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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-2416
Lower Tribunal No.: 5D12-1823

HOWARD BROWNING,

Petitioner,

v.

LYNN ANNE POIRIER,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT, LYNN ANNE POIRIER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTORY STATEMENT

Petitioner, Howard Browning, shall be referred to herein as "Browning." Respondent, Lynn Anne Poirier, shall be referred to herein as "Poirier." References to the record on appeal shall be indicated by volume first, and then the page number, and shall appear as "(V., p.)."

STATEMENT OF THE CASE AND OF THE FACTS

Procedural History

On January 25, 2008, Browning brought suit against Poirier in Seminole County, Florida. (V. 1, p. 1-7.) Browning's original complaint alleged that the parties had resided together for sixteen (16) years and "had an oral agreement that if either party were to win a significant lottery payout, that that party would equally split said payout with the other party." (V. 1, p. 2.) Browning also alleged that the parties "ratified the oral agreement at least once per year for the past 16 years." (V. 1, p. 2.) Browning alleged that Poirier purchased a winning lottery ticket and refused to share any of the winnings; Browning sought damages based on claims for breach of contract; promissory estoppel; and quasi-contract. (V. 1, p. 2-6.)

On November 7, 2008, Browning filed an amended complaint. (V. 1, p. 160-73.) Notably, Browning's amended complaint did not allege that the parties ever ratified the alleged agreement. (V. 1, p. 160-73.) The amended complaint simply alleged that the parties had an agreement wherein they originally agreed to

share lottery winnings. (V. 1, p. 160-73.) The amended complaint also added claims for breach of fiduciary duty; conversion; civil theft; and declaratory action. (V. 1, p. 160-73.). Interestingly, in the amended complaint, no claim for breach of any contract is alleged. (V.1, p. 160-173).

On March 30, 2009, Browning filed a second amended complaint. (V. 2, p. 214-229.) Therein, Browning further refined his allegations of the parties' original agreement to clarify that "in approximately 1993, [the parties] entered into an oral agreement in which they each agreed to purchase lottery tickets jointly on a frequent and regular basis, and to equally share in the proceeds of any winning lottery ticket(s)." (V. 2, p. 214.) Browning, in paragraph 5 thereof, simply alleges in conclusory fashion that "[t]his agreement was capable of being performed within one (1) year." (V. 2, p. 215.) In paragraph 24, Browning also claimed that the parties' alleged agreement had been "reaffirmed and/or ratified several times orally and by the parties' conduct since 1993." (V. 2, p. 218.)

Poirier responded with a motion to dismiss the second amended complaint based on section 725.01, *Florida Statutes* (*hereinafter* "Statute of Frauds"), as the alleged oral agreement was claimed to have been made sixteen (16) years prior to the winning ticket having been purchased by Poirier. (V. 2, p. 232-51.) The trial court denied Poirier's motion to dismiss and Poirier filed an answer denying the

allegations in paragraphs 5 and 24. (V. 3, p. 383-85.) Poirier also raised the Statute of Frauds as an affirmative defense. (V. 3, p. 393.)

Without leave of court, Browning then filed a third amended complaint, but because Browning voluntarily dismissed the one (1) count that was added, this case proceeded to a jury trial on Browning's second amended complaint. (V. 3, p. 424-440, 452-53.) However, Browning proceeded to trial on only the breach of contract and unjust enrichment claims. (V. 2, p. 214-229.)

A jury trial was held on February 6 & 7, 2012. (V. 18; V. 19.) At the conclusion of Browning's case-in-chief, Poirier moved for a directed verdict, arguing that the breach of contract claim was barred by the Statute of Frauds. (V. 19, p. 308.) Poirier cited to *Yates v. Ball*, 181 So. 341 (Fla. 1937), amongst other authorities, in support of her motion for directed verdict. The trial court granted Poirier's motion for directed verdict as to the breach of contract count, and stated:

> The Court's ruling is this: **The issue here is whether or not there is evidence that the parties intended that this contract be performed in less than a year**. … **The intent was that the contract was to last** and it did last, as it turns out, **much longer than a year**. And the contract was to buy lottery tickets and share the proceeds.…the whole thing went on lottery ticket after lottery ticket for much more than a year. **It was intended to go on for much more than a year and it's barred by the [S]tatute of [F]raud[s].**

(V. 19, p. 326-28) (emphasis added). On April 5, 2012, Browning filed a motion for new trial, which was denied that same day. (V. 17, p. 3008-16.)

In his Initial Brief, Browning references the proposed jury instructions and notes with emphasis that "Respondent's counsel relied **entirely** upon cases that are not the cases…agreed upon by the parties as part of the jury instructions." Initial Brief of Petitioner at 9-10, 11, *Browning v. Poirier*, No. SC13-2416 (Fla. July 25, 2014) (emphasis added). This is grossly inaccurate as *Yates v. Ball* is expressly cited in the jury instructions, and was relied on by Poirier in the oral motion for a directed verdict at trial. (*See* V. 19, p. 315-16.) At trial, not only did Poirier quote the qualifying rule from *Yates* (V. 19, p. 315), but Poirier even expressly argued that "[t]hat [the circumstances] makes it fall squarely within *Yates* versus *Ball*…" (V. 19, p. 316.) Moreover, any stipulation to jury instructions was not a stipulation that restricted the available case law in support of a motion for directed verdict. By their very nature, the applicability of jury instructions, and any challenge to said instructions, do not become ripe until both parties rest their respective cases. The trial court's directed verdict made the jury instructions moot. Browning, thereafter, appealed the trial court's grant of a directed verdict.

On March 8, 2013, the Fifth District Court of Appeal reversed the trial court's directed verdict based on the Statute of Frauds defense. *Browning v. Poirier*, 113 So. 3d 976 (Fla. 5th DCA 2013) (*hereinafter* "*Browning I*"). On or about March 18, 2013, Poirier timely filed a Motion for Rehearing *En Banc*, which was granted by the Fifth District Court of Appeal. As a result, on November 8,

2013, the original panel opinion was withdrawn, and a new opinion was substituted in its place. *Browning v. Poirier*, 128 So. 3d 144, 145 (Fla. 5th DCA 2013) (*hereinafter* "*Browning II*"). *Browning II* affirmed "the judgment under review regarding the count for breach of the alleged oral contract." *Id.* at 146. In affirming the trial court's decision, the Fifth District Court of Appeal stated:

> [t]o suggest that these parties intended and agreed in 1993 that they would win the lottery, split the proceeds, and dissolve their romantic relationship in the span of one year, and that they intended anything other than a long-term relationship is belied by Browning's own testimony and the testimony of his own witnesses.

Browning, 128 So. 3d at 146. Seven (7) of the eight (8) Fifth District Court of Appeal judges who decided *Browning II* agreed that Browning's claim for breach of contract was barred by the Statute of Frauds in accordance with the authority of this Court's decision in *Yates*. *Browning*, 128 So. 3d at 145, 147.

The majority certified the following question to this Court as a matter of great public importance:

> Is an oral agreement to play the lottery and split the proceeds in the event a winning ticket is purchased unenforceable under the [S]tatute of [F]rauds when: there is no time agreed for the complete performance of the agreement; the parties intended the agreement to extend for a period longer than one year and it did extend for a period of fourteen years; and it clearly appears from the surrounding circumstances and the object to be accomplished that the oral agreement would last longer than one year?

Id. at 146-47. On June 20, 2014, this Court accepted jurisdiction over this case.

Evidence Presented At Trial

A jury trial was held on February 6 & 7, 2012, wherein Browning's case-in-chief was presented. (V. 18; V. 19.) Therein, Browning called seven (7) witnesses. However, in the Briefs submitted on appeal, Browning only references his own testimony. *See* Initial Brief of Petitioner at 6-9, *Browning v. Poirier*, 113 So. 3d 976 (Fla. 5th DCA 2013) (No. 5D12-1823); Initial Brief of Petitioner at 6-9, *Browning v. Poirier*, No. SC13-2416 (Fla. July 25, 2014).

Browning testified at trial that he and Poirier first met in August of 1991. (V. 18, p. 50-51.) Browning was a handyman and offered to work at Poirier's home in Geneva, Florida. (V. 18, p. 50-51.) Browning and Poirier began a relationship during the course of Browning's handyman work. (V. 18, p. 52-53.) In October of 1991, Browning moved into Poirier's Lake Geneva home, and lived there rent-free from 1991 through 2009. (V. 18, p. 49; 53; 110; 114.) At trial, Browning initially claimed that he paid the majority of the bills at Poirier's home. (V. 18, p. 115.) However, Browning later admitted that he could only substantiate the payment of $1,978.15 which he paid for any bills or other expenses related to the home for the eighteen (18) year period in question. (V. 18, p. 121-22.)

Browning's case-in-chief established that he intended to be, and was, in a committed relationship with Poirier starting in 1993 and extending many years thereafter. (*See* V. 18, p. 146, 183-84.) Specifically, Browning testified that the

oral contract was to last as long as he and Poirier "was [sic] together." (V. 18, p. 146.) Browning further testified that he planned on staying with Poirier. (V. 18, p. 183-84.)

On June 2, 2007, Poirier purchased lottery ticket number 666168, which yielded a gross payout of $1,000,000.00. (V. 19, p. 306-07.) Browning claimed that the money Poirier used to purchase the winning ticket was his money that he had withdrawn from an ATM and then given to Poirier that evening. (V. 18, p. 88; 90.) However, the evidence established that Poirier and Browning bought lottery tickets separately that evening; were not together in line to purchase the tickets that each purchased that evening; and did not buy consecutive lottery tickets. (V. 18, p. 88-89.) Regardless of the factual dispute regarding whether the parties were even in the store together on the evening in question, it was not disputed that Poirier held the winning ticket; tendered the winning ticket; and collected the prize money from the winning ticket. (V. 19, p. 306-07.)

After Poirier won the lottery with the ticket she had purchased that evening, Browning also claimed that he was entitled to share the winnings because the parties had made an alleged oral agreement fifteen (15) years earlier in 1992 to share any lottery winnings that either party won during their relationship, regardless of the source of the funds. (V. 18, p. 73.) Specifically, Browning testified "[t]he agreement that we had since we were buying tickets that we would

go in and buy them together and we would play together and that if we win, we would split the money." (V. 18, p. 73.) Browning testified that this agreement was made in 1992, and most recently reaffirmed in 1993—fourteen (14) years prior to the date the winning lottery ticket was purchased. (V. 18, p. 73; 160.) Browning stated that "[t]he only thing I want is my share….[s]plit [the proceeds] in half, yes, sir." (V. 18, p. 90.); however, Browning admitted that, at the start of the case, his main goal was to simply receive an interest in Poirier's Lake Geneva property, rather than to receive half of her lottery winnings. (V. 18, p. 104). Browning made this claim to the winnings despite the fact that Paul Gay, Browning's son-in-law and one of Browning's witnesses at trial, testified that he never heard either party indicate they had an agreement to share lottery winnings. (V. 19, p. 221.)

Browning testified that he believed he had a partnership to split "pretty much" everything with Poirier. (V. 18, p. 122.) However, Browning testified that he filed a lawsuit against the City of Winter Springs, and ultimately recovered $78,000 during his relationship with Poirier; **yet, he failed to share half of this money with Poirier**. (V. 18, p. 107; 122-23.) Browning testified that, of those funds, he gave $9,000 to his nephews to start a radio shop and he gave $5,000 to his father. (V. 18, p. 124-25.)

Additionally, Poirier and Browning both participated in a drawing for a new Ford Mustang worth $29,000, which Browning won. (V. 18, p. 123-24, 164.)

Browning testified at trial that he did not believe his alleged "partnership" with Poirier covered the Mustang drawing. (V. 18, p. 124.) As soon as Browning received the Mustang, he sold the vehicle for $24,500 and used the money to buy a Ford F350, which he titled in his sole name. (V. 19, p. 164-65.) After Browning sold the truck for $25,000, **he did not share any of the proceeds from the sale of the truck with Poirier**. (V. 18, p. 165.)

Browning also acknowledged that the alleged oral agreement with Poirier was only effective as long as Browning still had a romantic relationship with Poirier. (V. 18, p. 146.) Prior to Poirier's purchase of the winning lottery ticket, Browning was having romantic contact with Debbie Swaitkowsky, admitted that he lied to Poirier about his relationship with Ms. Swaitkowsky, and acknowledged that he had "lots of girlfriends." (V. 18, p. 149; 151-52.) Browning admitted to buying a dress for Swaitkowsky; visiting her parents with her in Niagara Falls on a ticket that she purchased for him; repairing Swaitkowsky's vehicle; and fixing a drain pipe in Swaitkowsky's kitchen—all prior to Poirier's purchase of the winning lottery ticket. (V. 18, p. 149-50.) Further, Poirier left Browning for a week in 2007; returned with an engagement ring on her finger; and announced that she was engaged to Michael Jenkins. (V. 18, p. 152-54.)

Browning admitted to going out to dinner with Swaitkowsky and later lying to Poirier about that contact with Swaitkowsky. (V. 18, p. 151.) On cross

examination Browning was asked, "And the reason you lied to [Poirier] is because you didn't want her to know [that you dined with Debbie Swaitkowsky]?" (V. 18, p. 151). Browning responded, "Maybe." (V. 18, p. 151.) Browning testified that he had seen Swaitkowsky "three or four times." (V. 18, p. 152.) Kristy Gay, Browning's daughter, testified that Poirier told her, in 2005, that she suspected Browning was involved in a romantic relationship with Swaitkowsky at that time. (V. 19, p. 273.) Browning testified that one of Poirier's friends had called law enforcement in order to force him from the home in 2005, but Browning refused to leave the home. (V. 18, p. 155, 157.) Browning stated that the argument and law enforcement involvement in 2005 stemmed from an argument he and Poirier had regarding Browning's involvement with Swaitkowsky. (V. 18, p. 155-57.)

Paul Gay, Browning's son-in-law, has known Poirier since 2001, yet he admitted in his deposition that he has **never** seen Browning and Poirier kiss each other. (V. 18, p. 193; V. 19, p. 208-09.) Kristy Gay testified that Poirier told her she was scared of Browning, and that she had witnessed Browning yell and curse at Poirier. (V. 19, p. 282-84.) The parties alleged oral agreement to divide lottery winnings so long as Poirier and Browning were in a relationship was certainly not effectual subsequent to 2007, given Browning's admitted romantic involvement with Debbie Swaitkowsky (and others), and Poirier's romantic involvement with Michael Jenkins. (V. 18, p. 152-53, 155.)

Browning testified that he did not get paid for the work he did once he moved into Poirier's home. (V. 18, p. 57.) Prior to moving into Poirier's home, Browning worked on Poirier's pump room and pump house and used a chainsaw to cut down a tree on the property. (V. 18, p. 52.) Browning received payment for that work. (V. 18, p. 108.)

After Browning moved into the home, he fenced in eight and a half acres around the property and reroofed the garage. (V. 18, p. 58-59.) Browning testified that it took him two (2) years to complete the fence work around the property. (V. 18, p. 126.) Browning did not keep track of how many hours of work he did on the home and could not produce receipts for any of the work Browning claimed he had done. (V. 18, p. 144-45.) Browning believes that his work on Poirier's home was a "good job." (V. 18, p. 138-39.) However, Browning agreed in his deposition that the home could possibly have been **condemned**, had it been inspected. (V. 18, p. 138.) Browning testified that the plumbing in the home was "falling apart" and the walls had dry rot and termite damage. (V. 18, p. 57.) Shannon Browning, Browning's daughter, testified that her dad "unfortunately" never finished any project he worked on at the Lake Geneva property. (V. 19, p. 248.) Jaime Rolle, Browning's daughter, testified that she was removed from the Lake Geneva home in 2001 by the Department of Children and Families **because the home was unfit for a child**. (V. 19, p. 261-62.)

On cross-examination, Browning protested that he never "squatted" on Poirier's property. (V. 18, p. 53.) However, Browning admitted that Poirier had him evicted from the Lake Geneva property in March of 2009. (V. 18, p. 49-50; 102.) Browning testified that he first received notice to vacate the Lake Geneva property in July of 2008, yet he did not leave until April of 2009. (V. 18, p. 174.) At trial, Browning admitted that when he filed the underlying suit herein, his main goal was to receive an interest in Poirier's Lake Geneva property rather than to receive half of her lottery winnings. (V. 18, p. 104.) By trial, Browning had no such claim. (V. 18, p. 90.)

SUMMARY OF THE ARGUMENT

Florida's Statute of Frauds provides that any alleged oral contract is void if it is based "upon any agreement that is not to be performed within the space of one year from the making thereof." § 725.01, Fla. Stat. (2013). Since English Parliament adopted this exact language into English law in 1677, the Statue of Frauds has been interpreted to require courts to consider the intent and understanding of the parties if no time for completion is expressed in the alleged agreement. In Florida, this Court's decision in *Yates v. Ball*, 181 So. 341, 344 (Fla. 1937), is in accord with prior English and United States Supreme Court rulings to this effect. The qualifying rule expressed in *Yates* applies and controls resolution of the case at bar. The evidence presented in the light most favorable to Browning

established that the parties did not agree on a time for complete performance, and Browning intended the alleged oral agreement to extend throughout the parties' entire relationship, which was contemplated to last longer than a year. Thus, the Fifth District Court of Appeal properly affirmed the trial court's grant of a directed verdict based on the authority of *Yates*.

Yates requires the "intent and the understanding of the parties" to be the controlling factor in determining whether an oral contract is barred by the Statute of Frauds. *Yates*, 181 So. at 344. A contrary approach, which never looks at intent and instead focuses solely on whether performance could possibly be completed within a year, is an open invitation to fraud and is poor public policy. This Court should re-affirm its prior precedent, not simply due to the doctrine of *stare decisis*, but because such an interpretation is in accord with the general requirement in contract law that the intent of the parties is to be considered in the face of any ambiguity in a contract's terms. Moreover, permitting a contingency to remove an oral contract from the Statute of Frauds would rob the statute of time-honored force and promote the very fraud the statute is designed to prevent.

Similarly, the Fifth District Court of Appeal's decision in *Browning II* is in accord with *Yates* because *Browning II* relied exclusively on the qualifying rule articulated in *Yates* in determining that the parties' alleged oral agreement is barred by the Statute of Frauds. Browning acknowledges in his Initial Brief that the

qualifying rule is fatal to his case. Browning is apparently implicitly urging this Court to overturn *Yates.* This Court should decline the invitation due to the doctrine of *stare decisis* and because *Yates* is founded on the bedrock of fraud avoidance.

Despite Browning's claim of conflict on this specific issue among Florida's district courts of appeal, none exists. Each of the five (5) district courts of appeal in Florida, within the last eleven (11) years, has considered and properly applied the qualifying rule as articulated in *Yates*. The only conflict is between the cases relied upon by Browning and this Court's approach in *Yates*. *Browning II* does not conflict with the cases cited by Browning. Browning makes the false argument of conflict as he fails to properly employ the qualifying rule expressed in *Yates*. Instead, Browning relies only on the general rule articulated in the Restatement (Second) of Contracts and cited in the various district courts of appeal cases Browning references. Thus, this Court should not follow any decision based on any alleged conflict as no conflict exists.

STANDARD OF REVIEW

The Fifth District Court of Appeal's certified question presents a pure question of law and is reviewed *de novo*. *Christensen v. Brown*, 140 So. 3d 498, 501 (Fla. 2014). This Court has jurisdiction to decide the question certified. *See* FLA. CONST. art. 5 § 3(b)(4). Further, the issue in this case concerns an order

entered on a motion for directed verdict, which is also reviewed *de novo*. *Christensen*, 140 So. 3d at 501.

ARGUMENT

I. THE QUESTION CERTIFIED BY THE FIFTH DISTRICT COURT OF APPEAL SHOULD BE ANSWERED AFFIRMATIVELY BASED ON THE AUTHORITY OF THIS COURT'S *YATES v. BALL* DECISION.

A. This Court's *Yates v. Ball* decision contains a qualifying rule that controls the certified question and should result in this Court answering the certified question affirmatively.

The original "statute of frauds," first called "An Act for Prevention of Frauds and Perjuryes," was passed by English Parliament in 1677. 29 Car. II c. 3. The original language of what is known as the one (1) year provision rendered a contract void if it was based "upon any agreement that is not to be performed within the space of one year from the making thereof." *Id.* After Florida achieved statehood, Florida adopted language identical to the one (1) year provision contained in the English Act for Prevention of Frauds and Perjuryes into its own Statute of Frauds. *See* § 1995, Fla. Stat. (1892). This same statutory language remains in Florida's present Statute of Frauds. *See* § 725.01, Fla. Stat. (2013). Despite statutory amendments in 1997 and 1998, the language quoted above has **never** been legislatively modified. *See* Laws 1997, c. 97-102, § 933, eff. July 1, 1997; Laws 1997, c. 97-264, § 60, eff. July 1, 1997; Laws 1998, c. 98-166, §§ 227, 294, eff. July 1, 1998.

This exact Court, in *DK Arena, Inc. v. EB Acquisitions I, LLC*, 112 So. 3d 85 (Fla. 2013), noted, "In Florida, it has long been recognized that **the Statute of Frauds is a legislative prerogative, grounded in a policy judgment that certain contracts should not be enforced unless supported by written evidence**." *DK Arena*, 112 So. 3d at 93 (emphasis added).

The original judicial interpretation of the relevant Statute of Frauds language comes from the English case of *Peter and Compton*, which succinctly ruled:

> [W]here the agreement is to be performed upon a contingent, and it does not appear within the agreement, that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year; but **where it appears by the whole tenour of the agreement, that it is to be performed after the year, there a note is necessary**; otherwise not.

Peter and Compton, Skin. 353, 90 Eng. Rep. 157 (1694) (emphasis added).

The rule articulated in *Peter and Compton* was affirmed in *Boydell v. Drummond*, 170 Eng. Rep. 1114 (1809). Therein, the Boydells had orally proposed to publish, by subscription, a series of large prints from some of the scenes of Shakespeare's plays. *Boydell*, 170 Eng. Rep. at 1114. The first prospectus issued by the publishers stated certain conditions, in substance as set out in the declaration, and others showing the magnitude of the undertaking, and that its completion would unavoidably take a considerable time. *Id.* at 1114-15. The court found the contract unenforceable because the contract, according to the

understanding and contemplation of the parties as manifested by the terms of the contract, was not to be fully performed by the completion of the whole work within the year. *See id.* at 1114-16. Consequently, a full completion within the year, even if physically possible, would not have been according to the terms or the intent of the parties to the contract. *See id.*; *see also Souch v. Strawbridge*, 135 Eng. Rep. 1161 (1846) (affirming the same rule from *Peter and Compton*).

The Florida legislature is presumed to have had full understanding of the Statute of Fraud's jurisprudence when it enacted the statute in 1892, as well as when the legislature modified other parts of the Statute of Frauds in 1997 and 1998. *See Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 917 (Fla. 2001) (stating that a legislature is presumed to know and have adopted the judicial construction of a law when enacting a new version unless a contrary intention is expressed in the new version).

The United States Supreme Court has also cited to *Peter and Compton* with approval, and specifically stated that "to make a parol contract void it must be apparent that it was the **understanding of the parties** that it was not to be performed within a year from the time it was made." *McPherson v. Cox*, 96 U.S. 404, 416 (1877) (emphasis added). This Court, in *Yates*, based its interpretation of the rule regarding the one (1) year provision of the Statute of Frauds on both *McPherson* and *Peter and Compton*. *Yates*, 181 So. at 344. Thus, this Court's

interpretation is steeped in venerated English jurisprudence such that if the intent and understanding of the parties is that the alleged oral agreement is to extend beyond one (1) year, then the contract is void unless it is in writing.

The Statute of Frauds has an important underlying public policy concern that "grew out of a purpose to intercept the frequency and success of actions based on nothing more than loose verbal statements or mere innuendos." *Id.* The intent of the Statute of Frauds is "to prevent persons from being enmeshed in and harassed by claimed oral promises made in the course of negotiations not ending in contracts reduced to writing." *LynkUs Commc'ns, Inc. v. WebMD Corp.*, 965 So. 2d 1161, 1165 (Fla. 2d DCA 2007) (quoting *Cohen v. Pullman Co.*, 243 F.2d 725, 729 (5th Cir. 1957)). It is because of this public policy concern that this Court has indicated, "The [S]tatute [of Frauds] should be strictly construed to prevent the fraud it was designed to correct, and so long as it can be made to effectuate this purpose, **courts should be reluctant to take cases from its protection**." *Yates*, 181 So. at 344 (emphasis added).

To determine whether an oral contract is barred by the Statute of Frauds, this Court articulated the following rules:

> When, as in this case, no definite time was fixed by the parties for the performance of their agreement, and there is nothing in its terms to show that it could not be performed within a year **according to its intent and the understanding of the parties**, it should not be construed as being within the [S]tatute of [F]rauds. **The general rule so stated is subject to the**

> **qualifying rule that when no time is agreed on for the complete performance of the contract, if from the object to be accomplished by it and the surrounding circumstances, it clearly appears that the parties intended that it should extend for a longer period than a year, it is within the [S]tatute of [F]rauds, though it cannot be said that there is any impossibility preventing its performance within a year**.

Id. (emphasis added). In *Yates,* the factual circumstances involved a mortgage bond transaction and an alleged oral agreement to pay certain second mortgage bonds secured by a trust deed after a period of forbearance by the bondholders in foreclosing on the bonds. *Id.* at 342. The alleged oral agreement had no definite time for the undertaking of the actions that were contemplated to occur during the time of forbearance. *Id.* at 342, 344. The second mortgage bonds, however, were not due for four (4) years. *Id.* at 344. The defendant made three (3) payments on the bonds and then defaulted under the alleged oral agreement. *Id.* at 343. This Court found that the agreement sued on was clearly not barred by the Statute of Frauds because the oral agreement:

> contains no express provision that it should not be performed within a year, **nor is there anything embraced within its terms that shows conclusively that it was intended to run for more than a year**. Under its terms, it is susceptible of performance within a year, **and the evidence shows that it was expected to have been performed within that time.**

Yates, 181 So. at 344 (emphasis added). Thus, in *Yates*, this Court properly analyzed the tests of the general rule and the qualifying rule; considered the parties' intent and understanding; and determined that the oral agreement could

have and was intended to have been performed within a year, thus removing the oral agreement from the application of the Statute of Frauds.

Unlike the oral agreement in *Yates*, the alleged oral agreement herein clearly falls within the qualifying rule, not the general rule. This is because the parties did not agree on a time for complete performance, and it is clear from the object to be accomplished by the parties' alleged oral agreement that the parties in fact intended that their agreement would last throughout their relationship that was anticipated to last longer than one (1) year. Thus, the parties' alleged oral agreement is barred by the Statute of Frauds according to the qualifying rule articulated in *Yates*. This is true even "though it cannot be said that there is any impossibility preventing its performance within a year." *Yates*, 181 So. at 344.

The evidence presented herein established that the parties did not agree on a time for complete performance. This conclusion was admitted twice by Browning in his Initial Brief. Initial Brief of Petitioner at 24-25, *Browning v. Poirier*, No. SC13-2416 (Fla. July 25, 2014). Browning testified that the oral contract was to last as long as he and Poirier were together, and that Browning planned on staying with Poirier. Browning intended to be, and was, in a committed relationship with Poirier, which spanned multiple years both before and after the parties' alleged 1992 oral agreement. Browning moved into Poirier's house in 1991, was still living there in 1992 when the alleged oral agreement was purportedly made, and

was still living there in 1993 when the alleged oral agreement was last purportedly affirmed (and he intended to continue living there). Accordingly, the first element of the qualifying rule is present, *i.e.*, there was no time agreed on for the complete performance of the contract.

The evidence also established that from the object to be accomplished by the parties' alleged agreement, *i.e.* to purchase lottery tickets and split the proceeds while in a romantic relationship, the parties in fact intended that their agreement would extend for longer than a year. According to Browning, the lottery was to be played and the proceeds were to be split between the parties for as long as they were together. The object of the alleged agreement was for both parties to make money from playing the lottery and Browning testified that the alleged agreement was effective only while the parties were involved in a romantic relationship. Not only did Browning testify that he planned on staying with Poirier, but the parties were already living together when the alleged oral agreement was made. Hence, there was no intent by either party that a breakup would occur, or that the parties' alleged lottery agreement would terminate in less than a year.

Browning attempts to minimize the magnitude of his own testimony at trial by arguing that there is only "one statement regarding the anticipated duration of the agreement." Initial Brief of Petitioner at 25, *Browning v. Poirier*, No. SC13-2416 (Fla. July 25, 2014). However, that statement, which was **never**

contradicted and is therefore the unrebutted evidence on the subject, is alone sufficient to establish that the parties intended that their agreement would extend for longer than a year. Based on Browning's evidence, the Fifth District Court of Appeal, in *Browning II*, concluded:

> To suggest that these parties intended and agreed in 1993 that they would win the lottery, split the proceeds, and dissolve their romantic relationship in the span of one year, and that they intended anything other than a long-term relationship is belied by Browning's own testimony and the testimony of his own witnesses.

Browning v. Poirier, 128 So. 3d 144, 146 (Fla. 5th DCA 2013). Thus, the final element of the qualifying rule is also present, *i.e.* the parties in fact intended that their agreement would extend for longer than a year.

Moreover, because the parties' alleged oral agreement called for the establishment of an ongoing business venture that was to span multiple years, the circumstances are analogous to the decisions of *LynkUs Commc'ns, Inc. v. WebMD Corp.*, 965 So. 2d 1161 (Fla. 2d DCA 2007) and *Khawly v. Reboul*, 488 So. 2d 856 (Fla. 3d DCA 1986). *LynkUs* and *Khawly* correctly applied the qualifying rule articulated in *Yates.* In *LynkUs*, the alleged agreement essentially "called for the establishment of an ongoing business," to provide wireless communications services. *LynkUs*, 965 So. 2d at 1165. There, the parties understood that the joint business arrangement "would be a long-term arrangement or an arrangement that, by its very nature, would extend for more than a year." *Id.* at 1165. The fact that

the business would commence within one (1) year by its contemplation was determined to be "of no moment." *Id.* Here, the parties' alleged agreement to split lottery proceeds was an ongoing venture by its nature, and, according to Browning's testimony, he intended and understood that it was to extend for more than a year.

In *Khawly*, it was determined that "the parties intended to establish an ongoing concern, to extend well beyond a year." *Khawly*, 488 So. 2d at 858. There, the court relied on, *inter alia*, the complaint's allegation that "the parties agreed to form a corporation for the purpose of entering into the business of retail sales of sportswear"; that the parties entered into a three (3) year lease at the onset of the relationship; and at trial the plaintiffs' counsel argued that the business is where the plaintiffs had intended to continue "working." *Id.* All of this evidence indicated an intention for the contract to last beyond one (1) year. In the instant case, the object of the agreement was for both parties to make money from playing the lottery; this object is no different than the object of a business venture.

The Second in *LynkUs* and the Third District Courts of Appeal in *Khawly* found that an ongoing agreement, which was intended to extend well beyond a year, was unenforceable under the Statute of Frauds. Similarly, the parties' alleged oral agreement herein was intended to last longer than a year by the circumstances established in the record. The alleged agreement is therefore void.

Accordingly, the qualifying rule set forth in *Yates* is the appropriate standard under Florida law. The Fifth District Court of Appeal in *Browning II* applied that qualifying rule to a record containing unrebutted evidence of an alleged oral agreement that was intended to last longer than a year. Further, that same qualifying rule was the basis for the certified question herein, as its language mirrors that qualifying rule. *Compare Browning*, 128 So. 3d at 146-47 (Fla. 5th DCA 2013), *with Yates*, 181 So. at 344. Therefore, this Court should affirmatively answer the certified question, and thereby affirm the Fifth District Court of Appeal's decision because the Statute of Frauds bars the parties' alleged oral agreement.

Browning himself even admits in his Initial Brief that "**it is clear that the qualifying rule set forth in the *Yates* case, under the circumstances of the instant case…would…bring the instant contract within the [S]tatute of [F]rauds**." Initial Brief of Petitioner at 27, *Browning v. Poirier*, No. SC132-2416 (Fla. July 25, 2014) (emphasis added). However, Browning "contends that the qualifying rule from the *Yates* case contradicts the express language of *Florida Statutes*, § 725.01, and would unfairly bring the instant contract within the [S]tatute of [F]rauds." *Id.* In doing so, Browning has overlooked the clear language of the Statute of Frauds which requires a court to void any contract that "is not to be performed [within a year]." § 725.01, Fla. Stat. (2013). The

qualifying rule in *Yates* is in accord with early English jurisprudence which provides that if the contract itself is ambiguous because it does not provide for a time of completion, the ambiguity must be resolved by consideration of the parties' intent. *See Peter and Compton*, 90 Eng. Rep. at 157; *Boydell*, 170 Eng. Rep. at 1114-16.

Browning's claim of contradiction is based on his novel and unsupported contention that Florida's Statute of Frauds "looks to the express terms of the contract" while the qualifying rule in *Yates* allows consideration of "*merely a clear intent* or desire by the parties (stated or not) that the agreement extend beyond a year." Initial Brief of Petitioner at 27-28, *Browning v. Poirier*, No. SC132-2416 (Fla. July 25, 2014) (emphasis added). Rather, under *Yates* it is only if the contract does **not** have an express term of duration for the contract that consideration of the parties' intent is considered. Browning further errs by failing to even passingly consider the historical jurisprudence of the Statute of Frauds, and by failing to even generally acknowledge that a resort to the parties' intent is a cornerstone of contractual interpretation in the event of any ambiguity. *See Gray v. Andrews*, 192 So. 634, 635 (Fla. 1939) ("[T]he construction placed upon a contract by the parties themselves will be resorted to to clarify any of its ambiguous terms.").

Browning claims that the controlling authority in this case is simply the plain language and meaning of the Statute of Frauds on its face, and

inappropriately characterizes this Court's decision in *Yates* as a statutory modification rather than an interpretation. Initial Brief of Petitioner at 18-19, *Browning v. Poirier*, No. SC132-2416 (Fla. July 25, 2014). Browning cites four (4) cases for the proposition that "[i]f the language of a statute is clear and unambiguous and conveys a clear and definite meaning, the statute should be given its plain meaning." *Id.* at 18. Browning also cites two (2) cases which add that "[w]hen necessary, the plain and ordinary meaning of words in a statute can be ascertained by reference to a dictionary." *Id.* However, Browning's argument and his cited case law are irrelevant because Florida's Statute of Frauds does not provide clear and unambiguous language for a Florida court to determine whether a contract is not to be performed within a year. *See generally Browning*, 128 So. 3d at 147 (Lawson, J., specially concurring) (stating that the plain language could be interpreted to mean "is not [capable of being] performed" within a year or is "[neither intended nor likely to be] performed" within a year). Reasonable persons may provide different methods of determining whether a contract is not to be performed within a year. *See Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) ("Ambiguity suggests that reasonable persons can find different meaning in the same language."). A plausible interpretation might be that if a contract does not expressly provide that it is intended to be performed within a year then it is void. A second approach is that

adopted by *Yates* to defer to evidence of the parties' intention. Yet a third approach would be what Browning argues herein, that a contract without an express term can be enforced many years after it was allegedly made if the ascribing witnesses' testimony yields the conclusion that the parties could have performed within one (1) year. Thus, Browning's argument is meritless.

Contrary to Browning's argument, no dictionary can offer clarification of the phrase "not to be performed," since the phrase is not a dictionary entry. Thus, the historical jurisprudence of the Statute of Frauds; the fact that a legislature is generally presumed to know the interpretation of a statute when adopting its language; and the concept of *stare decisis*, all dictate that Browning's argument is merely an attempt to overturn a long-standing statutory construction without foundation and must fail. *See Gulfstream Park Racing Ass'n v. Dep't of Bus. Regulation,* 441 So. 2d 627, 629 (Fla. 1983) (stating that reenactment of statute after judicial construction carries presumption that legislature intended to approve construction); *see North Florida Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 638 (Fla. 2003) (stating that, under *stare decisis* principles, this Court cannot recede from its controlling precedent when the only change is membership).

Incredibly, Browning argues that "allow[ing] the [S]tatute of [F]rauds to reach the contract in the instant case would be to effectively modify the statutory

language…" Initial Brief of Petitioner at 19, *Browning v. Poirier*, No. SC132-2416 (Fla. July 25, 2014). Browning cites *State v. McMahon*, 94 So. 3d 468, 473 (Fla. 2012), for the proposition that courts may not "judicially modify" a statute. *Id.* *McMahon* involved a criminal case where the State of Florida attempted to appeal a legal sentence based on alleged judicial misconduct even though the relevant statute permitted appeals of only illegal sentences. *McMahon*, 94 So. 3d at 472, 477. This Court, in *Yates*, clearly did not modify Florida's Statute of Frauds, but instead, followed centuries-old jurisprudence in providing a reasonable method for courts to resolve an ambiguity within the statutory language in particular cases.

Browning ingenuously and incorrectly claims that the instant case is controlled not by *Yates*, but rather by *Berger v. Jackson*, 23 So. 2d 265 (Fla. 1945) and *Schenkel v. Atlantic Nat'l Bank of Jacksonville*, 141 So. 2d 327 (Fla. 1st DCA 1962)[1], which relies on *Berger*. Initial Brief of Petitioner at 32, *Browning v. Poirier*, No. SC13-2416 (Fla. July 25, 2014). Both *Berger* and *Schenkel* involved an oral agreement to compensate an individual upon the promissee's death. The *Berger* Court found that the Statute of Frauds did not apply, but provided **no explanation** of the facts at trial beyond stating that "we are not, on this record,

[1] Browning inexplicably refers to and cites to *Schenkel* as a Florida Supreme Court precedent, although it is a case that was decided by the First District Court of Appeal. Initial Brief of Petitioner at 31-32, *Browning v. Poirier*, No. SC13-2416 (Fla. July 25, 2014).

prepared to disturb the court's rulings." *Berger*, 23 So. 2d at 267. It is therefore without foundation that the First District Court of Appeal, in *Schenkel*, attempted to support its conclusion that the Statute of Frauds did not apply to the oral agreement therein by stating that "[t]his contention is supported by the decision of the Supreme Court of Florida in *Berger*…" *Schenkel*, 141 So. 2d at 330. There simply are no facts or statements of law on the Statute of Frauds in the *Berger* opinion to support the conclusion in *Schenkel*. Further, *Schenkel* never cites to, or even references, the prior decision of *Yates*, which clearly set forth the rules for courts to determine the parties' intention when their oral agreement fails to provide a time for completion. Opinions such as *Berger* cannot be said to have any precedential effect given the absence of any articulated holding that can be applied to subsequent cases. *See Dep't of Legal Affairs v. Dist. Court of Appeal, 5th Dist.*, 434 so. 2d 310, 313 (Fla. 1983) (Boyd, J., dissenting) (stating that a court decision is a source of authority if it can be determined what the decision stands for); *see also Mouzon v. Mouzon*, 458 so. 2d 381, 390 n.18 (Fla. 5th DCA 1984) (defining a legal precedent as a point of law which is presented, duly considered, and essential to the conclusion reached in that case).

Moreover, the fact patterns of both *Berger* and *Schenkel* are distinguishable because therein, no evidence reflected that the parties intended and understood their agreement would extend beyond a year; unlike the evidence herein. Thus, the

critical factor in those cases was not, as Browning asserts, "the uncertainty of life and the possibility of intervening death." Initial Brief of Petitioner at 32, *Browning v. Poirier*, No. SC13-2416 (Fla. July 25, 2014). Rather, the general rule set forth in *Yates* applies where the parties did not intend or understand that the agreement would extend for longer than a year, and in such cases, the Statute of Frauds would not apply. Herein, however, Browning specifically testified that the alleged agreement would continue for as long as he and Poirier "was [sic] together," and that he planned on staying with Poirier. Thus, the qualifying rule was triggered by Browning's unrebutted testimony that the alleged agreement was for an indefinite duration. Browning specifically intended and understood that the alleged agreement would continue beyond a year. On these specific facts, the qualifying rule articulated in *Yates* applies and the alleged agreement is barred by the Statute of Frauds. Accordingly, *Berger* and *Schenkel* are inapplicable to this case.

Browning herein, and the dissent in *Browning II*, argues that a directed verdict was improper because the alleged oral agreement could possibly have been performed within a year. Initial Brief of Petitioner at 24, *Browning v. Poirier*, No. SC13-2416 (Fla. July 25, 2014); *Browning*, 128 So. 3d at 150, 155 (Torpy, J., dissenting). Such an argument blithely ignores applicable and longstanding Florida law, as this Court has expressly stated that the qualifying rule applies to bar an oral contract that is intended to last longer than one (1)year "**though it cannot**

be said that there is any impossibility preventing performance within a year." *Yates*, 181 So. at 344 (emphasis added). Therefore, the factual question was not what could possibly have occurred once the agreement was made, but rather, whether the parties **intended** for the agreement to extend beyond a year. Intention that is subject to demonstration by a variety of circumstances and verifiable evidence, not alleged contingencies that are capable of manipulation through perjured testimony, is the lynchpin under *Yates*. Accordingly, a directed verdict was appropriate in this case because Browning's own testimony established that the agreement was to last as long as the parties' relationship, which Browning intended to be long term (*i.e.* an indefinite duration of more than a year).

The dissent in *Browning II*'s string cite includes *Futch v. Head*, 511 So. 2d 314 (Fla. 1st DCA 1987), although this case is distinguishable. The oral agreement in *Futch* was to share the commission derived from the sale of certain real property known as the "Melroe" property. *Futch*, 511 So. 2d at 316. In finding that the Statute of Frauds did not apply, the First District Court of Appeal stated:

> we do not believe the facts sub judice support an inference that Head and Futch's pact respecting the Melroe property was a longstanding one. Indeed, the contrary appears to have been true. The disputed contract between Head and Futch arose around December of 1979. **That the parties intended quick performance is indicated by Head's testimony that Futch was desperate to sell the Melroe property**. The closing for the Melroe property occurred in May of 1980, scarcely five months after Head and Futch had entered into their agreement.

Id. at 319 (emphasis added). Thus, the oral agreement in *Futch* is unlike the alleged agreement herein which Browning intended to last more than a year and intends to apply fourteen (14) years later. Therefore, in *Futch*, the qualifying rule articulated in *Yates* was properly applied as the court looked to the parties' intent in entering into the agreement, and determined that the Statute of Frauds did not bar the agreement as the parties intended performance to be more than a year.

Browning I cites to *Hope v. Nat'l Airlines*, 99 So. 2d 244 (Fla. 1st DCA 1957), in support of the court's conclusion that the Statute of Frauds did not bar Browning's claim. *Browning v. Poirier*, 113 So. 3d 976, 979 (Fla. 5th DCA 2013). In doing so, *Browning I* asserted that *Hope* recognized "that [an] oral contract that [an] employee would be employed as long as [a] corporation was in business is generally not barred by the [S]tatute of [F]rauds." *Id.* That is a mischaracterization of *Hope*'s position on the Statute of Frauds issue, as the *Hope* court stated:

> The court is not unmindful of the rule in Yates...wherein the Supreme Court of Florida…indicated that if an intent were expressed between the parties that the contract was to be performed in excess of one year, the contract would be within the Statute. However, **it would be premature to apply this rule to the case at bar as the proceedings in the lower court had not reached the stage of discovery or taking of testimony**. The complaint must stand or fall on its allegations and **we are not called upon to speculate as to what the intent of the parties might have been**.

Hope, 99 So. 2d at 246 (emphasis added). Thus, if *Hope* ultimately was tried, the trial court would have applied the *Yates* qualifying rule and considered the parties' intent in determining whether that oral employment contract was barred by the Statute of Frauds. Therefore, *Hope* is in accord with *Yates* and does not support the conclusion in *Browning I*.

The *Terzis v. Pompano Paint & Body Repair, Inc.*, 127 So. 3d 592 (Fla. 4th DCA 2012) and *Aspsoft, Inc. v. WebClay*, 983 So. 2d 761 (Fla. 5th DCA 2008), decisions string cited in *Browning II's* dissent, asserted that both courts found an oral agreement valid under the Statute of Frauds because performance within a year was possible. *Browning*, 128 So. 3d at 152 (Torpy, C.J., dissenting). This is a misstatement of both decisions, which were made at the motion to dismiss stage. In *Terzis*, "the oral contract [was determined to fall] outside the purview of the [S]tatute of [F]rauds" because it was determined that "the plaintiff's third amended complaint did not allege…that the parties intended that it should extend for a longer period than a year." *Terzis*, 127 So. 3d at 595. Likewise, in *Aspsoft*, the breach of contract claim was not barred by the Statute of Frauds because "neither the amended complaint nor any of the affidavits demonstrate an intent on the part of the parties that the…work would not have been completed within one year…" *Aspsoft*, 983 So. 2d at 769. Thus, it was the litigants' failure to allege the parties' intent that the agreement would last longer than a year, rather than the possibility

of performance, that was the determining factor in the applicability of the Statute of Frauds to those cases. Thus, *Terzis* and *Aspsoft* are both consistent with *Yates* and *Browning II*.

Furthermore, *Browning I* analogizes the alleged agreement herein to "employment cases in which an employee is hired for an indefinite duration." *Browning*, 113 So. 3d at 979. In support, *Richey v. Modular Designs, Inc.*, 879 So. 2d 665 (Fla. 1st DCA 2004) and *Cabanas v. Womack & Bass, P.A.*, 706 So. 2d 68 (Fla. 3d DCA 1998), are cited; each case is distinguishable from the instant case. First, the First District Court of Appeal in *Richey* cited to *Yates* but found the Statute of Frauds to be inapplicable because "the record is devoid of evidence that the parties intended the contract to last beyond a year." *Richey*, 879 So. 2d at 666. Therefore, *Richey* is unlike this case where the unrebutted record is that the alleged agreement was intended to last beyond a year. In addition, *Cabanas* is distinguishable because the Third District Court of Appeal relied on *Gulf Solar, Inc. v. Westfall*, 447 So. 2d 363 (Fla. 2d DCA 1984), which applied the "majority" approach rather than the one set forth by this Court in *Yates*.[2] *Cabanas*, 706 So. 2d at 69. In fact, *Cabanas* does not cite to *Yates* at all. *Id.*

Chief Justice Torpy's dissent in *Browning II* argues that because the "not to be performed" language in the Statute of Frauds is expressed in the negative, "the

[2] This statement is explained in detail in Section III A, *infra*.

terms of the contract must contain a 'negation of the right to perform it within the year' to bring the contract within the statute." *Browning*, 128 So. 3d at 150 (Torpy, C.J., dissenting). Chief Justice Torpy cites an Arkansas case from 1891 in support of that argument. However, Arkansas follows a different approach than Florida because Arkansas determines the applicability of the statute of frauds not by looking to the parties' intent, but instead by determining whether "the happening of [the] contingency… may occur within the year." *Arkansas Midland Ry. Co. v. Whitley*, 15 S.W. 465, 466 (Ark. 1891). If the contingency may happen within a year, the promise is not within Arkansas' statute of frauds regardless of the parties' intent. *Id.* Such an approach is not in accord with *Yates*. Such approach is also not founded on appropriate public policy as it allows claims of alleged oral contracts to be filed many years after the alleged promise based solely on *post-facto* speculation that performance could have occurred within a year regardless of the parties' intent.

Finally, the dissent in *Browning II* asserts that *City of Clewiston v. B & B Cash Grocery Stores, Inc.*, 445 So. 2d 1038 (Fla. 2d DCA 1984), found an oral agreement by the city to furnish electricity not within the Statute of Frauds "because [the] business could end within one year…even though [the] parties expected it to last longer than one year." *Browning*, 128 So. 3d at 152 (Torpy, C.J., dissenting). This is a factual mischaracterization of the decision. The

Clewiston court noted that there was no evidence that the parties intended that the defendant would "purchase electricity at a time more than one year in the future." *Clewiston*, 445 So. 2d at 1040. Instead, the court stated, "At the most, the parties have an oral contract for the purchase and sale of electricity on a monthly basis." *Id.* Here, however, Browning's own testimony supports the conclusion that the parties' alleged agreement was for an indefinite duration which was intended to be longer than a year. Thus, the evidence supported *Browning II*'s application of the qualifying rule to the facts herein.

The language in *Yates* makes it clear that the parties' intent is controlling when an oral agreement is for an indefinite duration, and such intent is a fact-specific determination. Therefore, *LynkUs Commc'ns, Inc. v. WebMD Corp.*, 965 So. 2d 1161 (Fla. 2d DCA 2007), is not "in conflict with" the earlier decision of *Clewiston* despite such an assertion by the dissent in *Browning II*. *Browning*, 128 So. 3d at 152 (Torpy, C.J., dissenting). The decision in both cases is in accord with the qualifying rule of *Yates*.

To restate, Browning's own testimony established the applicability of the qualifying rule set forth in *Yates*. The Fifth District Court of Appeal properly decided this case based on the authority of the qualifying rule. Further, that same qualifying rule was the basis for the majority's certified question. Therefore, this

Court should affirmatively answer the certified question and affirm *Browning II* based on the authority of *Yates*.

B. This Court should reaffirm *Yates v. Ball* as controlling authority for the interpretation of Florida's Statute of Frauds.

It is well-settled that Florida is a jurisdiction where the intent of the parties is the primary factor to be considered in deciding whether an agreement is unenforceable under the Statute of Frauds when an alleged oral agreement is for an indefinite duration. *See* 27 Fla. Jur. 2d § 16. Nationwide, *Yates* is admittedly the minority approach of interpreting the one (1) year provision of the Statute of Frauds.[3] On this precise issue, Florida Jurisprudence, states:

> **The statutory language "not to be performed within the space of one year from the making thereof" has been construed as referring to the expressed intention and expectation of the parties at the time they contract**.... **Thus, the primary factor in determining whether an oral contract is to be performed within the one-year limitation is the intent of the parties at the time the agreement is made**.... For the Statute of Frauds to make an agreement unenforceable, it must be apparent that it was **the understanding of the parties** that the agreement was not to be performed within a year from the time it was made. ... **when no time is agreed on for the complete performance of a contract, if from the object to be accomplished by it and the surrounding circumstances, it clearly appears that the parties intended**

[3] Florida, based on *Yates v. Ball*, is listed as a jurisdiction that uses the "minority" approach to interpreting the one (1) year provision. 72 Am. Jur. 2d § 13. The minority approach has been defined as "allow[ing] the parties' actual understanding and the surrounding circumstances to influence whether an agreement is within the Statute of Frauds." *Leon v. Kelly*, 618 F. Supp. 2d 1334, 1342 (D.N.M. 2008).

> **that it should extend for a longer period than a year, it is within the Statute of Frauds though it cannot be said that there is any impossibility preventing its performance within a year**.

27 Fla. Jur. 2d § 16 (emphasis added).

However, confusion in Florida jurisprudence has arisen because the "majority" approach, which only looks at whether performance could possibly be completed within a year and **never considers the intent of the parties**, has been improperly relied on by district courts of appeal as authority in Florida in contradiction to *Yates*. For example, Chief Judge Torpy's dissent in *Browning II* includes two (2) block quotes from secondary sources that recite the "majority" approach and are therefore contrary to Florida law and inapplicable to the instant case.[4] *Browning*, 128 So. 3d at 150-51 (Torpy, C.J., dissenting) (quoting 9 Williston on Contracts § 24:3 (4th ed. 2012); Restatement (Second) of Contracts § 130 cmt. a (2012)). As a result of reliance on inapplicable law, Chief Judge Torpy focuses on the fact that "[n]othing in the lottery agreement precluded either party from terminating the lottery agreement." *Id.* **Chief Judge Torpy completely disregards the evidence of the parties' intent and understanding of the alleged**

[4] Likewise, *Browning I* incorrectly relied on Restatement (Second) of Contracts for the proposition that "[c]ontracts of uncertain duration are simply excluded; the provision covers only those contracts whose performance cannot possibly be completed within a year." *Browning*, 113 So. 3d at 978-79. The majority in *Browning II*, who properly decided the case, did not reference the Restatement (Second) of Contracts at all.

agreement. *Id.* Such confusion seems to be the sole basis for the dissent.

This Court should re-affirm *Yates* as Florida's approach to interpreting the Statute of Frauds for several reasons. First, this Court "cannot forsake the doctrine of *stare decisis* and recede from [its] own controlling precedent when the only change in this area has been in the membership of this Court." *North Florida*, 866 So. 2d at 638. As noted in Section III below, all of Florida's district courts of appeal (within the last eleven (11) years) have used the qualifying rule articulated in *Yates* to decide whether oral agreements of an indefinite duration are barred by the Statute of Frauds. Moreover, the applicable language of Florida's Statute of Frauds is still identical to the original English version, and Florida's current interpretation is steeped in English jurisprudence and derived from language also approved by the United States Supreme Court. *See Peter and Compton*, Skin. 353, 90 Eng. Rep. at 157; *McPherson*, 96 U.S. at 416. Thus, the continued validity of the *Yates* approach should not be in issue.

Second, the *Yates* approach's consideration of the parties' intent is in accord with general contract law. *See Gray v. Andrews*, 192 So. 634, 635 (Fla. 1939) ("[T]he construction placed upon a contract by the parties themselves will be resorted to to clarify any of its ambiguous terms."). A contract without an express term for complete performance is ambiguous as to duration, and is therefore ambiguous as to whether the term is for longer than a year. *See id.* Thus,

consideration of the parties' intent, as *Yates* requires, is the proper method for resolving such an ambiguity.

Third, this Court's approach is the most logical interpretation of this centuries-old statute. Judge Lawson, in *Browning II*, noted:

> It defies reason to suggest that the legislature intended this statute to apply to a fixed duration contract of one year and a day, but not to a contract that the parties fully expected and intended to last for years or decades based upon a hypothetical possibility, no matter how slight, that the contract might be performed in less than a year.

Browning, 128 So. 3d at 148 (Lawson, J., specially concurring). Judge Lawson also provided a hypothetical example which illustrates how illogical and counterintuitive the "majority" approach is to a reasonable person reading the Statute of Frauds. *See id.* at 148 n.2 (Lawson, J., specially concurring). This hypothetical shows how an agreement without a stated term would be enforceable throughout the life of the parties merely if the agreement might have been performed with a year regardless of the parties' intent. *See id.* Therefore, the "minority" approach set forth in *Yates* is the best interpretation of the one (1) year provision of the Statute of Frauds relative to preventing the very evil contemplated, *i.e.* fraud.

Fourthly, fraud is the persistent mischief resulting from the "majority" approach as it invites plaintiff's counsel to base a lawsuit on any alleged promise that contains an alleged contingency which could allow performance of the

contract within a year. This places the determination of the applicability of the Statute of Frauds on the imagination of lawyers and judges, rather than on the intention of the parties. Such an approach is arbitrary and encourages fraud. The *Yates* approach is congruent with the purpose of the Statute of Frauds because the actual intent of the parties is subject to verification by a variety of witnesses and evidence, and can be objectively determined.

The Eleventh Circuit Court of Appeal commented on this issue and agreed with the public policy behind the "minority" approach set forth in *Yates* by stating that "contigenc[ies] appl[y] to any contract, and to permit a contingency…to remove an oral contract from the [S]tatute of [F]rauds would rob the statute of its force." *All Brand Importers, Inc. v. Tampa Crown Distribs., Inc.*, 864 F.2d 748, 751 (11th Cir. 1989). The Supreme Court of Kentucky, which follows the same "minority" approach as Florida, also commented, "A contrary rule—that if it is possible to perform a contract within a year even though such completion is not contemplated by the parties—would eviscerate the Statute of Frauds' requirement that agreements not to be performed within one year be in writing." *Sawyer v. Mills*, 295 S.W.3d 79, 84 (Ky. 2009).

This Court has specifically stated, "**The [S]tatute [of Frauds] should be strictly construed to prevent the fraud it was designed to correct, and so long as it can be made to effectuate this purpose, courts should be reluctant to take**

cases from its protection." *Yates*, 181 So. at 344 (emphasis added). The one (1) year provision as construed by this Court in *Yates* currently effectuates the Statute of Frauds' original purpose of "intercept[ing] the frequency and success of actions based on nothing more than loose verbal statements or mere innuendos." *Id.* Accordingly, the approach set forth in *Yates* is still the correct interpretation of Florida's Statute of Frauds, and that interpretation should be re-affirmed.

II. THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED BECAUSE IT DOES NOT CONFLICT WITH THIS COURT'S *YATES v. BALL* DECISION.

The Fifth District Court of Appeal's decision in this case is not in conflict with this Court's decision in *Yates*. In fact, *Browning II* relied exclusively on the qualifying rule articulated in *Yates* in determining that the trial court properly granted a directed verdict to Poirier because the parties' alleged oral agreement is barred by the Statute of Frauds. *See Browning*, 128 So. 3d at 145-47 (Fla. 5th DCA 2013). *Browning II* not only quoted the relevant legal principle from *Yates*, *i.e.* the qualifying rule, but analyzed the evidence according to that qualifying rule. *Id.* After determining that the parties intended the alleged oral agreement should extend for longer than a year, the Fifth District Court of Appeal expressly found the result required by *Yates*, *i.e.* the parties' alleged oral agreement is within the Statute of Frauds. *Browning*, 128 So. 3d at 146-47. Thus, there is no conflict

between the Fifth District Court of Appeal's decision herein and this Court's decision in *Yates*. This Court should affirm *Browning II* as a result.

III. THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED BECAUSE IT CORRECTLY APPLIES *YATES v. BALL* AND NO CONFLICT EXISTS BETWEEN THE DISTRICT COURTS OF APPEAL.

The Fifth District Court of Appeal never certified conflict between its decision in *Browning II* and any other decision. Instead, while Browning claims that *Browning II* is in conflict with other decisions; Browning lists allegedly conflicting decisions from three (3) other Florida district courts of appeal. *See infra.* However, none of the decisions cited by Browning establish the existence of any irreconcilable conflict with *Browning II*. *See Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960) (justifying conflict review where a new rule of law is announced which conflicts with a rule previously announced by this Court, or a rule of law is applied to produce a different result in a case which involved substantially the same controlling facts as a prior case disposed of by this Court). Moreover, there is a case from each district court of appeal which considers whether the qualifying rule articulated in *Yates* applies to the facts then before that court. Each of the following cases was decided within the last eleven (11) years.

The First District Court of Appeal, in *Ballard-Cannon Dev. Corp. v. Sandman Props. & Dev., LLC*, 933 So. 2d 1251 (Fla. 1st DCA 2006), decided that the oral contract was rendered unenforceable by the Statute of Frauds because the

undisputed evidence was that the parties intended to be involved with a real estate development project through its completion, and that process would take longer than a year. *Ballard-Cannon*, 933 So. 2d at 1252.

Justice Canady, while writing for the majority of the Second District Court of Appeal in *LynkUs Commc'ns, Inc. v. WebMD Corp.*, 965 So. 2d 1161 (Fla. 2d DCA 2007), applied the qualifying rule from *Yates* and ruled that the oral agreement was unenforceable where "[t]he evidence before the trial court shows beyond dispute that the joint business arrangement which was contemplated by LynkUs…would be a long-term arrangement or an arrangement that, by its very nature, would extend for more than a year." *LynkUs*, 965 So. 2d at 1165.

In *LaRue v. Kalex Constr. & Dev., Inc.*, 97 So. 3d 251 (Fla. 3d DCA 2012), the Third District Court of Appeal stated, "The intent of the parties is a determinative factor," and analyzed the facts therein according to the qualifying rule. *LaRue*, 97 So. 3d at 255-56.

The Fourth District Court of Appeal, in *Lundstrom Realty Advisors, Inc. v. Schickedanz Bros.-Rivera Ltd.*, 856 So. 2d 1117 (Fla. 4th DCA 2003), summarized the qualifying rule from *Yates* by stating, "When an oral agreement is silent as to time, yet capable of performance within one year, the parties' intent will control to determine whether the statute of frauds bars enforcement." *Lundstrom*, 856 So. 2d at 1122.

Finally, the Fifth District Court of Appeal has a history of considering the intent and understanding of the parties and applying the qualifying rule. *See Browning v. Poirier*, 128 So. 3d 144 (Fla. 5th DCA 2013); *see also Bross v. Wallace*, 600 So. 2d 1198, 1199 (Fla. 5th DCA 1992) ("[I]f the parties intended to…establish an ongoing business, [that agreement] would be within the [S]tatute of [F]rauds and, consequently, unenforceable.").

While Browning contends a conflict exists between the district courts of appeal based on the four (4) cases cited, none of the cases in which the conflict is alleged to exist expressly and directly conflict with the instant case. First, this is because it is unclear whether the facts of the post-*Gulf Solar* cases cited by Browning trigger the qualifying rule articulated in *Yates*.[5] Further, while subsequent cases relied on *Gulf Solar*, each also relied on the general rule from the Restatement (Second) of Contracts, which recited the "majority" approach to the one (1) year provision of the Statute of Frauds. Such an approach is in direct conflict with the "minority" approach set forth in *Yates*. Finally, Browning himself creates confusion because in his summary of argument section, Browning misstates the rule applied by each of his cited conflict cases. Browning recites the general rule from *Yates* as the basis for each conflict cases' decision. Initial Brief of Petitioner at 16, *Browning v. Poirier*, No. SC13-2416 (Fla. July 25, 2014).

[5] The lack of clarity is because there are no facts available regarding the intent of the parties in any alleged conflict case besides *Gulf Solar*.

However, as discussed in detail below, **the alleged conflict cases fail to apply either the general or qualifying rules articulated in *Yates***.

A. The Second District Court of Appeal's decision in *Gulf Solar, Inc. v. Westfall* is not in conflict with the instant case, but is in conflict with *Yates v. Ball*.

The Second District Court of Appeal's decision in *Gulf Solar, Inc. v. Westfall*, 447 So. 2d 363 (Fla. 2d DCA 1984), held that an oral compensation agreement was not barred by the one (1) year provision of the Statute of Frauds. Therein, Westfall, a management employee, was hired for an indefinite term upon a condition of employment that Westfall "soon prepare a sales plan" or "be fired." *Gulf Solar*, 447 So. 2d at 364. Westfall stated in his deposition that he intended to be employed by Gulf Solar for more than a year. *Id.* at 365. Since Gulf Solar fired Westfall for not completing a sales plan within two (2) months, Gulf Solar did not necessarily intend to employ Westfall for more than a year. *Id.* at 365-66. Most importantly, the court noted "there has been no showing that [Westfall] could not have performed his duties completely within one year of his hiring." *Id.* at 366. Thus, despite evidence of the parties' intent, *Gulf Solar* was decided using the "majority" approach and is therefore in conflict with *Yates*. Here, because the parties' intent was the determining factor, no conflict exists between *Browning II* and *Gulf Solar*.

B. The Fourth District Court of Appeal's decisions in *Byam v. Klopich* and *Acoustic Innovations, Inc. v. Schafer* are not in conflict with the instant case, but are in conflict with *Yates v. Ball*.

In *Byam v. Klopich*, 454 So. 2d 720 (Fla. 4th DCA 1984), the Fourth District Court of Appeal stated it was presented with facts "virtually identical to those involved in *Gulf Solar*" and relied on "the same reasoning applied in…*Gulf Solar*." *Byam*, 454 So. 2d at 721. However, the court in *Byam* deviated from *Gulf Solar* by not referencing the intent of either party.[6] Further, *Byam* distinguished its facts from those in *First Realty Investment Corp. v. Gallaher*, 345 So. 2d 1088 (Fla. 3d DCA 1977). *Byam*, 454 So. 2d at 721. In *First Realty,* the Court acknowledged that "the primary factor to be utilized in determining whether or not an oral contract is to be performed within the one year limitation of the statute is, of course, the intent of the parties." *First Realty*, 345 So. 2d at 1089. Since the *Byam* decision did not consider the intent of the parties, *Byam* cannot be in conflict with *Browning II* which looks to the parties' intent to resolve the ambiguity in the alleged agreement.

Byam, however, is in direct conflict with this Court's decision in *Yates*

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[6] Although *De Ribeaux v. Del Valle*, 531 So. 2d 992 (Fla. 3d DCA 1988) is cited by the dissent to *Browning II* (*Browning*, 128 So. 3d at 152 (Torpy, C.J., dissenting)), it is inapplicable to the instant case because the Third District Court of Appeal included no facts regarding the parties' intent. *De Ribeaux*, 531 So. 2d at 993-94. While the decision stated the general rule from *Yates*, the qualifying rule was not mentioned. *Id*. Ignoring the qualifying rule places *De Ribeaux* in conflict with *Yates*.

because instead of citing the general rule articulated in *Yates*, the Fourth District Court of Appeal stated the general rule according to the Restatement (Second) of Contracts. *Byam*, 454 So. 2d at 721. **The Restatement's general rule is the "majority" approach to interpreting the one (1) year provision**. According to the language in *Yates*, Florida follows the "minority" approach which looks to the intent of the parties when contracts are for an indefinite duration. *See Yates*, 181 So. at 344. Instead of looking to the parties' intent as *Yates* requires, the Fourth District Court of Appeal focused exclusively on the possibility that the oral agreement could be performed within a year in concluding that the Statute of Frauds did not apply.[7]

Similarly, in *Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139 (Fla. 4th DCA 2008), the Fourth District Court of Appeal again did not reference the intent of either party. That is because the general rule relied on therein was a quotation from *Byam* which, as stated above, inappropriately relied on the Restatement (Second) of Contracts. *Acoustic*, 976 So. 2d at 1143. Thus, the *Acoustic* court's application of the "majority" approach to interpreting the one (1) year provision was inappropriate and is therefore in conflict with *Yates* because the "minority"

[7] The Second District Court of Appeal compounded this error in *Elliot v. Carol H. Winslow, Jr., P.A.*, 737 So. 2d 609 (Fla. 2d DCA 1999), in referencing the holding of *Gulf Solar*; noting that *Byam* followed that reasoning; and restating the general rule from the Restatement (Second) of Contracts. *Elliot*, 737 So. 2d at 609-10. Although cited by the dissent in *Browning II*, *Elliot* is, therefore, also in conflict with *Yates*. *Browning*, 128 So. 3d at 152 (Torpy, C.J., dissenting).

approach is controlling here.

C. The Third District Court of Appeal's decision in *Wilcox v. Lang Equities, Inc.* is not in conflict with the instant case, but is in conflict with *Yates v. Ball*.

The Third District Court of Appeal's decision in *Wilcox v. Lang Equities, Inc.*, 588 So. 2d 318 (Fla. 3d DCA 1991), does not set forth any facts concerning the intent of either party to the alleged oral agreement as it was decided at the pleading stage.[8] *Wilcox*, 588 So. 2d at 319. No evidence of the parties' intentions had been adduced. *Id.* Instead, a summary of the holdings of both *Byam* and *Gulf Solar* were included and there is only a conclusory statement that "appellee's affirmative defense [of the Statute of Frauds] was not established from the pleadings as a matter of law." *Id.* at 320. While *Wilcox* did directly cite to *Yates* in articulating the applicable law, the Third District Court of Appeal included only the general rule portion and did not include the qualifying rule portion. *Id.* Moreover, following the citation to *Yates*, there is an erroneous string citation to the Restatement (Second) of Contracts, *Byam*, and *Gulf Solar*. *Wilcox*, 588 So. 2d at 320. Thus, despite quoting a portion of the "minority" approach articulated in *Yates*, the "majority" approach to interpreting the one (1) year provision was applied. Therefore, *Wilcox* is not in conflict with *Browning II* but is in conflict with *Yates*.

[8] *Wilcox* is similar to *Terzis* and *Aspsoft*, *supra*, because all were decided on the pleadings and no evidence of the parties' intent was stated in the opinion.

Thus, there is not an express or direct conflict on this specific issue between *Browning II* and any decision of any other Florida district court of appeal. However, there are district court of appeal decisions that conflict with the "minority" approach set forth in *Yates*. Since there can be confusion when the law on this issue is merely glossed over, this Court should author a clarifying opinion which affirms the Fifth District Court of Appeal's decision in *Browning II*.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative, and should affirm the Fifth District Court of Appeal's decision herein.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Answer Brief complies with the font requirements set forth in the Florida Rules of Appellate Procedure 9.210 by using Times New Roman 14-point font.

/s/ Mark A. Sessums
MARK A. SESSUMS, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Electronic mail to: Sean P. Sheppard, Esquire, 500 E. Broward Blvd., Suite 1600, Fort Lauderdale, Florida 33394, at sean@sheppardfirm.com; sean@jscottgunn.com; and lawsps@aol.com; on this 7th day of August, 2014.

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