**IN THE SUPREME COURT OF FLORIDA**

**Case No. SC19-1729**
**LT Case No. 4D18-1221**

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**MAGGY HURCHALLA**

**Petitioner**
**v.**

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

**Respondents**.

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**On Petition for Discretionary Review**
**from the Fourth District Court of Appeal**

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# RESPONDENTS' BRIEF ON JURISDICTION

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## STATEMENT OF CASE AND FACTS

The jury awarded damages to Respondent, Lake Point Phase I, LLC and Lake Point Phase II, LLC (collectively, "Lake Point" or "Respondent"), after finding Petitioner, Maggy Hurchalla ("Petitioner" or "Hurchalla") liable for tortious interference with a contract not terminable at will. *Hurchalla v. Lake Point Phase I, LLC*, 278 So. 3d 58 (Fla. 4th DCA 2019). The Fourth District issued a thorough twelve-page Opinion affirming the jury verdict. *Id*. Now, based on unpreserved arguments, Petitioner seeks additional review because she believes the Opinion misconstrued the Florida or United States Constitutions; or, the Opinion conflicts with this Court's decisions or decisions of other district courts. (Pet. Brief at 3, 5). It does not.

The Opinion illustrates that Petitioner received the benefit of the doubt because the court conducted a full, independent *Bose* review of the trial evidence under "actual malice" and "clear and convincing evidence" standards, even though Petitioner did not preserve her right to any such review. *Hurchalla*, 278 So. 3d at 65. Moreover, the Opinion demonstrates the unique facts of this case and how they are unlikely to be repeated in the future. For example, the face of the Opinion notes that Petitioner—an influential former Martin County commissioner—engaged in ghostwriting emails for Martin County Commission Chairperson Sarah Heard about Lake Point, and how Petitioner encouraged Martin County to terminate an agreement

and take other actions harming Lake Point, using the commissioners private email accounts. *Id*. The Opinion also provides examples of Petitioner's "false" statements encouraging county commissioners, who were otherwise personally ignorant of the Lake Point project, to take adverse action against Lake Point. *Id*. at 65, 68. Petitioner acted as a schemer in tandem with sitting elected officials, *id*. at 61–62, not as a mere citizen who made "flippant" comments, (Pet. Brief at 2). The Opinion correctly applied existing law. There has never been a right to lie before or after the Opinion.

## SUMMARY OF THE ARGUMENT

Petitioner seeks discretionary review under two theories. Neither is an adequate ground for review.

First, the Opinion does not expressly construe any provision of the state or federal constitutions. It does not mention the Florida Constitution nor quote any portion of the U.S. Constitution. It merely applied existing principles of First Amendment law to a common law claim for tortious interference with a contract.

Second, the Opinion does not expressly and directly conflict with a decision from another Florida appellate court. No such conflict was recognized in the Opinion by the Fourth District. Petitioner has not demonstrated that the holdings in this case are in irreconcilable conflict with those decisions in any other court. Petitioner is *really* arguing "misapplication" conflict, but even under that very difficult standard, she has established no conflict.

As a result, this Court does not have jurisdiction; and, it does not need to exercise its jurisdiction in this fact-specific matter that was poorly preserved below.

## JURISDICTIONAL ARGUMENT

### I. THE OPINION, AT MOST, APPLIES FREEDOM OF SPEECH PRINCIPLES; IT DOES NOT "EXPRESSLY CONSTRUE" THE FLORIDA OR UNITED STATES CONSTITUTIONS.

Article V, Section 3(b)(3) of the Florida Constitution gives this Court discretionary jurisdiction to review a decision that "expressly construes a provision of the state or federal constitution." The Fourth District's decision does not even reference the Florida Constitution. It does not quote a provision from the First Amendment. It discusses and applies First Amendment principles established by the courts without making any express or implied change in those principles.

The Petitioner makes no attempt to quote a portion of the Fourth District's Opinion that purportedly construes a constitutional provision; there is no such construction. Instead, the Opinion simply explains that "actual malice" overcomes the First Amendment protection. It also explains "express malice" overcomes Florida's common law privilege. However, due to the intermingling of these concepts in the Petitioner's jury instructions, the Fourth District held:

> Because defense counsel's submissions and arguments during the charge conference failed to make important distinctions between the two privileges, we determine the trial court's instructions regarding privileged communication and the privilege defense were not reversible error. *See Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 65 (Fla. 2012) ("Fundamental error is waived where defense counsel requests

> an erroneous instruction."); *Goodwin v. State*, 751 So. 2d 537, 544 (Fla. 1999) ("If the error is 'invited,' . . . the appellate court will not consider the error a basis for reversal." (footnote omitted)).

*Hurchalla*, 278 So. 3d at 64.

That holding does not construe any constitutional provision. Indeed, no constitutional provision is even dispositive in this holding. And, Petitioner is not arguing that the application of Florida's fundamental error doctrine in this case creates conflict or provides this Court with jurisdiction.

Nevertheless, the Fourth District obliged Petitioner's request that it perform "an independent examination of the whole record." The court explained that process and ultimately held:

> Thus, upon our independent review of the record, we determine there was sufficient clear and convincing evidence to refute Hurchalla's First Amendment privilege to petition her government as to those two statements.

*Id*. at 65.

Petitioner is obviously dissatisfied with the outcome of the independent review performed by the Fourth District, but that does not permit this Court to take jurisdiction over a fact-specific determination regarding the sufficiency of the evidence in an extensive record, under the guise of the Petitioner's theory that such a determination expressly construes a constitutional provision.

Assuming *arguendo* the Fourth District did not "meaningfully apply the First Amendment's requirement that the record include clear and convincing evidence,"

as suggested by the Petitioner, (Pet. Brief at 5), this is not a cognizable jurisdictional argument regarding an express construction of the constitutions. *Carmazi v. Board of Cnty. Commissioners of Dade Cnty*., 104 So. 2d 727, 729–730 (Fla. 1958).

Furthermore, Hurchalla's mere disappointment in the outcome of the Fourth District's decision does not justify her intentional reliance on a portion of a January 2013 email, the content of which is not on the face of the Opinion. (Pet. Brief at 5). Thus, the Petitioner's argument is not within the "four corners" of the Opinion to vest jurisdiction in this Court. *See Reaves v. State*, 485 So. 2d 829, 830, n.3 (Fla. 1986) (per curiam) ("The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record . . . it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below . . .").

Even before narrowing jurisdiction in the Florida Constitution to "express" constructions of constitutional provisions, it was well settled that this Court did not have jurisdiction if the district court merely applied established constitutional principles to the facts of a case. *Page v. State*, 113 So. 2d 557, 557 (Fla. 1959) (per curiam) (explaining a district court's simple "application of the facts in a case to a recognized clearcut provision of the Constitution does not amount to a decision upon

which this Court could entertain jurisdiction."); *Ogle v. Pepin*, 273 So. 2d 391, 392–393 (Fla. 1973).

## II. THE OPINION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A CASE FROM ANOTHER DISTRICT COURT OR THIS COURT.

Article V, Section 3(b)(3) of the Florida Constitution also gives this Court discretionary jurisdiction to review a decision that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." This can be accomplished in three ways.

First, it can be accomplished if the district court itself recognizes the conflict. Petitioner must admit that no such judicially recognized conflict occurred here.

Second, it can be accomplished if a party demonstrates that the holdings of the challenged decision and another decision are irreconcilable. *Aravena v. Miami-Dade Cnty.,* 928 So. 2d 1163, 1166 (Fla. 2006). Despite the numerous cases cited by Petitioner, she does not even attempt to place the holdings in the Fourth District's Opinion in juxtaposition with the holdings of any other case to demonstrate irreconcilable conflict.

Finally, on extremely rare occasions, a party can establish that a case passes the express and direct conflict test by showing that it involves a misapplication of a decision from this Court, or a decision from another district court. *See Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1254 (Fla. 2006); *Jaimes v. State*, 51 So. 3d

445, 446 (Fla. 2010); *Dorsey v. Reider*, 139 So. 3d 860, 862, n.1 (Fla. 2014). At a minimum, however, a reader must be able to read the challenged opinion, recognize that it is expressly applying a rule of law announced in an earlier case, but that opinion reached a conflicting outcome available under that same rule. It must be a true and express misapplication. *Engle*, *Jaimes*, *Dorsey*, supra. In contravention of this requirement, Petitioner seems to be relying on misapplication conflict, but never actually states that this is her theory. (Pet. Brief at 7).

Here, the Petitioner presented no example of such a misapplication. Instead, Petitioner contends the Fourth District should have reached a different result after reviewing the entire record to determine sufficiency of the evidence. Regardless, the purported "misapplication" argument does not bestow jurisdiction on this Court. *See Page*, 113 So. 2d at 557.

Hurchalla argues the Opinion conflicts with other cases involving Florida's common law concept of "express malice." The Opinion actually held:

> We agree with the proposition that in tortious interference cases, when a privilege is asserted for the interference, the express malice necessary to negate the privilege can be proven either by direct or circumstantial evidence of malice through malevolent intent to harm, or by harm accomplished by improper methods. In this case, we find that there was **sufficient evidence as to both methods**. We address the issue of proof of express malice by improper methods, followed by our analysis as to malevolent intent.

*Hurchalla*, 278 So. 3d at 66 (emphasis added).

Unsurprisingly, the Petitioner does not claim that any, of the many cases she discusses, held that "harm by improper methods" cannot be sufficient proof of malice in a claim of tortious interference with a contract between a private party and a governmental body. Even if Petitioner asserted such an argument, this was merely an alternative holding, which is not necessary to the Fourth District's disposition. Notably, Petitioner is not claiming any conflict with the first of the two alternatives.

Petitioner argues the Opinion conflicts with *Hay v. Indep. Newspapers, Inc*., 450 So. 2d 293 (Fla. 2d DCA 1984); *Smith v. Cuban Am.*, 731 So. 2d 702 (Fla. 3d DCA 1999); *Times Pub. Co. v. Huffstetler*, 409 So. 2d 112 (Fla. 5th DCA 1982); *Lamkin-Asam v. Miami Daily News*, 408 So. 2d 666 (Fla. 3d DCA 1981). But, none of these cases contain a dispositive holding in conflict with the Fourth District's Opinion. None of these cases even announce a rule of law that the Fourth District misapplied to reach an outcome inconsistent with the outcome of the purported conflict case.

Petitioner also argues the Opinion conflicts with Fourth District cases, such as *Don King v. Walt Disney Co*., 40 So. 3d 40 (Fla. 4th DCA 2010); *Scandinavian v. Ergle*, 525 So. 2d 1012 (Fla. 4th DCA 1988); and *Cape Publications, Inc. v. Adams*, 336 So. 2d 1197 (Fla. 4th DCA 1976), clearly knowing that intradistrict conflict, even if it existed, was not corrected on Petitioner's motion for en banc

rehearing, and it would not be a conflict with "another" district court of appeal sufficient to confer jurisdiction.

## III. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW A CASE THAT MERELY EXPLAINS THE DISTINCTIONS BETWEEN EXPRESS AND ACTUAL MALICE AND PERFORMS A FACT-SPECIFIC REVIEW OF THE SUFFICIENCY OF THE EVIDENCE.

The Fourth District's decision will not "chill expression and political activity" in Florida. To the contrary, the Opinion will help practitioners prepare better jury instructions addressing express and actual malice in the context of a claim for tortious interference with a contract not terminable at will. It will remind practitioners to ask both the trial court, and the district court, to perform an independent review of the sufficiency of the evidence in cases applying aspects of the First Amendment. The Opinion also cautions that, while the First Amendment opens the door for debate and petitioning elected representatives, it proscribes strategic and secretive interference with a public contract, through false statements that maliciously harm a company doing legal business with the government.

## CONCLUSION

This Court should deny Hurchalla's petition for lack of jurisdiction.

Dated: December 4, 2019.

Respectfully submitted,

*/s/Ethan J. Loeb*

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements Florida Rule of Appellate Procedure 9.210(a)(2).

*/s/Ethan J. Loeb*

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of December 2019, the foregoing was electronically filed with the Clerk of Courts using the Florida Courts E-filing Portal, which will send a notice of electronic filing to the service list below:

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