

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2023-0432

L.T. CASE NO. 4D22-1979
062021CA007130AXXXCE

WILLIAM J. MITCHELL,

Petitioner,

v.

DAVID W. RACE,

Respondent. _____ /

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, William J. Mitchell, will be referred to as “Mitchell.”

Respondent, David W. Race, will be referred to as “Race.” Citations to the record are R. ____.

STATEMENT OF THE CASE AND FACTS

Race and Mitchell are both widely recognized throughout the videogame industry for their classic arcade achievements. R. 85, ¶2. Race and Mitchell had a falling out in September 2019 when Race, who had previously supported Mitchell, came to believe the videogame cheating allegations that had been made against Mitchell. R. 34. This case concerns 27 alleged telephone calls between Race and Mitchell, all of which took place while Race was located in Ohio and Mitchell was located in Florida. R. 33-34. Mitchell asserted that Race recorded their telephone calls without his knowledge or consent. R. 34. Mitchell allegedly learned of at least one of the recordings on October 7, 2020, after Race disclosed the substance of an April 1, 2018, call to Twin Galaxies and to its counsel. R. 35-36. Twin Galaxies is a third-party media entity that administers videogame records and also reports on the videogame industry. R. 35. At the time, Twin Galaxies was involved in litigation with Mitchell in California. R. 35.

On April 8, 2021, Mitchell filed his initial *Complaint* against Race asserting a cause of action against Race for interception and disclosure of a wire, oral, or electronic communication (the April 1, 2018, call) in violation of Section 934.10, *Florida Statutes*. Race filed a *Motion to Dismiss* the initial *Complaint* for lack of personal jurisdiction. Mitchell then filed his *First Amended Complaint* on January 4, 2022, alleging additional recorded telephone calls, which Race also moved to dismiss for lack of personal jurisdiction.

On or about April 11, 2022, Mitchell filed his *Second Amended Complaint* (the “Complaint”), again alleging additional recorded telephone calls, which is the operative complaint. R. 32-38. There was no allegation that the subject of the telephone calls was unlawful or improper. On May 10, 2022, Race filed his *Motion to Dismiss Second Amended Complaint for Lack of Jurisdiction* (the “Motion”). R. 71-82. On June 2, 2022, the trial court heard oral arguments on the Motion. On June 22, 2022, the trial court issued its *Order Denying Motion to Dismiss and Order to Answer and Corrected Order Denying Motion to Dismiss* (the “Order”). R. 4-5. Race timely appealed the Order to the Fourth District Court of Appeal (the “Fourth District”). R. 4-13.

On March 8, 2023, the Fourth District issued its opinion reversing the trial court's Order, and holding that Race lacked sufficient minimum contacts with Florida to require him to defend a lawsuit in Florida. R. 725-729. The Fourth District held that:

[T]o subject a defendant to an in personam judgment when he is not present within the territory of the forum, due process requires that the defendant have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Parthenais*, 554 So. 2d at 500 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

Where a defendant legally records a phone conversation in his home state, and has no other significant contacts with Florida, it offends traditional notions of fair play and substantial justice to require him to appear in Florida to defend against a lawsuit for an alleged violation of the Florida Security of Communications Act.

Race v. Mitchell, 357 So. 3d 720, 722-723 (Fla. 4th DCA 2023). The Fourth District certified an express and direct conflict of its opinion with *France v. France*, 90 So. 3d 860 (Fla. 5th DCA 2012). See *id.* at 723. On June 29, 2023, the Court accepted jurisdiction of the case. R. 745-746.

SUMMARY OF ARGUMENT

The Court should affirm the Fourth District's opinion as the trial court did not have personal jurisdiction over Race. The Complaint did not contain sufficient jurisdictional allegations to support the trial court's exercise of

jurisdiction over Race under Florida's Long-Arm Statute, as defined below. As admitted in the Complaint, Race was "located in the State of Ohio" when he recorded the subject telephone calls. R. 80, ¶ 9. The trial court found the alleged recordings to be "interceptions" contemplated by Chapter 934, *Florida Statutes*. It is undisputed that the only alleged tortious acts that Mitchell was attributing to Race were the acts of recording the telephone calls; Mitchell made no allegation that the substance and content of the telephone calls, in and of themselves, were tortious. Finally, in Ohio, where the recordings were made, mutual consent to such recordings is not required. Rather, pursuant to Ohio law, as with federal law, only one party's consent is required lawfully to record a telephone call. Accordingly, the jurisdictional allegations set forth in the Complaint, accepted as true, were not sufficient to support the trial court's exercise of jurisdiction over Race because Race did not commit any tortious acts in Florida.

Additionally, the Court should affirm the Fourth District's opinion that Race's contacts with the Florida did not satisfy the Due Process Clause of the United States Constitution. The allegations in the Complaint did not establish that there were sufficient minimum contacts between Race and Florida to satisfy due process requirements. Due process mandates that maintenance of an action in Florida must not offend traditional notions of fair

play and justice, and there must be a legitimate basis that would cause Race to reasonably anticipate being sued in Florida. Race had only visited Florida twice in the decade prior to the filing of the operative Complaint for reasons wholly unrelated to the claims at issue. R. 131, ¶ 4. Simply making telephone calls to an individual located in Florida and recording them in a state where such conduct is lawful are not acts that would reasonably cause Race to believe that he could be sued in Florida or that would justify a lawsuit against Race in Florida.

Based on the foregoing, the Court should affirm the Fourth District's opinion.

ARGUMENT

In evaluating whether it had personal jurisdiction over Race, the trial court was to evaluate: (1) whether the exercise of jurisdiction is appropriate under Florida's Long-Arm Statute, as defined below; and then (2) whether the exercise of personal jurisdiction violates due process. *Internet Sols. Corp. v. Marshall*, 39 So. 3d 1201, 1205 (Fla. 2010); *see also Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 500 (Fla. 1989). When evaluating the first part of the jurisdictional inquiry, "the court determines whether sufficient jurisdictional facts exist to support the exercise of jurisdiction under Florida's long-arm statute." *Kountze v. Kountze*, 996 So. 2d 246, 252 (Fla.

2nd DCA 2008), (citing *Parthenais*, 554 So. 2d at 502). Then, under the second part of the jurisdictional inquiry, the court evaluates whether the exercise of personal jurisdiction violates due process by conducting “a constitutional inquiry . . . to determine whether sufficient minimum contacts exist between the forum state and the defendant to satisfy the due process requirement that a nonresident defendant should reasonably anticipate being haled into court in Florida.” *Id.* (internal citations and quotations omitted).

If the first part of the jurisdictional inquiry is not satisfied, there is no need for the court to analyze the second part because *both* parts must be satisfied for the court to exercise jurisdiction over the defendant. “Failure to satisfy *either* inquiry means the forum state’s court does not have the authority to exercise jurisdiction over the defendant.” *Kountze*, 996 So. 2d at 251 (emphasis added).

As set forth herein, Mitchell failed to establish either part of the jurisdictional inquiry, much less both parts. Consequently, as held by the Fourth District, the trial court did not have authority to exercise jurisdiction over Race.

1. Race did not commit a tortious act in Florida under Section 48.193(1)(a)(2), Florida Statutes.

Mitchell argues that Race is subject to personal jurisdiction in Florida based upon Section 48.193(1)(a)(2), *Florida Statutes*, which provides as follows:

(1)(a) A person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from any of the following acts:

...

2. Committing a tortious act ***within*** this state.

Sec. 48.193(1)(a)(2), *Florida Statutes* (2022) (emphasis added) (the “Long-Arm Statute”).¹ The dispute between the parties is whether the alleged interception of telephone calls in Florida constitutes tortious acts within Florida that trigger personal jurisdiction. Mitchell contends they do. Race, on the other hand, argues that neither the statutory violation constituting an “interception” nor the simple act of placing a telephone call into Florida

¹ That a nonresident submits himself or herself to the jurisdiction of Florida Courts for any cause of action arising from the commission of a tortious act within this state was previously codified in Section 48.193(1)(b), *Florida Statutes*. Cases cited herein that refer to Section 48.193(1)(b), *Florida Statutes*, are referring to the same language now codified in Section 48.193(1)(a)(2), *Florida Statutes*.

constitutes an intentional tort necessary to trigger personal jurisdiction. Rather, for jurisdiction to be triggered, the substance of the telephone calls into Florida must constitute the intentional tort. There were no allegations in the Complaint that the substance or content of any of the recorded telephone calls were tortious. While the Fourth District did not expressly rule upon this issue, Florida jurisprudence supports Race's argument that the sole act of recording a telephone call does not result in a tortious act being committed within Florida sufficient to trigger jurisdiction under the Long-Arm Statute.

Mitchell argues that "interceptions" that occurred in Florida, standing alone, transformed Race's out-of-state act of recording his calls with Mitchell into a tortious act in Florida for jurisdictional purposes primarily based upon *Koch v. Kimball*, 710 So. 2d 5 (Fla. 2d DCA 1998). As is established below, while such "interceptions" may constitute a statutory violation, they do not constitute tortious actions within Florida for jurisdictional purposes.

In *Koch*, the Second District Court of Appeal (the "Second District") held that the actual "interception" of a telephone call occurred in the state where the plaintiff's statement was made and not in the state where the communication was heard and recorded. *Koch*, 710 So. 2d at 7. Mitchell's reliance on *Koch* is based upon footnote 11 of *Acquadro v. Bergeron*, 851 So.2d 665 (Fla. 2003), wherein the Court approved *Koch* because "the

decision held that a telephonic communication into Florida can constitute a tortious act under section 48.193(1)(b), [Fla. Stat. (1999)].” Mitchell’s reliance on the footnote approving *Koch* is misplaced as the Court held that such communication **can constitute** a tortious act but did not hold that it must always constitute a tortious act, as argued by Mitchell. Clearly, as set forth more particularly below, what matters is the substance of the telephonic communication and whether the substance of the communication constitutes the tortious act.

The Second District unanimously and expressly receded from its prior decision in *Koch* in *Kountze v. Kountze*, 996 So. 2d 246 (Fla. 2nd DCA 2008).² See *Kountze*, 996 So. 2d at 253. In *Kountze*, the Second District held that the Long-Arm Statute “does not provide a basis for personal jurisdiction over a foreign defendant who recorded the call from his Nebraska office without engaging in any actions inside Florida.” 996 So. 2d at 247. In receding from *Koch*, the Second District recognized that the cases that it “relied upon in *Koch* did not address a jurisdictional issue, but rather involved statutory interpretation of the term ‘interception.’ See, e.g., *State v. Mozo*,

² In *Kountze*, the plaintiff, who was located in Florida, sued the defendant, who was located in Nebraska, for recording a telephone conversation without the plaintiff’s permission under Chapter 934, Florida Statutes. See *Kountze*, 996 So. 2d at 247.

655 So.2d 1115, 1117 (Fla.1995); *United States v. Nelson*, 837 F.2d 1519, 1527 (11th Cir.1988).” *Kountze*, 996 So. 2d at 250. The Second District then held that “a defendant’s out-of-state act of recording [a] communication, standing alone, [is not transformed] into a tortious act within Florida for jurisdictional purposes.” See *id.* at 248. The Second District reasoned as follows:

Although a defendant's presence in Florida is not always required to support the exercise of personal jurisdiction, if we construe section 48.193(1)(b) strictly, as we are required to do, we are not convinced that ***the isolated act of recording a telephone call in another state*** in violation of a Florida statute is enough to constitute a “tortious act within this state” for purposes of the long-arm statute. We are admittedly influenced by the fact that the ***act was not illegal in the state where the defendant actually committed it and was not illegal under the federal law that would apply to interstate telephone calls.*** Under the circumstances, we follow the general rule that the existence of an injury within Florida, standing alone, is insufficient to support jurisdiction over an out-of-state tortfeasor.

The ramifications of the opposite holding should not be overlooked. If the legislature could create a statutory cause of action that deemed an action in another state to have occurred in Florida, and then use that deemed action as the basis to find tortious conduct in Florida justifying jurisdiction over the defendant, then section 48.193(1)(b) would permit practically any regulated act committed anywhere in the world affecting a person in Florida to subject the actor to the jurisdiction of the courts of Florida even if that person had no other contacts with the state. No doubt such a broad application of the statute would be held unconstitutional as applied in many scenarios under *Woodson*. ***We have no basis to believe that the legislature intended such an expansive interpretation of section 48.193(1)(b),*** and we decline to give it that interpretation today. We accordingly

recede from our decision in *Koch* to the extent we held that an extraterritorial violation of the Florida Security of Communications Act was sufficient, standing alone, to support personal jurisdiction over a foreign defendant under section 48.193(1)(b).

Id. at 252 (internal citations omitted) (emphasis added).

The holding in *Kountze* was later recognized and accepted by this Court in *Internet Solutions Corporation v. Marshall*, 39 So. 3d 1201 (Fla. 2010). In *Marshall*, the Court distinguished the facts at issue therein from the facts in *Kountze*, which are analogous to the facts *sub judice*. See *Marshall*, 39 So. 3d at 1208–09. The *Marshall* Court cited the *Kountze* Court’s conclusion that “a Florida statute that created a private cause of action for the nonconsensual interception of a communication originating within Florida could not transform the nonresident defendant’s out-of-state recording into a ‘tortious act within the state’ for jurisdictional purposes.” *Id.* at 1209 (quoting *Kountze*, 996 So. 2d at 248).

Further, the *Marshall* Court emphasized that the *Kountze* Court was “‘influenced by the fact that the act was not illegal in the state where the defendant actually committed it and was not illegal under the federal law that would apply to interstate telephone calls.’” *Marshall*, 39 So. 3d at 1209 (quoting *Kountze*, 996 So. 2d at 252). Such circumstances are different, the *Marshall* Court explained, “from cases in which a conversation was directed

into Florida over an interstate telephone call that was defamatory, fraudulent, or otherwise an element of a traditional intentional tort under the common law.” *Marshall*, 39 So. 3d at 1209 (citing *Kountze*, 996 So. 2d at 248). In those cases, because the conversation itself (as opposed to the simple act of recording it) constitutes a tortious activity, it satisfies the first part of Florida’s jurisdictional inquiry, i.e., that the exercise of jurisdiction is appropriate under the Long-Arm Statute. *See Marshall*, 39 So. 3d at 1209. Indeed, in virtually every case where personal jurisdiction is authorized under the Long-Arm Statute against a nonresident defendant who commits a tort outside of Florida there is “a communication directed into Florida for the purpose of fraud, slander, or other intentional tort.” *Wiggins v. Tigrent, Inc.*, 147 So. 3d 76, 86 (Fla. 2d DCA 2014).

The *Marshall* opinion is in line with this Court’s earlier ruling in *Wendt v. Horowitz*, 822 So. 2d 1252 (Fla. 2002). The *Wendt* Court held that “‘committing a tortious act’ in Florida under section 48.193(1)(b) can occur through the nonresident defendant’s telephonic, electronic, or written communications into Florida. **However, the cause of action must arise from the communications.** This predicate finding is necessary because of the connexity requirement contained in section 48.193(1).” 822 So. 2d 1252 at 1260.

Despite this depth of legal authority, Mitchell relies upon *France v. France*, 90 So. 3d 860 (Fla. 5th DCA 2012), which reluctantly held that the simple act of recording the telephone call was sufficient to trigger personal jurisdiction. See *France*, 90 So. 3d at 862-864. The *France* Court based its ruling on this Court's footnote in *Acquadro*, which was handed down seven years prior to *Marshall*, and which, as set forth above merely reflects that a call into Florida can constitute a tortious act but not that it automatically does. See *id.* Importantly, the substance of the telephone call at issue before the *Acquadro* Court was alleged to be defamatory. 851 So. 2d 670-671. Accordingly, finding personal jurisdiction based upon the substance of the telephone call constituting the tortious act is consistent with the analysis set forth by the Court in *Wendt* and *Marshall*.

Mitchell's reliance on *Koch*, as approved by *France* and *Acquadro*, for his argument that the "interception" occurred in Florida for purposes of jurisdiction is misplaced as the Second District expressly and specifically receded from *Koch* in *Kountze*, which analysis was later recognized by this Court in *Marshall*. While Mitchell may have received the telephone calls in Florida, the alleged tortious act was the recording of the calls by Race, which occurred in Ohio on Race's device, where such recording is lawful. There is no allegation that the substance of the communications was actionable.

Additionally, Mitchell's reliance on *State v. Mozo*, 655 So. 2d 1115 (Fla. 1995), is misplaced. *Mozo* involved privacy issues and did not address jurisdictional concerns. Adoption of the analysis set forth in *Marshall*, *Wendt* and *Kountze* in no way impacts the *Mozo* holding, which did not involve an out-of-state defendant.

While Race acknowledges the *France* decision, he contends that *Wendt*, *Marshall* and *Kountze* are the appropriate legal authority to determine the jurisdictional issue before the Court based on the specific facts and circumstances before the Court. Pursuant to that legal authority, a defendant's out-of-state act of recording a call (or numerous calls), standing alone, is not a tortious act within Florida for jurisdictional purposes. The cause of action must arise from the substance of the communication, not the simple act of recording the call. There were no allegations in the Complaint that the substance or content of the telephone calls that were recorded constitute a tort.

Race did not commit a tortious act in Florida under §48.193(1)(a)(2), Florida Statutes. Accordingly, Mitchell failed to satisfy the connexity requirement of Section 48.193(1), *Florida Statutes*, and the trial court lacked jurisdiction over *Race* under Florida's Long-Arm Statute. As such, the Fourth District's opinion should be affirmed.

2. There was no jurisdiction under the Due Process Clause.

“Florida courts may exercise personal jurisdiction of a nonresident defendant **only** if there are sufficient minimum contacts between the defendant and the state such that maintaining the action in Florida does not offend traditional notions of fair play and substantial justice.” *Wiggins*, 147 So. 3d at 85 (emphasis added); *see also International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (explaining that a defendant’s contacts with the forum state must be such that maintenance of the suit “does not offend traditional notions of fair play and substantial justice”) (internal quotations and citation omitted); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–94 (1980) (noting that the purpose of the minimum contacts test is to: (1) protect the defendant against the burdens of litigating in a distant or inconvenient forum; and (2) ensure that states do not overreach beyond their status as coequal sovereigns in a federal system). The Fourth District found that Race lacked sufficient minimum contacts with Florida to satisfy due process. *Race*, 357 So. 3d at 722. Despite Mitchell’s contention to the contrary, this holding should be affirmed as Race did not purposefully availed himself under the *Calder v. Jones*, 465 U.S. 783 (1984), effects test nor did Race have sufficient minimum contacts with Florida.

The nexus between Race and Florida is virtually nonexistent. Race has only visited Florida twice in the relevant decade (R. 131, ¶ 4), and Mitchell's only alleged basis for the trial court exercising personal jurisdiction over Race is that he allegedly initiated and recorded their telephone calls *while in Ohio* (R. 79-81, ¶¶ 4, 9–15). Moreover, Race does not own land or other property, reside, or work in Florida. R. 131, ¶¶ 2, 3. Thus, Race lacked sufficient minimum contacts with Florida to establish a basis for the trial court to exercise personal jurisdiction over him.

Mitchell attempts to avoid this fact by citing to: (1) the number of telephone calls that are purportedly at issue in this lawsuit between himself and Race; (2) text messages that were exchanged between the parties; (3) communications that allegedly were exchanged between Race and a few alleged Florida residents who are not parties to this lawsuit; and (4) a few social media posts made by Race. See Initial Brief, p.33. Even accepting these allegations as true, none of them are either relevant to the issues before the Court or sufficient to establish that Race had the requisite contact with Florida to satisfy the substantial requirements of the Due Process Clause.

As set forth by the United States Circuit Court of Appeals for the Eleventh Circuit in *Louis Vuitton Malletier v. Mosseri*, 736 F. 3d 1339 (11th

Cir. 2013), there is a three-part test to determine whether jurisdiction is proper under the Due Process Clause: “(1) whether the plaintiff’s claims ‘arise out of or relate to’ at least one of the defendant’s contacts with the forum; (2) whether the nonresident defendant ‘purposefully availed’ himself of the privilege of conducting activities within the forum state, thus invoking the benefit of the forum state’s laws; and (3) whether the exercise of personal jurisdiction comports with ‘traditional notions of fair play and substantial justice.’” See *Louis Vuitton Malletier*, 736 F. 3d at 1355 (internal citations omitted). Mitchell failed to satisfy the first two prongs of this test for which he bore the burden.

First, it is fundamental that Mitchell’s claims must have arisen out of or relate to Race’s contacts “with the forum”, which is Florida. As set forth above, Race did not commit an intentional tort in Florida. All the actions asserted by Mitchell took place in Ohio. Accordingly, jurisdiction is not proper under the Due Process Clause.

Second, Race did not “purposefully avail” himself of the “privilege of conducting activities within [Florida], thus invoking the benefit of [Florida’s] laws.” *Id.* As recognized by Mitchell, in cases involving intentional torts, courts have utilized two tests to determine whether a party purposefully avails himself of the privilege of conducting activities within the forum state:

(1) the “effects test,” as set forth in *Calder v. Jones*, 465 U.S. 783 (1984), and (2) the traditional minimum contacts test, as set forth in *Louis Vuitton Malletier*. It is clear under both of these analyses, that Race did not purposefully avail himself of the privilege of conducting activities within Florida such that he is subject to jurisdiction under the Due Process Clause.

The *Calder* “Effects Test”:

Under the “effects test,” purposeful avilment can be established when the tort: “(1) [was] intentional; (2) [was] aimed at the forum state; and (3) caused harm that the defendant should have anticipated would be suffered in the forum state.” *Louis Vuitton Malletier*, 736 F. 3d at 1356 (internal citations omitted). In *Walden v. Fiore*, 571 U.S. 277 (2014), the Supreme Court clarified the *Calder* test and held that emphasis on the injury suffered by the plaintiff is “misplaced”:

Calder made clear that mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant’s conduct connects him to the forum in a meaningful way.

571 U.S. at 289-290. The *Walden* Court held that the “‘minimum contacts’ analysis looks to the defendant’s contacts with the forum state itself, not the defendant’s contacts with persons who reside there.” *Id.* at 285. The *Walden*

Court made it clear that for purposes of determining jurisdiction, Mitchell (nor any other third party) cannot be the only link between Race and Florida:

But the plaintiff cannot be the only link between the defendant and the forum. Rather, it is defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.

To be sure, a defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.

Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State.

Id. at 285-286 (internal citations omitted).

The Complaint was devoid of any action of Race being connected in any way, much less a meaningful way, with Florida, absent Race's interaction with Mitchell and limited interactions with few other alleged Florida residents. This is because Race did not have any contacts with Florida. The sole basis for Mitchell's claim is Race's recording of telephone calls when Mitchell was located in Florida. There was no allegation that Race did anything else within Florida. In fact, the actions listed by Mitchell in the Initial Brief that do not form the basis of the lawsuit and are irrelevant, took place in other States – text messages sent by Race occurred in Ohio (Initial

Brief, p. 33), other phone calls recorded by Race occurred in Ohio (Initial Brief, p. 33), social media posts by Race occurred in Ohio (Initial Brief, p. 33). The act of recording the telephone calls is not sufficient for Race to have purposefully availed himself of the privilege of conducting activities within Florida such that he triggered jurisdiction of the trial court under the Due Process Clause. See *Estes v. Rodin*, 259 So. 3d 183 (Fla. 3rd DCA 2018)³ (holding that “because the only link between Appellees and Florida is the alleged injury to Appellants, Appellants failed to satisfy the purposeful availment prong of the due process analysis”).

Mitchell’s argument that jurisdiction is proper under the *Calder* “effects test” improperly shifts the jurisdictional analysis’ focus to Mitchell’s contact with Race and Mitchell’s contact with Florida. Such a shift was specifically rejected as improper by the *Walden* Court. See *Walden*, 571 U.S. at 1125. The cases upon which Mitchell relies are distinguishable from the facts *sub judice*. Both *Calder* and *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984), involved the widespread publication of libelous materials in the forum States

³ In *Estes*, the court found that simply posting allegedly defamatory comments on Facebook about the appellant was not sufficient to establish sufficient minimum contacts with Florida to satisfy constitutional due process requirements. Accordingly, to the extent Mitchell contends that Race’s Facebook posts, which were not alleged to be defamatory, create the requisite sufficient minimum contacts with Florida, such contention is meritless.

in which the plaintiffs resided, which the courts viewed as exploiting those forums. In *Licciardello v. Lovelady*, 544 F. 3d 1280 (11th Cir. 2008), the defendant used protected trademarked material on its website. In *Guvarev v. BuzzFeed, Inc.*, 253 F. Supp. 3d 1149 (S. D. Fla. 2017), the defendant intentionally posted defamatory articles on its social media platform. In this case, the only tortious action Mitchell is claiming Race committed was the act of recording the telephone calls, which he did in Ohio where such conduct is legal. The social media posts that are mentioned in the Initial Brief are not the basis for the claims in the lawsuit. Thus, unlike the cases upon which Mitchell relies, there was no connection between Race and Florida – the only connection to Florida is with Mitchell himself, which cannot be the sole basis for jurisdiction under the Due Process Clause. When he recorded the telephone calls, Race was not purposefully reaching beyond his home state and into Florida. He was conducting what he believed to be lawful activity, and which is lawful activity in Ohio.

As discussed above, Mitchell incorrectly relies on *Koch* to support its argument for satisfying the *Calder* “effects test,” because the Second District specifically receded from that decision. See *Kountze*, 996 So. 2d at 253. As described above, the Second District receded from *Koch* because the *Koch* Court relied on cases that addressed statutory interpretations of the term

“interception” and not personal jurisdiction. *Id.* at 250. The *Kountze* Court explained “[t]he theory that a recording in a distant location is an ‘interception’ inside Florida may be appropriate for some legal purposes, but [it] conclude[d] it is insufficient, standing alone, to support a claim that a person in a distant state or country committed a tortious act within Florida as required to support long-arm jurisdiction under section 48.193(1)(b).” *Kountze*, 996 So. 2d at 250.

As Race did not conduct any activities within Florida such that he invoked the benefit of Florida’s laws, Mitchell failed to satisfy the purposeful availment prong of the analysis.

The “Traditional Analysis”:

“Under the minimum contacts test for purposeful availment, [courts] assess the nonresident defendant’s contacts with the forum state and ask whether those contacts: (1) are related to the plaintiff’s cause of action; (2) involve some act by which the defendant purposefully availed himself of the privileges of doing business within the forum; and (3) are such that the defendant should reasonably anticipate being haled into court in the forum.” *Louis Vuitton Malletier*, 736 F. 3d at 1357. Despite Mitchell’s contention to the contrary, Race’s only “contact” with Florida that relates to Mitchell’s cause of action was Race’s relationship with Mitchell. The sole issue in this

lawsuit is whether Race violated Florida Statutes when he recorded the telephone calls in Ohio without Mitchell's consent while Mitchell was located in Florida. Exchanging text messages with Mitchell and having alleged telephone conversations with three (3) other Florida residents are not "contacts" with the State of Florida. If those types of "contacts" are sufficient to give rise to jurisdiction under the Due Process Clause, anyone could be subject to the jurisdiction of a foreign state simply because they made an innocuous phone call or sent a friendly text message to someone who lives therein. Race did not purposefully avail himself of the privileges of conducting activities within Florida such that he could have anticipated being haled into the trial court.

Mitchell asserts that the district court erred in not considering other contacts for purposes of this analysis. See Initial Brief, p.39. This contention is erroneous. Mitchell attempts to bolster Race's alleged "contacts" by listing numerous irrelevant alleged calls with other Florida residents and text messages between the parties. Despite these efforts, Mitchell still did not allege sufficient minimum contacts between Race and Florida to satisfy due process requirements.

Fair Play and Substantial Justice:

Finally, even though Mitchell did not satisfy his burden of proving the

first two prongs of the due process test, the exercise of jurisdiction over Race offends the traditional notions of fair play and substantial justice. See *Louis Vuitton Malletier*, 736 F. 3d at 1355 (holding that only if the plaintiff establishes the first two prongs of the test is the defendant required to demonstrate the “that exercise of jurisdiction violates the traditional notions of fair play and substantial justice”). As the Fourth District found, it would offend the traditional notices of fair play and substantial justice to require Race to appear in Florida to defend against this lawsuit. See *Race*, 357 So. 3d at 723. Race does not have any relevant contacts with Florida other than his relationship with Mitchell. Accordingly, the burden on Race to litigate in Florida outweighs any convenience for Mitchell to litigate in his home forum.

Based upon the foregoing, the Fourth District’s ruling that the trial court did not have jurisdiction over Race under the Due Process Clause should be affirmed.

3. The Fourth District’s denial of Mitchell’s request for appellate attorneys’ fees should be affirmed.

The Fourth District was correct to deny Mitchell’s motion for appellate attorney’s fees because there is no jurisdiction over Race and, therefore, the prevailing plaintiff attorney’s fees award under §934.10(1)(d), *Florida Statutes*, is not applicable.

AMICUS BRIEF OF THE ATTORNEY GENERAL

The Attorney General filed an Amicus Brief in support of Mitchell’s Initial Brief. In the Amicus Brief, the Attorney General agrees with Mitchell that the trial court had personal jurisdiction over Race under both the Long-Arm Statute and the Due Process Clause. As Mitchell did, the Attorney General conflated the act of recording the telephone calls with the substance of the conversation. The cause of action alleged in the Complaint – a violation of Section 934.10, *Florida Statutes* – did not “stem” from the conversation. See Amicus Brief, p. 10. Rather, the cause of action stemmed from the act of recording the telephone calls that took place in Ohio, where it was legal. As set forth above, this action is not a tortious act that can trigger jurisdiction under the Long-Arm Statute.

The Attorney General also argues that the trial court exercising personal jurisdiction over Race comported with the Due Process Clause because Race purposefully availed himself to jurisdiction in Florida and because jurisdiction did not offend traditional notions of fair play. See Amicus Brief, p. 14-15. The basis for its argument that Race availed himself to the trial court’s jurisdiction is the Attorney General’s assumption that Race committed an intentional tort. See *id.*, p. 15-24. As set forth above, Race did not commit an intentional tort because the simple act of recording the

telephone calls did not transform the action into a tortious act. Accordingly, the Attorney General's argument is meritless.

Finally, as set forth above, jurisdiction over Race does offend notions of fair play and substantial justice. While the Attorney General argues that the burden on Race is minimal because of modern technology and communication and the fact that the trial can be handled by counsel, such argument is baseless. In order to defend himself, Race would need to travel from Ohio to Florida, likely multiple times. As the Fourth District recognized, where a defendant legally records a phone conversation in his home state, where it was legal like Race, and there are no other significant contacts with Florida, "it offends traditional notions of fair play and substantial justice to require him to appear in Florida to defend against a lawsuit for an alleged violation of the Florida Security of Communications Act." *Race*, 357 So. 3d at 723.

For the reasons set forth above, the Fourth District's opinion holding that the trial court did not have personal jurisdiction over Race must be affirmed.

CONCLUSION

For the foregoing reasons, Race respectfully requests this Court to affirm the Fourth District's March 8, 2023, opinion, reversing the trial court's

denial of Race's Motion, and affirm the Fourth District's March 8, 2023, order denying Mitchell's requested for an award of attorneys' fees.

Respectfully submitted this 28th day of November 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of November 2023, that a true and correct copy of the foregoing was e-filed via the Florida Court e-portal system and served via email to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document complies with the applicable font and word count limit requirements set forth in Rule 9.045 and Rule 9.210 of the Florida Rules of Appellate Procedure.

/s/ Rebecca E. Rhoden _____
Rebecca E. Rhoden