

IN THE SUPREME COURT OF FLORIDA

Case No. SC2023-0432

L.T. Case Nos. 4D22-1979
062021CA007130AXXCE

WILLIAM J. MITCHELL,

Petitioner,

v.

DAVID W. RACE

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

March 31, 2023

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STATEMENT OF THE ISSUES

The issue is whether there is conflict jurisdiction under Article V, § 3(b)(3) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(vi) between the Fourth District's Opinion in the instant case and the Fifth District's opinion in *France v. France*, 90 So. 3d 860 (Fla. 5th DCA 2012) involving personal jurisdiction under the Florida Security of Communications Act, §§ 934.03(1), 934.02(1), 934.02(3), and 934.10(1) Fla. Stat. The Fourth District's Opinion certified direct and express conflict with *France*. The issue is whether this Court should review this case since discretionary review was granted in *France* but the case settled before resolution. The issue is also whether the Fourth District's opinion conflicts with *Acquadro v. Bergeron*, 851 So. 2d 665, 671 n.11 (Fla. 2003), which approved *Koch v. Kimball*, 710 So. 2d 5, 6-8 (Fla. 2d DCA 1998).

The issue is whether there is personal jurisdiction in Florida over Respondent, an Ohio resident, who recorded twenty-seven (27) phone calls with Petitioner, who is a Florida resident, without Petitioner's consent while Petitioner was located in Florida. Respondent also disclosed one recording to a third party without Petitioner's consent. The issue is also whether the Fourth District properly considered jurisdiction under the Due Process clause, including the trial court's ruling on long arm jurisdiction and whether

proper consideration was given to Race's contacts with Florida. Petitioner also seeks review of the order denying his motion for appellate attorney's fees under § 934.10(1)(d) Fla. Stat.

Accepting conflict jurisdiction will resolve the debate and confusion over whether and how an out-of-state defendant can be held liable for violations of the Florida Security of Communications Act.

PREFACE

Petitioner William J. Mitchell is referred to as “Mitchell”.

Respondent David W. Race is referred to as “Race”.

The Fourth District’s opinion in *Race v. Mitchell*, No. 4D22-1979, 2023 WL 2395832 (Fla. 4th DCA March 8, 2023) that is the subject matter of this brief is referred to as the “Opinion”.

STATEMENT OF THE CASE AND FACTS

Mitchell is a Broward County resident and holder of several video game records for the original Donkey Kong and Pac-Man. Race is an Ohio resident who also claims video game records. This case arises out of Race’s recording twenty-seven (27) phone calls with Mitchell without Mitchell’s consent in violation of the Florida Security of Communications Act, §§ 934.03(1), 934.02(1), 934.02(3), and 934.10(1) Fla. Stat.

Per the Florida Security of Communications Act, Florida is a two-consent state, meaning that consent of all parties is required to record a phone call. §§ 934.03(2)(d), 934.03(1), 934.10 Fla. Stat. Ohio allows a single party to record phone calls “if the communication is not intercepted for the purpose of committing a criminal offense or tortious act in violation of the laws or Constitution of the United States or this state or for the purpose of committing any other injurious act.” ORC § 2933.52(B)(4).

Mitchell learned in October 2020 that Race recorded a phone call on April 1, 2018 without his consent after Race voluntarily and without Mitchell's consent provided an edited recording of that call to Twin Galaxies, a video game media entity, without a subpoena. Mitchell filed suit in a California state court in Los Angeles against Twin Galaxies, a media entity, for defamation over statements that Mitchell cheated to obtain his records and Race is not a party to that case. The transcript of the call was filed with a declaration from Race. The *Twin Galaxies* case is still pending.

After learning via responses to requests for admission that Race recorded all of his calls with Mitchell, Mitchell amended to bring suit for 27 recorded calls. Race does not deny that he recorded the 27 phone calls. Mitchell was located in Florida for the 27 phone calls. The phone calls occurred from February 9, 2018 to September 17, 2019.

Race admitted that he knowingly recorded the April 1, 2018 phone call without asking Mitchell for his consent or permission. Race routinely records phone calls via a smart phone app. On October 15, 2019, Race posted a quote from www.justia.com on Facebook acknowledging that Florida is a two-consent state.

Race was initially supportive of Mitchell's position that he did not cheat on his video game records. He described this as "working" for "Team Billy",

which included communications between Race, Mitchell, and other Florida residents. Race and Mitchell exchanged 47 PDF pages of texts from February 9, 2018, to April 8, 2021, the majority of which were about Mitchell's Donkey Kong records and claims by Twin Galaxies that Mitchell cheated.

Race made numerous posts to Facebook and Twin Galaxies' website about Mitchell that were accessible in Florida starting in February 2018. After Race began to believe that Mitchell's scores were not legitimate in 2019, Race made a series of posts on Facebook and on his own YouTube channel titled "proveall" that called Mitchell a liar, cheater, and a fraud. These posts are accessible in Florida and continued after this lawsuit began in June 2021.

Race recorded multiple phone calls with three other Florida residents without their consent. He also exchanged numerous text messages, some of which were unsolicited, with other Florida residents about Mitchell, his video game records, and the *Twin Galaxies* case.

The trial court entered an order denying Race's motion to dismiss for lack of personal jurisdiction on June 22, 2022 after a hearing on June 2, 2022. Race did not argue due process at the hearing and effectively conceded at the hearing that the issue of long arm jurisdiction under § 48.193(1)(a)(2) Fla. Stat. was outcome-determinative. The trial court cited *France v. France*, 90 So. 3d 860, 864 (Fla. 5th DCA 2012) in the order and

held that its ruling was on long arm jurisdiction. *France* held that personal jurisdiction existed over an out-of-state defendant from a one-consent state who recorded a phone call with a Florida resident and cited *Acquadro v. Bergeron*, 851 So. 2d 665, 671 n.11 (Fla. 2003), which approved *Koch v. Kimball*, 710 So. 2d 5, 6-8 (Fla. 2d DCA 1998), in support.

Race appealed and the Fourth District entered the Opinion on March 8, 2023, which reversed the order denying Race’s motion to dismiss for lack of personal jurisdiction and certified direct and express conflict with *France*. The Fourth District held that Race lacks sufficient minimum contacts and:

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.

* * * * *

Unlike the Fifth District in *France*, we do not believe that footnote 11 in *Acquadro* controls our decision in this case. The footnote does not address the issue of minimum contacts under *International Shoe* but focuses on the different proposition that “a telephonic communication into Florida can constitute a tortious act under section 48.193(1)(b).” *Acquadro*, 851 So. 2d at 670 n.11.

We certify an express and direct conflict with *France*.

Opinion, p. 3, 4-5. This holding, as the Fourth District recognized, directly and expressly conflicts with *France*.

The Fourth District also denied Mitchell's motion for appellate attorney's fees by separate order on March 8, 2023. Section 934.10(1)(d) Fla. Stat. states that a plaintiff "shall be entitled to recover . . . a reasonable attorney's fees and other litigation costs reasonably incurred."

Mitchell brings this petition to review both the Opinion and the order denying his motion for appellate attorney's fees.

ARGUMENT FOR JURISDICTION

I. THE FOURTH DISTRICT CERTIFIED EXPRESS AND DIRECT CONFLICT WITH *FRANCE*

This Court has conflict jurisdiction under Article V, § 3(b)(3) and Fla. R. App. P. 9.030(a)(2)(A)(vi) because the Fourth District certified express and direct conflict with the Fifth District's decision in *France*.

In *France*, the plaintiff was located in Tampa when the defendant (his former wife), who was located in North Carolina (a one-consent state), recorded phone calls without the plaintiff's consent. The Fifth District, citing *Acquadro*, held that long arm jurisdiction existed:

Notwithstanding our aforesaid concerns, we feel compelled to reverse the trial court's dismissal order based on the Florida Supreme Court's express approval of *Koch* in *Acquadro v. Bergeron*, 851 So. 2d 665, 671 n.11 (Fla. 2003). In *Acquadro*, our supreme court held, inter alia, that alleged statements made by telephone into this state by a nonresident defendant, which allegedly resulted in plaintiff's false arrest and malicious prosecution, were sufficient to establish personal jurisdiction over the defendant. Significantly, the *Acquadro* court apparently

found *Koch* to have been correctly decided:

Similarly, the Second District in *Koch* considered whether a tape-recorded telephone call between a nonresident defendant and a Florida resident plaintiff could serve as the basis for personal jurisdiction under section 48.193(1)(b). The Second District held that the tortious act occurred in Florida because the interception occurred where the communication was uttered, and thus the nonresident defendant was subject to personal jurisdiction under section 48.193(1)(b). Thus, we *approve* the Second District's decision in *Koch* because like *Wendt*, the decision held that a telephonic communication into Florida can constitute a tortious act under section 48.193(1)(b).

851 So. 2d at 671 n.11 (emphasis added) (citations omitted). Based on this language, we conclude that the trial court erred in granting the former wife's motion to dismiss for lack of personal jurisdiction. We certify direct conflict with *Kountze*.

France, 90 So. 3d at 864, citing *Acquadro*, 851 So. 2d at 671 n.11 (emphasis in original). The Fourth District reached the opposite view. Opinion p. 5.

II. THE FOURTH DISTRICT'S OPINION CONFLICTS WITH ACQUADRO AND KOCH

The Fourth District's Opinion also conflicts with *Acquadro* by rejecting *Acquadro's* approval of *Koch*. Opinion, p. 4-5; *Acquadro*, 851 So. 2d at 671 n.11. *Acquadro* held that a defamatory phone call made out-of-state into Florida is sufficient for personal jurisdiction in Florida. *Acquadro*, 851 So. 2d at 670-671.

In *Koch*, the defendant was located in Georgia, a one-consent state,

and recorded a phone call without the consent of the plaintiff, who was in Tampa. *Koch* followed *State v. Mozo*, 655 So. 2d 1115, 1117 (Fla. 1995), which held that “the actual ‘interception’ of a communication occurs not where such is ultimately heard or recorded but where the communication originates.” *Id.*; *Koch*, 710 So. 2d at 6-7.

Koch held that personal jurisdiction existed under the long arm statute because “the key question then becomes where the communication was intercepted. Under the Act, the actual “interception” occurs not where the communication is ultimately heard (here, Georgia), but where the communication originates (Tampa). . . . Under this analysis, the interception occurred in Tampa, Florida, since that is where the recorded communication was uttered. Accordingly, the tort alleged, intentional violation of the Act, was committed in Florida.” *Koch*, 710 So. 2d at 7.

Koch further held that Due Process clause jurisdiction existed:

In *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), the court stated that where the nonresident defendant commits intentional and tortious acts that were expressly aimed at the forum state, the knowledge that the acts would have a devastating impact on the forum state and that the brunt of the acts would be felt in that state, that nonresident defendant “must have reasonably anticipated being haled into court there. We believe that the same analysis applies here. Since appellee alleged that appellant committed the intentional tort of violation of the Florida Security of Communications Act by expressly calling Florida with the knowledge that the only impact of her action would be in Florida, we conclude that appellant's

actions were not the random, fortuitous or attenuated actions that courts seek to avoid pinning jurisdiction upon.

Id.

Conflict exists because the Fourth District held that the Due Process clause was not met. Opinion, p. 3-5. In fact, the Fourth District did not address Race's other contacts with Florida, such as texts with Mitchell and other Florida residents, recording calls without consent of other Florida residents, and a negative social media campaign directed at Mitchell that is accessible in Florida. Opinion, p. 1-5.

III. THIS COURT PREVIOUSLY ACCEPTED REVIEW OF FRANCE DUE TO AN EXPRESS CONFLICT WITH KOUNTZE

Conflict jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(vi) existed in *France* and this Court accepted discretionary jurisdiction in *France v. France*, 107 So. 3d 404, no. SC12-1370 (Fla. 2012). *France* certified direct conflict with *Kountze v. Kountze*, 996 So. 2d 246 (Fla. 2d DCA 2008). *France*, 90 So. 3d at 864.

France was then settled by the parties after briefing but before oral argument, leaving the issues unresolved. Race cited this Court's discretionary review of *France* as part of its argument in the briefs before the trial court and the Fourth District to reject *France*, thereby conceding that conflict exists.

Kountze held en banc “ . . . 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” and receded from *Koch*. *Kountze*, 996 So. 2d at 252-253.

As the Fourth District’s Opinion and *France* recognizes, the express and direct conflict between *France* and *Kountze* arises from this Court’s approval of *Koch* in *Acquadro*. Opinion, p. 4-5; *Acquadro*, 851 So. 2d at 671 n.11; *France*, 90 So. 3d at 864.

IV. ORDER DENYING ATTORNEY’S FEES

Furthermore, conflict jurisdiction over the order denying appellate attorney’s fees exists because attorney’s fees are recoverable to a prevailing plaintiff under § 934.10(1)(d) Fla. Stat. and there is a conflict between the instant case and *France*, *Acquadro*, and *Koch*.

CONCLUSION

Conflict jurisdiction exists because the Fourth District certified direct and express conflict with *France* and because the Fourth District’s Opinion conflicts with this Court’s approval of *Koch* in *Acquadro*. This Court already granted discretionary review of *France* based on a certified conflict with *Kountze* but *France* was settled before an opinion could issue. Review will settle the confusion as to how and under what circumstances an out-of-state

defendant is subject to a claim for violation of the Florida Security of Communications Act.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Arial, 14 Point Font, in compliance with Rule 9.045 of the Florida Rules of Appellate Procedure. I further certify that this brief complies with the word count limit requirement of Rule 9.210(a)(2)(A) of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served through E-Service via the Florida Courts e-Portal filing system to James Toscano, Esq. James.Toscano@lowndes-law.com and Rebecca Rhoden, Esq. Rebecca.Rhoden@lowndes-law.com, Lowndes, Drosdick, Doster, Kantor & Reed, 215 North Eola Drive PO Box 2809, Orlando, FL 32802-4600 on this 31st day of March 2023.

/s/ James A. Stepan

James A. Stepan