

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.

RESPONSE TO PETITIONER'S BRIEF ON JURISDICTION

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ARGUMENT

Respondent acknowledges that the Fourth District Court of Appeals (the “Fourth District”) has certified a direct and express conflict between its opinion in the instant case and the opinion of the Fifth District Court of Appeals (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 Appeals (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.

Further, 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.

Based on the foregoing, 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 1st day of May 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st 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
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