

CAUSE NO. _____

**Windermere Marina Association, Inc.,
Kenneth R. Wynne, W. T. Womble, Sandy
Nielson, Dirk Hoekstra, and Lisa Hutson,**

Plaintiffs,

v.

**Windermere Oaks Property Owners
Association, Inc.,**

Defendant.

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IN THE DISTRICT COURT

BURNET COUNTY, TEXAS

__th JUDICIAL DISTRICT

**PLAINTIFFS' VERIFIED ORIGINAL PETITION,
APPLICATION FOR TEMPORARY RESTRAINING ORDER,
AND APPLICATION FOR TEMPORARY INJUNCTION**

Plaintiffs Windermere Marina Association, Inc. (“**WMA**”), Sandy Nielson, Dirk Hoekstra, Lisa Hutson, Kenneth R. Wynne, and W. T. Womble bring this action against Defendants Windermere Oaks Property Owners Association, Inc. (“**WOPOA**”).

DISCOVERY-CONTROL PLAN

1. Plaintiffs intend to conduct discovery under Level 2 of Texas Rule of Civil Procedure 190.3 and affirmatively pleads that this suit is not governed by the expedited actions process in Texas Rule of Civil Procedure 169 because Plaintiffs seek injunctive relief.

CLAIM FOR RELIEF

2. Plaintiffs seeks monetary relief of \$100,000 or less and nonmonetary relief.

PARTIES

3. Plaintiff Windermere Marina Association, Inc. is a Texas nonprofit corporation whose registered office address is located in Travis County at 3101 Mistyglen Circle, Austin, Texas 78746.

4. Plaintiff Sandy Nielson is an individual who resides in Burnet County at 1001 Coventry Rd., Spicewood, TX 78669.

5. Plaintiff Dirk Hoekstra is an individual who resides in Burnet County at 110 Center Cove I, Spicewood, TX 78669.

6. Plaintiff Lisa Hutson is an individual who resides in Michigan at 18 Woodshire Dr., Freeland, MI 48623.

7. Plaintiff W. T. Womble is an individual who resides in Harris County at 8 Eaton Square, Houston, Texas 77027.

8. Plaintiff Kenneth R. Wynne is an individual who resides in Harris County at 9126 Chatsworth, Houston, TX 77024.

9. Defendant Windermere Oaks Property Owners Association, Inc. is a Texas nonprofit corporation whose registered office is located in Travis County at 7700 West Hwy 71, Suite 270, Austin, Texas 78735 and may be served by serving its registered agent for service of process, Community Association Management, Inc. in Travis County at 7700 West Hwy 71, Suite 270, Austin, Texas 78735.

JURISDICTION AND VENUE

10. The Court has subject-matter jurisdiction over the lawsuit because the amount in controversy exceeds this Court's minimum jurisdictional requirements. Further, this Court has jurisdiction because the suit involves title or right in an estate.

11. Venue is mandatory in Burnet County under Texas Civil Practices and Remedies Code § 15.011 because this is a suit regarding an estate or interest in real property located in Burnet County.

FACTS

12. Windermere Oaks is a subdivision located on the shores of Lake Travis in Spicewood, Texas.

13. Since 1982, WMA, or its predecessors in interest, has operated two marinas in Lake Travis located adjacent to Windermere Oaks. (*See* Covenants, Conditions and Restrictions for Windermere Marine Association, **Exhibit A**; Covenants, Conditions, and Restrictions for Windermere Marine Association II, **Exhibit B**; Bylaws of Windermere Marina Association, Inc. [hereinafter WMA Bylaws], **Exhibit C**; Covenants, Conditions and Restrictions for Windermere Marina Association, Inc. [hereinafter WMA Covenants], **Exhibit D**.) The slips within the marinas are owned by WMA members, all of whom own or owned property in Windermere Oaks and are members of its homeowners association, WOPOA. (*See* WMA Bylaws art. 4, at 3; WMA Covenants art. II, § 1.)

14. Except in times of extreme drought, when the marinas are temporarily relocated, the marinas have been anchored via a cable anchoring system to land west of the Windermere Oaks boat ramp, and WMA members have accessed the marinas via a gangplank running from the marinas to roughly the same location on the shore. Of course, both the anchoring system (which keeps the marina from floating away) and the gangplank (on which one must walk from the shore to the marina) are necessary for the WMA and its members to access and enjoy the marina.

15. The marinas receive power via electrical lines that run to an electrical box that is also located west of the boat ramp in the same area as the anchor lines and gangplank entrance. Electricity is necessary to raise and lower the boats in the marina. More importantly, the Lower Colorado River Authority's ("LCRA") Highland Lake Marina Ordinance requires marinas to maintain lighting all night from sunset to sunlight. (Highland Lakes Marina Ordinance § 6.06(B), at 17, **Exhibit E**.) WMA, not WOPOA, pays for the marinas electricity use

16. The marinas themselves are located over a 0.8 acre tract of land leased from the LCRA. The precise terms under which the marinas occupied this land prior to 1992 are currently unclear. On April 1, 1992, the LCRA and WMA entered into a 15-year lease for the property. (*See* Lease, Apr. 1, 1992, **Exhibit F**.) WMA and the LCRA executed a subsequent 15-year lease on August 18, 2007. (*See* Lease Agreement, Aug. 18, 2007, **Exhibit G**.)

17. Until 1992, the property west of the boat ramp to which the marinas are connected was owned by the LCRA, as part of the same larger tract that also contains the 0.8 acre tract that WMA leases from the LCRA. On April 2, 1992, more than ten years after the marinas had been in their current location, the LCRA conveyed to WOPOA an approximately five-acre tract of land that includes the area west of the boat ramp where the marina anchor points, the landward end of the gangplank, and the electrical box sit. (*See* Special Warranty Deed, Apr. 2, 1992, **Exhibit H**; Lease Agreement, Ex. A, at 3.) The special warranty deed conveying the property expressly reserved and excepted from the conveyance and warranty “[e]asements, rights-of-way, and prescriptive rights, whether of record or not.” (Special Warranty Deed 1.) The deed further expressly reserves for the LCRA “an easement strip twenty (20) feet in width, abutting the high water line of Lake Travis for the purpose of passage and use by the public for public sports and amusements.” (Special Warranty Deed 2.)

18. Approximately five years after WOPOA acquired the five-acre tract, which it designated as a Common Area, WOPOA adopted revised restrictive covenants, which expressly acknowledge the right of WMA and its members to use the Common Area for the marinas. Specifically, the restrictive covenants provide as follows:

No boat docks, piers, boat lifts, ramps, boat houses, floats, swim platforms or other structures shall be permitted in the lake, on any lake front lots, or any area adjacent to the Subdivision or in any Common Area **except (i) in the marina leased from the [LCRA] and related facilities existing from time to time and (ii) non-floating structures in existence on January 1, 1996.**”

(Second Amendment and Restatement of Restrictive Covenants ¶ 11, **Exhibit I** (emphasis added).) The restrictive covenants also provide all homeowners “a right and easement of enjoyment as well as easement of ingress and egress in, to and over the Common Areas.” (*Id.* ¶ 12.)

19. Despite the marinas’ and WMA’s longstanding existence and operation in exactly the spaces it currently occupies, WOPOA and its board of directors have begun interfering with the marinas’ operations. On February 29, 2016, a lawyer hired by WOPOA sent a letter to WMA demanding that it stop using “POA property to anchor [WMA]’s marina, to run utility lines across, and as a means of access by the WMA’s members,” unless the WMA entered into a “lease” with WOPOA and agreed to a slew of oppressive and unprecedented conditions. (*See* Demand Letter, **Exhibit J**.)

20. When WMA did not agree to these unfounded demands, WOPOA, without permission from WMA or the LCRA, unplugged the marinas’ power cables and placed a lock on the electrical box, preventing WMA from reestablishing power. Without power to the marinas, WMA members cannot operate the slips to lower their boats into the water. As importantly, the marinas are now unable to provide the minimum lighting required by LCRA regulations.

21. Then, on the Friday night before Memorial Day weekend, someone disconnected the now-darkened marinas from their cable anchoring system, leaving them free to float into the lake where unsuspecting boaters could hit them. On information and belief, the marinas were disconnected by a member of WOPOA’s board or someone working at such member’s direction.

COUNT 1 – DECLARATORY JUDGMENT

22. A justiciable controversy exists between WMA and WOPOA regarding WMA’s right to use the property to the west of the Windermere boat ramp to anchor its marinas, run power cables to a power box, and allow its members to access the marinas via the gangplank. WOPOA has

taken the position that it has the sole and exclusive right to permit WMA to use the property, and apparently believes that it can withdraw that permission at will.

23. That is not so. Before the LCRA conveyed the five-acre tract to WOPOA, that tract was part of a large unified tract of property that also included the tract on which the marina sits, which WMA has leased from the LCRA for at least 24 years. For over 35 years, including more than a decade before the LCRA conveyed the property to WOPOA, WMA used the property to anchor its marinas, access an electrical box, and allow its members to access the marinas via a gangplank. Further, just one day before the LCRA's conveyance to WOPOA, the LCRA entered into a 15-year lease with WMA to continue operating the marinas on the same location. In light of these circumstances, the LCRA's conveyance to WOPOA of the five-acre tract west of the boat ramp included the implied reservation of an easement to permit WMA to continue using the property to anchor the marinas, run cables to the electricity box, and run a gangplank from the property to the marinas. As the LCRA's tenant, WMA is invested with all the rights incident to possession and is entitled to the easements appurtenant to the leased property.

24. A justiciable controversy also exists between Plaintiffs Nielson, Hoekstra, Hutson, Wynne and Womble (the "Individual Plaintiffs") on the one hand, and WOPOA on the other, regarding WOPOA's claimed ability to prohibit the Individual Plaintiffs, who are WOPOA members, from using the Common Area to access and operate the marinas. WOPOA's restrictive covenants grant each lot owner "a right and easement of enjoyment as well as an easement of ingress and egress in, to and over the Common Area." This easement includes the right to use the Common Area to access the marina via a gangplank, to anchor the marina, and to run power cables from the marina to the electrical box.

25. By disconnecting the marinas' power, locking the electricity box, and purporting to prohibit WMA members from using the property to access the marinas, WOPOA has interfered

with and obstructed WMA's use of the implied easement reserved in the conveyance from the LCRA to WOPOA, as well as the express easements granted to the Individual Plaintiffs in WOPOA's restrictive covenants.

26. Plaintiffs therefore request a declaratory judgment stating:

- a. there is an implied easement appurtenant benefitting the property WMA leases from the LCRA that permits the continued use of WOPOA's adjacent property to anchor the marinas, run cables to the electricity box, and run a gangplank from the property to the marinas;
- b. as the LCRA's lessee, WMA is entitled to the use and privilege of that implied easement;
- c. the Individual Plaintiffs and all other members of WMA, who are all also WOPOA members, hold an express easement to enjoy the Common Area and of egress and ingress over the Common Area; and
- d. WOPOA has interfered with and obstructed WMA's use of the implied easement, and the Individual Plaintiffs' express easement, by disconnecting the marinas' power, locking the electricity box, and purporting to prohibit WMA members from using the property to access the marinas.

27. Attorneys' fees. WMA is entitled to recover reasonable and necessary attorneys' fees that are just and equitable under Texas Civil Practices and Remedies Code § 37.009 because this suit is for declaratory relief, and the Individual Plaintiffs are entitled to recover their attorneys' fees under the provisions of WOPOA's restrictive covenants.

COUNT 2 – PRIVATE NUISANCE

28. WMA enjoys the right to use and enjoy the implied easement reserved by the LCRA when it conveyed the property in question to WOPOA, and the Individual Plaintiffs were granted an express easement to use and enjoy the Common Area.

29. WOPOA intentionally interfered with Plaintiffs' interests by disconnecting the marinas' power, locking the electricity box, and purporting to prohibit WMA members from using the property to access the marinas.

30. WOPOA's interference with Plaintiffs' interests caused injury to Plaintiffs, which resulted in damages for loss of use and enjoyment caused by this temporary nuisance. Specifically, WMA has been unable to use not only the implied easement but also the underlying property that it leases from the LCRA to operate a marina. Likewise, the Individual Plaintiffs have been unable to use not only the Common Area but also their slips and boats in the marina. Although, the Plaintiffs' loss of access to and enjoyment of their property cannot be adequately compensated through damages, Plaintiffs are entitled to damages in an amount at least as measured by the daily rental value of the property for every day of WOPOA's interference.

31. Exemplary Damages. The Plaintiffs' injury resulted from conduct by WOPOA that was intentional or at least grossly negligent, which entitles the Plaintiffs to exemplary damages under Texas Civil Practices and Remedies Code § 41.003(a).

APPLICATION FOR TEMPORARY RESTRAINING ORDER

32. Plaintiffs are entitled to a temporary restraining order (TRO) because there is a bona fide dispute as to the existence of the easements claimed, and injunctive relief is necessary to preserve the continued exercise of their easement right pending the outcome of trial on the merits. *See AIMCO Properties v. Time Warner Entm't Advanced/Newhouse P'ship*, No. 03-97-00340-CV, 1997 WL 590675, at *3 (Tex. App.—Austin Sept. 25, 1997, no pet.) (citing *Petty v. Winn Exploration Co.*, 816

S.W.2d 432, 433 (Tex. App.—San Antonio 1992, writ denied); *Richter v. Hickman*, 243 S.W.2d 466, 468 (Tex. Civ. App.—Galveston 951, no writ); *Carleton v. Dierks*, 195 S.W.2d 834, 837 (Tex. Civ. App.—Austin 1946, no writ)). Further, Plaintiffs’ application for TRO is authorized by Texas Civil Practices and Remedies Code § 65.011 because a TRO is necessary to preserve the subject matter of the suit until the suit is resolved by judgment.

33. It is probable that Plaintiffs will recover from WOPOA after trial on the merits. The verified allegations above demonstrate that WMA has an easement to use property within WOPOA’s Common Area in the same manner it has been using that property for over 35 years. Likewise, the verified allegations show that the Individual Plaintiffs have an express easement to use and enjoy the Common Area. Thus, Plaintiffs have shown “the probability of some easement right in the property.” *AIMCO Props.*, 1997 WL 590675, at *3. That being the case, they are entitled to restoration of the status quo pending trial on the merits. *Id.* In the case of an easement, the status quo is the applicant’s continued right to exercise possession or use of the property as the easement provides. *Id.*

34. Without immediate relief restoring the status quo, Plaintiffs will suffer immediate and irreparable injury.

35. Plaintiffs therefore request that the Court order WOPOA and its representatives:
- a. to remove the lock on the electrical box and restore power to the marinas;
 - b. to refrain from interfering with WMA’s access to and use of the electrical box;
 - c. to refrain from interfering with WMA’s placement of the gangplank to allow WMA members to access the marinas;
 - d. to refrain from interfering or tampering with the marinas’ anchoring system; and
 - e. to refrain from issuing any directive, resolution, order, or regulation purporting to prohibit any WMA members from using the Common Area to access the marinas.

36. Plaintiffs are willing to post bond.

REQUEST FOR TEMPORARY INJUNCTION

37. Plaintiffs ask the Court to set their application for temporary injunction for hearing and, after the hearing, issue a temporary injunction against WOPOA and its representatives.

CONDITIONS PRECEDENT

38. All conditions precedent to Plaintiffs' claim for relief have been performed or have occurred.

PRAYER

39. For the foregoing reasons, Plaintiffs ask that WOPOA be cited to appear and answer and that Plaintiffs be awarded the following relief against WOPOA.

- a. Temporary restraining order
- b. Temporary injunction
- c. Actual damages
- d. Exemplary damages
- e. Declaratory judgment
- f. Permanent injunction
- g. Court costs
- h. Reasonable attorneys' fees
- i. All other relief to which Plaintiffs are entitled

Respectfully submitted,

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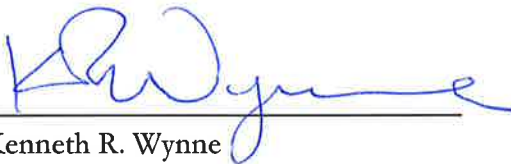
Attorneys for Plaintiffs

VERIFICATION DECLARATION

1. My name is Kenneth R. Wynne. I am of lawful age to provide this declaration, and my address is 9126 Chatsworth, Houston, Texas 77024.

2. I have read Plaintiffs' Verified Original Petition, Application for Temporary Restraining Order, and Application for Temporary Injunction. I declare under penalty of perjury that the facts stated in that document are true and correct based on my personal knowledge and my familiarity with the historical records of WMA.

Executed in Harris County, State of Texas, on June 8, 2016.



Kenneth R. Wynne