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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-2416

Lower Tribunal Nos.: 5D12-1823
08-CA-453-15-W

HOWARD BROWNING,

Petitioner,

vs.

LYNN ANNE POIRIER,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER HOWARD BROWNING

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II. PRELIMINARY STATEMENT

References to the record on appeal shall be indicated by (Volume, Page) as **(V. ____, P. ____)**. An Appendix is also being filed contemporaneously with the filing of this Initial Brief. References to the Appendix shall be indicated as **(Appendix T. ____, P. ____).**

III. STATEMENT OF THE FACTS AND CASE

Petitioner sued Respondent in Seminole County, Florida on two (2) counts which remained at issue as of the date of the trial; to wit: (1) breach of contract; and (2) unjust enrichment **(V. II, PP. 214-229)**. Petitioner's claims as against Respondent were based upon Petitioner's contention that the parties entered into an agreement to purchase lottery tickets together and to divide the winnings in the event a winning ticket(s) was purchased **(V. XVIII, P. 73)**. Specifically, Petitioner testified at trial that the parties entered into an agreement to purchase lottery tickets together and that if they won, they would split the money from the winnings **(V. XVIII, P. 73)**. Petitioner testified that the agreement was initially made in 1992 **(V. XVIII, P. 73)**, that they proceeded to act in accordance with the agreement over the years and consistently engaged in activities in furtherance of the agreement **(V. XVIII, P. 73)**. Petitioner testified that the parties would purchase the lottery tickets from various business locations **(V. XVIII, P. 73)** and that they would also travel out of state to purchase lottery tickets **(V. XVIII, P. 76)**.

Petitioner testified that on Friday, June 1, 2007 he had visited an ATM to obtain cash from his Bank of America account **(V. XVIII, P. 82**). Petitioner also testified that he received $400.00 in cash and that the cash was received in $20.00 bills **(V. XVIII, P. 82**). He testified that he obtained the cash for use during the weekend **(V. XVIII, P. 82**), and that on Saturday, June 2, 2007 he came home from work, cleaned up and then proceeded to go to dinner **(V. XVIII, P. 81**) with Respondent at a "Red Lobster" restaurant at approximately 8:00 P.M. or 8:30 P.M. **(V. XVIII, P. 84**). Petitioner testified that he advised Respondent that they needed to buy more raffle tickets for the Firecracker Raffle through the Florida Lottery **(V. XVIII, P. 85**). Petitioner testified that Respondent agreed with him and they proceeded to stop on the way home from the restaurant at the Island convenience store shortly after 10:00 P.M. **(V. XVIII, P. 88**). Petitioner introduced into evidence one of the Firecracker Florida Lottery tickets that was purchased on the evening of June 2, 2007 bearing number 666180 **(V. XVIII, P. 87**). Petitioner testified that both he and Respondent went into the store together to purchase the lottery tickets **(V. XVIII, P. 88**) and that ticket number 666180 was purchased, according to the time indicated on the ticket, at 10:11:05 P.M. **(V. XVIII, P. 88**). Ticket number 666180 was admitted into evidence **(V. XVIII, P. 184**). Petitioner testified that the tickets were all purchased with money that came from his pocket **(V. XVIII, P. 90**), which was the money that he had obtained from his Bank of

America account through the ATM the day before (June 1, 2007) **(V. XVIII, P. 90**), as was evidenced by his Bank of America statement, which was admitted into evidence **(V. XVIII, P. 184**). Petitioner testified that when they went into the Island convenience store, he handed a $20.00 bill to Respondent and advised her to go buy a ticket first **(V. XVIII, P. 88**), that another gentlemen then paid for a pack of cigarettes **(V. XVIII, P. 88**), and that Petitioner then stepped up and then purchase another Firecracker Raffle ticket **(V. XVIII, PP. 88-89**). Petitioner testified that the winning ticket (ticket number 666168) was twelve numbers apart from the other ticket that was purchased by the parties during their visit (ticket number 666180), due to the fact that tickets for this particular raffle were sold state-wide and in consecutive numerical order as they are sold **(V. XVIII, P. 88**). Petitioner testified that the parties did not want to purchase consecutively numbered tickets, as there are twelve (12) million dollar prizes, and the odds of two (2) consecutive numbers being million dollar prize winners was not likely **(V. XVIII, P. 90**). Therefore, strategically, the parties wanted to have tickets that were not consecutively numbered **(V. XVIII, P. 90**).

Ticket number 666168 was drawn as a million dollar winning ticket **(V. XVIII, P. 91**). Respondent proceeded to tender the winning ticket and collect the $1,000,000.00 winning prize **(V. XIX, P. 306**) and failed and refused to honor the agreement between the parties and pay to Petitioner his ½ of the proceeds **(V.**

XVIII, P. 91). Petitioner filed suit against Respondent for two (2) counts that remained at issue as of the date of trial; to wit: (1) breach of contract; and (2) unjust enrichment **(V. II, PP. 214-229**).

This matter was tried before a jury on February 6-7, 2012 **(V. XVIII and V. XIX)**. Prior to the jury trial, the parties, through their respective counsel, complied with the pretrial order in this case, in part, by preparing and agreeing upon certain jury instructions that they requested the Trial Judge read to the jury at appropriate times throughout the proceedings. Respondent's counsel also filed his own Requested Jury Instructions which also included the same instruction that was stipulated to by the parties relevant to these appellate proceedings **(V. XVII, PP. 2933-2969**). Included within the parties' stipulated jury instructions was the following instruction:

> **"SPECIAL INSTRUCTION**
>
> Any agreement that is not to be performed within the time of one year from the making of the alleged agreement must be reduced to writing to be enforceable. If you find that the parties had an agreement that was not to be performed within one (1) year, then your verdict should be for the Respondent. *Advanced Protection Ind. v. Square D Co.*, 390 F. Supp. 2d 1155, 1162 (M.D. Fla. 2005)(applying Florida law). However, if you determine that there was an oral agreement and that the oral agreement could possibly have been performed within a period of one year, then you must find that the agreement was enforceable. *Futch v. Head,* 511 So.2d 314 (Fla. 1st DCA 1987); See, *Restatement (Second) of Contracts* §

> 130, comment (a) (1981); see also, *Yates v. Ball,* 181 So. 341 (Fla. 1937); see also, *Acoustic Innovations, Inc. v. Schafer, 976* So.2d 1139, 1143 (Fla. 4th DCA 2008); see also, *Hesston Corp. v. Roche,* 599 So.2d 148, 152 (Fla. 5th DCA 1992); see also, *Gulf Solar, Inc. v. Westfall,* 447 So.2d 363 (Fla. 2nd DCA 1984); see also, *Wilcox v. Lang Equities, Inc.,* 588 So.2d 318 (Fla. 3rd DCA 1991); see also, *Ostman v. Lawn,* 305 So.2d 871 (Fla. 3rd DCA 1974); see also, *Bross v. Wallace,* 600 So.2d 1198 (Fla. 5th DCA 1992); see also, *Byam v. Klopcich,* 454 So.2d 720 (Fla. 4th DCA 1984)."

(V. XVII, PP. 2933-2969).

This matter proceeded with jury trial on February 6-7, 2012 **(V. XVIII and V. XIX)**. At the close of the Petitioner's case, Respondent's counsel moved for directed verdict on the two remaining counts (Count I--Breach of Contract; Count III--Unjust Enrichment) **(V. XIX, P. 308)**. At that time, the only evidence heard and considered was that evidence presented by Petitioner during his case in chief **(V. XVIII and V. XIX, PP. 201-307)**. Respondent had not presented any evidence on her behalf and had not started her case in response at the time the motion for directed verdict was made **(V. XVIII and V. XIX, PP. 201-307)**.

Respondent contended, on motion for directed verdict, that the Petitioner's cause of action for breach of contract was barred by the statute of frauds. Specifically, Respondent relied upon the cases of *Santovenia v. Confederation Life Association,* 460 F.2d 805 (5th Cir. 1972); *Khawly v. Reboul,* 488 So.2d 856 (Fla. 3rd DCA 1986); *Hospital Corporation of America v. Associates in Adolescent*

Psychiatry, 605 So.2d 556 (Fla. 4th DCA *1992); Weinsier v. Soffer,* 358 So.2d 61 (Fla. 3rd DCA 1978); *Food Fair Stores, Inc., v. Vanguard Investments Company Limited,* 298 So.2d 515 (Fla. 3rd DCA 1974); and *Ballard-Cannon Development Corporation v. Sandman Properties and Development, LLC,* 933 So.2d 1251 (Fla. 1st DCA 2006) **(V. XIX, PP. 307-337)**. Notably, Respondent's counsel relied entirely upon cases that are **not** the cases that were stipulated to by the parties as the cases to be read to the jury as set forth above in the "Special Instruction" agreed upon by the parties as part of the jury instructions **(V. XIX, PP. 307-337)**.

In opposition to Respondent's motion for directed verdict based upon the statute of frauds, Petitioner relied upon the jury instructions that were agreed upon by the parties, and also cited to the cases of *Hesston Corporation* v. *Roche,* 599 So.2d 148 (Fla. 5th DCA 1992)(citing *Schenkel* v. *Atlantic National Bank of Jacksonville,* 141 So.2d 327, 330 (Fla. 1st DCA), cert. denied, 148 So.2d 280 (Fla. 1962) **(V. XIX, P. 326)**. Petitioner also argued to the Trial Judge that there existed factual disputes in this case that should have been decided by the jury, to wit: (1) whether the contract could have possibly been performed within a year, (2) whether there had been partial performance in avoidance of the statute of frauds and (3) whether there had been complete performance in avoidance of the statute of frauds **(V. XIX, PP. 307-337)**. Finally, Petitioner contended that the jury could have come to a factual conclusion that, as a separate and independent act, the

parties, by their actions on the date the winning ticket was purchased, engaged in activities warranting an action for breach of contract (i.e. act of handing $20.00 from Petitioner to Respondent, the Respondent's purchase of the ticket in accordance with previous practices of the parties, and the subsequent winning of the ticket formed a separately enforceable contract) **(V. XIX, P. 333)**.

The Trial Judge also had before him for consideration the case of *Moneyhun* v. *Vital Industries, Inc.,* 611 So.2d 1316 (Fla. 1st DCA), which held that "[b]ecause of the existence of these disputed issues of fact whether *Moneyhun* fully performed, or, in the event of partial performance, whether this was a contract for personal services the trial court erroneously concluded that *Moneyhun* 's cause of action was barred by the statute of frauds." **(V. XIX, P. 333).**

Petitioner contended that this matter should not have been decided on a directed verdict motion **(V. XIX, PP. 307-337)**. Instead, there were ample facts upon which the jury, having been instructed pursuant to the agreed upon jury instructions, could have reasonably made a factual determination on these issues **(V. XIX, PP. 334)**.

Respondent also contended, on motion for directed verdict that the unjust enrichment count could not be pursued based upon the case of *Tobin* v. *Tobin,* 315 So.2d 518 (Fla. 3rd DCA 1975) ("[a]s a general rule, an action seeking to enforce an express contract and also attempting to disavow the existence of the express

contract and accomplish the same purpose under quantum meruit is not available.") **(V. XIX, PP. 322)**. Respondent also cited to *Terranova Corporation* v. *1550 Biscayne Associates, Corp.*, 847 So.2d 529 (Fla. 3rd DCA 2003) for the holding in that case that summary judgment on an unjust enrichment cause of action was appropriate when the Court concluded "that a: party seeking to enforce an express contract could not simultaneously disavow the existence of the express contract and seek equitable relief base upon a quasi contract." **(V. XIX, PP. 321, 330).**

Petitioner contended that he never disavowed the existence of the express verbal contract in this case **(V. XIX, PP. 330-331)**. Therefore, Petitioner contended that the *Terranova* case was not on point with the facts of the instant case **(V. XIX, PP. 330-331)**. Instead, Petitioner alternatively sought relief on two different counts, which is entirely permissible. In addition to being a separate and alternative cause of action, Petitioner further contended on the motion for directed verdict that the jury could have come to a factual conclusion that, as a separate and independent act, the parties, by their actions on the date the winning ticket was purchased, engaged in activities warranting an action for unjust enrichment (i.e. act of handing $20.00 from Petitioner to Respondent, the Respondent's purchase of the ticket in accordance with previous practices of the parties, and the subsequent winning of the ticket formed a separately enforceable cause of action for unjust enrichment) **(V. XIX, P. 333)**.

Based upon the foregoing, the Petitioner requested that the Trial Judge deny the motion for directed verdict **(V. XIX, P. 334)**. Despite Petitioner's arguments, the Trial Judge granted directed verdict in favor of Respondent on both counts **(V. XIX, PP. 334-336)**. The Trial Judge made the following ruling on the record in this case:

> "Thank you. Okay. 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. And there has been evidence presented by the plaintiff 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. There has been no evidence that any lottery tickets were bought and that the proceeds were shared during the time of this alleged contract. So that's part of it. The rest of it is there may be partial performance by the testimony that they bought tickets together with the intent – they bought tickets separately with the intent to share in the proceeds when a ticket was a winner. So they never bought tickets together. There's been no evidence of that. The only evidence is Mr. Browning bought tickets and Ms. Poirier bought tickets. There's no testimony that they bought equal numbers of tickets on any given occasion. There is no -- the only testimony is that they both bought a lot of tickets. And the other testimony is and the agreement was that if any of them won, that we would share in the proceeds. Now, I didn't hear any testimony that they ever shared in the proceeds, but even if they did, 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 statute of fraud. There is no partial performance. Partial performance of an oral contract is a different animal than this. You can argue, I

> guess, you could say, well, every week that they bought or every day, however often it was, that they bought all of these lottery tickets, that was partial performance of the contract, but that's not what partial performance in the context of the statute of frauds is." **(V. XIX, PP. 326-328).**

Petitioner then appealed to the Fifth District Court of Appeal **(V. XVII, PP. 3017-3042)**. Following appeal to the Fifth District Court of Appeal, an opinion was entered on March 8, 2013 reversing the entirety of the decision by the Trial Judge and remanding the case for a new trial on both counts.

On March 18, 2013, Respondent's counsel filed a Motion for Rehearing and/or Clarification and/or Certification and Motion for Rehearing *En Banc*. On November 8, 2013, the Fifth District Court of Appeal entered an Opinion On Motion for Rehearing *En Banc*. In its November 8, 2013 Opinion, the Fifth District Court of Appeal certified the following question to the Florida Supreme Court, which it indicated was a question 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 statute of frauds when: there is no time agreed for the complete performance of the agreement; the parties intended the agreement to extend for 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?"

Petitioner then sought jurisdiction in this court on two bases: (1) the foregoing certified question; and (2) the alleged conflict between the opinion in the instant case from the Fifth District Court of Appeal and other decisions of this Court and the Florida Supreme Court, the Second District Court of Appeal, the Third District Court of Appeal, and the Fourth District Court of Appeal.[1] This Court accepted jurisdiction on June, 20, 2014.

IV. SUMMARY OF ARGUMENT

The certified question should be answered in the negative. Furthermore, the opinion of the Fifth District Court of Appeal in the instant case directly conflicts with other cases decided by this Court and decided by the Second, Third and Fourth districts, which hold that the statute of frauds does not bar causes of action based upon an alleged oral agreement when 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.

V. ARGUMENT

A. Standard of Review

[1] *Gulf Solar, Inc. v. Westfall,* 447 So.2d 363 (Fla. 2nd DCA 1984); *Byam v. Klopcich,* 454 So.2d 720 (Fla. 4th DCA 1984); *Wilcox v. Lang Equities, Inc.*, 588 So.2d 318 (Fla. 3rd DCA 1991); and *Acoustic Innovations, Inc. v. Schafer, 976* So.2d 1139, 1143 (Fla. 4th DCA 2008).

The standard of review to be applied on appeal with regard to the granting of a motion for directed verdict by a trial judge is *de novo*.[2]

B. <u>Certified Question</u>: "Is an oral agreement to play the lottery and split the proceeds in the event a winning ticket is purchased unenforceable under the statute of frauds when: there is no time agreed for the complete performance of the agreement; the parties intended the agreement to extend for 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?"

Petitioner contends that the certified question should be answered in the negative.

Florida's statute of frauds is embodied within *Florida Statutes*, § 725.01 states, in pertinent part, as follows:

> "**Promise to pay another's debt, etc.**—No action shall be brought . . . upon any agreement that is not to be performed within the space of 1 year from the making thereof, . . ., unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized. **History.**—s. 10, Nov. 15, 1828; RS 1995; GS 2517; RGS 3872; CGL 5779; s. 10, ch. 75-9; s. 933, ch. 97-102; s. 60, ch. 97-264; ss. 227, 294, ch. 98-166."

[2] *Philip Morris USA, Inc. v. Naugle*, --- So.3d. ---, 2012 WL 2361748 (Fla. 4th DCA 2012)(holding that "[A] trial court should direct a verdict against the plaintiff only if there is no evidence, or reasonable inferences therefrom, upon which a jury may find for the nonmoving party." *NITV, L.L.C. v. Baker*, 61 So.3d 1249, 1252 (Fla. 4th DCA 2011) (citation omitted). We review this issue *de novo. Contreras v. U.S. Sec. Ins. Co.*, 927 So.2d 16, 20 (Fla. 4th DCA 2006).

Applying *Florida Statutes*, § 725.01 to the instant case, the statute of frauds clearly does not apply. In this case, there was no evidence presented indicating that the agreement was not to be performed within the space of 1 year from the making thereof. Therefore, there was no requirement that the agreement in the instant case meet the formalities set forth in *Florida Statutes*, § 725.01 (i.e. that it be in writing and signed by the party to be charged).

Petitioner contends that a straight application of the statutory language contained within *Florida Statutes*, § 725.01 demonstrates that the statute of frauds does not apply to the contract at issue in this case. The fact that the express language of *Florida Statutes*, § 725.01 does not bring the instant contract within the statute of frauds is further support for a holding by this Court that the certified question should be answered in the negative.

"If the language of a statute 'is clear and unambiguous and conveys a clear and definite meaning, the statute should be given its plain meaning.' *Fla. Hosp. v. Agency for Health Care Admin.*, 823 So.2d 844, 848 (Fla. 1st DCA 2002)(citing *M.W. v. Davis*, 756 So.2d 90, 101 (Fla. 2000); *Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank*, 609 So.2d 1315, 1317 (Fla. 1992); *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984). "When necessary, the plain and ordinary meaning of words in a statute can be ascertained by reference to a dictionary." *Id.* At 848 (citing *Seagrave v. State*, 802 So.2d 281, 286 (Fla. 2001).

To determine the intent of the legislature, courts look primarily to the "actual language used in the statute." *See Borden v. East-European Ins. Co.*, 921 So.2d 587, 595 (Fla. 2006); *Hill v. Davis*, 70 So.3d 572, 575 (Fla. 2011)(recognizing that a statute's text is the "most reliable and authoritative expression of the Legislature's intent"). "Therefore, we are not at liberty to judicially modify the authorizing statute to extend to the State authority to appeal a sentence based on any grounds other than those specifically specified by the Legislature." *State v. McMahon*, 94 So.3d 468, 473 (Fla. 2012).

Based upon the express language as contained within *Florida Statutes*, § 725.01, and giving plain meaning to the language crafted by the legislature, the contract at issue in this case does not fall within the statute of frauds. To allow the statute of frauds to reach the contract in the instant case would be to effectively modify the statutory language contained within *Florida Statutes*, § 725.01.

The case of *Yates v. Ball*, 132 Fla. 132, 181 So. 341 (Fla. 1937) has also been referenced by the Fifth District Court of Appeal in its opinion regarding the instant case. The *Yates* case involved, in pertinent part, a cause of action predicated upon an oral agreement to pay for certain second mortgage bonds secured by a trust deed, payment of which was due approximately four years from the date of the agreement.[3] The case proceeded to trial and one of the defenses

[3] The terms of the agreement at issue in *Yates* are as follows:

> "The agreement sued on was oral but is alleged in the declaration to have been in the following words: 'The bondholders promised that they would refrain from taking any steps to terminate the aforesaid extension agreement until defendant could form a new corporation to acquire title to said lands and that they would likewise refrain from precipitating the maturity of the second mortgage bonds and would take no steps to cause the second trust deed to be foreclosed and would, upon the formation of said new corporation by defendant accept a delayed payment equal to the semi-annual interest then due and owing on their bonds and would thereafter cooperate with defendant by permitting an attorney of his selection to represent their (second mortgage) trustee in a suit which defendant proposed to have brought for the alleged purpose of clearing the title to said property by eliminating certain interests that were subordinate to said mortgage; and in consideration of the foregoing undertakings and assurances given by the bondholders and in return therefor defendant, through his said representative, agreed that he would cause said new corporation to be promptly formed and adequately capitalized so that it would be able to pay for said property and protect the lien of the mortgage securing the second issue of bonds, and that said corporation would acquire the legal title to said 'Atlantic Beach Tract' and pay the interest then overdue on said mortgage bonds and the interest then due on the first mortgage bonds and that defendant or his said corporation would thereafter at all times meet the payments of principal and interest to become due on said second issue of bonds and would give protection to said bonds against the first mortgage bonds, so that the second issue of bonds would be made good in all respects and so that the holders of the second issue need have no further concern about the ultimate payment of their bonds.' Summarized, the plaintiff, Yates, agreed: (1) To refrain from taking any steps to terminate the extension agreement until defendant could

posed by the defendant was that the agreement was void under the statute of frauds because it was for longer duration than one year and no note or memorandum of it was in writing signed by the party to be charged. As in the instant case, at the conclusion of the plaintiff's case, the defendant moved for a directed verdict and the same was granted.[4]

> form a new corporation to acquire title to the lands described in the trust deed as the 'Atlantic Beach Tract,' (2) To refrain from precipitating the maturity of the second mortgage bonds or from foreclosing the trust deed, (3) Accept delayed payment of interest due when the new corporation was formed, and (4) To cooperate with an attorney of defendant's selection to prosecute a foreclosure suit to clear the title of 'Atlantic Beach Tract" of all incumbrances subordinate to the second mortgage. In consideration of these assurances on the part of plaintiff, defendant Ball agreed; (1) That he would have the new corporation promptly created and amply capitalized to pay for the 'Atlantic Beach Tract,' protect the lien of Yates' mortgage securing the second issue of bonds and acquire the legal title to the lands securing them, (2) Pay interest overdue on the second mortgage bonds including that due on first mortgage bonds, (3) At all times thereafter, meet the payments of principal and interest to become due on the second mortgage bonds, and (4) Protect the second mortgage bonds against the first mortgage bonds and make them payable in any event."

Yates v. Ball, 132 Fla. 132, 135-7, 181 So. 341 (Fla. 1937).

[4] There was no indication in the record on which of the various grounds the motion for directed verdict had been granted. As a result, this Court conducted a review of all of the grounds, including the contention that the agreement violated the statute of frauds. *See Yates* at 135.

In *Yates*, as in the instant case, it was admitted that the contract was oral, that no part or memorandum of the oral agreement was in writing or signed by the party to be charged, and that the time within which the contract was to be performed was not specifically stated.[5] This Court in *Yates*, on the very issue of the applicability of the statute of frauds to an oral agreement of this kind, set forth a general rule and a qualifying rule. This Court held as follows:

> "In other words, 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. This holding is supported by Peter v. Compton, Skinner 353, 90 Eng. Rep. 157, decided in King's Bench by Lord Holt.
>
> 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 statute of frauds. 25 R.C.L. 456, and cases cited.
>
> 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 statute of frauds, though it cannot be said that there is any impossibility preventing its performance within a year. 25 R.C.L. 458."[6]

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[5] *See Yates v. Ball*, 132 Fla. 132, 138, 181 So. 341 (Fla. 1937).
[6] *Yates v. Ball*, 132 Fla. 132, 139, 181 So. 341 (Fla. 1937).

> . . .
>
> In our view, this provision does not render the agreement vulnerable to the statute of frauds. While the second mortgage bonds were not due for four years and the interest was payable semi-annually, they were by their terms susceptible of payment in full at any time upon notice given, the very purpose of their foreclosure was to get rid of all subsequent claims against them, discharge them promptly as they provided might be done, but if it developed that they could not be promptly discharged, a new contract was to be made for their payment. In other words, an agreement to buy and sell at a stated price, the vendee to take charge at the end of a period of years but with the option to take charge at any time prior to the termination of that period is not within the statute of frauds. *Seddon v. Rosenbaum*, 85 Va. 928, 9 S.E. 326.
>
> In our view, the agreement sued on was clearly within the general rule as here stated. It 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. When such is the case, even if actual performance runs beyond the year, it is not within the statute of frauds."[7]

Despite the fact that in *Yates* this Court found that payments on the second mortgage bonds were not due for four years, the fact that prepayment could be made on such bonds was enough to protect the contract from the statute of frauds. Moreover, this Court found in *Yates* that the contract was "clearly" within the

[7] *Yates v. Ball*, 132 Fla. 132, 139-40, 181 So. 341 (Fla. 1937).

general rule in that it "contain[ed] 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." According to *Yates* "even if actual performance runs beyond the year, it is not within the statute of frauds."

Petitioner submits that much of the confusion regarding this issue has come from the application and reconciliation of the general rule and the qualifying rule. In this particular case, the evidence clearly demonstrates that no definite time was fixed by the parties for the performance of their agreement. For example, there was no express agreement that they were going to continue to purchase lottery tickets for two (2) years and to share in the winnings to the extent they were fortunate enough to purchase a winning ticket. Furthermore, the evidence is equally clear that there is nothing in the terms of the agreement to show that it could not be performed within a year. The difficulty in applying the holding from *Yates* to the instant case arises from the application of the qualifying rule; to wit:

> "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 statute of frauds, though it cannot be said that there is any impossibility preventing its performance within a year."[8]

[8] *Yates v. Ball*, 132 Fla. 132, 139, 181 So. 341 (Fla. 1937).

In the instant case, the evidence clearly shows that no time was expressly agreed to regarding the complete performance of the contract. However, the Trial Judge concluded, on his own, that the parties *intended* the agreement to last for longer than a year.[9] In the instant case, the only testimony remotely relevant to the issue of the intent of the Petitioner regarding the length of the oral agreement involved the Petitioner, on cross examination, testifying that the agreement was to last "as long as they remained romantically involved." Other than this one statement regarding the anticipated duration of the agreement, no other testimony regarding the duration of the agreement was presented at trial. Respondent relies upon collateral testimony at trial relating to Petitioner's testimony that he desired or anticipated his romantic relationship with Respondent to last for more than a year. Respondent then creatively utilized this testimony to relate back to the oral agreement and argue that since Petitioner stated that the agreement was to last as long as the parties were romantically involved and as Petitioner testified that he

[9] It should be noted that there was no stipulation of fact that the parties intended the agreement to last for longer than a year. In fact, Respondent had not even presented her case at the time of the directed verdict in this case. This was a jury trial, and it remains Petitioner's position that this issue was a finding of fact, and not a situation where the Trial Judge should have stepped into the process and entered a directed verdict, which included his own findings of fact on these contested issues. The parties had agreed upon the law of the case and the jury instructions to be read to the jury upon completion of presentation of the evidence. The jury, as the factfinder in this case, should have been granted the opportunity to make findings of fact regarding whether or not the parties intended the agreement to last for longer than a year.

desired or anticipated the romantic relationship lasting for more than a year, the agreement was subject to the statute of frauds.

Following the statement of the general and qualifying rules in *Yates*, this Court went on to apply the said rules to the facts. Appellant contends that the application sheds light upon the proper manner in which cases of this kind are to be analyzed. In *Yates*, unlike in the instant case, the parties had entered into an agreement whereby payments of interest on the second mortgage bonds pursuant to that agreement were due approximately four years from the date of the agreement. Therefore, there were clear factors involved that demonstrated that actual payments were due four years out from the date of the agreement. This Court in *Yates* held that, due to the fact that there was no prohibition on early payment and that the bonds at issue "were by their terms susceptible of payment in full at any time upon notice given" the agreement did not fall within the statute of frauds. This Court in *Yates* stated that:

> "[T]he agreement sued on was clearly within the general rule as here stated. It 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. When such is the case, even if actual performance runs beyond the year, it is not within the statute of frauds."

(Emphasis added herein).

Despite the fact that this Court did not find that the contract in the *Yates* case fell within the qualifying rule, Petitioner contends that the qualifying rule in *Yates* remains the point of contention and a source of confusion for parties to contracts. Petitioner 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 statute of frauds.

Comparing *Florida Statutes*, § 725.01 and the qualifying rule from the *Yates* case side by side, it is clear that the qualifying rule set forth in the *Yates* case, under the circumstances of the instant case, modifies the plain language of *Florida Statutes*, § 725.01, and would improperly bring the instant contract within the statute of frauds. Pursuant to the definitive language of *Florida Statutes*, § 725.01, a contract is only subject to the statute of frauds when it "is not to be performed within the space of 1 year from the making thereof." There is no other language contained within *Florida Statutes*, § 725.01 regarding contracts to be performed within 1 year. In contrast, the qualifying rule in *Yates* appears to allow a contract to be subject to the statute of frauds when "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."[10] To put it differently, *Florida Statutes*, § 725.01 looks to the express terms of the contract to determine

[10] *Yates v. Ball*, 132 Fla. 132, 139, 181 So. 341 (Fla. 1937).

whether or not a written contract is required, which allows for simple interpretation and application of facts to law. In contrast, the qualifying rule in *Yates* would allow contracts that do not contain any language indicating that the agreement is going to last beyond a year to be subject to the statute of frauds provided there is merely a clear intent or desire by the parties (stated or not) that the agreement extend beyond a year.

With regard to the instant case, Petitioner contends that the certified question should be answered in the negative based upon the application of the express plain language of *Florida Statutes*, § 725.01. To allow for the application of the qualifying rule in Yates to bring the instant contract within the statute of frauds would be to effectively modify *Florida Statutes*, § 725.01, thus broadening the scope and reach of *Florida Statutes*, § 725.01.

C. There Exist Conflicts Between The Opinion By The Fifth District Court Of Appeal In The Instant Case And Other Cases Of The Florida Supreme Court, As Well As The Second, Third And Fourth District Courts of Appeal.

The Fifth District Court of Appeal has rendered a decision in this case that is also in conflict with the case of *Gulf Solar, Inc. v. Westfall*, 447 So.2d 363 (Fla. 2nd DCA 1984). In the *Gulf* case, the Second District Court of Appeal determined that an oral employment agreement, despite the fact that the parties thereto may have expected and desired that the employee to remain employed with the employer for some unknown period of time, the employer was under no obligation

to retain the employee and the employee had no obligation to remain in the employ of the employer for any definite period of time. As a result, the Second District Court of Appeal (citing to *Yates v. Ball*, 132 Fla. 132, 181 So. 341 (Fla. 1937) among other cases), held that the oral agreement involved in that case was not barred by the statute of frauds. Obviously, the instant case, involving a romantic relationship, which is similar in nature to an employment at will contract, should have received the same analysis.

The Fifth District Court of Appeal has rendered a decision in this case that is contrary to *Acoustic Innovations, Inc. v. Schafer*, *976* So.2d 1139, 1143 (Fla. 4th DCA 2008). In *Acoustic* there was again an alleged oral agreement regarding a contention by one party that the other had agreed to convey 50% ownership in a company in exchange for certain consideration. In *Acoustic* the Fourth District Court of Appeal held that "[n]o evidence established the existence of an oral contract incapable of being performed within one year. Miller could have transferred the shares to Schafer immediately after forming the oral agreement, had Schafer requested he do so. The fact that Schafer waited until a year had passed to request the shares is of no import." In *Acoustic* the principal was again reiterated that if the oral agreement **could** be performed within a year, then the statute of frauds does not bar the action. The Fifth District Court of Appeal in the instant case has rendered an opinion in conflict with the decision in *Acoustic*.

The Fifth District Court of Appeal has rendered a decision in this case that is contrary to *Byam v. Klopcich,* 454 So.2d 720 (Fla. 4th DCA 1984). In *Byam* there was again an alleged oral employment contract whereby the employer agreed to pay to the employee the greater of $500 or 20 percent of sales per week, and the employee agreed to work for the employer. In citing to *Yates v. Ball,* 132 Fla. 132, 181 So. 341 (Fla. 1937) among other cases, the Fourth District Court of Appeal in *Byam* held that the "general rule is that an oral contract for an indefinite time is not barred by the Statute of Frauds" and "[o]nly if a contract could not possibly be performed within one year would it fall within the statute." *Byam v. Klopcich,* 454 So.2d 720, 721 (Fla. 4th DCA 1984)(citing *Yates v. Ball,* 132 Fla. 132, 181 So. 341 (Fla. 1937); *Gulf Solar, Inc. v. Westfall,* 447 So.2d 363 (Fla. 2nd DCA 1984).

The Fifth District Court of Appeal has rendered a decision in this case that is contrary to *Wilcox v. Lang Equities, Inc.*, 588 So.2d 318 (Fla. 3rd DCA 1991). In *Wilcox* there was again an oral agreement whereby one party was to sell customers vacations packages for the other party's hotel. There was no definitive term placed upon the duration of the agreement. In citing to *Yates v. Ball,* 132 Fla. 132, 181 So. 341 (Fla. 1937) among other cases, the Third District Court of Appeal in *Wilcox* held 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 is made" and "when no definite time is fixed by the parties for 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 statute of frauds." *Wilcox v. Lang Equities, Inc.*, 588 So.2d 318, 320 (Fla. 3rd DCA 1991).

In the case of *Schenkel v. Atlantic Nat. Bank of Jacksonville*, 141 So.2d 327 (Fla. 1962), the issue of performance of an oral agreement within 1 year was addressed as it related to personal contracts between individuals and the obvious possibility of death as a means of terminating a contract within a year. In *Schenkel*, the Court held that "[w]ith reference to the sixth defense (that the first count is founded upon an oral contract not intended to be performed within one year from the date thereof, which contract was not in writing as required by law-Section 725.01, *Florida Statutes*, F.S.A.), the Petitioner contends that the Statute of Frauds, requiring contracts 'not to be performed, within the space of one year' to be in writing, is not applicable in the instant case because, since death is uncertain, the contract could have been terminated prior to the expiration of one year. This contention is supported by the decision of the Supreme Court of Florida in *Berger v. Jackson*, 156 Fla. 251, 23 So.2d 265 (1949), and, again, we hold that the Circuit Court erred in granting a new trial on the ground among others, that it had erred in striking the sixth defense."

Obviously, in the *Schenkel* case, it was the intent and desire of all participants that they would live for more than a year. Despite that obvious intent and desire, this Court held that, due to the uncertainty of life and the possibility of intervening death, the contract did not fall within the statute of frauds. Likewise, in the instant case, at issue is an alleged oral agreement between two individual parties, which obviously could have been completed within 1 year based upon the fact that either party could have died during the year, their romantic relationship could have terminated during the year, they could have stopped playing the lottery, or there could have been countless reasons why the agreement could have been terminated. As in the *Schenkel* case, the possibility of an intervening death of either party imposes upon the agreement the possibility that the agreement could have been performed within the period of one year. There exists a conflict between the opinion rendered by the Fifth District Court of Appeal in the instant case, this Court's decision in the case of *Schenkel v. Atlantic Nat. Bank of Jacksonville*, 141 So.2d 327 (Fla. 1962), and this Court's decision in the case of *Berger v. Jackson*, 156 Fla. 251, 23 So.2d 265 (1949).

CONCLUSION AND REQUEST FOR RELIEF

For the reasons stated above, the Court should reverse the Opinion of the Fifth District Court of Appeal, answer the certified question in the negative, and resolve the existing conflict between the districts as set forth herein.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to msessums@sessumspa.com and U.S. mail to Mark A. Sessums, Esq. at 2212 South Florida Avenue, Lakeland, Florida 33803 on this 25th day of July 2014.

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