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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-_____
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 PETITIONER, HOWARD BROWNING

Sean P. Sheppard, Esq.
Florida Bar No. 67253

500 E. Broward Blvd., Suite 1600
Fort Lauderdale, FL 33394
Telephone: (954) 632-0668
Facsimile: (954) 666-0362
E-mail: sean@sheppardfirm.com
Counsel for Petitioner

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STATEMENT OF THE CASE AND OF THE FACTS

A. **Nature of the Case**.-- The case arose from Petitioner's claim that Respondent breached an oral agreement that the parties would buy lottery tickets together, and if they won, they would split the proceeds. Petitioner filed a two-count complaint that was pending before the trial court at the time of a jury trial on February 6-7, 2012 seeking relief upon causes of action for (1) breach of oral contract; and (2) unjust enrichment.

B. Course of Proceedings in the Lower Tribunal.— At the close of the Petitioner's case before the jury, Respondent's counsel moved for directed verdict on both counts. The Trial Judge granted directed verdict on both counts in favor of Respondent. With regard to the cause of action for breach of oral agreement, the trial judge held that the oral agreement was barred by the statute of frauds. Following entry of a directed verdict by the trial judge, Petitioner appealed the matter to the Fifth District Court of Appeal.

C. Disposition in the Lower Tribunal.—Following appeal by Petitioner 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 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?"

It should be noted that the dissent in the Opinion indicated a different question of great public importance, which Petitioner contends is the more appropriate certified question to be answered on appeal:

> "Is a terminable-at-will agreement to pool lottery winnings unenforceable in the absence of an express agreement to continue the agreement for a period of time exceeding one year, when full performance of the agreement is possible within one year from the inception of the agreement."

As the Fifth District Court of Appeal reversed as to the cause of action for Unjust Enrichment and remanded for a new trial on such count, the issues regarding Unjust Enrichment will not be further discussed in this brief. Instead, this brief will focus entirely upon the Fifth District Court of Appeal's decision regarding the cause of action for breach of contract.

SUMMARY OF THE ARGUMENT

The *Browning* decision expressly passed upon a question certified by the Fifth District Court of Appeal to be of great public importance. The decision also expressly and directly conflicts with the decision of *Yates v. Ball*, 132 Fla. 132, 181 So. 341 (Fla. 1937) and other decisions within the Second, Third and Fourth districts as set forth below.

ARGUMENT

I. Jurisdiction Should Be Accepted Because The Decision Expressly Passes Upon a Question Certified By The Fifth District Court of Appeal To Be Of Great Public Importance.

The Fifth District Court of Appeal's decision expressly passes upon a question certified to be of great public importance. This certified question should be considered by this Court.

II. Jurisdiction Should Be Accepted Because The Decision Of The Fifth District Court of Appeal Expressly And Directly Conflicts with the Decisions of The Florida Supreme Court And Other District Courts on the Same Important Point of Law.

In addition to the certified question of great public importance, the decision directly and expressly conflicts with previous decisions of this Court and with several other decisions of the Second, Third, and Fourth Districts. Specifically the decision of the Fifth District Court of Appeal in the instant case directly conflicts with *Yates v. Ball*, 132 Fla. 132, 181 So. 341 (Fla. 1937) and other cases within the Second, Third and Fourth districts, all of which explicitly held 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. Thus, the Court may accept jurisdiction under Art. V, § 3(b)(3), *Fla. Const.*, and *Fla.R.App.P.* 9.030(a)(2)(A)(iv).

The parties to this action stipulated to certain special jury instructions to be read at the trial in this matter. Among those instructions was the following: "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." This special jury instruction was specifically agreed to by the Respondent and it cited within the jury instruction to the case of *Yates v. Ball*, 132 Fla. 132, 181 So. 341 (Fla. 1937) among other cases and references. Petitioner contends that the Fifth District Court of Appeal's decision in this case directly conflicts with the *Yates* case in that it effectively changes the standard applied in *Yates*. Furthermore, as the parties expressly agreed upon the specific and special jury instruction, regardless of any conflict, the parties were bound by the rule of law to be read to the jury. Instead of allowing that to happen, the trial judge in this case took the issue from the jury and applied an entirely different standard than that agreed to by the parties.

The *Yates* case also specifically states 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." *Yates v. Ball*, 132 Fla. 132, 139, 181 So. 341 (Fla. 1937). This Court went on to state that "[w]hen, 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." *Id*. The Fifth District Court of Appeal has rendered a decision in this case that is contrary to the decision in *Yates*. As a result, this Court should accept jurisdiction to resolve the conflict.

The Fifth District Court of Appeal has rendered a decision in this case that is contrary to *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 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.

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 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).

CONCLUSION

Wherefore, Petitioner respectfully requests that this Court accept jurisdiction to resolve the conflict between the decision in the instant case and the Florida Supreme Court case of *Yates v. Ball,* 132 Fla. 132, 181 So. 341 (Fla. 1937), as well

as the conflict between the decision in the instant case and the decisions of other district courts of appeal in the cases of *Gulf Solar, Inc. v. Westfall,* 447 So.2d 363 (Fla. 2nd DCA 1984), *Acoustic Innovations, Inc. v. Schafer, 976* So.2d 1139, 1143 (Fla. 4th DCA 2008), *Byam v. Klopcich*, 454 So.2d 720 (Fla. 4th DCA 1984), and *Wilcox v. Lang Equities, Inc.*, 588 So.2d 318 (Fla. 3rd DCA 1991).

SHEPPARD FIRM, P.A.
500 E. Broward Blvd., Suite 1600
Fort Lauderdale, FL 33394
Telephone: (954) 632-0668
Facsimile: (954) 666-0362
E-mail: sean@sheppardfirm.com

_/s/ Sean P. Sheppard_____
Sean P. Sheppard, Esq.
Florida Bar No. 67253
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been served by Electronic Mail this 19th day of December, 2013, Mark A. Sessums, Esq. (**msessums@sessumspa.com**) **and** Brian M. Monk, Esq. (**b.monk@bcnlawfirm.com**).

_/s/ Sean P. Sheppard_____
Sean P. Sheppard, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements (14-point Times New Roman) of Fla. R. App. P. Rule 9.210(a)(2).

_/s/ Sean P. Sheppard_____
Sean P. Sheppard, Esq.