IN THE DISTRICT COURT OF APPEAL
FOURTH DISTICT COURT OF FLORIDA

MAGGY HURCHALLA

Appellant,

CASE NO. 4D18-1221
L.T. CASE NO. 2013-CA-1321

v.

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

Appellees.
_____/

LAKE POINT'S RESPONSE IN OPPOSITION TO HURCHALLA'S MOTION FOR REHEARING EN BANC AND MOTION FOR CERTIFICATION

Appellees Lake Point Phase I, LLC, and Lake Point Phase II, LLC ("Lake Point"), hereby oppose the Motion for Rehearing En Banc (the "Motion") and Motion for Certification filed by Appellant Maggy Hurchalla ("Ms. Hurchalla"), and state as follows:

I. The Court should deny Ms. Hurchalla's Motion for Rehearing En Banc. The Panel should also deny her Motion for Certification.

This Court encourages litigants to file motions for rehearing sparingly and to attempt to present their arguments in as little as four pages. *Bryant v. Buerman*, 752 So. 2d 625 (Fla. 4th DCA 1999); *Teca, Inc. v. WM–TAB, Inc*., 726 So. 2d 828, 831 (Fla. 4th DCA 1999) (Klein, J. concurring specially). Ms. Hurchalla's 16-page

motion contains an improper restatement of the facts that alone nearly exceeds the 4-page recommendation. Lake Point will nevertheless attempt to be brief, and will rely on the full recitation of the facts in the panel's opinion, including those facts that Ms. Hurchalla chooses to omit from her discussion.

The panel issued a thorough twelve page opinion affirming the jury verdict below. The panel even gave Ms. Hurchalla the benefit of the doubt by conducting a full, independent review of the trial evidence under "actual malice" and "clear and convincing evidence" standards even though Ms. Hurchalla did not preserve her right to any such review. The panel's opinion reflects that it obviously did review the 8,000+ page record. Now, based on unpreserved arguments, Ms. Hurchalla requests en banc review because she does not believe that the panel fully reviewed the record, but merely "purported" to do so. (Motion, p. 5).

The panel opinion's extensive discussion confirms the uniqueness of the facts in this case and how they are unlikely to be repeated in the future. Here, Ms. Hurchalla was acting as a "schemer" in tandem with sitting elected officials—not as a mere "petitioner." These facts included that Ms. Hurchalla, an influential former Martin County commissioner, was regularly ghostwriting emails for Chairperson Sarah Heard regarding Lake Point, using the private email accounts of Commissioners to encourage Martin County to terminate the Interlocal Agreement and take other actions harming Lake Point, while making false statements to

encourage County Commissioners who were otherwise personally ignorant of the Lake Point project to take adverse action against Lake Point. *Hurchalla v. Lake Point Phase I, LLC*, No. 4D18-1221, 2019 WL 2518748, at *4, 7-9, 12 (Fla. 4th DCA June 19, 2019). Further, Ms. Hurchalla deleted emails pertaining to Lake Point to cover her tracks. (Ans. Br. p. 46). There has never been a constitutional right to lie, whether before the panel's opinion or after.

II. There are No Issues of Exceptional Importance.

Ms. Hurchalla obviously disagrees with the panel's decision. But that is not a recognized basis for en banc review. *Perera v. Diolife*, LLC, 2019 WL 2439908, at *1, n.1 (Fla. 4th DCA June 12, 2019). In the trial court, Ms. Hurchalla's defense to Lake Point's tortious interference claim was not fundamentally about the First Amendment. She did not plead or reference the actual malice standard in her Answer and Affirmative Defenses (R. 1480–1493), nor did she plead or argue that Lake Point was a limited purpose public figure (T. 967, 1670). She also failed to proffer a jury instruction on actual malice or an instruction stating that the burden of proof on the privilege issue was "clear and convincing evidence." (R. 5846, 5841; R. 5857–5858). Further, Ms. Hurchalla did not object to the standard on whether she abused any right to petition the government as being "greater weight of the evidence." (T. 1670:21–25; 1671:20).

From the outset, the panel opinion acknowledges these serious preservation issues, including that Ms. Hurchalla argued only express malice in the trial court. 2019 WL 2518748, at *3, 4. During oral argument, Ms. Hurchalla's counsel conceded that a First Amendment actual malice privilege was not provided in her jury instructions. *See Hurchalla v. Lake Point Phase, I, LLC*, Case No. 4D18-1221, https://www.4dca.org/Oral-Arguments/Archived-Video-Oral-Arguments (March 12, 2019) (O.A. Video at 4:24–5:20). If this case was truly about the actual malice standard, then Ms. Hurchalla should have pled as much. *See, e.g., Kersey v. City of Riviera Beach*, 337 So. 2d 995, 997 (Fla. 4th DCA 1976). She certainly should have provided for an "actual malice" standard in her proposed jury instructions. *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 519 (Fla. 2015); *Feliciano v. Sch. Bd. of Palm Beach Cnty.*, 776 So. 2d 306, 308 (Fla. 4th DCA 2000); (R. 5841, 5846).

Given the preservation problems, this Court should decline the invitation to accept an en banc review. *Dixon v. AmeriFirst Fed. Sav. and Loan Assoc.*, 510 So. 2d 981, 981 (Fla. 4th DCA 1987) (per curiam) (declining to hold an en banc review where failure to preserve).

Although it was not required to do so given Ms. Hurchalla's failure to preserve, the panel nevertheless analyzed the jury verdict under the "actual malice" and "clear and convincing evidence" standards anyway and concluded that there was "clear and convincing evidence to support a determination that Hurchalla

demonstrated actual malice by interfering with Lake Point's contract." *Hurchalla*, 2019 WL 2518748, at *3. The panel gave non-exhaustive examples of evidence demonstrating that Ms. Hurchalla acted with "actual malice." *Id*. at *4–5. Lake Point also identified other knowingly false statements in its brief that supported the jury's verdict. (Ans. Br. 38–41).

III. The Panel Decision Conforms With Other Decisions From this Court.

Ms. Hurchalla does not point to any cases from this Court "assessing actual malice or express malice" differently than the panel decision. (Motion, p. 12–13).

A. Under the special set of facts presented in this case, the panel opinion does not conflict with the Court's decisions concerning "actual malice."

Ms. Hurchalla argues the panel decision is not in conformity with *Scandinavian World Cruises (Bahamas) Ltd. v. Ergle*, 525 So. 2d 1012, 1013 (Fla. 4th DCA 1988), and *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510 (1984), which were raised in her briefing and fully considered by the panel. (Motion, p. 13). These cases involve libel or defamation against a public figure. *See Scandinavian*, 525 So. 2d at 1013; *Bose*, 466 U.S. at 493, n.8 (explaining it reviewed the district court's order, and the circuit court's affirmance, finding Bose is a public figure). The rule "prohibits a public official from recovering damages." *Bose*, 466 U.S. at 499; *Scandinavian*, 525 So. 2d at 1013. In this case, Ms. Hurchalla never asked the court or the jury to find that Lake Point was even a limited purpose public figure. (T. 976, 1672).

Further, the panel opinion cites to *Bose* explaining that it will still conduct an "independent review" (even though Lake Point was *never* considered a limited public figure). *See* 2019 WL 2518748, at *4. Thus, the Court granted Ms. Hurchalla's request for a *Bose* review of the entire record. *Id*. Even after conducting an "independent examination" on an unpreserved issue, the panel found clear and convincing evidence of actual malice. *Id*. at *4–5. Here, Ms. Hurchalla is simply frustrated with the outcome of the panel's independent review, which is not a basis for en banc review. *See Perera*, 2019 WL 2439908, at *1.

Further, *Don King Products, Inc. v. Walt Disney Co*., 40 So. 3d 40, 43 (Fla. 4th DCA 2010) and *Cape Publications v. Adams*, 336 So. 2d 1197, 1189 (Fla. 4th DCA 1976) do not warrant en banc review. (Motion, pp. 12–13). The *Don King* case is a defamation action involving a public figure. *Don King*, 40 So. 3d at 43–44. Similarly, *Adams* involved a libel action against a public official. Regardless, Ms. Hurchalla's initial brief includes a discussion on the analysis presented in the *Don King* case, and it is cited within her brief. (Initial Br. 23). The *Hurchalla* opinion does not offend *Adams* or *Don King*, particularly given that Ms. Hurchalla did not seek a determination at the trial court level that Lake Point was a public figure.

The facts of this case are wholly consistent with those in *Adams*. In that case, the plaintiff Newcome used resources with "close friends" to perpetuate a "feud" with Adams (a public official). *Id*. Although Newcome was clearly told that Adams

was not engaging in "improper conduct," Newcome still printed false statements about Adams. *Id*. Given the unusual facts, the *Adams* court affirmed the jury verdict. Like *Adams*, the panel opinion includes precise examples of statements, which "clearly and convincingly proved that Hurchalla demonstrated actual malice in interfering with Lake Point's contracts." *Hurchalla*, 2019 WL 2518748, at *5.

B. The opinion does not conflict with other decisions regarding "express malice".

Ms. Hurchalla next argues the panel failed to consider the express malice standard as articulated in *Nodar v. Galbreath*, 462 So. 2d 803 (Fla. 1984), *Londono v. Turkey Creek*, 609 So. 2d 14, 18 (Fla. 1992), and *Fridovich v. Fridovich*, 598 So. 2d 65, 68–69 (Fla. 1992). (Motion, pp. 14–15). Ms. Hurchalla contends that under the above case law, "improper methods" is not part of the "express malice" inquiry, and that there was insufficient evidence to infer that Ms. Hurchalla acted to harm Lake Point.

The *Hurchalla* opinion, however, does not conflict with these cases, which were thoroughly considered by the panel in the briefing and oral argument. Ms. Hurchalla briefed the *Fridovich* case (Initial Br. 31), the *Nodar* case (Initial Br. 11, 22, 26, 27, 29– 31; Reply Br. 8, 17), and the *Turkey Creek* case (Reply Br. 4, 8). Lake Point's brief also discussed the *Nodar* case (Ans. Br. 35, 42–43), and *Turkey Creek* case (Ans. Br. 35, 42, 43). The panel further considered these two cases at the oral argument. *See* (O.A. Video 26:52–29:10) (Connor, J.).

"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*, 462 So. 2d 803, 806 (Fla. 1984). In addition, however, the making of intentionally false statements is also an improper means for interference recognized by the Florida Supreme Court in *Turkey Creek. In Turkey Creek*, the Court applied the *Nodar* approach in the context of claim for tortious interference with a contract terminable at will, 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." 609 So. 2d at 18–19.

The panel decision is consistent with other Florida decisions regarding proof of express malice through improper means. Ms. Hurchalla's initial brief examines the Florida Model Civil Jury Instruction 408, and it analyzes Judge Altenbernd's dissenting opinion in *GNB, Inc. v. United Danco Batteries, Inc.*, 627 So. 2d 492, 494 (Fla. 2d DCA 1993). (Initial Br. 28). Considering Ms. Hurchalla's arguments, the panel meaningfully discussed why those secondary sources are consistent with Florida law. *See Hurchalla*, 2019 WL 2518748, at *5–6.

Concerning express malice through improper methods, the panel opinion here is consistent with the factors in *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010),

finding that: "(1) Hurchalla made two false statements concerning a material fact to the BOCC; (2) Hurchalla knew that the representations were false; (3) Hurchalla intended that the representations induce the BOCC to act on them; and (4) the County was injured when the BOCC acted upon the representation and was subsequently sued for its actions based on the reliance." *Id.* at *6. Notably, nothing in Ms. Hurchalla's request for en banc review argues the panel decision conflicts with *Butler*.

Lastly, with respect to express malice through malevolent intent to harm, the panel found that a reasonable jury could "infer" that her statements were "primarily" intended to harm Lake Point's contract with the County based on the January 12, 2013 email, signed by Ms. Hurchalla as "Deep Rockpit," directing the BOCC to "get the contract canceled" (R. 8097), coupled with Ms. Hurchalla's statement that she "gratuitously" attacks businesses (R. 8062). *See Hurchalla*, 2019 WL 2518748, at *7; *see also* (O.A. Video 28:44). This intensive examination of the law demonstrates the panel opinion conforms with *Turkey Creek's* discussion of *Nodar* and supports the finding that Ms. Hurchalla acted with the primary intent to harm Lake Point—express malice. *See Hurchalla*, 2019 WL 2518748, at *5, 7.

IV. The Motion for Certification should be Denied by the Panel.

The Supreme Court of Florida has discretionary jurisdiction to answer a certified question **only if** the question is one that was actually decided by the district

court of appeal. *Floridians For A Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 834 (Fla. 2007) (emphasis added).

In this case, neither of the two questions presented by Ms. Hurchalla were decided by this Court. Ms. Hurchalla's first purported question consists of an argumentative re-statement of Ms. Hurchalla's view of the facts in this case. It does not present a legal question based on the panel's decision under a "First Amendment" "actual malice" analysis.

The second question also fails to state a legal issue that aligns with the panel's decision addressing the common law privilege. Again, this question is improper because it merely states Ms. Hurchalla's perspective on the evidence presented to the jury below.

The jury in this case resolved the elements of a well-established tort under a very unique set of circumstances. This panel concurred with the jury that clear and convincing evidence demonstrated Ms. Hurchalla's reckless disregard for the truth. The Supreme Court's discretionary jurisdiction is properly invoked to settle only recurring legal issues; juries settle unique cases. *See* Philip J. Padovano, Certified Decisions of District Courts, 2 Florida Practice Series § 3:11 (2018 ed.).

V. Conclusion.

For the foregoing reasons the Motion, and Motion for Certification, should be denied.

Dated: August 13, 2019.

Respectfully submitted,

/s/ Latasha Scott

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2019, the foregoing was electronically filed with the Clerk of Courts using the Florida Courts E-filing Portal, which will send a notice of electronic filing to the service list below:

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