

CAUSE NO. 48292

RENE FFRENCH, JOHN RICHARD	§	IN THE DISTRICT COURT
DIAL and STUART BRUCE SORGEN,	§	
each on his own behalf and as a representative	§	
of WINDERMERE OAKS WATER	§	
SUPPLY CORPORATION,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	BURNET COUNTY, TEXAS
	§	
FRIENDSHIP HOMES & HANGARS,	§	
LLC, WINDERMERE OAKS WATER	§	
SUPPLY CORPORATION and its Directors	§	
WILLIAM EARNEST, THOMAS MICHAEL	§	
MADDEN, DANA MARTIN, ROBERT	§	
MEBANE and PATRICK MULLIGAN,	§	
	§	
Defendants.	§	33rd JUDICIAL DISTRICT

**PLAINTIFFS’ SUMMARY CONCERNING  
PLEAS AND MOTIONS**

TO THE HONORABLE MARGARET MIRABAL, JUDGE OF SAID COURT:

COME NOW LAWRENCE RENE FFRENCH, JR., JOHN RICHARD DIAL and STUART BRUCE SORGEN (“Plaintiffs”) and file this Summary Concerning Pleas and Motions, and would show the Court as follows:

As and to the extent the Court may find it useful, the following summarizes Plaintiffs’ takeaways from the reply of the WSC and the Individual Defendants. If and to the extent the Court needs no additional assistance and/or considers this summary inappropriate, Plaintiffs assume the Court will disregard it.

*A. Ultra Vires Claims*

The WSC/Individual Defendants admit Plaintiffs have standing under Section 20.002.

The WSC/Individual Defendants admit Section 20.002 claims are not derivative claims.

The WSC/Individual Defendants did not urge in their motions or opening briefing that Plaintiffs *ultra vires* claims were somehow defective. Instead, they stated they would address that matter in later motions.

The WSC/Individual Defendants cite no authority for the proposition that damages are not recoverable for the current and former directors' *ultra vires* conduct, and Plaintiffs have found none.

*B. Direct Claims as Owners*

The WSC/Individual Defendants do not dispute that if the assets and revenues are owned by the members, the injury is not to the corporation but to the members and the members have standing to sue for injuries to their assets and revenues. This is the particularized injury alleged in the cited paragraphs of the Second Amended Petition.

The WSC/Individual Defendants do not dispute that the assets and revenues of a 501(c)(12) organization are owned by the members, not by the corporate entity. This is the hallmark distinction between a 501(c)(12) organization and other types of corporate entities and what is alleged in the Second Amended Petition.

The WSC/Individual Defendants do not dispute that under its governing documents and applicable law, the WSC has no power to operate except as a 501(c)(12) organization, whether it be a corporation or some other type of business entity.

The WSC/Individual Defendants do not dispute that the Board has portrayed the WSC as a 501(c)(12) organization under penalties of perjury for many years.

Tex. Atty. Gen. Op. DM-479 concludes that if the cooperative is organized under a special statute, then the Cooperative Act does not apply. The WSC is organized under a special statute: art. 1434a/Chapter 67 of the Texas Water Code. Tex. Bus. Orgs. Code Ann. § 2.010 (West) (only a nonprofit organized under Chapter 67 can provide water or sewer service in Texas). See also Tex. Water Code Ann. § 13.002(23) (West) (“water supply or sewer service corporation” means a nonprofit corporation *organized and operating under Chapter 67* that provides potable water service or sewer service for compensation and that has adopted and is operating in accordance with by-laws or articles of incorporation which ensure that it is member-owned and member-controlled.) (emphasis added).

It is not uncommon for water supply corporations in Texas to be organized as cooperatives. See, Robert Gaines article attached to Plaintiffs' Response; Tex. Atty Gen Op. DM-479; see also, e.g., *Derebery v. Two-Way Water Supply Corp.*, 590 S.W.2d 647, 648 (Tex. Civ. App. – Dallas 1979, writ ref'd n.r.e.) (Two-Way is a rural water supply corporation with all the characteristics of a cooperative).

The WSC has all the characteristics of a 501(c)(12) cooperative; they are listed in the Response.

C. Direct Claims Based on Joint and Several Liability

The WSC/Individual Defendants do not deny that the directors can be directly liable as joint tortfeasors for damages for aiding and abetting, knowing participation in the wrongful conduct and conspiracy, all of which are alleged in the Second Amended Petition.

D. Res Judicata/Collateral Estoppel

The legal question in the TOMA case – whether the Board violated the Open Meetings Act in connection with its meetings on December 19, 2015 and February 22, 2016 – is not an issue in this litigation.

Res judicata and collateral estoppel apply as to causes of action or actually litigated facts, not types of relief.

The WSC/Individual Defendants do not dispute that the claims in this lawsuit could not have been brought in the TOMA lawsuit for the many reasons set forth in Exhibit 9 to Plaintiffs' Response.

E. Attorneys' Fees

The WSC/Individual Defendants do not dispute that Plaintiffs' breach of fiduciary duty claims are, in part, contractual.

The WSC/Individual Defendants did not urge in their motions or opening briefing that Plaintiffs *could not* plead a cause of action for which attorneys' fees are recoverable.

Plaintiffs can and will plead additional contract claims based on the Individual Defendants' many breaches of the bylaws, which are contractual.

Plaintiffs can and will plead for declaratory relief establishing that the WSC's governing documents require it to be organized and operated as a 501(c)(12) cooperative.

WHEREFORE, premises considered, Plaintiffs respectfully request that the Court deny all Pleas and Motions within the Submission Matters or, alternatively, direct

Plaintiffs to replead as necessary or appropriate and award Plaintiffs such other and further relief, at law or in equity, to which they may show themselves justly entitled.

Respectfully Submitted,

THE LAW OFFICE OF KATHRYN E. ALLEN,  
PLLC  
114 W. 7th St., Suite 1100  
Austin, Texas 78701  
(512) 495-1400 telephone  
(512) 499-0094 fax

By: /s/ Kathryn E. Allen  
Kathryn E. Allen  
State Bar ID No. 01043100  
kallen@keallenlaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been sent via electronic service to all lead counsel of record on this 30<sup>th</sup> day of January 2020.

/s/ Kathryn E. Allen  
Kathryn E. Allen