IN THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA
FIFTH DISTRICT
Appeal Case No.: 5D18-0537
Lower Tribunal Case No.: 05-2016-CA-013866

SKYDIVE SPACE CENTER, INC.
and CRISTOPHER PARENTE,

Appellant(s),

v.

HENRI POHJOLAINEN, DAVID STROBEL and
TANDEM SOLUTIONS, INC. D/B/A WINGS TANDEM

Appellee(s).

APPELLEE, HENRI POHJOLAINEN'S, ANSWER BRIEF

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III. PREFACE

Appellants, Skydive Space Center, Inc. and Cristopher Parente[1], are the plaintiffs below and will be referred to individually as "Skydive Space Center" and "Parente" respectively, and collectively as "Skydive." Appellee, Henri Pohjolainen was a defendant below and will be referred to as "Pohjolainen." Co-defendants, David Strobel and Tandem Solutions, Inc. d/b/a Wings Tandem will be referred to as "Strobel" and "Wings" respectively.

The Record on Appeal will be referred to as "R (page number)." Deposition transcripts will be cited as "Depo. (deponent's last name), p. ___."

IV. STATEMENT OF THE CASE AND OF THE FACTS

A. Statement of The Case

Appellants, Skydive Space Center, Inc. ("Skydive Space Center") and Cristofer Parente ("Parente") (collectively "Skydive"), filed suit against appellee, Henri Pohjolainen ("Pohjolainen"), and others on February 3, 2016. (R14-18). The one-count amended complaint alleged that the defendants, including Pohjolainen, violated Fla. Stat. § 934.03. That statute prohibits specific acts relating to the interception, use, and disclosure of oral communications.[2]

[1] The pleadings below identify this appellant as "Cristofer" Parente (R1728-1734).
[2] Although Fla. Stat. § 934.03 also prohibits the interception, use, or disclosure of wire and electronic communications, this case relates solely to the alleged interception, use, and disclosure of an oral communication.

After discovery revealed no basis for Skydive's claim against him, Pohjolainen filed a motion for summary judgment (hereafter "First Motion for Summary Judgment") on October 17, 2016. (R180-183). Skydive opposed the First Motion for Summary Judgment on the basis that it was premature and identified certain additional discovery it wished to conduct. (R511-548). Specifically, Skydive wished to take depositions of David Strobel, Nina Luoto, Wing's corporate representative, an IT person employed by Wings and certain related entities, Giuseppe Crott, United Parachute Technologies, United State Parachute Association "and [engage in] any other relevant discovery based on documents or their testimony, including non-parties." (R511-548, *see* p.9–10 of Skydive's response in opposition to Pohjolainen's motion for summary judgment).

Finding Pohjolainen's First Motion for Summary Judgment to be premature, the trial court denied it without prejudice for Pohjolainen to re-file it "after additional discovery and depositions have occurred." (R549-550). In the months that followed, Skydive conducted extensive discovery[3] and filed two motions for leave to amend its complaint on May 16, 2017 (R607-629) and August 8, 2017 (R856-

[3] Between the date on which Pohjolainen filed his First Motion for Summary Judgment and April 28, 2017, Skydive received responses to three sets of interrogatories (R556-557, R561, R597-598) and four sets of requests for production (R591-593, R594-596, R603-604, R605-606). Following the lower court's denial of Pohjolainen's First Motion for Summary Judgment, Skydive conducted five additional depositions the last of which occurred on June 28, 2017. (R921-1029).

888). Each of Skydive's motions for leave to amend sought to add an additional defendant and neither motion asserted any additional or different claims against Pohjolainen. (R607-629, R856-888).

Approximately one year after the trial court found Pohjolainen's First Motion For Summary Judgment to be premature and while no depositions were pending, Pohjolainen filed his second Motion for Summary Judgment on October 2, 2017 ("Second Motion for Summary Judgment"). (R1034-1047). On October 31, 2017, after Pohjolainen noticed his Second Motion For Summary Judgment for hearing, Skydive filed a motion to compel discovery regarding a timely objection Pohjolainen had made to a request to produce over seven months earlier. (R9-13, Doc. 129, 131; R1637-1647). Skydive did not seek to have its motion to compel heard by the trial court prior to the hearing on Pohjolainen's Second Motion For Summary Judgment. (R9-13).

On January 23, 2018, the trial court entered summary judgment finding that:

. . .

> 2. Pohjolainen's testimony establishes he did not engage in any act that would constitute a violation of Fla. Stat. § 943.03(1)[4]. There is no record evidence or reasonable inference drawn from record evidence that Pohjolainen engaged in any act that would violate Fla. Stat. §943.03(1).

[4] Reference in the Order to "943.03" is a scrivener's error. The sole statute pertinent to this matter was and is § 934.03.

> 3. After considering the entire record, resolving all doubts in favor of plaintiffs, and considering all inferences reasonably justified by the evidence in favor of plaintiffs, the Court finds that there is no genuine issue of material fact and Pohjolainen is entitled to judgment as a matter of law.
>
> 4. In reaching its decision, the Court relies on Pohjolainen's deposition testimony that he did not engage in any act in violation of Fla. Stat. § 943.03(1). Should later discovery in this case establish that Pohjolainen's testimony was false, the Court will consider that testimony to have constituted a fraud on the Court. In such event, this summary judgment will be set aside and Pohjolainen will reinstated as a defendant in this case.
>
> . . .
>
> (R1695-1699). This appeal follows.

B. Statement Of The Facts

Appellant, Skydive Space Center, offers its customers the opportunity to skydive with an experienced instructor in a "tandem jump."[5] Skydive Space Center's principal is Greg Nardi ("Nardi") and appellant, Parente, is one of Skydive Space Center's instructors.

Appellee, Pohjolainen, was, at all relevant times, the sole or majority shareholder of corporations that designed and manufactured tandem rigs[6] sold by

[5] A "tandem jump" is performed with a rig that is designed for two persons, one of whom typically does not have any training in skydiving and the other, who is experienced. (R1048-1231, Depo. Parente, 110 – 111).

[6] "Rig" is the term used to describe all constituent parts of the apparatus including the main parachute, the reserve parachute, and the container in which those parachutes are packed. (R1232-1428, Depo. Strobel, p.21).

co-defendant, Wings. (R290-405, Depo. Pohjolainen, 17-18, 20-21, 22-23). Wings sold several of its tandem rigs to Skydive Space Center. (R1048-1231, Depo. Parente, p.50, R1454-1636, Depo. Nardi[7], p. 33-34, 109). At all relevant times, the principal of Wings was Pohjolainen's wife, Nina Luoto ("Luoto"). (R921-1029, Depo. Luoto, p.17-18, 25; R290-405, Depo. Pohjolainen, p.22-23).[8]

To obtain a "certification" to use the Wings tandem rig, the Skydive Space Center instructors were required to satisfy Wings' certification requirements. (R1454-1636, Depo. Nardi, p.35-36, 38). During the relevant time period, the certification requirement included, in addition to instruction and training, one solo jump with the Wings tandem rig and one jump with an examiner or another instructor. (R1048-1231, Depo. Parente, p. 56, 177; R1232-1428, Depo. Strobel, p.86, 141-142).

A certification examiner, Giuseppe Crott ("Crott"), instructed and trained the Skydive instructors on the Wings tandem rig. However, Crott did not require the Skydive Space Center instructors to perform the certification jumps. (R1048-1231, Depo. Parente, p.56-57). Instead, he told the instructors that he would "waive" the

[7] Nardi provided deposition testimony in his capacity as Skydive Space Center, Inc.'s designated corporate representative.

[8] Approximately six months before her deposition and well after this lawsuit was filed, Luoto transferred the ownership of Wings to Pohjolainen. (R921-1029, Depo. Luoto, p. 17-18).

certification jump requirement. (R1048-1231, Depo. Parente, p. 57, 114; R1454-1636, Depo. Nardi, p.115).

According to Skydive, David Strobel ("Strobel") "represents" Wings.[9] (R1048-1231, Parente Depo., p.59). Rather than admitting to Strobel that he waived the certification jump requirement, Crott told Strobel that the Skydive Space Center instructors completed their certification jumps. (R1048-1231, Depo. Parente, p. 60, 112 – 114, 163-164; R1454-1636, Depo. Nardi, p. 118-120; R1232-1428, Depo. Strobel, p.141-142). Later, Crott asked the Skydive Space Center instructors to "back him up" by telling Strobel they performed the certification jumps, even though they had not. (R1048-1231, Depo. Parente, p. 60-61).

Parente called for, and conducted, a meeting with other Skydive Space Center instructors on May 29, 2015. (R1048-1231, Depo. Parente, p. 66, 117, R36-44). At that meeting, Parente told the other instructors that Crott had asked them to "cover for him" by saying they had performed the certification jumps even though they had not. (R1048-1231, Depo. Parente, p. 82-83; R1454-1636, Depo. Nardi, p.123). Some instructors at the meeting said that they would not lie about having performed the certification jumps. (R1048-1231, Depo. Parente, p.83; R1454-1636, Depo. Nardi, p.127).

[9] Solely for the purpose of his motion for summary judgment, Pohjolainen did not dispute that Strobel "represented" Wings.

An unidentified person made an audio recording of the conversation at the May 29, 2015 meeting. (R1048-1231, Depo. Parente, p.83, 85-86, 124). According to Skydive, Strobel eventually obtained a copy of that recording from an unidentified person. (R1048-1231, Depo. Parente, p. 128; R1454-1636, Depo. Nardi, p.93, 131). Skydive alleges that Strobel edited the recording and provided a copy of it to Skydive Space Center's principal, Greg Nardi ("Nardi"). (R1048-1231, Depo. Parente, p. 86-87; R1454-1636, Depo. Nardi, p.41, 138). Skydive also alleges that Strobel sent the edited recording to the United States Parachute Association and others. (R1048-1231, Depo. Parente, p. 86-87; R1454-1636, Depo. Nardi, p.46, 77-78).

Notwithstanding Skydive's allegations, the undisputed facts establish that Pohjolainen did not engage in any of the acts prohibited by Fla. Stat. § 934.03. After Skydive's exhaustive discovery failed to unearth any basis for its claim against Pohjolainen or create a genuine issue of material fact, the trial court entered summary judgment in favor of Pohjolainen. The issues in this resulting appeal are: (1) whether the undisputed facts establish that Pohjolainen was entitled to summary judgment on Skydive's claim; and, if so, (2) whether the entry of summary judgment in Pohjolainen's favor was premature.

C. Disposition By Lower Tribunal

The trial court entered summary judgment in favor of Pohjolainen on January 23, 2018, and this appeal follows.

SUMMARY OF THE ARGUMENT

Skydive's one-count complaint alleges that Pohjolainen and others violated Fla. Stat. § 934.03 which, in general, prohibits the interception, use, or disclosure, of oral communications. After nearly two years of discovery and after Pohjolainen's earlier motion for summary judgment was denied as being premature, the trial court entered summary judgment in Pohjolainen's favor finding that:

> After considering the entire record, resolving all doubts in favor of plaintiffs, and considering all inferences reasonably justified by the evidence in favor of plaintiffs, the Court finds that there is no genuine issue of material fact and Pohjolainen is entitled to judgment as a matter of law.

Skydive suggests, without express argument, that a genuine issue of material facts as to whether Pohjolainen violated Fla. Stat. § 934.03 by devoting nearly two-thirds of its brief to a recitation of facts. Notwithstanding Skydive's reference to numerous individuals and entities and their alleged misdeeds, the focus of this appeal is on whether one person, Pohjolainen, engaged in one of the specific, express, and unambiguous acts prohibited by one statute, Fla. Stat. § 934.03. He did not. More significantly for the purpose of this appeal, there is no genuine dispute of material fact or reasonable inference derived from a material fact that he did.

Pohjolainen satisfied his burden of tendering competent evidence demonstrating the absence of any genuine issue of material fact. Skydive failed to meet its burden of coming forward with any evidence establishing a genuine issue

of material fact. In the absence of any genuine issue of material fact, Pohjolainen is entitled to judgment as a matter of law.

Tacitly acknowledging the absence of any genuine issue of material fact, Skydive's apparent objective in this appeal is to delay the trial court's eventual entry of summary judgment in Pohjolainen's favor. To that end, Skydive argues that summary judgment in Pohjolainen's favor was premature. It is not.

Skydive commenced this lawsuit on February 20, 2016. Pohjolainen filed his First Motion for Summary Judgment on October 17, 2016. After successfully opposing that motion on the basis that it was premature, Skydive engaged in extensive discovery. On January 22, 2018, nearly two years after the lawsuit commenced and nearly six months after the conclusion of the last deposition noticed by Skydive, the trial court entered summary judgment in Pohjolainen's favor.

No deposition was pending at the time the trial court entered summary judgment nor was any order compelling discovery from Pohjolainen. Skydive's attempt to thwart summary judgment by noticing a motion to compel to be heard nearly a month after the hearing on Pohjolainen's Second Motion For Summary Judgment is unavailing. Skydive's pending motions to amend its complaint to add additional defendants, did not seek to assert additional or different claims against Pohjolainen and are immaterial to the trial court's entry of summary judgment in his favor.

Skydive complains that it should have been allowed to examine the hard drive of Strobel's laptop before summary judgment was entered because it had been provided to Strobel by one of Pohjolainen's companies. It is undisputed that this laptop was in Strobel's exclusive possession from the time he took delivery until a date well after Skydive filed its lawsuit. Skydive's failure to request its inspection of the laptop for nine months after learning of its existence does not render summary judgment in Pohjolainen's favor premature.

The general principle that summary judgment is premature where discovery is not complete applies only when future discovery may create a disputed issue of material fact. Regardless of whether Strobel used his laptop to violate Fla. Stat. § 934.03, that statute does not impose liability on Pohjolainen in his capacity as a shareholder of a corporation that purchased the laptop. Similarly, the statute does not impose liability on Pohjolainen in his capacity as a shareholder of a corporation for whom the alleged violator performed work. Only the person who engages in the conduct prohibited by Fla. Stat. § 934.03 is liable under that statute.

No substantial discovery remains as to Pohjolainen. Skydive identified the discovery it believed was necessary in connection with Pohjolainen's First Motion For Summary Judgment. In the year that followed, Skydive performed, or had the opportunity to conduct that discovery. Now, after nearly two years of discovery,

Skydive has still not discovered any fact to support its allegations against Pohjolainen. Accordingly, summary judgment was properly entered.

V. ARGUMENT

Standard of Review

A final order granting summary judgment is reviewed de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law. *Id*. at 130, citing *Menendez v. Palms West Condominium Association*, 736 So. 2d 58 (Fla. 1st DCA 1999). The burden rests on the moving party to demonstrate the nonexistence of any dispute as to the material facts; only after the moving party has tendered competent evidence supporting its motion does the burden shift to the other party to come forward with counterevidence that establishes a question of material fact. *Wilmington Trust v. Moon*, 238 So. 3d 425, 427 (Fla. 5th DCA 2018), citing *Hicks v. Hoagland*, 953 So. 2d 695, 697 (Fla. 5th DCA 2007). If it appears in the record that there are disputed issues of material fact, summary judgment must be reversed. *Doering v. Villages Operating Co.*, 153 So. 3d 417, 418 (Fla. 5th DCA 2014), citing *Lawrence v. Pep Boys Manny Moe & Jack, Inc.*, 842 So. 2d 303 (Fla. 5th DCA 2003). If this court finds the lack of any genuine material issue of fact, summary judgment should be affirmed. *Id*.

A. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND POHJOLAINEN IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Skydive does not expressly argue that a genuine issue of material fact exists as to whether Pohjolainen violated Fla. Stat. § 934.03. Nevertheless, Skydive implies the existence of such an issue by devoting twenty-two pages of its thirty-two-page brief to a discussion of facts involving numerous individuals and entities, their alleged relationships, their alleged misdeeds, and their alleged motivations. (Initial Brief, pp. 1 – 23).

This appeal does not involve those other people and entities, their alleged misdeeds, or their alleged motives. The questions presented by this appeal are whether there is any dispute of material fact as to whether one person, Pohjolainen, violated one statute, Fla. Stat. § 934.03; and, if not, whether summary judgment was properly entered.

1. The Statute

Skydive's one-count complaint alleges that Pohjolainen violated Fla. Stat. § 934.03 which, in general, prohibits the interception, use, or disclosure, of oral communications. Subsection (1) of § 934.03 identifies the specifically prohibited acts:

(1) Except as otherwise specifically provided in this chapter, any person who:

(a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication;

(b) Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

2. Such device transmits communications by radio or interferes with the transmission of such communication;

(c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) Intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

. . .

shall be punished as provided in subsection (4).[10]

Fla. Stat. § 934.10 creates a civil cause of action for the violation of Fla. Stat. § 934.03.

[10] Subsection (4)(a) provides that "Except as provided in paragraph (b), whoever violates subsection (1) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 934.41." Subsection 4(b) creates an exception in certain cases in which the intercepted communication was a "radio transmission" and is inapplicable to this case.

2. Liability Under The Statute

As noted by this Court, "statutes in derogation of common law are subject to strict interpretation." *Accident Cleaners, Inc. v. Universal Ins. Co.*, 186 So. 3d 1, 2 (Fla. 5th DCA 2015) (citations omitted). "[A] court will presume that such a statute was not intended to alter the common law other than by what was clearly and plainly specified in the statute." *Id*. (citation omitted). If statutory language is "clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction [and] the statute must be given its plain and obvious meaning." *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 367` (Fla. 2013), quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984).

The legislature's identification of the actions resulting in liability is specific, plain, and unambiguous. Fla. Stat. § 934.03 imposes liability only on one who:

- intentionally intercepts or endeavors to intercept an oral communication;
- procures another person to intercept or endeavor to intercept an oral communication;
- intentionally uses or endeavors to use a device to intercept an oral communication;

- procures another to use or endeavor to use a device to intercept an oral communication;
- intentionally discloses or endeavors to disclose to another person the contents of an oral communication; or
- intentionally uses or endeavors to use the contents of an oral communication.

In its Initial Brief, Skydive recites twenty-two pages of facts it learned during nearly two years of discovery. None of those facts, however, creates a genuine issue of material fact or a reasonable inference that Pohjolainen violated Fla. Stat. § 934.03. Skydive's recitation of a magnitude of facts is not an acceptable proxy for identifying a genuine issue of material fact.

The statute does not, as suggested by Skydive's reference to these facts, impose liability on a person for: owning four business or housing them in the same location (Initial Brief, at 1-2); having a spouse who sells his companies' products (Initial Brief, at 2); housing his spouse's business in a building with his own (Initial Brief, at 2); sharing employees between businesses (Initial Brief, at 2); or working at his business every day including weekends. (Initial Brief, at 2-3).

The statute does not impose liability on a person who does not know: who performs his business' IT work (Initial Brief, at 3); whether business computers have been replaced (Initial Brief, at 3); whether hard drives have been changed

(Initial Brief, at 3); whether passwords protect computers (Initial Brief, at 3); whether the companies have a computer server (Initial Brief, at 3); or who owns his business' domain names (Initial Brief, at 3).

The statute does not impose liability on a person who does not know: how someone is paid (Initial Brief, at 3); whether that person is a W-2 employee (Initial Brief, at 3); or whether that person works for his wife's company. (Initial Brief, at 3-4).

The statute does not impose liability on one who: knows a customer has a product complaint (Initial Brief, at 6-7); or communicates with others about that complaint. (Initial Brief, at 7-8).

The statute does not, as suggested by Skydive's reference to these facts, impose liability on one who: learns from another that a conversation may have been improperly recorded (Initial Brief, at 7); does not hear or attempt to hear a recording (Initial Brief, at 7); fails to ask employees or friends about the recording (Initial Brief, at 7); participates in the suspension of a tandem inspector (Initial Brief, at 7-8); or communicates with others regarding the suspension of that tandem examiner. (Initial Brief, at 7-8).

The statute does not impose liability on a person who: is a shareholder of a company for which a person who may have violated the statute performs work (Initial Brief, at 1, 3); is a supervisor, manager, or friend of a person who may have

violated the statute (Initial Brief, at 3, 7); fails to investigate a claim that another person violated the statute (Initial Brief, at 7-8); fails to have a conversation with the alleged violator about the alleged violation (Initial Brief, at 7-8); or fails to know whether equipment owned by the company in which he is a shareholder may have been improperly used by a person to violate the statute. (Initial Brief, at 7 – 8).

Fla. Stat. § 934.03 is specific, plain, and unambiguous. It imposes liability only on one who commits one or more of the express and specific acts prohibited by the statute.

3. There Is No Genuine Dispute As to The Material Facts.

Fla. Stat. § 934.03 (1)(a) prohibits a person from intentionally intercepting or endeavoring to intercept an oral communication or procuring another to do so. Pohjolainen testified at his deposition that he did not intercept or try to intercept the conversation between Skydive instructors at the May 29, 2015 meeting and that he did not procure anyone else to do so. (R290-405, Depo. Pohjolainen, p. 74). Skydive testified that it does not know who recorded the meeting and admitted that Pohjolainen was not even present at the meeting. (R1048-1231, Depo. Parente, p. 124, 133; R1454-1636, Nardi, p. 43, 128-129). Skydive admits it has no knowledge as to whether Pohjolainen procured someone to record the conversation of the instructors at that meeting. (R1048-1231, Depo. Parente, p. 133, 169; (R1454-1636, Depo. Nardi, p. 148). When asked, by way of interrogatories, for the factual basis

of its claim that Pohjolainen violated Fla. Stat. § 934.03 (1)(a), Skydive was unable to identify any such fact. (R1048-1636, *See* Parente and Skydive Space Center's Unverified Answers to Pohjolainen's First Set of Interrogatories, #1- 4).

Fla. Stat. § 934.03 (1)(b) prohibits a person from intentionally using or endeavoring to use a device to intercept an oral communication or procuring another to do so. Pohjolainen testified that he did not use or try to use any device to intercept the conversation at the May 29, 2017 meeting and that he did not procure anyone else to do so. (R290-405, Depo. Pohjolainen, p. 74–75). Skydive admits that Pohjolainen was not present at the meeting, and that it has no knowledge as to what device was used to record the meeting or who used the device. (R1048-1231, Depo. Parente, p.85, 133; R1454-1636, Depo. Nardi, p.128-129, 130, 148). Skydive also admits that it has no knowledge as to whether Pohjolainen procured someone to record the conversation of the instructors at that meeting. (R1048-1231, Depo. Parente, p.133, 169; R1454-1636, Depo. Nardi, p. 148). When asked, by way of interrogatories, for the factual basis of its claim that Pohjolainen violated Fla. Stat. § 934.03 (1)(b), Skydive was unable to identify any such fact. (R1048-1636, *See* Parente and Skydive Space Center's Unverified Answers to Pohjolainen's First Set of Interrogatories, #5-8).

Fla. Stat. § 934.03 (1)(c) prohibits a person from disclosing, or endeavoring to disclose the contents of an unlawfully intercepted oral communication.

Pohjolainen testified that he did not disclose or try to disclose the contents of the communication that was intercepted at the May 29, 2015 meeting nor has he has ever heard the recording. (R290-405, Depo. Pohjolainen, p.47, 75; R.445-448, Pohjolainen's answers to Plaintiffs' First Set Of Interrogatories, #2, 3, and 4). Skydive does not know whether Pohjolainen disclosed or tried to disclose the contents of the recording to anyone. (R1048-1231, Depo. Parente, p.134; R1454-1636, Depo. Nardi, p. 149, 158). Skydive does not know whether Pohjolainen has ever heard the recording or edited recording to this day. Skydive's assertion that "it appears" the edited recording was disclosed "in order to discredit Skydive's and Parente's reputation" (Initial Brief, at 6) does not create a genuine issue of material fact as to whether Pohjolainen disclosed the recording. When asked, by way of interrogatories, for the factual basis of its claim that Pohjolainen violated Fla. Stat. § 934.03 (1)(c), Skydive was unable to identify any such fact. (R1048-1636, *See* Parente and Skydive Space Center's Unverified Answers to Pohjolainen's First Set of Interrogatories, #9, 10).

Fla. Stat. § 934.03 (1)(d) prohibits a person from using or trying to use the contents of an unlawfully intercepted communication. Pohjolainen testified that he did not use or try to use the contents of the communications that were intercepted at the May 29, 2015 meeting nor has he even heard the recording. (R290-405, Depo. Pohjolainen, p. 47, 75; R445-448, Pohjolainen's answers to Plaintiffs' First Set Of

Interrogatories, #3, 4, 5). Plaintiffs testified that they do not know if Pohjolainen ever used or tried to use the recording in any way. (R1048-1231, Depo. Parente, p.133-134; R1454-1636, Depo. Nardi, p. 148-149). Skydive's assumption Pohjolainen used the recording in the suspension and reinstatement of Crott is neither a fact nor a substitute for a fact. (Initial Brief, at 7-8). Further, Skydive's assumption does not create a genuine issue of disputed fact. When asked, by way of interrogatories, for the factual basis of its claim that Pohjolainen violated Fla. Stat. § 934.03 (1)(d), Skydive was unable to identify any such fact. (R1048-1636, *See* Parente and Skydive Space Center's Unverified Answers to Pohjolainen's First Set of Interrogatories, #11, 12).

If the moving party satisfies its burden of tendering competent evidence supporting its motion for summary judgment, the burden shifts to the non-movant to come forward with counterevidence establishing a question of material fact. *See Wilmington Trust v. Moon*, 238 So. 3d 425, 427 (Fla. 5th DCA 2018).

There was no factual basis to support Skydive's claim that Pohjolainen violated Fla. Stat. § 934.03 (1) at the time Skydive's filed suit. Pohjolainen satisfied his burden of tendering competent evidence demonstrating the absence of any genuine issue of material fact. Skydive failed to meet its burden of coming forward with evidence establishing a question of material fact. After nearly two years of discovery, there is still no testimony, other evidence, or reasonable inference that

Pohjolainen: (a) intercepted the oral communications of the Skydive instructors, tried to intercept them, or procured anyone else to do so; (b) used a device to intercept an oral communication, tried to use one, or procured someone else to do so; (c) disclosed or tried to disclose the contents of any recording of Skydive's oral communications; or (d) used or tried to use the contents of any recording of Skydive's oral communications at the May 29, 2015 meeting.

Notwithstanding that Skydive devoted twenty-two pages of its thirty-two-page brief to a recitation of facts, none of them create a genuine issue of material fact or reasonable inference as to whether Pohjolainen engaged in one of the acts prohibited by Fla. Stat. § 934.03.

B. THE ENTRY OF SUMMARY JUDGMENT WAS NOT PREMATURE

Pohjolainen's First Motion For Summary Judgment was denied without prejudice because the trial court found it to be premature. In opposing that motion, Skydive identified the discovery it wished to conduct. In the year following the denial of Pohjolainen's First Motion For Summary Judgment, Skydive did, or had the opportunity to, engage in the discovery it identified to the Court. By the time Pohjolainen's Second Motion For Summary Judgment was heard, eight (8) depositions, including the depositions of all parties, were taken and eight (8) different sets of interrogatories and requests for production were served and responded to between and among the parties. At the time Pohjolainen noticed his

Second Motion For Summary Judgment for hearing, there were no depositions pending and Pohjolainen had responded to all discovery served.[11]

Skydive cites a number of cases in support of its argument that summary judgment was prematurely entered. Among those cases, Skydive cites *Arguelles v. City of Orlando*, 855 So. 2d 1202 (Fla. 5th DCA 2003) for the proposition that summary judgment is premature where even a single deposition remains to be taken and trial is set to occur within sixty days. (Initial Brief, at 27). In *Arguelles*, the plaintiff, set the deposition of the chief of the Code Enforcement Board in an action against the city arising out of a code enforcement issue. *Id*. at 1203. The city responded to that notice by filing a motion for summary judgment and scheduling it to be heard *before* that deposition. *Id*. at 1203. This Court determined that the entry of summary judgment was premature in light of the pending deposition. *Id*. at 1203.

Skydive's reliance on *Arguelles* is misplaced. No depositions were noticed or scheduled after Pohjolainen noticed his Second Motion for Summary Judgment and none were pending at the time the trial court entered summary final judgment in favor of Pohjolainen.

Skydive also argues that summary judgment is premature where relevant discovery is in progress citing *UFF DAA, Inc. v. Towne Realty*, Inc. 666 So. 2d 199,

[11] Skydive's complaint that it had not yet inspected Strobel's laptop as of the date on which Pohjolainen's Second Motion For Summary Judgment was heard is addressed below. Skydive's subsequently-filed motion to compel is likewise addressed below.

200 (Fla. 5th DCA 1995). In *UFF DAA, Inc.*, two of defendant's corporate representatives failed to appear for their depositions. As a result, the plaintiff filed a motion to compel their attendance together with a motion for sanctions. This Court found that the trial court erred in entering summary judgment in favor of the defendant where plaintiff's motions regarding the corporate officers' depositions were still pending. *UFF DAA, Inc.*, 666 So. 2d at 200. In the present case, no depositions or motions to compel depositions were pending at the time summary judgment was entered.

Similarly, Skydive's reliance on *Singer v. Star*, 510, So. 2d 637 (Fla. 4th DCA 1987) and *Sica v. Sam Caliendo Design*, 623 So. 2d 859 (Fla. 4th DCA 1993) is unavailing. In *Singer*, the appellate court found summary judgment to be premature where it was granted notwithstanding that scheduled depositions had not yet been taken through no fault of the plaintiff. *Singer*, 510 at 639. Likewise, the *Sica* court found summary judgment premature because a deposition was pending at the time summary judgment was entered. *Sica*, 623 So. 2d at 859.

The present case is distinguishable from *Arguelles*, *UFF DAA, Inc.*, *Singer*, and *Sica*. No depositions were scheduled or pending at the time of the hearing on Pohjolainen's Second Motion For Summary Judgment. In fact, the last deposition noticed in this case, that of Luoto, was completed June 28, 2017, nearly six months before that hearing. (R921-1029).

While relying, in large part, on cases in which summary judgment was entered while depositions were pending, Skydive does not, and cannot, assert that depositions were pending at the time summary judgment was entered in this case. Instead, Skydive argues that summary judgment was prematurely entered because: (1) the case was not at issue, noticed for trial, or on a trial docket (Initial Brief, at 25); (2) a motion to compel the production of documents had not been heard (Initial Brief, at 29); (3) two motions for leave to amend the complaint had not yet been heard (Initial Brief, at 26, 29-30); (4) a co-defendant's laptop had not yet been examined (Initial Brief, at 25, 29); and (5) "relevant discovery," in general, had not been completed. (Initial Brief, at 25, 27 - 30).

1. The Entry Of Summary Judgment Is Not Conditioned On An Action Being Set For Trial.

Skydive complains that summary judgment was entered even though "the case had not been ordered at issue nor had a request for trial docketing been made by any party [and] [t]he case [was] not set for trial." (Initial Brief, at 25). In fact, the case was at issue. Skydive's amended complaint was filed on April 13, 2016. (R36-44). Pohjolainen's answer was filed on August 08, 2016, over eighteen months before the summary judgment hearing. (R149-162).

Skydive cites no authority for the proposition that a case must be noticed for trial or on a trial docket before summary judgment may be properly entered. In contrast to Skydive's assertion, Fla. R. Civ. P. 1.510(b) provides that "[a] party

against whom a claim . . . is asserted . . . may move for a summary judgment in that party's favor . . . ***at any time*** . . ." (emphasis added).

2. Skydive's Motion to Compel Discovery.

Without expressly asserting it, Skydive implies that its "pending" motion to compel production of documents rendered summary judgment in Pohjolainen's favor premature (Initial Brief, at 29). Skydive served its Second Request For Production on February 3, 2017. Pohjolainen timely objected to that Request For Production on March 8, 2017. (R562-563). Skydive did not move to compel Pohjolainen's responses for seven months. On October 31, 2017, after Pohjolainen noticed his Second Motion For Summary Judgment for hearing, Skydive filed its motion to compel (R9-13, R1637-1647). Although Skydive could have noticed its motion to compel for hearing prior to the January 10, 2018 hearing on Pohjolainen's Second Motion For Summary Judgment, it chose not to do so. Instead, Skydive waited until January 19, nine days after the hearing on the Second Motion For Summary Judgment to notice its motion to compel for a February 22, 2018 hearing. (R9-13).

A party cannot thwart summary judgment by initiating discovery. *Harper v. Wal-Mart Stores East, L.P.*, 134 So. 3d 557, 558 (Fla. 5th DCA 2014). Skydive waited seven months to file its motion to compel discovery and filed it only after Pohjolainen had served his Second Motion For Summary Judgment. Skydive then

waited another three (3) months and, then, only after the trial court had already announced its ruling on Pohjolainen's Second Motion For Summary Judgment before noticing its motion to compel for hearing. By delaying the filing of its motion to compel and setting it to be heard on a date after the hearing on Pohjolainen's Second Motion For Summary Judgment, Skydive improperly sought to use its motion as a device to thwart summary judgment.

This Court acknowledged in *Villages at Mango Key Homeowners Association, Inc. v. Hunter Development, Inc.*, 699 So. 2d 337, (Fla. 5th DCA 1997) that a party cannot use discovery to thwart summary judgment.

> Of course, that is not to say that a defending party is entitled to unlimited discovery or that a defending party should be permitted to file last-minute notices of deposition simply to delay the trial court's consideration of a motion for summary judgment.

Id. at 338, citing *Colby v. Ellis*, 562 So. 2d 356 (Fla. 2d DCA 1990).

Skydive's reliance on *Kimball v. Publix Super Markets, Inc.*, 901 So. 2d 293, 295 (2d DCA 2005), is unavailing. In *Kimball*, the trial court entered an order compelling Publix to provide discovery. However, *before* Publix complied with that order, the trial court granted Publix's motion for summary judgment. The Second District Court of Appeal determined that summary judgment should not have been entered when relevant discovery was pending. *Kimball*, 901 So. 2d at 295.

In the present case, and unlike *Kimball*, no order compelling Pohjolainen to respond to discovery was pending at the time the trial court entered summary

judgment in his favor. Indeed, Skydive waited until nine days *after* the trial court announced its ruling at the hearing on Pohjolainen's Second Motion For Summary Judgment before noticing its motion to compel for hearing.

For the same reason, Skydive's reliance on *Abbate v. Publix Super Markets*, 632 So. 2d 1141 (Fla. 4th DCA 1994) is misplaced. As in *Kimball*, the *Abbate* court determined that the entry of summary judgment improper where the movant had previously been ordered to respond to discovery but had not complied. *Abbate v. Publix Super Markets*, 632 So. 2d at 1142. In the present case, Pohjolainen had not failed to comply with any order of the court at the time summary judgment was entered.

3. Skydive's Motions To Amend Its Complaint.

Skydive asserts that summary judgment was improperly entered in favor of Pohjolainen because two motions to amend its complaint were pending at the time of the judgment. Notwithstanding Skydive's assertion that the law prohibiting summary judgments when motions to amend are pending is "quite clear" and "universally acknowledged," it cites no such authority. (Initial Brief, at 30).

Skydive filed a motion for leave to Amend his Complaint to add an additional party, Tandem Designs' Inc., on May 16, 2017. (R607-629). On August 8, 2017, Skydive filed its Second Motion To Amend Complaint seeking to add Sunrise

Manufacturing International Inc., d/b/a Wings as another additional defendant. (R856-888). To date, the trial court has not granted either motion.

The Second District Court of Appeal found the entry of summary judgment to be premature in light of a plaintiff's pending motion for leave to amend its complaint in *Kimball*, 901 So. 2d at 296. Specifically, the plaintiff wished to add a claim for spoliation against defendant, Publix, to its then-existing complaint that alleged only a claim for premises liability against Publix. *Id.*

Here, Skydive's pending motions for leave to amend did not seek to assert additional or different claims against Pohjolainen. In its complaint, Skydive alleged that Pohjolainen violated Fla. Stat. §934.03. (R36-44). Neither of Skydive's motions to amend its complaint alleged any additional or different theory of liability against Pohjolainen. Instead, each of Skydive's motions to amend merely sought to add an additional defendant, claiming that each of those defendants also allegedly violated that statute. (R607-629, R856-888). Regardless of whether the trial court granted, denied, or even heard these motions, neither of the motions impacted or was relevant in any way to Skydive's claim against Pohjolainen.

4. The Laptop

Although not express, Skydive implicitly argues that summary judgment should not have been entered until it had inspected a laptop computer used by co-defendant, Strobel. Specifically, Skydive complains that it "didn't even get to

examine the . . . hard drive of the laptop Strobel used and was purchased by one of Pohjolainen's companies [before summary judgment was entered in favor of Pohjolainen]." (Initial Brief, at 25).

There is no dispute that one of the corporations in which Pohjolainen is a shareholder purchased a laptop computer for Strobel. (R290-405, Depo. Pohjolainen, p.50-51; R1232-1428. Depo. Strobel, p.52-53; R921-1029, Depo. Luoto, p.37-38). That laptop was delivered directly to Strobel and it remained in his possession through March of 2017, well after Skydive's lawsuit. (R921-1029, Depo. Luoto, p.38-40). Strobel testified he had the laptop from the time it was purchased until a few weeks before his April 13, 2017 deposition at which time he returned the non-functioning laptop to Pohjolainen. (R1232-1428, Depo. Strobel, p.52-53). Skydive may assert that Strobel used that laptop to edit and / or distribute the offending recording.

Skydive served its request to inspect Strobel's laptop on June 27, 2017 (R646-650), approximately nine (9) months after learning of its existence at Pohjolainen's deposition on September 16, 2016. (R290—405, Depo. Pohjolainen, p.50-51). Skydive's assertion that Pohjolainen objected to its request to produce Strobel's laptop is inaccurate. It was Strobel who objected to Skydive's Request to Inspect. (R 839-848). Faced with Skydive's Request for Inspection addressed to Pohjolainen and an objection to producing the laptop by co-defendant, Strobel, Pohjolainen filed

his "Motion For Court Determination of the Discovery Dispute Between Plaintiffs and Defendant, David Strobel." (R851-852). As was clear from his Motion, Pohjolainen took no position on the production of the laptop. Pohjolainen merely asked the trial court to resolve his uncertainty "as to whether to produce the laptop pursuant to [Skydive's] request for production or withhold the laptop pursuant to Strobel's objections." (R851-852).

Although, as a general principle, the entry of summary judgment is premature where discovery has not yet been completed, this Court articulated a significant exception in *A&B Discount Lumbar & Supply v. Mitchell*, 799 So. 2d 301, 303 (Fla. 5th DCA 2001). This Court observed "that general principle of law applies only when future discovery might create a disputed issue of material fact." *Mitchell*, 799 So. 2d at 303.

Skydive's request to inspect Strobel's laptop undoubtedly satisfies the Fla. R. Civ. P. 1.280(b)(1) standard of being reasonably calculated to lead to the discovery of admissible evidence *as to Strobel*. Skydive's principal, Nardi, testified that Strobel admitted to him that Strobel both edited and distributed the recording. (R1454-1636, Depo. Nardi, p.46, 132). However, the inspection of the laptop which was indisputably in Strobel's possession and control at all material times, is not reasonably calculated to lead to the discovery of admissible evidence *as to whether Pohjolainen* violated Fla. Stat. §934.03.

Fla. Stat. § 934.03 does not impose liability on the purchaser or owner of a laptop that another uses to violate the statute. Even if it did impose such liability, however, Pohjolainen is not the purchaser or owner of the laptop. Rather, it is undisputed that a corporation, of which Pohjolainen is a shareholder, was the purchaser and, perhaps, the owner of the laptop. (R290-405, Depo. Pohjolainen, p.50-51; R1232-1428; R921-1029, Depo. Luoto, p.37-38).

Fla. Stat. § 934.03 does not impose liability on the employer of a person that uses a laptop to violate the statute. Even if it did impose such liability, however, Pohjolainen was not Strobel's employer. Pohjolainen was a shareholder of a corporation for which Strobel performed work.

Only the one who actually engages in the conduct prohibited by Fla. Stat. § 934.03 is liable under the statute. Even if the statute imposed liability on laptop owners or employers of violators, however, Pohjolainen is neither. Accordingly, the contents of Strobel's laptop cannot create a genuine issue of material fact as to whether Pohjolainen is responsible in one of those capacities for Strobel's violation of the statute, if any. Pursuant to *Mitchell*, "the general principal that discovery be completed prior to the entry of summary judgment is applicable only when future discovery might create a disputed issue of material fact." *Mitchell*, 799 So. 2d at 303.

After two years of discovery, eight depositions, and voluminous written discovery, Skydive is without any fact or reasonable inference that Pohjolainen violated the statute. Nevertheless, Skydive seeks to forestall summary judgment by conducting endless discovery in the hope that there might be something somewhere to support its allegations. The trial court properly recognized that, unless Pohjolainen's testimony turned out to be false, no future discovery would create a genuine dispute of material fact as to whether Pohjolainen violated Fla. Stat. § 934.03. In order to protect Skydive from that hypothetical possibility, the trial court included the following in its summary judgment order:

> In reaching its decision, the Court relies on Pohjolainen's deposition testimony that he did not engage in any act in violation of Fla. Stat. § 943.03(1). Should later discovery in this case establish that Pohjolainen's testimony was false, the Court will consider that testimony to have constituted a fraud on the Court. In such event, this summary judgment will be set aside and Pohjolainen will reinstated as a defendant in this case.

(R1695-1699).

Notwithstanding that the trial court entered its order to permit Skydive access to the laptop's contents on March 19, 2018, Skydive has not sought to invoke paragraph 4 of the trial court's summary judgment order in the months that have followed. Nevertheless, paragraph 4 of that order remains in effect to protect Skydive as it continues conducting its perpetual discovery.

5. No Substantial Discovery Remains

Skydive cites *Villages at Mango Key Homeowners Association, Inc. v. Hunter Development, Inc.*, 699 So. 2d 337, 338 (5th DCA 1997) noting that "it is reversable error for a trial court to grant summary judgment when relevant discovery is pending." In *Mango Key*, this Court reversed summary judgment finding that the plaintiff did not have a reasonable opportunity to complete discovery prior to the entry of that judgment. 699 So. 2d at 337. This Court noted that insufficient time for discovery had been allowed where summary judgment was entered five days before the answer was due to be filed. *Id.* at 338.

In the present case, summary judgment was not entered five days before the answer was due to be filed. Skydive filed its complaint on February 3, 2016. Pohjolainen's First Motion For Summary Judgment was denied as premature on December 29, 2016, after Skydive announced the additional depositions it wished to take. The last deposition occurred on June 28, 2017 with none being noticed thereafter. It was not until January 22, 2018, nearly two years after the complaint was filed and nearly seven months following the last noticed deposition, that summary judgment was finally entered in favor of Pohjolainen. While finding that the plaintiff in *Mango Key* had not been provided a reasonable time in which to complete discovery, this Court cautioned "this is not to say that a defending party is entitled to unlimited discovery or that a defending party should be permitted to file

last-minute notices of deposition simply to delay the trial court's consideration of a motion for summary judgment." *Mango Key*, 699 So. 2d at 338.

In affirming summary judgment in the face of an argument that it had been prematurely entered, the Second District Court of Appeal found that where the plaintiff had failed to discover any evidence supporting its claim in the nearly three years following the filing of his complaint "the time has come to end this litigation." *Colby v. Ellis*, 562 So. 2d 356, at 357 (Fla. 2d DCA 1990). The *Colby* Court stated:

> A party does not have an unlimited right to discovery prior to a hearing on a motion for summary judgment. When the record becomes clear enough to disclose that further discovery is not needed to develop significant aspects of the case and that such discovery is not likely to produce a genuine issue of material fact, discovery should be ended.

Colby, 562 So. 2d at 357.

Skydive identified the discovery it wished to engage in at the hearing on Pohjolainen's First Motion For Summary Judgment. Skydive conducted that discovery and its last deposition occurred on June 28, 2017, with none being noticed thereafter. In the two years following the filing of its complaint, Skydive has failed to discover any fact to support its allegations against Pohjolainen. In the words of the *Colby* court, "the time has come to end this litigation" against Pohjolainen.

This Court has held that "summary judgment should not be granted until the facts have been developed to such an extent that the court may be reasonably certain that there are no genuine issues of material fact to be determined." *Anderson v. Wolf*,

998 So. 2d 1172, 1173 (Fla. 5th DCA 2009). In this case, the facts were developed sufficiently to enable the trial court to determine that there are no genuine issues of fact or reasonable inference that Pohjolainen violated Fla. Stat. § 934.03. Summary Judgment in favor of Pohjolainen was not premature.

VI. CONCLUSION

There is no genuine issue of material fact and Pohjolainen is entitled to judgment as a matter of law. Furthermore, the entry of summary judgment was not premature as to Pohjolainen. Accordingly, Pohjolainen respectfully requests that this Court affirm the trial court's summary judgment in Pohjolainen's favor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished to Frederick C. Morello, Esq., counsel for Appellants, by electronic mail at live2freefly@gmail.com, laurie@fcmesq.com on this 8th day of October, 2018.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief is typewritten using 14-point Times New Roman font and complies with Fla. R. App. P. 9.210(a)(2).

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