By Stephen Gibson[1]

***Local Government*: Franchise Agreement and Home Rule Authority Governs Utility Tariff Concerning Facility Relocation Costs Resulting from Exercise of Governmental Authority Where Tariff Did Not Irreconcilably Conflict With Franchise Agreement.**

In *City of Richardson v. Oncor Electric Co., LLC*, the parties disputed whether the utility or a home-rule city had to pay for the relocation of the utilities' facilities to permit some alleys to be widened. A home rule city is one that is chartered by the Legislature and given certain rights. Some of these rights are specified in the charter, but residual rights are also conferred by statute. One of these statutory rights is control over the rights of ways along streets and alleys that utilities use to distribute their services. The issue here arose due to conflicting provisions concerning who pays relocation costs when made necessary by the legitimate exercise of home rule authority such as widening alleys.

The utilities are authorized to provide services in home rule municipalities through franchise agreements. Under the utility's franchise agreement with the city and under common and statutory law, the utility was obliged to pay equipment relocation costs to accommodate changes in rights of way by the municipality. After the utility refused to pay these costs when the city approved widening certain alleys, the utility filed a case with the Public Utility Commission seeking to alter its rates. These rates are established by a tariff. As part of the resolution of that proceeding, the city passed an ordinance that obliged the "[r]etail [c]ustomer, or the entity requesting such removal or relocation, [to] pay to … the total cost" of any requested relocation.

The Texas Supreme Court resolved the conflict between the franchise agreement, statutes, and common law on the one hand and the tariff on the other in favor of the franchise agreement. It held the home-rule city's right to control its rights of ways and the franchise agreement's allocation of the relocation costs to the utility was paramount to the provisions included in the ordinance and tariff governing the utility's relationship with its customers. The court deemed this outcome consistent with longstanding common law as well as provisions in the Texas Utility Code that make the utility's use of public property in a municipality subordinate to the municipality's authority to regulate rights of way. The court explained that home rule cities are granted full governmental power so that it needs no grant of authority. It has the power to act unless the Legislature has limited that authority. Thus, a statute that gave the city the power to require the utility to pay relocation costs in connection with modification of a *street* does not imply that the city did not have the same authority with respect to changes to *alleys*.

If there had been an irreconcilable conflict between the tariff and the franchise contract, the utility might have prevailed on the basis of a tariff provision that repealed all conflicting ordinances. Emphasizing that any reasonable interpretation avoiding such an irreconcilable conflict is sufficient to do so. The court emphasized that the purpose of the tariff was not to regulate the city-utility's relationship, but rather to define the utility-customer relationship. As such, the tariff was not perceived to present with "unmistakable clarity" an irreconcilable conflict. The utility was obliged to pay the costs of relocating its facilities to accommodate widening the alleys.

[1] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

***Health Care Liability*: Expert Report Describing Sticking Optic Nerve with Needle During Anesthesia Administration Satisfied Chapter 74 Even Though It Did Not Describe How the Procedure Should Have Been Performed.**

Baty v. Futrell arose from the trial court's dismissal of a malpractice suit for an expert report that was allegedly inadequate. Under Texas Civil Practice & Remedies Code §74.351, the plaintiff asserting a health care liability claim must file a report "that provides a fair summary of the expert's opinions … regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury … claimed."

The case arose out of alleged damage to the plaintiff's optic nerve when a nurse anesthetist was "augmenting" a retrobulbar block by injecting anesthetic into the space behind the eye's globe. According to the expert report, having to "augment" the block with repeated needle penetrations raises the likelihood of injury to the optic nerve. According to the report, any augmentation should have occurred by a procedure that involved an incision rather than a needle due to distortion in the eye's structure by introducing the anesthesia. The expert opined that the standard of care required "administering the block in the proper manner to preclude injuring the delicate structures of the orbit, including the globe and optic nerve." The expert further observed that the procedure as performed breached that standard because it was not "performed … with sufficient competence and skill to avoid damaging her optic nerve" and because it "[i]rreparably damage[ed the patient's] left optic nerve … by sticking it with the … needle."

A six-person majority held in an opinion written by Justice Lehrmann that the trail court abused its discretion in holding that this report did not surpass the minimum "good faith effort" standard necessary to comply with Chapter 74. The majority noted that the standard of care was straightforward – do not stick the optic nerve with a needle – and that the facts demonstrated that this standard was violated.

Justices Johnson and Brown dissented. They reasoned the expert report did not describe precisely how the procedure should or should not have been performed beyond saying the procedure was not performed "properly." Without this information, they considered the report insufficient.