

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2023-0432

L.T. CASE NO. 4D22-1979
2021-CA-007130

WILLIAM J. MITCHELL,

Petitioner,

v.

DAVID W. RACE,

Respondent.

AMENDED RESPONSE TO PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE ISSUES

The issue before the Court is whether there is conflict jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(vi), *Florida Rules of Appellate Procedure*, between the Fourth District Court of Appeal's Opinion in this case and the Fifth District Court of Appeal's opinion in *France v. France*, 90 So.3d 860 (Fla. 5th DCA 2012), which address the standard for personal jurisdiction for causes of action under the Florida Security of Communications Act. The issue is whether this Court should exercise its discretionary jurisdiction to resolve the perceived conflict between these two decisions.

STATEMENT OF THE CASE AND FACTS

Respondent and Petitioner are both widely recognized throughout the videogame industry for their classic arcade achievements. Respondent and Petitioner had a falling out in September 2019 when Respondent, who had previously supported Petitioner, came to believe the videogame cheating allegations that had been made against Petitioner. The facts in this case arose out of 27 alleged telephone calls between Respondent and Petitioner, all of which took place while Respondent was located in Ohio and Petitioner was located in Florida. Petitioner asserted that Respondent recorded their telephone calls without his knowledge or consent. Petitioner allegedly

learned of at least one of the recordings on October 7, 2020, after Respondent disclosed the substance of an April 1, 2018, call to Twin Galaxies and to its counsel. Twin Galaxies is a third-party media entity that administers videogame records and also reports on the videogame industry. At the time, Twin Galaxies was involved in litigation with Petitioner in California.

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

On or about April 11, 2022, Petitioner filed his *Second Amended Complaint* (the “Complaint”), again alleging additional recorded telephone calls, which is the operative complaint. On May 10, 2022, Respondent filed his *Motion to Dismiss Second Amended Complaint for Lack of Jurisdiction* (the “Motion”). 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”). Respondent timely appealed the Order to the Fourth District Court of Appeal (the “Fourth District”).

On March 8, 2023, the Fourth District issued its opinion reversing the trial court’s Order, and holding that Respondent lacked sufficient minimum contacts with Florida to require him to defend a lawsuit in Florida. 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.

Petitioner’s Appendix Tab A, p. 3.

On or about March 21, 2023, Petitioner filed its Notice to Invoke Discretionary Jurisdiction/Notice of Appeal to the Court.

ARGUMENT

Respondent acknowledges that the Fourth District certified a direct and express conflict between its opinion in the instant case and the opinion of the

Fifth District Court of Appeal (the “Fifth District”) in *France v. France*, 90 So.3d 860 (Fla. 5th DCA 2012). Respondent respectfully suggests that the Court’s opinion in *Internet Sols. Corp. v. Marshall*, 39 So. 3d 1201 (Fla. 2010), previously addressed and resolved any perceived conflict in the law regarding the subject jurisdictional issue prior to the opinion in *France* being rendered. Accordingly, it is unnecessary for the Court to exercise its discretionary jurisdiction to resolve the perceived conflict relating thereto.

The perceived conflict is based on two Second District Court of Appeal (the “Second District”) opinions, the latter of which expressly receded from the former, that the Court cited in two of its opinions. The first Second District opinion was *Koch v. Kimball*, 710 So. 2d 5 (Fla. 2d DCA 1998). In *Koch*, the Second District held that for purposes of the Florida Security of Communications Act, Chapter 934, *Florida Statutes* (the “Act”), the “interception” of the communication occurred where the communication was uttered, not where it was recorded. In a footnote to its opinion in *Acquadro v. Bergeron*, 851 So. 2d 665, 670, n. 11 (Fla. 2003), the Court cited *Koch* as an example of a decision that held that a telephonic communication into Florida could constitute a tortious act under Section 48.193(1)(b), *Florida Statutes*. The *Acquadro* Court, however, never addressed or expressly affirmed the specific holding in *Koch* relating to when the “interception” of the

communication occurred.

The second opinion was handed down in 2008, five years after the *Acquadro* decision. In *Kountze v. Kountze*, 996 So. 2d 246 (Fla. 2d DCA 2008), the Second District, in an *en banc* decision, unanimously receded from *Koch* and held that:

a Florida statute that creates a private cause of action for the nonconsensual interception of a communication originating within Florida cannot transform a defendant's out of state act of recording that communication, standing alone, into a "tortious act within the state" for jurisdictional purposes.

Kountze v. Kountze, 996 So. 2d 246, 248 (Fla. 2d DCA 2008). In *Marshall*, the Court recognized and accepted the holding in *Kountze* as clearly setting forth that a conversation directed into Florida over an interstate call must itself constitute the intentional tort in order to trigger personal jurisdiction. *Marshall*, 39 So. 3d 1208-09.

In 2012, after the Second District's opinion in *Kountze* receding from *Koch* had been issued and after the *Marshall* Court accepted the *Kountze* holding, the Fifth District rendered its decision in *France*, which is the basis of the perceived conflict. As the Second District had expressly receded from *Koch* at the time of the *France* holding there was no longer any valid Florida decision holding that, for purposes of the Act, the interception occurred where the statement was made rather than where it was recorded.

Notwithstanding this fact, in its opinion in *France*, the Fifth District, which made no mention of *Marshall*, relied on footnote 11 in *Acquadro*, which it interpreted as the Court affirming the Second District's holding in *Koch* rather than merely citing the decision as an example of a telephonic communication into Florida constituting a tortious act under Section 48.193(1)(b) *Florida Statutes*. After the Second District receded from *Koch* and rendered its *en banc* decision in *Kountze*, the Fifth District's decision in *France*, which admittedly came after *Marshall*, lacked its primary underpinning that an interception under the Act occurs where the statement was made rather than where it was recorded. Accordingly, the Fifth District's reliance on *Acquadro* was misplaced. The Court resolved the issue through its *Marshall* opinion, which thoroughly analyzed the *Kountze* holding.

Finally, the Fourth District's opinion is based on its determination that Respondent lacks sufficient minimum contacts with Florida to satisfy due process. See *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 500 (Fla. 1989). Accordingly, the Fourth District held that footnote 11 in *Acquadro*, which is the basis of the *France* decision, does not control its decision in this case because the footnote does not address the issue of minimum contacts under *International Shoe Co. v. Washington*, 362 U.S. 310 (1945). Rather it focuses on the different proposition that a "telephonic communication into

Florida can constitute a tortious act under Section 48.193(1)(b),” which is undisputed. The distinction in this case, pursuant to *Marshall* and *Kountze*, is that the telephone call itself was not the actionable tort.

CONCLUSION

The Fourth District’s opinion in the instant case properly follows the Court’s previously recognized holding that the “interception” of a communication occurs where the communication was recorded, not where it was uttered, as held by the *Kountze* Court. As such, it is unnecessary for the Court to exercise its discretionary jurisdiction based upon the perceived conflict.

Respectfully submitted this 2nd day of May 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May 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