No. 121241

IN THE SUPREME COURT OF ILLINOIS

In re ESTATE OF THOMAS F. SHELTON,) Deceased (Ruth Ann Alford, Executor,) Petitioner-Appellant v. Rodney I. Shelton,) Respondent-Appellee).)	Appeal from the Circuit Court of the 13th Judicial Circuit Grundy County, Illinois
)	Appeal No. 3-14-0163
)	Circuit No. 13-P-17
)	Honorable Lance R. Peterson, Judge Presiding

Consolidated with:
No. 121199

RUTH ANN ALFORD, as executor of the ESTATE OF DORIS E. SHELTON,)	On Petition for Leave to Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-14-0685
Plaintiff-Appellant.)	
v.)	There on Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois No. 14-L-13
RODNEY I. SHELTON,)	
Defendant-Appellee.)	Honorable Lance R. Peterson, Judge Presiding

BRIEF OF APPELLEE, RESPONDENT RODNEY I. SHELTON

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STATUTES INVOLVED

Appellee, Respondent Rodney I. Shelton ("Rodney" herein) submits that Appellant ("Ruth Ann" herein) improperly and erroneously included 755 ILCS 45/2-10.3(b) under "Statutes Involved" in her brief. This appeal does not involve the construction or validity of a statute. The cited provision is not referenced in the pleading at issue (the amended citation) (C93-104; Appendix to Brief of Appellant, A43-55), or in the original appeal and petition for leave to appeal in this action. The construction of the cited statute is involved only in the consolidated appeal (Supreme Court Docket No. 121199). Ill. S. Ct. R. 341(h)(5).

STATEMENT OF FACTS

In this brief, for consistency, the parties and their parents are designated by the same names as in the brief of Appellant ("Ruth Ann", "Rodney", "Thomas", and "Doris"). All references to "Appendix" mean the Appendix to Brief of Appellant; this brief does not contain an appendix.

Rodney submits that the Statement of Facts in the brief of Appellant ("Brief" herein) is unsatisfactory, erroneous, and attempts improper argument in the following respects:

A. Ruth Ann states therein, "It is uncontroverted that on December 1, 2011 Doris was *in fact* incompetent and unable to manage her own affairs [emphasis in original text]", citing in the record to the physician's report procured and filed by her counsel during the proceedings before the trial court (Appendix to Brief of Appellant ["Appendix" herein], A78-79). Brief, p. 4.

B. Ruth Ann further asserts, again as a fact, "Doris's incompetency further [sic] illustrated by the fact that Thomas, as Power of Attorney for Doris, executed one of the Deeds in question transferring Real Property of Doris to the [sic] Rodney." For this statement, Ruth Ann cites to the statements of her counsel during argument in the motion hearing before the trial court, and not to the pleading at issue (Appendix, A31-32). Brief, p. 5.

The aforementioned statements do not constitute "facts necessary to an understanding of the case"; they represent improper argument and legal conclusions, contrary to the provisions of Illinois Supreme Court Rules 315(h) and 341(h)(6). The first statement improperly implies and argues that Rodney conceded and did not dispute that Doris was incompetent at the time of execution of the deed; Ruth Ann later asserts exactly that in the Argument portion of her brief, stating that Rodney has presented "[n]othing to the contrary" and "does not appear to dispute that fact". Brief, p. 6. This assertion in the Statement of Facts is pure argument (by Ruth Ann's counsel in the cited report of proceedings), not factual, and an improper conclusion, which erroneously suggests that an agent under a power of attorney would or could only execute a document for the principal if the principal was incompetent.

The issue in this appeal is based solely on the pleadings. Under section 2-615 and section 2-619, a reviewing court accepts as true all well-pleaded facts and reasonable inferences that may be drawn from them, but cannot accept as true mere conclusions unsupported by specific facts. Rodney is not deemed thereby to have waived any factual dispute as to the allegations or to have admitted mere conclusions in the pleading.

ARGUMENT

The Third District Appellate Court properly and correctly affirmed the trial court's dismissal of the amended estate citation filed in this action.

This action, as noted by the appellate court, presents issues of first impression. It also involves a legal theory that is wholly unsupported in the common law, statutory law, and the written power of attorney on which the action is based.

Rodney filed combined motions to dismiss the amended citation under section 2-615 and 2-619(a)(9) if the Code of Civil Procedure. (C109-119; Appendix, A56-66). A section 2-615 motion to dismiss tests the legal sufficiency of a complaint, while a section 2-619 motion to dismiss admits the sufficiency of the complaint but permits involuntary dismissal where the claim is barred by "other affirmative matter". 735 ILCS 5/2-615 and 2-619(a)(9). When ruling on such motions, a court must accept all well-pleaded facts and any reasonable inferences that may arise from them; a court cannot accept as true mere conclusions, including conclusions of law and conclusory factual allegations not supported by allegations of specific facts. *Patrick Engineering v. City of Naperville*, 2012 IL 113148, 976 N.E.2d 318, 328 (2012). A motion for involuntary dismissal under section 2-619 should be granted only if the plaintiff can prove no set of facts that would support a cause of action. *Feltmeier v. Feltmeier*, 207 Ill.2d 263, 798 N.E.2d 75, 84-85 (2003). Rodney submits that the trial court could have properly granted either motion, and correctly dismissed the citation under section 2-619(a)(9).

1. The appointed agent (attorney-in-fact) under a power of attorney has a fiduciary duty to the principal as a matter of law from the time it is executed; a successor agent named in a power of attorney does not have a fiduciary duty to the principal until he becomes the acting agent (attorney-in-fact).

The trial court and the Third District Appellate Court ("appellate court" or "Third District" herein) correctly and properly found that Rodney did not have an agent or fiduciary status as to the principal, Thomas, at the time of the conveyance at issue. As the Third District noted, Illinois courts have repeatedly held that an appointed agent under a property power of attorney ["POA" herein] (i.e., the agent designated as the principal's attorney-in-fact) has a fiduciary duty to the principal as a matter of law from the time the instrument is executed, regardless of whether or when he exercises his powers under that instrument [*Alford v. Shelton*, 2016 IL App (3d) 140163, ¶23, p. 10]. *Apple v. Apple*, 407 Ill. 464, 95 N.E.2d 334, 337 (1950); *Lemp v. Hauptmann*, 170 Ill.App.3d 753, 525 N.E.2d 203, 205 (5th Dist. 1988); *In re Estate of Miller*, 334 Ill.App.3d 692, 697, 778 N.E.2d 262 (2002). It is when a person is designated and empowered as an agent under a power of attorney that he has a fiduciary duty to the person who made the designation. *Spring Valley Nursing Center v. Allen*, 2012 IL App (3d) 110915, 977 N.E.2d 1230, 1233 (2012) [citing 755 ILCS 45/2-7(a) and (b), provisions of the Illinois Power of Attorney Act]. *Clark v. Clark*, 398 Ill. 592, 600, 76 N.E.2d 446 (1947); *Estate of DeJarnette*, 286 Ill.App.3d 1082, 1088, 677 N.E.2d 1024 (1997).

When a complaint alleges that a transaction is invalid by reason of a fiduciary relation and seeks recovery of the property, the complainant must establish the existence of the fiduciary relationship by clear and convincing proof, and that the transaction occurred at a time when that relationship existed. *Hogg v. Eckhardt*, 434 Ill. 246, 175 N.E. 382, 286 (1931); *Estate of Jessman*, 197 Ill.App.3d 414, 554 N.E.2d 718, 721 (5th Dist. 1990).

In the decision under review, the appellate court correctly summarized existing Illinois law as to the creation of an agency relationship under a POA, noting that no published Illinois decision has held that a party named a *successor* agent under a POA has a fiduciary duty before he becomes the principal's attorney-in-fact, which that court found "not surprising" since a fiduciary relation is created by the "appointment", "granting", or "designation" of a power of attorney. A successor agent under a POA is appointed, granted or designated a power of attorney only contingently. This was expressly stated in the Statutory Short Form POA of Thomas Shelton, which provided that the successor agents (Rodney and Ruth Ann) were to act, "successively, in the order named" if the agent named by Thomas should die, become incompetent, resign or refuse to accept the office of agent. Until any of those events occurred, Rodney had no power under the agency instrument and no common-law fiduciary duty to the principal. *Alford v. Shelton*, ¶23, p. 10-11.

This case does involve, in a technical sense, an issue of first impression, because there is no Illinois authority, decisional or statutory, that supports the theory put forth in the amended citation. In fact, that theory runs contrary to the well established principles regarding the creation of an agency and a fiduciary relationship under a power of attorney in Illinois.

2. The trial court and appellate court correctly ruled that an agent under the POA at issue cannot be "retroactively" declared incompetent, such that a named successor agent is retroactively deemed the acting agent under that instrument.

The trial court granted Rodney's motion to dismiss under Section 2-619, finding

that Doris, as Thomas's agent under his POA, could not be "retroactively" declared incompetent approximately two years after the execution of the deed at issue. The trial court noted that there was no doctor certification as of the deed execution that Doris was unable to manage her financial affairs; likewise, there had been no adjudication that she was incompetent. (C33; Appendix, A39). The Third District agreed with the trial court that a physician's certification of incompetency had to have been rendered prior to the conveyance at issue in order to establish Doris' incompetency under Thomas' POA, and that a certification prepared two years after the fact could not establish her incompetency "retroactively". *Alford v. Shelton*, 2016 IL App (3d) 140163, ¶24, p.11-12.

The appellate court relied upon the specific language of Thomas' POA in connection with the empowerment of a successor agent. ***Alford v. Shelton***, ¶25, p.12. The POA, in Statutory Short Form terms, provides in paragraph 8 as follows:

> 8. If any agent named by me shall die, become incompetent, resign or refuse to accept the office of agent, I name the following (each to act alone and successively, in the order named) as successor(s) to such agent: my son, Rodney I Shelton---my daughter, Ruth Ann Alford. For purposes of this paragraph 8, a person shall be considered to be incompetent if and while the person is a minor or an adjudicated incompetent or disabled person or the person is unable to give prompt and intelligent consideration to business matters, as certified by a licensed physician. (C96; Appendix, A46).

The Third District engaged in the "most straightforward reading" of the relevant provisions, finding that a physician's certification, like an adjudication of incompetency, is meant to serve as a "triggering event" that nullifies the primary agent's authority at the time of the certification and in the future, until the certification is rescinded. The court noted that nothing in Thomas's POA suggests that a physician's certification prepared

years after the fact may retroactively nullify the designated agent's authority to act under the POA. The court correctly noted that written powers of attorney must be strictly construed in Illinois, and declined to read such intent into the instrument by implication where the text does not clearly support that interpretation. *Alford v. Shelton*, ¶25, p.12-13 [citing *In re Estate of Romanowski*, 329 Ill.App.3d 769, 759 N.E.2d 174, 182 (2002)].

Strict construction of powers of attorney is well established in Illinois. Written powers of attorney must be strictly construed so as to reflect the clear and obvious intent of the parties. *Amcore Bank N.A. v. Hahnaman-Albrecht, Inc.*, 326 Ill.App.3d 126, 135, 759 N.E.2d 174, 182 (2001); *Fort Dearborn Life Insurance Company v. Holcomb*, 316 Ill.App.3d 485, 499, 736 N.E.2d 578 (2000). "Strict construction" in Illinois calls for a court to construe an instrument to mean nothing more and nothing less than the letter of the text, confining the construction to such subjects or applications as are obviously within the terms and purposes of the instrument or statute. The instrument means nothing more and nothing less than the letter of the text. *Erlenbush v. Largent*, 353 Ill.App.3d 949, 819 N.E.2d 1186, 1189 (2004) [citing *Warner v. King*, 267 Ill.182, 186 (1915)]. Where the language of an instrument is unambiguous, strict construction mandates that nothing is to be read into the subject content by intendment or implication, and that the document means exactly what it says. *Associated Cotton Shops v. Evergreen Park Shopping Plaza*, 27 Ill.App.2d 467, 170 N.E.2d 35, 38 (1st Dist. 1960). The language of paragraph 8 in Thomas's Statutory Short Form Property POA is not ambiguous in any manner. On the contrary, it is very specific as to the means by which incompetency of an agent must be established for purposes of empowerment of a successor agent.

The Third District found substantial policy reasons for reading a standard form POA strictly and in accordance with its text. The court noted that allowing incompetency determinations to be made years after the fact could create uncertainty in transactions on behalf of the principal, since principals, acting agents, successor agents, and third parties need to know with certainty who has authority to act in that regard and who has fiduciary duties to the principal at a particular time. The court explained that this would create "a regime of instability and uncertainty which could upset the settled expectations" of the parties to the POA and third parties who have transacted business with the agent, and would likely spawn litigation, complete with conflicting expert testimony, to establish when an agent became incompetent. *Alford v. Shelton*, ¶26, p.13.

The appellate decisions cited by Ruth Ann do not in any manner support the theory espoused in the amended citation. Ruth Ann relies primarily on two Illinois decisions, *Spring Valley Nursing Center v. Allen* (2102 IL App (3d) 1109150 and *In re Elias* (408 Ill.App.3d 301 [2011]). Neither of those decisions has factual or legal relevance to the case at bar. In all of the authorities cited, the fiduciary relationship and the resulting presumption of fraud arose as to transactions benefiting the actual appointed agent under the POA at issue. A "successor agent" is not mentioned or involved in these or in any of the cases cited by Ruth Ann. As to the designated agent (attorney-in-fact) under a POA, it is true that the fiduciary duty attaches even absent any evidence that the POA was used in the transaction, and regardless of whether the agent claims that the POA had not been "activated" till after a transaction. In each cited case, the presumption of fraud arising out of the fiduciary relationship between a principal and an agent under a

POA was recognized and operative as to the designated agent, not a successor agent. Brief, p.7-9.

Ruth Ann inappropriately submits as supporting authority the decision of the Third District Appellate Court majority in the consolidated case on appeal (*Alford v. Shelton*, Supreme Court Docket No. 121199), wherein the court held that section 2-10.3(b) of the Illinois Power of Attorney Act applies to a "successor agent" as well as an "agent" under a POA, where the successor agent participates in or conceals a breach of fiduciary duty by "another agent". *Alford v. Shelton*, ¶28-41, p.14-20. This argument is misplaced. First, the consolidated action is also under review by this Court upon grant of a petition for leave to appeal. Secondly, the cited statute [755 ILCS 45/2-10.3(b)] is not involved in the case at bar, and the provision itself does not apply to the pleading at issue or the circumstances presented here. The precedential scope of a decision is limited to the facts before the court. *People v. Flatt*, 82 Ill.2d 250, 412 N.E.2d 509, 515 (1980). The words of a judicial opinion do not have a vitality independent of the facts to which the opinion is addressed. *People v. Arndt*, 49 Ill.2d 530, 276 N.E.2d 306, 307-08 (1971).

3. The unrecognized legal theory on which the amended citation is based is directly contrary to the intent and provisions of the Illinois Power of Attorney Act (755 ILCS 45/1-1 et seq.).

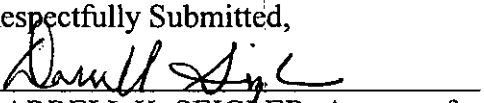
The legal theory put forth in the amended citation is inconsistent with and directly contrary to the intent and provisions of the Illinois Power of Attorney Act (755 ILCS 45/1-1 et seq.). Section 2-4(a) provides that the principal may specify in the agency (POA) the event or time when the agency will begin and terminate; the rights, powers, duties, limitations, immunities, and other terms applicable to the agent (the attorney-in-

fact designated to act for the principal in the agency [as defined in section 2-3(b)]; and the provisions of the agency will control notwithstanding the Act. 755 ILCS 45/2-4(a). The POA at issue in this appeal, as to its terms regarding successor agents and determination of the incompetency of an acting agent (paragraph 8), is in standardized form and contains the Short Form language contained in the Act in section 3-3(d). 755 ILCS 45/3-3(d). (C105; Appendix, A55). As noted earlier, the terms of Thomas's POA are controlling under the Act, are unambiguous, and must be strictly construed.

CONCLUSION

In conclusion, Appellee, Respondent Rodney I. Shelton, submits that the trial court's dismissal of the amended estate citation was correct and proper, and that the Third District Appellate Court correctly affirmed the dismissal. Accordingly, Appellee requests that this Honorable Court affirm the decision of the Third District Appellate Court and the judgment of the trial court, and grant such other relief as may be deemed proper.

Respectfully Submitted,



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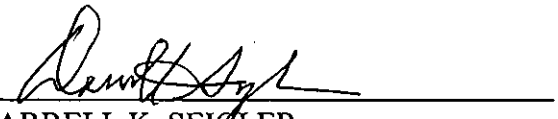
RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1)statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is ten (10) pages.



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