IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

MAGGY HURCHALLA,

Appellant,

Case No. 4D18-1221

v.

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

Appellees.

_____/

AMICUS CURIAE BRIEF OF AMICUS CURIAE BRIEF OF FIRST AMENDMENT FOUNDATION, THE LEAGUE OF WOMEN VOTERS OF FLORIDA, FLORIDA PRESS ASSOCIATION, FLORIDA SOCIETY OF NEWS EDITORS, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, FANE LOZAMN, AND THE BRECHNER CENTER, IN SUPPORT OF THE APPELLANT IN SUPPORT OF MAGGY HURCHALLA

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SUMMARY OF THE ARGUMENT

At the heart of First Amendment protections of robust public debate lies the requirement that defamation plaintiffs plead and prove malice. If such requirement is not vigorously implemented by courts, the ability of citizen advocacy groups to participate in such debates will be significantly chilled.

ARGUMENT

I. THE COURT'S JURY INSTRUCTION REGARDING HURCHALLA'S QUALIFIED PRIVILEGE WAS A MISTATEMENT OF LAW, AS IT IMPROPERLY PLACED THE BURDEN OF PROVING EXPRESS MALICE ON HURCHALLA AND CONTAINED A LEGALLY INCORRECT DEFINITION OF EXPRESS MALICE.

A. The Trial Court Erred by Failing to Place the Burden to Prove Malice Squarely on Plaintiffs

Citizens have a First Amendment right to communicate with public officials about matters of public policy. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . . The constitutional protection does not turn upon 'the truth, popularity, or social unity of the ideas and beliefs which are offered.'"); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614 (8th Cir. 1980) ("the private citizens and their lawyer were absolutely privileged by the First Amendment to petition for

the zoning amendment that cause plaintiffs' damages"); *Video Intern. Prod. Inc. v. Warner-Amex Cable Comm.*, 858 F.2d 1075, 1082 (5th Cir. 1988) ("parties who petition the government . . . cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent"). Additionally, the Florida Supreme Court has held that statements made by a citizen to a political authority regarding matters of public concern are also protected by a common law qualified privilege, such that and there can be no recovery for conduct based on privileged statements absent "express malice." *See Nodar v. Galbreath*, 462 So. 2d 803, 810 (Fla. 1984), *superseded on other grounds by statute*; Section 768.095 (1997); *see also McCurdy v. Collins*, 508 So. 2d 380, 382 (Fla. 1st DCA 1987). Express malice, as opposed to constitutional (or "actual") malice, exists where a person speaks upon a privileged occasion, but the speaker is motivated more by a desire to harm the plaintiff than to protect the personal or social interest giving rise to the privilege. *Nodar*, 462 So. 2d. at 811. Communications are actionable as interference only when malice is the sole basis for interference. *McCurdy*, 508 So.2d at 383.

In order to ensure that defamation actions do not curtail First Amendment rights, the law requires that defamation plaintiffs plead and prove malice where the alleged defamatory statement pertained to a matter of public concern. This ensures that debate concerning such matters remains robust, and that unintentional mistakes

of fact are not penalized in a way that would chill public debate and free expression. Accordingly, the qualified privilege that attaches to statements of a citizen to a political authority regarding matters of public concern "raises a presumption of good faith and places upon the plaintiff the burden of proving express malice." *Nodar v. Galbreath*, 462 So. 2d 803, 810 (Fla. 1984); *DelMonico v. Traynor*, 116 So. 3d 1205, 1219 (Fla. 2013)(stating the rule that once a qualified privilege applies, "the defendant to a defamation action is entitled to assert a qualified privilege, placing the burden upon the plaintiff to then prove the additional element of express malice"); *Fridovich v. Fridovich*, 598 So. 2d 65, 69 (Fla. 1992) (same); *McCurdy v. Collis*, 508 So. 2d 380, 382 (Fla. 1st DCA 1987) ("In those instances where there is a qualified privilege to make statements potentially damaging to another, a plaintiff must prove express malice or malice in fact in order to recover.").

The cases cited by Lake Point, *Wackenhut Corp. v. Maimone*, 389 So. 2d 656 (Fla. 4th DCA 1980) and *McDonald v. McGowan*, 402 So. 2d 1197 (Fla. 5th DCA 1981) are inapplicable and cannot be used by this court to overcome the traditional rules of defamation. *Fridovich v. Fridovich*, 598 So. 2d 65, 69 (Fla. 1992) ("It is clear that a plaintiff is not permitted to make an end-run around a successfully invoked defamation privilege by simply renaming the cause of action and repleading the same facts*"); Callaway Land & Cattle Col, Inc., v. Banyon Lakes C. Corp*., 831 So. 2d 204, 209 (Fla. 4th DCA 2002); *Procacci v. Zacco*, 402 So. 2d 425, 427 (Fla.

4th DCA 1981) (holding that a tortious interference claim is subject to the same privilege defenses available in defamation action); *Seminole Tribe of Florida v. Times Pub. Co., Inc*., 780 So. 2d 310, (Fla. 4th DCA 2001) (bringing a tortious interference claim cannot be used as an end run around defamation law).

For example, in *Callaway*, this Court dismissed a lawsuit that contained a cause of action for tortious interference, and other similar torts, even though the claim was brought within the applicable four-year statute of limitations. 831 So. 2d 204 at 208. This Court instead applied the two-year statute of limitations governing defamation because a contrary result would allow a party to circumvent the statute of limitations defense by relabeling the cause of action to one that was more plaintiff-friendly. *Id*. Further, it is a plaintiff's burden "to establish that the privilege was lost through malice or improper purpose" in a defamation case. *Randolph v. Beer,* 695 So. 2d 401 (Fla. 5th DCA 1997).

The burden to prove malice cannot be circumvented by re-framing the cause of action as tortious interference with contract rather than defamation. To allow otherwise would effectively gut the protection of public debate afforded by the First Amendment and Florida privilege law and allow plaintiffs to such debate simply by virtue of artful pleading. Florida courts have routinely held that creative pleading cannot avoid traditional defamation defenses.

The trial court below, however, failed entirely to make clear that the burden to prove malice rested with the plaintiff. The trial court's instructions stated as follows:

> Lake Point claims that Hurchalla intentionally interfered with the Interlocal Agreement . . . Hurchalla denies Lake Point's claim and defends that her conduct is protected by her First Amendment right to petition the government . . . The parties must prove all claims and defenses by the greater weight of the evidence.
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> Hurchalla claims as a defense that the First Amendment gives her the privilege to freely petition the government on matters of public concern. You must render your verdict in favor of Hurchalla on Lake Point's tortious interference claim if you find that Hurchalla used proper methods to attempt to influence Martin County, and that her motive for petitioning Martin County was not primarily to harm Lake Point. However, deliberate misrepresentations of fact are not considered to be a proper method. R. 5856-57

Amici, all of which are organizations whose core purpose is to engage in and/or protect robust public debate, are deeply concerned that failure of courts to implement the burden to prove malice will hamper their ability to carry out their mission. The threat of crippling litigation costs will discourage such participation if they cannot rely on the federal and state-imposed burden on plaintiffs to prove malice.

B. <u>The jury instructions on Hurchalla's qualified privilege defense contains a wholly insufficient definition of express malice and</u>

incorrectly instructed the jury upon which grounds an express malice finding can be based on.

The Florida Supreme Court has made clear that malice as a legal element of a claim requires a showing of more than ill will. In *Nodar*, the Florida Supreme Court determined whether sufficient evidence was presented at trial on an express malice issue. The Court focused on whether there was adequate evidence to prove express malice, finding that simply feeling ill will and hostility towards another is not enough to meet this burden:

> Where a person speaks upon a privileged occasion, but the speaker is motivated more by a desire to harm the person defamed than by a purpose to protect the personal or social interest giving rise to the privilege, then it can be said that there was express malice and the privilege is destroyed. 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" . . . If the occasion of the communication is privileged because of a proper interest to be protected, and the defamer is motivated by a desire to protect that interest, he does not forfeit the privilege merely because he also in fact feels hostility or ill will toward the plaintiff.

Nodar, 462 So. 2d at 811-12. Importantly, the Court reviewed the jury instruction and found that "the jury was misled by inadequate instructions." *Id*. at 812. The instruction given in *Nodar* was: "It is malicious to make a false statement concerning another with ill will, hostility, or evil intention to defame and injure." *Id*. at n. 8. The Court stated that "[t]he addition of the word "or" had the effect of allowing the jury to find express malice upon a showing of any of the three elements given." *Id*. Thus,

"[t]he Supreme Court has unequivocally established that all of the three elements (ill will, hostility, and evil intention to defame and injure) and more must be shown." *Boehm v. American Bankers Ins. Group, Inc.*, 557 So. 2d 91, 94 (Fla. 3d DCA 1990).

Here, the trial court's jury instructions allowed the jury to find express malice without any regard to ill will, hostility, or the gratification of one's malevolence. Framing malice as a primary motivation to harm does not go far enough to instruct the jury about other requirements of express malice. "The bottom line is that to overcome the privilege . . . the jury had to decide that [defendant] made the false statements with the primary motive of gratifying ill will, hostility, *and* their desire to harm the plaintiff." *Crestview Hosp. Corp. v. Coastal Anesthesia, P.A.*, 203 So. 3d 978, 979 (Fla. 1st DCA 2016) (emphasis added).

The trial court's inclusion in the jury instructions "You must render your verdict in favor of Hurcahlla on Lake Point's tortious interference claim if you find that Hurchalla used proper methods to attempt to influence Martin County" does not c sufficiently define malice, because it says nothing about "ill will" and "evil nature" as components of malice; and does not reference any requirement that plaintiff supply evidence that Hurchalla's purported motivation was to harm Lake Point. The "Florida Supreme Court has long held . . . that a qualified privilege isn't overcome by the simple fact that a defendant makes a false statement, or disregards its truth." *Crestview*, 203 So. 3d at 993. In *Crestview*, an anesthesiologist brought a

defamation action against a hospital and its CEO for statements made about a doctor's disruptive behavior that resulted in the doctor's resignation. *Id*. at 980. At trial, the trial court gave the following instruction on express malice:

> One makes a false statement about another with improper motives if the person's primary motive and purpose in making the statement is to gratify his ill will, his hostility, and his intent to harm the other, rather than to advance or protect himself and his employer's interests, right or duty to speak to AHP on the subject of Dr. Ederer's employment.
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> If reasonable bounds are exceeded in making this communication or if the communication be made knowing it to be false, malice may be inferred, which would destroy any privilege.
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> Malice also exists where the false publication was made with such gross and reckless negligence as to amount to actual malice, or the false publication was made with reckless disregard to the plaintiffs' rights, or false publication was made with moral turpitude, or the false publication was made under circumstances as to be outrageous.

Id. at 982. After the jury returned a verdict in favor of plaintiff, defendants appealed, arguing the instruction on express malice was improper. *Id*. Agreeing with defendants, the appellate court reversed and remanded for a new trial because, "while evidence that [defendant] said knowingly false things, or said things with a reckless disregard for a plaintiff's rights may be relevant to a jury's consideration of

the ultimate question, it was wrong to give instructions permitting it to base a defemation verdict upon something other than [defendant's] primary motive." *Id*. at 983. Likewise, in *John Hancock Mut. Life Ins. Co. v. Zalay*, 581 So. 2d 178 (Fla. 2d DCA 1991), the court reviewed a similar instruction[1] and reversed the jury's verdict because the express malice instruction allowed the jury to find that a defendant acted with express malice if defendant knew statements to be false or if defendants acted in disregard of whether the statements were false. *Id* at 180.

Here, the jury instructions provided in this case required Hurchalla to prove two things: (1) use of proper methods to influence Martin County officials; and (2) primary motivation not to harm Lake Point. R. 5858. The trial judge further instructed that, "However, deliberate misrepresentations of fact are not considered to be a proper method." R. 5858. Thus, because Hurchalla was required to prove both items to successfully assert her qualified privilege defense, the jury was permitted to disregard Hurchalla's motives as long as deliberate misrepresentations of fact were made. This allowed Lake Point to avoid application of defamation law and eliminate one of Hurchalla's key defenses.

[1] The specific instruction given was: "It is malicious to make a false statement concerning another with knowledge of its falsity *or* to make such a statement recklessly and without regard for its truth or falsity *or* to make a statement concerning another for the primary purpose of injuring the other." *Zalay*, 581 So. 2d at 181.

Further, the trial court refused to follow standard jury instructions for intentional interference with a contract not terminable at will and modify the instruction to address a qualified privilege. This resulted in the jury being allowed to find that Hurchalla used improper methods to influence Martin County officials, and thus completely avoid the requirement to present evidence of Hurchalla's motives. The tortious interference instruction given to the jury, in describing the elements of Lake Point's claim, stated that "Intentional interference with another person's contract is improper." R. 5857. Although this comes directly from the applicable standard jury instructions, the second note to the instructions states as follows:

> Instruction 408.5 is intended to apply to the majority of cases where the issue to be determined is whether the defendant has intentionally interfered with a contract not terminable at will. *In most such cases, there is no "justification" or "privilege*"; therefore if the interference is "intentional," it is likewise "improper." However, in certain relatively rare factual situations, interference with a contract not terminable at will *may be justified or privileged* and, therefore, proper even though intentional, *see, e.g*., RESTATEMENT (2D) OF TORTS §§770 ("Actor Responsible for Welfare of Another"), 772 ("Advice as Proper or Improper Interference"), 773 ("Asserting Bona Fide Claim"), 774 ("Agreement Illegal or Contrary to Public Policy"). *See generally*, *id*. §767; W. Prosser, Law of Torts, §§129, 942–44 (4th ed. 1971). In such cases, instruction 408.5 *will have to be modified*.
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> (emphasis added).

Here, the trial court's jury instruction was not modified and the jury was left to interpret action constituting intentional interference as an improper method that would defeat Hurchalla's qualified privilege.

II. PUBLIC POLICY DEMANDS THAT A PRIVATE CITIZEN NOT BE PENALIZED FOR A PUBLIC RECORDS VIOLATIONS COMMITTED BY THE CITIZEN'S ELECTED OFFICIALS.

The trial court granted an adverse inference instruction to the jury based on Hurchalla's deletion of email communications with elected public officials. "Prior to a court exercising any leveling mechanism due to spoliation of evidence, the court must answer three threshold questions: 1) whether the evidence existed at one time, 2) whether the spoliator had a duty to preserve the evidence, and 3) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense." *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006); *See also Landry v. Charlotte Motor Cars, LLC*, 226 So. 3d 1053, 1057 (Fla. 2d DCA 2017) (holding that, even after the decision of *League of Women Voters of Fla. v. Detnzer*, 172 So. 3d 363, 391 (Fla. 2015), a "determination that evidence has been spoliated does not inevitably lead to the imposition of sanctions under the three fold inquiry."). Instead of making this three-part inquiry, the trial based its determination to give an adverse inference solely on the fact that it came to light, during trial, that Hurchalla had deleted emails after litigation began. As a matter of public policy, it

was even more important for the trial court to conduct the three-part test so that it could take into consideration how the Public Records Act affects the analysis.

The purpose of the Public Records Act "is to open public records to allow Florida's citizens to discover the actions of their government." *Christy v. Palm Beach Cnty. Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997). Under the Florida Constitution, a citizen's access to public records is a fundamental constitutional right. *Rhea v. District Bd. of Trustees of Santa Fe College*, 109 So. 3d 851 (Fla. 1st DCA 2013). Hurchalla actually has the express constitutional "right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state." Art. I, § 24, Fla. Const. In fact, Hurchalla even had the right to file a lawsuit to compel the County to produce public records – the very same right enjoyed and actually used by Lake Point in this case. Hurchalla, as a private citizen, has no duty to maintain public records *See* § 119.01, Fla. Stat. Rather, "[p]roviding access to public records is a duty of each agency." Fla. Stat. s. 119.01.

Given that Hurchalla has the constitutional right to obtain records from the County, any obligation that she had maintain her own copies of the emails curtails any potential finding of a duty to preserve evidence. Further, it is difficult to see how such emails could prejudice Lake Point in proving its prima facie case when the jury instructions already improperly put the burden of disproving proving express malice

on Hurchalla. Finally, as a matter of public policy, this Court should not sanction the adverse inference in this case as it has the potential to chill a citizen's participation in the government process.

CONCLUSION

This Court should vacate the Final Judgment and direct a verdict in Hurchalla's favor.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2018, I filed a copy of the foregoing through the eDCA portal, and served the following via e-mail:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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