IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1997 Term

_____

No. 23987

_____

FRY RACING ENTERPRISES, INC.,
Plaintiff below, Appellant,

v.

DONALD A. CHAPMAN, individually and d/b/a
ONA SPEEDWAY,
Defendants below, Appellees.

Appeal from the Circuit Court of Cabell County
Hon. L. D. Egnor, Judge
Civil Action No. 95-C-710

AFFIRMED

Submitted: September 16, 1997
Filed: October 24, 1997

James W. St. Clair, Esq. St. Clair & Levine Huntington, West Virginia Attorney for the Appellant	Daniel A. Earl, Esq. Huddleston, Bolen, Beatty, Porter & Copen Huntington, West Virginia Attorney for the Appellees

The Opinion of the Court was delivered PER CURIAM.

JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

JUSTICE DAVIS, deeming herself disqualified, did not participate in the decision in this case.

SYLLABUS BY THE COURT

1. "Every agreement required by the statute of frauds to be in writing must be certain in itself or capable of being made so by reference to something else, whereby the terms can be ascertained with reasonable certainty." Syllabus Point 2, in part, *White v. Core*, 20 W.Va. 272 (1882).

2. "It is well settled, that courts of equity will notwithstanding the statute of frauds enforce oral contracts for the sale of land which have been partially performed; and when the failure to complete the contract would operate as a fraud, *such courts* may exercise a similar jurisdiction with regard to chattels; but courts of law will not enforce such contracts contrary to the provisions of the statute." Syllabus Point 2, *Kimmins v. Oldham*, 27 W.Va. 258 (1885).

3. "But it is a general rule, that where one has rendered services, paid a consideration, or sold and delivered goods in execution of an oral contract, which on account of the statute [of frauds] can not be enforced against the other party, such one can in a court of law recover the value of the services or goods upon a *quantum meruit* or *valebant*." Syllabus Point 3, *Kimmins v. Oldham*, 27 W.Va. 258 (1885).

4. "This general rule, however, is limited and confined to cases, in which the services rendered, the goods delivered or consideration paid inured to the benefit of the defendant; and in such cases the recovery is not upon the contract but upon the *quantum meruit* or *valebant* or upon the money counts." Syllabus Point 4, *Kimmins v. Oldham*, 27 W.Va. 258 (1885).

Per Curiam:[1]

In this case we are asked to review the granting of summary judgment and the application of the statute of frauds, *W.Va. Code*, 55-1-1 [1990], in a contract action. The plaintiff-appellant, Fry Racing Enterprises, Inc. ("Fry"), alleges that it was a party to an oral, three-year contract with the defendant-appellee Donald A. Chapman ("Chapman"). The plaintiff claims that it began to perform according to the terms of the agreement, but that after only three months the defendant terminated the agreement without cause. The plaintiff filed this action for damages under the contract.

In the circuit court, the defendant moved for summary judgment pursuant to *West Virginia Rules of Civil Procedure* ("*W.Va.R.C.P.*") Rule 56 [1978], arguing that if such a contract had been formed, its enforcement was barred by the statute of frauds requirement that contracts not to be performed within one year must be memorialized in some writing or memorandum. The circuit court granted summary judgment to the defendant, and we affirm the court's order.

[1]We point out that a *per curiam* opinion is not legal precedent. *See Lieving v. Hadley*, 188 W.Va. 197, 201 n.4, 423 S.E.2d 600, 604 n.4. (1992) ("*Per curiam* opinions . . . are used to decide only the specific case before the Court; everything in a *per curiam* opinion beyond the syllabus point is merely *obiter dicta* . . . . Other courts, such as many of the United States Circuit Courts of Appeals, have gone to non-published (not-to-be-cited) opinions to deal with similar cases. We do not have such a specific practice, but instead use published *per curiam* opinions. However, if rules of law or accepted ways of doing things are to be changed, then this Court will do so in a signed opinion, not a *per curiam* opinion.")

I.

Defendant Chapman began to operate an automobile racetrack known as the Ona Speedway in Ona, West Virginia in early 1995. Beginning in April 1995, plaintiff Fry was allowed to sell racing tires and fuel to race participants without a written agreement between the parties. On July 20, 1995, Chapman informed Fry that it would no longer be allowed to sell products at the racetrack.

On August 23, 1995, Fry filed this lawsuit against Chapman alleging that, in March 1995, the parties had entered into an oral three-year agreement for plaintiff Fry to sell racing tires and fuel at the racetrack. The plaintiff also alleged that it spent $17,600.00 on tires and equipment pursuant to the contract, and that the defendant had canceled the contract without cause. The plaintiff's complaint sought money damages.

After conducting limited discovery, the defendant moved for summary judgment contending that no contract existed between the parties, and asserting that if there was a contract, then the plaintiff's claims were barred by the statute of frauds' requirement that agreements "not to be performed within a year" must be in writing. *W.Va. Code*, 55-1-1 [1990].[2]

---

[2]The pertinent part of our statute of frauds, *W.Va. Code*, 55-1-1 [1990], states:

> No action shall be brought in any of the following cases: . . .
>
> (f) Upon any agreement that is not to be performed within a year; . . .
>
> Unless the offer, promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby or his agent. But the

consideration need not be set forth or expressed in the writing; and it may be proved (where a consideration is necessary) by other evidence.

In opposition to the motion for summary judgment, the plaintiff argued that a document signed in March 1995 by both parties and a distributor for the Goodyear Tire and Rubber Company (the "Goodyear document")[3] was a sufficient memorandum of an agreement between the parties. The plaintiff also argued that his partial performance of the alleged agreement took the agreement outside the requirements of the statute of frauds.

On March 1, 1996, the circuit court granted the defendant's motion for summary judgment and dismissed the plaintiff's cause of action with prejudice. The plaintiff now appeals the circuit court's order.

II.

We are asked in this case to consider the appropriateness of summary judgment under *W.Va.R.C.P.* Rule 56 [1978]. As we stated in Syllabus Point 1 of *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), we review a circuit court's entry of summary judgment *de novo.* The standard for granting summary judgment was established in Syllabus Point 3 of *Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y.*, 148 W.Va. 160, 133 S.E.2d 770 (1963) where we held:

> A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be

[3]The Goodyear document indicates that Goodyear agreed with the defendant to sell racing tires to the Ona Speedway (defendant Chapman) for a period of three years at certain prices. These tires would, however, be ordered by and delivered to plaintiff Fry at the racetrack. The Goodyear tire distributor, the plaintiff and the defendant signed the Goodyear document in acknowledgment of this arrangement.

> tried and inquiry concerning the facts is not desirable to clarify the application of the law.

In accord, Syllabus Point 1, *Fayette Co. National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997); Syllabus Point 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995); Syllabus Point 2, *Painter, supra*.

The plaintiff appeals the circuit court's summary judgment order on three grounds. First, the plaintiff asserts that an oral contract exists between the parties regarding the sale of racing tires and fuel, and that questions of material fact remain regarding the terms of the contract. Second, the plaintiff argues that the Goodyear document, signed by the plaintiff and the defendant, constitutes a memorandum of the contract which meets the statute of frauds' requirement that such agreements be in writing, signed by the party to be charged. Third, and alternatively, the plaintiff argues that it had partially performed the contract so that even if the Goodyear document is an insufficient memorandum, the statute of frauds' writing requirement is no longer applicable.

The defendant denies that a contract existed, but argues that even if a contract was formed between the parties, then that contract was for a period in excess of one year.[4] Accordingly, the statute of frauds requires that the "contract, agreement,

[4]The plaintiff and defendant dispute the existence of any contract. While this may constitute a question of fact sufficient to avoid summary judgment, we do not reach this question because we conclude that the enforcement of any such contract would be barred by the statute of frauds.

representation, assurance . . . or some memorandum or note thereof, be in writing and signed by the party to be charged thereby[.]" *See, W.Va. Code*, 55-1-1(f) [1990], *supra*, note 2.

We have previously stated that a writing, to be sufficient under a statute of frauds, must in some way refer to the terms of the agreement that is sought to be enforced.

> Every agreement required by the statute of frauds to be in writing must be certain in itself or capable of being made so by reference to something else, whereby the terms can be ascertained with reasonable certainty.

Syllabus Point 2, in part, *White v. Core*, 20 W.Va. 272 (1882). *Accord*, Syllabus Point 5, *Timberlake v. Heflin*, 180 W.Va. 644, 379 S.E.2d 149 (1989); Syllabus, *Harper v. Pauley*, 139 W.Va. 17, 81 S.E.2d 728 (1953). By "certain in itself," we mean that within its four corners the writing must contain or refer to the basic terms of the agreement:

> It is essential for the memorandum relied on to take the contract out of the operation of the statute [of frauds] that it contain every essential element of the agreement, except under our statute it need not state the consideration. In all other respects it must be a valid common law contract, having the element of certainty. Of course, that is certain which may be made certain. . . .

Milton Bradley Co. v. Moore, 91 W.Va. 77, 80, 112 S.E. 236, 237 (1922).

We have carefully reviewed the Goodyear document, and we conclude that the document does not contain the terms essential to the agreement alleged to exist between the plaintiff and defendant. There is nothing in the Goodyear document or any

other writing to suggest that the plaintiff will be the exclusive seller of those tires at the Ona Speedway; that the plaintiff will be allowed to operate a concession at the track for three years; that the plaintiff will be the exclusive seller of racing fuel at the track for three years; nor is there any indication that the alleged agreement can be terminated only for cause. Therefore, the Goodyear document does not serve to take the agreement out of the requirements of the statute of frauds. Accordingly, find that the circuit court could not have reasonably concluded that the Goodyear document was a proper writing under the statute of frauds.

The plaintiff further asserts that under the doctrine of partial performance, notwithstanding the statute of frauds, courts will enforce an oral contract which has been partially performed. Forester Fry (the owner of the plaintiff corporation) contended in an affidavit that after he entered into the oral agreement with the defendant, he formed the plaintiff corporation, obtained all necessary licenses, purchased equipment, bought tires and racing fuel, and operated the business at the defendant's racetrack for approximately three months. These acts, he contends, satisfy the partial performance doctrine.

The plaintiff relies upon *Kimmins v. Oldham*, 27 W.Va. 258 (1885) for the proposition that courts will avoid the application of the statute of frauds and will enforce an oral services or sale of goods contract which has been partially performed. We stated in Syllabus Point 2 of *Kimmins* that:

> It is well settled, that courts of equity will notwithstanding the statute of frauds enforce oral contracts for the sale of land which have been partially performed; and when the failure to complete the contract would operate as a fraud, *such courts* may exercise a similar jurisdiction with regard to chattels; but courts of law will not enforce such contracts contrary to the provisions of the statute.

The plaintiff points to Syllabus Point 3 of *Kimmins*, where we went on to state:

> But it is a general rule, that where one has rendered services, paid a consideration, or sold and delivered goods in execution of an oral contract, which on account of the statute [of frauds] can not be enforced against the other party, such one can in a court of law recover the value of the services or goods upon a *quantum meruit* or *valebant*.

Here we laid out the general rule for the part performance doctrine. However, we believe that the plaintiff's sole reliance upon Syllabus Point 3 of *Kimmins* is misplaced because in Syllabus Point 4 of *Kimmins* we qualified that general rule, providing that its application

> . . . is limited and confined to cases, in which the services rendered, the goods delivered or consideration paid inured to the benefit of the defendant; and in such cases the recovery is not upon the contract but upon the *quantum meruit* or *valebant* or upon the money counts.

In the instant case, we believe that the plaintiff cannot recover on a *contract theory* relying on *Kimmins*, but rather is entitled to recovery only on *quantum meruit* or *quantum valebant*. There is no evidence in the record to suggest that the plaintiff was denied the benefit of its sales of tires and fuel, or that it was not paid for any services rendered. Instead, it appears uncontroverted that the plaintiff received full compensation for the services it performed and the goods it sold.

We therefore conclude that, under our expression in *Kimmins* of the doctrine of part performance, the circuit court could not have reasonably concluded that the plaintiff was entitled to relief from the requirements of the statute of frauds.

Based upon the foregoing, the order of the circuit court granting summary judgment to the defendant is affirmed.

Affirmed.