRIAL COURT BECAUSE ONLY THE

TRIAL COURT IS GOING TO BE ABLE
TO DO BOTH OF THOSE PROBLEMS.
IF THEY DECIDE IT'S NOT
SEVERABLE THAN THE AGREEMENT TO
ARBITRATE IS NOT VALID AND THAT
WOULD BE CLEARLY WITHIN THE
BUCKEYE DICHOTOMY.
WHICH YOU HAVE TO GET TO THE
SEVERABILITY PART OF THE
TWO-PRONGED ANALYSIS.
AM I GETTING THAT WRONG?
>> I DON'T THINK IT'S
NECESSARILY COMPELLED BY THE
ANALYSIS.
>> BECAUSE OF THE AGREEMENT TO
WHATEVER IT IS INSUFFERABLE,
THEN THE ARBITRATION AGREEMENT
IS VALID.
>> WELL, YOUR HONOR, UNDER THE
SEIFERT CASE I WOULD SUGGEST
THAT PART OF THE PROBLEM WITH
RESPECT TO THIS IS SOMETHING THE
JUDGE ALSO MENTIONED IN THE
STEEL VERSUS MANAGER CASE.
BOTH OF WHICH THIS COURT HAS
STATED JURISDICTION ON PENDING
THESE TWO.
THE ISSUE BECOMES THIS COURT
ANNOUNCED IN SEIFERT BECAUSE
PROTECTIVE COSTS OF NURSING HOME
RESIDENTS INVOLVES THE WAIVER OF
CERTAIN COMES TO SHUTTLE RIDES.
THAT WAIVER TO BE KNOWING AND
INTELLIGENT.
IN SEIFERT THE WAIVER OF THE
CONSTITUTIONAL RIGHTS ACCESS THE
COURTS TO PROCESS AND JURY TRIAL
IS INVOLVED IN THIS COURT ALSO
OBSERVED IN SEIFERT THAT IT HAS
TO BE KNOWING INTELLIGENT AND
INVOLUNTARY.
AND THERE'S BEEN NO FINDING BY

THE LOWER COURT HERE.
>> JUSTICE CANADY WAS ASKING ABOUT HOW BUCKEYE APPLIED AND YOU WERE GIVING THE REASON WHY THE DECISION HERE IS THE VALIDITY OF THE ARBITRATION AGREEMENT, NOT THE CONTRACT AS A WHOLE.
AND MY ONLY QUESTION TO YOU WAS THAT THERE'S GOT TO BE -- THAT THERE'S TWO PARTS AND IT WAS SEVERABILITY BEING PART OF THE ANALYSIS AS TO WHETHER THE ARBITRATION AGREEMENT IS VALID.
>> THAT IS THE NARROW ANALYSIS ON THE FACTS.
>> IN THIS CASE AND YOU'RE IN YOUR REBUTTAL BUT THAT'S PART OF SORT OF THE CONFLICT.
THIS CASE -- THE SON OF A SEVERABILITY CAUSE.
>> BOTH FLETCHER AND THE FOURTH AND FIFTH DISTRICTS FOUND A CHOICE OF RULES HERE, THE PARTIES INTEND TO USE THE RULES OF THE AMERICAN HEALTH LAWYERS ASSOCIATION ARE SO INTEGRAL TO THE AGREEMENT THEY CANNOT BE BETTER.
>> IT'S THE SECOND ISSUE WE HAVE TO DECIDE IN THIS CASE.
IF WE AGREE WITH THE SECOND, THEN THIS CASE GOES TO ARBITRATION.
WITHOUT THE OFFENDING PROVISIONS IN THERE.
>> WELL, THE SECOND AND CANNOT SAY THIS VIOLATES PUBLIC POLICY.
BUT THEY HAVEN'T GOT TO THE FIRST POINT IF YOU DECIDE THAT.
>> THAT'S RIGHT.
>> JUST A FOLLOW-UP, WHY SHOULD

THE TRIAL COURT INITIALLY MAKE
THE DETERMINATION OF
SEVERABILITY AS A MATTER OF
STATE LAW OF PROGRESS SO.
AND IF IT CAN BE SEVERED SINCE
THE ARBITRATION PANEL IF ALL THE
OTHER FEDERAL COURT TO LOOK AT
THIS AS FAR AS I KNOW DO SO.
>> AND THE 11th CIRCUIT BEGAN
BY JUST FINDING THAT LIMITATIONS
VIOLATED UNDER FLORIDA LAW OF
PUBLIC POLICY, THE 11th
CIRCUIT IN THE INDUSTRY IS
LOOKED AT THE PRESENCE OF A
SEVERABILITY CAUSE AND UNDER
ALABAMA'S STATE LAW FOUND THAT
THAT WAS AN ISSUE FOR THE
ARBITRATOR TO DECIDE.
UNDER FLORIDA LAW, THE FACT THAT
THESE PROVISIONS VIOLATE PUBLIC
POLICY IF WE ALLOW THAT TO THE
ARBITRATOR, THAT WOULD BE
SOMETHING THAT COULD ESCAPE
JUDICIAL REVIEW AND THAT'S A
SIGNIFICANT ISSUE MEETING THESE
PARTICULAR ISSUES TO ARBITRATORS
ARE NOT IN THE COURT DECIDED THE
FIRST INSTANCE THAT THESE
VIOLATE PUBLIC POLICY.
>> IT'S A GOOD PUBLIC POLICY
REASON FOR THE COURT TO DECIDE
IT.
IF WE ARE BOUND BY BUCKEYE, THEN
WE STILL HAVE TO SAY WITH THE
BUCKEYE DICHOTOMY AS A WHOLE.
AND AGAIN I WASN'T ON BUCKEYE,
BUT IT SEEMS TO ME THAT BOTH OF
THOSE CASES THE QUESTION SHOULD
BE FOR THE COURTS, BUT THE
SUPREME COURT HAS HELD OTHERWISE
AND KNOWING THAT THESE
AGREEMENTS WILL NOT BE TESTED BY

JUDICIAL REVIEW BECAUSE THEY'RE
CONFIDENTIAL.
SO THE PUBLIC POLICY REASON FOR
THE JUDGES DECIDING THE REALLY
HAS BEEN DECIDED BY BUCKEYE.
>> IT HAS BEEN I THINK THE
POLICY IS EXACTLY THE POLICY IN
BUCKEYE, THE VALIDITY AND
ARBITRATION AGREEMENT IS FOR THE
TRIAL COURT TO DECIDE USING
STATE LAW PRINCIPLES.
THANK YOU.
>> MAY I PLEASE THE COURT?
TONY SIFUENTES.
IF I COULD START WITH A PRIOR
ATTORNEY BECAUSE ANY
CLARIFICATION ON THIS POINT.
TANDEM INTRODUCED A POWER OF
ATTORNEY AND THE TRIAL COURT
INTO EVIDENCE AT TRIAL ATTORNEY
SPECIFICALLY GRANTED TO

MS. SHOTTS THE POWER TO COMMIT
THE RESIDENT, MR. CLARK TO
ARBITRATION.
THE STATE RAISED TWO DEFENSES
AND IT ALSO SAID THAT SECOND
DISTRICT COURT OF APPEAL SHOULD
DID THE BURDEN ON THAT ISSUE.
NOW I'M A FIRST OFFENSE THEY
RAISED INCAPACITY.
AND HERE'S THE PROBLEM WITH THAT
SPECIFIC DEFENSE BECAUSE
THROUGHOUT THESE PROCEEDINGS AT
THE TRIAL LEVEL, SECOND DISTRICT
COURT OF APPEAL AND IN THIS
COURT THEY HAVE PRESENTED
MS. SHOTTS THE'S TESTIMONY AND
DEPOSITIONS AS STATING THAT HER
UNCLE, MR. CLARK, WAS
ADJUDICATED INCOMPETENT AND A
QUARTER TO NEW JERSEY IN 1981.
>> I DO WANT TO STOP YOU

ACTUALLY BEFORE YOU GO ON.
IS THIS AN ISSUE THAT IS SUBJECT
TO THE CONFLICT BETWEEN
APPELLATE COURT?
I'M ASKING YOU WHETHER --
>> I DON'T THINK IT IS A
CONFLICT.
THE SIT UP STRAIGHT AND ISSUE
THE SECOND DISTRICT COURT OF
APPEAL, THE CONFLICT WITH OTHER
DISTRICTS ON THE BURDEN OF
PROOF.
>> IF WE GET TO THE MAIN ISSUE,
WHICH IS THAT IT'S WRONG FOR THE
SECOND DISTRICT TO BE THROWING
ISSUES ABOUT WEIGHT AGAINST
PUBLIC POLICY AND ARBITRATION
CLAUSES TO THE ARBITRATOR AND
THIS IS AGAINST PUBLIC POLICY
AND IS NOT SEVERABLE, THE POWER
OF ATTORNEY -- IT'S ANOTHER WAY
AND THERE IS CONFLICT ON THESE
ISSUES.
>> WELL YOUR HONOR, THIS IS A
GATEWAY ISSUE.
THIS IS A MUTUAL ASSENT ISSUE.
THIS IS AN ISSUE THAT WAS RAISED
AT THE TRIAL COURT TO SET THE
POWER OF ATTORNEY IS AN ISSUE OF
CONFLICT FORMATION.
IT'S A GATEWAY ISSUE.
>> SO WHAT IS THE CONFLICT WITH
THE OTHER APPELLATE COURTS ON
THIS ISSUE?
>> THE ALLEGED CONFLICT YOUR
HONOR IS THAT THE SECOND
DISTRICT COURT OF APPEAL SHIFTED
THE BURDEN OF PROOF ON THE POWER
OF ATTORNEY.
THAT'S THE CONFLICT THAT THEY'RE
REASONING AND FAIRLY SIMPLY THE
POINT I WANT TO MAKE HIS THERE'S

NO RECORD OF THAT EVIDENCE HERE.
MS. SHOTTS DIDN'T HAVE AUTHORITY TO BUY THE REST HAD TO ARBITRATION BECAUSE MR. CLARK WAS CASTIGATED.
>> WOULD YOU GO TO THE POINT THAT THEY WERE DISCUSSING PREVIOUSLY, WHICH I THINK IT'S VERY SIGNIFICANT IN THIS DISCUSSION ON THIS ANALYSIS AND THAT IS GIVEN THE FEDERAL SUPREME COURT'S INTERPRETATION AFTER THIS COURT HEARD HE PASSED ON SEVERAL OF THESE ISSUES, WHETHER THERE IS ROOM FOR DISCUSSION PITCHER OPPOSITION SAYS EVEN AFTER THE SUPREME COURT CASE IS, THAT THERE IS STILL AN AREA IN WHICH TRIAL COURT OPERATES.
IT IS THAT CORRECT OR INCORRECT AND WHAT'S YOUR VIEW ON THE STATUS OF THE LAW WITH REGARD TO WHO DECIDES WHAT THE ARBITRATORS -- WHAT DO THEY DECIDE TO WHAT STILL REMAINS FOR A TRIAL COURT IS ANYTHING?
THAT SEEMS TO BE REALLY AT THE HEART OF WHAT WE'RE TALKING ABOUT.
>> THAT CONTROLS THIS CASE.
>> I UNDERSTAND IN YOUR OPPOSITION SAYS THERE'S STILL AN AREA IN THE BUCKEYE ANALYSIS FOR TRIAL JUDGES, TRIAL LAWYERS STILL HAVE ROOM TO OPERATE.
WOULD YOU DISCUSS THAT?
>> UNDER BUCKEYE AND UNDER SEIFERT THERE ARE THREE THINGS THAT THIS COURT HAS TO CONSIDER ON THE ISSUE OF WHETHER THIS CASE -- ON THE ISSUE OF WHETHER

THE COURT DECIDES THE PUBLIC POLICY ISSUE.
THE FIRST PRONG IN SEIFERT IS WHETHER A VALID ARBITRATION AGREEMENT EXISTS.
THAT'S THE QUESTION.
BUCKEYE SAYS THAT'S AN ISSUE OF CONTRACT FORMATION.
WHAT THEY'RE DOING IN THIS CASE THEY RECEIVE THE ISSUE OF PUBLIC POLICY GOES TO AN ATTACK ON THE CONTRACT AS A WHOLE.
>> THUS WOULD BE SEEN AS THOUGH IT'S NOT.
HE'S SUGGESTING THAT THE ATTACK ON THIS CASE ON A PART OF THE ARBITRATION ASPECT, NOT ON THE WHOLE CONTRACT.
THAT'S THE DISTINCTION I UNDERSTAND IS BEING MADE AND THAT'S WHAT I WOULD LIKE YOU TO ADDRESS.
IS THAT DISTINCTION VALID AND IF NOT, WHY NOT?
I ASSUME YOU SAY IT'S NOT VALID.
>> TO CUT UNDER BUCKEYE THAT IS NOT THE ANALYSIS.
UNDER BUCKEYE WITH THE COURT HAS TO LOOK AT IS WHETHER THE AGREEMENT -- THE ATTACK IS PROTECTED THE CONTRACT THE CONTRACT AS A WHOLE.
THAT IS EXACTLY WHAT THEY'RE DOING HERE.
THEY'RE ASKING THE COURT TO INVALIDATE THE TOTAL CONTRACT.
>> WE'RE LOOKING AT BINDING ARBITRATION AGREEMENTS.
IN THIS CASE, THE BINDING ARBITRATION AGREEMENT IS SEPARATE AND APART FROM ANOTHER CONTRACT EXISTED BETWEEN THE

NURSING HOME AND THE PATIENT.
WITH THIS POINT IS UNLIKE

BUCKEYE FOR THE WEALTHIEST AREAS
WHERE THEY WENT TO THE CONTRACT
AS A WHOLE, IT HERE IF THE
PROVISION IS NOT SEVERABLE, IT
INVALIDATES -- THERE'S NO
BINDING ARBITRATION AGREEMENT IF
IT'S NOT SEVERABLE.
SO I GUESS I'M HAVING, YOU KNOW,
BECAUSE THE NURSING HOME ALIKE
TO TO PUT THIS BINDING
ARBITRATION AGREEMENT
SEPARATE -- I MEAN, IF THEY
COULD HAVE DONE OR THEY HAD A
CONTRACT AS A WHOLE SO THERE'S
LIMITATION OF DAMAGES AND AN
ACCORD WHILE YOU'VE GOT GOT TO
BE BOUND BY THE AHLA RULES.
THEY DIDN'T DO THAT.
THEY PUT THAT IN THE ARBITRATION
AGREEMENT.
IF IT'S NOT SEVERABLE AND ITS
FOOTAGE OF PUBLIC POLICY,
THERE'S NO BINDING ARBITRATION
AGREEMENT.
>> IF IT'S NOT SEVERABLE, THEN
THE PROVISIONS -- THE COURT OF
THE TRILEVEL FINDS THE AGREEMENT
DOES NOT SEVERABLE, DONE THAT
ISSUE GOES TO THE ARBITRATOR TO
DECIDE AS JUSTICE POLSON
SUGGESTED.
>> WAIT A MINUTE.
IF YOU FIND THAT IT'S NOT
SEVERABLE, WHAT ISSUE GOES TO
THE ARBITRATOR?
>> THE PUBLIC POLICY ISSUE.
>> EVEN -- YOU'RE SAYING IT'S
THE PUBLIC POLICY THAT RENDERS
THE ARBITRATION AGREEMENT IN
VALID.

>> I WOULD AGREE WITH YOU IF THE JUDGE FOUND AT THE INSUFFERABLE THAN I GUESS UNDER THE LOGIC OF BUCKEYE DATA WOULD THEN GO TO THE ARBITRATORS TO DECIDE WHETHER THOSE LIMITATIONS ARE LIKEWISE INVALID.
BUT IF THEY FIND -- IF THEY'RE NOT SEVERABLE THEN THEY'VE GOT TO LOOK AT WHETHER THE AGREEMENT -- WHETHER THOSE PROVISIONS ARE VOID AGAINST PUBLIC POLICY, WHICH WILL THEN INVALIDATE THE WHOLE AGREEMENT.
SO I THINK THAT'S WHAT THE THRESHOLD ISSUE HAS TO BE SEVERABILITY BECAUSE IF IT IS SEVERABLE IT GOES TO THE ARBITRATORS.
IF IT'S NOT SEVERABLE IT STAYS WITH THE TRIAL COURT TO DETERMINE IF THERE IS A BINDING VALID ARBITRATION AGREEMENT.
I MEAN, I MISS IN THE LOGIC THE OTHER WAY.
MAYBE I'M WRONG ABOUT THIS BUT THAT'S HOW I'M SEEING THAT THIS ANALYSIS HAS TO GO.
>> I THINK WE JUST HAVE A FUNDAMENTAL DISAGREEMENT.
MY UNDERSTANDING THAT IF THE COURT FINDS THE AGREEMENT TO REMEDIAL LIMITATIONS ARE NOT SEVERABLE, THEN AT THAT POINT UNDER THAT I, THAN THE PUBLIC POLICY ISSUE, THE CASES INTO ARBITRATION TO ARBITRATION UNDER BUCKEYE THE PUBLIC POLICY ISSUE IS DETERMINED BY THE ARBITRATOR.
>> THEY GET BACK IS UP TO THE INITIAL THING OF WHETHER OR NOT THEY'RE TRULY ATTACKING AN

ARBITRATION AGREEMENT WHICH IS SEPARATE FROM THE WHOLE CONTRACT.
AND ON THE AGREEMENTS BEFORE US, IT DOES APPEAR THAT AT LEAST WITHOUT READING THE COMPLAINT THAT THAT'S WHAT THEY'RE DOING BECAUSE THERE IS AN ADMISSION AGREEMENT THAT IS SEPARATE AND DISTINCT FROM THE BINDING ARBITRATION AGREEMENT AND WHAT THEY'RE DOING I THINK IT'S ATTACKING THE VALIDITY OF THE BINDING ARBITRATION AGREEMENT, WHICH IS WHERE THE LIMITATIONS ARE.
IN EFFECT IN PARAGRAPH 40 OF THE RESIDENCE ADMISSION AGREEMENT, IT SAYS THAT IN THE EVENT THAT THE PRESIDENT AND FACILITIES BINDING ARBITRATION AGREEMENT WOULD BE HELD INVALID OR AN APPLICABLE, THEN THEY WOULD REVERT BACK TO PARAGRAPH 40 OF THIS, WHICH IS THE MEDIATION AND MANDATORY NONBINDING ARBITRATION.
SUPPOSE WE MIGHT TO SEPARATE AGREEMENT THAN IT DOES SEEM AS IF THEY'RE ATTACKING THE ARBITRATION AGREEMENT BY ITSELF UNDER FEDERAL LAW THE TRIAL COURT WOULD LOOK AT THAT AS THE SEVERABILITY ISSUES THAT JUSTICE PARIENTE IS TALKING ABOUT.
IT DOES SEEM THEY'RE ATTACKING JUST THE ARBITRATION AGREEMENT, NOT THE CONTRACT AS A WHOLE.
COULD YOU EXPLAIN WHY PERHAPS I'M WRONG ON THAT?
>> WELL, THE ISSUE UNDER THE FIRST PRONG IS THE EXISTENCE OF

THE AGREEMENT TO ARBITRATE.
IF THAT IS THE ONLY THING THAT
THE COURT IS LIMITED TO
INQUIRING ABOUT UNDER THE FIRST
PRONG, ACCORDING TO BUCKEYE,
UNDER THE FIRST PRONG IN
SEIFERT.
THAT ISSUE OF WHETHER THE PUBLIC
POLICY -- THAT ISSUE A PUBLIC
HOLIDAY, WHETHER IT INVALIDATES
THE REMEDIAL LIMITATIONS DOES
NOT GO TO CONTRACT FORMATION.
THAT IS NOT A CONTRACT FORMATION
ISSUE.
>> SO IF IT GOES TO THE
VALIDITY -- IS IT CORRECT THAT
THE COURT CAN LOOK AT WHETHER
THERE IS A VALID ARBITRATION
AGREEMENT?
>> SEIFERT SAYS ALTHOUGH THERE
IS A VALID AGREEMENT OR WHETHER
A VALID AGREEMENT TO ARBITRATE
EXISTS.
THAT IS AN ISSUE CONTRACT
FORMATION.
UNDER THAT ANALYSIS YOU CAN LOOK
AT UNCONSCIONABILITY.
YOU CANNOT GET ISSUES OF
AUTHORITY LIKE WE HAVE IN THIS
CASE.
THE ISSUE OF WHETHER YOU HAVE
REMEDIAL LIMITATIONS, THE PUBLIC
POLICY DOES NOT GO INTO THE
ISSUE OF CONTRACT FORMATION.
>> IF WE COULD HAVE IN VARIOUS
PLACES AND ARBITRATOR WHO SAYS
YEAH, THIS IS VOID BECAUSE IT'S
AGAINST PUBLIC POLICY AND
ANOTHER ARBITRATORS THEY KNOW WE
CAN CONTINUE AT THE SAME TIME OF
CONTRACT BECAUSE IT ISN'T A
PUBLIC POLICY VIOLATION.

SO THAT'S WHAT WE CAN AND THAT HAVING IS THE TRIAL COURT IS NOT THE ONE WHO WOULD LOOK AT WHETHER OR NOT THIS CONTRACT IS VOID FOR PUBLIC POLICY REASONS.
>> THAT MAY BE TRUE, YOUR HONOR, BUT WE CAN ALSO HAVE A SITUATION WHERE THE AGREEMENT -- THE REMEDIAL LIMITATIONS THAT WERE, HERE AT THIS POINT WERE SPECULATING WHETHER THOSE REMEDIAL LIMITATIONS WILL BE AN ISSUE.
AND SO THAT IS THE QUESTION.
AND IN THAT CASE THE COURT WILL INVALIDATE AN AGREEMENT TO ARBITRATE -- WILL DO AWAY WITH THE INTENT OF THE PARTIES.
>> WILL DO IT AFTER THE FACT?
>> THE COURTS HAVE LIMITED ABILITY TO REVIEW THE ARBITRATOR'S DECISION?
THAT'S WHAT HAS TO BE MADE INITIALLY TO DETERMINE WHETHER OR NOT IT'S AN ARBITRATION AGREEMENT.
>> I'M SORRY.
WAS THERE -- WAS THERE A QUESTION?
>> YOU WERE SAYING THE COURTS WERE DETERMINED AFTER IT'S GIVEN TO THE ARBITRATOR WHETHER OR NOT IT VIOLATES PUBLIC POLICY?
>> NO, THE QUESTION GOES TO THE ARBITRATOR.
>> LIVING MAKE SURE I UNDERSTAND SOMETHING.
WHY THEN WOULD SEVERABILITY BE AN ISSUE THAT THE TRIAL COURT WOULD FIRST MAKE?
>> BECAUSE IT WOULD BE AN ISSUE -- THE ISSUE WOULD BECOME

RIGHT AT THE TRIAL LEVEL WHEN A
PLAINTIFF WILL MAKE THE ARGUMENT
THAT THERE'S A PUBLIC POLICY
CHALLENGE TO THE AGREEMENT.
>> UNDER YOUR THEORY, WHY
WOULDN'T THE ARBITRATOR ALSO
DECIDED SEVERABILITY ON A PUBLIC
POLICY QUESTIONS?
>> IS THAT THE QUESTION --
THAT'S A QUESTION PROPER FOR THE
COURT.
>> BUT WHY?
THE ONLY REASON CAN BE BECAUSE
WHAT I WAS TRYING TO SAY EARLIER
IS THAT THEY FIND IT'S NOT
SEVERABLE, THEN IT GOES TO THE
ENTIRE AGREEMENT IS VOID IF THE
OFFENDING PROVISIONS ARE AGAINST
PUBLIC POLICY, JUST LIKE YOU
ADMITTED THAT UNCONSCIONABILITY
WOULD INVALIDATE THE WHOLE
AGREEMENT AND THEREFORE
UNCONSCIONABILITY WOULD BE
BEFORE THE TRIAL COURT.
HE DID AGREE WITH THAT.
IF YOU AGREE WITH THAT BUT IF
SUCH ABILITIES FOR THE TRIAL
COURT?
>> YES.
>> BUT BECAUSE OF THE AGREEMENT
IS UNCONSCIONABLE, THERE IS THE
ARBITRATION AGREEMENT IS
INVALID.
>> NO.
I AGREE IT'S FOR THE TRIAL COURT
TO THE GOES TO A NATIONAL
CONTRACT FORMATION.
>> IF THE AGREEMENT WAS
UNCONSCIONABLE, SO MY QUESTION
TO YOU, WHY IS IT THE SAME ISSUE
GO TO BED IF THE AGREEMENT
DEFENDING PROVISIONS ILLEGAL AND

THERE IS NOT SEVERABLE, YOU
COULD NOT HAVE -- YOU DO NOT
HAVE A VALID ARBITRATION
AGREEMENT.
>> YOUR HONOR, THE TRIAL COURT
HAS THE ABILITY TO ADDRESS THE
ISSUE OF SEVERABILITY.
THAT ISSUE IS EJECTED.
>> FOLLOWING UP ON THE QUESTION
THAT'S BEEN ASKED, WHY IS THAT
ISSUE THAT RELATES TO THE MAKING
OF THE AGREEMENTS TO ARBITRATE,
WHICH IS WHERE THE FOCUS SHOULD
BE ON THIS ISSUE, ISN'T IT?
>> UNDER SEIFERT, THAT'S ONE OF
THE PRONGS.
THAT'S ONE OF THE ISSUES THAT
THE COURT CAN DECIDE, YOUR
HONOR.
THE SEIFERT DOESN'T ADDRESS --
>> I DON'T UNDERSTAND HOW THE
SEVERABILITY ISSUE IS AN ISSUE
THAT IS INTRINSIC TO THE ISSUE
OF THE ISSUES RELATED TO THE
MAKING A NEW AGREEMENT TO
ARBITRATE.
IT IS NOT.
>> IT'S A TOTALLY SEPARATE TO
ISSUE APART FROM SEIFERT.
THIS COURT IS BOUND BY BUCKEYE
IN THIS CASE.
I WOULD ASK THE COURT TO UPHOLD
THE SECOND DISTRICT COURT OF
APPEAL DECISION IN THIS CASE.
THANK YOU.
>> YOU HAVE A MINUTE OR SO FOR
REBUTTAL HERE?
>> HOW LONG?
>> A MINUTE AND EIGHT SECONDS.
>> SEVERANCE ISSUE GOES TO THE
CONTRACT.
[INAUDIBLE]

>> YOU KNOW, AND I GUESS IN THIS FRAME THE CONTRACT THERE COULD HAVE BEEN GONE IF THE WHOLE AGREEMENT WAS FRAUDULENTLY INDUCED.
IT'S THE OVERALL CONTRACT.
BUT IF I UNDERSTAND WHAT HAPPENED THERE, THE SUPREME COURT SAYS IT DOESN'T REALLY MATTER UNLESS THERE IS AN ATTACK SPECIFICALLY ON THE MAKING OF THE AGREEMENT TO ARBITRATE AS A SEPARATE THING.
THEN THE ISSUE IS GOING TO GO TO THE ARBITRATOR.
IT'S NOT WHAT THEY DECIDED THERE?
[INAUDIBLE]
>> WHILE THERE'S NO QUESTION THERE'S SOME THINGS THAT IT'S RELATED TO THE ARBITRATION AGREEMENT AND IT'S A PART OF IT YET BUT I THINK THE QUESTION IS, DOES IT RELATE TO THE MAKING OF THE AGREEMENT TO ARBITRATE, BASICALLY THE AGREEMENT OF THE PARTIES HAD THAT WE'RE GOING TO TAKE THIS -- THESE DISPUTES OF WHATEVER CATEGORY COVERED ARE THE AGREEMENT TO ARBITRATION.
>> WELL, IT DOES.
IF YOU TAKE IT TO ARBITRATION, WE WANT TO FOLLOW THESE RULES.
>> I UNDERSTAND YOUR POSITION ON THAT.
BUT I DON'T REALLY UNDERSTAND HOW THAT ANSWERS THE QUESTION ABOUT HOW TO SEVERANCE --
>> THAT QUESTION ALSO GOES TO THE MAKING OF A CONTRACT IF YOU START SEVERING OUT ESSENTIAL CONDITIONS TO THE ARBITRATION

CONTRACT.
AND THE MASSES THERE'S NO ARBITRATION CONTACT LEFT.
>> THANK YOU BOTH FOR YOUR ARGUMENTS.
THE COURT WILL NOW TAKE ITS MORNING RECESS FOR 10 MINUTES.
>> PLEASE RISE.