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.

APPELLANT MAGGY HURCHALLA'S MOTION FOR REHEARING EN BANC OR CERTIFICATION

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

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Pursuant to Florida Rule of Appellate Procedure 9.331, Appellant Maggy Hurchalla respectfully moves for rehearing en banc of this Court's June 19, 2019 opinion. Alternatively, Hurchalla moves for certification pursuant to Rules 9.030 and 9.330 because the case raises questions of great public importance requiring immediate resolution by the Florida Supreme Court.

INTRODUCTION

A basic premise of our representative democracy is that citizens are free to communicate policy concerns to their elected leaders. The First Amendment to the U.S. Constitution protects both "the freedom of speech" and "the right to petition the Government for a redress of grievances." U.S. Const. Amend. I. The Florida Constitution echoes those protections and adds "the right" of "[t]he people … to instruct their representatives." Fla. Const. Art. I, §§4-5.

Maggy Hurchalla exercised these fundamental rights by expressing her concerns to Martin County Commissioners about the environmental consequences of a public-private development project being performed by Appellees Lake Point Phase I, LLC and Lake Point Phase II, LLC (collectively, "Lake Point"). After conducting an independent investigation of the project, County staff concluded that Lake Point was not honoring its commitments to the County and issued two Notices of Violation ("NOVs"). Rather than contesting the NOVs, however, Lake Point sued Hurchalla, claiming her statements tortiously interfered with its contract

with the County. Lake Point won a $4.4 million judgment against her. A panel of this Court affirmed, reasoning that Hurchalla lost her First Amendment and Florida common-law privileges by making two purportedly false statements to the Commissioners with intentional or reckless disregard for the truth (i.e., actual malice), and further lost her common-law privilege by allegedly acting with malevolence toward Lake Point (i.e., express malice). **No Florida appellate court has ever upheld a judgment directed at petitioning activity**, let alone such an enormous judgment on such a thin record.

The panel's decision poses a grave threat to the federal and state rights to speak and to petition the government and will encourage any party aggrieved by valid governmental action to sue whoever supported such action—not just environmental activists but also public policy organizations (and their members) supporting or opposing legislation, religious groups seeking regulatory exemption, and companies bidding for government contracts.[1] For many, the risk that a factual statement will be misconstrued and become the basis for multi-million dollar liability will be too great; they will be silenced. That "chill" on political activity will diminish the free flow of information in our state and the quality of our policies. Because the panel's decision thus raises issues of exceptional importance

[1] *See, e.g.*, Erica Goode, *N.R.A.'s Influence Seen in Expansion of Self-Defense Laws*, N.Y. Times (Apr. 12, 2012), https://www.nytimes.com/2012/04/13/us/nra-campaign-leads-to-expanded-self-defense-laws.html.

and conflicts with Florida precedent, the en banc court should grant rehearing, reverse the judgment, and vindicate the fundamental rights exercised by Hurchalla.

STATEMENT OF THE CASE

Lake Point owns land in Martin County ("Property"), some of which is covered by a County order permitting limestone mining ("Development Order"). Op.2-3. In 2008, Lake Point formed an agreement with the South Florida Water Management District ("District") whereby Lake Point could mine limestone on portions of the Property in exchange for creating a public stormwater treatment facility that would feed the water to the Everglades and donating the associated Property to the District. Op.3; R.6574-75, 6579. The District entered into an Interlocal Agreement with Martin County to facilitate the project. Op.3-4; R.6669.

In September 2012, local media reported that Lake Point secretly planned instead to commercially sell Florida waters. R.6765-70; Tr.615, 659, 1419. Alarmed by the environmental consequences, Hurchalla emailed her concerns to Martin County Commissioners. Op.4; R.7185-86, 8056-58.

In December 2012, County staff sent Lake Point a letter noting possible regulatory violations and issued a report reflecting similar preliminary findings. R.5974-80, 7939-44; Tr.317, 328-29, 333, 337, 1018, 1021, 1024, 1032, 1240. At a January 2013 public hearing, the Board heard a staff presentation about Lake Point's possible regulatory violations, R.7668-69; Tr.505-19, and directed staff to

further investigate the matter, R.7762-63. In February 2013, County staff—without the Board's or Hurchalla's involvement—issued two NOVs to Lake Point, requiring it to show that its mining activities were consistent with the Interlocal Agreement or to cease them. R.7003-13; Tr.1324-30, 1558-59. Lake Point never contested the NOVs. The panel opinion omits these critical facts.

Lake Point thereupon sued the County, claiming that the County breached the Interlocal Agreement by not vacating the Development Order, by issuing the two NOVs, and by not cashing a check Lake Point had written to the County. Ans. Br. 26-30. Lake Point also sued Hurchalla, claiming that she tortiously caused those alleged contract breaches through supposedly false communications with County Commissioners (though none of those statements had anything to do with the supposed breaches by the County). Op.4; Ans. Br. 26-30. The County settled, but Hurchalla argued that her communications were privileged communications with government officials regarding matters of public concern and in any case did not cause any breaches. *See, e.g.*, R.1421-25; R.2064-69. Lake Point responded that Hurchalla lost her privilege by making deliberately false statements and by acting with ill will toward Lake Point. R.1212-13, 3849-51. The judge denied Hurchalla's dispositive motions, and a jury rendered a general verdict for Lake Point awarding $4.4 million in damages. Op.5.

On appeal, Hurchalla raised several objections: (1) she did not lose her First

Amendment privilege because Lake Point had not proved by clear and convincing evidence that her statements were false and made with "actual malice"; (2) she did not lose her common-law privilege because Lake Point had not proved that her statements were made with "express malice"; (3) the jury instructions did not conform to the First Amendment and Florida common law because they permitted the jury to find for Lake Point without finding that Hurchalla had spoken with either actual or express malice (let alone both, as required to defeat both privileges); and (4) the record was insufficient to prove the tortious interference claim, i.e., that the County breached the Interlocal Agreement, that Hurchalla's allegedly tortious speech caused the breach, and that Lake Point suffered damages.

The panel affirmed the judgment. The panel concluded that Hurchalla's challenge to the jury instructions was waived, Op.7, and then turned to Hurchalla's sufficiency arguments. After purportedly conducting a full de novo review of the factual record relating to Hurchalla's privilege defense as required by *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), the panel first concluded that Hurchalla lost her First Amendment privilege because she made statements regarding studies of the Project's benefits that she allegedly knew or should have known were false. Op.8. The panel then concluded that Hurchalla lost her common-law privilege because she acted through an "improper method," namely, making those same supposedly false statements, and because she allegedly evinced

ill will toward Lake Point, as shown by her signing emails "Deep Rockpit" and "Ms. Machiavelli," "coupled with … her significant influence with a majority of the commissioners … [who] knew little-to-nothing about" the project. Op.12. The panel rejected Hurchalla's remaining arguments without discussion. Op.2.

ARGUMENT

I. THE PANEL OPINION WILL CHILL CORE RIGHTS PROTECTED BY THE SPEECH AND PETITION CLAUSES OF THE FIRST AMENDMENT AND FLORIDA LAW

This case presents issues of exceptional importance because the panel's decision will chill the speech of those who would petition the government.

A. The First Amendment right to petition the Government is "one of the most precious of the liberties safeguarded by the Bill of Rights." *Lozman v. City of Rivera Beach, Fla.*, 138 S. Ct. 1945, 1954 (2018). Likewise, the Free Speech Clause's guarantee "of the opportunity for free political discussion … is a fundamental principle of our constitutional system." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). To afford these "[f]reedoms of expression" the "require[d] 'breathing space,'" *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986), courts must not only avoid punishing citizens for exercising their expressive rights, but must also take care not to create rules that could lead citizens to restrain their expression out of fear of criminal or civil liability, *New York Times*, 376 U.S. at 279. Accordingly, the First Amendment allows a speaker

to be held liable for a tort caused by her speech or petition only if the plaintiff proves by clear and convincing evidence that the speech or petition was materially false and was made with actual malice, i.e., knowledge or a "high degree of awareness of … probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (speech); *McDonald v. Smith*, 472 U.S. 479, 485 (1985) (petition).

Recognizing the importance of protecting "statements of a citizen to a political authority regarding matters of public concern," Florida law supplements these First Amendment protections by precluding tort liability unless the plaintiff proves that such statements were made with **express** malice, i.e., "an intention to injure the plaintiff." *Nodar v. Galbreath*, 462 So. 2d 803, 806 (Fla. 1984). The "express malice" standard creates a high bar: "Strong, angry, or intemperate words do not alone show express malice; rather, there must be a showing that the speaker used his privileged position 'to gratify his malevolence.'" *Id.* at 811. Further, where the speech is to a political authority on a matter of public concern, the plaintiff must prove that express malice was the speaker's **sole** motivation; if the speech was "made for a proper purpose … there can be no recovery" even if the speaker "**also** in fact feels hostility or ill will toward the plaintiff." *Id.* at 810, 812; *see also Boehm v. American Bankers Ins. Grp., Inc.*, 557 So. 2d 91, 95 (Fla. 3d DCA 1990); *Alexis v. Ventura*, 66 So. 3d 986, 988 (Fla. 3d DCA 2011).[2]

[2] The panel declined to address whether express malice must be the "**sole**, rather

B. The panel's assessment of the sufficiency of the evidence erodes these protections in several important ways. First, the panel failed to acknowledge that Lake Point's alleged injury stemmed from governmental actions—the non-termination of the Development Order and the issuance of two NOVs—whose validity Lake Point **never contested**. The proper avenue for a company claiming to be aggrieved by adverse governmental action is administrative or judicial review of that action—not a tort claim against a citizen who spoke to her government representatives about the issue. The upshot of the panel's decision is that private citizens can now be ordered to pay millions of dollars to a plaintiff injured by concededly valid governmental action that the private citizens encouraged.

The effect of such a rule, coupled with a multi-million dollar verdict, would "freeze" public expression, not just impermissibly "chill" it. Anyone who joined a rulemaking comment could be liable to an entity adversely affected by the final rule if any portion of the comment turned out to be false. Any public-policy organization that indulged in some puffery to persuade a legislator to sponsor its bill could be liable to someone adversely affected by the legislation once enacted. Displeased organizations and individuals may now scour rulemaking dockets and lobbying disclosures to identify targets to blame for adverse governmental actions.

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than merely **primary**, motive" because it believed Hurchalla waived her instructional challenge. Op.7 n.1. But the panel had to address the question to resolve Hurchalla's sufficiency challenge with respect to Florida privilege.

Second, the panel did not meaningfully apply the First Amendment's requirement that the **plaintiff** prove by **clear and convincing** evidence that the speech was not only false but also uttered with **intentional or reckless** disregard for the truth. The evidence on which the panel relied to conclude that Hurchalla lost her privilege does not come close to that standard. The panel focused on portions of a January 2013 email, which states in relevant part:

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

R.8056-57 (emphasis added); *see* Op.8.

The panel omitted and disregarded the emphasized sentence, but that sentence contains an essential qualifier. No CERP peer review of benefits—"[t]hat study," in Hurchalla's email—had been performed. Based on Hurchalla's testimony that she had been aware that a non-CERP "preliminary study" had been performed, the panel determined that Hurchalla lied about the project's benefits being documented. Op.8. But Hurchalla also testified (and an expert agreed) that she considered the preliminary report insufficient to document the project's benefits. *See* Tr.1511, 1550-1551. Thus, the evidence shows Hurchalla's email expressed her genuine beliefs about the documentation of benefits but, at worst, used ambiguous language. That is insufficient to defeat her First Amendment privilege. *Bose*, 466 U.S. at 511-514. The panel's reasoning will chill speech:

"[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times*, 376 U.S. at 279.

Tellingly, the panel also considered it "significant" that two of the Commissioners who received the email "admitted at trial that they had not read the permits or studies conducted on the Project." Op.9. That has nothing to do with the only questions that matter here: whether the statement was false and whether Hurchalla intentionally recognized or entertained "serious doubts" about its falsity.

Third, the panel's decision upends the Florida express-malice standard. The panel perceived a "malevolent intent to harm" Lake Point in the following facts: Hurchalla emailed "instructi[ons]" to Commissioners with whom she was influential and signed an email "Deep Rockpit" and another "Ms. Machiavelli." Op.12. Given Hurchalla's undeniable dedication to environmental issues, there is no basis to construe her criticisms of the project or her tongue-in-cheek signatures as evidence of express malice directed toward Lake Point. Indeed, the "Ms. Machiavelli" email, which plaintiffs did not introduce into evidence, was not even about Lake Point or the project. Pls.' Ex. 165 (attached). And the Florida Constitution guaranteed her right to "instruct" her representatives. Fla. Const. Art. I, §5. Certainly, these facts do not show that ill will was Hurchalla's **sole** motive.

See supra p.7.[3]

Finally, the chilling effect of the panel's decision is compounded by its perfunctory and erroneous affirmance on the affirmative elements of Lake Point's claim. For example, what Lake Point deemed "the most persuasive evidence" of breach—the settlement agreement with the County—disavowed relevance to, and was entirely inadmissible on, that question, R.8284; *Saleeby v. Rocky Elson Const., Inc.*, 3 So. 3d 1078, 1083 (Fla. 2009), and the purported breaches did not implicate any provision of the contract, *see* Initial Br. 32-37; Reply 8-11. Nor was there a scintilla of evidence that Hurchalla's statements about the absence of documented benefits injured Lake Point.[4] Coupled with its analysis of Hurchalla's privileges, the panel's refusal to recognize the obvious deficiencies in Lake Point's claim sends a clear message that even a baseless claim is sufficient for a powerful interest to use the courts to silence its critics.

C. Even if the evidence were sufficient to find for Lake Point, the judgment should have been reversed because the jury instructions failed to require

[3] As explained below (*infra* p.15), the panel also diluted the express-malice standard by treating "improper method" as a type of express malice, contrary to precedent. In any event, the panel's improper-method analysis simply repeated its finding that Hurchalla lied to Commissioners and therefore was incorrect for the same reasons its finding of actual malice was incorrect.

[4] The panel ignored that County staff could not reasonably have relied on Hurchalla's assertions regarding whether the County had been provided with studies, Tr.503-504, and that Lake Point's damages analysis was facially incoherent, Initial Br.41-45; Reply 13.

the jury to find actual and express malice consistent with U.S. Supreme Court and Florida precedent. Initial Br.21-25, 27-29; Reply 6-8. According to the panel, "defense counsel" waived the instructional objections by "blurring the distinction between the two privileges," Op.6-7, but that is not the same as "invit[ing]" error (as the panel suggested), *see Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 65 (Fla. 2012) ("Warfel did not invite the erroneous jury instruction" because "Warfel never 'affirmatively agreed' to" it.). Such fundamental rights should not be jeopardized by a lawyer's imprecise descriptions of the law.

II. THE PANEL'S OPINION CONFLICTS WITH OTHER FLORIDA COURT DECISIONS

Rehearing is also necessary to maintain uniformity in this District and throughout the State because the panel opinion directly conflicts with numerous Florida cases assessing actual malice or express malice.

A. To find actual malice, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Don King Prods., Inc. v. Walt Disney Co.*, 40 So. 3d 40, 43 (Fla. 4th DCA 2010) (Damoorgian, J.) (citing *St. Amant*, 390 U.S. at 731). As discussed above, there is **no** evidence that Hurchalla doubted the truth of her statements about the lack of documented project benefits.

This Court routinely has held that actual malice was not established despite greater evidence that the speaker knew the statements may have been untrue. For

example, in *Don King Productions*, King sued ESPN for publishing several of his acquaintances' defamatory statements in a sports documentary about his life. 40 So. 3d at 42, 45-46. The Court found no actual malice even though: (1) ESPN harbored ill will toward King and intended to portray him negatively, (2) ESPN knew or should have known that one acquaintance had committed tax fraud, and (3) ESPN had a videotape undermining one acquaintance's statements. *Id.*

In *Scandinavian World Cruises (Bahamas) Ltd. v. Ergle*, Ergle, a harbormaster, sued a cruise line for stating that "Ergle is unreasonable, is milking the cow to death, and the total charges are too high." 525 So. 2d 1012, 1013 (Fla. 4th DCA 1988). The Court found no actual malice because "there was no clear and convincing proof that [the plaintiff's] representatives made the statements complained of with knowledge of their falsity or with reckless disregard of whether they were false or not." *Id.* at 1014.

The only case in which this District has ever affirmed an actual-malice finding involved a journalist who repeated statements that he had obtained from a second-hand source known to be biased against the subject of the statements and who had been told directly by the original "sources of the information" that those "statements were untrue." *Cape Publications v. Adams*, 336 So. 2d 1197, 1199 (Fla. 4th DCA 1976). The facts here fall far short of the facts that were necessary to find actual malice in *Cape Publications*, and even the facts found in *Don King*

Productions and *Scandinavian World Cruises* not to constitute actual malice.

B. Similarly, Florida courts have set "a very high standard" to find express malice: extreme hostility on facts far worse than Hurchalla's cheeky comments. *Shaw v. R.J. Reynolds Tobacco Co.*, 818 F. Supp. 1539, 1542 (M.D. Fla. 1993). For example, in *Nodar*, a parent told a school board that his son's teacher had harassed and verbally abused his son, that she was unqualified, and that her performance as a teacher was victimizing his son. The Court held those words did not show express malice because they reflected parental concern for the effectiveness of public schools, not malicious harassment. 462 So. 2d at 811-812. If those remarks did not show express malice, it is baffling that the panel thought Hurchalla's email signatures could. Certainly, nothing in the record suggests Hurchalla made her statements to the Commissioners to "gratify [her] malevolence" toward Lake Point. *Id.* at 811. On the rare occasions when Florida courts have found express malice, the facts were much more extreme. *See Fridovich v. Fridovich*, 598 So. 2d 65, 68-69 (Fla. 1992) (express malice where conspiring siblings purchased stress analyzer to determine who could lie most convincingly to police, then orchestrated plan to frame brother for father's murder); *Loeb v. Geronemus*, 66 So. 2d 241, 242-243 (Fla. 1953) (express malice where defendant tried to expel plaintiff from religious group by saying plaintiff "is not a Jew," a "disgrace to any Jewish Organization," "a bad example for our

children," "a man of low moral character," etc.).

The panel decision further conflicts with established case law because, as an alternative holding, the panel stated that express malice can be shown by the use of improper means. That is not Florida law. Where the liability would be based on expression to a government official on a matter of public concern, only proof of malevolence can defeat the privilege. *Nodar*, 462 So. 2d at 806, 810; *Londono v. Turkey Creek, Inc.*, 609 So. 2d 14, 18 (Fla. 1992); *see also Montgomery v. Knox*, 3 So. 211, 217 (Fla. 1887) (defining express malice as "ill will, hostility, evil intention to defame and injure").

The cases relied upon by the panel addressed the privilege to interfere with a business relationship or contract based upon the defendant's financial interest or the defendant being a party to the relationship or contract. *See KMS Rest. Corp. v. Wendy's Int'l, Inc.*, 361 F.3d 1321, 1325 (11th Cir. 2004); *Morsani v. Major League Baseball*, 663 So. 2d 653, 656-657 (Fla. 2d DCA 1995); *see also GNB, Inc. v. United Danco Batteries, Inc.*, 627 So. 2d 492, 493-500 (Fla. 2d DCA 1993) (Altenbernd, J., dissenting) (addressing counterclaim alleging interference while attempting to collect outstanding indebtedness). None of those cases involved speech or even used the term "express malice." The panel decision contradicts the established framework for protecting citizens who make statements to their government regarding matters of public concern.

III. MOTION FOR CERTIFICATION

The Supreme Court has discretionary jurisdiction to review decisions which "pass upon a question certified to be of great public importance." Fla. R. App. P. 9.030(a)(2)(A)(v). In the alternative to rehearing en banc, Hurchalla requests that this Court certify to the Supreme Court of Florida that the panel opinion passes upon two questions of great public importance:

> WHETHER A COURT MAY FIND ACTUAL MALICE SUFFICIENT TO OVERCOME A CITIZEN'S RIGHT TO PETITION THE GOVERNMENT AND TO EXERCISE THE RIGHT TO FREE SPEECH UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS SOLELY BECAUSE A READER COULD CONCLUDE THAT A STATEMENT, WHEN TAKEN OUT OF CONTEXT OR INTERPRETED IN A MANNER NOT INTENDED BY ITS AUTHOR, MAY BE FALSE.
>
> WHETHER A COURT MAY FIND EXPRESS MALICE SUFFICIENT TO OVERCOME THE FLORIDA COMMON-LAW PRIVILEGE PROTECTING STATEMENTS MADE TO GOVERNMENT OFFICIALS ABOUT MATTERS OF PUBLIC IMPORTANCE SIMPLY BECAUSE THE SPEAKER SPOKE PASSIONATELY ABOUT HER CAUSE, OCCASIONALLY USED FLIPPANT LANGUAGE, AND WAS INFLUENTIAL WITH THE OFFICIALS WITH WHOM SHE SPOKE.

Rule 9.331(d)(2) Statement

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

I also express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court set forth in section II above.

/s/ Richard J. Ovelmen
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Dated: July 15, 2019

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 the eDCA portal on counsel of record listed below on this 15th day of July, 2019 to:

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