IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

MAGGY HURCHALLA,

Appellant,

DCA CASE NO: 4D18-1221
LOWER CASE NO.: 2013-CA-001321

v.

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

Appellees.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY, FLORIDA

LAKE POINT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The record on appeal consists of the circuit court filings, sequentially paginated from 0001 through 8499. Citations to the record will be referred to as "R." followed by the specific page number (R. at __). The trial transcript (Volumes 1–8) was uploaded separately and is paginated separately from 0001 through 1844. Citations to the trial transcript shall be referred to as "T." followed by the specific page and line numbers referenced (T. at __ : __ – __:__). Contemporaneous with this filing, Lake Point also has filed an Appendix to its Answer Brief. Citations to Lake Point's Appendix shall be referred to as "Appx." followed by the specific page number referenced (Appx. at __).

NATURE OF THE CASE

The Appellant's brief begins with a long, argumentative introduction without citation to the record. The Appellees provide only this nature of the case.

The jury returned a verdict in this case determining that the Appellant, Maggy Hurchalla ("**Ms. Hurchalla**"), was liable for tortious interference with a contract not terminable at will. That verdict was based on substantial evidence that Ms. Hurchalla intentionally interfered with long-term contracts by disseminating knowingly false statements that helped cause the breach of same.

In this appeal, Ms. Hurchalla attempts to shift the focus away from the jury's lawful verdict to a constitutional debate over legal issues that were never presented to the trial court. This Court does not need to participate in the Appellant's belated debate for a simple reason:

> "[T]he knowingly false statement and the false statement made with reckless disregard for the truth, do not enjoy constitutional protection."

Long v. State, 622 So. 2d 536, 537 (Fla. 1st DCA 1993) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)).

STATEMENT OF THE FACTS

The Appellees, Lake Point Phase I, LLC and Lake Point Phase II, LLC (collectively, "**Lake Point**"), own 2,200+ acres in western Martin County (the "**Property**"). (T. at 404:16–404:20, 407:3–407:7). The Property is strategically

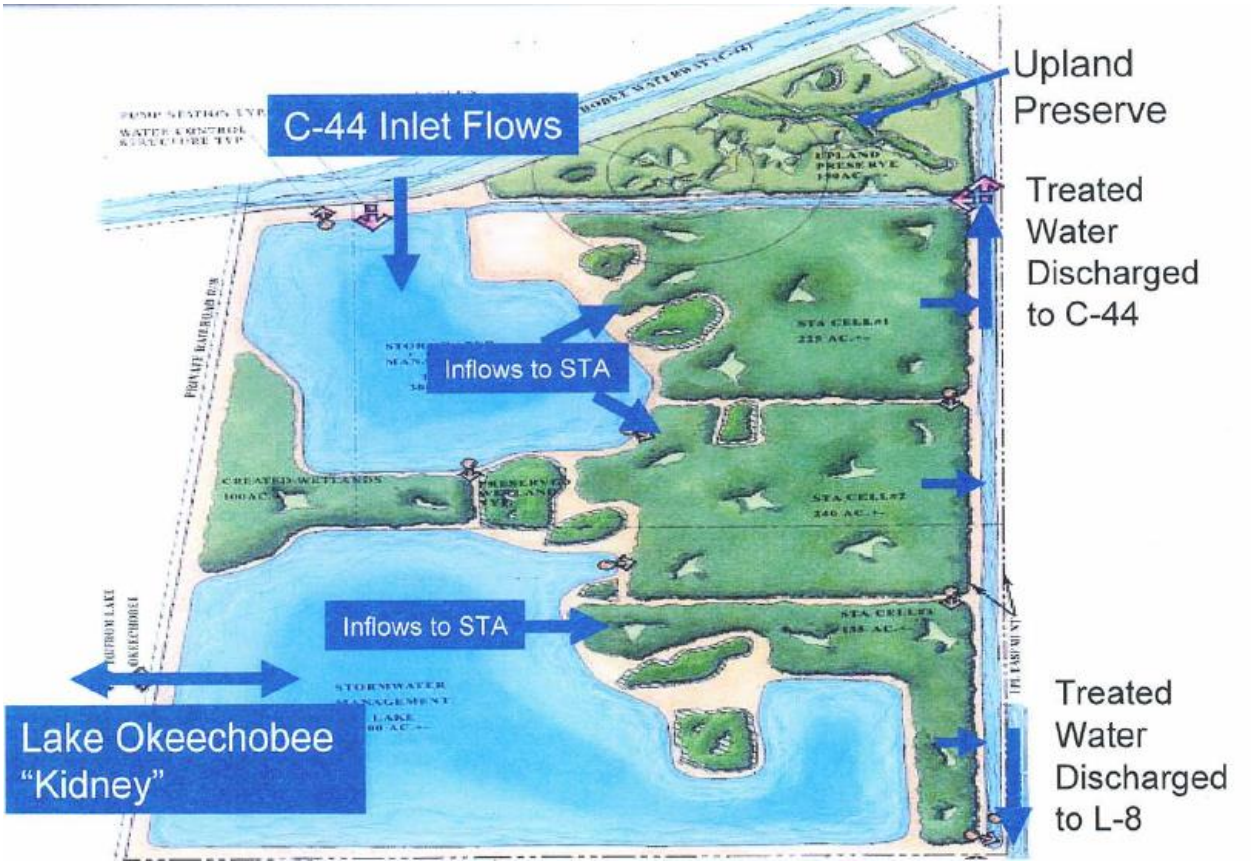
situated at the only location where Lake Okeechobee, the C-44 Canal, and the L-8 canal all converge. (T. at 412:10–413:25). As later recognized by the South Florida Water Management District ("**SFWMD**"), this unique location "lends itself to phosphorous reduction and water treatment and transfer possibilities." (R. at 6567).

The previous owners originally sought to develop the Property into a subdivision comprised of 20-acre ranchettes; however, they abandoned that idea when the real estate market crashed in 2008. (T. 405:3–405:8). The SFWMD then attempted to purchase the Property from the previous owners, but was unable to secure adequate financing. (T. at 405:9–405:24) (R. at 7856). After the SFWMD's acquisition attempt fell through, Lake Point saw an opportunity to develop the Property in a manner that was both profitable as well as environmentally beneficial. Lake Point would excavate limestone deposits on the Property thereby creating large stormwater management lakes that would then be donated to the SFWMD at no cost. (R. at 6579–581). Accordingly, Lake Point purchased the Property for approximately $50 million. (T. at 405:3–407:7; 1429:7–1429:10).

The Public Works Project

In 2008, Lake Point approached the SFWMD with a concept for a public-private partnership to construct a Stormwater Treatment Project on the Property (the "**Project**"). (T. at 411:18–413:10). This was possible due to the Property's unique location at the convergence of three major water basins. (T. at 412:10–413:25).

Below is a graphical depiction of the Property and the completed Project, showing Lake Okeechobee to the West, the C-44 canal to the north, and the L-8 canal to the south.



(R. at 6738).[1] Often described as a "kidney," the Project would create the ability to cleanse dirty water from Lake Okeechobee as well as the ability to store water or convey it between the three water basins. (T. at 411:18–413:10).

[1] The clerk of court scanned this image in black and white for the record on appeal, however, the full color version reproduced above is what was admitted into evidence and presented to the jury.

To evaluate the Project's potential benefits, the SFWMD oversaw an "in depth" due diligence investigation. This included reviewing the work of outside consultants hired by Lake Point as well as that of other consultants hired by the SFWMD who performed water modeling and water quality studies as well as geotechnical reports, a feasibility analysis, and conducted site visits. (T. at 415:12–416:19; 417:20–418:21) (R. at 5892–93; 6796–97). After its investigation, the SFWMD determined that the Project was "an integral component of the Northern Everglades and Estuaries Protection Program," (R. at 6575), and concluded that it was good for the environment, water quality, and the taxpayers, (R. at 5894). Specifically, the SFWMD concluded that the Project "has potential for reduction of phosphorous in the range of 2.5 to 6.2 metric tons/year," (R. at 6750), and would save approximately 37,555 acre/feet of problematic discharges from going into the St. Lucie estuary, (R. at 5895). Making the Project a reality, however, required the cooperation of Martin County.

The Martin County Board of County Commissioners ("**BOCC**") adopted a resolution supporting the SFWMD's letter of intent to sign an agreement with Lake Point to construct the Project on April 8, 2008, (R. at 6345–346), and on August 12, 2008, the BOCC unanimously approved the execution of such an agreement, (R. at 5894; 6567–69).

The Acquisition Agreement

On November 21, 2008, after notice and public hearings, Lake Point entered into an Acquisition and Development Agreement with the SFWMD (the "**Acquisition Agreement**"). (R. at 6574). The Acquisition Agreement required Lake Point to donate the Property, in phases, to the SFWMD subject to a 20-year reservation of mining rights. (R. at 6579–581). During that 20-year period, Lake Point's excavation of limestone would create the stormwater management lakes that could be used by the SFWMD for water storage and conveyance purposes. (R. at 6579–581).

The Property is divided into two separate parcels known as Phase I and Phase II. (T. at 404:16–404:20). The Phase I parcel was subject to both a Major Development Approval and Unity of Title (collectively, the "**Development Order**") issued by Martin County to the previous owner for construction of the 20-acre ranchettes subdivision. (R. at 6591). Before the Property could be donated to the SFWMD, the Acquisition Agreement required that the Development Order be vacated because it was an encumbrance on Lake Point's Property. (R. at 6591).

The Interlocal Agreement

On May 28, 2009, Lake Point, the SFWMD, and Martin County, after notice and public hearings, executed an Interlocal Agreement, which expressly acknowledged the Project's numerous "water related benefits." (R. at 6670). Just

like the Acquisition Agreement between Lake Point and the SFWMD, the Interlocal Agreement stated that the Development Order would need to be terminated before any portion of the Property could be donated to the SFWMD. (R. at 6680). For its part, the County expressly agreed that it would take no action to create any encumbrances on the Property. (R. at 6678). The County also agreed that until the Property was transferred to the SFWMD, the Development Order would remain "in full force and effect, including, without limitation, the right of Lake Point to excavate, process and remove subsurface materials" from the Phase I parcel (R. at 6680).

In order to mine outside of the Phase I parcel Lake Point required permits from both the Florida Department of Environmental Protection ("**FDEP**") and the Army Corps of Engineers ("**Army Corps**"). (R. at 6673). But under the Interlocal Agreement, once Lake Point obtained these permits "no separate . . . excavation and mining permit [was] required" from Martin County because the Project "qualifie[d] as an exempt 'public stormwater project.'" (R. at 6679). Accordingly, the Interlocal Agreement allowed Lake Point to continue mining in Phase I of the Property, and to expand mining activities to the Phase II parcel, when it received the mining permits from the FDEP and Army Corps. (R. at 6679–80).

Performing under the Contracts between 2009 and 2012

Over the next several years, Lake Point worked diligently to implement the Project—spending significant sums of money in the process. (T. 434:10–434:12). Specifically, Lake Point commissioned additional engineering reports to ensure the Project's success, (R. at 7099–116, 7117–174), and deeded a Conservation Easement to the SFWMD, (R. at 8066). Lake Point also applied for and was issued the necessary mining permits from the FDEP, (R. at 6400–434), and the Army Corps, (R. at 6458–472). Once it began excavating material from the Property, Lake Point submitted annual reports of its activity to the County and tendered the environmental contribution that was contemplated in the Interlocal Agreement. (T. at 298:14–299:4; 300:22–301:2).

Up through the summer of 2012, Martin County staff performed various unannounced inspections of the Property, checking on the development of the Project. (T. at 299:5–299:8). During this time, the County never identified any wrongdoing by Lake Point. (T. at 299:14–299:19). To the contrary, the County supported Lake Point and held a favorable view of the Project. (T. at 303:3–303:5). However, as the deputy County administrator confirmed at trial, the County's "attitude towards Lake Point start[ed] to change in September of 2012." (T. at 303:3–303:9).

Fall of 2012: Ms. Hurchalla Targets Lake Point

Ms. Hurchalla is a former County Commissioner who served two decades, from 1974 to 1994, on the Martin County BOCC. (T. at 1495:1–1495:6). At the time the County entered into the Interlocal Agreement in 2009, Ms. Hurchalla knew of the Lake Point Project, (T. at 1505:11–1505:13), but took no action in protest. As explained by Ms. Hurchalla, however, a "very bitter election" in the fall of 2012 resulted in a new, "slower growth" BOCC. (T. 1513:5–1513:17). Although no longer a Commissioner herself, Ms. Hurchalla maintained close ties with members of the new BOCC. She was friends with the chairwoman, Commissioner Sarah Heard. (R. at 5885). She was also friends with Commissioner Anne Scott, (T. at 1582:11–1583:5), whom Ms. Hurchalla persuaded to run for public office, (R. at 5898). Beyond that, Ms. Hurchalla had access to the private e-mail addresses of at least four of the five members of the new BOCC. (T. at 1516:14–1516:24).

On September 9, 2012—with the new, slower growth BOCC in place—Ms. Hurchalla sent an e-mail to Commissioner Heard's private e-mail address regarding the Lake Point Project. (R. at 7842) (Appx. at 3). In this e-mail titled "water," Ms. Hurchalla claimed that "Martin County allowed [Lake Point] to destroy wetlands." (R. at 7842) (Appx. at 3). She then instructed Commissioner Heard to undermine the Lake Point Project by sending a message—carefully drafted by Ms. Hurchalla—to County staff, copying various news outlets and the officials at the SFWMD. (R. at

7842) (Appx. at 3). In accordance with Ms. Hurchalla's instructions, Commissioner Heard forwarded the "water" e-mail from her personal account to her official, government e-mail address. (R. at 7842) (Appx. at 3). Then—after removing all indications that Ms. Hurchalla had authored the "water" e-mail's message—Commissioner Heard, from her government account, sent Ms. Hurchalla's carefully crafted statement, verbatim, to County staff and the executive director of the SFWMD, Melissa Meeker. (R. at 6761) (Appx. at 6).

The "water" e-mail surprised County staff since the destruction of wetlands is a serious issue—especially in Martin County. (T. at 303:10–303:19; 304:23–305:23). Moreover, the "water" e-mail represented a complete reversal for Commissioner Heard who previously voted in favor of the Project, along with every other member of the BOCC. (R. at 7846, 7861, 7867). County staff responded to the "water" e-mail by unequivocally stating: "No wetland impacts have occurred on this property." (R. at 6765). Commissioner Heard then forwarded staff's response to Ms. Hurchalla, who refused to accept the truth and instead drafted a reply e-mail for Commissioner Heard to send back to County staff. (R. at 6765).

On January 4, 2013, Ms. Hurchalla sent the BOCC an e-mail about Lake Point stating that: (1) the Project "destroys 60 acres of wetlands"; (2) "[n]either the storage nor the treatment benefits have been documented"; and (3) the Project "has been fast tracked and allowed to violate the rules." (R. at 8056–057). Ms. Hurchalla also

claimed that Lake Point did not qualify as a "Public Works Project" and, therefore, was not exempt from obtaining further County approvals to mine on the Property. (R. at 8056–057). In this same e-mail, Ms. Hurchalla admitted that she was aware that County staff "actually looked at the project and inspected the site" and concluded that "[n]o board action [was] necessary." (R. at 8057). However, in apparent belief that she could run the County better than its own staff, Ms. Hurchalla defiantly declared: "SOME Board action is necessary." (R. at 8057).

During this same time period, Ms. Hurchalla hosted a private meeting in her home—outside of public view—with the executive director of the SFWMD, Melissa Meeker, and a member of its governing board, Kevin Powers. At this meeting, Ms. Hurchalla again claimed that "the wetlands on the property had been destroyed." (T. at 390:12–391:16).

Martin County Breaches the Interlocal Agreement

On January 8, 2013, a few days after Ms. Hurchalla's last e-mail, the BOCC convened a meeting during which Commissioner Heard parroted Ms. Hurchalla's claim that "[w]etlands are being destroyed on this Property." (T. at 510:12–510:13). Although she had previously referred to Lake Point as "a fine project" and voted to support it, (R. at 7861, 7867), Commissioner Heard now described the Project as "environmental treachery," (R. at 7706). Despite presenting these unfounded claims about the Project as her own, Commissioner Heard later admitted that she never

visited the Lake Point Property, never read any of the applicable permits, and she was unaware of any facts that would indicate that wetlands were destroyed. (R. at 5877–78, 5886). Indeed, the only information that a majority of the BOCC had regarding the alleged destruction of wetlands on the Lake Point Property came from Ms. Hurchalla. (R. at 5869–70, 5877–78, 5886, 5869–70, 5899–5900).

At this same BOCC meeting, Commissioner Heard claimed for the first time that Lake Point was improperly mining outside of the Phase I parcel without the required County approvals. (T. at 508:8–508:12). However, Martin County had earlier acknowledged in the Interlocal Agreement that Lake Point was an exempt Public Works Project under County regulations and that no County mining permit or further County approvals were required once the FDEP and Army Corps had issued mining permits for the Property. (R. at 6679). County staff acknowledged that "it was clear" that Lake Point was mining "within the boundaries" of the Public Works Project. (T. at 319:11–319:21). Indeed, the County had been aware for more than a year that Lake Point was constructing the Public Works Project by excavating limerock in both the Phase I and Phase II portions of the Property. (R. at 6961).

On January 2, 2013, as envisioned in the Interlocal Agreement, Lake Point formally requested that the County vacate the Development Order for the former ranchette subdivision and submitted a check as payment for the processing fee. (R. at 7965; 8049). Martin County cashed Lake Point's check, (T. at 477:2–477:13), and

staff advised the BOCC of Lake Point's request, (T. at 518:19–519:5). Rather than vacate the Development Order, however, the BOCC instructed staff "to take no action on [Lake Point's] request." (T. at 519:6–519:9). The BOCC then suggested that it was "in a position to shut [the Project] down" and instructed staff to initiate code enforcement proceedings against Lake Point for mining outside of Phase I. (T. at 515:16; 517:10–517:19). As the County Administrator later admitted at trial, if the County processed Lake Point's request to vacate the Development Order, any purported issues regarding Lake Point's right to mine outside of Phase I "would have gone away." (T. at 349:2–349:6). But by refusing to do so, the County put Lake Point in a classic Catch-22 situation: Lake Point could not transfer the Property to the SFWMD until the County processed Lake Point's request to vacate the Development Order, but the County refused to process Lake Point's request until after Lake Point transferred the Property to the SFWMD. (T. at 349:23–350:6). Doing so breached the Interlocal Agreement provision wherein the County promised to take no action that would frustrate Lake Point's mining reservation or create encumbrances on the Property. (R. at 6678).

Ms. Hurchalla: DON'T DO IT!

After the January 8th BOCC meeting, Ms. Hurchalla sent additional e-mails regarding Lake Point to various County Commissioners at their private e-mail addresses. (R. at 6784, 8097) (Appx. at 10–11). These e-mails were sarcastically

signed: "Deep Rockpit." (R. at 6784, 8097) (Appx. at 10–11). Doing so was consistent with Ms. Hurchalla's past references to herself as **Ms. Machiavelli**, (T. at 814:4), and her admission that she "gratuitously" attacks business organizations, (R. at 8062). In the "Deep Rockpit" e-mail, Ms. Hurchalla privately instructed individual County Commissioners on how to respond to Lake Point's attempt to pay the environmental contribution under the Interlocal Agreement:

> DON'T DO IT! If you accept the money it can be argued that the Interlocal agreement with SFWMD and the County is in effect. IT IS NOT . . . it does not go into effect until the property is transferred . . . INSTEAD ask staff to bring back an agenda item terminating the Interlocal agreement . . . [a]void discussion of other issues. Don't complicate things . . . Get the contract cancelled."

(R. at 6784, 8097) (Appx. at 10–11).

Heeding Ms. Hurchalla's instructions, the BOCC reconvened on January 15, 2013 and "request[ed] staff to bring back a termination document." (R. at 7872). In further compliance with Ms. Hurchalla's commands, the BOCC never processed Lake Point's request to vacate the Development Order thereby preventing the Property from being transferred to the SFMWD. (T. at 477:14–477:17).

On January 22, 2013, County staff informed Commissioner Heard that—contrary to Ms. Hurchalla's claims—the mining permits do not allow for the destruction of wetlands; rather, the lands to be filled are considered "other surface waters," which are not wetlands under Florida or Martin County standards. (R. at

6786–787). Commissioner Heard immediately forwarded staff's analysis to her private e-mail address, and on to Ms. Hurchalla who responded by characterizing staff's analysis as "BS" and defiantly stating that the mining permits "allowed delineated wetlands to be destroyed." (R. at 6787. Doubling down, Ms. Hurchalla then e-mailed Commissioner Scott at her private e-mail address claiming that Lake Point was destroying wetlands. (R. at 8096).

Martin County Breaches Again

On February 4, 2013—at the request of the BOCC—County staff began code enforcement proceedings against Lake Point by issuing two Notices of Violation. (T. at 317:6–317:15). The Notices alleged that Lake Point was: (i) conducting activity "that is not consistent with the approved Development Order" for the former ranchette project; and (ii) mining outside of the Phase I parcel without a County-issued permit. (R. at 7003, 7009). And if Lake Point did not immediately cease these activities, it could face up to a $1,000.00 per day fine that the County warned "may become a lien on [the] [P]roperty." (R. at 7005, 7011). By issuing these Notices, the County breached the Interlocal Agreement provision stating that Lake Point did not need a separate mining permit nor other approvals from Martin County once Lake Point had obtained the FDEP and Army Corps permits. (R. at 6679). The County also breached its promise to take no action that would create an encumbrance on the Property. (R. at 6678).

On February 5, 2013, the BOCC met once again to discuss the Lake Point Project. (R. at 7886). Consistent with Ms. Hurchalla's instructions, (R. at 6784, 7185, 8097) (Appx. at 10–11), the BOCC directed County staff not to accept Lake Point's environmental contribution payment made pursuant to the Interlocal Agreement, (R. at 7960–961). This was a repudiation and breach of the Interlocal Agreement.

STATEMENT OF THE CASE

On February 5, 2013, Lake Point sued the County for breach of the Interlocal Agreement and the SFWMD for breach of the Acquisition Agreement. (R. at 1–14). Lake Point later added a claim against Ms. Hurchalla for tortious interference. (R. at 206–07). After several years of litigation, Lake Point reached favorable settlements with both the County, (R. at 8110), and the SFWMD, (R. at 8283). The settlement with the County included a $12 Million cash payment to Lake Point and the BOCC issuing Lake Point an apology letter. (T. at 321:8–321:22). In its apology letter, the County described the BOCC's negative turn towards the Lake Point Project as "an unjustified and unsupportable rush to judgment." (R. at 8282) (Appx. at 12).

The sole remaining claim was for tortious interference against Ms. Hurchalla. As an affirmative defense, Ms. Hurchalla alleged that her statements were privileged under the First Amendment. (R. at 548; 1165; 1489–90). Contrary to what is claimed

in the Initial Brief, Ms. Hurchalla never alleged a separate common-law privilege defense. (R. at 548; 1165; 1489–90). The parties then proceeded to trial.

The Trial Against Ms. Hurchalla

At trial, the jury was presented with evidence of the facts described above. Before beginning deliberation, the jury received the standard instruction for tortious interference with a contract not terminable at will, which stated in pertinent part:

> Intentional interference with another person's contract is improper. Interference is intentional if the person interfering knows of the contract with which he or she is interfering, knows he or she is interfering, and desires to interfere or knows that interference is substantially certain to occur as a result of his or her action.

(R. at 5817). With regard to Ms. Hurchalla's First Amendment defense, the jury was instructed that it must find for Ms. Hurchalla so long as she did not make "deliberate misrepresentations of fact" or intend "primarily to harm Lake Point." (R. at 5818). Ms. Hurchalla did not request a jury instruction regarding "actual malice" or a common-law privilege, (R. at 5846) (Appx. at 34), therefore, no such instructions were provided. (R. at 5857–58) (Appx. at 45–46). As for the burden of proof, Ms. Hurchalla's own instructions placed on her the burden to prove her defenses by the greater weight of the evidence. (R. at 5841, 5846) (Appx. at 29, 34). And her counsel remained silent when the trial court specifically asked: "Greater weight of the evidence, there's no objection to that, right?" (T. at 1670:21–1670:25); and, "The parties must prove all claims and defenses by the greater weight of the evidence . . .

Any objection to that?" (T. at 1671:20–1672:9). Accordingly, the jury was instructed that Ms. Hurchalla had the burden of proving her First Amendment defense by the greater weight of the evidence. (R. at 5857–58) (Appx. at 45–46).

Moreover, evidence was presented during trial showing that Ms. Hurchalla deleted e-mails between her and various County officials regarding the Lake Point Project. (T. at 1566:19–1566:20; 822:21–822:23). Accordingly, the jury received the standard failure to maintain evidence instruction:

> If you find that: Hurchalla deleted or otherwise caused various emails between her and Martin County Commissioners to be unavailable . . . 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.

(R. at 5856) (Appx. at 44). After deliberating, the jury returned a verdict against Ms. Hurchalla and in favor of Lake Point. (R. at 5863). This appeal soon followed.

Although not germane to any of the issues raised by Ms. Hurchalla on appeal, Ms. Hurchalla's Statement of the Case repeats claims of alleged impropriety by the trial court judge. (Initial Brief at 15–16). These allegations were already reviewed and rejected by this Court. *See Maggy Hurchalla v. Lake Point Phase I, LLC and Lake Point Phase II, LLC*, Case No. 4D18-0763 (dismissing a petition for writ of prohibition seeking review of the denial of Ms. Hurchalla's motion for judicial disqualification). Lake Point's response in that proceeding addresses Ms.

Hurchalla's claims of impropriety in detail, and there is no need to repeat the same arguments here.

SUMMARY OF THE ARGUMENT

This case centers around a secretive campaign orchestrated by a self-described Ms. Machiavelli, that was designed to and did, in fact, cause the breach of a multimillion-dollar contract—a classic example of tortious interference. Central to this campaign was Ms. Hurchalla's repeated dissemination of information that she either knew was false or had a high degree of awareness of the information's probable falsity. In her zeal to stop Lake Point, she did not engage in public protest; instead, she secretly poisoned the relationship between the County and Lake Point with false information behind the scenes. Rather than publicly oppose the Project in 2008 and 2009, when the SFWMD and the County approved the underlying multi-year contracts, Ms. Hurchalla waited until her friends occupied a majority of the BOCC in 2012. Then, through clandestine communications to their private e-mail addresses, Ms. Hurchalla instructed her friends: "Get the contract cancelled."

For years, Lake Point and Martin County performed under the Interlocal Agreement without interruption or controversy. But that ended abruptly after Ms. Hurchalla began privately contacting her newly elected friends on the BOCC. Within a few short months—and without any specific knowledge of the Project other than the false statements made by Ms. Hurchalla—the County reversed course and

breached the Interlocal Agreement. As a direct result of its breach, the County paid Lake Point $12 Million and apologized for its unsupported rush to judgment. Thus, the suggestion that there is no competent evidence showing that Ms. Hurchalla caused the County to breach the Interlocal Agreement thereby causing damage to Lake Point is entirely without merit. Indeed, the record demonstrates that Ms. Hurchalla regularly sent e-mails to individual BOCC members at their private e-mail addresses making false claims about Lake Point and instructing them to take specific actions regarding the Project. These e-mails were followed by those same BOCC members parroting Ms. Hurchalla's statements in hearings and acting in conformity with her instructions.

Disregarding the record, Ms. Hurchalla claims that the trial judge incorrectly instructed the jury on the applicable law. This argument, however, is belied by Ms. Hurchalla's own proposed jury instructions at trial, which portrayed the law entirely different from what she now claims on appeal. Although Ms. Hurchalla attempts to shield her intentional misrepresentations about Lake Point behind the protections of the First Amendment, such attempts are futile for a simple reason: There is no constitutional right to lie.

Finally, evidence was presented demonstrating that Ms. Hurchalla deleted e-mails that she sent to BOCC members regarding the Lake Point Project even after this lawsuit was filed. Accordingly, the trial court instructed the jury regarding a

permissible inference that the jury was free, but not required, to draw if it concluded that Ms. Hurchalla lost or destroyed relevant evidence. Since evidence was presented to support giving this instruction, Ms. Hurchalla's claim that the trial court abused its discretion is entirely without merit.

For these reasons, the Final Judgment should be affirmed.

ARGUMENT

I. Lake Point presented competent substantial evidence establishing each element of its claim for tortious interference with a contract not terminable at will.

Ms. Hurchalla raises the sufficiency of the evidence to support Lake Point's claim for tortious interference as the third issue in her brief. (Initial Brief at 32–45). However, addressing this threshold question first will place in better context the Initial Brief's two opening arguments regarding Ms. Hurchalla's defenses. For this reason, Lake Point respectfully reorders the presentation of the issues on appeal and addresses the sufficiency of the evidence to support its claim for tortious interference at the forefront.

A. Standard of Review

The critical question in this case is whether there was any evidence to support the jury's verdict against Ms. Hurchalla. *See Castillo v. E.I. Du Pont De Nemours & Co.*, 854 So. 2d 1264, 1277 (Fla. 2003) ("[I]f there is any competent evidence to support a verdict, that verdict must be sustained regardless of the District Court's

opinion as to its appropriateness."). In considering this question, the Court should view the evidence and all reasonable inferences that might be drawn from the evidence in the light most favorable to Lake Point. *Thompson v. Jacobs*, 314 So. 2d 797, 799 (Fla. 1st DCA 1975). Indeed, "[i]t is a basic tenet of appellate review that appellate courts do not reevaluate the evidence and substitute their judgment for that of the jury." *Castillo*, 854 So. 2d at 1277.

B. Lake Point presented competent substantial evidence that Ms. Hurchalla caused Martin County to breach the Interlocal Agreement.

Parties to an "at will" contract have only a bare expectancy that the relationship will continue, therefore, intentional interference with such a contract is actionable only if unjustified. *Brown v. Larkin & Shea, P.A.*, 522 So. 2d 500, 501 (Fla. 1st DCA 1988). In contrast, a contract that is not terminable at will establishes a legal right to the continued relationship—and intentional interference with that right is actionable. The Interlocal Agreement is a contract not terminable at will. Thus, to prevail on its claim for tortious interference, Lake Point was required to present evidence demonstrating: (1) the existence of a contract; (2) Ms. Hurchalla's knowledge of that contract; (3) Ms. Hurchalla's intentional interference causing the breach of that contract; and (4) damages to Lake Point as a result of that breach. *Wackenhut Corp. v. Maimone*, 389 So. 2d 656, 658 (Fla. 4th DCA 1980); *see also* Fla. Std. Jury Instr. (Civ.) 408.5. The Initial Brief challenges only issues three and

four—the sufficiency of the evidence to support a finding that Ms. Hurchalla caused Martin County to breach the Interlocal Agreement resulting in damages to Lake Point. (Initial Brief at 32–45). This argument is without merit.

For years, Lake Point worked to construct the Project with the County's general support, however, in the Fall of 2012—after Ms. Hurchalla began privately e-mailing BOCC members false claims about the destruction of wetlands on the Property—the County's attitude towards Lake Point dramatically changed. (T. at 303:3–303:9).

i. Martin County pays Lake Point $12 Million and apologizes.

Perhaps the most persuasive evidence that Martin County breached the Interlocal Agreement was that the County agreed to pay Lake Point $12 Million in cash and apologized to Lake Point. (T. at 321:8–321:12). The apology letter included the County's confession that its negative change in attitude towards the Lake Point Project was "**an <u>unjustified</u> and <u>unsupportable</u> rush to judgment**." (R. at 8282) (Appx. at 12) (emphasis added). The County Administrator even testified at trial that he had never before seen Martin County issue this type of apology. (T. at 321:19–321:22).

The BOCC's rush to judgment was exemplified by the baseless claims it levied against the Project starting in the Fall of 2012 despite a dearth of facts supporting such claims. Indeed, the jury learned that the Project's most ardent

opponents lacked even a general understanding of the Project or the Lake Point Property:

- **Chairwoman Heard** never visited the Lake Point Property, never read any of the applicable permits that described where wetlands were located on the Property, and was unaware of any facts that would indicate that wetlands were destroyed, (R. at 5877–78, 5886);
- **Commissioner Fielding** did not know the purpose of the Lake Point Project, did not even know the County had entered into the Interlocal Agreement, did not review the applicable permits for the Project, and had never reviewed any wetland delineations for the Property, (T. at 1753:21–1754:1; R. at 5869–70); and
- **Commissioner Scott** had not read the FDEP or Army Corps permits, nor had she "read any of the communications and documentation that was within the County's files with regard to the Lake Point Public Works Project," (R. at 5899–5900).

The only thing that a majority of the BOCC did read before breaching the Interlocal Agreement were the false statements made by Ms. Hurchalla—an influential 20-year veteran of the BOCC—as well as her specific instructions to void the Interlocal Agreement and, until that occurred, avoid taking any steps that would allow Lake Point to claim that the Interlocal Agreement was in place. From this, the

jury reasonably could infer that Martin County's "unjustified and unsupportable rush to judgment" was directly caused by the specific directions in Ms. Hurchalla's private e-mails. *See Atl. Coast Line R. Co. v. Gary*, 57 So. 2d 10, 13 (Fla. 1951) ("A jury is at liberty to draw reasonable deductions from the evidence."); *see also Hastie v. Ekholm*, 199 So. 3d 461, 465 (Fla. 4th DCA 2016) (stating that appellate courts "draw all reasonable inferences in favor of the verdict on appeal") (internal quotations omitted).

Even if not the sole cause, at the very least, the jury could conclude that Ms. Hurchalla's private e-mails contributed to causing the County's breach—which is all that Lake Point was required to show. *See KMS Rest. Corp. v. Wendy's Intern. Inc.*, 194 Fed. Appx. 591, 603 (11th Cir. 2006) (approving the trial court's instruction on causation stating, in pertinent part, that "damage is proximately caused by interference only when the interference directly and in natural and continuous sequence produces, or contributes substantially to producing such injury"); *see also* Fla. Std. Jury Instr. (Civ.) 408.4 (stating that interference with a contract may be a legal cause of damage "even though it operates in combination" with some other cause). Ms. Hurchalla even acknowledged this in her proposed jury instructions. (R. at 5843).

ii. As a result of Ms. Hurchalla's interference, the County refused to terminate the Development Order as required by the Interlocal Agreement.

As more fully described above, Lake Point requested that Martin County vacate the Development Order for the former ranchette project, which was an encumbrance on the Property that had to be cleared before Lake Point could convey its Property to the SFWMD. *Supra* at 12–13. The County Administrator testified at trial that the Interlocal Agreement required Martin County to do so upon Lake Point's request. (T. at 348:6–348:17). The BOCC, however, instructed County staff "to take no action on [Lake Point's] request." (T. at 519:6–519:9). By doing so, Martin County breached the Interlocal Agreement.

As part of the Interlocal Agreement the County expressly promised to take no action that would "frustrate or interfere" with Lake Point's reservation of mining rights, (R. at 6678)—which were to be retained by Lake Point after transferring the Property to the SFWMD, (R. at 6673) (the "**Mining Reservation**"). But by refusing to vacate the Development Order, the County prevented Lake Point from transferring the Property to the SFWMD. (*See* R. at 6591) (requiring that the Development Order be vacated as a condition precedent to transferring the Property to the SFWMD). Thus, in direct violation of the Interlocal Agreement, the County interfered with and made impossible Lake Point's Mining Reservation.

Lake Point also presented significant evidence that Ms. Hurchalla caused this breach by surreptitiously instructing her friends on the BOCC to prevent Lake Point from transferring the Property to the SFWMD. Specifically, in the "Deep Rockpit" e-mail, which she sent to the private accounts of BOCC members after Lake Point asked the County to vacate the Development Order, Ms. Hurchalla claimed that the Interlocal Agreement "does not go into effect until the property is transferred" to the SFWMD. (R. at 6784, 8097) (Appx. at 10–11). Rather than allow Lake Point to transfer the Property to the SFWMD as required, Ms. Hurchalla instructed the BOCC: "INSTEAD ask staff to bring back an agenda item terminating the Interlocal agreement." (R. at 6784, 8097) (Appx. at 10–11). Ms. Hurchalla then followed-up with another e-mail regarding Lake Point's attempts to transfer the Property to the SFWMD, stating: "I don't think you can or should let that happen." (R. at 7185).

Moreover, in addition to Ms. Hurchalla's explicit instructions, the jury also could consider that, concurrent with the instruction to staff not to process Lake Point's request, Commissioner Heard parroted the same baseless claims made by Ms. Hurchalla in her e-mail to the BOCC:

- that wetlands were being destroyed on the Property; and
- that the Project did not yet qualify as a Public Works Project since the Property had not been conveyed to the SFWMD.

(*Compare* R. at 7185–86, *with* T. at 509:20–510:13). From this, the jury reasonably could infer that Ms. Hurchalla contributed to causing the County's refusal to process Lake Point's request to vacate the Development Order and, therefore, the breach of the Interlocal Agreement. *See Gary*, 57 So. 2d at 13; *Hastie*, 199 So. 3d at 465.

iii. As a result of Ms. Hurchalla's interference, the County breached the Interlocal Agreement by creating encumbrances on the Property and erroneously demanding that Lake Point obtain further County mining approvals.

As part of the Interlocal Agreement, Martin County expressly promised that Lake Point did not need a separate, County-issued mining permit or further site plan approvals, once Lake Point had obtained its permits from the FDEP and the Army Corps. (R. at 6679). The County also promised that it would take no action to create any encumbrances on the Property. (R. at 6678). Despite these promises, the County nevertheless issued two Notices of Violation to Lake Point for purportedly mining without County approvals. (R. at 7005, 7011). And the County warned that such Notices of Violation "may become a lien on [the] [P]roperty," thereby creating an encumbrance. (R. at 7005, 7011). Doing so breached the Interlocal Agreement.

Lake Point presented direct evidence that Ms. Hurchalla caused this breach. Specifically, on January 4, 2013, Ms. Hurchalla e-mailed the BOCC claiming that Lake Point was not exempt from obtaining further County approvals for mining activities. (R. at 8056). Ms. Hurchalla also sent e-mails to the private accounts of

several BOCC members stating that County staff should be directed to follow-up on this supposed violation of County rules. (R. at 6784, 8097) (Appx. at 10–11). Contrary to Ms. Hurchalla's claims, Lake Point's mining activities were fully authorized and expressly agreed to by the County in the Interlocal Agreement.[2] (R. at 6679). Nevertheless, the County blindly followed Ms. Hurchalla's instructions and issued the two Notices of Violation for mining without a County-issued permit. (R. at 7005, 7011). Thus, there was competent substantial evidence demonstrating that Ms. Hurchalla contributed to this breach.

iv. Refusing to accept payment of the environmental contribution

The Interlocal Agreement required Lake Point to pay the County an environmental contribution under the Interlocal Agreement. (R. at 6671). After Lake Point tried to do just that, Ms. Hurchalla sent private e-mails to the personal accounts

[2] Although Ms. Hurchalla suggests that the Interlocal Agreement amounts to improper contract zoning, this is a red herring. (Initial Brief at 36). "Contract zoning" occurs where a local government obligates itself by agreement with a developer to rezone property without going through the formal rezoning process or where notice and hearings are simply an administrative formality on the way to the already agreed rezoning of property. *Molina v. Tradewinds Development Corp.*, 526 So. 2d 695, 696 (Fla. 4th DCA 1988); *Housing Auth. of the City of Melbourne v. Richardson*, 196 So. 2d 489, 493 (Fla. 4th DCA 1967). Nothing about the Interlocal Agreement obligates the County to exercise its zoning or police authority in any particular improper way. Rather, the County merely recognized that the Lake Point Project qualifies as an exempt "public stormwater project" pursuant to pre-existing County regulations and, therefore, no separate County-issued mining permit was required. (R. at 6679).

of individual BOCC members instructing them: "DON'T DO IT! If you accept the money it can be argued that the Interlocal agreement with SFWMD and the County is in effect. IT IS NOT . . . ask staff to bring back an agenda item terminating the Interlocal agreement." (R. at 6784, 8097) (Appx. at 10–11). The next day, Ms. Hurchalla e-mailed the entire BOCC and stated:

> If you accept the payment that is being offered you may be causing the County some serious problems . . . The owner's attorney appears to believe that rescinding the County approvals [i.e., vacating the Development Order] and transferring the project to [the SFWMD] will exempt the project from the requirements of the Martin County Comprehensive Plan. I don't think you can or should let that happen.

(R. at 7185). Instead, "[b]efore taking any other action, the faulty Interlocal Agreement needs to be corrected or voided." (R. at 7186). Following Ms. Hurchalla's instructions, the BOCC instructed County staff to "[n]ot accept payment." (R. at 7960–961). Thus, there was competent substantial evidence demonstrating that Ms. Hurchalla contributed to this breach.

C. Lake Point presented competent substantial evidence of the damages it suffered as a result of Ms. Hurchalla's interference.

Ms. Hurchalla provided no testimony at trial, expert or otherwise, to refute Lake Point's damages claim. Nevertheless, Ms. Hurchalla now questions on appeal the methodology employed by Lake Point's two expert witnesses on damages below—Dr. Henry Fishkind and Mr. Lloyd Morgenstern. (Initial Brief at 41–45). However, Ms. Hurchalla raised no objection to the methodology of Dr. Fishkind or

Mr. Morgenstern at trial and she cannot do so for the first time on appeal. *See Reimbursement Recovery, Inc. v. Indian River Mem'l Hosp., Inc.*, 22 So. 3d 679, 682 (Fla. 4th DCA 2009) (holding that the appellant, based on the absence of any objection below, waived any claim on appeal that an expert opinion lacked evidentiary support); *see also Philip Morris USA Inc. v. Gore*, 238 So. 3d 828, 830 (Fla. 4th DCA 2018) (holding based on the lack of a contemporaneous objection that the appellant failed to preserve any challenge to the expert's opinion); *Madsen, Sapp, Mena, Rodriguez & Co., P.A. v. Leaman*, 686 So. 2d 780, 782 (Fla. 4th DCA 1997) (same).

Moreover, Lake Point did present competent substantial evidence to support its damages. Dr. Henry Fishkind—a noted economist and econometrician who frequently performs economic forecasts for limerock mining operations, (T. at 709:15–712:24)—testified that Lake Point's "sales were dramatically lower in the period [ ] from 2013 forward compared to how much their sales were from 2008 to 2012." (T. at 713:3–713:25). After evaluating all possible causes for the "precipitous drop" in limestone sales, Dr. Fishkind concluded that Lake Point's reduced sales were the result of the County's "negative actions," which created a cloud of uncertainty over whether Lake Point would remain in business. (T. at 714:5–715:7; 752:1–752:9). Dr. Fishkind then confirmed through various interviews that Lake Point's competitors were using the Notices of Violation to dissuade customers from

ordering Lake Point's rock—suggesting that the County was on the verge of shutting Lake Point down. (T. at 772:8–774:6; 776:4–776:22). To determine the amount of Lake Point's damages, Dr. Fishkind modeled the relationship between the excavation of limestone and housing starts in the relevant market area—which he testified strongly correlates with limestone production. (T. at 747:8–747:20).

Mr. Lloyd Morgenstern—a certified public accountant accredited in business valuation—applied Dr. Fishkind's model to determine the impact of the County's negative actions on Lake Point's business. (T. at 912:6–913:17). Mr. Morgenstern concluded that Lake Point's total lost profit damages (i.e., the difference in the present value of Lake Point's future profits before and after the County's actions) were $22,142,553.00. (T. at 908:16–908:17). But Mr. Morgenstern did not stop there; rather he also valued the impact of Lake Point's settlement with Martin County, as well as a separate settlement reached with the SFWMD, and subtracted these amounts from the damages. (T. at 923:2–924:23). Applying this setoff, Mr. Morgenstern concluded that Lake Point's total remaining damages were $4,381,708.00. (T. at 923:2–924:23).

Accordingly, the jury was presented with competent substantial evidence supporting Lake Point's damages.

II. Ms. Hurchalla's arguments regarding her First Amendment defense are both unpreserved and erroneous.

Regarding the First Amendment defense, Ms. Hurchalla now claims that the trial court erred by instructing the jury that such a defense failed if Ms. Hurchalla acted with express malice and used improper methods to influence Martin County. (Initial Brief at 22–24). Ms. Hurchalla also claims that the trial court instructed the jury on the incorrect burden of proof. (Initial Brief at 24–25). These claims of error, however, are entirely without merit since Ms. Hurchalla never asked for such instructions below and, in fact, requested entirely different instructions.

A. Standard of Review

"No party may assign as error . . . the failure to give any instruction unless that party requested the same." Fla. R. Civ. P. 1.470(b). And "[a] party cannot complain on appeal that a trial court committed reversible error by failing to correct that party's own inaccurate and misleading proposed instructions." *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 519 (Fla. 2015).

Trial courts have broad discretion in formulating jury instructions that "as a whole fairly state the applicable law to the jury." *City of Delray Beach v. DeSisto*, 197 So. 3d 1206, 1209 (Fla. 4th DCA 2016) (internal quotations omitted). Thus, a trial court's decision on jury instructions "should not be reversed unless the error complained of resulted in a miscarriage of justice or the jury instructions were

reasonably calculated to confuse or mislead the jury.'" *Id.* (internal quotations omitted).

B. Ms. Hurchalla herself argued that her First Amendment defense protected her statements only if made "without express malice."

During the charge conference below, Ms. Hurchalla never mentioned the term "actual malice," much less requested that the jury be instructed about "actual malice." (T. at 1644:2–1712:17). For this reason, Ms. Hurchalla cannot claim error based on the failure to give an instruction using the term "actual malice." Fla. R. Civ. P. 1.470(b).

Contrary to the position she now takes on appeal, Ms. Hurchalla's proposed jury instruction stated that her First Amendment defense protected her statements only if made "without express malice." (R. at 5846) (Appx. at 34). Because Ms. Hurchalla specifically requested an instruction on "express malice"—as distinct from "actual malice"—she cannot claim that the trial court erred in giving such an instruction. *See Aubin*, 177 So. 3d at 519. This is true even if, assuming *arguendo*, the instruction provided was an incorrect statement of law. Indeed, as succinctly stated by this Court:

> [F]ailure to preserve objections to jury instructions cannot be cured by application of the fundamental error doctrine . . . [because] [i]n a civil case, the policies behind the requirement of Rule 1.470(b), that objections to jury instructions be properly preserved, override the necessity that a jury be correctly charged on the law.

Feliciano v. Sch. Bd. of Palm Beach County, 776 So. 2d 306, 308 (Fla. 4th DCA 2000).

Even if preserved, however, Ms. Hurchalla's argument is erroneous since the jury was properly instructed that her First Amendment defense failed if the jury determined that Ms. Hurchalla used improper methods "to attempt to influence Martin County." (R. at 5858) (Appx. at 46). Improper methods were defined as "deliberate misrepresentations of fact," (R. at 5858) (Appx. at 46), which are not constitutionally protected. *See Londono v. Turkey Creek, Inc.*, 609 So. 2d 14, 18–19 (Fla. 1992) (holding that the First Amendment right to petition one's government does not protect false statements "intentionally and maliciously made . . . to third parties and [ ] local government officials for the purpose of harming [another's] economic interests."); *Long*, 622 So. 2d at 537 ("'[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.'") (quoting *Garrison*, 379 U.S. at 75) (internal citations omitted); *Colson v. Grohman*, 174 F.3d 498, 507 (5th Cir. 1999) ("[I]ntentional or reckless falsehood, even political falsehood, enjoys no First Amendment protection . . . ."). Simply put, there is no constitutional right to lie.

The Initial Brief recognizes that the use of deliberate misrepresentations of fact constitutes "actual malice" sufficient to overcome a First Amendment defense. (*See* Initial Brief at 20) (acknowledging that the First Amendment does not protect

statements made "with 'actual malice,' i.e., knowing or high degree of awareness of probable falsity"). Thus, although the term "actual malice" was not used in the instructions, the jury was nevertheless instructed on this legal concept. During the charge conference, Ms. Hurchalla never objected to the use of the phrase "deliberate misrepresentations of fact" in lieu of the legal term "actual malice." (T. at 1662:17–1670:21). Accordingly, she cannot argue for the first time on appeal that instructing the jury in this manner was error. *See* Fla. R. Civ. P. 1.470(b) ("No party may assign as error the giving of any instruction unless that party objects thereto at such time . . . ."); *Feliciano*, 776 So. 2d at 308 ("To properly preserve an objection to an instruction requested by the opposing party, it is necessary that a distinct and specific objection be made. A general objection is not sufficient.") (internal quotations omitted).

C. Ms. Hurchalla herself argued that her First Amendment Defense was subject to the greater weight of the evidence standard, for which the trial court correctly placed the burden of proof on Ms. Hurchalla.

Ms. Hurchalla never requested that the jury be instructed on the "clear and convincing" standard that she mentions for the first time on appeal. Thus, Ms. Hurchalla cannot claim error based on the failure to give an instruction using the

"clear and convincing" standard.[3] *See* Fla. R. Civ. P. 1.470(b) ("No party may assign as error . . . the failure to give any instruction unless that party requested the same.").

Contrary to the evidentiary standard Ms. Hurchalla now seeks to apply on appeal, Ms. Hurchalla's proposed jury instructions referenced only the "greater weight of the evidence" standard. (R. at 5841) (Appx. at 29). As more fully described above, Ms. Hurchalla's counsel did not object when asked by the trial court whether the greater weight of the evidence standard applied. *Supra* 17–18. Because Ms. Hurchalla specifically requested a First Amendment instruction using the "greater weight of the evidence" standard, she cannot claim that the trial court erred in so instructing the jury. *See Aubin* 177 So. at 519 (finding that a party cannot complain on appeal that a trial court failed to fix that party's inaccurate instruction); *Feliciano*, 776 So. 2d at 308 (same). Accordingly, Ms. Hurchalla's claims of error regarding the jury instructions on the burden of proof are unpreserved and erroneous.

[3] Even if Ms. Hurchalla had requested such an instruction, giving it would have constituted error because at trial Ms. Hurchalla did not argue—and the court did not determine—that Lake Point is a limited-purpose public figure. *See Marous Bros. Const., LLC v. Alabama State Univ.*, 2:07CV384ID, 2008 WL 370903, at *2 (M.D. Ala. Feb. 11, 2008) (reasoning that whether a party is a limited-purpose public figure is a threshold question that must be answered before applying the heightened "clear and convincing" evidentiary standard).

D. The record is replete with competent substantial evidence supporting a determination that Ms. Hurchalla acted with actual malice, i.e. that she either knew that her statements were false or had a high degree of awareness as to their probable falsity.

"It is a basic tenet of appellate review that appellate courts do not reevaluate the evidence and substitute their judgment for that of the jury." *Castillo*, 854 So. 2d at 1277. "[I]f there is any competent evidence to support a verdict, that verdict must be sustained regardless of the District Court's opinion as to its appropriateness." *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 675–76 (Fla. 2004). Here, the record is brimming with evidence that Ms. Hurchalla made deliberately false statements.

i. Ms. Hurchalla falsely claimed that Lake Point had destroyed all of the wetlands on the Property.

Ms. Hurchalla made broad statements in late 2012 to the effect that Lake Point had destroyed all of the wetlands on its property, but also later made more specific claims about the wetland acreage allegedly destroyed by Lake Point. As to her broad statements, on September 9, 2012 Ms. Hurchalla sent the "water" e-mail to Commissioner Heard's private e-mail address claiming that "Martin County allowed [Lake point] to destroy wetlands." (R. at 7842) (Appx. at 3). Also, in December 2012, Ms. Hurchalla hosted a meeting at her home with the executive director and a governing board member of the SFWMD at which she claimed that "the wetlands on the property had been destroyed." (T. at 390:20–391:16). These statements were false. (T. at 872:1–872:10). Indeed, the SFWMD later concluded that Lake Point

"had not destroyed the wetlands"; rather, "they were protecting them." (R. at 5896). Ms. Hurchalla either knew that wetlands were not, in fact, destroyed or had a high degree of awareness that her statements were false since she was forwarded an e-mail wherein Martin County staff unequivocally stated: "No wetland impacts have occurred on this property." (R. at 6765).

ii. Ms. Hurchalla falsely claimed that 60 acres of wetlands could be destroyed

On multiple occasions Ms. Hurchalla claimed that the Army Corps Permit allows 60 acres of wetlands to be destroyed. (R. at 6786, 7185, 8096). These statements were false and Ms. Hurchalla either knew, or had a high degree of awareness, of their falsity.

On January 22, 2013, Martin County's growth management director explained in an e-mail, which was forwarded to Ms. Hurchalla that same day, that the Army Corps Permit does not allow for the destruction of wetlands. Rather, the areas identified in the Army Corps Permit "are not recognized by the State of Florida [as wetlands] but are classified as other surface waters."[4] (R. at 6787). After receiving this explanation, Ms. Hurchalla continued—in private e-mails to County

[4] The County's explanation is consistent with the trial testimony of Lake Point's wetland expert that "[a]gricultural wetlands and wetlands are two different things." (T. at 899:18–899:20) (emphasis added). Unlike wetlands, which are protected, agricultural wetlands are "farmed area[s]" that are "plowed and planted every year." (T. at 900:2–900:8).

Commissioners—falsely claiming that Lake Point was destroying wetlands. (R. at 6786, 8096). Thus, Ms. Hurchalla either knew her statements were false or had a high degree of awareness as to their probable falsity.

iii. Ms. Hurchalla falsely claimed that the Project had no documented benefits

On January 4, 2013, Ms. Hurchalla e-mailed Commissioner Heard stating, among other things, that "[n]either the storage nor the treatment benefits [for the Project] have been documented." (R. at 8057). This was false. (T. at 1285:8–1285:12) (stating that the SFWMD believed "it was a good idea" to sign the Interlocal Agreement in 2009 "as a result of the studies and the reports that were prepared"). Indeed, Ms. Hurchalla's own expert testified that as of 2012, numerous studies were performed documenting "the storage and treatment benefits of the Lake Point project." (T. at 1184:24–1187:16). Moreover, Ms. Hurchalla either knew that such studies were performed or had a high degree of awareness that a study probably was performed. (R. at 8056). On January 4, 2013, Ms. Hurchalla expressly acknowledged that "[a] study was to follow that documented the benefits" of the Project. (R. at 8056). Nevertheless, she claimed that the Project's benefits were never documented simply because Ms. Hurchalla—a private citizen—did not receive or review a copy of such a study. (R. at 8056).

Accordingly, there was competent substantial evidence in the record from which the jury could conclude that Ms. Hurchalla made numerous knowingly false statements. Therefore, the jury's verdict must be sustained. *See Castillo*, 854 So. 2d at 1277; *Berges*, 896 So. 2d at 675–76.

Moreover, Ms. Hurchalla's attempt to couch her false statements as expressions of pure opinion is wholly without merit. The false statements made by Mrs. Hurchalla are purely factual since they are readily capable of being proved false (e.g. there either were or were not studies performed documenting the benefits of the Project). At best, however, Ms. Hurchalla's statements are of mixed opinion and fact which are not constitutionally protected. *See LRX, Inc. v. Horizon Associates Joint Venture ex rel. Horizon-ANF, Inc.*, 842 So. 2d 881, 885 (Fla. 4th DCA 2003) (a statement that a person was engaged in the unauthorized practice of law was not a statement of pure opinion).

III. Ms. Hurchalla never asserted a common law privilege; however, even if she had, the jury was instructed on express malice.

Ms. Hurchalla's claim that her false statements were protected by a distinct common law privilege, separate from the First Amendment, is improperly raised for the first time on appeal. This common law privilege was not raised in any pleading, (R. at 548; 1165; 1489–90), nor referenced in Ms. Hurchalla's proposed jury instructions. (R. at 5842–43, 5846–47) (Appx. at 30–31, 34–35). And Ms. Hurchalla

did not mention a common law privilege during the charge conference. (T. at 1644:2–1712:17). Thus, Ms. Hurchalla cannot now claim error based on the failure to instruct the jury regarding a defense that she never asserted below. *See* Fla. R. Civ. P. 1.470(b). However, even if Ms. Hurchalla had requested that the jury be instructed on a distinct common law privilege, the instructions provided below were sufficient.

A. The trial court instructed the jury on express malice.

Here, the jury was instructed that Ms. Hurchalla should prevail on her First Amendment defense so long as her statements were not made "primarily to harm Lake Point." (R. at 5858) (Appx. at 46). This statement of the law is directly in accord with controlling Florida Supreme Court precedent. Specifically, the Florida Supreme Court has stated: "Express malice under the common law of Florida, necessary to overcome the common-law qualified privilege, is present where the **primary motive** for the statement is shown to have been an intention to injure the plaintiff." *Nodar v. Galbreath*, 462 So. 2d 803, 806 (Fla. 1984) (emphasis added). Eight years later, in *Londono v. Turkey Creek, Inc.*, the Florida Supreme Court applied the *Nodar* approach in the context of claim for tortious interference with a contract terminable at will, stating: "We find that the test used in *Nodar* protects the Homeowners' First Amendment rights and adequately guards against the danger of intimidation suits." 609 So. 2d at 18.

Overlooking this controlling precedent, Ms. Hurchalla suggests, based on non-binding and inapposite legal authority, that the court should have instructed the jury that Ms. Hurchalla's statements were privileged so long as they were not *solely* motivated by malice. (Answer Brief at 29) (citing *Boehm v. Am. Bankers Ins. Group, Inc.*, 557 So. 2d 91, 95 (Fla. 3d DCA 1990); *McCurdy v. Collis*, 508 So. 2d 380, 383 (Fla. 1st DCA 1987)). However, the trial court surely did not err in using the word "primary" instead of "sole" in the instruction provided to the jury below, given the Florida Supreme Court's recognition of *Nodar* in *Londono*, 609 So. 2d at 18.

Further, unlike this case, neither *Boehm* nor *McCurdy* concerned interference with a contract **not terminable at will**. *See Boehm*, 557 So. 2d at 92 (describing plaintiff's claim as interference with a prospective job offer); *McCurdy*, 508 So. 2d 383 (stating that the contract alleged to be interfered with was "terminable at will"). Indeed, Ms. Hurchalla's particular motivation for interfering with the Interlocal Agreement (a contract not terminable at will) is not even "an essential element of the tort." *McDonald v. McGowan*, 402 So. 2d 1197, 1201 (Fla. 5th DCA 1981).[5]

[5] Ms. Hurchalla also contends the trial court erred in not giving the jury her version of the verdict form, which asked whether Ms. Hurchalla's statements were "made for the sole purpose of harming Lake Point and for no other purpose." (R. at 5812). As set forth above, however, the trial court had already instructed the jury correctly through the use of the word "primary" in the pertinent privilege instruction; thus, a special interrogatory on this point was not necessary. Further, Ms. Hurchalla's proposed special interrogatories omitted any question asking the jury whether Ms.

B. The evidence presented supports the finding that Ms. Hurchalla acted primarily to harm Lake Point.

Regardless, there was competent and substantial evidence showing that Ms. Hurchalla acted primarily to harm Lake Point. Ms. Hurchalla's true colors come through in her private e-mails to BOCC members. In her "Deep Rockpit" e-mail for example, Ms. Hurchalla expressly instructed individual County Commissioners to avoid discussing other issues and "[g]et the contract cancelled." (R. at 6784, 8097) (Appx. at 10–11). She specifically told the BOCC to take no further action on the Lake Point Project until the Interlocal Agreement was voided. (R. at 6784, 8097) (Appx. at 10–11). Moreover, the jury was presented evidence that Ms. Hurchalla deliberately made numerous statements about the Lake Point Project that she knew were false. *Supra* Section III.D. In *Abram v. Odham*, the Florida Supreme Court considered the relationship between deliberately false statements and malice:

> [I]t is our opinion that if the facts published by the defendant Odham in the handbill, quoted above, were, in fact, deliberately fabricated by the defendant Odham, and the jury so found, they would also have the right to infer that this defendant was motivated by purely personal motives of spite and ill will and also to gain the favor of the voters, regardless of the damage caused to plaintiff by the willfully false statements. Such improper and unjustifiable motives would, in our opinion, justify a finding of malice in fact, on the part of the defendant Odham, so that the communication would lose its qualifiedly privileged character.

Hurchalla had made intentionally false statements. (R. at 5811–12). The trial court, therefore, acted within its discretion in giving the verdict form it did.

89 So. 2d 334, 338 (Fla. 1956). Accordingly, the jury reasonably could infer that Ms. Hurchalla's motives were not only primarily to harm Lake Point—but purely out of spite and ill will. *See id.*

IV. The court did not err by instructing the jury that if it concluded Ms. Hurchalla lost or destroyed relevant evidence than it could, but was not required to, infer that such evidence was not favorable.

A. Standard of Review.

"We review a trial court's decision to give or withhold a jury instruction for abuse of discretion." *Citizens Prop. Ins. Corp. v. Hamilton*, 43 So. 3d 746, 753 (Fla. 1st DCA 2010). "A trial court must give jury instructions that are supported by facts in evidence; only when the court gives an instruction not founded upon evidence adduced at trial has error occurred." *Gordon v. Colbert*, 789 So. 2d 471, 473 (Fla. 4th DCA 2001).

B. Evidence was presented from which the jury could conclude that Ms. Hurchalla lost or destroyed relevant evidence.

Contrary to Ms. Hurchalla's characterization in the Initial Brief, the court below did not impose any sort of sanction on Ms. Hurchalla based on her destruction of evidence. As such, Ms. Hurchalla's suggestion that an order compelling discovery was necessary before the trial court could provide an adverse inference instruction here is erroneous. (Initial Brief at 47) (citing *Bechtel Corp. v. Batchelor*, 250 So. 3d 187 (Fla. 3d DCA 2018)). In *Bechtel*, the appellate court considered the propriety of

giving an adverse inference instruction as a sanction based on the trial court's determination—not that of the jury—that the defendant failed to produce a sufficient corporate representative witness during discovery process. 250 So. 3d at 194. In stark contrast to *Bechtel*, here the adverse inference instruction was not a sanction resulting from a discovery violation determined by the trial court to have occurred. Rather, the adverse inference instruction was merely the result of the presentation of record evidence that Ms. Hurchalla lost or deleted relevant evidence during the litigation. "Unlike an adverse presumption instruction, where the court must find the spoliator was duty-bound to preserve the evidence, 'an adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence.'" *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006) (emphasis added) (quoting *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1257 (Fla. 4th DCA 2003), *approved*, 908 So. 2d 342 (Fla. 2005)). Based on such evidence, the trial court instructed the jury that if it determined Ms. Hurchalla deleted or lost e-mails within her custody or control than the jury could, but was not required to, infer that such e-mails were unfavorable to Ms. Hurchalla. (T. at 1826:5–1826:16).

It is undisputed that Ms. Hurchalla deleted e-mails related to Lake Point during the course of this litigation. (T. at 1566:19–1566:20). Attempting to explain away her behavior, Ms. Hurchalla claimed that prior to deleting any e-mails she

produced them to her counsel. (T. at 1566:19–1566:22). The jury, however, heard from Mr. John Jorgensen, a former NSA computer forensics expert, (T. at 796:19–796:24), that Ms. Hurchalla authored e-mails to BOCC members, which she later deleted during the course of the litigation, and never produced to Lake Point.

Specifically, Mr. Jorgensen evaluated three e-mails (referred to as Lake Point 1, 2, and 3) that were sent by Commissioner Heard to County staff in December of 2012. (R. at 7648–50). After an exhaustive review, Mr. Jorgensen was able to conclude that Commissioner Heard was not the original author of Lake Point 1, 2, and 3; rather—similar to the "water" e-mail that Commissioner Heard passed off as her own—Ms. Hurchalla was the original author. (T. at 806:14–806:25; 812:19–812:24). Neither Ms. Hurchalla nor any other source, however, produced the original version of the Lake Point 1, 2, and 3 e-mails. (T. at 822:21–822:23). This is significant since Mr. Jorgensen testified that certain information from the original Lake Point 1, 2, and 3, which was authored by Ms. Hurchalla and never produced, was deleted and missing from the version of Lake Point 1, 2, and 3 sent by Commissioner Heard that was produced. (T. at 810:10–812:3). In Mr. Jorgensen's opinion, this deleted information, consistent with Ms. Hurchalla's pattern and practice demonstrated by other emails to Chairwoman Heard, likely contained further instructions and commentary to Chairwoman Heard regarding the Lake Point Project. (T. at 811:23–815:1).

The deleted information missing from the Lake Point 1, 2 and 3 e-mails was material to Lake Point's tortious interference claim and to Hurchalla's defense. Ms. Hurchalla has consistently argued that the County did not take Hurchalla's lead in any of its conduct. However, Hurchalla deleted key e-mails (i.e. Lake Point 1, 2, and 3) from December 2012 leading up to the BOCC's decisions regarding Lake Point in early 2013. Further, Hurchalla vigorously argues in this appeal that she had pure motives for her actions and that she was simply trying to help the environment. However, Hurchalla cannot simultaneously take this position while excusing her deletion of e-mails that may further have shown Hurchalla's intent to harm Lake Point.

Based on the evidence described above, the trial court did not abuse its discretion by instructing the jury regarding the permissible, but not required, inference that could be drawn if it concluded Ms. Hurchalla deleted e-mails regarding the Lake Point Project. Indeed, such an instruction is perfectly consistent with Florida Supreme Court Standard Jury Instruction 301.11(a), as well the jury instruction recommended by this Court in *American Hospitality Management Co. of Minnesota v. Hettiger*, 904 So. 2d 547, 551 (Fla. 4th DCA 2005).

C. The trial court did not abuse its discretion by sanctioning Ms. Hurchalla and her counsel for improperly delaying entry of the Final Judgment.

Oddly, on the final page of the Initial Brief, Appellant's raise an entirely different issue involving a post-judgment sanctions order under section 57.105, Florida Statutes. (Initial Brief at 50). "The standard of review applicable to the circuit court's award of fees under section 57.105(1) is abuse of discretion." *Siegel v. Rowe*, 71 So. 3d 205, 211 (Fla. 2d DCA 2011).

Here, the trial court's order was premised on Ms. Hurchalla's objection to entry of final judgment and filing a motion to dismiss a non-existent count from a more than four-year old prior version of Lake Point's complaint. (R. at 8419). Such an erroneous motion was particularly improper since at the close of trial Ms. Hurchalla stated that no additional matters needed to be addressed before a final judgment was entered. (T. at 1844:7–1844:14). The court then entered sanctions pursuant to section 57.105, Florida Statutes, finding that Ms. Hurchalla's motion was interposed "primarily for the purposes of delaying the entry of the Final Judgment against Ms. Hurchalla" and was not supported by the material facts nor the law applicable to such facts. (R. at 8422). Doing so was not an abuse of discretion.

CONCLUSION

For all these reasons, this Court should affirm the Final Judgment.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the preceding was prepared utilizing a Times New Roman 14-point and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 2018, a true and correct copy of **the foregoing** has been furnished via e-mail to: **DAVID W. OGDEN**, david.ogden@wilmerhale.com, **JAMIE S. GORELICK**, jamie.gorelick@wilmerhale.com, **DAVID LEHN**, david.lehn@wilmerhale.com, **JUSTIN BAXENBERG**, justin.baxenberg@wilmerhale.com, **MEGHAN M. INGRISANO**, meghan.ingrisano@wilmerhale.com, Wilmer Cutler Pickering Hale and Dorr, 1875 Pennsylvania Avenue NW, Washington D.C. 20006; **RICHARD J. OVELMEN**, rovelmen@carltonfields.com, **RACHEL A. OOSTENDORP**, roostendorp@carltonfields.com, and **ALIX I. COHEN**, acohen@carltonfields.com, Carlton Fields Jorden Burt, P.A., 100 S.E. Second Street, **Suite 4200,** Miami, FL 33131; **TALBOT D'ALEMBERTE**, dalemberte@dalemberteandpalmer.com, 121 N. Monroe Street, Tallahassee, Florida, 32301; **VIRGINIA P. SHERLOCK**, vsherlock@lshlaw.net, LSHLawfirm@gmail.com, and **HOWARD K. HEIMS**, hheims@lshlaw.net, Littman, Sherlock & Heims, P.A., P.O. Box 1197 Stuart, Florida 34995, ***Attorneys for Appellant, Maggy Ms. Hurchalla***; **RICHARD GROSSO**, grossso.richard@yahoo.com, Richard Grosso, P.A., 6511 Nova Drive, Davie, Florida 33317, ***Attorneys for Amicus Curiae, Professors Penelope Canan and George W. Pring, as well as Amicus Curiae, Bullsugar.org, Florida Wildlife Federation, Friends of the Everglades, and the Pegasus Foundation***; and **PAUL M. CROCHET**, paul.crochet@webercrabb.com, jesse.wagner@webercrabb.com, Weber, Crabb & Wein, P.A., 5453 Central Avenue, St. Petersburg, Florida 33710, ***Attorneys for the Amicus Curiae, The League of Women Voters of Florida, Florida Press Association, Florida Society of News Editors, Sierra Club, Natural Resources Defense Council, Inc., American Civil Liberties Union Foundation of Florida, Fane Lozman, and the Brechner Center, as well as The First Amendment Foundation, Inc.***; **JACK SCHRAMM COX**, jscoxpa@gmail.com, Jack Schramm Cox, Chartered, 12171 SE Heckler Drive, Hobe Sound, Florida 33455, ***Attorneys for The Guardians of Martin County, Inc.***

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