STATE OF FLORIDA
IN THE FOURTH DISTRICT COURT OF APPEAL

CONSOLIDATED CASE NOS. 4D18-1220, 4D18-1519, and 4D18-2124

EVERGLADES LAW CENTER, INC., MAGGY HURCHALLA, and DONNA SUTTER MELZER,
Appellants

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, et al.,
Appellees

On Appeal from Orders of the Nineteenth Judicial Circuit
in and for Martin County County, Florida

Case No. 43 2017 CA 001098 CAAXMX
Case No. 43 2017 CA 000108 CAAXMX

ANSWER BRIEF OF APPELLEE SOUTH FLORIDA WATER MANAGEMENT DISTRICT

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STATEMENT OF THE FACTS

This case involves a defendant in a multimillion-dollar suit attempting to circumvent mediation confidentiality, with the help of allies, in an effort to uncover mediation communications for use at trial against the Plaintiff, Lake Point.[1]

After five years of expensive, contentious, and high-stakes litigation between Lake Point and the South Florida Water Management District (the "Lake Point Litigation"), they settled during court-ordered mediation. (SR, 265–91). Before mediation, the public-private partnership between these two entities had been on the brink of ending with public losses from the expensive fight and no public benefit. Now, the mediated settlement paved the way for construction of a water storage project, promoting environmental benefits in Martin County, consistent with the original intent of the partnership. *Id*. Litigation between these two parties ended on terms acceptable to both.

Despite its merits, the District's co-defendants were unhappy with the compromise. Co-defendants Martin County ("County") and Maggy Hurchalla lost the South Florida Water Management District ("District") as a litigation ally and the economics of continuing the litigation had changed. With trial looming for the remaining defendants, the County proceeded under the trial court's mediation order and settled its own dispute with Lake Point. (R1, 338–39). During this time, the

[1] Lake Point Phase I, LLC and Lake Point Phase II, LLC (collectively "Lake Point").

County requested, and received, the District's cooperation, which was integral to the ultimate settlement. (SR, 295–303). In contrast, Hurchalla charged forward, placing her fate in the hands of a Martin County jury.

As Hurchalla readied for trial, a long-time Hurchalla friend sought to rally special-interest allies to Hurchalla's aid: Presumably to see if anything could be learned from the District's mediated settlement that would frustrate Lake Point's continuing case against Hurchalla. (R2, 12). Everglades Law Center ("Law Center") answered the call to action,[2] seeking public records from the District. (R1, 13).

The District made its mediated settlement agreement with Lake Point available to the public the day it was signed.[3] But the District did *not* make public any mediation communications between the District's in-house and contracted counsel, mediation communications between the District's counsel and Lake Point's counsel, mediation communications between the District's counsel and the mediator, or mediation communications between the District's counsel and the District's Governing Board—the client with settlement authority. The Law Center's records request provoked Lake Point to demand that the District continue to maintain

[2] Hurchalla (for purposes of the appeal, all appellants are referred to collectively as "Hurchalla") admits in her brief there were "more than a dozen" similar requests targeting this transcript. (Initial Brief, 47, n. 18).

[3] Hurchalla concedes the Mediated Settlement Agreement was "made public" shortly after execution. (Initial Brief, 7). The District's Governing Board conducted discussion and voted to approve the settlement agreement during a noticed public meeting. (R2, 217-29).

mediation confidentiality. (R1, 16–17). The trial court's mediation order mandated as much. (SR, 226).[4] Lake Point forewarned breaches of confidentiality would be met with serious legal consequences. (R1, 16–17). The District was in a bind.

To address this conflict, the District proactively filed a Complaint for Declaratory Judgment in Martin County circuit court to resolve the questions of mediation confidentiality and public records production two weeks after receiving the Law Center's records request and resulting Lake Point warning. (R1, 1–12). The District named Law Center and Lake Point as defendants. *Id*. The District also named its former co-defendants from the Lake Point Litigation. *Id*.

The District presumed that the County and Hurchalla must be necessary parties because its resolution could affect the ongoing mediation (the County) or litigation (Hurchalla) with Lake Point. Confirming this presumption, both Hurchalla and the County jumped into action to further their Lake Point Litigation strategies, before the circuit court considered the merits of the District's declaratory judgment suit. Shortly after the District filed suit, the County and Lake Point jointly sought and obtained a trial court order requiring the District to protect mediation confidences while those parties continued to explore settlement through mediation. (SR, 295–301). In contrast, Hurchalla made her own public records request for Lake

[4] The trial court's Pre-Trial Order directed "[a]ll discussions, representations and statements made at the mediation conference are privileged as settlement negotiations."

Point and District mediation communications before her jury trial against Lake Point. (R1, 154).

The District filed its declaratory judgment suit in Martin County, with the same trial court that issued the mediation order in the Lake Point Litigation and that continued to preside over the Lake Point, County, and Hurchalla proceeding.[5] Law Center and Hurchalla each attempted, but failed, to have a different judge consider the District's questions of mediation confidentiality and public records production. (R1, 225–232). They also failed in attempts to have the District's suit dismissed. (R1, 114–117).

While the District pursued declaratory judgment, additional Hurchalla allies submitted multiple public records requests, continually seeking production of the mediation communications at issue in that suit. (R2, 12).[6] The District responded to each of these records requests in turn, referencing the ongoing declaratory judgment suit in Martin County. After receiving this response, long time Hurchalla associate, Donna Melzer, whose son is co-counsel of record for Hurchalla,[7] notified the District of her intent to sue to compel production of the mediation communications. Facing

[5] All trials in Martin County circuit court are assigned to the same judge.

[6] See, Initial Brief, 47, n.18 (Referencing the "more than a dozen" other public records requests.)

[7] (R1, 216)

an imminent legal threat, the District filed a second declaratory judgment suit in Martin County circuit court, naming Melzer as a defendant. (R2, 1–15).

In another attempt to circumvent the trial court's jurisdiction and prior Orders, Melzer sought an emergency hearing for mandamus in Palm Beach County circuit court. (R2, 88). Melzer's attempt to have a Palm Beach County judge decide the same questions at issue in the District's original Martin County declaratory judgment suit failed. *Id*. In dismissing Melzer's action, the Palm Beach County judge chastised Melzer for withholding information about the Martin County lawsuit (the Law Center and Hurchalla suit). This Court upheld the Palm Beach County court's dismissal of Melzer's claims. (*See,* Case No. 4D18-0763).

One month later, the Martin County Circuit Court decided the District's original declaratory judgment suit on its merits. (R1, 361–65). The trial court's decision in the second declaratory judgment suit with Melzer followed. (R2, 425–29). The narrow dispute at the time of the circuit court's decisions on the merits of both declaratory judgment suits concerned only production of a transcript of a single meeting between the District's counsel and Governing Board. (R1:T2, 9).

The meeting and transcript at issue immediately preceded the District Governing Board's public vote to settle the Lake Point Litigation. At this attorney-client meeting, the District's attorneys and Governing Board discussed the potential settlement of claims on terms negotiated through mediation. (R2, 272). As to the

transcripts, Law Center, Hurchalla, and Melzer stipulated to all factual matters, including that the entirety of the requested transcript contained mediation communications. (R1, 362–63).

With all parties agreeing to the facts and accepting the transcript contained mediation discussions, the parties acknowledged that a single legal issue would conclude the District's declaratory judgment suits: was the transcript exempt from public records disclosure? (R1: T2, 24; R1: T2, 8). The trial court concluded that as a written communication in a court-ordered mediation proceeding, the attorney-client transcript was exempt from mandatory disclosure as a public record. (R1, 361–65).

Appellants Law Center, Hurchalla, and Melzer now appeal that judgment.

SUMMARY OF THE ARGUMENT

This case concerns two sacrosanct pubic policies which, at first glance, appear at odds, but upon further inspection are reconcilable. The Florida Legislature and Judiciary have constructed an exemplary mediation program, which stands entirely upon the bedrock of confidentiality. This Court, as have countless other courts and commentaries, recognizes that "[m]ediation could not take place if litigants had to worry about admissions against interest being offered into evidence at trial, if a settlement was not reached" and has cautioned that if disclosures of mediation communications "go unchecked, continued behavior in this vein could have a

chilling effect upon the mediation process." To ensure mediation confidentiality when governmental parties are involved, the Legislature crafted section 44.102(3), Florida Statutes, exempting "all written communications in a mediation proceeding" from Chapter 119, when the mediation is court-ordered. By agreement of the parties, interpretation of that exemption is the sole issue before this Court.

Hurchalla is not entitled to the transcript and the discussion contained therein because it constitutes a mediation communication made by a mediation participant during the mediation period, in furtherance of court-ordered mediation. And, the transcript contains, in substance, conveyance of mediation communications which must be exempt under section 44.102(3), Florida Statutes. Any other interpretation of the relevant provisions would render mediation with governmental entities unworkable and unacceptable for private litigants.

Hurchalla fails to offer an interpretation that would give effect to the provision, and instead spends most of the initial brief arguing against positions the District does not take. And when she does attempt to harmonize the exemption with the rest of Chapter 44, she does so using redefined terms. Most significantly, however, Hurchalla's attempt to categorize the transcript as an oral communication backfires.

Under Florida law, oral communications are not public records.[8] When the Legislature removed "oral" from the exemption in 2004, it did so with that express recognition. Thus, if Hurchalla is correct that the transcript is truly an oral communication, then it is not subject to a public records request. Alternatively, because transcripts are regularly characterized as "written" under Florida law, they fall squarely within the exemption.

Hurchalla and the supporting Amicus seem to suggest the Legislature would never have intended to permanently exempt what would otherwise be a public record. Of course, this fails to account for the existence of the exemption at all, or for any of the hundreds of other exemptions contained in Chapter 119 and elsewhere under Florida law. There are simply certain categories of sensitive information the Legislature has chosen to protect.

There are numerous obvious policy objections for the Legislature's decision. For mediation to succeed, the parties must have assurance their confidences will be protected. And a court cannot order good faith participation if it has no authority to assure confidentiality. The Florida Rules of Civil Procedure and Statutes contemplate government participation in court-ordered mediation, so the exemption must be read, in *pari materia*, in a way that allows that participation to be meaningful.

[8] *See, State v. Coca-Cola Bottling Co*., 582 So. 2d 1, 2 (Fla. 4th DCA 1990).

Alternatively, if this court finds the transcript is not exempt, it is not yet subject to production because litigation is ongoing. Under section 286.011(8)(e), Florida Statutes, the transcript is not a public record until the conclusion of litigation. Litigation has not concluded since Hurchalla is currently pursuing her appeal of the Final Judgment from the Lake Point Litigation before this Court.

Hurchalla's remaining issues are baseless. The parties stipulated below, and on appeal, that the only issue was whether the transcript is exempt, thereby waiving any other substantive issues. Regardless of the waiver, the District dutifully complied with the strictures of the Sunshine Law in conducting the confidential attorney-client sessions. As to the procedural issues, venue was proper in Martin County because at least two of the defendants to the District's action are residents of Martin County and the trial court from the Lake Point Litigation had continuing jurisdiction over its mediation orders and a declaratory action was the proper vehicle because a present controversy existed and a government can seek judicial guidance under the circumstance.

This Court should not condone Hurchalla's attempt to use public records requests to game the system. The ruling below must be affirmed.

ARGUMENTS

I. The transcript is a confidential mediation communication made in furtherance of mediation and is exempt under section 44.102(3), Florida Statutes.

Standard of Review

Statutory interpretation is a question of law and is reviewed de novo. *Tierra Holdings Ltd. v. Mercantile Bank*, 78 So. 3d 558, 562 (Fla. 1st DCA 2011).

Argument

This case embodies an age-old question: What happens when an irresistible force, Florida's policy of open public records, meets an immovable object, Florida's protection of court-ordered mediation confidentiality. The District, like the trial court, believes the Legislature answered the question by exempting "all written communications in a mediation proceeding, other than a mediated settlement agreement" from Chapter 119, Florida's public records statutes. *See* §44.102(3), Fla. Stat. Despite constructing straw-man arguments, redefining statutorily defined terms, and clouding the single issue before the Court with extraneous (and waived) issues of fact, the Appellants fail to offer an alternative interpretation of the exemption.

The District cannot produce the single transcript at issue because it consists entirely of confidential attorney-client, court-ordered mediation communications which are exempt under Florida law.[9]

A. Hurchalla avoids interpretation of the exemption and instead addresses arguments that are not at issue.

It is necessary to address Hurchalla's extraneous arguments at the outset because they distract from the sole issue on appeal: interpretation of §44.102(3), Fla. Stat.

First, this case is not about the District's compliance with section 286.011(8), Florida Statutes. Not only is that question of fact waived, but it is meritless.[10] The District fastidiously complied with its statutory obligations in conducting the confidential attorney-client sessions.[11] The Governing Board designated the

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[9] Again, stipulated facts.

[10] Hurchalla conceded below and acknowledges on appeal that this is a narrow legal issue: "I think there's a very simple legal question before you. Either these transcripts are exempt under the statute they [the District] cite, Section 44.102(3) or they're not. That is all you need to decide." (R1:T2, 24).

[11] Hurchalla conceded below and acknowledges on appeal that "there were no issues of material fact to be decided, only matters of law and statutory interpretation." (Initial Brief, 1). Hurchalla makes stray remarks that the Governing Board entered the attorney-client session "without identifying the persons who would be attending," while simultaneously acknowledging "the minutes of the meeting state that the Chair announced the names of the attorney-client session attendees." (Initial Brief, 6; n. 5). These statements are an improper attempt to inject new issues on appeal and should be stricken. *See, Hadley v. Hadley*, 140 So. 2d 325 (Fla. 3d DCA 1961) (Noting because point on appeal had not been raised below, it "may not be considered by th[e] court and the same is stricken.").

District's General Counsel as its representative for mediation,[12] duly noticed the Governing Board meeting at which the Board would vote on settlement, procedurally complied with section 286.011, Florida Statutes, held public discussions following the attorney-client session (R2, 271–284), received public comment (*Id*.), publicly voted on the mediated settlement agreement, and made the mediated settlement available for public review the same day it was executed.[13] Abundantly aware of its statutory obligations to participate in the Sunshine, the District complied with and was restrained from disclosure by both section 286.011(8), Florida Statutes, and section 44.102(3), Florida Statutes.

Next, Hurchalla is mistaken in claiming section 286.011(8)(e), Florida Statutes, requires automatic production of an attorney-client session transcript once litigation is concluded. It does not. Instead, the statute provides that upon conclusion of the litigation, "the transcript shall be made part of the public record," meaning that it is swept into the auspices of Chapter 119 and subject to any exemptions from that Chapter.[14] In other words, section 286.011(8)(e), Florida Statutes, is itself a

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[12] *See*, Fla. R. Civ. P. 1.720(d).

[13] Hurchalla concedes the settlement agreement was made public within hours of its execution. (Initial Brief, 7).

[14] There are numerous public records exemptions listed in Chapter 119, and hundreds more outside of it. *See*, §11.45(4)(c), Fla. Stat. (Exempting audit workpapers and notes used to prepare audit reports by the Auditor General); §15.07, Fla. Stat.(Exempting the journal of the executive session of the Senate); §39.809(4), Fla. Stat. (Closing from the public all hearings involving termination of parental rights);

temporary exemption from Chapter 119. Hurchalla's argument, in essence, is that there must be an exemption from this temporary exemption, which is illogical. The District, like the First Amendment Foundation, believes there is no conflict between section 286.011, Florida Statutes, and section 44.102(3), Florida Statutes.[15] The difference is that the District's interpretation gives effect to all the relevant statutes including Chapter 119.

Because the District complied with section 286.011(8), Florida Statutes, and because it is not an issue on appeal, Hurchalla's reliance on *Brown v. Denton*, 152 So. 3d 8 (Fla. 1st DCA 2014) is misplaced. There, firemen and police officers sued the City of Jacksonville and the Jacksonville Police and Fire Pension Fund Board of Trustees in a dispute over the pension plan. The parties voluntarily sought mediation and engaged in a series of closed door negotiations that included other non-party unions' representatives. The discussions were not noticed, transcribed, or otherwise in compliance with section 286.011, Florida Statutes., but they resulted in a mediated

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§110(201(4), Fla. Stat. (Exempting Certain discussions and work product among the Department of Management Services, the Governor, and the Administration Commission regarding collective bargaining); §211.33(5), Fla. Stat., (Exempting information contained in tax returns filed in connection with water treatment); §395.0193(4), Fla. Stat., (Exempting information obtained in final disciplinary action by licensed health care facility from disclosure and public hearing); §395.0197(6)(c), Fla. Stat., (Exempting annual incident report submitted by hospitals and surgical facilities); §288.9520, Fla. Stat., (Exempting certain trade secrets from disclosure).

[15] See, Brief of Amicus, 8.

settlement agreement. The First District held that the meetings were collective bargaining negotiations subject to the Sunshine Law, and the parties' failure to comply with it rendered the agreement void. *Id*. at 12. Here, unlike in *Denton,* the District's compliance with section 286.011, Florida Statutes, is not an issue.[16]

Finally, Hurchalla's and the First Amendment Foundation's position that the Legislature would never have intended to permanently exempt what would otherwise be a public record fails to account for the existence of the section 44.102(3), Florida Statutes, exemption at all. How could anything be exempted from Chapter 119 unless it was otherwise a public record?

B. The attorney-client sessions were confidential mediation communications under the statutory definitions.

In the instant Final Judgments, the trial court structured a logical bridge from the mediation statutes to the conclusion that the attorney-client session "constitute[d] communications at a mediation proceeding within the meaning of section 44.102(3), Florida Statutes." (R1, 361–65). The attorney-client session is exempt under the mediation statutes because it constitutes confidential mediation communications[17]

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[16] As previously noted, Hurchalla conceded the only issue before the court is the legal interpretation of section 44.102(3), Florida Statutes.

[17] Section 44.403(1), Fla. Stat. defines "mediation communication as "an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation."

during the mediation period[18] by mediation participants[19] in furtherance of mediation.[20]

Hurchalla misses the mark while applying the statutory definitions. First, a mediation participant is not limited to "a party or person who attends a mediation," (Initial Brief, 26) but includes a "mediation party," which is broader and encompasses a party "participating…through a designated representative, in a mediation" as the Governing Board did.

Next, Hurchalla attempts to attribute an absurd interpretation of "mediation communication" to the District that would mean once the mediation period begins any discussion between the mediation participants *whatsoever*, until the conclusion of mediation, are exempt. *Id.* That is not the District's position. "Mediation communication" only comprises statements made by participants during the mediation period "*in furtherance of mediation*." *See*, §44.403(1), Fla. Stat.

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[18] A court-ordered mediation begins when an order is issued by the court and ends when…a partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by law, approved by the court. §44.404, Fla. Stat.

[19] Section 44.403, Fla. Stat., defines a "mediation participant" as "a mediation party or a person who attends a mediation in person or by telephone, videoconference, or other electronic means." In turn, a "mediation party" includes a person participating directly, or through a designated representative, in a mediation and a person who (a) Is a named party; (b) Is a real party in interest; or (c) Would be a named party or real party in interest if an action relating to the subject matter of the mediation were brought in a court of law."

[20] *See*, §44.403(1), *Fla. Stat.*

(emphasis added). It is also worth noting that although Hurchalla and company effectively stipulated below that the attorney-client session solely contained mediation communications[21] and admit on appeal it concerned settlement negotiations arising from mediation, they now appear to contend they were not mediation communications because they did not physically take place at mediation.

This Court previously recognized that mediation communications are not limited to those that take place in the presence of the mediator. *See, Paranzino v. Barnett Bank, N.A.*, 690 So. 2d 725 (Fla. 4th DCA 1997). In *Parazino*, this Court upheld sanctions against a mediation party for publicly disclosing a settlement offer made after the parties left the physical mediation, because the parties had agreed to extend the mediation period for 10 days. The offer was found to be a mediation communication because it "was presented within those 10 days…and the applicable statutes and rules were still binding upon the parties." *Id*. at 728–29. Here, mediation was not over when the communication between the parties at issue was made.

The attorney-client session at issue met the statutory definition of confidential mediation communication and is, therefore, exempt under section 44.102(3), Florida Statutes.

[21] As counsel for Law Center succinctly stated, "I guess it doesn't make sense to me that (sic) an in camera inspection to determine whether the redacted materials are mediation communications. That doesn't seem to be the issue. The issue is whether there's an exemption for mediation communications. It doesn't matter what the Court were to determine on an in camera inspection." (R1: T2, 8).

C. The exemption must also be content based or it is quickly stripped of any effect.

Regardless of its temporal relation to the physical mediation itself, the attorney-client discussion contains confidential information obtained solely in furtherance of the mediation, which is likewise exempted from disclosure under section 44.102(3), Florida Statutes. To reach its full scope, this exemption must be content based. Where a mediation communication is made *in a mediation proceeding*, any later transmission of that information must also be exempt or the exemption risks being swallowed by the loophole. For instance, there can be no doubt that a concession made during a mediation to the representative of a public entity, who has full authority to negotiate and recommend settlement to the entity's decision-making body, is exempt from disclosure. *See* Fla. R. Civ. P. 1.720(d). Discussion of that concession in any future confidential attorney-client sessions must also be exempt or the exemption would be stripped of any effect. There are a host of other written communications that no party would rationally contend could be obtained by a public records request such as mediation communications between District counsel and the mediator, District general counsel and outside counsel, or District counsel and counsel for the opposing party, just to name a few. Yet that is the same nature of communication Hurchalla is seeking here. The transcript cannot be used to short circuit other exemptions.

The First District came to an analogous conclusion in *Justice Coalition v. First Dist. Ct. of App. Nominating Comm'n*., 823 So. 2d 185 (Fla. 1st DCA 2002) In *Justice Coalition*, an interest group served the First District Judicial Nominating Commission with a public records request seeking vote sheets, ballots, and tally sheets, as well as individual members' notes. The First District construed the Constitutional exemption of "deliberations" under Art. I, Sec. 24 to include all records "made for or used during deliberations" that might reflect those discussions:

> Because the 1984 amendment to article V intentionally and purposely created an exemption for deliberations, the public policy debate was ultimately won by those who opposed opening deliberations to the public. *It defies common sense to keep deliberations closed, but allow the disclosure of records made for or used during deliberations. To do so would circumvent the confidential nature of deliberations as specifically exempted by the Constitution*. As such, the trial court was correct in interpreting this constitutional provision as exempting all records which 'constitute an integral part of the deliberations of the commission.' Therefore, all records pertaining to voting, including vote sheets, ballots, and ballot tally sheets are clearly part of the deliberation process. (emphasis added).

Id. at 192. Likewise, here, an interpretation of the exemption that fails to cover later recitation of confidential mediation communications would "def[y] common sense." *Id*. This is not an attempt to create an exemption, but an effort to give rational effect to the exemption the Legislature already created.

Though prior to the enactment of Art. I, Sec. 24., *Marston v. Gainesville Sun Pub. Co.*, 341 So. 2d 783 (Fla. 1st DCA 1976), is also persuasive. In *Marston*, a local newspaper sued to enjoin the University of Florida from conducting closed student

disciplinary hearings, which it argued were public hearings under section 286.011, Florida Statutes. *Id*. at 784. In reversing the trial court's determination that the hearings must be open to the public, the First District first noted that existing Florida law protected student records from inspection by anyone other than the student, his or her parents, and university staff. *Id*. (*citing* §239.77, Fla. Stat. (1975)).[22] The Court concluded that allowing public access to the hearings would "destroy" the protections afforded to student records:

> …the beneficial policy promoted by the legislature in §239.77 would be entirely subverted if the curious public, denied access to the record of the Honor Court's consideration and recommended disposition of a disciplinary matter, should nevertheless have entry as of right to the meeting whose only purpose is formulation of that record. To put it another way, there is no benefit to the student of confidentiality in the documentary evidence and report of his infraction if the public may demand admittance to the meeting where that evidence is exhibited and the substance of that report discussed; and there is little purpose in preserving from public view a memorandum or transcript of a witness' testimony before the Honor Court if the public is there to hear the spoken word.

Id. at 785. *See also, Capeletti Bros. Inc. v. Dep't of Transp.*, 499 So. 2d 855, 858 (Fla. 1st DCA1986), (holding the Sunshine Law did not require open access to bid-review committees); *Fla. Soc. of News. Ed., Inc. v. Fla. Pub. Svc. Comm'n.,* 543 So. 2d 1262, 1266 (Fla. 1989) (reaffirming validity of *Marston, supra* that the Sunshine Act should not be construed to defeat the Public Records Act).

[22] A student records exemption was later codified in Section1000.52(1), Florida Statutes.

Likewise, it makes no sense that certain communications, protected from disclosure when written, would be subject to disclosure if they were read off the page and transcribed. And even more absurdly, even if the transcript were produced and the mediation communications disclosed, the District's Governing Board would still be bound by court-ordered mediation confidentiality from discussing it. This Court should not give effect to a statute that would lead to such illogical results.

D. Transcripts are written communications.

If Hurchalla is correct that transcripts are oral communications, this case is simple because oral communications are not public records under Florida law. *See, State v. Coca-Cola Bottling Co*., 582 So. 2d 1, 2 (Fla. 4th DCA 1990) (holding that "Section 119.07 only pertains to disclosure of public records. It does not cover oral testimony").

Hurchalla is also mistaken regarding the Legislature's elimination of "oral" from section 44.102(3), Florida Statutes.[23] The term was not removed to expose oral communications; it was deleted based on the express recognition that "oral communications are not considered public records." H.B. 1765 Staff Anal., at 5

[23] In prior iterations of the statute the Legislature exempted both "oral and written communication*." See,* §44.102(3), Fla. Stat. (1996); §44.302(2), Fla. Stat. (1990); §44.101(3), Fla. Stat. (1989). In 2004, during a major overhaul and reorganization of the mediation statutes, the Legislature deleted reference to "oral."

(2004). Thus, if Hurchalla is correct that the transcript is an oral communication, then it is not a public record, and Judgment must be affirmed.

On the other hand, if transcripts are not oral communications, common usage dictates they be construed as written mediation communications. Florida caselaw, statutes, and rules are replete with references to transcripts as "written transcripts." *See,* §390.01114(4)(e), Fla. Stat., ("A court that conducts proceedings under this section shall provide for a written transcript of all testimony and proceedings."); *Gretz v. Fla. Unemp. Appeals Comm*., 572 So. 2d 1384 (Fla. 1991) (defining transcripts as "a written or printed copy of everything that was said at a hearing or trial.") (quoting *Black's Law Dictionary* 1324, 1342 (5th ed. 1979); Fla. R. Jud. Admin. 2.535 (defining "official record" as "the transcript, which is the written or electronically stored record of court proceedings and depositions…."); Fla. R. Juv. P. 8.830 (mirroring 390.01114, Fla. Stat.). Given the common reference to transcripts as "written," the subject transcript fits squarely within the confidential written mediation communications exempted under section 44.102(3), Florida Statutes.

Finally, construction of the exemption to include portions of transcripts (and in this case the entire transcript) containing mediation communications is consistent with common sense. As observed in *Justice Coalition*, 823 So. 2d at 192, it would be irrational to conclude that an oral recitation is protected from disclosure, but the

act of reducing it to writing strips it from its protections. Likewise, it is irrational to conclude that a written communication is protected from disclosure, *see* §44.102(3), Fla. Stat., but the act of speaking it strips it of its protection.

The obvious work around would be for government attorneys to communicate mediation discussions with Governing Boards solely in writing during attorney client sessions, which would undeniably be a written communication in furtherance of mediation. Giving effect to the exemption that would allow such obvious inconsistencies would be pointless. Courts must avoid such absurd statutory interpretations. *See, Hardee Cnty. v. FINR II, Inc*., 221 So. 3d 1162, 1165 (Fla. 2017) (directing courts to "avoid interpretations which would lead to absurd results.") (citing *Tampa-Hillsborough Cty. Expressway Auth. v. K.E. Morris Alignment Serv., Inc.*, 444 So. 2d 926, 929 (Fla. 1983)).

E. The exemption in section 44.102(3), Florida Statutes, reflects a policy objective by the Legislature to protect the sanctity of court-ordered mediation confidentiality.

The legislative history of the provision and the mediation statutes reflect a clear directive by the Florida Legislature that information revealed in mediation should be protected from disclosure, and even more so when the mediation is court-ordered. Florida is at the forefront in its use of court-ordered mediation and its broad protection of mediation confidentiality, and the exemption reflects the Legislature's intention to keep it inviolate. The language used within the provision (broadly

exempting "*all* written communications") and its history reflect that. The exemption provision has been in existence for over 30 years,[24] and has been revised numerous times. Notably, with each refinement, the Legislature pared away extraneous language, evidencing an intention to make the provision increasingly unassailable. *See,* §44.102(3), Fla. Stat. (1996); §44.102(3), Fla. Stat. (1991); § 44.302(2), Fla. Stat. (1990); §44.101(3), Fla. Stat. (1989).

In 2004, when the Legislature relocated several provisions of section 44.102 to the newly enacted Mediation Confidentiality and Privilege Act, it recognized that existing law (including s. 44.102(3)) protected the confidentiality of court-ordered mediation and extended some, but not all, of those protections to non-court-ordered mediation. *See,* §§44.401–44.406, *Fla. Stat*. Significantly, the public records exemption was retained in a section applicable solely to court-ordered mediations. This choice by the Florida Legislature makes sense because it prevents public entities from misusing the mediation exemption by engaging in informal mediation whenever they wish to transact business off the record. Meanwhile, the exemption remains narrowly applicable to only those mediations that are court-ordered.

The Legislature's unwavering protection of court-ordered mediation communications is justified. Exposure of confidential, court-ordered mediation communications harms all participants. A contrary interpretation would allow such

[24] Formerly codified in section 44.302, Florida Statutes.

exposure for any party unfortunate enough to engage in litigation with a government entity. For example, embarrassing private information revealed in personal injury suits would be subject to disclosure, as would trade secrets, and other protected matters. Moreover, required production would foster the very type of requests in the present case that are designed to give a litigant an unfair leg-up in related or future litigation.

This Court, recognizing confidentiality as the lynchpin to successful mediation, previously expressed its willingness to use its strongest judicial powers to protect it. *See, Paranzino,* 690 So. 2d at 729. And rightfully so. After all, "[i]f the trial court were to allow [disclosure of mediation communications] to go unchecked, continued behavior in this vein could have a chilling effect upon the mediation process." *Id*. The importance of exempting court-ordered mediation communications cannot be understated.

Certainly, one of the primary communications the statutes were designed to protect, as the trial court found, are concessions made by parties in full candor at mediation. (R1, 363). The trial court's Order is consistent with this Court's reasoning in *DR Lakes, Inc. v. Brandsmart U.S.A.,* 819 So. 2d 971, 974 (Fla. 4th DCA 2002), in which it warned that "[m]ediation could not take place if litigants had to worry about admissions against interest being offered into evidence at trial, if a settlement was not reached."

Damage from exposure of confidential third-party disclosures cannot be limited to their use at trial. Private parties would not risk mediation with a public entity if they knew their concessions could subject them later to unfair public scrutiny, or the metaphorical town square shaming that has become so prevalent in today's social media landscape. While the government accepts public scrutiny, the State of Florida has not put that burden on private litigants. Although the settlement agreement is not protected, all discussions leading up to it must be.

For instance, imagine an individual injured and suffering disfiguring and humiliating injuries who would rather settle than face the embarrassment of trial, in a case where liability is questionable. At mediation, the person candidly discusses the limitations he or she faces as a result of the injury (physical, mental, or sexual), which the general counsel, as designated representative and consistent with his ethical obligations as an attorney, reports back to a governing board. Because liability is questionable, the gravity of the injury is a significant consideration that must be thoroughly communicated to the board. Under Hurchalla's theory, the private litigant, who would forego trial to spare the embarrassment, is now laid bare before any member of the public or press who requests the transcript. The same goes for other categories of sensitive information such as trade secrets. Surely the Legislature meant to protect such discussions when it enacted the exemption.

There is a robust body of commentaries and authority that document the importance of confidentiality to successful mediation. *See,* Fran L. Tetunic, *Florida Mediation Case Law: Two Decades of Maturation*, 28 Nova L. Rev. 87, 91, 142 (2003) ("Confidentiality is the foundation on which mediation rests, allowing parties to build trust, share information, problem solve and decide whether to reach resolution."); Paul Dayton Johnson, *Confidentiality in Mediation: What Can Florida Glean from the Uniform Mediation Act?*, 30 Fla. St. U.L. Rev. 487, 489 (2003) ("Candor by the parties can be crucial to a successful mediation."); Marcia S. Cohen, *The Mediation Privilege*, 87 Fla. Bar J. 14 (2013) ("The guarantee of privacy concerning sensitive information often motivates parties to resolve their disagreements through mediation."); T. Noble Foster et al., *The Promise of Confidentiality in Mediation: Practitioners' Perceptions*, J. Disp. Resol. 163 (2009) ("It is the ability to reveal intimate details and information contrary to one's own interest that often leads to the settlement of cases."); Sarah Randolph Cole. *Secrecy and Transparency in Dispute Resolution: Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 Kan. L. Rev. 1419 (2006) ("Legislators, courts, and commentators generally agree that maintaining the confidentiality of mediation communications and documents prepared for mediation is essential to the success of the mediation process.")

Here, public policy favoring court-ordered mediation requires the transcript, which is a mediation communication and includes conveyance of other mediation communications by mediation participants, remain exempt from public disclosure, as the Legislature intended. To be clear, the District is not asking this Court find a public policy to justify its interpretation. Rather, the District requests this Court recognize and affirm the obvious public policy behind the Legislature's creation of the express exemption at section 44.102(3), Florida Statutes.

F. Disclosure of the transcript would render the section 44.102(3), Florida Statutes, exemption mere surplusage when considered with other statutes and rules.

If these discussions are not exempted from disclosure, then section 44.102(3), Florida Statutes, is superfluous because confidential mediation communications will always be documented by transcript. Chapter 286 requires all public meetings to be held in the Sunshine but anticipates that settlement and litigation strategy discussions may be held in confidence. *See,* §286.011, Fla. Stat.; Rule 1.720(d), contemplating Chapter 286 requirements, provides that a public entity, "required to operate in compliance with Chapter 286" is deemed to "appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity." Thus, every time a governmental party attends a mediation, it will be required to create a transcript like the one at issue here, in which confidential

mediation communications are conveyed to the decision-making body, here, the District's Governing Board.

Hurchalla's position not only strips section 44.102(3), Florida Statutes, of any effect; it does the same to judges' and mediators' authority to hold mediation and bind parties to confidentiality. How can a judge order a party to participate in mediation in good faith when that party knows whatever it says will later be disclosed? The exemption must be construed to give practical effect, or the entire mediation structure has no logical application to cases involving governmental parties, even though it is clearly designed to include them.

G. The cited Attorney General opinion would have disastrous impacts.

Hurchalla relies on an Attorney General Opinion that, if adopted, would interfere with the attorney-client relationship and affect the decision-making body's ability to make informed decisions. *See*, AGO 96-75, Sep. 30, (1996). The Opinion stands for the proposition that confidential and highly-sensitive information discussed during a meeting pursuant to section 286.011(8), Florida Statutes, must be disclosed at the conclusion of litigation. The obvious impact would be devastating to third parties. Moreover, if accepted, the Attorney General's suggestion that "the city and its attorney should be sensitive to any discussions of an employee's medical reports that are reviewed during such a meeting" would interfere with the attorney-client relationship and hamstring attorneys in their representation of governmental

bodies. Such a rule would prevent governing bodies from making informed decisions while essentially tying their hands and preventing them from settling lawsuits.

In *Palm Beach Newspapers, Inc. v. Burk*, 504 So. 2d 378 (Fla. 1987), the Florida Supreme Court considered whether unfiled depositions in a criminal case should be available to the press, and in doing so examined public policy implications that resonate in this context as well. The Court held that "providing access to unfiled depositions under the guise of Chapter 119…would not only present serious constitutional concerns for both the accused and innocent third parties, it would also undermine effective advocacy." *Id*. at 384. Court-ordered mediations, like pretrial depositions, are "judicially compelled," and mediation participants are required to engage in good faith. Requiring disclosure would infringe upon the rights of third-parties and subject them to the release of potentially embarrassing or damaging private information. Moreover, it would "undermine effective advocacy" by restricting a government attorney's ability to openly confer with his or her client about disclosures made by opposing parties at court-ordered mediation.

H. The District's interpretation of section 44.102(3), Florida Statutes, would not protect improper conduct because the Legislature has implemented safeguards against its misuse.

Hurchalla sounds the alarm that applying this Legislatively established exemption to the case at hand would lead to improper conduct. However, there are several statutory protections against misuse. First, by limiting the exemption to

court-ordered mediation, the Legislature prevented government bodies from jumping into voluntary, informal mediation whenever they wish to transact business off the record. The Legislature clearly reflected its limitation of the exemption to court-ordered mediation when it enacted section 44.406(3), Florida Statutes, which shields government officials from punishment for disclosure of mediation communications in compliance with Chapter 119.[25] That provision, considered in *pari materia* with section 44.102(3), Florida Statutes, can only be read to apply to non-court ordered mediation.

Nor does the trial court's interpretation nullify section 286.011(8)(e), Florida Statutes, as contended by the First Amendment Foundation. Because it only applies to court-ordered mediation discussions, informal mediation, pre-suit, and mid-suit settlement discussions would not be exempted, so those transcripts would still be subject to public request.

Second, section 44.405(4)(a), Florida Statutes, excludes several types of mediation communications from protection including plans to commit crimes or conceal illegal activity, communications that require a mandatory report pursuant to Chapters 39 and 415, Florida Statutes, evidence of professional malpractice,

[25] "A mediation participant shall not be subject to a civil action under this section for lawful compliance with the provisions of s. 119.07." This acknowledges that non-court-ordered mediation communications are not to be produced as part of the public record.

evidence used to refute or reform a mediated settlement agreement, and evidence used by an investigative body regarding professional misconduct. Exempted public records are also subject to review by "the Auditor General, the Office of Program Policy Analysis and Government Accountability, or any state, county, municipal, university, board of community college, school district, or special district internal auditor." *See*, §119.07(6), Fla. Stat.

Exempted transcripts are not destroyed, just withheld from public disclosure. Construing the exemption to protect confidential mediation communications would not provide a safe harbor for mischief. It would only protect the records from default public disclosure.

The First Amendment Foundation's citation to *Chmielewski v. City of St. Pete Beach*, 161 So. 3d 521, 524 (Fla. 2d DCA 2014) is misplaced. Most significantly, the *Chmielewski* court did not discuss the section 44.102(3), Florida Statutes, exemption which is the critical issue here. Second, unlike in *Chmielewski*, in which the litigation had ended, the litigation in the present case continues to this day.[26]

The Legislature's intention to exempt mediation communications must not be defeated simply because Hurchalla disagrees with it.

[26] First Amendment Foundation mistakenly states that it is undisputed underlying litigation had been concluded. The District contends that the litigation has not concluded given Hurchalla's appeal of the Judgment in the underlying case. *See, Case No*. 4D18-1221.

II. Even if section 44.102(3), Florida Statutes, does not apply, the transcript is protected from disclosure by section 286.011, Florida Statutes, because litigation is ongoing.

Standard of Review

Statutory interpretation is a question of law and is reviewed de novo. *Tierra Holdings Ltd.*, 78 So. 3d at 562.

Argument

Section 286.011(8), Florida Statutes, provides a time limited exemption, preventing "litigation settlement negotiation [and] strategy sessions" from becoming public record until "conclusion of the litigation." At the time of the public records requests, litigation had not concluded. The first public records request, made by the Law Center on October 4, 2017, was submitted during the mediation period, specifically, while the District was continuing to participate in and facilitate mediation discussions between Lake Point and Martin County. After the trial court entered an Order declaring the District's continued participation "imperative" and ordering the parties to remain bound by the mediation confidentiality statutes (SR, 302–03), Hurchalla and Melzer served their requests on December 11th and 17th, respectively (R1, 154; R2, 12). The mediation period would not have ended until January 11, 2018 (R1, 363), and even then, litigation continued between Lake Point

and Hurchalla. In fact, it still has not concluded.[27] Accordingly, the transcript would not yet be under the auspices of Chapter 119 and the District's withholding of the records was proper.

The implications of allowing Hurchalla, a party to the on-going Lake Point Litigation, to obtain confidential mediation disclosures is obvious. Hurchalla, or any litigant similarly situated, could formulate devastating cross-examination targeted at mediation revelations and concessions. Likewise, an unscrupulous litigant given access to confidential information, could leak it to exert external settlement pressure on its remaining adversaries. *See*, *Paranzino,* 690 So. 2d at 729.

Hurchalla's position, that settlement with one governmental entity exposes other litigants' mediation discussions while they are still in suit with the remaining parties, incentivizes delaying settlement with the government when other parties remain in litigation. In this case, Lake Point would have had every reason to wait until the day of trial to settle with the District and Martin County to avoid disclosure of mediation discussions. The result is wasted tax dollars and public resources spent preparing and hiring experts for a trial that could have been avoided. Under this premise, mediation, recognized by the Legislature and the Judiciary as an invaluable tool for avoiding the expense of trial, would be illusory for governmental entities.

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[27] Hurchalla's appeal from the judgment in the Lake Point Litigation is still pending before this Court. *See*, *Case No*. 4D18-1221.

Regardless of this Court's construction of section 44.102(3), Florida Statutes, the transcript cannot yet be disclosed under section 286.011(8), Florida Statutes, because litigation has not yet concluded.

III. The trial court correctly found venue for the District's Declaratory Action was proper in Martin County because it is the county of residence for two of the Defendants, the cause of action accrued there, and the trial judge had continuing jurisdiction over enforcement of his mediation orders.

Standard of Review

The standard of review of an Order concerning venue is abuse of discretion. *See, Carr v. Stetson*, 741 So. 2d 567, 568 (Fla. 4th DCA 1999).

Argument

Florida law is unambiguous that a plaintiff may file suit "in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located." §47.011, Fla. Stat. Where claims are brought against multiple defendants, venue will lie "in any county in which any defendant resides." *See*, §47.021, Fla. Stat. It is undisputed that Hurchalla and Melzer are residents of Martin County. Thus, under section 47.011, Florida Statutes, the trial court correctly determined it was an appropriate venue for the District's declaratory suit.

It is axiomatic that "the plaintiff has the prerogative 'to select the venue and as long as that selection is one of the alternatives provided by statute, the plaintiff's selection will not be disturbed.'" *Fla. Gamco, Inc. v. Fontaine*, 68 So. 3d 923, 928

(Fla. 4th DCA 2011) (quoting *Premier Cruise Lines, Ltd., Inc. v. Gavrilis*, 554 So. 2d 659, 660 (Fla. 3d DCA 1990)). A defendant contesting venue bears the burden of proving the plaintiff's choice of venue is improper. *Id.*; *Am. Vehicle Ins. Co. v. Goheagan*, 35 So. 3d 1001, 1003 (Fla. 4th DCA 2010). This requires affirmative proof, such as an affidavit. *See, Tropicana Prod., Inc. v. Shirley*, 501 So. 2d 1373, 1375 (Fla. 2d DCA 1987). No such evidence was introduced below.

The rule upon which Hurchalla relies ("the home venue privilege") applies in actions where the state entity is the *defendant*, which is clearly not the case here. *See, Bush v. State,* 945 So. 2d 1207, 1212 (Fla. 2006). (holding that the home venue privilege applies "in civil actions brought *against* the state or one of its agencies or subdivisions..."). And, even if it were applicable, the privilege inures to the benefit of the District as plaintiff and can be waived. *See, Dept. of Agr. v. Middleton*, 24 So. 3d 624, 627 (Fla. 2d DCA 2009).

A. Venue was properly entertained in Martin County where the Declaratory Action accrued from a Martin County case and the trial judge's enforcement power over its own mediation orders was implicated.

In addition to the District's black-letter-law entitlement to bring suit based upon the defendants' residence in Martin County, venue was also proper because the cause of action accrued from, and was inextricably linked to, the Lake Point Litigation, over which the trial judge continued to preside at the time of the requests. *See,* §44.011, Fla. Stat., (empowering plaintiffs to file suit where the cause of action

accrued). *See also, Fla. Gamco, Inc.*, 68 So. 3d at 923; *Dive Bimini, Inc. v. Roberts*, 745 So. 2d 482 (Fla. 1st DCA1999); *Allen v. Walker*, 810 So. 2d 1090 (Fla. 4th DCA 2002). Although the initial records request may have been submitted in Palm Beach County, the impetus for the requests and the mediation from which the requested transcript derived all flowed from the Lake Point Litigation based in Martin County.

The trial court's inherent, and statutory authority to sanction parties for violation of its Orders requiring compliance with the mediation confidentiality privilege justified his jurisdiction over the case as well. *See, MCR Funding v. CMG Funding Corp*., 771 So. 2d 32, 34 (Fla. 4th DCA 2000) (holding that a "court has inherent and continuing power to enforce its own orders"); *Moakley v. Smallwood*, 826 So. 2d 221, 223 (Fla. 2002) (recognizing a trial court's "inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice"). The trial court, in its Order on October 31, 2017, ordered the parties to abide by the mediation confidentiality statutes and rules. (R1, 334–35). Production of the transcript would represent a potential violation of that Order, so venue was proper in Martin County.

Moreover, the District's choice to file its declaratory suit in Martin County, where the mediation orders were issued, "promotes orderly and uniform handling of

state litigation and helps to minimize expenditure of public funds and manpower" *Bush*, 945 So. 2d at 1212.

IV. Law Center's Petition for Writ of Mandamus was properly denied because the transcript is exempt. To the extent Hurchalla raises other issues in Point II, they are waived.

Standard of Review

The Standard of Review of the Court's denial of Mandamus is abuse of discretion. *See, Rosado v. State,* 1 So. 3d 1147, 1148 (Fla. 4th DCA 2009).

Argument

Hurchalla's arguments in Point II regarding denial of the Law Center's Mandamus Petition and the District's compliance with the strictures of section 286.011(8), Florida Statutes, are wrong on the merits and are waived. It appears that Hurchalla is not advocating these as independent bases for reversal, but in compliment of the primary argument that the transcript is not exempt. In either event, they do not warrant reversal.

A. Hurchalla waived all issues except interpretation of mediation exemption.

The collateral arguments raised by Hurchalla cannot cloud the Court's view of the sole issue before it for consideration: Whether the confidential mediation

transcript is exempt under section 44.102(3), Florida Statutes. Everything else has been waived.[28]

Hurchalla's argument that the District did not provide any portion of the transcript is an issue of fact, which was waived by stipulations below and on appeal. At the hearing on the cross-motions below, the parties stipulated that "we're just arguing legal issues and we have stipulated that there is no factual issue for the Court to have to address." (R2: T1, 4). Similarly, on appeal, Hurchalla concedes there are "only matters of law and statutory interpretation" to be decided. (Initial Brief, 1). Hurchalla also waived the related issue of the District's obligation to provide any portion of the transcript when they declined in-camera review. (R1: T2, 6, 8).

It is well settled that a party's failure to raise an issue in the trial court bars him or her from raising the issue for the first time on appeal. *See, Kissimmee Util. Auth. v. Better Plastics, Inc.*, 526 So. 2d 46, 48 (Fla. 1988); *Johnston v. Hudlett*, 32 So. 3d 700, 703 (Fla. 4th DCA 2010). Doing so is not just impermissible, but inappropriate. *See, Dober v. Worrell*, 401 So. 2d 1322, 1324 (Fla. 1981) (reaffirming that it is "inappropriate to raise an issue for the first time on appeal").

[28] At the hearing, Hurchalla succinctly narrowed the issue for the court's determination: "I guess it doesn't make sense to me that an in-camera inspection to determine whether the redacted materials are mediation communications. That doesn't seem to be the issue. The issue is whether there's an exemption for mediation communications. It doesn't matter what the Court were to determine on an in-camera inspection." (R1: T2, 8).

Previously unpreserved issues may be stricken from briefs on appeal. *See*, *Hadley v. Hadley*, 140 So. 2d 325 (Fla. 3d DCA 1961) (noting that appellant was required to request certain relief in the trial court and "because no such application was made in this case appellant's point number three may not be considered by this court and the same is stricken").

Even if Hurchalla's claim regarding the suitability of a declaratory action for resolution of this case had been properly preserved, she must lose on the merits because she misconstrues the holding in *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793, 803 (Fla. 2008). In *Crossings*, the Florida Supreme Court held "a property appraiser does not have standing in his or her official capacity to raise the constitutionality of a statute as a defense in a tax suit filed by a taxpayer." Here, there was no challenge to a statute as unconstitutional, but only uncertainty about how to interpret the section 44.102(3), Florida Statutes, exemption.

And, as Hurchalla recognizes, government officials may bring declaratory actions when "the official is willing to perform his or her duties but is prevented from doing so by others." (Initial Brief, 42). Here, the District was restrained by Lake Points' threats of the legal consequence for breaches of mediation confidentiality and the trial court's mediation order from disclosing confidential

mediation communications. By Hurchalla's own admission, this scenario is suitable for declaratory relief.

CONCLUSION

The ruling below should be affirmed. The transcript is a mediation communication made by a mediation participant, during the mediation period, in furtherance of mediation, and contains conveyance of earlier mediation communications. An interpretation of section 44.102(3), Florida Statutes, that does not exempt these discussions undermines the bedrock of mediation and makes mediation with governmental entities unpalatable, contradicting the clear intention of the Legislature.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 5, 2018, I electronically filed the foregoing document with the Clerk of the Court. I also certify that the foregoing document is being served via e-mail this day on all counsel of record or pro se parties identified on the attached Service List.

/s/ James W. Sherman
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ATTORNEY CERTIFICATION REGARDING FONT REQUIREMENTS

Pursuant to Fla. R. App. P. 9.210(a), the signator hereby certifies that this Answer Brief meets the font requirements of New Times Roman font at 14 points.

/s/ James W. Sherman
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SERVICE LIST

CONSOLIDATED APPEAL NOS. 4D18-1220 and 4D18-1519
L.T. NO. 43 2017 CA 001098 CAAXMX
Everglades Law Center, Inc. v. South Florida Water Management District, et al.
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