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IN THE SUPREME COURT OF FLORIDA

Case No. SC2023-0432

L.T. Case Nos. 4D22-1979
062021CA007130AXXXCE

WILLIAM J. MITCHELL,

Petitioner,

v.

DAVID W. RACE,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

February 8, 2024

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Race committed tortious acts in Florida because the interceptions occurred here under the plain language of Chapter 934 Fla. Stat. (2018-2024), *State v. Mozo,* 655 So. 2d 1115, 1117 (Fla. 1995), and the other authorities cited by Mitchell. Chapter 934 Fla. Stat. (2018-2024) should not be interpreted differently in the context of jurisdiction than in other instances. Race created numerous contacts with Florida such that due process is met under both the *Calder v. Jones* effects test and minimum contacts. Litigating here does not offend fair play and substantial justice.

ARGUMENT

I. RACE COMMITTED TORTIOUS ACTS IN FLORIDA UNDER § 48.193(1)(a)(2) FLA. STAT.

A. RECORDING CALLS WITHOUT CONSENT IS A TORTIOUS ACT UNDER § 934.10(1) FLA. STAT.

Race incorrectly argues that the "substance" of the recorded calls needs to be tortious. There is no requirement in Chapter 934 Fla. Stat. (2018-2024) that the substance of a phone call recorded without consent needs to be tortious to be actionable under § 934.10(1) Fla. Stat. (2018-2024). That is, the plain language of Chapter 934 Fla. Stat. (2018-2024) does not divide phone calls recorded without consent into substantively tortious and substantively non-tortious. *E.g., White v. Mederi Caretenders,*

226 So. 3d 774, 779-780 (Fla. 2017) ("To determine the legislative intent we look to the plain language of the statute."); *McCloud v. State,* 260 So. 3d 911, 914-919 (Fla. 2018); *State v. Peraza,* 259 So. 3d 728, 730-733 (Fla. 2018).

Instead, the act of recording phone calls without consent, along with disclosing or using such recorded calls, ***is*** tortious. Sections 934.03(1)(a)-(e), 934.03(2)(d); 934.02(18), and 934.02(2)-(3) Fla. Stat. (2018-2024) provide that it is unlawful to intercept a telephone call without the prior consent of all parties to the call. Section 934.03(2)(d) (2018-2024) states "it is lawful under this section and §§ 934.04-934.09 for a person to intercept a wire, oral, or electronic communication when ***all*** of the parties to the communication have given prior consent to such interception." *Id.* (emphasis added). Sections 934.10(1)(a) (d) Fla. Stat. (2018-2024) provides for a civil action for preliminary, equitable, or declaratory relief, actual or statutory damages, punitive damages, and attorney's fees and costs to the plaintiff only. Thus, Race's position is directly contrasted by the plain language of Chapter 934 Fla. Stat. (2018-2024).

Race does not define the supposed difference in "substance" between a tortious and untortious phone call recorded without consent, which in of itself is telling, but there is no need to entertain such a hypothetical distinction given the plain language of Chapter 934. That is, any unconsented to

recorded phone call is tortious unless the exceptions in § 934.10(2) Fla. Stat. (2018-2024) apply, such as law enforcement obtaining a court order to intercept phone calls per § 934.09 Fla. Stat. (2018-2024).

Race also argues that the second amended complaint does not allege the recorded calls were tortious. But Mitchell brings suit under § 934.10(1) Fla. Stat. (2018-2024) and alleges that Race recorded 27 calls without his consent in violation of §§ 934.03(1)(b)(i), 934.02(1), and 934.02(3) Fla. Stat. (2018-2024), disclosed the contents of the calls to a third party (Twin Galaxies) without his consent in violation of § 934.03(1)(c) Fla. Stat. (2018-2024), and used the contents of the intercepted calls knowing that the information was obtained through interception in violation of § 934.03(1)(d) Fla. Stat. (2018-2024). R. 603-641.

B. THE INTERCEPTIONS OCCURRED IN FLORIDA

Race acknowledges that his interception of the 27 phone calls "may constitute a statutory violation" while simultaneously contending that these violations of § 934.10(1) Fla. Stat. (2018-2024) "do not constitute tortious actions within Florida for jurisdictional purposes." Answer brief, p. 8. This position does not make sense.

First, acknowledging that Mitchell alleges a statutory violation of § 934.10(1) Fla. Stat. (2018-2024) should end the debate because the issue

at the jurisdictional stage is "whether the tort *as alleged* occurred in Florida, and not whether the alleged tort actually occurred." *Osi Industries v. Carter,* 834 So. 2d 362, 367-368 (Fla. 5th DCA 2003) (emphasis added); *NHB Advisors v. Czyzyk,* 95 So. 3d 444, 448 (Fla. 4th DCA 2021); *Gold v. Rosen,* 338 So. 3d 948, 948 (Fla. 3d DCA 2021); *Internet Solutions Corp. v. Marshall,* 39 So. 3d 1201, 1215 (Fla. 2010) ("[T]he statutory prong of the jurisdictional analysis bestows broad jurisdiction on Florida courts.").

Race incorrectly argues that the tortious acts were the recording of calls by Race in Ohio. Answer brief, p. 13. For the reasons discussed in the initial brief, the interceptions occurred in Florida, where Mitchell was located when he spoke with Race on the 2 phone calls. This is due to the plain language of the statutory definitions of "intercept", "oral communication", and "aural transfer" in §§ 934.02(2), (3), (18) Fla. Stat. (2018-2024) and in *State v. Mozo,* 655 So. 2d 1115, 1117 (Fla. 1995), *Koch v. Kimball,* 710 So. 2d 5, 6-8 (Fla. 2d DCA 1998), *France v. France*, 90 So. 3d 860, 864 (Fla. 5th DCA 2012), and this Court's approval of *Koch* in *Acquadro v. Bergeron,* 851 So. 2d 665, 670 n.11 (Fla. 2003).

As recognized in *Koch,* it is also consistent with the definition of "wire communication" in § 934.02(1) Fla. Stat. (2018-2024) because a "wire communication means any aural transfer" and the aural transfer in this

situation was Mitchell in Florida speaking with Race. *Koch,* 710 So. 2d at 7. The definition of "wire communication" also includes the language transmission of intrastate, interstate, or foreign communications or communications affecting intrastate, interstate, or foreign commerce", which shows that the Florida Legislature anticipated that interstate communications are subject to Chapter 934 and allow for a civil action under § 934.10(1) Fla. Stat. (2018-2024).

Race also tries to distinguish *Mozo* by arguing that *Mozo* involved privacy and not jurisdiction. This is a distinction without a difference because *Mozo* held that an interception under § 934.02(3) Fla. Stat. occurs where the speaker speaks, not where a call is recorded, and the issue is whether the tort as alleged occurred in Florida. *Mozo,* 655 So. 2d at 1117; *Hentz v. State,* 62 So. 2d 1184, 1192 (Fla. 4th DCA 2011); *Osi,* 834 So. 2d at 367-368. Privacy is a component since Chapter 934 exists to protect privacy. § 934.01(4) Fla. Stat. (2018-2024).

Furthermore, the definition of intercept in § 934.02(3) Fla. Stat. (2018-2024) is the *same* for criminal cases involving evidence admission or suppression and civil cases under § 934.10(1) Fla. Stat. (2018-2024). As such, *Mozo* and the plain language of Chapter 934 Fla. Stat. hold that the interceptions occurred in Florida, which means that Race committed a

tortious act in Florida. The State of Florida advocates for the same conclusion. Amicus brief, p. 7-8. Indeed, to hold otherwise *requires a reversal of Mozo,* which will upend search and seizure law.

Race further argues that the word "can" in the language in *Acquadro* approving *Koch* does not mean that jurisdiction should exist in every instance. The sentence in question is:

> 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).

Acquadro, 851 So. 2d at 670 n.11 (emphasis added).

This is a semantic argument that tries to turn the word "can" into the word "maybe" or "no" despite the approval of *Koch* in *Acquadro,* the statutory language of Chapter 934, and Race's acknowledgment that a statutory violation was alleged. Answer brief, p. 8. It also distracts from the main issue, i.e. whether there is jurisdiction over Race in this case, not whether there is a hypothetical factual scenario where long arm jurisdiction does not exist. Also, a putative out-of-state defendant contesting jurisdiction in a § 934.10(1) Fla. Stat. case can argue due process. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502-503 (Fla. 1989).

C. *KOUNTZE* DOES NOT CONTROL THE OUTCOME

In essence, Race's long arm jurisdiction argument boils down to

advancing *Kountze v. Kountze,* 996 So. 2d 246 (Fla. 2d DCA 2008), as the controlling authority. This is not a correct statement of the law for the reasons set forth in the initial brief. In fact, the Second District should not have issued *Kountze* in the first place because of this Court's approval of *Koch* in *Acquadro*, the plain language of Chapter 934 Fla. Stat., and *Mozo.* It is unclear whether the Second District even considered *Acquadro's* approval of *Koch* since it is not mentioned in the opinion. *Kountze,* 996 So. 2d at 252.

Race relies on *Kountze* to argue that an interception under § 934.02(3) Fla. Stat. (2018-2024) is somehow different when considered for jurisdictional purposes as opposed to liability or other issues. *Kountze,* 996 So. 2d at 250 ("The cases we relied upon in *Koch* did not address a jurisdictional issue, but rather involved statutory interpretation of the term "interception." The theory that a recording in a distant location is an "interception" inside Florida may be appropriate for some legal purposes, but we conclude 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 does not explain how it can construe the same statutory definition of intercept in § 934.02(3) Fla. Stat. (2018-2024) to mean one thing when examining whether an interception occurs and mean something else

in the context of committing a tortious act in Florida. *Id.* at 250-251. Section 934.02(3) Fla. Stat. (2018-2024) means the same thing in either situation (or in other situations) and the all-consent requirement has existed in Florida since 1974. Amicus brief, p. 3-6; *State v. Tsavaris*, 394 So. 2d 418, 422 (Fla. 1981), receded from in part on other grounds by *Dean v. State,* 478 So. 2d 38, 40-41 (Fla. 1985). *Kountze* therefore did not properly consider the plain language of the statutes. *White,* 226 So. 3d at 779-780.

Instead, *Kountze* was an outcome-oriented decision that, in addition to being factually distinct due to the number of phone calls and contacts by Race with Florida, also presupposed a choice of law determination at the motion to dismiss for lack of personal jurisdiction stage. But that issue was not decided in *Kountze* and was not done in this case either. *Kountze,* 996 So. 2d at 248-253; *Bishop v. Florida Specialty Paint Co.,* 389 So. 2d 999, 1000-1001 (Fla. 1980); R. 51-71; R. 118-129; R. 275-296.

Race also incorrectly argues that this Court approved *Kountze* in *Internet Solutions.* However, all this Court did was to recite the holding as part of a discussion of the case law and did not approve or reject *Kountze. Internet Solutions,* 39 So. 3d at 1208-1209. Under the heading "Relevant Case Law Applying Section 48.193(1)(b) to Telephonic, Electronic, or Written Communications*",* this is what is contained in *Internet Solutions:*

> In a case on a similar topic but with distinguishable facts, the Second District Court of Appeal in an en banc decision held that the out-of-state recording of a phone call originating in Florida did not constitute the commission of a tortious act within the state. *Kountze v. Kountze,* 996 So.2d 246 (Fla. 2d DCA 2008). The court receded from a previous case in which it had decided that the defendant's "interception" of the telephone call occurred at the point of origin in Florida and not at the point of reception and recording in the foreign state. *Id.* at 247. The court instead concluded 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 248. The court was "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." Id. at 252. In its holding, the court distinguished the case 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. *Id.* at 248.

Id. This is not an approval and is just a review of the case law.

While Race cites *Internet Solutions* and *Wendt v. Horowitz,* 822 So. 2d 1252 (Fla. 2002), these cases do not help him. *Internet Solutions* held that an out-of-state defendant commits defamation in Florida by posting defamatory material that is accessible and accessed in Florida. The clicking to make the posts was done out of state, as is Race's claim that he recorded the 27 calls out of state, but there was a tortious act within Florida. *Internet Solutions,* 39 So. 3d at 1208, 1216. *Wendt* supports jurisdiction because it held that telephonic communications can be tortious acts in Florida. *Wendt,*

822 So. 2d at 1260. Race's tortious act of recording calls is inseparable from, and thus directly arises from, his electronic and telephonic communications into Florida.[1] R. 603-641.

II. THERE IS JURISDICTION UNDER THE DUE PROCESS CLAUSE

A. THE *CALDER v. JONES* EFFECTS TEST

The *Calder v. Jones,* 465 U.S. 783, 790 (1984) effects test is met and Race's contacts with Florida are not random, fortuitous or attenuated. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 486 (1985). *Walden v. Fiore,* 571 U.S. 277, 291 (2014) does not help Race because of the contacts with Florida that *he* created. *Id.* ("The proper focus of the "minimum contacts" inquiry in intentional-tort cases is the relationship among the defendant, the forum, and the litigation. And it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State.").

Mitchell is not, as Race contends, focusing on Mitchell's contacts with Florida. Rather, Race *chose* to (i) record 27 phone calls with Mitchell, who

[1] "The determination of whether certain acts constitute communications into Florida is straightforward when the case concerns telephonic communications, written communications, or electronic communications in the form of e-mails or facsimiles, because those communications are directed to reach a specific recipient in a specific forum; in other words, it is clear that the nonresident defendant's communications were made into Florida." *Internet Solutions,* 39 So. 3d at 1208.

he knew resided in Florida, without consent including calls made by Race into Florida (ii) post false and derogatory statements on Facebook about Mitchell that were accessible and accessed in Florida, including the July 4, 2021 post calling Mitchell a liar, cheater, and a fraud, and post on October 15, 2019 that his actions were illegal; (iii) post false and derogatory statements about Mitchell on other websites including YouTube and Twin Galaxies' website that were accessible and accessed in Florida; (iv) record calls with three other Florida residents (that Mitchell knows of) without their consent; (v) exchange 46 pages of texts with Mitchell over 3 years about Mitchell and his video game records, 33 pages of texts with Florida resident Robert Childs over 2 ½ years about Mitchell and his video game records, 22 pages of texts with Florida resident Chris Ayra about games and Mitchell over 8 years; and (vi) work for "Team Billy" before deciding to turn on him. The social media and internet posts were directed at Florida because Race knew Mitchell is a Florida resident. R. 216-219, ¶ 5-14, 24-25; R. 603-641; R. 216-218, ¶ 5-15; R. 642-643, ¶ 2-5; R. 301-302, ¶ 26-31; R. 304-349; R. 424-463; R. 552-554, ¶ 4-18; R. 571-578; R. 511-550, ¶ 1-11; R. 469, ¶ 14-15; R. 579-580, ¶ 3-7; R. 581-583; R. 586-589; R. 601-602, ¶ 1-8; R. 215-225, ¶ 6-15, 24-25, 33-49, 51, 57, 60, 68-71.

Each false social media and internet post made by Race alone is

enough for jurisdiction in a defamation case. *Internet Solutions,* 39 So. 3d at 1203, 1216. Race's contacts that are not the 27 recorded calls do not need to be the basis for the lawsuit for due process. *Ford Motor Company v. Montana Eighth Judicial District Court,* 141 S.Ct. 1017, 1026 (2021).

Likewise, *Walden* involved facts that do not exist here. When the plaintiffs boarded a flight from San Juan to Atlanta, security found almost $97,000 in cash in their luggage, which they claimed was from gambling wins. The cash was then seized at the Atlanta airport by a DEA agent, the plaintiffs flew back to Nevada, and the money was later returned to them. The plaintiffs then filed suit in federal court in Nevada against the DEA agent, who was a deputized police officer for a city near Atlanta, claiming improper seizure of the cash. There was no claim of electronic communications into Nevada. The Supreme Court held that the defendant did not have minimum contacts with Nevada because his "relevant conduct occurred entirely in Georgia." *Walden,* 571 U.S. 277 at 279-281, 285-286, 290-291.

This is not the same situation because there were interceptions in Florida and Race engaged in numerous other contacts with Florida. In fact, the Eleventh Circuit rejected an argument that *Walden* prevented jurisdiction in *Skyhop Technologies v. Narra,* 58 F.4th 1211, 1228-1232 (11th Cir. 2023). The plaintiff sued for, inter alia, federal and Florida computer fraud and abuse

against a California corporation and a California resident based on emails sent to the plaintiff in Florida. The emails constituted tortious acts in Florida, the plaintiff's claims arose out of the emails, and the emails were purposeful availment to Florida. *Id.*

In particular, the court distanced the facts from *Walden* because the plaintiff's claims arose out of and related to the defendants' contacts:

> Indyzen responds by citing *Walden* for the proposition that "the plaintiff cannot be the only link between the defendant and the forum." We agree that that is an accurate statement of the law. But it doesn't help Indyzen here. In *Walden*, Nevada-resident plaintiffs sued a Georgia-based Drug Enforcement Administration agent in Nevada after an incident that occurred wholly at the Atlanta Hartsfield-Jackson Airport. So there, the defendant's conduct provided no connection to the forum state. By contrast, here, through its emails sent to SkyHop in Florida, Indyzen directed its conduct into Florida. And that very same conduct serves as the basis for the claims SkyHop brings against it. So *Walden* does not apply here.

Id. at 1229; *Baronowsky v. Mairoano,* 326 So. 3d 85, 89 (Fla. 2d DCA 2021). Race's phone calls, texts, internet postings, and social media postings into Florida are no different than the emails in *Skyhop.* R. 216-219, ¶ 5-15, 24-25; R. 221-225, ¶ 39-50, ¶ 63-71; R. 298, ¶ 3; R. 300, ¶ 18, 20; R. 302, ¶ 26-31; R. 303-349; R. 497, ¶ 66; R. 376; R. 424-463; R. 466-468, ¶ 6, 8, 11; R. 469, ¶ 14-15; R. 486, ¶ 29; R. 500-507; R. 552-554, ¶ 4-18; R. 556-578; R. 511-513, ¶ 1-11; R. 515-550; R. 579-580, ¶ 5; R. 584-589; R. 579, ¶ 3-4; R. 581-583; R. 601-602, ¶ 1-8; R. 604-605, ¶ 9, 13; R. 634-643; R. 646.

Race also cites *Estes v. Rodin,* 259 So. 3d 183 (Fla. 3d DCA 2018) but, as held in *Baronowsky*, *Estes* did not find jurisdiction because there was no evidence that anyone in Florida read the subject defamatory statements made in a closed Facebook group. *Baronowsky,* 326 So. 3d at 90 ("The [*Estes*] court discounted the claim that the defendants' comments could have caused reputational harm to the plaintiff in Florida because there was no proof that anyone in Florida had read them. Thus, unlike in this case and *Calder,* there was no connection among the defendants' conduct, the reputational injury to the plaintiff, and the forum state."). Race's social media and internet posts are open and accessible and, per the record cites above, Florida residents *read* Race's texts, social media, and internet posts.

B. MINIMUM CONTACTS

Race does not cite any case law for his belief that text messages with Mitchell and other Florida residents or recording calls with other Florida residents are not contacts with Florida. This is not surprising because these electronic and phone contacts are no different than the emails in *Skyhop* or and the same as the phone calls in *Acquadro* and *Wendt.* Text messages are as commonplace as emails and emails can already serve as sufficient contacts. *Skyhop,* 58 F.4th at 1228-1232. Race does not deny recording calls with other Florida residents and instead tries to downplay these

contacts as irrelevant. Answer brief, p. 23. Race does not mention his internet and social media posts, each of which would be enough contact for defamation, trademark infringement, or other claims. *Internet Solutions,* 39 So. 3d at 1215-1216; *Licciardello v. Lovelady,* 544 F.3d 1280, 1285-1288 (11th Cir. 2008). Race does not address the minimum contacts factors either. *Louis Vuitton Malletier v. Mosseri,* 736 F.3d 1339, 1357 (11th Cir. 2013).

C. JURISDICTION MEETS WITH FAIR PLAY AND SUBSTANTIAL JUSTICE

Race again tries to downplay the situation by claiming that he has no contacts "other than his relationship with Mitchell." Answer brief, p. 24. This is a euphemistic description for his negative (and entirely voluntary) social media and internet campaign against Mitchell and does not take into consideration his recording other Florida residents without consent and other contacts. Since Race can litigate via his Florida counsel and obtaining a flight to South Florida for the trial is not difficult, there is no undue burden on him to litigate here. All hearings to date have been via Zoom and Race has attended several of those hearings.

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) of the Florida Rules of Appellate Procedure.

/s/ James A. Stepan
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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 carol.anderson@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 and Thomas Hunker thomas.hunker@hunkerappeals.com and Ashley Paxton ashley.paxton@hunkerappeals.com HunkerPaxton Appeals and Trials, 1 East Broward Boulevard, Suite 700, Fort Lauderdale, FL 33301 and Robert Scott Schenk robert.schenck@myfloridalegal.com and jenna.hodges@myfloridalegal.com Office of the Attorney General, The Capitol, PL-01 Tallahassee, Florida 32399 on this 8th day of February 2024.

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