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.

REPLY 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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INTRODUCTION

Maggy Hurchalla is facing a $4.4 million judgment solely because she exercised rights guaranteed by the First Amendment and Florida common law to send emails to public officials commenting on a development that became a matter of considerable public concern when it changed from supplying water to an estuary into selling Florida waters for a profit. Leading outside experts have correctly described this lawsuit as a "remarkably obvious" example of a strategic lawsuit against public participation (SLAPP). Prof. Br. 5.

Lake Point clings (at 35) to the mantra that "deliberate misrepresentations of fact … are not constitutionally protected," but the notion that Hurchalla lied to County Commissioners is facially absurd and a red herring. The crux of this case is that a powerful developer sued her simply because it disagreed with her opinion that agricultural wetlands are a type of wetland, objected to her questioning the mutation of the project from initially providing water to the Everglades to selling Florida waters, and wanted to silence her questioning Lake Point's contract with the County. Lake Point denies citizens' right to do that: "the First Amendment privilege … and in any privilege to petition the government … cease to exist when you have a contract … that is not terminable at will." Tr.1649-50.

Lake Point's view of the law is obviously wrong. Recognizing that the vitality of our democracy depends on citizens' right to freely engage in critical

political speech, the U.S. Supreme Court and the Florida courts have created a latticework of federal and common-law privileges that protects speakers from tort liability unless their speech was false, made with a "high degree of awareness of probable falsity," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), and motivated solely by ill will and a desire to harm another person. Under these standards, Hurchalla's emails to Commissioners expressing her concerns about Lake Point's project clearly constituted protected political activity.

The trial court, through numerous fundamental legal errors, abetted Lake Point's troubling effort to punish Hurchalla and chill concerned citizens from questioning future public projects. Rather than requiring Lake Point to demonstrate that Hurchalla made knowingly false statements solely to harm Lake Point, the court permitted the jury to find for Lake Point if it concluded she communicated with her elected representatives through any means the jury deemed "improper" in any way (such as private emails) or if it concluded she was motivated "primarily" to harm Lake Point. These instructions dramatically lowered the burden for penalizing a concerned citizen such as Hurchalla for questioning a public project.

But even if the jury instructions were legally sound, the verdict would still be infirm. Where First Amendment concerns are implicated, appellate courts must conduct an independent review to determine whether the record shows that the defendant's speech fell outside constitutional protection. Here, there is no credible

evidence that Hurchalla tortiously interfered with Lake Point's contract. The County's supposed breaches did not actually violate the Interlocal Agreement; Hurchalla did not cause the supposed breaches; and Lake Point did not suffer damages as a result of the supposed breaches. The record further shows unequivocally that any such interference would have been privileged because Hurchalla's statements were opinions, or certainly were not made with any knowledge of falsity, and her purpose was to promote her interests in environmental protection and good government, not to injure Lake Point.

Since the judgment for Lake Point cannot be sustained, it should be reversed and entered instead for Hurchalla.

ARGUMENT

1. THE JURY INSTRUCTIONS DID NOT CONFORM TO SETTLED FIRST AMENDMENT AND COMMON-LAW PRINCIPLES

The statements that form the basis of Lake Point's case against Hurchalla are protected from tort liability by layered privileges under the First Amendment to the U.S. Constitution and Florida common law. Hurchalla's First Amendment privilege could be overcome only if Lake Point proved by clear and convincing evidence that she made false statements with "actual malice," i.e., intentional or reckless disregard for the truth.[1] Br. 20-21; *McDonald v. Smith*, 472 U.S. 479, 485 (1985).

1 Lake Point notes (at 37 n.3) that the trial court did not find Lake Point to be a limited-purpose public figure. But the actual-malice standard applies under the Petition Clause regardless of the plaintiff's status. *See* Br. 20-21. Additionally,

Her common law privilege could be overcome only if Lake Point proved she spoke with "express malice," i.e., motivated solely by ill will and a desire to harm Lake Point. Br. 26-27. Because of these layered privileges, Hurchalla could be liable to Lake Point only if the jury found that *both* privileges were defeated. *See Londono v. Turkey Creek, Inc.*, 609 So. 2d 14, 18-19 (Fla. 1992) (plaintiff stated tortious-interference claim by alleging defendants "intentionally and maliciously made numerous false statements … for the purpose of harming [plaintiff's] economic interests"). The jury instructions required neither. R.5858.

A. The Court May And Should Consider Hurchalla's Challenges To The Jury Instructions

Lake Point asserts (at 34, 41) that Hurchalla's jury instruction challenges are "improperly raised for the first time on appeal" because she "never mentioned" or "requested that the jury be instructed about 'actual malice'" and did not "rais[e]" or "reference[]" the common-law privilege "in any pleading" or her "proposed jury instructions." The record shows otherwise.

Consistent with the position she has espoused before this Court, Hurchalla's proposed jury instructions stated that her privilege would be lost only if her statements were "false" and made "with the sole purpose of gratifying one's ill will

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Lake Point is undoubtedly and undisputedly a limited-purpose public figure. *See id.* at 21; *Della-Donna v. Gore Newspapers Co.*, 489 So. 2d 72, 77 (Fla. 4th DCA 1986). If needed, the Court may take judicial notice of the relevant facts. §§90.202(11)-(12), 90.203, Fla. Stat.

or [with] intent to harm the other." R.5846; R.5842. She also advocated this position during pre-trial briefing, at trial, and in post-trial briefing. R.2066; R.5786; R.8382, 8386; Tr.968 ("Communications with government representatives are qualifi[ed]ly privileged even if actual malice is present so long as a justifiable or proper purpose or purposes are also present."). As Lake Point itself acknowledges (at 35-36), it is irrelevant whether Hurchalla recited the phrase "actual malice" because her submissions conveyed that "legal concept" in substance.

Regardless of whether Hurchalla previously raised these arguments, this Court can and should address her challenge because they are fundamental errors—that is, errors that "go[] to the foundation of the case or … to the merits of the cause of action." *Universal Ins. Co. of N. America v. Warfel*, 82 So. 3d 47, 64 (Fla. 2012).[2] Here the jury was permitted to impose a multi-million dollar damages verdict on Hurchalla for her political speech *without* finding that her speech was false, *without* finding that she deliberately disregarded the truth, and *without* finding that she was motivated solely by ill will and a desire to harm Lake Point.

2 Lake Point suggests (at 34-35) that in *Feliciano v. Sch. Bd. of Palm Beach Cty.*, 776 So. 2d 306, 308 (Fla. 4th DCA 2000), this Court held that unpreserved errors cannot be reviewed *even if fundamental*. It did not. Rather, this Court was careful not to allow "[l]oose application of the fundamental error rule" and concluded that the error at issue was not fundamental. *Id*. If *Feliciano* went further and foreclosed review of unpreserved fundamental errors, it would no longer be good law in light of the Florida Supreme Court's later decision in *Warfel*.

The United States Supreme Court and the Florida courts have recognized the paramount importance of free speech and have accordingly developed demanding standards for subjecting political speakers to tort liability. This Court should not let a verdict stand where those precautionary standards have not been met.

B. The Jury Instructions Did Not Require Lake Point To Prove Actual Malice As Required By The First Amendment

As Hurchalla's opening brief explained (Br. 21-24), the instructions given did not conform to the First Amendment because they allowed the jury to find for Lake Point if Hurchalla did not use "proper methods" or had some "motive … to harm Lake Point." R.5858. The instructions should have required the jury to find that her speech was false and made with actual malice.

Lake Point does not expressly disagree with that statement of the law, but claims (at 35) that the instructions were valid because "[i]mproper methods were defined as 'deliberate misrepresentations of fact.'" Lake Point's description of the instructions is plainly incorrect. The instructions identified deliberate misrepresentation as but *one* improper method and otherwise left the term "proper methods" unbounded. The instructions thus erroneously permitted the jury to find the First Amendment privilege overcome based on *any conduct* by Hurchalla that the jury deemed improper *for whatever reason*. Br. 23-24. And as Hurchalla has explained (Br. 24), Lake Point explicitly invited the jury to take an overbroad view of "proper methods" by arguing that it was improper for Hurchalla to communicate

with commissioners through private email accounts. *See also* Tr.1726 ("[T]hat seems pretty bad when you have somebody who is trying to figure out how to attack gratuitously behind the scenes. ... That ain't right.").

Even were Lake Point's description of the instructions correct, however, the instructions would still have been erroneous because they treated a motive to harm Lake Point as sufficient to overcome Hurchalla's First Amendment privilege. Motive, even if to harm, cannot deprive a speaker of her First Amendment protection. Br. at 22; *Palm Beach Newspapers v. Early*, 334 So. 2d 50, 53 (Fla. 4th DCA 1976) (statements that are "slanted, mean, [and] vicious" are privileged unless "made with actual malice"). Lake Point does not dispute that principle and therefore implicitly concedes that the instructions were invalid.

C. The Jury Instructions Did Not Require Lake Point To Prove Express Malice As Required By Florida Law

Hurchalla could be liable to Lake Point under Florida common law only if she spoke with "express malice"—*i.e.*, her *sole* motivation was ill will and a desire to harm Lake Point. Br. 27, 29-30. The Judge erroneously permitted the jury to find that Hurchalla's qualified privilege was overcome if she had not "used proper methods," failed to define "proper methods," and inverted the burden by requiring Hurchalla to disprove facts that would defeat privilege. Br. 27-29. Lake Point does not argue this language conformed to Florida law.

Lake Point only defends the instruction's use of "primarily" instead of

"solely." That is a peripheral issue because of the instruction's other errors, and because, as discussed below, the evidence was insufficient under either standard. Regardless, "solely" is the correct standard for tortious interference claims, and Lake Point does not show otherwise. Br. 29.[3] Indeed, Florida appellate courts have continued to apply the "solely" test in tortious interference cases even after *Londono*. *See, e.g.*, *Alexis v. Ventura*, 66 So. 3d 986, 988 (Fla. 3d DCA 2011).

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE TORTIOUS INTERFERENCE WITH CONTRACT

A verdict cannot stand unless supported by "competent, substantial evidence." *O'Connor v. U.S. Bank Nat'l Ass'n*, 253 So. 3d 628, 630 (Fla. 4th DCA 2018). There is no substantial competent evidence that: (A) Martin County breached the Interlocal Agreement; (B) Hurchalla caused any breach; and (C) Lake Point suffered damages as a result. Br. 32-35. Lake Point's responses are meritless.

D. There Is No Evidence Of Breach

Lake Point effectively admits that it has no case when it declares (at 23) that the County's settlement agreement with Lake Point is "the most persuasive

3 *Nodar v. Galbreath*, 462 So. 2d 803 (Fla. 1984), and *Londono* are not contrary: *Nodar* was a defamation case and *Londono* did not directly address the issue because the question was whether to recognize a "sham" test for tortious interference. Lake Point argues (at 43) *Boehm v. Am. Bankers Inc. Grp.*, 557 So. 2d 91 (Fla. 3d DCA 1990), and *McCurdy v. Collis*, 508 So. 2d 380 (Fla. 1st DCA 1987), are inapposite because they did not concern a contract not terminable at will, but there is no rationale for distinguishing between such contracts in this context.

evidence that Martin County breached the Interlocal Agreement." That is not evidence of breach at all. Settlement agreements generally are inadmissible to prove liability. *Saleeby v. Rocky Elson Constr., Inc.*, 3 So. 3d 1078, 1083 (Fla. 2009). Here, the settlement agreement stated that it "shall not be construed as, or deemed to be evidence of, an admission or concession of any fault or liability or damage whatsoever." R.8284. Lake Point's lesser arguments about the three supposed breaches of the Interlocal Agreement fare no better.

(D.i) Not Vacating The Development Order

The Interlocal Agreement nowhere obligated the County to vacate the Development Order upon Lake Point's request. Br. 32-33. Lake Point does not disagree about what the agreement actually says, but instead relies (at 26) on the contrary testimony of the then-County Engineer, who Lake Point incorrectly calls the "County Administrator." His testimony is not competent on the meaning of the Interlocal Agreement because its "language is unambiguous," *Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp.*, 636 So. 2d 700, 705 (Fla. 1993), and there was no evidence that he had personal knowledge of the drafters' intent.

Shifting focus, Lake Point argues (at 26) that the non-vacatur of the Development Order breached the County's promise not to "frustrate or interfere with the Mining Reservation." R.6678. This theory of breach is self-defeating. According to Lake Point (at 26), it was to acquire the Mining Reservation only

after it had transferred the Property to the Water District, and the County's vacatur of the Development Order was "a condition precedent" of that transfer. By Lake Point's own telling, therefore, the non-vacatur of the Development Order did not interfere with Lake Point's exercise of the Mining Reservation because it never came into existence as Lake Point never conveyed the property. Nothing in the Interlocal Agreement guaranteed Lake Point acquisition of the Mining Reservation if Lake Point did not satisfy its contract obligations.

In any event, the record shows unequivocally that the County never actually denied Lake Point's termination request: Lake Point prematurely filed suit before the County had had a reasonable opportunity to consider the request. Br. 33-34. Lake Point's brief offers no response. And even if the Interlocal Agreement had required the County to vacate the Development Order upon Lake Point's request, that requirement would have been void because municipalities cannot contractually promise to exercise their regulatory powers in a certain way. Br. 36; *see also Morgran Co. v. Orange Cty.*, 818 So. 2d 640, 643 (Fla. 5th DCA 2002).

(D.ii) Issuing The Notices of Violation

Hurchalla's opening brief explained in detail (at 34-36) why the County's issuance of the Notices of Violation did not breach the Interlocal Agreement. Instead of responding to any of those points, Lake Point claims (at 28) the issuance of the NOVs breached the Agreement because they "creat[ed] encumbrances on

the Property." That is false. Courts have recognized that administrative notices of violation are not encumbrances on property, *see, e.g.*, *McCrae v. Giteles*, 253 So. 2d 260, 261 (Fla. 3d DCA 1971) (a "code violation is not an 'encumbrance' within the meaning of a covenant against encumbrances"), and nothing about the NOVs here warrants a different conclusion. The NOVs stated that the "failure to correct" the violations "may result" in the matter being "present[ed]" to a code-enforcement magistrate and that if the magistrate imposed a fine, that fine "may become a lien" on the property. R.7005, 7011. Thus, the NOVs were merely the first step in a chain of contingent events that might lead to a lien—a chain Lake Point could have broken by showing that it was acting consistent with the Interlocal Agreement, which Lake Point never attempted to do, *see* Br. 35.[4]

(D.iii) Not Accepting The Environmental Contribution

Lake Point notes (at 29) that the "Interlocal Agreement required Lake Point to pay the County an environmental contribution under the Interlocal Agreement," which is true, but Lake Point still has not identified any provision in the Interlocal Agreement requiring the County to accept the contribution. Br. 34.

4 If the Agreement precluded the County from issuing an NOV, it would be void because municipalities cannot contract away their regulatory powers. *Supra* p. 10. Moreover, even parties to a private contract have the right to demand that their counterparty provide assurance of performance. *See, e.g.*, U.C.C. §2-609.

E. There Is No Evidence Of Causation

Lake Point failed to prove Hurchalla caused any County actions that supposedly breached the Interlocal Agreement. The County actions concerned matters separate from Hurchalla's supposedly false statements and rested on findings that County officials made independently of any influence by Hurchalla. For example, County staff, not the Board, found Lake Point in violation of County codes; the project review that led to the NOVs occurred without Hurchalla's knowledge; County staff made the findings of violation without interacting with her; and the violations found by County staff (unpermitted mining) were different from the concerns she raised (destruction of wetlands, lack of a CERP study of the project's benefits). Br. 5-9, 37-41. Similarly, County staff determined that Lake Point had not satisfied the preconditions to vacate the Development Order and therefore did not recommend the vacatur, Tr.7690-7691; Br. 6, and Hurchalla never urged the County not to vacate the Order; at most, her statements may have encouraged the Commissioners to maintain the staff's ongoing review of the project, Br. 40. That cannot prove proximate causation given the independence of the findings on which the County's actions rested. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011) (even if supervisor prompts investigation out of illicit bias, "employer will not be liable" to employee "if the employer's investigation results in an adverse [employment] action for reasons unrelated to the supervisor's

original biased action"). Lake Point's Brief points to no contrary evidence.

F. There Is No Evidence Of Damages

Lake Point failed to prove damages with the requisite reasonable certainty because its damages analysis produced skewed and unrealistically inflated results and was internally inconsistent. Br. 41. Lake Point's Answer Brief (at 31-32) recounts its damages analysis but does not actually address the substance of Hurchalla's arguments. Instead, it asserts (*id.* 30-31) that Hurchalla did not preserve her objections for appellate review. But she did. For example, at trial she pointed out the lack of correlation between housing starts and Lake Point's sales, Tr.933-937; Br. 42-45, and Lake Point's failure to account for the fact that the settlement with the County lowered any risk of business interruption that may have been created by the issuance of the NOVs, Tr.950-951; Br. 43-45. She renewed these objections in post-trial briefing. R.8399-8404.

II. THE EVIDENCE WAS INSUFFICIENT TO OVERCOME HURCHALLA'S PRIVILEGES

Even if the record supported Lake Point's tortious-interference claim, the judgment should still be reversed because Lake Point failed to adduce evidence sufficient to overcome Hurchalla's First Amendment and common-law privileges —she did not speak with actual or express malice. Because this case implicates First Amendment rights, the Court "must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold" to tort

liability. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 486, 511 (1984); *see Scandinavian World Cruises (Bahamas) Ltd. v. Ergle*, 525 So. 2d 1012, 1014 (Fla. 4th DCA 1988) ("appellate judges must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity"). Here, the record clearly shows the statements about which Lake Point complains were factually true or opinions and were made in good faith to protect the environment and County interests as Hurchalla understood them. Br. 25-26, 29-31.

G. Hurchalla Did Not Make Deliberately False Factual Statements

Lake Point focuses (at 38-41) on three supposedly false statements, two concerning past or future destruction of "wetlands" and the third concerning a study of the Lake Point project's benefits. None were false, let alone deliberately.

Lake Point's contention that the "wetlands" statements were false largely turns on its refusal to accept the simple fact that County staff used one definition of "wetlands" and Hurchalla used another valid definition. As Lake Point's expert admitted, the Army Corps of Engineers designated the lands at issue as "agricultural wetlands" in the permit it issued to Lake Point—the permit on which Hurchalla was relying when she made her statements—and at trial Hurchalla's expert explained that agricultural wetlands are *wetlands*. Br. 12-13; R.3297; Tr.885-886. Lake Point notes (at 39) that the State of Florida classifies these lands as "other surface waters" rather than "wetlands." But that does not mean that

anyone who calls those lands "wetlands" is lying; indeed, the State itself recognizes that "the term wetland can mean different things to different people."[5]

Lake Point complains (at 38-40) that Hurchalla persisted in claiming that the project had destroyed or would destroy wetlands even after she was informed by County officials that there were different meanings of "wetlands" and that there was no such destruction under *their* definition. R.6787. But her persistence does not show untruthfulness: she had a right to continue to argue that the project jeopardized "wetlands" as she legitimately defined the term, particularly because she did not pretend to be using the County's narrower definition. *Bose*, 466 U.S. at 511 & n.30 (actual malice requires showing that defendant subjectively understand his statement was false); *Ergle*, 525 So. 2d at 1015 (statements are pure opinion and thus privileged where underlying facts are disclosed). And the evidence showed that even wetlands as the County understood the term had been destroyed —her expert testified that a small wetland had existed on the Lake Point property in 2006 but had been cleared and filled by December 2009. Tr.1210.

To find that Hurchalla's statement in an email dated January 4, 2013, about the study of project benefits was deliberately false, Lake Point asks (at 40-41) the Court to disregard the context of her remark. The Court may not: "[t]o determine

5 Florida Department of Environmental Protection, "Wetland Evaluation and Delineation," *at* https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/wetland-evaluation-and. *See also* Envt'l. Br. 9-12.

whether a statement is actionable, the court must examine it in the context in which it was [uttered] … [and] consider all the words used, not merely a particular phrase or sentence." *Morse v. Ripken*, 707 So. 2d 921, 922 (Fla. 4th DCA 1998). That context shows that Hurchalla was making the specific point that there had not been "any peer review by the CERP team to verify benefits from the rockpit." R.8056. Lake Point does not deny the truth of that statement.

And even if Hurchalla had made the broader claim that the project had no documented benefits, the record would still not establish that the statement was the result of intentional or reckless disregard of the truth. Although Lake Point adduced some evidence that there were other benefits studies, there is no evidence that Hurchalla intentionally or recklessly disregarded their existence. Lake Point admits (at 40) that as "a private citizen," Hurchalla never "receive[d] or review[ed] a copy of such a study." Yet, citing the same January 4 email, Lake Point speculates (at 40) she nonetheless "either knew that such studies were performed or had a high degree of awareness that a study probably was performed." That is a brazenly false description of her email, which merely said "a study" of benefits "was to follow"—again referring, as the next sentence makes clear, only to the peer-reviewed CERP study she had expected to be produced. R.8056; Br.14-15.

H. Hurchalla's Statements Were Not Motivated By Ill Will And A Desire To Harm Lake Point

That Hurchalla's statements were adverse to Lake Point's interests does not

come close to showing express malice. Lake Point had to show that Hurchalla spoke "to gratify [her] malevolence." *Nodar*, 462 So. 2d at 811-812. Even if Hurchalla felt "hostility or ill will toward" Lake Point, that would not be express malice if she sought "to protect [a] personal or social interest." *Id.* at 811. If stating an adverse view destroyed the privilege, the privilege would be worthless.

There is no evidence Hurchalla spoke to gratify any personal animosity toward Lake Point. She was prompted to raise concerns by a news article revealing Lake Point's previously undisclosed plan to sell water for consumptive use. Tr.1521. Consistent with her longstanding commitment to environmental protection, her concerns and objections were confined to the project's environmental effects and conformity to regulatory requirements. Br. 7-8, 12-15.

Hurchalla had no ill will toward Lake Point. The record reflects that she met with Lake Point representatives only twice, back in 2008, during which meetings she expressed her concerns about the environmental impacts of the project, and that the meetings had been amicable. Tr.1506-12; *cf. Nodar*, 462 So. 2d at 812 (that parent's remarks to school board were preceded by months of communication with teacher showed not express malice, but concern for effectiveness of public schools). Lake Point argues that Hurchalla's "true colors" can be seen in emails urging the Board to void the Interlocal Agreement. But the statements Lake Point identifies show at most that she wanted Martin County to *legally* cancel the

contract. Because the intent to cause a breach is itself an element of tortious interference, to hold that this was sufficient to overcome the common law privilege would render the privilege meaningless. Lake Point must show that Hurchalla wanted the Interlocal Agreement cancelled *because she wanted to hurt Lake Point*, and not because she wanted to protect the environment or Martin County. Lake Point has not met that standard. *Supra* section III.B; Br. 25, 26, 29-31.

III. THE COURT ERRED IN GIVING AN ADVERSE INFERENCE INSTRUCTION REGARDING DELETED EMAILS

Adverse inference instructions "invade the province of the jury" and therefore are available only in limited circumstances. *Bechtel Corp. v. Batchelor*, 250 So. 3d 187, 194 (Fla. 3d DCA 2018). To give such an instruction, "the court must answer three threshold questions: 1) whether the evidence ever existed, 2) whether the spoliator had a duty to preserve it, and 3) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense." *Golden Yachts, Inc. v. Hall*, 902 So. 2d 777, 781 (Fla. 4th DCA 2006).

Missing evidence is critical only if the party shows "an inability to proceed without" it. *Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co.*, 881 So. 2d 565, 581 (Fla. 3d DCA 2004). Lake Point argues (at 48) that the deleted information was "material to Lake Point's tortious interference claim and to Hurchalla's defense," but the record contains several other emails from Hurchalla to Commissioners voicing her opposition to the project. Indeed, Lake Point has

repeatedly cited these emails for the contention that Hurchalla directed Commissioners to void the Interlocal Agreement. (*E.g.*, at 9-10, 14, 24, 27, 30).[6] An adverse inference instruction therefore was not appropriate. *See Palmas*, 881 So. 2d at 579 & n.12 (Fla. 3d DCA 2004) (instruction inappropriate where plaintiff showed "at best" defendant "destroyed one of many pieces of evidence").

Moreover, Lake Point fails to show any evidence that Hurchalla was not acting in good faith, as necessary to support the trial court's imposition of sanctions for failure to provide electronically stored information. Br. 46; Fla. R. Civ. P. 1.380(e). Sanctions are also inappropriate because Hurchalla never had sole control over the messages. Br. 47-48. Lake Point argues that the adverse inference instruction was not a sanction, but this Court has concluded otherwise. *See Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1256 (Fla. 4th DCA 2003) ("Chief among these sanctions are the adverse evidentiary inferences.").

Finally, Lake Point argues (at 48) that the lower court did not abuse its discretion because the instruction "is perfectly consistent with … Standard Jury Instruction 301.11(a)" and the "instruction recommended by this Court in *American Hospitality Management Co. of Minnesota v. Hettiger*, 904 So. 2d 547, 551 (Fla. 4th DCA 2005)." First, that an instruction is standard does not justify its

6 Hurchalla could not have made unavailable any emails sent to Commissioners because, as public records, they had to be preserved by the County.

application in all instances. *See Smith v. State*, 933 So. 2d 1275, 1276-77 (Fla. 2d DCA 2006). Second, Lake Point's reliance on *Hettiger* is misplaced. There, the defendant destroyed its ladder the same day as the accident. The Court held that the adverse inference instruction *may* be appropriate because the defendant should have anticipated litigation given the injuries' severity, the destroyed ladder was crucial to the allegation that it was defective, and the ladder was in the defendants' sole control. *Hettiger*, 904 So. 2d at 551. None of these reasons applies here.

IV. THE COURT'S SANCTIONS WERE AN ABUSE OF DISCRETION

Raising the issue of sanctions against Hurchalla and her counsel was not, as Lake Point contends, "odd" (at Br. 49)—this Court consolidated this appeal with the sanctions order appeal, No. 18-1632. Hurchalla cannot be sanctioned for moving to ensure finality for purposes of appeal. Lake Point does not deny that the trial court could not unilaterally sanction on the unsubstantiated basis that her motion had been filed for purposes of delay, §§57.105(1),(2), Fla. Stat. or that the court's prior dismissal of the count without prejudice was not a final order. Br. 50.

CONCLUSION

Therefore, judgment should be reversed and entered for Hurchalla.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court through e-portal, and served via e-mail on counsel of record listed below on this ___th day of January, 2019 to:

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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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