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Supreme Court of Texas.
Evanston Insurance Co.

v.
Legacy of Life Inc.
No. 11-0519.

January 12, 2012.

Appearances:

Marc J. Wojciechowski of Wojciechowski & Associates, PC, for Appellant.

Miguel Villarreal, Jr. of Gunn, Lee & Cave, P.C., for Appellee.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 11- 0519, Evanston Insurance Co. v. Legacy of Life Inc.

MARSHAL: May it please the Court, Mr. Wojciechowski will present argument for the Appellant.

ORAL ARGUMENT OF MARC J. WOJCIECHOWSKI ON BEHALF OF THE PETITIONER

ATTORNEY MARC J. WOJCIECHOWSKI: Good morning and may it please the Court, holding that pure mental anguish not attended to any personal injury or physical injury to the human body falls within the definition of personal injury and the policy of insurance that we're construing here today would require this Court to directly overrule it's 1997 decision in Trinity Universal. It would be contrary to rules of proper grammatical construction and violative of many axioms of insurance policy interpretation. Likewise, holding that human body parts remains, tissues and organs are mere property would require this Court to circumvent, overrule and be contrary to over 100 years of Texas common law-

JUSTICE DAVID M. MEDINA: Well, they certainly appear to have used this property here when there's so and give the appearance that you're going to donate these organs and they turn around and sell them as you would property, what is it then?

ATTORNEY MARC J. WOJCIECHOWSKI: Well, no, it's, the law, the common law historically has struggled with this and the evolution of the common law was this. At common law, human remains were not considered

property. As society developed, the law recognized the severe emotional distress and mental anguish that maybe caused to the living when their loved ones' remains were desiccated, were lost or damaged in some way and-

JUSTICE DON R. WILLET: You mentioned we have to overrule necessarily Trinity from 15 years ago. Trinity, of course, involved a policy that used a term bodily injury and, of course, this policy uses a different term, personal injury and I wonder whether you see any distinction, any meaningful distinction between those two.

ATTORNEY MARC J. WOJCIECHOWSKI: No, because if you look at the Provident Life case from this Court in 2003, what this Court said was you take the definition of the terms and this is where the water has been muddied in this case. If you look at the definition of bodily injury in Trinity Universal and you look at the definition of personal injury in this policy, they're virtually identical. In Trinity Universal, bodily injury was defined as bodily harm, sickness or disease. In the Evanston policy, personal injury is defined as bodily injury, sickness or disease and when this Court in Trinity Universal interpreted the definition, what it did was it said the word bodily that appeared before the word harm as an adjective modifying that noun that it not only modified the word harm, it modified the word sickness. It modified the word disease.

JUSTICE DON R. WILLET: You don't read the word personal as a term that is necessarily broader than the word, bodily.

ATTORNEY MARC J. WOJCIECHOWSKI: Not in the context of this policy. In the general legal sense, personal injuries are broader than bodily injuries, but in this case, we have a definition of the term personal injury and despite how much more reasonable an outside definition may be, Provident Life instructs us that we cannot go outside the policy definition if the policy defines the terms and the reason why the term bodily modifies injury, sickness or disease has been explained by this Court in statutory construction in two cases, the Osterberg case from 2000 interpreted the election code. The McIntyre v. Ramirez case in 2003 interpreted the Good Samaritan statute and what this Court said is when you have either an adjective or an adverb in a string of respectively nouns or verbs with a disjunctive, such as the word or, the adjective or adverb that begins the string modifies the noun or the verb all of them in that string and that is consistent with the way the court analyzed the phrase bodily harm, excuse me, bodily injury in Trinity Universal. It did not go into the reasons why, but it cited the cases of E-Z Loader and Knapp v. Eagle and those cases said that the modifying adjective at the beginning of the string that appeared before the word harm, sickness or disease modified all three words and that's what E-Z Loader and Knapp said, the two cases this Court relied up in Trinity Universal.

JUSTICE DAVID M. MEDINA: You're telling me about the property. You're going into that. Would you mind finishing that part.

ATTORNEY MARC J. WOJCIECHOWSKI: Sure and I got disrupted by Justice Willett. Justice Medina, going back to the evolution of how human remains have been considered in the common law, I got up to the point where the law then recognized that if human remains were desecrated in any ways mutilated or lost or used wrongfully, it could cause severe mental anguish to a loved one so the law created this fiction and Prosser talks about it Prosser on torts that it was virtually evolved out of thin air. We are going to create a right to redress this wrong, but you look at the cases that are cited in my brief from different jurisdictions and the most instructive case, I think, on this is the Carpachi case out of Wisconsin, a 1980 case, and it talks about it that the recovery for these mental anguish is not based upon property law. It's based upon a personal right, not a property law right.

JUSTICE EVA M. GUZMAN: Do the advances in technology impact how we should view organs? In the past, you couldn't store them, reuse them and I'm wondering if they are still quasi property as we held so long ago or if we should look to current understandings of what property is because of technological advances and how they're handled.

ATTORNEY MARC J. WOJCIECHOWSKI: Justice Guzman, I do not believe that is the case. If you look at

the evolution of technology and medical advancements, as Legacy of Life cited in their brief, since 1957, that was, I think, the first liver transplantation that occurred that was successful and then the technology medical advancements seemed to evolve very quickly after that. We have no less than 12, 15, possibly 20 cases decided on this issue and no court has gone astray to do that and for good reason. The common law is the law of the state of Texas and the common law is the law of other states unless abrogated, limited or expanded by the Legislature and the Legislature has spoken to the extent of how far it may want to expand or limit the common law when it comes to human remains.

JUSTICE EVA M. GUZMAN: Here's why I was asking you. There are now facilities that store different tissues and organs and what have you. Do you provide coverage to those facilities, property coverage in the event of a fire or hurricane or something that would damage everything in the building?

ATTORNEY MARC J. WOJCIECHOWSKI: Well under this particular policy this was--

JUSTICE EVA M. GUZMAN: Well, no, but in hypothetical, do you provide coverage to those types of facilities?

ATTORNEY MARC J. WOJCIECHOWSKI: It would not under this--

JUSTICE EVA M. GUZMAN: Property damage.

ATTORNEY MARC J. WOJCIECHOWSKI: Not under this policy because this is a general liability and professional--

JUSTICE PHIL JOHNSON: How about under a property?

ATTORNEY MARC J. WOJCIECHOWSKI: Under a commercial property policy, I would not know, but I will tell you this that there are special policies that are out there that are issued to funeral homes and that are issued to facilities such as this that provide the specific coverage to redress, provide coverage for such claims as the one we're talking up here.

JUSTICE EVA M. GUZMAN: They classify organs as property in those types of policies.

ATTORNEY MARC J. WOJCIECHOWSKI: I do not know if they do or they do not. I think one would have to look at Miller's annotated policies to look at the various policy forms to determine what it did, but then that would go to getting back to Trinity Universal, if you give a definition of property, then you wouldn't have to look to the common law or to statutes. You'd have to stay within the policy and, therefore, hence it would be covered because you're paying for that coverage.

JUSTICE PAUL W. GREEN: Under this liability policy then, it would probably be covered if, for example, the Legacy had, say there was an heirloom bracelet that was on the woman's body and it was taken by an employee and sold and the suit was filed to recover the loss of this heirloom and the value and whatever inherent value might have been. That would be covered under the policy, I assume?

ATTORNEY MARC J. WOJCIECHOWSKI: It absolutely would because there's no question that the heirloom bracelet is both tangible and it is property.

JUSTICE PAUL W. GREEN: Okay now my question is what about a situation where the insured treats something as property. In this particular instance, the body parts are treated as property because then they're taken and sold for a profit. Just like the bracelet would have been. Why wouldn't that then fall under the allegation, the pleading, the use of these parts as property, why wouldn't that then fall within the definition?

ATTORNEY MARC J. WOJCIECHOWSKI: Well, that's the 5th Circuit when it considered this case originally, before it certified the two questions to this Honorable Court, spent some time discussing that and its opinion and I'll briefly say that the reason being it is not how the parties classify the object. It is up to the court to make the determination of whether the object is or is not property and the 5th Circuit in that instant relied up this Court's opinion in *National Union v. Merchants Fast Motor Lines*, which was a 1997 decision, which says you look at the factual allegations and not the legal conclusions so if--

JUSTICE PAUL W. GREEN: But the factual allegations are that it was treated as property.

ATTORNEY MARC J. WOJCIECHOWSKI: The factual allegations in this underlying dispute was that there were tissues, organs, corneas and other human remains that were misused. Then they jumped down into the legal allegations and called them property.

JUSTICE PAUL W. GREEN: Well but the misuse in the sense that they were treated as having some value because obviously they were sold.

ATTORNEY MARC J. WOJCIECHOWSKI: Oh, the reason that you would treat something as something else does not necessarily make it that. If they treated it as property, that does not necessarily make it property.

JUSTICE DON R. WILLET: Well you can see there's a, today in modern society, there's a in the traditional sense of the word, a market for tissue for human tissue and organ procurement and the dynamics are changing at warp speed. You would agree there's a market for this procurement.

ATTORNEY MARC J. WOJCIECHOWSKI: There is definitely a market and that's why the Legislature is one of 38 states and the District of Columbia to adopt the revised Uniform Anatomical Gift Act and the reason the Legislature had to adopt that act is to allow for this process of transplantation to occur because under the common law, you couldn't get, you couldn't convey, you couldn't sell. In fact, today, you cannot sell the revised Uniform Anatomical Gift Act makes it illegal. The penal code makes it illegal to sell or transfer. The penal code makes it illegal to dispose of human remains in certain ways. What the Legislature has done is it has taken upon itself to revise the common law of the state to a very limited extent and create this act to allow for this type of disposition. Interestingly enough, you look at the revised Uniform Anatomical Gift Act, which is many, many pages and hundreds of sentences and paragraphs and not once does it use the word property to describe human remains.

JUSTICE DON R. WILLET: If we have a sort of a traditional market in modern society for body parts, I mean wouldn't it be a natural kind of by-product to allow people to control what happens to, I guess, property that enters the stream of that market.

ATTORNEY MARC J. WOJCIECHOWSKI: It would be a natural by-product to control it to the extent that the Legislature would allow it to be controlled. The Legislature is the one who must speak on this issue because the common law in this state as you go back as in every case I have found says, the rights that you have in the remains of others is purely the right to see that they get a proper internment and a proper burial. That is the only common law right that exists and that is based upon a personal property right and not a property right.

JUSTICE EVA M. GUZMAN: Can you --

ATTORNEY MARC J. WOJCIECHOWSKI: Property is not the --

JUSTICE EVA M. GUZMAN: Go ahead. I'm sorry.

ATTORNEY MARC J. WOJCIECHOWSKI: Property is not the object itself. Property is the bundle of rights that the law vests in one over the domination of that object and the law as it stands today in the state of Texas

and in every other jurisdiction is that you have a very limited right of internment, save and except under the revised Uniform Anatomical Gift Act, we're going to give a person a couple of more additional rights to get their remains, but we are not going to take each one of the sticks, put them in a bundle and vest all of those rights in human remains so that they can be property.

JUSTICE EVA M. GUZMAN: Can you own or possess, I'm sorry, Mr. Chief Justice.

CHIEF JUSTICE WALLACE B. JEFFERSON: No, go ahead, please.

JUSTICE EVA M. GUZMAN: Can you own or possess property of organs, I'm sorry, organs?

ATTORNEY MARC J. WOJCIECHOWSKI: You can own or possess property, but--

JUSTICE EVA M. GUZMAN: Organs.

ATTORNEY MARC J. WOJCIECHOWSKI: You cannot own or possess organs, tissues, corneas or remains.

JUSTICE EVA M. GUZMAN: What if I decide to donate my kidney and it's, I'm here, I just donate my kidney and it is damaged, it is stored somewhere for transplant and damaged at that facility. Do I have an ownership interest in that kidney that I'm still here.

ATTORNEY MARC J. WOJCIECHOWSKI: I would say no.

JUSTICE EVA M. GUZMAN: Okay.

ATTORNEY MARC J. WOJCIECHOWSKI: And that was very closely addressed in that New York case that I cited in my reply brief. Yes, Chief Justice.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel.

ATTORNEY MARC J. WOJCIECHOWSKI: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument from the Appellee.

MARSHAL: May it please the Court, Mr. Villarreal will present argument for the Appellee.

ORAL ARGUMENT OF MIGUEL VILLARREAL, JR. ON BEHALF OF THE RESPONDENT

ATTORNEY MIGUEL VILLARREAL, JR.: Good morning, may it please the Court. I just wanted to clarify one thing and there's been comments here that human tissue, organs, body parts are clearly there's a prohibition on the selling of those items and that's by statute and so what my client is involved in is in selling the services that go along with the procurement of those tissues, transporting those tissues over to an organization that will then process it, test it, manipulate it, analyze it and then so that's where the any money if there is any money to be made is made on the services and not on the actual selling.

JUSTICE DAVID M. MEDINA: Justice Guzman asked a great question.

ATTORNEY MIGUEL VILLARREAL, JR.: Yes, sir.

JUSTICE DAVID M. MEDINA: And that is whether you have insurance to protect for a potential loss of those tissues and organs and the procurement of those organs so from wherever you have them stored. Is there insurance to cover that loss?

ATTORNEY MIGUEL VILLARREAL, JR.: I have not seen one. That doesn't mean that there isn't one. There's insurance for various things. I'm sure there's an insurance company that would cover that. I personally do not know of one, Your Honor.

JUSTICE PHIL JOHNSON: Well if you, let's assume for a moment there would be someone who would write a policy. You can only write a policy for something in which the insured has insurable interest typically.

ATTORNEY MIGUEL VILLARREAL, JR.: Correct.

JUSTICE PHIL JOHNSON: So would you then have insurable interest in the organ or would you have insurable interest in the expenditures that you had made in processing the organ? If we think about what it is that you would be insuring if you were to take out that type policy.

ATTORNEY MIGUEL VILLARREAL, JR.: Well I believe it was Justice Guzman who had asked whether or not storage facilities if they were to lose samples of tissue, would that be covered under an insurance policy. My suspicion is that in that situation, it would be covered because the organization's business

JUSTICE PHIL JOHNSON: What would be covered?

ATTORNEY MIGUEL VILLARREAL, JR.: The loss of those tissues.

JUSTICE PHIL JOHNSON: And how much would those tissues, how would they be valued?

ATTORNEY MIGUEL VILLARREAL, JR.: It would depend on how the insurance company or even the organization would value those tissues. There would be some value associated with the services that are surrounding those tissue to determine what type of loss would need to be covered in that instance.

JUSTICE PHIL JOHNSON: Let me go a little further. Let's assume that someone can transfer and let me ask you this question, does someone who makes the donation to your client transfer the right to control those organs or what is it that they actually transfer to your client?

ATTORNEY MIGUEL VILLARREAL, JR.: That's a good question and that's exactly what happens when the donor of the decedent or the individual who's providing the consent to the decedent's tissues gives that consent. It then allows for my client to go and recover those tissue maintain or get possession of those tissues so there is a transfer that would not otherwise take place without that consent.

JUSTICE PHIL JOHNSON: And does that transfer also allow your client to determine where the tissue then goes?

ATTORNEY MIGUEL VILLARREAL, JR.: It goes to a processing organization.

JUSTICE PHIL JOHNSON: Does your client have the right to determine where the tissue goes under your agreement with the donors?

ATTORNEY MIGUEL VILLARREAL, JR.: Yes. Yes because our--

JUSTICE PHIL JOHNSON: Okay, if it's property then, if it's property, what happens to it when it then is incorporated into another person's body?

ATTORNEY MIGUEL VILLARREAL, JR.: Then it becomes the possession of that recipient of that particular tissue or organ.

JUSTICE PHIL JOHNSON: Is it still property while it's in their body, I guess would be the next question. If it becomes at some point property, does it become non-property when it goes into someone's body, I guess, would be the next question we have to answer.

ATTORNEY MIGUEL VILLARREAL, JR.: I think at each stage, it would have characteristics of property all along the way. Certainly, a recipient of an organ would argue that they own the kidney or the liver that they've received and that they now have to the exclusion of anyone else coming in and trying to remove that.

JUSTICE DON R. WILLETT: A tagalong question is is your client, Ms. Alvarez, does she under your argument, does she have her own property right in the organs or is she exercising the property right that her mother had?

ATTORNEY MIGUEL VILLARREAL, JR.: To make a correction, my client is Legacy of Life. It is the entity that was sued. Ms. Alvarez was the plaintiff under the underlying lawsuit and she was representing her mother's estate in the underlying lawsuit so the allegations that she made were that after the consent was made that my client then sent it to an entity that she claims was not authorized to receive that.

JUSTICE DON R. WILLETT: But as you understand it, whose property right is at issue?

ATTORNEY MIGUEL VILLARREAL, JR.: Whose property right is at issue? Well, according to the State pleadings, it would have been the mother's, but since she is now deceased, it passes to the next of kin, which would be the Plaintiff.

JUSTICE DON R. WILLETT: Can I take you back to the policy language? Opposing Counsel says that bodily injury is synonymous with personal injury and that this definition in this policy of personal injury is virtually identical to the language we interpreted in Trinity and why should we not treat it the same way here?

ATTORNEY MIGUEL VILLARREAL, JR.: Because as the 5th Circuit noted, though the definitions are similar, the term that's being defined are completely different. In Trinity Universal, this Court interpreted that the term bodily by looking to other cases that also interpreted the term bodily. It never used the term personal in its application to its holding that bodily injury did not encompass mental anguish.

JUSTICE DON R. WILLETT: Why necessarily would the difference in the terms matter if the definition itself is identical?

ATTORNEY MIGUEL VILLARREAL, JR.: Well the definition is not identical. It's virtually identical, but you also have additional terms in our policy in the Evanston policy and the personal injury itself is not defined in our policy so you need to go outside that. If we take assuming arguing under Trinity would apply and we don't believe it does, but then the most logical thing to do then would be to substitute the exact definition, bodily injury, which it defined as bodily harm, sickness and disease into the bodily injury component of the personal injury definition under the policy and what you end up getting there is a very long, superfluous definition, which still leaves sickness and disease unaffected and there's no definition for those terms in the policy so then you'd have to go to the generally understood meaning of those terms and sickness, according to the general understanding does include a mental condition or ill condition of the mind, which then lends itself to mental anguish or emotional distress. So even using, even assuming that the Trinity, you could do it that way, you have a construction where it would still be reasonable to conclude that mental anguish or emotional distress, which what was alleged in the State action would be included under the policy.

JUSTICE PHIL JOHNSON: May I follow up that?

ATTORNEY MIGUEL VILLARREAL, JR.: Yes, sir.

JUSTICE PHIL JOHNSON: So your position under the Evanston definition is it your position that mental anguish is a bodily injury? That's one of the three categories they define personal injury by and is your position that mental anguish only is a bodily injury? Because that term is not defined in the Evanston policy. It just says personal injury is a bodily injury or sickness or disease the way logically you would ready that.

ATTORNEY MIGUEL VILLARREAL, JR.: Correct.

JUSTICE PHIL JOHNSON: So is mental anguish a bodily injury?

ATTORNEY MIGUEL VILLARREAL, JR.: I would say no.

JUSTICE PHIL JOHNSON: All right, so your position is mental anguish is it a disease?

ATTORNEY MIGUEL VILLARREAL, JR.: Yes. It would also be a sickness.

JUSTICE PHIL JOHNSON: And sickness okay.

ATTORNEY MIGUEL VILLARREAL, JR.: Correct.

JUSTICE PHIL JOHNSON: Now how is it a disease, how is an emotional injury because something happened to the body parts, how is that a disease?

ATTORNEY MIGUEL VILLARREAL, JR.: It is a disease because if you look under the general common meaning of disease, a dictionary definition, for instance, you would see a similar definition as you would for sickness, an ill condition of the body or mind. When you have that, that brings in the inclusion of mental anguish or emotional distress and that would be separate and apart from the bodily injury portion of the definition so in either the sickness term or in the disease term, mental anguish would be included in both of those and we have case law that was cited in our briefs giving examples of this Court's interpretation that personal injury is a much broader term than is bodily injury.

JUSTICE DON R. WILLETT: You say it would fit under both disease and sickness.

ATTORNEY MIGUEL VILLARREAL, JR.: I believe so, yes.

JUSTICE DEBRA H. LEHRMANN: If we were to conclude that these body parts are tangible personal property, do you concede or do you, or what is your argument about the danger of some undesirable, unintended consequences of that type of conclusion by the Court?

ATTORNEY MIGUEL VILLARREAL, JR.: I don't think that there's a danger. The reason for that is this and I think that's a very good conclusion that the Court could reach given that the policy does not define the term property and because it doesn't define the term property, then we look to the general meaning of what property is. Black's Law, I believe, defines it as the right to possess use of a determinant thing, but to answer your question, there are several safeguards already in place that would take away any chilling effect that a global declaration that human tissue is property would [inaudible] for instance, [inaudible] had already referenced, the Texas Anatomical Gift Act prohibits the selling of tissue, of human organs, as does penal codes, criminal statutes. The donation organization is highly organized. The consent process is highly organized so there are safeguards in place everywhere throughout the process, but the Court need not even go that far because we go back to the policy terms. Property is not defined and so we don't have to say human tissue is property generally. We can make it more specific to in this particular policy that doesn't define property and is for the coverage of an organization that deals in human tissue recovery and pays a premium and there aren't any exclusions in this policy for human tissue. Clearly, then, the human tissue in this instance is covered under the property damage policy.

JUSTICE DAVID M. MEDINA: But here, I mean you're looking for declaratory judgment that there's a duty to defend the lawsuit against your client, correct?

ATTORNEY MIGUEL VILLARREAL, JR.: We're asking for an affirmation of the district court on that decision, yes, sir.

JUSTICE DAVID M. MEDINA: So you have this daughter. How did she have an interest in something that didn't physically belong to her even if it is classified as property because this is not an internment. It's not wrongful removal of a body or desecration of a body. So where does she get her interest here?

ATTORNEY MIGUEL VILLARREAL, JR.: It is in the allegations that she made in her petition that trigger the coverage, the duty to defend on part of the insured.

JUSTICE DAVID M. MEDINA: I understand that, but what is that because that seems to me even looking at those pleadings, she has no interest. If this were property, it's not hers.

ATTORNEY MIGUEL VILLARREAL, JR.: Well that, to me is a determination that needed to be made at that district level. What we look at under the eight corners rule are the pleadings and the policy and you look at the factual allegations as I believe either Justice Green or Justice Willett had alluded to earlier, she was-

JUSTICE DAVID M. MEDINA: That was Guide One but go ahead.

ATTORNEY MIGUEL VILLARREAL, JR.: What's that?

JUSTICE DAVID M. MEDINA: C is the case you're referring to.

ATTORNEY MIGUEL VILLARREAL, JR.: Okay and so when you do that and you take the factual allegations as they are, without regard to whether or not they're true, then any potential claim must be covered by the defendant by the insured in a duty to defend so it's if there's a potential, whether or not that wasn't a correct conclusion or correct finding from the state court because that would not be determined until trial or some file of motion at the get-go, your client has been sued and you look at the pleadings and you look at the policy. Is there a potential claim there and if there is, then there's a duty to defend and Judge Hudspeth from the federal district court agreed with that conclusion.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, counsel. If you're-

ATTORNEY MIGUEL VILLARREAL, JR.: I'd like to, I have just a couple more, oh, the issue of whether to put modified bodily on all the nouns or not, we discussed that in our briefs. There's actually a law article that was discussing that. It was called syntactic ambiguity and it really talked to how do you decide whether the adjective modifies the first noun or all of the nouns and I believe that that article concluded that you need to look at the context and here the context was you look at the insured at its business at the rest of the terms in the policy and based on that, we have the position where Legacy is saying that bodily really should not modify all three nouns.

JUSTICE PHIL JOHNSON: Now that you've gone back to that, let me ask one more question if I might. I believe you argued awhile ago that not only do we look at the specifics of the definition, bodily injury, sickness or disease, but also we consider the number of personal injuries somehow and it seems that where we have the term personal injury in the policy defined by using these three specific terms that it would be going beyond the policies definition to then go back to personal injury and say now, let's talk about what a personal injury is because we do have the specific definition bodily injury, sickness or disease. Is there a conflict in your positions in

saying let's talk about what a personal injury is generally considered or do you have it defined here?

ATTORNEY MIGUEL VILLARREAL, JR.: No, I don't, I don't believe so, Judge. The reason why there isn't a conflict is because like I indicated earlier, when you translate the Trinity definition into that personal injury, personal injury has a definition, but then there's terms within that definition that are not defined and so you need to then get the plain and ordinary meaning of those terms. You're left with sickness and disease as unaffected by any interpretation that you have with bringing in the Trinity definition. If you have more than one interpretation or construction of a provision in an insurance policy, which was not otherwise defined, then the Texas precedent says that it should be resolved in favor of the insured to the exclusion or to avoid or minimize any exclusion and I wanted to point out that the 5th Circuit actually gave some guidance in their opinion by providing three constructions that this Court could consider. The first one would say that it was reasonable that the Texas Supreme Court natural reading of Trinity definition would apply. In that case, the mental anguish would not be covered under personal injury and that would favor Evanston, but the problem with that definition is that it ignores the choice that Evanston made to include the term personal as opposed to bodily in that definition. Another consideration for that is that the Trinity case was decided almost a decade before this insurance policy was entered into and so Evanston had the benefit of knowing what the law was at the time that it entered into and yet still chose the more broader term personal versus the narrow bodily injury, I mean bodily term. The other construction was that the 5th Circuit recognized the term that was defined under the policy was different than the term that was defined in Trinity and so maybe it would be less natural to read that bodily modified each of the terms and, in fact, the Court said a reading of personal injury that encompasses more than simple physical harm seems to comport to the tradition motion under Texas law that personal injury as opposed to bodily injury includes claims for emotional distress. Well that construction favors Legacy and then finally the third construction that it proposed was that it noted that the bodily injury is a component of the personal injury and it substituted the Trinity definition in for the component bodily injury of the policy term and that, as I indicated earlier, gave a superfluous surplusage of terms leaving sickness or disease unaffected and the Court indicated that the sickness or disease portion then might be read to include mental and emotional maladies. So what we have here are three constructions that the Court had given, two of which favor Legacy of Life and, again, if there are multiple constructions, then the Court needs to go with the one that's more favorable to the insured. The only thing I want to add now is we have two certified questions here to this Court and it's whether mental anguish is covered under the policy and whether body loss of use of tissues is covered. We only need, Legacy only needs to have one answered in the affirmative so it would not be necessary to go back to the comments we made earlier to have a global human tissue is property. We can also decide it under mental anguish is included under personal injury.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF MARC J. WOJCIECHOWSKI ON BEHALF OF PETITIONER

ATTORNEY MARC J. WOJCIECHOWSKI: May it please the Court.

JUSTICE EVA M. GUZMAN: Could you begin by discussing his last point that Trinity had been out, I guess about 10 years and you made a choice to use the words that you did in this policy as opposed to the language from Trinity, which you knew would be narrower in scope potentially?

ATTORNEY MARC J. WOJCIECHOWSKI: Absolutely and that's where I was going to start, Justice Guzman. Evanston chose a traditionally broader term to use personal injury over bodily injury; however, it specifically gave it a narrower definition and I would encourage this Court to look at its opinion in *Osterberg v. Peca*, a 2000 case 12 S.W. 3d 31, *McIntyre v. Ramirez* 2003 case at 109 S.W. 3d 741 and your brethren across the hall *Tovar v. State* 978 S.W. 2d 584, 1998 where it talks about the concept of conjunctions and disjunctives and the string of verbs and nouns and adverbs and adjectives to explain the rules of grammatical construction and then specifically cited on page 3 of my reply brief, *USF&G v. Fireman's Fund*, which was a 6th Circuit case from 1990, which specifically involved interpretation of an insurance policy where you had an adjective modifying a string of nouns separated by the word or and the court there and the court in the three Texas highest court cases

I've just cited all indicated that the adjective or adverb modifies everything in the string so in this case, it's just abundantly clear that both under the context of proper rules of insurance policy construction, proper rules of grammatical construction and under Trinity Universal, which this Court used the same application of the rules of grammatical construction I've just discussed by relying upon and citing E-Z Loader and Knapp are all of the opinion and the conclusion that Trinity Universal v. Cowan absolutely controls this particular issue.

JUSTICE DEBRA H. LEHRMANN: Can I ask you to respond to his position that if we are to categorize this as personal property that the Legislature is going to take care of any unintended consequences.

ATTORNEY MARC J. WOJCIECHOWSKI: Well, yes, Your Honor. The Legislature would take care of them because it is within the province of the Legislature and not this Court to make that categorization. In response to Justice Johnson's--

JUSTICE NATHAN L. HECHT: I'm sorry, to make which categorization?

ATTORNEY MARC J. WOJCIECHOWSKI: To categorize them to give human remains all the sticks in the bundle to make them property.

JUSTICE NATHAN L. HECHT: I always thought that common law was our special province.

ATTORNEY MARC J. WOJCIECHOWSKI: The common law is the special province of the court except to the extent where the Legislature has chosen to limit to extend it and I think what this Court would have to do in order to make the leap of giving human remains all the sticks in the bundle to make it property, is to overrule over 100 years of case law in Texas including the Burnett case, which was a writ refused case where this Court gave its blessing over property over human remains not being property and as Justice Johnson was talking about, well, how do you contract for this once it leaves the body and once it goes to the donation organization, what happens? Well, those questions are all answered and there's left little discretion under the revised Uniform Anatomical Gift Act. It gives the parties virtually no discretion on how the donation process will work and at what phases the organs, the tissues, the corneas and the like are disposed of, transferred and used. There's no discretion basically under that Act.

JUSTICE PHIL JOHNSON: Counsel, assuming that to be the case, if we read the pleadings, there's an allegation, first of all, your policy says you'll defend. We're not talking coverage or indemnity here, but defense. You'll defend any claim to which the insurance applies even if the allegations are groundless, false or fraudulent. So if the allegations are fraudulent, intentionally fraudulent, you still have the obligation to defend under the eight corners rule, do you not?

ATTORNEY MARC J. WOJCIECHOWSKI: We absolutely have that allegation, Your Honor.

JUSTICE PHIL JOHNSON: I'm reading from paragraph 3 here of the Plaintiff's Petition, although the remains of Alicia Garza are the sole and exclusive property of the estate of Alicia Garza, defendants have effectively, they allege it is proper so how is it when you have the obligation to defend even fraudulent or false or wrong claims, and they allege it's property, how is it that you have no duty to defend? You may prove that they're completely wrong on the merits, but it seems like we're arguing here about the merits and not the allegations.

ATTORNEY MARC J. WOJCIECHOWSKI: Justice Johnson, the 5th Circuit on pages 8 through 10 of its written opinion that came into this Court as part of the record under the III legal issues specifically address that. That was the one out of the three issues that was not certified and what they have held based upon National Union v. Merchants Fast Motors and Admiral v. Ford and a plethora of other cases is the language you just read appear in a legal cause of action under the Texas Civil Theft Liability Act, not in factual averments. It is up to the Court to look at the factual averments in determining the duty to defend and not how the parties may legally characterize the factual averments. It would be like calling a car intangible property in order to trigger coverage

say under a policy that only insured intangible property. You don't look at that. A car is clearly tangible property. So you ignore how Alvarez in the underlying case characterized her mother's tissues and organs and the like and you look at what they really are, not how she legally characterized that. That answers that question.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel, the cause is submitted and the Court will take a brief recess.

ATTORNEY MARC J. WOJCIECHOWSKI: Thank you.

MARSHAL: All rise.

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