Filing # 8997712 Electronically Filed 01/09/2014 04:21:13 PM

RECEIVED, 1/9/2014 16:23:40, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

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

HOWARD BROWNING,

Petitioner,

vs.

LYNN ANNE POIRIER,

Respondent.

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

JURISDICTIONAL BRIEF OF RESPONDENT, LYNN ANNE POIRIER

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

On January 28, 2005, Petitioner sued Respondent, claiming that Respondent breached a 1992 oral agreement between the parties. Petitioner alleged that the parties agreed to purchase lottery tickets together, and to split equally any winnings.

A jury trial was held on February 6-7, 2012 on two (2) of Petitioner's claims: (1) breach of contract and (2) unjust enrichment. At the close of Petitioner's case-in-chief, Respondent moved for a directed verdict. Respondent argued that the breach of contract count was barred by the statute of frauds. The trial court granted Respondent's motion for directed verdict on both counts.

On May 8, 2012, Petitioner appealed the trial court's decision to the Fifth District Court of Appeal. On March 8, 2013, the Fifth District Court of Appeal authored an opinion reversing the trial court's decision as to both counts and remanding the case for a new trial. However, on March 18, 2013, Respondent's counsel filed a Motion for Rehearing and/or Clarification and/or Certification and Motion for Rehearing *En Banc*, which the Fifth District Court of Appeal subsequently granted. On November 8, 2013, the Fifth District Court of Appeal withdrew the March 8, 2013 panel opinion and substituted a new opinion, which affirmed the trial court's directed verdict regarding the breach of oral contract

count, and reversed the trial court's directed verdict regarding the unjust enrichment count.

As a part of the November 8, 2013 opinion, the Fifth District Court of Appeal certified the following to the Florida Supreme Court as 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 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?

Following this certification, Petitioner filed his Notice to Invoke Discretionary Jurisdiction and Jurisdictional Brief of Petitioner.

SUMMARY OF THE ARGUMENT

This Court should exercise jurisdiction based on the question of law certified by the majority as an issue of great public importance. If, however, this Court accepts jurisdiction, it should only consider the question certified below by the majority, and not the question posed by the dissent as argued by Petitioner. This Court should also exercise discretionary jurisdiction on the grounds that the Fifth District Court of Appeal has rendered a decision that is in conflict with the decisions of the Second, Third, and Fourth District Court of Appeal in *Gulf Solar, Inc. v. Westfall*, 447 So.2d 363 (Fla. 2d DCA 1984), *Byam v. Klopcich*, 454 So.2d

720 (Fla. 4th DCA 1984), *Wilcox v. Lang Equities, Inc.*, 588 So.2d 318 (Fla. 3d DCA 1992), and *Acoustic Innovations, Inc. v. Schafer*, 976 So.2d 1139 (Fla. 4th DCA 2008). However, the decisions of *Gulf Solar*, *Byam*, *Wilcox*, and *Acoustic* are contrary to the law of *Yates v. Ball*, 181 So. 341 (Fla. 1937). This Court should accept jurisdiction and find that the decision of the Fifth District Court of Appeal below is consistent with the Florida Supreme Court decision of *Yates v. Ball*, and that there are no grounds to certify a conflict between the decision at issue herein and *Yates v. Ball*.

ARGUMENT

I. THIS COURT SHOULD EXERCISE JURISDICTION BECAUSE THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY PASSES UPON A QUESTION CERTIFIED BY THE FIFTH DISTRICT COURT OF APPEAL TO BE OF GREAT PUBLIC IMPORTANCE

Respondent recognizes that a jurisdictional brief shall not be filed if jurisdiction is invoked under Rule 9.030(a)(2)(A)(v) (questions of great public importance certified by the district courts to the supreme court). This Court has the discretion to exercise jurisdiction to hear the appeal, as the November 8, 2013 majority opinion contains a question of great public importance. Petitioner, however, urges this Court to consider the question posed by the dissent below. Petitioner's argument ignores that this Court may only exercise jurisdiction over the question certified by the majority of the Fifth District Court of Appeal. *See*

Floridians For A Level Playing Field v. Floridians Against Expanded Gambling, 967 So. 2d 832, 833 (Fla. 2007). In *Floridians*, this Court held that in order to have discretionary jurisdiction based on a certified question, there are three (3) prerequisites that must be met: 1) the district court of appeal must pass upon the question certified by it to be of great public importance; 2) there must be a district court "decision" to review; and 3) "the question **must be in fact certified by a majority decision** of the district court." *Id.* The question posed by the dissent differs from the question certified by the majority in the instant case. Thus, if this Court exercises its discretionary jurisdiction regarding the question certified by the Fifth District Court of Appeal, it must consider the question as certified by the majority opinion, and not the question posed by the dissent.

II. THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT DIRECTLY CONFLICT WITH THE DECISION OF THE FLORIDA SUPREME COURT IN *YATES V. BALL*

The Fifth District Court of Appeal has not rendered a decision that is in conflict with the Supreme Court decision in *Yates v. Ball*, 181 So. 341 (Fla. 1937). While Respondent contends that the Fifth District Court of Appeal decision is in conflict with the district court cases cited in Petitioner's jurisdictional brief and addressed below, the decision of the Fifth District Court of Appeal is not in conflict with the Florida Supreme Court case of *Yates v. Ball*, 181 So. 341 (Fla. 1937). The majority opinion, in fact, relies largely on *Yates* in determining that the

trial court was correct in granting a directed verdict as to the breach of oral contract count. The majority cites the seminal language in *Yates*:

> When no time is agreed upon 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. *Yates* at 344; Opinion at page 3.

The holding of the Fifth District Court of Appeal herein simply mirrors the exact *Yates* legal standard articulated above. The Fifth District Court of Appeal found that "[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." Opinion at page 4. After determining that the parties intended that the agreement should extend for a longer period than a year, the Fifth District Court of Appeal followed the holding of the *Yates* opinion expressly. Thus, there is no conflict between the Fifth District Court of Appeal below and the Florida Supreme Court decision in *Yates v. Ball*, and any alleged conflict between the two decisions cannot be the basis of an exercise of this Court's discretionary jurisdiction.

III. THIS COURT SHOULD EXERCISE JURISDICTION BECAUSE THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS

Petitioner seeks to invoke this Court's discretionary jurisdiction, asserting that the decision of the Fifth District Court of Appeal directly and expressly conflicts with several decisions of the Second, Third, and Fourth Districts. However, it is clear that it is the decisions of the Second, Third, and Fourth Districts relied upon in Petitioner's jurisdictional brief that directly conflict with *Yates v. Ball*, and not the Fifth District Court of Appeal decision herein.

A. ***Gulf Solar, Inc. v. Westfall*, 447 So.2d 363 (Fla. 2d DCA 1984)**

The Second District Court of Appeal 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 statute of frauds. The management employee at issue was hired for an indefinite term, however, a condition of employment was that the employee complete a sales plan "soon." The employee's failure to complete the sales plan within two (2) months prompted his termination. *Gulf Solar* at 366. From these facts, the Second District articulated a rule that, since "there has been no showing that he could not have performed his duties completely within one year of his hiring . . . . the oral agreement involved in this case is not barred by the statute of frauds." *Id.*

The Second District Court of Appeal does not directly cite any precedential legal authority in rendering its decision. Rather, it uses the citation signal "see" when referencing *Yates v. Ball*, 181 So.2d 341 (Fla. 1937). The decision of the

Second District Court of Appeal does conflict with the decision in the instant case of the Fifth District Court of Appeal. The Fifth District Court of Appeal appropriately relies on the language from *Yates*, that "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." *Yates* at 344. This Court should exercise its discretionary jurisdiction, and affirm the decision of the Fifth District Court of Appeal in the instant case based on the authority of *Yates v. Ball*.

B. ***Byam v. Klopcich*, 454 So.2d 720 (Fla. 4th DCA 1984)**

In a case with facts that were "virtually identical" to *Gulf Solar*, the Fourth District Court of Appeal in *Byam v. Klopcich*, 454 So.2d 720 (Fla. 4th DCA 1984) granted a rehearing of its previous determination regarding the statute of frauds "relying on the same reasoning applied in the recent decision of the Second District in *Gulf Solar, Inc. v. Westfall*, 447 So.2d 363 (Fla. 2d DCA 1984)." *Byam* holds that "[t]he general rule is that an oral contract for an indefinite time is not barred by the Statute of Frauds," and that "**[o]nly** if a contract could not possibly be performed within one year would it fall within the statute." *Byam* at 721, *citing Yates* and *Gulf Solar*. However, this is an incorrect statement of the controlling authority. The *Byam* court, similar to the *Gulf Solar* court,[1] neglected to include the

[1] And understandably similar, as the court admittedly adopted the same flawed reasoning as the *Gulf Solar* court.

qualifying rule explicitly carved out by the *Yates* court.[2] The majority decision of the Fifth District Court of Appeal in the instant case does conflict with the decision of the Fourth District Court of Appeal in *Byam*, and this Court should exercise its discretionary jurisdiction, and affirm the decision of the Fifth District Court of Appeal in the instant case based on the authority of *Yates v. Ball*.

C. ***Wilcox v. Lang Equities, Inc.*, 588 So.2d 318 (Fla. 3d DCA 1992)**

In *Wilcox v. Lang Equities, Inc.*, 588 So.2d 318 (Fla. 3d DCA 1992), the Third District Court of Appeal reversed the trial court's judgment on the pleadings on a statute of frauds defense. In the underlying case, a hotel sued a corporation selling dive packages for families to recover the hotel fee. Hotel fees were paid for the first eleven (11) months, and then were collected by the dive package operation for the next four (4) months, but not paid to the hotel. The *Wilcox* court 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 that "[w]hen 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

[2] "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." *Yates v. Ball*, 181 So. 341, 344 (1937).

not be construed as being within the statute of frauds." *Wilcox* at 320 (internal citations omitted). The first holding, which cites *Yates*, is a correct statement of the law to the effect that, in circumstances where it is apparent that the parties understand the contract is not to be performed within a year, the parol contract is void. *See id*. However, the second holding regarding the necessity of the *ability* of a contract to be performed within a year as a controlling factual issue, is contrary to Florida law and conflicts with the Fifth District Court of Appeal decision at issue herein, as well as the Florida Supreme Court in *Yates*. This Court should exercise its discretionary jurisdiction, and affirm the decision of the Fifth District Court of Appeal in the instant case on the authority of *Yates v. Ball*.

D. ***Acoustic Innovations, Inc. v. Schafer*, 976 So.2d 1139 (Fla. 4th DCA 2008)**

In *Acoustic Innovations, Inc. v. Schafer*, 976 So.2d 1139 (Fla. 4th DCA 2008), the Fourth District Court of Appeal dealt with an oral argument to transfer a fifty percent (50%) stock interest to an employee upon request. The trial court entered a money judgment, and the Fourth District Court of Appeal affirmed. In so ruling, the Fourth District Court of Appeal completely failed to even cite the seminal case of *Yates v. Ball*, and instead, relied upon *Byam*, when it determined that a party is only barred by the statute of frauds if it is proven that the oral contract is "incapable of being performed within one year," and that "only if a contract could not possibly be performed within one year would it fall within the

statute." *Acoustic* at 1443, citing *Byam*. The Fourth District Court of Appeal thereby completely strayed from the precedential authority of *Yates v. Ball*. As such, the decision of the Fifth District Court of Appeal below does conflict with the Fourth District Court of Appeal in *Acoustic*. This Court should exercise its discretionary jurisdiction, and affirm the decision of the Fifth District Court of Appeal in the instant case based on the authority of *Yates v. Ball*.

CONCLUSION

Respondent submits that, if this Court exercises jurisdiction based on a certified question of law, that this Court should consider only the question certified by the majority below, and not the minority question posed, as urged by Petitioner. Respondent requests that this Court exercise discretionary jurisdiction on the grounds that the Fifth District Court of Appeal has rendered a decision that is in conflict with the decisions of the Second, Third, and Fourth District Court of Appeal in *Gulf Solar, Byam*, *Wilcox*, and *Acoustic Innovations*. Respondent requests that this Court find that the decision of the Fifth District Court of Appeal below is consistent with the Florida Supreme Court decision of *Yates v. Ball*, and that there are no grounds to certify a conflict between the decision below and *Yates v. Ball*.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Jurisdictional 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 _____ day of January, 2014.

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