

IN THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA  
FOURTH DISTRICT

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

MAGGY HURCHALLA,

Appellant,

vs.

CASE NO.: 4D18-1221

L.T. CASE NO.: 2013-001321-CA

LAKE POINT PHASE 1, LLC,  
and LAKE POINT PHASE II, LLC,  
Florida limited liability companies,  
Appellees.

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**MOTION FOR LEAVE TO FILE AMICUS CURIE BRIEF**

Pursuant to Florida Rules of Appellate Procedure 9.370 and 9.300, Movants, Bullsugar.org, Florida Wildlife Federation, Friends of the Everglades, and the Pegasus Foundation, by and through the undersigned counsel, request leave to file an *amicus curiae* brief in support of Appellant Maggie Hurchalla in this matter. As grounds therefore, Amici state as follows:

**MOVANT'S INTEREST**

**Bullsugar.org**

Bullsugar.org (“Bullsugar”) is a non-profit membership organization incorporated under the laws of Florida. Its mission, as stated in its articles of

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incorporation, is to educate the public about water quality and related environmental issues in the state of Florida, and to advocate for policies that will further this mission. It is dedicated to informing citizens, public officials, and government agencies about threats to clean water in the Treasure Coast and throughout South Florida, the condition of waterways and the environments that affect them, and the policies and solutions to improve water quality. Bullsugar has engaged in such efforts from the Florida Keys and Florida Bay to Tallahassee, Florida.

Bullsugar was founded by citizens who sought a more organized means of channeling their alarm over the deteriorating conditions of their waterways. The founders' realization that the health of their local waterways was inevitably tied to the condition and health of waterways and water systems formed the basis for the organization's founding documents to provide for its involvement in statewide education and advocacy efforts. Bullsugar's mission expressly includes and requires communicating with public officials to encourage them to make decisions that prevent water quality reduction. Because wetlands filter water and remove nutrient pollution, which contributes to toxic algae blooms, including those that periodically threaten clean water, Bullsugar's mission includes encouraging public officials to ensure that development, mining, and other actions conducted by private entities and permitted or otherwise supported by government pose no risk to wetlands and water quality. Such matters are often the subject of competing scientific opinion and

perspectives. Bullsugar.org is concerned that its communication with public officials could incur the risk of prosecution, given the result in this case now on appeal.

Bullsugar.org is a young organization, and like many small groups and individual citizens, is less able than larger organizations to afford the costs of legal liability for good faith statements made during the course of its advocacy. That risk would greatly inhibit Bullsugar, and likely most individuals and small organizations, from providing more information to and asking public officials to adopt positions that prevent water quality reduction. It would have an undeniable chilling effect on our current and future clean water advocacy work if we were to face tort liability as a result of seeking redress from our governmental officials if a good faith statement made during the course of our advocacy is subsequently deemed to have been incorrect by a court or government decision-maker.

### **Florida Wildlife Federation**

Florida Wildlife Federation, Inc. (FWF) is a Florida non-profit corporation, founded in 1936, with approximately 60,000 members and supporters across the state, including many who reside and recreate in the Everglades region. FWF pursues its mission to conserve the natural resources of the state, advance environmental education, ethical outdoor recreation and sustainability by advocating before governmental bodies, and has litigated numerous times in both state and federal

court to these ends. FWF and its members have a keen interest in the ramifications of the pending appeal as FWF and its members often voice opinions as to the environmental implications of proposed actions. Moreover, FWF has many times relied on technical and scientific information produced by third parties for its legal positions. Tort liability resulting from a good faith expression in a judicial proceeding, which is subsequently rejected by the trier of fact, would greatly restrict FWF's advocacy. Additionally, it would have a dramatic and chilling effect on the ability of organizations and citizens to utilize the courts.

### **Friends of the Everglades**

Friends of the Everglades, Inc. ("Friends"), is a non-profit corporation organized under the laws of Florida. Its mission is to preserve, protect, and restore the Everglades, including Biscayne Bay. Friends pursues this mission through advocating before government bodies, including the courts, for compliance with environmental laws, public advocacy, education, and promoting awareness of the importance of the Everglades to the South Florida ecosystem.

Marjory Stoneman Douglas founded Friends in 1969 to protest against the plan by Miami-Dade County to construct a major commercial airport in the middle of the Everglades. Since that time, Friends, on behalf of hundreds of members in Miami-Dade and other Florida counties, has initiated or intervened as a plaintiff at

many levels of governmental action, from local zoning decisions, to state administrative court, and in federal decisions involving matters of great public importance. In Miami-Dade County, Friends has sought to protect wetlands and drinking water supplies from administrative changes to the county growth plan. Friends has participated in litigation related to siting of power lines and pollution by Florida Power and Light. In federal court, Friends has litigated on behalf of pollution standards for the Everglades and against practices by the South Florida Water Management District.

In all cases, Friends' advocates relies on technical information, including public records of interactions between private corporations and governmental entities as may be reasonably discovered. Any restriction of expression based on such information and analysis fundamentally restricts Friends' capacity on behalf of its members. Its advocacy requires substantial conversations with public officials and others. Friends is greatly concerned that its advocacy could create tort liability if any oral or written public statements – for example that a proposed permit or other action will harm the environment – are subsequently rejected in a court of law due to a court decision that the opposing viewpoint on a debated matter of scientific conclusion was correct.

Friends has members who have environmental, recreational, property, economic, health, and aesthetic interests in the outcome of advocacy and

litigation. Limitations on Friends' advocacy, through chilling restriction of its First Amendment rights, would fundamentally block the mission of the organization. Friends has members with important stakes in drinking water, in the inappropriate uses of former Everglades wetlands for suburban sprawl, agricultural pollution, and the siting of power plants, along with the protection of natural habitats for recreation, including fishing, and for conservation and restoration. A concern for tortious liability due to good faith statements made during our advocacy would fundamentally limit and block the environmental, recreational, property, economic, health and aesthetic interests of Friends and its members.

### **The Pegasus Foundation**

The Pegasus Foundation was founded in 1997 with a mission to improve animal welfare through effective grant making and education in the United States, the Caribbean, on Native American lands, and in Africa. Through a strategy of engaged philanthropy, the Pegasus Foundation serves as a catalyst to help non-profit organizations achieve their potential by forming partnerships, leveraging resources and educating the public. The Foundation seeks to inspire collaborative efforts by grant making, organizing conferences, public educational meetings and by facilitating communications.

The Foundation's work covers a wide range of wildlife and habitat protection measures as well as concern with domestic animals, including dogs, cats and equines. Its issue priorities include (1) rescue and rehabilitation of marine mammals; (2) stopping the slaughter of elephants and rhinos in four African countries; (3) saving mute swans; (4) assisting Native American nations with dog, cat and equine overpopulation; (5) killing of wildlife for sport; (6) rescue and rehabilitation of wildlife on Cape Cod; and (7) promoting ending greyhound racing in Massachusetts and Florida.

In Florida, the Foundation helps homeless and abandoned dogs and cats with medical needs. This includes projects in the Redlands/Homestead area of Miami Dade County and in Okeechobee County. The Foundation also advocates for better services for animals in Martin County, and has been an advocate for preserving critical wildlife habitats. In the past, the Pegasus Foundation helped to spearhead a major and successful effort of multiple non-profit groups in lawsuits against both the state of Florida and the federal government to insist that manatees actually receive the protections for them that are mandated by law. The Foundation is currently active with issues to prevent the pollution that is harming the Indian River Lagoon and its inhabitants, both human and animal. The Foundation is currently leading an effort to stop the killing of mute swans by the state of New York. Citizen participation is critical to the goals of the Pegasus Foundation.

## **REASONS FOR AND RELEVANCE OF MOVANTS' *AMICUS CURIAE* BRIEF**

Each of the Amici organizations have a mission and practice to advocate to public officials and the public on behalf of their members and the public in support of strong environmental protection. As environmental advocates before governmental bodies and courts, the Amici have experience with, and an important perspective and understanding of, the complex, debatable, and ever-changing nature of environmental facts, such as those that are involved in this appeal. Amici believe that their experience and views as advocates for the protection of communities, ecosystems and wildlife during public discussion and debate about environmental and land use issues, can aid the Court in resolving this appeal.

The particular issue the Amici seek to address, and assist the Court in understanding, is the unique nature of scientific or environmental “facts” (e.g., whether land is or remains a “wetland”, which is a matter of scientific judgment based on indefinite factors, or whether a proffered environmental restoration project will benefit the environment). The Amicus Brief would explain how courts have viewed environmental disputes in light of the inherently uncertain and debatable nature of environmental facts and opinions. The Brief would present past judicial treatment of such issues that strongly counsels a view of “falsehood” tort liability and that supports the ability of citizens and organizations to assert their supported,

if debatable, views to their governmental officials on disputed environmental issues without fear of tort liability. Amici would explain the legal principles that strongly militate against the conclusion that a citizen who asserts a good faith, supported, view of environmental facts but who ultimately does not prevail in a litigation or similar setting committed an actionable “falsehood” in asserting his or her position. Amici would proposed to explain to the Court the particularly relevant rulings in a recent federal court dismissal of similar claims against environmental advocates.

### **Brief Argument in Support of Motion**

As both litigation and the role of modern statutory programs and public advocacy and enforcement have grown, “many amicus curiae briefs are filed specifically for the purpose of informing the court of the broader social and political impacts that a decision in the case may have on a particular group or segment of the population”, and the strict “traditional” friend-of-the-court brief “has long since ceased to be a reality.” Gidiere, P. Stephen III, The Facts and Fictions of Amicus Curiae Practice in the Eleventh Circuit Court of Appeals, Seton Hall Circuit Review: Vol. 5: 1 at 15 (2008).<sup>1</sup>

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1. In no way does this observation reduce the importance of “credibility” in the presentation of legal arguments in an amicus brief “regardless of their source”. Id.

In *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128 (3rd Cir. 2002), Justice (then Circuit Judge) Alito, writing for the majority, rejected a restrictive standard for amicus participation. 293 F.3d at 130. The appellants in that case had opposed Amici participation because “the very term ‘amicus curiae’ suggests a degree of impartiality” and the term “means friend of the court, not friend of a party.” *Id.* at 131 (citations omitted). However, the Court explained that an advocate could be an appropriate amicus:

“strong (but fair) advocacy on behalf of opposing views promotes sound decision making. Thus, an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend.” *Id.* at 131.

The Court rejected the notion that adequate representation by a party precludes the appropriateness and value of an amicus brief in support of that party:

“Even when a party is very well represented, an amicus may provide important assistance to the court. Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group. Luther T. Munford, *When Does the Curiae Need An Amicus?*, 1 J.App. Prac. & Process 279 (1999). Accordingly, denying motions for leave to file an amicus brief whenever the party supported is adequately represented would in some instances deprive the court of valuable assistance.”

*Id.* at 132. (Internal quotation marks omitted).

Justice Alito concluded that “our court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29’s criteria as broadly interpreted”, and that this policy “is consistent with the predominant practice in the courts of appeals.” Id. at 133.

### **CONSENT OF THE PARTIES**

Appellee, Lake Point, after consultation, objects to this motion. Appellant Maggie Hurchalla consents to this motion.

WHEREFORE, Amici request leave to file amicus curiae brief in this matter.

Respectfully submitted this 1st day of August 2018,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 1st day of August 2018 the foregoing was electronically filed with the Clerk of Courts using the eDCA System, which will send a notice of electronic filing to the service list below:

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