IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 4D18-1221
L.T. CASE NO. 2013-001321-CA

MAGGY HURCHALLA,

Appellant,

v.

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

Appellees.

INITIAL BRIEF OF APPELLANT MAGGY HURCHALLA

On Appeal from a Final Order of the Nineteenth Judicial Circuit, In and For Martin County, Florida

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References to the Record will be designated R.Page. The trial transcript (Volumes 1-8) was uploaded separately from the record and is separately paginated. The trial transcript will be referred to as Tr.Page. References to the separately filed appendix (which contains select record material) will be referred to as App.Page. Unless otherwise noted, all emphasis is supplied.

INTRODUCTION

Maggy Hurchalla has long been recognized for her commitment to environmental protection. After reading press reports about secret plans and other possible problems with the Appellees' rock-mining project, she expressed concerns about it to the Martin County Board of Commissioners. The Board's staff independently became concerned that Appellees were mining on project lands outside approved areas, and upon learning of staff's concern, the Board directed staff to investigate further. The ensuing independent inquiry confirmed staff's initial concerns. Pursuant to ordinary administrative procedures, the Board deferred to staff to determine appropriate enforcement actions, and staff issued two notices of violation to Appellees. None of the violations identified in the notices involved the concerns raised by Hurchalla in her communications with the Commissioners.

The notices of violation invited Appellees to dispel staff's concerns or cure the violations. Appellees did neither; instead, they sued the County and the local water district, claiming the notices of violation breached contracts with the County and the district. After years of litigation, the County and the district settled, giving Appellees everything they claimed to have lost by the alleged breaches and more.

After Hurchalla refused to retract statements made to the Commission, Appellees sued her for tortiously interfering with the contracts. Although this is a textbook example of a "SLAPP" suit—a lawsuit commenced strategically to

discourage citizens from exercising their fundamental constitutional rights to speak on matters of public concern and to ask their government officials to redress problems—the trial judge allowed it to go to trial. The judge applied the wrong burden of proof when he instructed the jury that it could find for Appellees without requiring them to prove that her statements were made with "actual malice," let alone with "clear and convincing evidence," that she uttered them solely with "express malice," and that the jury could draw a negative inference from her routine deletion of emails that were produced by others. The jury returned a verdict awarding Appellees nearly $4.5 million in damages.

This verdict should be overturned and judgment directed for Hurchalla. As a matter of law, none of these instructions adequately protected her constitutional and common law privileges. As the U.S. Supreme Court recently confirmed, 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 Rivera Beach*, 138 S. Ct. 1945, 1954 (2018), and that right is not lost even where the citizen "foresaw—and directly intended—that [plaintiff] would sustain … injury as a result of" her petitioning. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). Appellees also failed to adduce evidence sufficient to show that Hurchalla's good faith communications with County officials were deliberately false statements of fact, and sending emails to government officials' private accounts is not an

improper method of petitioning. Neither Hurchalla's deletion of her copies of some of those emails nor any other evidence existed to show she acted solely to harm Appellees rather than to promote the public interest in the environment. Further, Appellees' tort claim failed because they did not prove that the County breached the contract, that Hurchalla caused any breach, or that they suffered damages.

STATEMENT OF THE CASE AND FACTS

The Lake Point Project. In January 2008, Appellee Lake Point Phase I, LLC, bought a 1,007-acre parcel in western Martin County. In September 2008, Appellee Lake Point Phase II, LLC, bought an adjacent 1,225-acre parcel. R.5633-34. These parcels ("Lake Point Property") were zoned for agricultural use, and therefore County regulations barred mining on them. Tr.282-83. A portion of the Property, however, was covered by a prior County order for development of a residential equestrian subdivision known as Lake Point Ranches ("Development Order"). R.6592.

In November 2008, Appellees (together, "Lake Point") abandoned the original plan to build an equestrian subdivision and entered into the Acquisition and Development Agreement ("Acquisition Agreement") with the South Florida Water Management District ("the District") to provide water from the Lake Point Property for the Loxahatchee River, the St. Lucie River Watershed Protection Plan, and the Northern Everglades and Estuaries Protection Program. R.6574-6667. The

agreement authorized Lake Point to use the Property to mine and sell the excavated rock during its twenty-year term. R.6580. The agreement said Lake Point would donate the mined portion of the Property to the District in phases for building stormwater treatment areas that would supplement efforts to restore damaged ecosystems, including the St. Lucie River watershed. R.6579-89.

In 2009, the County and the District entered into an Interlocal Agreement, which allowed Lake Point to conduct more intensive excavation on the Property once it received all required mining permits from the State of Florida and the U.S. Army Corps of Engineers ("the Corps"). R.6668-6733. The agreement also said the Development Order remained in effect until Lake Point donated the Property. R.6593. Although the Interlocal Agreement identified only the County and the District as "parties," Lake Point unilaterally agreed to be bound by sections of the agreement, including Sections 11 and 12. Section 11 specifies that Lake Point pay the County an annual Environmental Contribution based on the amount of rock removed from the Property; it also acknowledges that the "Public Works Facility" was a "public stormwater project" exempt from certain procedural requirements to obtain site plan approval. R.6684-85. Section 12 confirmed that, as stated in the Acquisition Agreement, the Development Order would remain in force until Lake Point had donated a certain portion of the Property to the District. R.6680.

In 2011-2012, Lake Point obtained permits from the State and the Corps to excavate lime rock. R.6399-6455; 6456-6522. Also in 2012, the County extended the Development Order at Lake Point's request—allowing mining to continue on the portion of the Property originally covered by the order. R.5974-80. Lake Point never donated any portion of the Property to the District, Tr.653, and therefore no mining on the Property was authorized outside the boundaries of the Development Order.

In September 2012, local media detailed a previously undisclosed plan by Lake Point to convert the project to one that would supply water to the City of West Palm Beach for consumptive use. R.6765-70. Although this had been Lake Point's intent all along, Tr.598, 620, 648, Lake Point had not previously informed the County, Tr.615, 659, or the District. Indeed, a District official was surprised by the news because, in his view, Lake Point's secret plan could not work, Tr.1419.

Because the water could not be used for both consumptive use and meet the needs of the federally designated Wild and Scenic Loxahatchee River and other environmental projects, these media reports alarmed Maggy Hurchalla, a resident of Martin County who has received numerous awards for her long commitment to environmental issues and who has served on state and regional environmental boards and committees. Tr.1111, 1063, 1500-01. Hurchalla expressed concerns

about the project's potential environmental effects to all five County Commissioners by email. R.8056-58; 7185-86.

County staff already was reviewing the project and eventually issued a report concluding that it had not yet become a public works project and was excavating outside the boundaries authorized for mining under the Development Order. R.7939-44. On December 17, 2012, the County Growth Management Director sent a letter to Lake Point, seeking compliance with County codes and pointing out areas where Lake Point was in potential violation. R.5974-80. In sending this letter, the director acted independently of Hurchalla, who had not communicated with the director or suggested such a letter. Tr.317, 328-29, 333, 337, 1018, 1021, 1024, 1032, 1240. Hurchalla did not even know about the letter until the County disclosed it a few weeks later in an information packet made publicly available for an upcoming Commission meeting scheduled for January 8, 2013. Tr.1558.

On January 2, 2013, Lake Point submitted a formal application to have the County vacate the Development Order and the unity of title on the Property that had been recorded pursuant to the Development Order. R.7042-44. Under the Acquisition Agreement, these actions were necessary preconditions for Lake Point to convey the Property to the District and acquire more intensive mining rights on the Property. R.6580-82, 6591.

On January 4, 2013, Hurchalla emailed the five Commissioners about the project. App. 025-27; R.6776-78. After noting her review of the staff report finding that Lake Point had excavated outside the area permitted by the Development Order, Hurchalla recounted the project's history and expressed various concerns about the project. In her discussion, she made seven statements that Lake Point alleges to be false.[1]

On January 8, 2013, the Commission discussed the project and heard a staff presentation about possible violations of the Development Order that could lead to code enforcement proceedings. R.7668-70; Tr.505-19. Upon the advice of the County Attorney, the Commission directed staff to investigate the apparent violations and proceed with normal code enforcement—an independent process overseen by a code enforcement magistrate (R.7762-63)—and postponed further discussion of the project until the next meeting to give staff time to conduct its investigation, and to give Lake Point an opportunity to address the Commission.[2] Tr.515-19.

Hurchalla sent other emails to Commissioners. On January 12, 2013, she wrote that she thought the County should "legally void" the Interlocal Agreement

[1] *See* R.1201 ¶52; *infra* 12-15.

[2] The Lake Point agenda item was continued from the January 15 meeting to a meeting on February 5, 2013. R.7873-83.

because it did "not do what the county was promised," and then "negotiate a new contract." App.031-33; R.6784-85, 8310. She specifically exhorted, "DON'T issue any cease and desist on the mining." Instead, she suggested that Commissioners "wait for staff to come back" with findings regarding possible "violations of the county rules." *Id.*

In other emails, Hurchalla criticized the County and the District for their handling of the Lake Point project. For example, she inquired about the details and status of the project and opined that the project would not work as promised because proper reservoir projects should not be below ground and small reservoirs are inefficient. Tr.1508-09, 1531. She expressed concern that the project would destroy wetlands, noting that the Corps permit allowed excavation and filling of sixty acres of "agricultural wetlands." She observed: "[I]f you fill or excavate a wetland, you destroyed it." Tr.1536; *see* R.6456-6552. She conveyed her belief that Lake Point had destroyed a small separate wetland which was depicted in an exhibit to the Interlocal Agreement but was absent from a site plan included in the County Commissioner Agenda Packet. Tr.1526; App.064-65; R.5948.

Hurchalla sent some of these emails to the Commissioners' official accounts, and others to their private accounts. Tr.1579. Although the Commissioners were legally required to ensure that the emails sent to their private accounts were preserved as County records, they frequently failed to do so. Tr.372-74. Some of

those emails were among ones that Hurchalla deleted—*before* Lake Point sued her—in order to avoid exceeding her email storage limit in response to warnings from her internet service provider. Tr.1576, 1616. Yet, the content of all relevant deleted emails known to have existed was provided to Lake Point before trial. App.005-063.

Lake Point is found to be in violation and targets Hurchalla. On February 1, 2013, Lake Point's lawyer sent a letter to Hurchalla demanding that she retract statements about the project and that she agree not to criticize Lake Point or the project in the future. R.2649-50. She did not respond to Lake Point's demand.

On February 4, 2013, County staff sent a Notice of Violation ("NOV") to Lake Point Phase I and a separate NOV to Lake Point Phase II, each specifying various County code violations and asking the companies to provide evidence that they were acting in compliance with the Development Order and the Interlocal Agreement, and to cease the offending operations (not the mining authorized by the Development Order) or cure the violations. R.7003-13. Hurchalla had no role in preparing these notices, did not identify these violations in her emails, and did not know about them until after they were issued. Tr.1558-59.

At its meeting the next day, February 5, 2013, the Commission heard presentations from staff and the District. At the County Engineer's recommendation, the Commission decided not to take any action regarding Lake

Point at that time, leaving code enforcement proceedings to staff. Tr.1324-30. Lake Point representatives attended the meeting but did not address the Commission to offer a response to the NOVs, nor did they address any of the concerns raised by staff and the Commissioners. Instead, later that day, Lake Point filed suit against the District and the County for breach of the contracts.

On February 20, 2013, Lake Point filed a separate suit against Hurchalla, claiming she had tortiously interfered with the Interlocal and Acquisition Agreements because seven statements in her email of January 4, 2013 (set out below) were "knowingly made false statements of material fact" for "the sole purpose of interfering with the Interlocal Agreement and the Development Agreement." R.195, 206, 635-36, 912, 1172, 1225.[3] Lake Point sought damages and an injunction barring Hurchalla from speaking publicly about the Lake Point project. Lake Point subsequently abandoned its claim with respect to the Acquisition Agreement, leaving only the Interlocal Agreement as the basis for its tortious interference claim at trial. Tr.36; *infra* 32 (discussing the three claimed breaches). The prayer for injunctive relief—a prior restraint—was dismissed without prejudice. R.538-39, 1104.

[3] Lake Point later dismissed that action and added Hurchalla as a defendant to the action previously filed against the District and the County.

In a series of dispositive pretrial motions, Hurchalla argued that her communications with County officials were protected by the First Amendment and Florida common law because they were made to government officials to redress matters of public concern (the project's environmental consequences). *See, e.g.*, R.1421-25; R.2064-69 (citing, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Nodar v. v. Galbreath*, 462 So. 2d 803 (Fla. 1984); *Demby v. English*, 667 So. 2d 350 (Fla. 1st DCA 1995)). Lake Point responded that Hurchalla lost her privilege because: (1) her statements were deliberate misrepresentations; (2) she was motivated by "express malice," i.e., a desire to hurt Lake Point; and (3) she used "improper methods" by sending her emails to Commissioners' private email accounts. R.3895-3905. The judge denied Hurchalla's motions. R.1479, 3749, 4423.

The County and the District settled separately with Lake Point before trial began. The settlement agreements did not admit that the Interlocal Agreement had been breached—indeed, they stated that the Interlocal Agreement "is valid and enforceable and remains in full force and effect" (R.8114)—but still gave Lake Point a bounty. They assured Lake Point it could mine without further permits; the County agreed to pay Lake Point $12 million; the Interlocal and Acquisition Agreements were extended by 30 years; the District assumed the cost of building the stormwater treatment areas from Lake Point; they gave Lake Point the right to

sell water, and the District agreed to buy excavated rock from Lake Point for District projects for the next 15 years. R.8112-8279, 8283-8309. The County also released a letter of apology. Nothing in the settlements implicated Hurchalla.

The Trial. At trial, Hurchalla demonstrated her good-faith basis for, and the truth of, the seven allegedly false statements at the heart of Lake Point's case:

1. Lake Point claims Hurchalla falsely stated: "The project has been 'fast tracked and allowed to violate the rules.'" R.1212. The actual statement made by Hurchalla was: "This project, for reasons I don't pretend to understand, has been fast tracked and allowed to violate the rules based on the supposition that it might help the river. At best it won't do anything for 20 years." App. 025-27; R.8056-58. Furthermore, Lake Point had received expedited and preferential treatment from the County by not having to obtain a land use change and mining permit from the County, which are lengthy and complicated processes and would have imposed more restrictive rules governing the mining operation.[4] Tr.1010; R.6679, 7932, 7951-57. Nonetheless, the project was expressly exempt from sections of the mining code and Section 10.1.E.2.e. of the Land Development Regulations. R.6679

2. Lake Point claims that Hurchalla falsely stated: "The new plan for the 'Public Works Project' destroys 60 acres of wetlands." R.1212. The Corps

[4] Section 10.1 provides for expedited review for certain projects, but does not exempt Lake Point from Land Development Regulations or from the Comprehensive Plan.

permit—introduced at trial—documented and authorized Lake Point's plan to excavate, mine, and mitigate the loss of more than sixty acres of agricultural wetlands. R.6456-6552. Lake Point's expert tried to distinguish between "agricultural wetlands" and "wetlands," but admitted that the Corps permit, over his objection, referred to sixty acres of "wetlands" being excavated or filled. Tr.885-86. Hurchalla's expert testified that wetlands are wetlands, whether agricultural or non-agricultural. Tr.1202, 1206-07, 1209-11. As for the small wetland Hurchalla identified from reviewing the Interlocal Agreement attachments and subsequent site plans from which it was missing, the Lake Point manager testified that he had brought in limestone rock to that area and stabilized it for parking. Tr.1332. Lake Point's engineer previously had identified the area as a wetland on a plan he prepared before Lake Point's manager filled in the area. Tr.875; App.064-65; R.5964.

3. Lake Point claims that Hurchalla falsely stated: "The reason for calling it a Public Works Project appeared to be that the owner no longer wanted to keep his promise about preserving wetlands. There were wetlands on top of some valuable limerock." R: 1212. Hurchalla testified that Lake Point was supposed to preserve all wetlands on the site. Tr: 1525-26. The Corps permit confirms that sixty acres of wetlands were to be destroyed, and the evidence showed at least one small wetland was filled in. Tr. 1332; 875; App. 064-65; R. 5964.

4. Lake Point claims that Hurchalla falsely stated: "There is no discussion of the fact that mining seems to be taking place immediately adjacent to wetlands." R.1213. Hurchalla's statement referred to quarterly reports submitted by Lake Point to the County. R.8056-58. Lake Point did not submit any evidence to rebut Hurchalla's opinion that the reports did not discuss mining which seemed to be taking place immediately adjacent to wetlands. Hurchalla submitted Lake Point's own mining plan and the Corps permit to show this fact. Tr.1536; R.6456-6552; App.064-65. Her statement was confirmed by testimony of an environmental engineer and a wetlands expert. Tr.1170, 1175, 1188, 1191, 1320, 1215, 1224.

5. Lake Point claims that Hurchalla falsely stated: "There was no public knowledge of any plan, concept or idea that required purchase of the Lake Point property." R.1212. Hurchalla testified that the District once considered purchasing at least some of the Property before Lake Point bought it, and that those considerations were done privately. Tr.1505-06; R.8056-58. This testimony went unrebutted.

6. Lake Point claims that Hurchalla falsely stated: "A study was to follow that documented the benefits but was not provided." R.1212. In 2008, Hurchalla met with Lake Point's owner and engineer to discuss the project. Tr.1506-08. During that meeting, they assured Hurchalla of Lake Point's commitment to doing environmental studies that Hurchalla considered important,

including Comprehensive Everglades Restoration Plan ("CERP") peer review. Tr.1511. Experts testified that the project never received CERP peer review. Tr.1166, 1188, 1191, 1511-12.

7. Lake Point claims that Hurchalla falsely stated: "There does not appear to be any peer review to verify benefits from the rockpit." Tr.1213. The actual opinion stated by Hurchalla was: "There does not appear to be any peer review **by a CERP team** to verify benefits from the rockpit." R.8056-58. Experts testified that the project never received peer review through CERP. Tr.1166, 1188, 1191, 1511-12.

With respect to damages, Lake Point's expert Henry Fishkind based his calculation on the contention that Lake Point's reputation was harmed, which, in turn, caused lost sales of rock excavated from the Property. Tr.714, 768. Lake Point presented no evidence that any customer ever refused to purchase rock because of the supposed breach by the County or anything Hurchalla said or did. And the rock remains in the ground and available for sale during the term of the now 50-year County and District mining authorizations.

Before Hurchalla's opportunity to present her case, the judge asked to meet *ex parte in camera* with each party. During that meeting, the judge told Hurchalla he did not think she would win, and then urged her to sign a letter, which he said he had drafted, in which she would apologize, admit Lake Point was a good

project, and promise never to criticize it in the future. Tr.568. Hurchalla refused. Tr.569. Upon returning to open court, Hurchalla moved for the judge's recusal, which he denied. Tr.588-89.[5] The judge also refused to place the letter in the record. R.8363; Tr.569.

The jury returned a verdict for Lake Point, awarding $4.4 million in damages. R.5863. The judge denied Hurchalla's motion for judgment notwithstanding the verdict. R.8454-55. Hurchalla also renewed her previously denied request for entry of a final order dismissing Lake Point's request for injunctive relief with prejudice. *See* R.8319-29; 8357-62. The judge denied the motion and *sua sponte* sanctioned Hurchalla and her counsel on the ground that, in the judge's view, Hurchalla had renewed this request merely to delay the proceedings. R.8416-22.

Hurchalla appealed the final judgment against her, the underlying denials of her dispositive motions, and the sanction order, which have been consolidated in this case. *See* R.8456-62.

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[5] Florida Code of Judicial Conduct, Canon 3(B)(5) states that "[a] judge shall perform judicial duties without bias or prejudice." Canon 3(E)(1)(a) says that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where … the judge has a personal bias or prejudice concerning a party or a party's lawyer …."

STANDARD OF REVIEW

Hurchalla appeals from the trial court's denial of her Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for New Trial, and from final judgment. A motion for judgment notwithstanding the verdict should be granted if the verdict is not "supported by competent, substantial evidence," and denial of such a motion is reviewed de novo. *Alterra Healthcare Corp. v. Campbell*, 78 So. 3d 595, 601 (Fla. 2d DCA 2011). Denial of a motion for new trial is reviewed for abuse of discretion, with questions of law reviewed de novo. *Heartland Express, Inc. of Iowa v. Farber*, 230 So. 3d 146, 150 (Fla. 1st DCA 2017). With regard to jury instructions, this Court reviews "de novo whether the trial court applied the correct burden of proof in its jury instructions," *Jones v. Federated Nat'l Ins. Co.*, 235 So. 3d 936, 940 (Fla. 4th DCA 2018), and "[r]eversible error occurs when [a jury] instruction is … an erroneous or incomplete statement of law" or is "confusing or misleading." *Dockswell v. Bethesda Memorial Hosp., Inc.*, 210 So. 3d 1201, 1214 (Fla. 2017). The interpretation of a contract is a question of law and thus reviewed de novo. *Ciklin Lubitz Martens & O'Connell v. Casey*, 199 So. 3d 309, 310 (Fla. 4th DCA 2016).

SUMMARY OF THE ARGUMENT

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, 1954–55 (2018). Lake Point's $4.4 million judgment against Maggy Hurchalla threatens that liberty because it is based solely upon her emails to public officials regarding environmental and regulatory issues relating to its project. There is no evidence these emails exceeded the scope of this fundamental right.

There are multiple grounds upon which the verdict should be vacated. First, Hurchalla's First Amendment right to make these statements could be overcome only if Lake Point proved there was "clear and convincing" evidence of "actual malice," that is, her statements were deliberate lies. There was no such evidence.

Second, Florida common law also protects Hurchalla's communications with government officials on this matter of public concern. This privilege could be defeated only if Lake Point proved she spoke with "express malice" toward Lake Point. In its tortious interference claim, Lake Point had to prove the sole motive for her communications was to hurt Lake Point. Again, there was no such evidence. Hurchalla simply spoke as a concerned citizen and dedicated environmentalist.

Third, the court's instructions on Hurchalla's speech privileges were erroneous because they (1) permitted Hurchalla's constitutional privilege to be overcome by express malice; (2) allowed her constitutional and common law privileges to be defeated by a finding that she did not use proper methods; and (3)

relieved Lake Point of its burden of proof with respect to both constitutional and common law malice.

Fourth, no reasonable jury could have found that Hurchalla tortiously interfered with any contract because there was no evidence of breach and no proof of any relationship between her emails and the purported breaches. Lake Point also failed to offer a sound method or any evidence supporting its theory of future damages.

Finally, the adverse inference instruction based on Hurchalla's deletion of emails was erroneous because (1) the instruction violated Florida's specific rule on electronically stored information; (2) sanctions should be imposed only after a reasonable opportunity to comply with discovery requirements; (3) no evidence crucial or material to the case was unavailable; and (4) government officials, not private citizens, have a duty to maintain public records.

ARGUMENT

I. APPELLEES FAILED TO DEFEAT HURCHALLA'S FIRST AMENDMENT PRIVILEGE

Lake Point claims that Hurchalla tortiously interfered with the Interlocal Agreement by voicing concerns to County officials about the Lake Point project. These statements are indisputably protected under the First Amendment. Yet the trial court concluded—and instructed the jury—that Hurchalla would lose her constitutional privilege unless she proved that she had used only "proper methods"

to communicate with the County and that her motive had not been to injure Lake Point. That was legally wrong and presents a serious threat of chilling vital public-issue speech. Hurchalla's constitutional privilege could be lost only if Lake Point proved by clear and convincing evidence that she had spoken with "actual malice," i.e., knowing or high degree of awareness of probable falsity. And the record was devoid of such evidence.

A. Under The First Amendment, Hurchalla Could Be Liable Only If She Spoke With Actual Malice

The Petition Clause guarantees the right to petition the Government for a redress of grievances—"one of the most precious of the liberties safeguarded by the Bill of Rights." *Lozman v. City of Rivera Beach*, 138 S. Ct. 1945, 1954 (2018). If this privilege can be overcome here, it is only where the speech was false and made with actual malice, i.e., knowing or "high degree of awareness of … probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Similarly, under the Free Speech Clause, speech about a "public figure" is privileged unless "false" and "made with actual malice." *Times*, 376 U.S. at 279-80.[6]

[6] The rules governing defamation apply to Lake Point's tortious interference claim. *See Londono v. Turkey Creek, Inc.*, 609 So. 2d 14, 18-19 (Fla. 1992) (applying defamation rules to tortious interference claim); *Seminole Tribe of Fla. v. Times Pub. Co.*, 780 So. 2d 310, 318 (Fla. 4th DCA 2001).

Hurchalla's speech was protected by the Petition Clause because she was asking public officials to address the environmental consequences and regulatory compliance of the Lake Point project. Her speech also was protected by the Free Speech Clause because Lake Point is at least a "limited-purpose public figure" due to its involvement in the "public controversy" over its project. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); *see also Mile Marker, Inc. v. Petersen Publishing, L.L.C.*, 811 So. 2d 841, 845-46 (Fla. 4th DCA 2002) (corporation was limited-purpose public figure where it entered public controversy over product quality); *S. Air Transp., Inc. v. Post-Newsweek Stations, Fla., Inc.*, 568 So. 2d 927, 927 (Fla. 3d DCA 1990) (corporation was limited-purpose public figure given involvement in scandal).

A plaintiff bears the burden of proving actual malice with convincing clarity to overcome this privilege. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 n. 30 (1984). Requiring "the critic" to "guarantee the truth of all … factual assertions" would "deter[] … [people] from voicing their criticism, even though it is believed to be true and even though it is in fact true." *Times*, 376 U.S. at 279.

B. The Judge Erroneously Departed From The First Amendment

The judge instructed the jury:

> Hurchalla claims as a defense that the First Amendment gives her the privilege to freely petition the government on matters of public

> concern. You must render your verdict in favor of Hurchalla on Lake Point's tortious interference claim *if* you find that Hurchalla used *proper methods* to attempt to influence Martin County, *and* that her *motive* for petitioning Martin County was not primarily to harm Lake Point. However, deliberate misrepresentations of fact are not considered to be a proper method.

Tr.1828. Although this instruction properly identified that a finding of deliberate misrepresentation—effectively, *actual* malice—could defeat Hurchalla's First Amendment privilege, it applied the wrong law and burden of proof.

First, the instruction erroneously permitted Hurchalla's constitutional privilege to be overcome by a finding that her "motive … was primarily to harm Lake Point," i.e., that she acted roughly with what is termed "express malice" under Florida law. *See Nodar*, 462 So. 2d at 811. The common-law privilege can be defeated by express malice, but the First Amendment privilege cannot. First Amendment protection "cannot properly be made to depend on [the speaker's] intent," *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961)—even intent to hurt the plaintiff, *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (rejecting tort liability though defendants "foresaw—and directly intended—that [plaintiffs] would sustain economic injury as a result of their" petitioning); *accord Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014); *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993).

Consistent with these precedents, the Florida Supreme Court and this Court have recognized that express malice or a motive to injure a plaintiff, standing alone, does not defeat the First Amendment privilege. In *Londono*, the court held that "the complaint ma[de] a facially sufficient claim that [defendants] abused their privilege" by alleging that defendants had "*intentionally and* maliciously made numerous *false* statements … for the purpose of harming [plaintiff's] economic interests." 609 So. 2d at 18-19. That is, the privilege was defeated in *Londono* because the plaintiff alleged *both* express malice (bad motive) and actual malice (intentional falsity)—a more demanding standard than required by the First Amendment. Likewise, in *Curry v. State* this Court said that "unsavory motivation" in petitioning the government "does not eviscerate the constitutional protection." 811 So. 2d 736, 742-743 (Fla. 4th DCA 2002); *accord Don King Prods., Inc. v. Walt Disney Co.*, 40 So. 3d 40, 45 (Fla. 4th DCA 2010). Thus, the trial court committed reversible error.

Second, the instruction erroneously permitted Hurchalla's privilege to be defeated by a finding that she had not "used proper methods to attempt to influence" the Commission. As described above, the First Amendment privilege may be defeated only under very limited circumstances, and "improper methods" is not among them. Even if the privilege could be lost by the speaker's use of

particularly problematic methods of communicating, the instruction did not cabin the jury at all—it could have deemed anything Hurchalla did to be improper.

That risk was not academic; Lake Point invited the jury to reject Hurchalla's First Amendment privilege because she sent emails to Commissioners' private email accounts. *See* Tr.233-34, 240, 1583-87, 1742, 1747; R.3833-38, 3846-48. That is not an improper method. The County did not prohibit citizens from sending emails to Commissioners' private email accounts; there is no legal requirement that citizens communicate with County officials only through public email accounts or at public meetings. Tr.372-374, 385. There is no authority allowing such mundane conduct to defeat the First Amendment privilege; indeed, allowing such conduct to defeat the privilege would severely chill vital political speech. The instruction regarding proper method, therefore, was also reversible error.

Third, the instruction erroneously relieved Lake Point of its burden to prove—by clear and convincing evidence—the facts that would defeat the privilege. The judge instructed the jury that the "parties must prove all claims and defenses by the greater weights of the evidence," Tr.1825, and, as shown in the instruction on privilege quoted above, framed the facts that might have defeated the privilege as affirmative elements of Hurchalla's privilege defense, thereby requiring her to prove their nonexistence. *See also* Tr.1666 (Judge to defense counsel: "it's your burden to show justification or privilege"). This, too, was

reversible error.[7]

C. No Reasonable Jury Could Have Found That Hurchalla Acted With Actual Malice

Under the correct legal framework, the only relevant question regarding Hurchalla's privilege was whether the statements that supposedly caused the County's breach were deliberately false (and thus the result of actual malice). No reasonable juror could have reached that conclusion, even under a "greater weight" standard but especially under a "clear and convincing" standard.

At trial, Lake Point focused on seven allegedly false statements in an email sent by Hurchalla to the Commissioners regarding the project's impact on wetlands, compliance with procedural requirements, and public awareness. There was no evidence that any were deliberately false. As detailed above, all were made in good faith, based on Hurchalla's review of primary sources and media reports, *supra* 12-15, and Lake Point adduced no evidence otherwise. Further, as also detailed above, the statements were true or opinions, which cannot be the basis of

[7] Exacerbating these errors, the judge denied Hurchalla's request for a special verdict form, which would have required the jury to make specific findings on each element of the claims and defenses. Tr.1708-12. Special verdict forms and special interrogatories are a "'particularly useful check against the misconstruction or misapplication of a standard as uncommon as actual malice.'" *West v. Media Gen. Operations*, *Inc*., 120 F. App'x 601, 625 (6th Cir. 2005) (quoting *Tavoulareas v. Piro*, 817 F.2d 762, 808-09 (D.C. Cir. 1987) (Ginsburg, J., concurring)).

tort liability. *See Gertz*, 418 U.S. at 339-40.[8]

Because the evidence was legally insufficient on the only issue that could have defeated Hurchalla's First Amendment privilege, the Court should reverse the judgment and dismiss the case. *Nodar*, 462 So. 2d at 812.

II. APPELLEES FAILED TO DEFEAT HURCHALLA'S COMMON LAW PRIVILEGE

Separate from the First Amendment, Florida common law protected Hurchalla's communications with County officials. Because she spoke on a matter of public concern, her privilege could be lost only if Lake Point proved that she spoke with "express malice," i.e., a motive to hurt Lake Point. The judge erred in permitting the privilege to be lost upon the jury's finding of improper method, in defining express malice, and in placing the burden of proof on Hurchalla. Further, no reasonable jury could have found express malice.

A. Under Florida Law, Hurchalla Could Be Liable Only If She Spoke With Express Malice

Under Florida law, there are numerous circumstances in which a person is privileged to interfere with a contract, e.g., "to protect or further one[']s legitimate economic situation." *Wackenhut Corp. v. Maimone*, 389 So. 2d 656, 658 (Fla. 4th DCA 1980). Relevant here, a person is also privileged to interfere by making

[8] This Court decides as a matter of law whether a statement is one of fact or opinion. *Morse v. Ripken*, 707 So. 2d 921, 922 (Fla. 4th DCA 1998).

"statements … to a political authority regarding matters of public concern." *Nodar*, 462 So. 2d at 810; *Londono*, 609 So. 2d at 18. Hurchalla's statements are undisputedly privileged because they were made to County officials regarding the environmental consequences of a public development project. George K. Rahdert & David M. Snyder, *Rediscovering Florida's Common Law Defenses to Libel and Slander*, 11 Stetson L. Rev. 1 (1981).

Although the use of "improper methods" can defeat the privilege to interfere in some circumstances, when, as here, the privilege is based on speech made to a political authority regarding a matter of public concern, the privilege can be defeated only if the speech was made with "express malice." *Nodar*, 462 So. 2d at 810 ("If the statements were made without express malice—that is, if they were made for a proper purpose in light of the interests sought to be protected by legal recognition of the privilege—then there can be no recovery."); *id.* at 806; *Londono*, 609 So. 2d at 18; *cf. Mattocks v. Black Entm't Television, LLC*, 43 F. Supp. 3d 1311, 1319 (S.D. Fla. 2014). Express malice exists only if the speaker's sole motive was "ill will and the desire to harm." *McCurdy v. Collis*, 508 So. 2d 380, 382-83 (Fla. 1st DCA 1987).

B. The Judge Erroneously Departed From Florida Law

The instruction given the jury regarding privilege—quoted above, *supra* 21-22—departed from settled law in three respects.

First, the judge permitted the jury to find that the privilege was overcome if Hurchalla had not "used proper methods to attempt to influence Martin County." Tr.1828. Use of "proper methods," however, was legally irrelevant because Hurchalla's speech was to a public authority on a matter of public concern; as explained, only express malice could have defeated her common law privilege.

Even if use of an improper method could have defeated Hurchalla's privilege, the instruction was erroneous because it was open ended and permitted the jury to find that mundane conduct such as sending emails to Commissioners' private email accounts was improper. Florida law recognizes as improper methods only far more serious actions: physical violence, otherwise illegal conduct, deliberate misrepresentations, or threats thereof. *See Morsani v. Major League Baseball*, 663 So. 2d 653, 657 (Fla. 2d DCA 1995) ("threats, intimidation, and conspiratorial conduct"); *GNB, Inc. v. United Danco Batteries, Inc.*, 627 So. 2d 492, 494 (Fla. 2d DCA 1993) (Altenbernd, J., dissenting) (improper methods rarely "include acts that are neither independently tortious nor proscribed by statute")[9]; Fla. Model Civil Jury Instruction 408.6 (recognizing "[physical violence] [misrepresentations] [illegal conduct] [threats of illegal conduct]" as "improper methods").

[9] The majority noted that "the dissent's explanation of the applicable law is entirely correct." *GNB, Inc.*, 627 So. 2d at 493.

Second, referring to express malice, the judge allowed the privilege to be defeated if Hurchalla's motive was "primarily to harm Lake Point." Tr.1828. That was erroneous: "Even though the speaker's *primary* motivation must be express malice to overcome the privilege in a *defamation* action[,] in a *tortious interference* claim, malice must be the sole basis for the interference." *Boehm v. Am. Bankers Ins. Grp., Inc.*, 557 So. 2d 91, 95 (Fla. 3d DCA 1990); *accord McCurdy*, 508 So. 2d at 383 ("It is only when malice is the *sole* basis for interference that it will be actionable.").

Third, as discussed above, the judge placed the burden of disproving facts that would defeat privilege on Hurchalla. *Supra* 24. Just as under the First Amendment, that was erroneous under Florida law. The common law privilege "raises a presumption of good faith and places upon the plaintiff the burden of proving express malice." *Nodar*, 462 So. 2d at 810; *accord DelMonico v. Traynor*, 116 So. 3d 1205, 1219 (Fla. 2013); *McCurdy*, 508 So. 2d at 382; *Wackenhut Corp. v. Maimone*, 389 So. 2d 656, 658 (Fla. 4th DCA 1980).

C. No Reasonable Jury Could Have Found That Hurchalla Acted With Express Malice

Lake Point's evidence was insufficient to permit a reasonable jury to have found the only fact that could have defeated Hurchalla's common law privilege: express malice. The evidence showed that Hurchalla was not motivated—solely or at all—"by a desire to harm" Lake Point, but rather by "a purpose to protect the

personal or social interest giving rise to the privilege," namely, ensuring that the Lake Point project did not improperly threaten the environment or the public. *Nodar*, 462 So. 2d at 811.

Express malice is "a very high standard" to meet. *Shaw v. R.J. Reynolds Tobacco Co.*, 818 F. Supp. 1539, 1542 (M.D. Fla. 1993), *aff'd sub nom. Shaw v. Reynolds Tobacco Co.*, 15 F.3d 1097 (11th Cir. 1994). "Strong, angry, or intemperate words" alone are not enough. *Nodar*, 462 So. 2d at 811. "Malice cannot be inferred from the fact that some statements are untrue," *Demby*, 667 So. 2d at 353, nor can the privilege be lost merely because a speaker "also in fact feels hostility or ill will toward the plaintiff." *Nodar*, 462 So. 2d at 811-12. Instead, a plaintiff must show the speaker used her "privileged position 'to gratify [her] malevolence.'" *Id*.

That is not a plausible description of Hurchalla's actions. Hurchalla has long been recognized as a dedicated environmentalist, experienced with relevant regulatory processes. *Supra* 5. She was spurred to action here after news reports of Lake Point's secret plan to sell water for consumptive use, which could have had adverse environmental consequences. *Supra* 5-6. Lake Point cherry picks Hurchalla's actions to suggest something nefarious. That fails because Hurchalla's statements facially exhibit no ill will toward Lake Point, and she testified that she was not motivated by a desire to harm Lake Point, Tr.1506-11; 1535-36; 1556-58.

The context must also be considered, *see Nodar*, 462 So. 2d at 812, and here the context reinforces Hurchalla's legitimate interest and good faith. Her offending statements—about whether the project threatened wetlands or complied with procedures—reflected her interest in and experience with environmental protection. And her concerns were supported by public records and expert testimony. *Supra* 12-15.

Nor does Hurchalla's deletion of her copies of some emails she sent to Commissioners show express malice. The duty to preserve those emails was on the Commissioners, not Hurchalla. Tr.373-374. And she deleted them for the entirely innocent reason that she was running out of storage space in her email account. *Supra* 8-9. As discussed below, the judge erred in instructing the jury that it could draw an adverse inference from the email deletions. *Infra* 46-49.

On this record, the jury could not reasonably have found that Hurchalla acted with express malice. *Compare Nodar*, 462 So. 2d at 812 (defendant's remarks at school board meeting that teacher had harassed and verbally abused his son and was unqualified to teach did not show express malice); *Demby*, 667 So. 2d at 354 (defendant's letters to county commissioners regarding animal control director's mistreatment of dog and complaining about director's job performance "clearly" did not show express malice), with *Fridovich v. Fridovich*, 598 So. 2d 65, 69 (Fla. 1992) (allegation that defendant initiated conspiracy among family

members to have brother charged for intentional killing of father would show express malice).

III. NO REASONABLE JURY COULD FIND THAT APPELLEES HAD PROVED A TORTIOUS INTERFERENCE WITH A CONTRACT

To prevail on their claim that Hurchalla tortiously interfered with the Interlocal Agreement, Lake Point had to prove that Hurchalla intentionally procured the County's breach of the agreement and that, as a result, Lake Point suffered damages. *See Howard v. Murray*, 184 So. 3d 1155, 1166 (Fla. 1st DCA 2015). Appellees' claim fails because the evidence was insufficient to show that the County breached the Interlocal Agreement at all, that Hurchalla caused the supposed breaches, or that Lake Point suffered damages as a result.

A. The County Did Not Breach The Interlocal Agreement

Appellees argued at trial that the County breached the Interlocal Agreement through a series of actions between January 2, 2013, and February 5, 2013: (1) the County's refusal to terminate the Development Order and unity of title; (2) the County's refusal to accept Appellees' payment of an environmental contribution; and (3) the County's issuance of two Notices of Violation. No reasonable factfinder could conclude that those actions breached the Interlocal Agreement.

The County's refusal to terminate the Development Order and unity of title was not a breach, for two reasons. First, nothing in the Interlocal Agreement purported to require the County to terminate either the Development Order or the

unity of title. Section 12 of the agreement acknowledges that "[p]ursuant to the [Acquisition Agreement], *Lake Point* further agreed to have [the Development Order and unity of title] terminated." R.6104. This section recognized Lake Point's obligation to seek termination before it transferred the Property to the District but placed no duty on the *County* to terminate upon Lake Point's request. The County cannot have breached an obligation it did not have. *Dorsett ex rel. Dorsett v. Nationwide Ins. Co.*, 2008 WL 2557508, at *6 (S.D. Fla. June 23, 2008).

Second, the undisputed evidence is that the County never actually denied Lake Point's termination request. Ordinarily, such requests take at least two months to process. Tr.1026-1027. Appellees filed their formal requests for termination on January 2, 2013. R.7965-8055. At the Board meeting six days later, Commissioner Heard asked "staff to take no action on that request until we've sorted out these other matters" related to analyzing the Interlocal Agreement and Appellees' compliance with that Agreement. R.7767-68. On February 4, staff asked Lake Point to provide documentation showing that its ongoing activities complied with the Interlocal Agreement. R.7003-08; 7009-13. At a meeting the next day, the Board took no further action on Lake Point to give staff additional time to gather sufficient information. R.7962-63. Instead of cooperating with staff's information requests, Appellees sued the County that day—weeks before a decision on the termination requests reasonably could have been expected. Thus,

the County did not deny Lake Point's request to terminate the Development Order and unity of title; Lake Point deprived the County of the opportunity to decide the request in due course.

The second theory of breach—that the County refused to accept an environmental contribution—similarly fails because the County had no relevant obligation. The Interlocal Agreement required Lake Point to make those payments at specified times. R.6678-79. Nowhere, however, did the agreement state that the County had to accept the payments or condition any subsequent action on the County's acceptance of those payments.

The third theory of breach—involving the Notices of Violation—is more elaborate but still unsupported by any evidence. NOV I declared that Lake Point Phase I was improperly excavating outside the area approved for mining in the Development Order.[10] That did not breach the Interlocal Agreement because Section 12 of the Agreement confirmed that the Development Order "remain[ed] in full force" and that Lake Point was bound to act "in accordance with the existing development plan." It is undisputed that the order remained in place at the time NOV I was issued. Tr.1021-22. Indeed, Lake Point has never denied that the development activities that were the basis for NOV I exceeded the area approved

[10] This NOV also declared that Lake Point was violating the relevant Preserve Area Management Plan. R.7003. That violation is not at issue here. Tr.550.

by the Development Order. Moreover, NOV I was explicitly conditioned on Lake Point's conduct not being "consistent with" the agreement and accordingly invited Lake Point to "demonstrate the project is consistent with the [Interlocal] Agreement." R.6580-81. By declining that invitation and suing for breach, Lake Point conceded the violation. And at trial, Lake Point never showed that its conduct conformed to the Interlocal Agreement.

Moreover, paragraph IV.a of the settlement agreement with the County states: "The Interlocal Agreement is valid and enforceable and remains in full force and effect until superseded by the Amended Interlocal Agreement." R.8112-8279.

NOV II declared that Lake Point Phase II was mining in violation of County regulations requiring a major development site plan and in violation of zoning regulations that did not permit mining on its Property. R.7009-10. Like NOV I, NOV II was explicitly conditioned on Lake Point's conduct *not* being consistent with the Interlocal Agreement and invited Lake Point to "provide documentation that the project is consistent with the Agreement." R.7011. And again, Lake Point declined the invitation, sued for breach, and at trial never showed that its conduct conformed to the Interlocal Agreement. The agreement contemplated that Lake Point would acquire the right to conduct mining activity on the Property once it had conveyed the Property to the District. *See, e.g.*, R.6580-81 (allowing Lake Point to convey portions of Property to District in advance of fulfilling conditions

precedent to receiving mining approval). But it was undisputed that Appellees had not conveyed the Property to the District. The County, therefore, was on firm ground concluding, consistent with the Interlocal Agreement, that Lake Point was mining without permission and requesting clarification from Lake Point.

If the Interlocal Agreement somehow purported to allow Lake Point to mine despite the regulatory violations or purported to override those regulations, it would have been void and thus not breached. *Hartnett v. Austin*, 93 So. 2d 86, 89 (Fla. 1956) ("A municipality has no authority to enter into a private contract with a property owner for the amendment of a zoning ordinance …. Any contrary rule would condone a violation of the long established principle that a municipality cannot contract away the exercise of its police powers."); *P.C.B. P'ship v. City of Largo*, 549 So. 2d 738, 741 (Fla. 5th DCA 1989) ("The City does not have the authority to enter into such a contract, which effectively contracts away the exercise of its police powers.").

Finally, besides the three supposed breaches just discussed, Lake Point suggested that various critical statements by individual Commissioners at public meetings on January 8 and February 5, 2013, including calls to terminate the Interlocal Agreement, amounted to an anticipatory breach of the Interlocal Agreement. *See, e.g.*, R.1222. Even if individual Commissioners expressed a desire to repudiate the agreement, however, such statements would not have been a

breach because they would have lacked legal effect. The *Board* as a collective body could have terminated the agreement only upon a majority vote by the Commissioners, but Lake Point presented no evidence that the Board did so or otherwise repudiated the agreement. *Turk v. Richard*, 47 So. 2d 543, 544 (Fla. 1950) ("The governing body of a municipality can act validly only when it sits as a *joint* body at an authorized meeting … and must be duly assembled and act in the mode prescribed by the law of its creation.").

Without evidence that the County breached any of its obligation under the Interlocal Agreement, no reasonable factfinder could have found for Lake Point.

B. Hurchalla Did Not Cause the Alleged Breaches

Nor was the evidence sufficient to permit a reasonable factfinder to conclude that Hurchalla caused the County's supposed breaches of the Interlocal Agreement; rather, the evidence clearly showed that the County decided independently to take those actions. *See Farah v. Canada*, 740 So. 2d 560, 561-62 (Fla. 5th DCA 1999). Appellees argued that Hurchalla interfered with the Interlocal Agreement by sending deliberately false emails to Commissioners in January and February 2013. By that time, however, Commission staff already had begun the administrative process that led to the purported breaches. Moreover, unrebutted evidence showed that staff then decided what to do without any consideration of Hurchalla's views and indeed acted contrary to at least one of Hurchalla's recommendations.

Undisputed testimony established that staff began to evaluate Lake Point's compliance with County regulations in the fall of 2012. Tr.1020. Staff thereupon conducted an independent review—undisputedly without Hurchalla's knowledge or participation, *see supra* 6, 9—and determined that Lake Point had not satisfied the conditions necessary to become a public works project and that, as a result, mining activities on the Property violated applicable regulations. Tr.327-328, 1018. County staff then contacted Lake Point regarding these regulatory violations in December 2012, requesting documentation showing that Lake Point had transferred the Property to the District, a precondition for Lake Point to be able to mine outside the original area approved by the Development Order. Lake Point never provided the requested documentation.

Hurchalla sent the email containing the seven allegedly false statements at the core of this case a few days before the ensuing Board meeting on January 8, 2013. The email was sent to all of the Commissioners on their public email accounts. But whereas those statements concerned destruction of wetlands, lack of public knowledge of Lake Point's new water plan, and Lake Point's failure to follow CERP procedures, the Board meeting focused on an entirely different issue: the mining violations identified by staff. At the meeting, staff presented their findings regarding Lake Point's mining activity and told the Board that Appellees had not made the necessary Property transfer to permit mining outside the area

approved by the Development Order. R.7684-85. They told the Board that the Development Order and other County regulations remained in effect, and detailed numerous concerns about Lake Point's compliance with those regulations. The Board also heard from a representative from the District, who emphasized that the District supported the project, but acknowledged "disagreements … about what triggers may have already occurred, whether or not they should have already or it's time for them to convey property to us." R.7733. According to the District representative, the transfer was overdue. Tr.50.

After this presentation, staff proposed following the code enforcement process to ensure that dialogue could continue between the County, the District, and Appellees. R.7762. The Commission then directed staff to commence that process and postponed further action to allow time for the process. R.7761-63. The code enforcement process is beyond the Board's control; it is reviewed by an independent code enforcement magistrate. R.7762-63.

The two February 4, 2013, Notices of Violation that Appellees claim constituted a breach were the result of this independent, staff-led enforcement process. R.7003-08, 7009-13. There is no evidence that Hurchalla urged the Commission or staff to find Lake Point to be mining unlawfully outside the scope of the Development Order—staff had reached that conclusion preliminarily on its own in December 2012, before Hurchalla sent her January 4, 2013, email to the

Commissioners and at a time when she had expressed concerns only about the environmental effects of the project. *Supra* 7. Nor is there evidence that staff acted at any point under Hurchalla's direction or even her influence. Hurchalla was not involved in the preparation of the NOVs and did not know about them until after they were issued. Tr.1558. Indeed, in an email sent on January 12, 2013, while staff was conducting the process that led to the NOVs, Hurchalla specifically exhorted the Commissioners: "DON'T issue any cease and desist on the mining." R.6784; App.031, 033. Yet, the NOVs directed Lake Point to stop mining outside the area approved by the Development Order.

Hurchalla also never urged the Commission or staff to refuse to terminate the Development Order or unity of title. She merely suggested that the Commission act legally to reform the agreements. *See* R.6784. Moreover, none of Hurchalla's supposedly false statements had anything to do with terminating the Development Order or unity of title.[11] The same is true of the County's refusal to accept Lake Point's environmental contribution. Although Hurchalla did recommend that the County not accept the payment, she did so not in connection

[11] In fact, Hurchalla wrote to one Commissioner: "Why do we continue to pretend that there is a residential subdivision on the property when we have agreed it will be turned into a rockpit? Shouldn't those earlier approvals be voided?" App.019; R.7662-67.

with any allegedly false statement but rather in connection with her recommendation that the County reform the agreements. R.6784.

It is clear, therefore, that the alleged breaches occurred independent of and even contrary to Hurchalla's allegedly false communications with County officials.

C. Lake Point Failed To Prove Damages

Lake Point also failed to prove that it suffered damages because of the supposed breaches for two fundamental reasons.

First, Lake Point's calculation of damages was internally inconsistent. Lost commercial profits are available only if the plaintiff "prove[s] … that the amount of the lost profits can be established with reasonable certainty." *River Bridge Corp. v. Am. Somax Ventures ex rel. Am. Home Dev. Corp.*, 18 So. 3d 648, 650 (Fla. 4th DCA 2009) (quotation cleaned); *accord Levitt-ANSCA Towne Park P'ship v. Smith & Co.*, 873 So. 2d 392, 396 (Fla. 4th DCA 2004). Lake Point's evidence does not approach any level of certainty.

Lake Point declined to use the usual method for measuring lost profits—comparing profits before and after the breach, *River Bridge*, 18 So. 3d at 650; *Godix Equip. Exp. Corp. v. Caterpillar, Inc.*, 948 F. Supp. 1570, 1583 n. 4 (S.D. Fla. 1996)—because it had no profits before the supposed breaches. Tr.928-29. Lake Point also eschewed the alternative "yardstick" method, Tr.767-68, which determines lost profits by reference to the profits of "businesses that are closely

comparable to the plaintiff's." *4 Corners Ins., Inc. v. Sun Publ'ns of Fla., Inc.*, 5 So. 3d 780, 783 (Fla. 2d DCA 2009); *River Bridge*, 18 So. 3d at 650. Instead, Lake Point invented its own method to calculate lost profits: First, determine its expected net cash flow from rock sales, and then apply varying discount rates to determine the difference between the net present value of that net cash flow before and after the breach. Put another way, in Lake Point's view, the supposed breaches increased risk of Lake Point's not securing the net cash flow from rock sales, and so the measure of damages was the value of that increased risk.

Even if this approach could be valid in some circumstances, Lake Point's estimate of future sales revenue was baseless. And risk cannot be used as a measure of damages with respect to the past because the past can be known with certainty. Nor can it be used with respect to the future when the risk has indisputably been eliminated.

To project future rock sales, Lake Point assumed that its rock sales would grow in proportion to housing starts. That assumption was unjustified and in fact contradicted by the evidence. Lake Point's expert testified that "*at the statewide level*," there is a correlation between housing starts and rock sales between 2000 and 2016. Tr.716-19, 731-32. Even if that relationship existed generally, it did not follow that *Lake Point's* rock sales would have exhibited such a relationship. Lake Point introduced no evidence showing that its rock sales ever correlated with

housing starts. In fact, the evidence showed the opposite: Lake Point's past sales volumes were higher when housing starts were *lower*, and vice versa. R.8090; Tr.744-45. Lake Point's use of an "average" ratio of rock sales to housing starts, Tr.722, might have reduced the data's variability, but it could not have created a correlation where there was none. This flaw alone is enough to vacate the judgment. *See River Bridge*, 18 So. 3d at 651 (vacating damages award where plaintiff failed to establish that contractors used as "yardstick" were comparable to defendant).

Moreover, Lake Point's ratio produced highly skewed, unrealistic results. It implied that Lake Point would have more than doubled its sales in a single year: from 877,000 tons in 2012 (the last year of actual sales counted by Lake Point's expert) to more than 2 million tons in 2013 (the first projected year). Tr.761, 766. And it predicted another 1 million-ton increase by 2017. *Id.* Lake Point adduced no evidence confirming such growth was plausible, let alone *reasonably certain*.

Lake Point's use of discount rates to measure lost profit damages was no more coherent. Its expert began with the premise that, absent the supposed breaches, the discount rate for future net cash flows would have been 8.45% and thus its net present value was $37,255,691. The expert then asserted that the discount rate *after* the supposed breaches should be 18.45%, reflecting the belief that the supposed breaches increased the risk that Lake Point would lose some rock

sales revenue. Tr.916. Next, acknowledging that the District's settlement with Lake Point reduced this risk, Lake Point's expert reduced the post-breach discount rate to 13.45% (halving the risk adjustment to 5 percentage points from 10), which yielded a present value of $20,863,983. Tr.923. Finally, the expert computed the difference between the pre- and post-breach present values—$16,391,708—and then offset that amount with the $12,000,000 paid by the County as settlement, leaving damages of $4,391,708, which is the amount awarded against Hurchalla.[12]

This analysis is thoroughly flawed. If Lake Point had experienced a decline in rock sales because of the supposed breaches, it could have shown that easily by pointing to its *actual* sales *after* the supposed breaches occurred in February 2013; trial was not until February 2018, giving Lake Point plenty of time to gather such data. But Lake Point never stopped mining and could not identify a single actual or potential customer who declined to buy rock because of the County's supposed breaches. So, rather than analyzing the effect on its sales, if any, Lake Point relied on projections of what the effect on sales might have been, including during a period for which actual data was available and thus no projection was needed. Lake Point's "projection," therefore, was not a valid measure of damages. *See Parc*

[12] No credit was given for millions of dollars in guaranteed future rock sales and the shifting of expenditures of millions of dollars to construct treatment areas from Lake Point to the District in the settlement agreement with the District. Tr.1451.

Royale E. Dev., Inc. v. U.S. Project Mgmt., Inc., 38 So. 3d 865, 869 (Fla. 4th DCA 2010).

If there was any need to project rock sales, it would only have been for post-trial sales. But Lake Point's analysis made no sense for that period, either. The premise of its damages theory was that the District's and the County's supposed breaches increased the risk associated with Lake Point's future rock sales. Tr.738-39 (discount rate increased to 18.45% because "now we actually have the government claiming the mine is illegal so it makes it more risky"). But by trial, Lake Point had settled with the District and the County, and those settlement agreements gave Lake Point everything it would have had but for the supposed breaches and more. *See supra* 11-12. Thus, the settlements fully mitigated any later breach-related risk and eliminated any potential post-judgment damages. In recognition of the *District's* settlement, Lake Point's expert halved the risk he had initially ascribed to the breach (5 of 10 percentage points). Tr.922-24 (expert explaining, having "government entities working with you and helping you … [is] a very important thing in this business"). But he made no adjustment for the elimination of the other half of the risk: the *County's* settlement. Tr.924-25. That was baseless. The expert could not rationally claim that the County's supposed breaches increased the risk but then deny that the County's settlement reduced the risk. It had to be one or the other, and either way, it resulted in no damages.

IV. THE COURT ERRED IN GIVING AN ADVERSE INFERENCE INSTRUCTION REGARDING DELETED EMAILS AND SANCTIONING HURCHALLA.

The trial court gave the following adverse inference instruction:

> Instruction number two, failure to maintain evidence or keep a record. If you find that Hurchalla deleted or otherwise caused various emails between her and Martin County commissioners to be unavailable while they were within Hurchalla's possession, custody or control, and the emails would have been material in deciding the disputed issues in this case, then you may, but are not required to infer that this evidence would have been unfavorable to Hurchalla. You may consider this together with other evidence in determining issues of the case.

Tr.1826. Giving this instruction was error.[13]

First, Florida has adopted a specific ESI rule, "[a]bsent exceptional circumstances, a court may not impose sanctions under [the discovery rules] on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system." Fla. R. Civ. P. 1.380(e); *see also* Fed. R. Civ. P. 37(e). The trial court violated Rule 1.380(e) by giving the instruction because Hurchalla's deletions were made in good faith and

[13] Even if an adverse inference were proper, this instruction constituted an abuse of discretion because it failed to adequately state the scope of the inference within the context of the evidence, *see* Fla. Std. Jury Instr. 3.011(1), permitting the jury to assume nearly anything and shifting Lake Point's burden to overcome Hurchalla's privilege. *See McConnell v. Union Carbide Corp.*, 937 So. 2d 148, 153 (Fla. 4th DCA 2006), *disapproved of on other grounds by Aubin v. Union Carbide Corp.*, 177 So. 3d 489 (Fla. 2015) (holding that trial court's flawed instruction constituted abuse of discretion).

routinely; there were no exceptional circumstances; and the instruction did not advise the jury of these requirements. The judge announced his erroneous interpretation aloud during the charge conference: "intentionally or not, if it happens after litigation was filed, I think that kicks in [the adverse inference]." Tr.1982-83. The unrebutted record evidence demonstrates that any deleted emails were either deleted before litigation commenced or were recovered later from other sources, and all relevant deletions were the result of Hurchalla's ordinary maintenance of space in her email account. Tr.1603-16, 1622-32. No exceptional circumstances were established.

Second, Florida law provides that:

> The normal rule is that "[a] sanction remedy for failure to allow discovery is legally unavailable to a party until the opposing party is first subject to and violates an order to provide such discovery." *Saewitz v. Saewitz*, 79 So. 3d 831, 835 (Fla. 3d DCA 2012). *See also Chmura v. Sam Rodgers Props., Inc.*, 2 So. 3d 984, 987 (Fla. 2d DCA 2008) ("Where a party has never been instructed by the court to comply with any discovery request, sanctions for noncompliance are inappropriate.") (quoting *Thomas v. Chase Manhattan Bank*, 875 So. 2d 758, 760 (Fla. 4th DCA 2004)).

Bechtel Corp. v. Batchelor, 2018 WL 3040336, at *5-6. (Fla. 3d DCA June 20, 2018) (holding that in absence of order to compel, trial court erred in imposing adverse inference jury instruction).

Lake Point never obtained an order to compel production of Hurchalla's computer hard drive, an order to inspect it forensically, or an order to produce

purportedly deleted emails. Indeed, "[a]dverse inferences are strong medicine: 'For the court to tell a jury that an adverse inference may be drawn from the failure to produce evidence invades the province of the jury.'" *Bechtel*, 2018 WL 3040336, at *5 (quoting *Jordan ex rel. Shealey v. Master*s, 821 So. 2d 342, 346 (Fla. 4th DCA 2002)). As such, adverse inference instructions "are reserved for circumstances where the normal discovery procedures have gone seriously awry." *Id.*; *Nacco Materials Handling Grp., Inc. v. Lilly Co.*, 278 F.R.D. 395, 406 (W.D. Tenn. 2011) (the "only way" to determine if evidence was lost or destroyed "is to conduct a forensic examination to see if such evidence exists"). Because the goal of Rule 1.380 is "not penal," but rather "compliance" with discovery rules, sanctions may be imposed only after a party has been given a reasonable opportunity to comply with discovery requirements. *Bechtel*, 2018 WL 3040336; *Fla. Physicians Ins. Reciprocal v. Baliton*, 436 So. 2d 1110, 1112 (Fla. 4th DCA 1983).

Third, to receive an adverse inference instruction, the unavailable evidence must be crucial to the case. Lake Point's counsel argued throughout that the *Commissioners'* email deletions constituted the "cornerstone" of his case, Tr.80-82, 201, 1726, 1741-42, 1744, and the trial judge described them as "part of the res gest[a]e of the entire case." Tr.202. But Hurchalla cannot be held responsible for those deletions. It is government officials who have a duty to maintain public

records, not private citizens. *See* § 119.01, Fla. Stat.; Art. I, § 24, Fla. Const.; *see also Forsberg v. Housing Auth. of Miami Beach*, 455 So. 2d 373, 374 (Fla. 1984). Hurchalla did nothing wrong in erasing some of her email exchanges with Commissioners prior to the litigation. *Cf. Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389, 394 (Fla. 2d DCA 2012) (defendant had no duty to preserve video recordings even under "reasonably foreseeable" standard where no lawsuit had been filed and no preservation demand had been made). To hold otherwise would unconstitutionally burden the right of private citizens to petition their government.

However, no crucial or material evidence was missing here. *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 780 (Fla. 4th DCA 2006) (court must decide "whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense"). Hurchalla produced the emails material to Lake Point's case or they were produced by public officials who sent or received them. *Supra* 9. Lake Point never established with any evidence that it was missing any emails it would need to prove its case. Under these circumstances, the adverse inference instruction was improper.[14]

[14] *Compare Jordan*, 821 So. 2d at 347 (adverse inference instruction was improper based on the absence of a video tape because the plaintiff was not prevented from presenting his case and the jury heard an audio tape and testimony); *with League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 390-91 (Fla. 2015) (adverse inference warranted because the legislature had "systematically deleted almost all of their e-mails and other documentation related to redistricting"), and *Golden*

The trial court also erred when it applied the wrong law to unilaterally impose sanctions on the ground that Hurchalla's motion for entry of dismissal with prejudice was filed for purposes of delay. § 57.105(1), Fla. Stat. (*sua sponte* sanctions require finding counsel knew or should have known claim or defense filed without support); *id.* § 57.105(2) (sanctions based on delay must be raised by motion). Prior to trial, the judge had dismissed one count without prejudice because it imposed an unlawful prior restraint. Because dismissal without prejudice is not a final order, *see McGuire v. Fla. Lottery*, 17 So. 3d 1276 (Fla. 1st DCA 2009), Hurchalla moved for entry of dismissal with prejudice on that count to obtain such an order. This motion was therefore brought in good faith, and there was nothing to delay because the jury had already reached a verdict. The sanctions order should thus be vacated.

CONCLUSION

For the foregoing reasons, the Court should vacate the verdict and direct judgment for Hurchalla.

Yachts, 920 So. 2d at 781 (instruction proper where defendants lost or destroyed allegedly defective boat cradle which assertedly caused the injury).

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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