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How Well Are You Protected from Liability as a Trustee?

August 15, 2023
9:05 – 9:50 AM

Presenters

Tyler Grossman

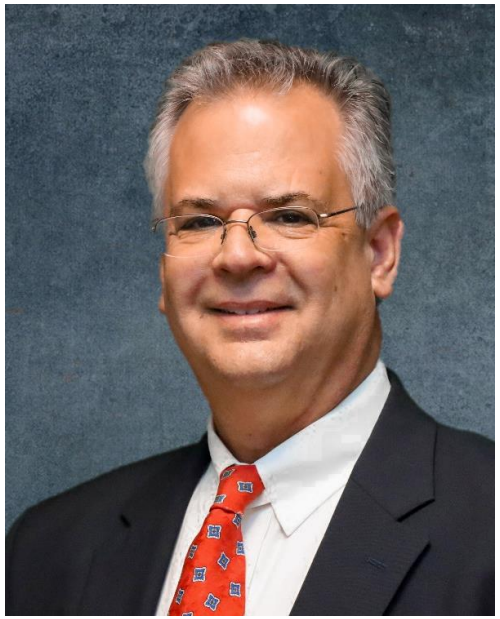
Executive Director,

El Paso Firemen and Policemen's Pension Fund

Ken Haben

Police Officer Trustee,

Dallas Police and Fire Pension Fund



Joe Gimenez

Public Affairs Consultant,

Community

Board Volunteer

Goals

- Sketch lawsuits involving volunteer Boards
- Describe factors +/- Boards' defense
- Touch on laws that protect volunteer Board members
- Offer thoughts on preventing lawsuits

Key Terms

- Sovereign or governmental immunity
  - Protects the State from lawsuits for money damages
- Ultra Vires –
  - Ultra vires occurs when an official acts without legal authority or failed to perform a purely ministerial act.
  - Ministerial acts occur when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.
  - Government or sovereign immunity does not apply to Ultra Vires acts
  - Ultra vires suits reassert the control of the state over wayward officials.

Timely Discussion

- SB 1446
  - Requires that the governing body of the public retirement system or an investment agent (2) is prohibited from taking any action, or considering any factor with a purpose of furthering social, political, or ideological interests.
  - (a) Authorizes the attorney general, if the attorney general has reason to believe that a person engaged in or is engaging in an act that violates Section(s)…Authorizes the attorney general to bring an action in the name of the state in district court to restrain or enjoin a person from violating Section 802.203(a), 802.2033, 802.2034, or 802.2035.

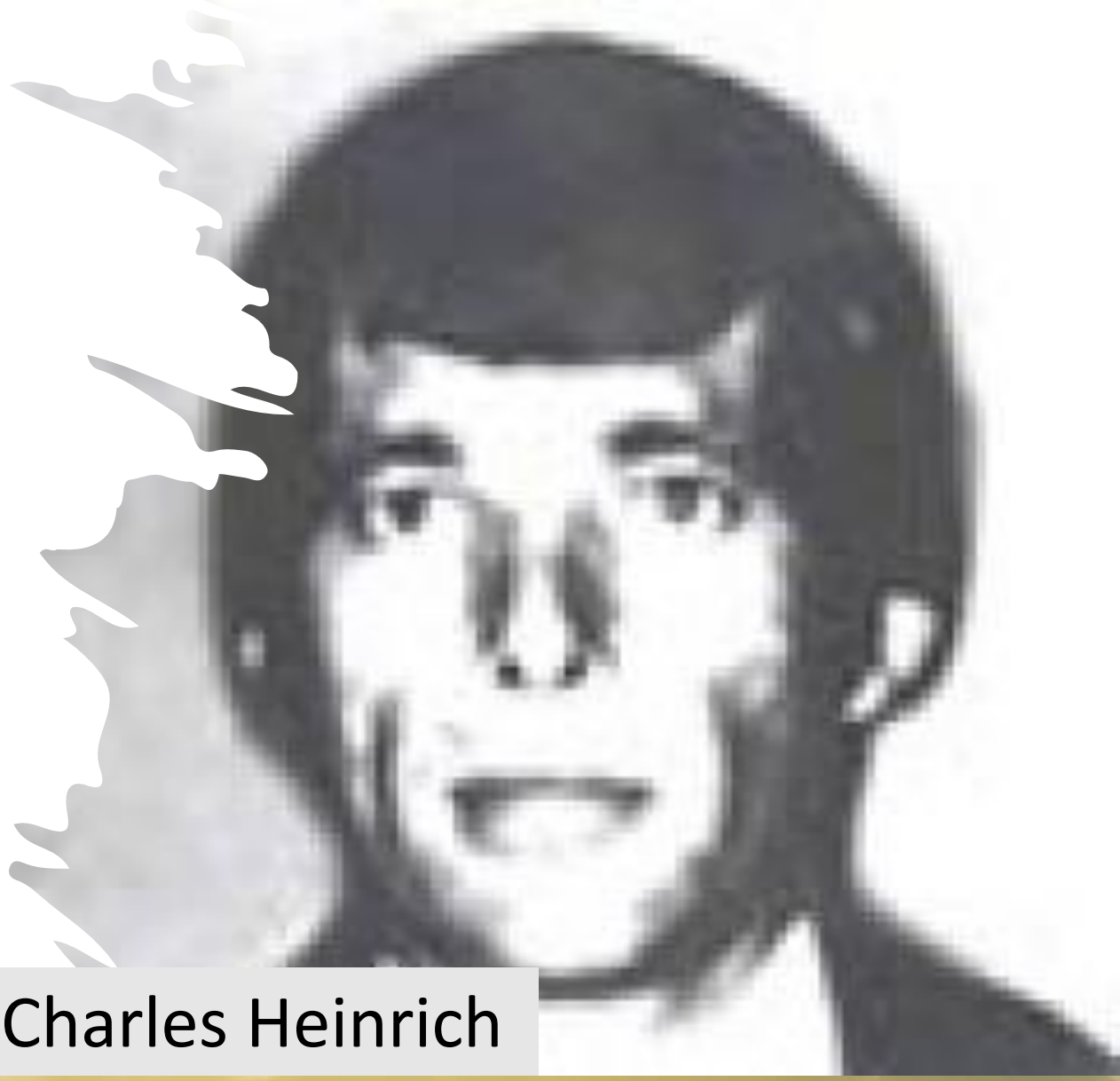
The City of El Paso, et al v. Lilli M. Heinrich

Tyler Grossman

Executive Director, El Paso Firemen and Policemen's Pension Fund

Board Authority, Directors' Actions

- The City of El Paso, et al v. Lilli M. Heinrich
  - Charles Heinrich, LODD, 1985
  - 100% benefit to widow Lillie Heinrich
  - In 2002, citing pension fund bylaws, EPFPPF reduced benefit to Lillie by 1/3 when Heinrich's son turned 23
  - **Mrs. Heinrich contended benefits could not be reduced retroactively and that Board had violated statutes by doing so, bylaws notwithstanding.**



Charles Heinrich

12 Years of Litigation

Trial Court 2006

Past, future money damages

Appeals Court 2006

Governmental immunity

Official immunity

TX Supreme Court 2007-2009

1) Sufficient facts to raise *ultra vires* claims…
2) An action to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars.

Trial Court 2010-16

1) Different Pension Fund letters to Mrs. Heinrich
2) Actuarial Study *after* 1985 benefit award
3) PF Lawyer's counsel re: benefits

Appeals Court 2018

Appeals Court 2018

Final Ruling - 1

Appeals Court 2018 Decision Affirmed Pension Fund

"Because Heinrich produced no evidence from which a reasonable jury could conclude she had originally been awarded her husband's full pension in her own right, she could not show the 2002 Board Members acted without legal authority in terminating the portion of her monthly payment attributable to her son's one-third benefit, as she was required to do to pursue her ultra vires claim."

Appeals Court 2018

Final Ruling - 2

Appeals Court 2018 Decision – PF Loses Costs

1) Letters to widow Heinrich caused confusion
2) Lack of notations on payments affirmed confusion
3) Lack of “proper bookkeeping” by Pension Fund

Judge: “This whole lawsuit could have been avoided…”

“Ministerial” Acts Matter

- Letters
- Agendas
- Open Meetings Act (communications among Board members)
- Resolutions
- Compliance with Laws, Bylaws, Policies

Ken Haben

Police Officer Trustee,

Dallas Police and Fire Pension Fund

DALLAS POLICE & FIRE PENSION SYSTEM

Joe Gimenez

Public Affairs Consultant,

Community Board Volunteer

Windermere Oaks Water Supply Corporation

Committed to Providing Clean, Safe Water for All Our Residents

Land Sale Controversy

- Windermere Oaks Water Supply Corporation
- 253 members
- 5 volunteer Board members, elected by members
- Subject to Texas Open Meetings Act and Public Information Act
- Non-profit corporation with $600,000 annual revenue

- 2015 land sale of 4 acres in small private airport, $200,000
- Law: Private corporations can sell land to whomever, however, but disclosures must be made.
- $35,000 highest comparable per acre price
- $50,000 per acre – Local record

The Land Sale
Case #1

WINDERMERE OAKS WATER SUPPLY CORPORATION 424 COVENTRY ROAD, SPICEWOOD, TX 78669

NOTICE OF OPEN MEETING

The Board of Directors of the
Windermere Oaks Water Supply Corporation
9:00 AM Saturday, December 19, 2015

At the
Windermere Oaks Water Supply Corporation
424 Coventry Road
Spicewood, Texas 78669

This meeting has been called as a matter of public necessity. To submit written statements, obtain copies of the agenda, and/or for further information, please call or write the Corporation at Windermere Oaks Water Supply Corporation, 424 Coventry Road, Spicewood, Texas 78669

December 14, 2015 Mike Madden, (Secretary/Treasurer)

TAKE NOTICE THAT A MEETING OF THE ABOVE-REFERENCED BOARD OF DIRECTORS OF WINDERMERE OAKS WATER SUPPLY CORPORATION will commence at the time and location as noted above to consider and act upon any lawful subject which may come before it, including, among others, considering the adoption of resolutions and authorizing procedures in connection with the subjects as listed below. This public meeting is being held pursuant to Texas Government Code §551.001 et seq. All actions and deliberations of the Board shall be made in Open Meeting unless taken in an Executive Session pursuant to Government Code §§551.071-551.085 to discuss an item listed below under Executive Session. In the event of a noticed Executive Session, no action will be taken by the Board until the Board has closed the Executive Session and returned to the noticed Open Meeting. All meetings shall be recorded.

AGENDA:

1. Roll Call and determination of Quorum
2. Review and approve prior meeting minutes 12-07-2015
3. Discussion and possible action on entering into a contract with Corix Utilities for Repair and Maintenance of WOWSC Water and Sewer System.
4. Review of "old" business, Introduction of new business
5. Executive session to discuss real estate, personnel or legal matters
6. Adjournment

Items 2 through 4 are posted for discussion and possible action by the Board. No action under Item 4 Old Business, will be taken unless the item in question has been noticed in a previous agenda and continued by the Board for action at this meeting.

Actual

5. Executive session to discuss real estate, personnel or legal matters

6. Adjournment

Should have been:

5. Executive session to discuss real estate, personnel or legal matters.

6. Consideration and possible action on items discussed in Executive Session.

7. Adjournment

The Land Sale

Case #1

Plaintiffs,
Water Company Members

Bill Aleshire,
Attorney

The Land Sale

Case #1

April 2018

Intervenor-Plaintiff brings this suit for mandamus … to reverse the violation of TOMA and asks the Court to declare void the action the WOWSC Board took on December 19, 2015 to sell WOWSC property and on February 22, 2016 to again authorize the sale and authorize officers to sign the closing documents, all without the required public notice.

Plaintiffs,
Water Company Members

Bill Aleshire,
Attorney

The Land Sale
Case #1

2018

"**Won**": WOWSC's uncontested admission of violation

Lost: Reversing Land Sale -

2019

Lost Appeal

2020

Lost: Appeal of Appeal to TX Supreme Ct.

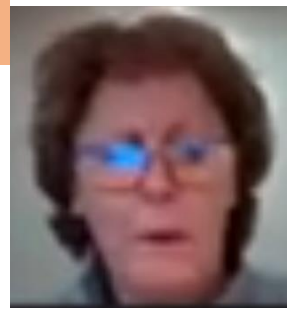
Legalities:

- TOMA requires “immediate remedy” for violations.
  - Land sale completed 2 years before lawsuit.
  - Void versus voidable.
  - “After the property was sold, they sought declaratory relief that the board’s past actions were void. Such relief is unavailable.”
- Mootness – “Simply addressing whether a violation had occurred would have no practical effect on the parties.”

The Land Sale

Case #1

Plaintiffs,
Water Company Members



Kathryn Allen,
Attorney

May 2019

The Land Sale
Case #2

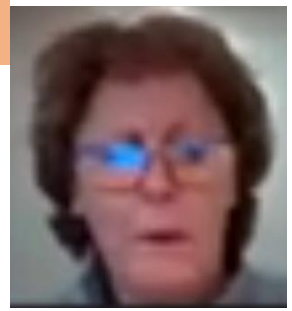
"The Board has no power to **give away** a valuable Cooperative asset or to transfer it for a fraction (or none) of its market value."

The power to convey real property interests in the WSC's name is **triggered only when** such conveyance is authorized by "appropriate resolution" of the Board.

"The 2019 Board has expended WSC resources to **defend the ultra vires acts** of the WSC and the misconduct of the Director Defendants."

"Using the assets **of the victims** to provide a defense for the **unfaithful fiduciaries** who harmed them would be wrong by any standard."

Plaintiffs,
Water Company Members



Kathryn Allen,
Attorney

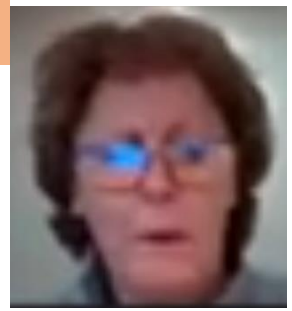
May 2019

The Land Sale
Case #2

"Should money damages be necessary to restore the WSC and its Member owners, the individual [Board] members, and not the [company] member owners, must account for such losses."

"Business judgment rule does not apply….because acts and omissions resulted from *ultra vires* acts.

Plaintiffs,
Water Company Members



Kathryn Allen,
Attorney

May 2019

The Land Sale
Case #2

"Each of these Defendants is personally accountable to the WSC and its Member Owners for the full amount of such illegal distributions of cooperative funds.

"Should money damages be necessary to restore the WSC and its Member owners, the individual [Board] members … must account for such losses."

"Business judgment rule does not apply….because acts and omissions resulted from *ultra vires* acts.

DEFENDANTS WINDERMERE OAKS WATER SUPPLY CORPORATION DIRECTORS WILLIAM EARNEST, THOMAS MICHAEL MADDEN, DANA MARTIN, ROBERT MEBANE, PATRICK MULLIGAN, JOE GIMENEZ, MIKE NELSON, AND DOROTHY TAYLOR'S REPLY IN SUPPORT OF TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

Defendant Directors,
Water Company Board Members

March 2021

Shelby O'Brien,
Attorney

The Land Sale
Case #2

Business Judgment Rule – Immunizes directors from liability:

- Honest exercise of business judgment and discretion
- Protects against liability for acts that are negligent, unwise, inexpedient or imprudent if within business judgement for the enterprise
- Even acts of gross negligence are protected if act is not ultra vires or tainted by fraud.

Plaintiffs must prove Directors did not act in Good faith, with ordinary care, *AND* reasonably within the best interest of the corporation.

DEFENDANTS WINDERMERE OAKS WATER SUPPLY CORPORATION DIRECTORS WILLIAM EARNEST, THOMAS MICHAEL MADDEN, DANA MARTIN, ROBERT MEBANE, PATRICK MULLIGAN, JOE GIMENEZ, MIKE NELSON, AND DOROTHY TAYLOR'S REPLY IN SUPPORT OF TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

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The Land Sale

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Defendant Directors,
Water Company Board Members

March 2021

Shelby O'Brien,
Attorney

The Land Sale
Case #2

Volunteer Immunity Statutes

- Texas Charitable Immunity and Liability Act
  - Covers organizations that promote social welfare
- Federal Volunteer Protection Act
  - Vols at organizations for Civic Purposes

Indemnification

- Chapter 8, Texas Business Code Chapter
- Advancement of legal expenses
- Mandatory for corporation to pay all legal fees when directors prevail

Legalities:

- Judge DISMISSED with **take-nothing order** all complaints against directors except the “interested director” Dana Martin
- Jury trial found Martin in **breach of fiduciary duty** and required her to add $70,000 to the $200,000 already paid to WOWSC.
- **Plaintiffs** intend to send jury verdict and/or all previous rulings to Appeals Court
- Martin will cross-appeal. Likely on grounds that **one-person cannot conspire with themselves**.

Plaintiffs

The Land Sale

Case #2

Lessons

- **Avoid Ultra Vires** -- Watch details for all legal processes (Agendas, minutes, bylaws, TOMA, PIA, Due Diligence, correspondence, etc.)
- **Adopt mindset** of plaintiffs' attorneys to evaluate Board and pension fund actions
- **Watch Texas Legislature** closely for erosions of volunteer protections.
- **Don't skimp on costs of legal advice** throughout pension fund business. It's worth every penny.

Lessons

- **Evaluate your Directors & Officers Insurance Policy**
  - Plaintiffs argued that Directors should pay their own defense costs
  - Texas law requires organizations to pay for legal defense of Directors – unless there is finding against them.
  - Insurance company denied 2019 claims, but lost in court when WOWSC challenged
  - Water company won $678,000 in costs and penalties against Insurance Co.
  - Have insurance attorneys review your current policy.
- **Evaluate bylaws for confluence with Chapter 8**