By Stephen Gibson[2]

In Memoriam Robert Hunter 1941-2019
"Like the morning sun you come and like the wind you go."[3]

***Contract Interpretation*: Custom and usage cannot be considered when the contract provision is neither ambiguous nor in need of material specifics. Surrounding circumstances cannot be considered unless the contract provision is ambiguous.**

***Fraud*: Reliance on a representation during negotiations that contradicts the ultimate written agreement is inherently unreasonable.**

Barrow-Shaver Resources Co. v. Carrizo Oil & Gas, Inc. revisits when industry custom and usage and the circumstances surrounding negotiations may be considered in breach-of-contract cases. Carrizo entered a farmout agreement with Barrow-Shaver ("Barrow") under which Barrow would receive a partial assignment of Carrizo's lease for drilling a well so that Carrizo could preserve the underlying lease. After contentious negotiations over the consent clause if Barrow wished to assign its interest under the farmout, the parties drafted an agreement stating Barrow's rights "may not be assigned, subleased or otherwise transferred … without [Carrizo's] express written consent," deleting a previous draft's restriction that Carrizo could not unreasonably withhold its consent. Despite the unadorned consent clause and deletion of the requirement in previous drafts that consent not be withheld unreasonably, Carrizo assured Barrow at least three times that it would consent if Barrow decided to assign.

Barrow's well proved unsuccessful. Barrow wanted to accept an offer from another driller for the assignment of Barrow's rights, but Carrizo refused to consent.

Barrow sued for breach of contract, fraud, and tortious interference. The trial court ruled the farmout was unambiguous, but allowed the jury to hear expert testimony about industry customs concerning consent. It charged the jury with deciding whether Carrizo breached the farmout and committed fraud by refusing to consent. The trial court rendered judgment against Carrizo based on the jury's $27 million verdict. A 5:4 majority of the Supreme Court of Texas under an opinion authored by Justice Green, agreed with the court of appeals that this judgment must be overturned, albeit for differing reasons.

Circumstances concerning withholding consent to an assignment of a farmout agreement are not material and, therefore, may not be supplemented by implication of "reasonable" terms.

One of the first maxims taught in contracts courses is if an agreement omits *material* specifics, a reasonable term will be implied. The question here is whether the specifics about withholding consent were material. Writing for a 5:4 majority, Justice Green reasoned that the farmout was sufficiently specific even though it did not state when or some

---

[2] 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.

[3] From "Uncle John's Band." The Grateful Dead, *Workingman's Dead* (Warner Bros. 1970).

details about the manner in which that consent must be expressed. The essence – i.e., the material part – of the consent clause *was* specific: Barrow needed Carrizo's written consent to assign. Because other terms concerning consent were immaterial, the court was not permitted to imply "reasonable" terms by that were omitted from the farmout.

Parol Evidence Rule bars extrinsic evidence such as prior negotiations and "surrounding circumstances" about an unambiguous agreement.

According to the majority, the farmout's consent clause unambiguously freed Carrizo from any strictures about why it could withhold consent. Due to this lack of ambiguity, the parol evidence rule barred extrinsic evidence of prior or contemporaneous agreements. Evidence about circumstances surrounding negotiations, however, may be considered notwithstanding the parol evidence rule to inform the context for the contract's creation and the parties' mutual understanding about what the agreement meant. However, when the agreement is deemed absolute and unequivocal, surrounding circumstances cannot be used to vary its meaning.

Industry custom and usage may only be admitted to resolve an "ambiguity," not create one.

The majority applied the same reasoning to the rejection of evidence concerning industry custom and usage. It cannot be admitted to vary unambiguous terms. But the majority nonetheless acknowledges that, much like persons speaking a particular dialect, parties to a contract may have a specific understanding of what a word or phrase may mean, persons in a particular industry are likely to understand terms according to any particular meaning common in that industry. (E. g., "pig" would have a very different meaning to a pipeline operator than a farmer). The majority sidesteps this chicken-and-egg problem by declaring that the plain language of the agreement unconditionally allowed consent to be withheld for any reason. It accepts at face value that the right to consent clause in the farmout could only mean consent could be withheld for *any* reason, regardless of general understandings in the industry. Based on that determination, the majority disallows evidence of industry custom and usage about consenting to assignments. The majority emphasized that including an express written consent requirement, the parties eliminated the possibility of an implied right to withhold consent for any grounds, reasonable or otherwise.

Disallowing evidence of trade custom evidence justified by the Restatement and freedom of contract.

The majority bolsters its decision by noting that the Restatement (Second) of Contracts only allows resort to custom and usage when the court could imply reasonable terms for an omitted term essential to the enforceability of the agreement. It also justifies its decision because evidence of trade usage and custom presents a fact question the jury might use to deviate from the objective meaning of the agreement when that meaning should be resolved by the court as a question of law. Texas's "strong policy" favoring freedom of contract and judicial hostility to alienation restraints as evidenced in decisions concerning mineral interest leases, the majority urges, does not permit altering the objectively clear terms of the consent clause. If the parties had intended to limit the grounds for withholding consent to those customary in the industry or otherwise, they should say so in the agreement.

The consent clause granted a right to withhold consent for any *reason, reasonable or otherwise.*

The consent clause gave Carrizo the unqualified right to withhold consent to an assignment for any reason. Therefore, the majority ruled, it could not, as a matter of law, have breached the farmout agreement by exercising that right even if its exercise had been extraordinary in the oil and gas industry. Allowing the jury to hear expert testimony about such customs was inappropriate. There was "No issue for the jury to decide" concerning interpretation of the consent clause or whether Carrizo breached the farmout by withholding it consent.

Reliance on prior oral promises contrary to the later finalized terms of the agreement cannot be reasonable and will not support recovery for fraud even when the terminology of the representation and the contract are not exactly the same.

In addition to breach of contract, Carrizo also asserted fraud claims against Barrow based on Carrizo's assurances during negotiations that it would "work with" Barrow, promised that "consent would not be a problem," and that consent was "just a formality" that would not prevent an assignment. The majority ruled that in an arm's-length transaction, a representation that contradicts the terms of a written agreement could not be reasonably relied upon as necessary to support a fraud claim. In doing so, it abandoned the "requirement that the contract and extra-contractual

representation to use precisely the same terms" for a contradiction to be sufficiently "direct." Instead, a direct contradiction occurs "even when the terminology appearing in the representation and the writing are not exactly the same." The majority concluded that Carrizo's representations met this standard and, therefore, Barrows-Shaver could not have reasonably relied on them. Even without a direct contradiction, reliance may be unreasonable if there are enough "red flags" against doing so in light of both parties' extensive experience in the oil and gas industry and their full appreciation of the meaning of the consent clause and Carrizo's ability to change its mind. For this reason, the majority denied recovery for fraud.

The Guzman Dissent

Justice Guzman, joined by Chief Justice Hecht and Justice Busby, and dissenting opinion concerning the breach-of-contract claim (the "Guzman opinion") that charges the majority with "muddl[ing]" the two essential precursors to whether reasonableness can be implied. According to the Guzman opinion, the majority's faulty analysis on these issues leads to an erroneous refusal to consider trade usage and thereby upset settled expectations in the oil and gas industry.

Insists that trade usage should be considered regardless of whether a provision is vague or ambiguous.

The Guzman opinion rejects as "manifestly wrong" the majority's premise that resort to trade usage is only appropriate when the contract is ambiguous. It points to numerous decisions that apply trade usage to specific and definite terms to show that the parties were using terms that were virtually universally understood in a given industry to mean something other than the dictionary definition; e.g., a baker's "dozen" means thirteen, not twelve, in the baking industry. The Guzman opinion reasons that if trade usage can be considered to vary something as specific as a number, it can also be used to vary the meaning of words like "consent" with less specific common definitions. When usage in a particular trade is shown to be well-established, resort to it does not, as the majority ruled, vary the terms of the agreement. Instead it simply illuminates what the parties must have understood and objectively assented.

Unnecessary to explicitly reference trade usage to allow its consideration because trade usage is part of the parties' objective intent.

Accordingly, the Guzman opinion asserts that the majority incorrectly concluded that it was necessary for the consent clause to say affirmatively that consent could not be withheld unreasonably because that proviso was included through trade usage that the majority refused to consider. The Guzman opinion considered trade usage that consent could not be withheld unreasonably sufficiently established by expert testimony to support the jury's finding that Carrizo breached the consent clause.

Evidence of prior negotiations could not be considered for any *reason, not even to confirm the parties' intent not to include any restrictions on the right to withhold consent.*

The Guzman opinion also chides the majority and Justice Boyd's separate dissent for the way they handled evidence of prior negotiations and the circumstances surrounding the contract formation. The majority complied with the parol evidence rule by not allowing the evidence of prior negotiations to *change* the plain meaning of the agreement, but considered parol evidence to *confirm* that the parties had not agreed to any restrictions on the right to withhold consent, including those based on trade usage. According to the Guzman dissent, consideration of parol evidence of the parties' *subjective* intent is not appropriate for consideration under the parol evidence rule and such evidence would have no probative value because it was equally plausible to infer from that evidence that they intended to include a reasonableness requirement as it was that they intended to exclude it. The Guzman dissent further proposed placing the burden on the party opposing consideration of trade usage to show that the agreement was drafted in a manner that prohibited it instead of permitting it as the majority held.

Implying a reasonableness restriction on the right to withhold consent based on trade usage and understanding of consent clauses is not a judicial re-writing of the agreement.

The Guzman dissent points out that incorporating trade usage in the interpretation of agreements is not the judicial imposition of a reasonableness requirement. The reasonableness requirement is the product of what the parties to the

agreement objectively intended by using a consent clause for which customary usage in the industry was understood to include a reasonableness restriction. In other words, based on the Restatement (Second) of Contracts' disparate treatment of judicially implied reasonableness requirements ant those required by trade custom, the *industry*'s reasonableness requirement is one that the parties themselves objectively imposed without need for overt expression. The Guzman dissent deems as "groundless hysteria" the majority's concern that allowing consideration of trade custom and usage would lead to subjecting every contract term to jury interpretation.

The majority's reasoning frustrates public policy encouraging the development of oil and gas resources.

The Guzman dissent points out that the majority's decision nullifies the *raison d'etre* of farmouts: to bring in parties with innovative ideas and capabilities to succeed in drilling operations where others have not. According to the Guzman dissent, the majority's decision authorized conduct the jury deemed unreasonable and fraudulent to cause Carrizo to block further development of the lease if it did not receive a $5 million payment. As a result of this unfulfilled demand, the lease was allowed to terminate leaving it undeveloped notwithstanding public policy to encourage oil and gas exploration. The Guzman dissent asserts that the majority reasoning invites such holdouts which frustrate this objective.

The majority's rejoinder

The majority responded that the approach in Guzman's dissent discouraged oil and gas development. They posit the person granting the farmout is vitally interested in assuring the driller is skilled and responsible. The majority insists that requiring the grantor to reasonably explain why consent was being withheld would hamstring the grantor's evaluation of the driller.

The majority also bristled at the suggestion it allowed Carrizo to "extort" a multimillion dollar payment while the lease term approached expiration. They counter that Carrizo offered to sell its interest to Barrow, which would have obviated the need for Carrizo's consent.

For this court, that's pretty spicy stuff.

The majority's rejoinder lacks logical consistency, however. If the grantor has reason to doubt the skill and reliability of the driller, that alone satisfies any reasonableness requirement. Genuine doubts whether the driller is skilled and responsible reasonably explain withholding consent. Otherwise, the party insisting on consent would be excused from proving the absence of any legitimate basis for withholding it. Doing so would undermine the grantor's legitimate interest in lawfully preserving the maximum value of its interest.

The Boyd dissent

Justice Boyd dissented separately to assert that parties in the same trade or industry presumably contract using the particular meaning of terms that trade or industry when those meanings differ from common usage. However, he disagrees the trial court properly excluded evidence about the parties' negotiations. He maintains that evidence showed the parties explicitly disagreed about including a reasonableness limitation. For Justice Boyd, that was inconsistent with any presumption favoring trade meaning. Justice Boyd deemed this evidence part of the "surrounding circumstances" essential to deciding whether the parties intended to contract in accordance with particularized trade or industry usage. Boyd argues Carrizo was entitled to adduce evidence of the negotiations to rebut Barrow's suggestion that the contract included the alleged "custom" and "practice" about withholding consent. Further, Justice Boyd would have remanded the case for retrial so that the jury could consider that evidence in resolving the custom and practice issue.

The practical takeaway

If the majority opinion withstands rehearing, *Barrow* makes clear drafters may no longer assume industry jargon will be given an industry-specific meaning when the word or phrase also has a different, commonly understood meaning outside that trade or industry. If the industry-specific definition is intended, that intent must be explicit even if the trade meaning is nearly universal in that business. Drafters may no longer assume courts will imply trade customs and definitions to contract terms.

Barrow's majority opinion suggests the meaning understood commonly by the general public, not industry participants, will be the bedrock for interpreting contracts that do not expressly specify special meanings and understandings of a particular trade or industry. If so, does the plain-meaning rule override trade usage so that applying the latter by implication is no longer permissible? When in doubt, spell it out.

"It ain't over 'til it's over."[4]

Motions for rehearing were due August 28. The majority opinion reflects how deep the inroads Scalia and Garner's "Reading Law" has made on Texas contract interpretation. Curiously, Barrow hired Mr. Garner as its lead counsel on rehearing. Presumably, Mr. Garner will be arguing the majority took the "Reading Law" approach a step too far to override particularized industry usage with "plain meaning." Ironic, no?

Questions to lookout for on rehearing are ones undecided in the original opinion. Does it matter the particular term – e.g., "unreasonably withheld" – is not readily identifiable as one that is industry specific? Does that alone defeat adoption of trade meaning? Will it create an ambiguity for the jury to resolve? Stay tuned.

***Disability-Based Discrimination*: A facility is "public" and subject to state anti-disability discrimination law if the public is invited to the facility for the opportunity to obtain services for which they ultimately do not qualify for reasons that are not disability-based or that are based on the creation of an undue burden or directly threaten health and safety.**

In *Silguero v. CSL Plasma, Inc.*, Justice Green writing for a unanimous court answered two certified questions from the Fifth Circuit to aid its resolution of a state-law discrimination claim. Texas Human Resources Code ("THRC") §121.003 provides "[p]ersons with disabilities have the same right as persons without disabilities to the full use and enjoyment of" and "may [not] be denied admittance to any public facility in the state because of … disability." In Silguero, two persons with disabilities prohibited from donating plasma sued for discrimination under the THRC.

In response to the Fifth Circuit's certified questions, the court held the plasma collection center is a "public facility" for purposes of the THRC, but that a plasma collection center may refuse donations from a disabled person the opportunity to donate plasma without liability if (1) the refusal is not statutorily impermissible discrimination or (2) falls within an exception to the discrimination proscribed.

Plasma donation centers are a "public facility."

A plasma donation center is a public facility to which the THRC's discrimination prohibitions because "public facility" is defined to include, among other things, "a … commercial establishment … to which the general public is invited." The question was whether the facility could be deemed "public" simply because the general public was invited to enter for screening purposes or was it non-public because only those who passed the donation screening were allowed to donate? The court ruled that plasma donation centers were public facilities even though privately owned because they invite the general public into the facility to participate in the screening process, which maximizes the commercial collecting and processing blood plasma. It is not necessary to under the THRC to be publicly owned or be a place of "public accommodation" necessary for application of the THRC's federal analog – the Americans with Disabilities Act. The process of winnowing the applicants to determine who may be donors does not undercut the public invitation that makes is a "public facility" for purposes of the THRC.

The court then turns its attention to whether refusing to accept donations from the plaintiffs is disability-based discrimination proscribed by the THRC. One of the plaintiffs alleged she was not permitted to donate because she needed a service animal to address her "serious anxiety" issues. The plasma donation center claimed that it disqualified her because of safety concerns about the consequences if she suffered an anxiety attack while donating. The other plaintiff alleged he was disqualified as a donor because he had "bad knees" that required use of a cane. The donation center claimed that he was not allowed to donate because of worries about his ability to get on and out of the donation bed.

[4] Philosophical hero and master of wisdom and insight: the late, great Yogi Bera.

The discrimination is not impermissible under the THRC if the necessary accommodation was subject to defense under the ADA because it posed a direct health or safety threat, imposed an undue burden or an alteration of the criteria for eligibility for the services provided.

THRC §121.003(a) grants "[p]ersons with disabilities have the same right as persons without disabilities to the full use and enjoyment of any public facility in the state." The THRC specifically recognizes no exceptions to this general rule, but the court rules that the context of this prohibition is largely limited to pretextual restrictions thanks to the references to "ruse" and "subterfuge" when defining prohibited discrimination.

It does not, however, prohibit "certain acceptable, legitimate reasons for which a public facility may deprive persons with disabilities of full use or enjoyment of a public facility." The court reached this conclusion in part from the legislative directive that only "reasonable accommodations" for making use the facility were required. It inferred that there was no obligation to make accommodations that were *un*reasonable. The court also resorted to interpretations of the federal ADA notwithstanding substantial differences in statutory language due to similarities in the structure of the state and federal anti-discrimination statutes. It found especially convincing the exception in federal law for discriminatory criteria that is necessary for providing the services offered. Under the federal ADA, the provider cannot be required under the guise of anti-discrimination to offer accommodations that would change the nature of the services provided, which impose an "undue burden," or which threaten direct threat or significant risk to other's health, safety or welfare.

The court imports these ADA standards into the THRC and holds that "a defendant will not be liable … under the THRC when allowing a person with a disability to participate in or use the defendant's services or facilities would pose a direct threat to the health or safety of others." "[A] a defense or exception that would excuse a defendant from discrimination liability under the ADA—whether it be because of a direct threat, undue burden, fundamental alteration, or necessity of eligibility criteria—would also exclude a public facility defendant from liability under the THRC. The court concludes that

> exclusion of a person with a disability from full use and enjoyment of a public facility, including services provided at the public facility, *does not run afoul of the THRC's broad discrimination prohibition* in section 121.003(a) when: (1) the defendant's conduct *does not meet the* [THRC's] *definition of* "*discrimination*" … or *satisfies an exception*, such as … allow[ing] a defendant to … exclude persons with disabilities … when such [screening] criteria are … necessary for the provision of services; *or* (2) the defendant establishes … *full use and enjoyment of the public facility would pose a direct threat to the health or safety of others*.

(Emphasis added).

***Sovereign Immunity*: The Tort Claims Act waives immunity for injuries caused by the use of tangible personal property even if the decision to use it was based on a professional judgment for which immunity would not otherwise have been waived.**

***Proximate causation*: Awareness of the risk of harm was sufficient to show proximate causation, even if the resulting harm was not predictable.**

M. D. Anderson is part of the University of Texas system. Its patient had a rare cancer. She agreed to experimental treatment in a double-blind protocol that called for the random selection between two cancer-fighting chemotherapy drugs to be used in a surgical procedure that delivered the drugs in a solution circulated through the peritoneum. One allowed the use of a saline solution as the delivery medium. For the other, only a dextrose solution was allowed.
The medication randomly-selected in this case required the dextrose solution. It came with a manufacturer's warning that a saline solution delivery medium was "incompatible" and should not be used.

One of the known risks of using dextrose solution was that it could cause electrolyte imbalance. This imbalance could cause serious side effects but those had not previously been fatal. The hospital sought to prevent an electrolyte imbalance by administering saline solutions during the procedure. The patient died from swelling of the brain as a result of an electrolyte imbalance. After the patient's demise and consultations with the experiment's conductor and the hospital, the manufacturer determined that its medication could have been used with a saline solution after all.

The decedent's family sued the hospital for alleged negligence in using dextrose instead of saline. They did not dispute that the procedure was performed correctly according to the protocol. Rather, they claimed the hospital was negligent for using dextrose rather than saline because of the risk of harm from an electrolyte imbalance. Under the Texas Tort Claims Act ("TCA"), sovereign immunity is waived for, among other things, "personal injury and death … caused by a condition or use of tangible personal … property if the governmental unit would, were it a private person, be liable to the claimant…." The hospital asserted it retained sovereign immunity because: (1) its alleged liability arose from an exercise of medical judgment, for which immunity remained, not the use of tangible personal property for which immunity had been waived; and (2) the patient's death from using the dextrose solution was not foreseeable and therefore not a proximate cause necessary to establish liability but for any sovereign immunity.

The holdings

In an opinion for a 5:3 majority authored by Justice Lehrmann, the court held in University of Texas M. D. Anderson Cancer Center v. McKenzie that the TCA waived the hospital's sovereign immunity because of the decision to perform the procedure that was believed at the time to require use of the dextrose solution. It rejected the hospital's argument the TCA only waived immunity for claims based on the manner of use, not the medical go-no go judgment on the performing the surgery. The majority also ruled that the decision to use the dextrose solution was a sufficient claim of proximate causation to be within the TCA's sovereign immunity waiver.

Use of tangible personal property v. medical judgment

The majority adhered to the court's oft-pledged allegiance to plain statutory language to reject the hospitals attempt to distinguish medical judgment from use. It relies on decisions that "use" in the context of the TCA's immunity waiver means "to employ for or apply to a given purpose." The majority was unmoved by the hospital's contention that the statute should be interpreted to supply an exception for matters of medical judgment. It explained the hospital relied on a decision that concerned injury allegedly caused by failure to use an alternate form of medication or an erroneous medical decision, not harm from the form of medication actually used. An alleged failure to use tangible property is not tantamount to the alleged misuse of tangible property necessary to fall within the TCA's waiver of immunity.

The majority also attempted to "distinguish" a refusal to find a waiver of immunity when a doctor erroneously diagnosed an organ cancerous and removed it because, it urged, the instrumentality of injury was an the error in medical judgment, not the use of the instruments to remove the organ. The majority justified that conclusion because loss of the organ was inevitable, no matter the instrumentality used. Here, the majority ruled, the injury was alleged to have been caused by the instrumentality – that is, the dextrose solution – itself.

The attempt to treat the misdiagnosis of cancer as an error for which immunity was not waived because it involved no injury-causing use of tangible property is undermined by the immediately following case analysis in which the court further pointed to a decision finding immunity waived when a patient suffered injury from an attempted suicide after treatment contraindicated medication. It explained that medical misjudgment was at the root of the events leading to injury, but use of the medication was essential to the chain of injury causation. Mere "involvement" is not enough.

It is difficult to understand, however, how the surgical instruments used to remove an organ as a result of misdiagnosis are different in kind from a contra-indicated medication in the waiver-of-immunity analysis. Both surgical instrument and misapplied medication are tangible personal property. Both were alleged instrumentalities causing the harm complained of. On its face, both would seem to satisfy the "use of tangible personal property" needed for the waiver of immunity.

The dissent believes the use of tangible property was merely incidental and that the alleged fault was in the medical judgment to perform the procedure, a liability for which the TCA does not waive immunity.

According to Chief Justice Hecht's dissent in which Justices Green and Brown joined, the majority's "decision runs counter to the Court's [previous] decisions that the [TCA's] waiver of immunity is limited." The dissent insisted the TCA only waived immunity for injuries involving the use of tangible personal property when the manner of its use was negligent or wrongful. The dissent traces the interpretive history of the TCA to demonstrate its evolution. Initially,

courts found immunity was waived nearly any time tangible property was involved in the injurious event. Over time, however, the judiciary resolved that a waiver of immunity should be clear and unequivocal. As a result, waivers were increasingly restricted to when the use of tangible personal property caused the injury, not just its setting. The Legislature later codified this standard in §311.034 of the Government Code.

The dissent also rejects the majority's single-factor distinction between a "use" that results in a waiver and a "non-use" of property that does not waive immunity. The dissent agrees that non-use of tangible personalty is not within the TCA's sovereign immunity waiver. But it goes further and asserts that prior decisions mandate the preservation of sovereign immunity if the injurious event was the result of an exercise of medical judgment instead of the result of negligence in the manner in which tangible personalty was used. Although the dissent acknowledged that the dextrose solution was an instrument of harm, its harm was the result of the decision to use the experimental procedure at all because, at the time, using any other solution as a delivery medium was not an option. The dissent especially challenged as inconsistent the majority's attempt to distinguish the cancer misdiagnosis and similar cases because they and the present case both involved the use of tangible personalty.

The dissenters aptly summarize their dispute with the majority as follows. "[U]sing property in treatment improperly is a negligent use for which the Act waives immunity, while choosing an improper treatment that involves the use of property is not…."

The majority's response to the dissent

The majority was unconvinced by the hospital's and the dissent's assertions that allowing immunity waiver for the consequences of mistaken medical judgments would expand government's exposure to health care liability claims under the TCA. The majority chastises the dissent's rationale of the that would exclude errors in medical judgment from waiver under the TCA because they deem it an overly broad reading of the cases and without foundation in the statutory text. No matter the relative persuasiveness of the majority's treatment of past decisions, it makes clear that an error in medical judgment does not avoid waiver if the use of tangible personal property is a necessary part of the chain of injury causation.

Foreseeability and proximate causation requires a probability of harm, not mere known possibility.

To be within the TCA's immunity waiver, there must be at least prima facie evidence the use of the tangible personal property allegedly proximately caused the injury in question. In reaching this conclusion, they relied on expert testimony that the patient's death was foreseeable result of using the dextrose solution, but it presented a risk of severe permanent neurological injury. The evidence showed that electrolyte imbalance and resulting swelling of the brain were known risks of using a dextrose solution as a medium for the chemotherapy and as a post treatment lavage. Moreover, the attempt to avoid an electrolyte imbalance by the administration of a saline solution during the procedure showed that the doctors were aware of and tried to avoid that risk.
For the majority, that was enough to establish that use of a dextrose solution was a proximate cause of the patient's cerebral herniation.

The dissent believes expert testimony established no more than a possibility, not a probability, of harm.

The dissent seized on what the testimony did not show: that neurological injury was a *probable* consequence of using the dextrose solution. According to the dissent, the TCA requires more than a mere risk that the conduct in question caused harm. To be foreseeable, the defense asserts, the harmful outcome must be *probable*, not merely possible, to establish the foreseeability essential to *proximate* causation. The dissent points out all surgery involves risks and that no one criticized the determination that the decedent was a good candidate for the experimental procedure. The dissenters reject the majority's notion that there could be differing standards for the proximate causation required to waive sovereign immunity and the that necessary to establish tort liability. The dissent cautions that the majority's decisions concerning both interpretation of the TCA and the standard applied to determine foreseeability for purposes of proximate causation "departs … from our caselaw and strikes all healthcare providers, government and private alike, a heavy blow."

The majority upheld the ruling that sovereign immunity had been waived and remand. In this writer's opinion, the real dispute between the majority and the dissent is not over the definition of foreseeability, but rather over balancing of risks. Here, electrolyte imbalance and of resulting cerebral edema had to be weighed against the risk of foregoing the surgery and pursuing other treatment. From the opinions, this does not appear to have been presented in the evidence adduced at trial.