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IN THE FLORIDA SUPREME COURT

CASE NO. SC19-1729
L.T. CASE NO. 4D18-1221

MAGGY HURCHALLA,

Petitioner,

vs.

LAKE POINT PHASE I, LLC, and
LAKE POINT PHASE II, LLC,
Florida Limited Liability Companies,

Respondents.

PETITIONER'S BRIEF ON JURISDICTION

On Review From A Decision
Of The Fourth District Court Of Appeal

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STATEMENT OF THE CASE AND FACTS

The right to petition the Government is "one of the most precious of the liberties safeguarded by the Bill of Rights." *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1954 (2018); *see* U.S. Const. Amend. I. Likewise, the guarantee "of the opportunity for free political discussion … is a fundamental principle of our constitutional system." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Florida qualified common-law privilege also affords substantial protection, and the Florida Constitution adds "the right" of "[t]he people … to instruct their representatives," Fla. Const. Art. I, §§ 4-5. Together, these fundamental safeguards may be overcome only when tortious statements are made with both actual and express malice—the statements are knowingly false and made with the sole intention of injuring the plaintiff. The Opinion below conflicts with these established standards. If allowed to stand, it will significantly undermine protection for petitioning activity.

Maggy Hurchalla is facing a $4 million judgment solely because she exercised her fundamental rights by expressing concerns to Martin County Commissioners about a public-private project being developed by Appellees Lake Point Phase I, LLC and Lake Point Phase II, LLC. The Fourth District concluded that: (1) Hurchalla lost her First Amendment privilege because she made statements regarding studies of the project's benefits that she purportedly knew were false or

recklessly disregarded their falsity; and (2) Hurchalla lost her common-law privilege because she acted through an "improper method" by making those same supposedly false statements and evinced ill will toward Lake Point by sending emails to County Commissioners that supposedly instructed them to take certain actions with respect to the project and were signed with facetious names.

SUMMARY OF THE ARGUMENT

The Fourth District's decision construes the state and federal constitutions and conflicts with the decisions of this Court and other Florida appellate courts. The Opinion eviscerates the protections afforded by the First Amendment and Florida law, which can be overcome only by clear and convincing evidence of actual and express malice, respectively. The jury instructions did not require such a finding. Moreover, the Court failed to conduct the required full-record *de novo* review of constitutional facts relating to whether it had been proven with convincing clarity that Hurchalla knew any of her emails were false. Rather, the Court ignored the circumstances, totality of context, and testimony regarding Hurchalla's statements; incorrectly concluded that express malice could be shown by use of whatever may be deemed "improper means"; and mistakenly determined that constitutionally protected communications with government officials and flippant email signatures demonstrated a malevolent intent to harm Lake Point.

The Opinion conflicts with Florida appellate court rulings because it falls far

short of marshaling facts *Bose de novo* review requires to find with convincing clarity a "high subjective awareness of probable falsity," that is, actual malice. It also conflicts with case law construing Florida's common-law privilege by concluding the facts referenced in the Opinion amounted to a malevolent intent to harm, express malice, and that express malice sufficient to overcome this privilege could be shown by use of "improper means." This Court should review the decision below to ensure that vital constitutional protections for political discussion are properly construed and preserved.

ARGUMENT

I. THE OPINION BELOW EXPRESSLY CONSTRUES THE FIRST AMENDMENT AND FLORIDA CONSTITUTION ART. I, §§ 4-5

A. To afford First Amendment freedoms the required "breathing space," *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986), courts must not only avoid punishing citizens for exercising these rights, but must also take care not to create rules that could lead citizens to restrain their expression out of fear of criminal or civil liability, *Sullivan*, 376 U.S. at 279. A speaker therefore may be held liable for a tort caused by her speech or petition only if the plaintiff proves by clear and convincing evidence that the speech or petition was materially false and was made with actual malice, *i.e.*, knowledge or a "high degree of awareness of … probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (speech); *McDonald v. Smith*, 472 U.S. 479, 485 (1985) (petition).

Florida law likewise provides a common-law privilege protecting the right to "instruct" representatives, as well as an express guarantee in Article I, Section 5 of the Florida Constitution. This privilege precludes tort liability unless the plaintiff proves that such statements were made with express malice, *i.e.*, "an intention to injure the plaintiff." *Nodar v. Galbreath*, 462 So. 2d 803, 806 (Fla. 1984). The express malice standard creates a high bar: "Strong, angry, or intemperate words do not alone show express malice; rather, there must be a showing that the speaker used his privileged position 'to gratify his malevolence.'" *Id.* at 811. Where the speech is to a political authority on a matter of public concern, the plaintiff must prove that express malice was the speaker's sole motivation; if the speech was "made for a proper purpose … there can be no recovery" even if the speaker "also in fact feels hostility or ill will toward the plaintiff." *Id.* at 810, 812.

B. The Opinion's construction of the requirements under the First Amendment and Florida law eviscerates these protections. The jury instructions failed to require the jury to find that Hurchalla ever made any false statement, let alone that her statements were made with actual and express malice as required to overcome the First Amendment and Florida privileges. The Fourth District held "defense counsel" waived the instructional objections by "blurring the distinction between the two privileges," A.8-9, but that is not the same as "invit[ing]" error (as the Court suggested); defense counsel objected to the instructions actually given and

in no way countenanced instructions that would allow the jury to determine liability without determining that Hurchalla had made knowingly false statements. *See Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 65 (Fla. 2012) ("Warfel did not invite the erroneous jury instruction" because "Warfel never 'affirmatively agreed' to" it.). Such fundamental rights should not be jeopardized by a lawyer's imprecise descriptions of the law.

C. The Opinion does not meaningfully apply the First Amendment's requirement that the record include clear and convincing evidence that the speech was not only false but uttered with knowledge of its falsity or reckless disregard for the truth. *See Scandinavian World Cruises (Bahamas) Ltd. v. Ergle*, 525 So. 2d 1012, 1014 (Fla. 4th DCA 1988) (appellate court must conduct independent review to determine if "the record establishes actual malice with convincing clarity") (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984)). In concluding Hurchalla lost her privilege, the Court relied on evidence that does not come close to that standard. The Opinion focuses on a January 2013 email, in which Hurchalla wrote:

> A study was to follow that documented the [project's] benefits. That study has not been provided. **There does not appear to be any peer review by the CERP [Comprehensive Everglades Restoration Plan] team to verify benefits from the rockpit**. … Neither the storage nor the treatment benefits have been documented.

The Opinion omitted and disregarded the emphasized sentence, concluding

that Hurchalla had asserted as a matter of fact that no studies *whatsoever* had been conducted. Based on Hurchalla's testimony that she was aware that a non-CERP "preliminary study" had been performed, the Court determined that Hurchalla lied about the project's benefits being documented. A.10. But the omitted language contains an essential qualifier, clarifying that Hurchalla meant that the promised CERP-*reviewed* study had not been provided. It is undisputed that no CERP peer review of benefits—"[t]hat study," in Hurchalla's email—was performed.[1]

Both Florida and federal precedent require that allegedly unprivileged statements be analyzed in the context of the communications "taken as a whole." *Smith v. Cuban Am. Nat'l Found.*, 731 So. 2d 702 (Fla. 3d DCA 1999); *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230 (11th Cir. 1999). The Opinion fails to satisfy the responsibility of full record review by appellate courts applying First Amendment standards. Such a precedent will chill speech: "[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Sullivan*, 376 U.S. at

[1] The Court disregarded expert testimony supporting Hurchalla's views on the inadequacy of the studies conducted, Tr.1184, 1189-93, and statements by government officials that her comments did not influence their actions, Tr.1021, 1024, 1032, 1423.

279.[2]

The decision also undermines the common-law privilege by misapplying the express malice standard. The Court perceived a "malevolent intent to harm" Lake Point because Hurchalla emailed "instructi[ons]" to Commissioners with whom she was influential and whimsically signed an email "Deep Rockpit" and another (unrelated to Lake Point) "Ms. Machiavelli." A.14. Given Hurchalla's undeniable dedication to environmental issues, there is no basis to construe her criticisms of the project or her tongue-in-cheek signatures as evidence of express malice directed toward Lake Point. The Opinion also permits the privilege to be overcome by "improper means," which is contrary to Florida law and permits plaintiffs to avoid the rigorous express malice standard by rebottling defamation or libel as tortious interference.

II. THE OPINION BELOW CONFLICTS WITH THIS COURT'S AND THE DCAS' RULINGS ON ACTUAL AND EXPRESS MALICE

A. To find actual malice, there "must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731. As discussed, there is no evidence Hurchalla doubted the truth of her statements about the lack of documented project

[2] The Court's reasoning is also problematic because it relies in part on the fact that two Commissioners who received the email "had not read the permits or studies conducted," A.11, suggesting that anyone petitioning the government assumes greater risk if their legislator is not already informed on the issue.

benefits. The facts here fall far short of the facts necessary for actual malice and even those that Florida courts have found not to constitute actual malice.[3] Moreover, allegedly false statements must be considered in the totality of their context, yet the Fourth District disregarded that Hurchalla was referencing CERP peer review. *Hay v. Indep. Newspapers, Inc.*, 450 So. 2d 293, 295 (Fla. 2d DCA 1984); *Ergle*, 525 So. 2d at 1015; *Smith*, *Levan*, *supra*.

B. Similarly, Florida courts have set "a very high standard" for finding express malice, which requires extreme hostility remote from Hurchalla's good faith but cheeky comments. *Shaw v. R.J. Reynolds Tobacco Co.*, 818 F. Supp. 1539, 1542 (M.D. Fla. 1993). For example, in *Nodar*, a parent told a school board that his son's teacher had harassed and verbally abused his son, that she was unqualified, and that her performance as a teacher was victimizing his son. This Court held those words did not show express malice because they reflected parental concern for the

[3] *See Don King Prods, Inc. v. Walt Disney Co.*, 40 So. 3d 40 (Fla. 4th DCA 2010) (no actual malice where publisher harbored ill will and intended to portray King negatively, knew or should have known acquaintance committed tax fraud, and had a videotape undermining some statements); *Times Pub. Co. v. Huffstetler*, 409 So. 2d 112 (Fla. 5th DCA 1982) (no actual malice by publisher where reporter failed to "completely verify" article); *Lampkin-Asam v. Miami Daily News, Inc.*, 408 So. 2d 666 (Fla. 3d DCA 1981) (while journalist's "careless[ness]" might satisfy "preponderance of the evidence" or "clear and convincing showing of negligence," no "actual malice by clear and convincing evidence"); *compare with Cape Publications, Inc. v. Adams*, 336 So. 2d 1197 (Fla. 4th DCA 1976) (actual malice where journalist repeated statements from source known to be biased against the subject of the statements and was told directly the statements "were untrue").

effectiveness of public schools, not malicious harassment. 462 So. 2d at 811-12. If those remarks did not show express malice, neither could Hurchalla's email signatures. Nothing identified by the Court suggests Hurchalla made her statements to Commissioners to "gratify [her] malevolence" toward Lake Point. *Id.* at 811. Nor can express malice "be inferred from the mere fact that the statements are untrue." *Gibson v. Maloney*, 231 So. 2d 823, 825 (Fla. 1970); *Crestview Hosp. Corp. v. Coastal Anesthesia, P.A.*, 203 So. 3d 978, 983 (Fla. 1st DCA 2016) ("the Florida Supreme Court has long held … a qualified privilege isn't overcome by the simple fact that a defendant makes a false statement"). On the rare occasions where this Court has found express malice, the facts instead reflect an ulterior motive unrelated to an intense belief the conduct criticized is wrong or harmful to the public. *See, e.g.*, *Fridovich v. Fridovich*, 598 So. 2d 65, 68-69 (Fla. 1992) (express malice where conspiring siblings purchased stress analyzer to determine who could lie most convincingly to police, then orchestrated plan to frame brother for father's murder).

The Opinion further conflicts with established case law because it held in the alternative that express malice can be shown by use of improper means. But where liability would be based on expression to a government official on a matter of public concern, only proof of malevolence can defeat the privilege. *Nodar*, *supra*; *Londono v. Turkey Creek, Inc.*, 609 So. 2d 14, 18 (Fla. 1992); *Montgomery v. Knox*, 3 So. 211, 217 (Fla. 1887) (defining express malice as "ill will, hostility, evil intention to

defame and injure").[4]

III. THE COURT SHOULD EXERCISE ITS JURISDICTION BECAUSE THIS CASE WILL CHILL EXPRESSION AND POLITICAL ACTIVITY THROUGHOUT THIS STATE

This case presents issues of exceptional importance. No Florida appellate court has ever upheld a judgment directed at petitioning activity, let alone one so enormous and on such a thin record. The Opinion will encourage any party aggrieved by governmental action to sue whoever supported such action—not just environmental activists but also public policy organizations (and members) supporting or opposing legislation, religious groups seeking regulatory exemption, and companies bidding for government contracts. If a few imprecise words and an email signature can overcome Hurchalla's right to petition, such lawsuits very well may succeed. Few potential petitioners can afford to take that risk. The Fourth District's approval of a multi-million-dollar judgment for communicating with government officials will do more than chill public expression—it will freeze it.

CONCLUSION

For the foregoing reasons, this Court should grant jurisdiction.

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[4] The cases cited, A.11-12, addressed the privilege to interfere with a business relationship or contract based upon financial interest or collection of a debt. *KMS Rest. Corp. v. Wendy's Int'l, Inc.*, 361 F.3d 1321 (11th Cir. 2004); *Morsani v. Major League Baseball*, 663 So. 2d 653 (Fla. 2d DCA 1995); *GNB, Inc. v. United Danco Batteries, Inc.*, 627 So. 2d 492, 493-500 (Fla. 2d DCA 1993) (Altenbernd, J., dissenting). None involved speech or even used the term "express malice." This contradicts the established framework for protecting petitioning activity.

Dated: October 21, 2019

Respectfully submitted,

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