

**IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT COURT OF FLORIDA**

MAGGY HURCHALLA

Appellant,

CASE NO. 4D18-1221

L.T. CASE NO. 2013-CA-1321

v.

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

Appellees.

_____ /

**LAKE POINT'S RESPONSE TO THE MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF BY BULLSUGAR.ORG, FLORIDA WILDLIFE
FOUNDATION, FRIENDS OF THE EVERGLADES, AND THE PEGASUS
FOUNDATION**

Ethan J. Loeb, Esq. (FBN: 0668338)
EthanL@smolkerbartlett.com
Jon P. Tasso, Esq. (FBN: 0120510)
JonT@smolkerbartlett.com
Latasha L. C. Scott, Esq. (FBN: 52316)
LatashaS@sblfirm.com
**SMOLKER, BARTLETT, LOEB,
HINDS & THOMPSON, P.A.**
100 North Tampa Street, Suite 2050
Tampa, Florida 33602

Counsel for Appellees

INTRODUCTION

Appellees, Lake Point Phase I, LLC and Lake Point Phase II, LLC (collectively “Lake Point”) hereby file this response in opposition to The Motion for Leave to File Amicus Curiae Brief by Bullsugar.Org, Florida Wildlife Foundation, Friends of The Everglades, and The Pegasus Foundation (“Motion”). This Court should deny the Motion because Bullsugar.org, Florida Wildlife Federation, Inc., Friends of the Everglades, Inc., and Pegasus Foundation (collectively, “Non-Parties”) already filed an amicus curiae brief discussing the same issues. Further, the Motion should be denied because Florida Rule of Appellate Procedure 9.331 does not permit an amicus brief on a request for rehearing en banc.

BRIEF BACKGROUND

1. On June 19, 2019, this Court entered a written opinion affirming the final judgment entered in favor of Lake Point. *See Hurchalla v. Lake Point Phase I, LLC*, Nos. 4D18-1221, 2019 WL 2518748, at *3 (Fla. 4th DCA June 19, 2019).

2. The panel opinion entered its decision after considering Appellant, Maggy Hurchalla’s (“Ms. Hurchalla”) Initial Brief filed on August 24, 2018, Lake Point’s Answer Brief filed on November 30, 2018, and Ms. Hurchalla’s Reply Brief filed on January 24, 2019. The panel also conducted oral argument.

3. Significantly, the Court has already also considered multiple amicus curiae brief, including one filed by the very same Non-Parties on September 18, 2018 (“2018 Amicus Brief”).

4. On July 15, 2019, Ms. Hurchalla filed a Motion for Rehearing En Banc and for Certification pursuant to Florida Rule of Appellate Procedure 9.331 (“Motion for En Banc Review”). Ms. Hurchalla argues the panel opinion infringes on her First Amendment right to free speech. (Mtn. 6–11.).

5. On July 24, 2019, the Non-Parties filed their Motion seeking leave to file yet another amicus curiae brief. Without first obtaining a ruling from this Court, the Non-Parties also filed the actual amicus brief. (“2019 Amicus Brief”).

6. The Court should deny the Motion for two reasons. First, the arguments in the 2019 Amicus Brief are virtually identical to the arguments presented in the 2018 Amicus Brief. Thus, the Court had the opportunity to consider the Non-Parties’ position before it even entered the *Hurchalla* opinion. The Motion does not raise any new arguments for the Court to consider. So, the Non-Parties should not be permitted to file successive amici briefs.

7. Second, as a procedural matter, nothing in the rules of appellate procedure permit the Non-Parties to submit an amicus brief prior to the entry of an order granting review en banc.

LEGAL ARGUMENT

A non-party is not free to file unlimited amicus briefs. Rather, this Court explained that a “friend of the court” is generally permitted to file no more than one brief. *Ciba–Geigy Ltd. v. Fish Peddler, Inc.*, 683 So. 2d 522, 523 (Fla. 4th DCA 1996) (per curiam) (denying motion a motion for leave to file two amicus briefs).

“Amicus briefs are supposed to assist the court in resolving cases of general public interest or aid in resolving difficult issues that have an impact beyond the parties to the litigation. They should not be used to simply give one side more exposure than the rules contemplate.” *Liberty Counsel v. Florida Bar Bd. of Governors*, 12 So. 3d 183, 186 n.9 (Fla. 2009) (internal quotation and citation omitted).

This Court also held that repetitious amicus briefs are not permitted because its “time for reading briefs is not unlimited.” *Ciba–Geigy Ltd.*, 683 So. 2d at 523.

In this appeal, the Non-Parties already enjoyed the benefit of filing an amicus brief, in which they made the following three arguments: (1) scientific and environmental factors are inherently uncertain and debatable in nature (Am., Br., 4); (2) the importance of allowing public comment concerning wetlands without risk of tort liability (Am. Br., 5, 16–19); and (3) the importance of the panel issuing a narrowly tailored opinion that will not result in a “chilling effect” on citizens who would potentially petition the government for redress. They cite the *Sullivan* case

to bolster their argument that the issues within the appeal are of great public importance. (Am., Br. 16, 19.)¹

In comparison, the points of contention within the 2019 Amicus Brief are essentially identical, namely: (1) the panel should consider the complexity of scientific and environmental factors (2019 Am. Br., 14–17); (2) the importance of allowing public comment concerning wetlands without risk of tort liability (2019 Am. Br., 16–17); and (3) the panel should not enter an opinion that would result in a chilling of speech of citizens who make statements to the government (2019 Am. Br., 5–7, 10–12). The Non-Parties again cite to the holding of *Sullivan*. (2019 Am. Br., 12.)

The Court should deny the Motion because the 2019 Amicus Brief does nothing more than impermissibly repeat the arguments from the 2018 Amicus Brief. *See Ciba–Geigy Ltd.*, 683 So. 2d at 523; *Liberty Counsel*, 12 So. 3d at 186 n.9. It would be unfair to give Ms. Hurchalla more exposure on the issues already presented to the panel. *See Ciba–Geigy Ltd.*, 683 So. 2d at 523.

As a related point, Rule 9.370 and 9.331 do not permit the Non-Parties to file an amicus brief when considering whether to grant an en banc review to Ms. Hurchalla. In fact, Rule 9.331 expressly states that only a “party” can seek an en banc review. *See Fla. R. Civ. P. 9.331*. To the extent this Court would permit an

¹ *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)

amicus brief to be filed, the Non-parties should have coordinated with Hurchalla when she filed her Motion for Rehearing En Banc. *See Ciba-Geigy Ltd.*, 683 So. 2d at 523–524)(explaining the amicus, or friends of the court, should “join together in one brief and cooperate with the parties so as not to be repetitious of the parties’ briefs”).

CONCLUSION

Wherefore, this Court should deny the Motion.

Dated: July 25, 2019

Respectfully submitted,

/s/ Latasha Scott

Ethan J. Loeb, Esq. (FBN: 0668338)

EthanL@smolkerbartlett.com

Jon P. Tasso, Esq. (FBN: 0120510)

JonT@smolkerbartlett.com

Latasha L. C. Scott, Esq. (FBN: 52316)

LatashaS@sblfirm.com

**SMOLKER, BARTLETT, LOEB,
HINDS & THOMPSON, P.A.**

100 North Tampa Street, Suite 2050

Tampa, Florida 33602

Counsel for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July 2019, the foregoing was electronically filed with the Clerk of Courts using the Florida Courts E-filing Portal, which will send a notice of electronic filing to the service list below:

<p>Richard J. Ovelmen, Esq. Rachel A. Oostendorp, Esq. Dorothy Kafka, Esq. CARLTON FIELDS, P.A. Suite 4200 – Miami Tower 100 S.E. Second Street Miami, Florida 33131 rovelmen@carltonfields.com roostendorp@carltonfields.com</p>	<p>Jamie S. Gorelick, Esq. David W. Ogden, Esq. David M. Lehn, Esq. Justin Baxenberg, Esq. WILMER CUTLER PICKERING HALE AND DORR LLP 1875 Pennsylvania Ave., NW Washington, DC 2006 jamie.gorelick@wilmerhale.com david.ogden@wilmerhale.com david.lehn@wilmerhale.com justin.baxenberg@wilmerhale.com</p>
<p>Virginia Sherlock, Esq. Howard K. Heims, Esq. LITTMAN, SHERLOCK & HEIMS, P.A. P.O. Box 1197 Stuart, Florida 34995 LSHLawfirm@gmail.com</p>	<p>Richard Grosso, Esq. grosso.richard@yahoo.com, RICHARD GROSSO, P.A. 6511 Nova Drive, Davie, Florida 33317 <i>Attorneys for the proposed amici, Professors Penelope Canan and George W. Pring, as well as other proposed amici Bullsugar.org, Florida Wildlife Federation, Friends of the Everglades, and the Pegasus Foundation</i></p>

/s/ Latasha Scott
Latasha L. C. Scott, Esq. (FBN: 52316)