ORAL ARGUMENT – 03/19/03
02-0485
PROVIDENT LIFE V. KNOTT

WHITAKER: The TC correctly entered summary judgment in Provident's favor, finding as a matter of law that Dr. Knott was not totally disabled from his occupation of Gynecologist. In its published opinion the CA acknowledged this court's earlier ruling and a recent ruling in the Cowen case that insurance policies are interpreted like other types of contracts: that where terms are defined, that is given a specific meaning within the four corners of an agreement, those defined terms should be interpreted as written. But after acknowledging those concepts the court then went on to completely rewrite the terms of the policies between Provident and Dr. Knott by taking the definition of total disability, which in the policies covers against the inability to do the duties of his occupation. And instead replaced that definition with a common law definition covering Dr. Knott's inability to do any substantial portion of the work connected with his occupation. If the CA is correct and if its ruling is allowed to stand, the court has rewritten not only the total disability policies between Provident and Dr. Knott, but it has by extension rewritten all of the occupations specific policies in force in the State of Texas by ignoring the terms of the policy itself and replacing it with this common law definition.

In addition to ignoring the terms of the policies between Provident and Dr. Knott, the CA also, erroneously we believe, failed to follow numerous recent decisions from this court interpreting the terms of a contract as written, reading the contract in such a way as to give meaning to all of the policy's terms and rejecting as unreasonable any reading of the policy that renders any part of the contract meaningless.

SCHNEIDER: How do you distinguish this particular fact situation where the courts in the early 1920's at least looked at language pretty similar to this and said that in fact we're not going to require a person to be totally shut down. How do we determine how much a person is supposed to be incapable of performing his daily duties?

WHITAKER: I think the natural starting point is the terms of the policy that have been agreed upon. The SC in the Murphy case made it clear that before you do a public policy type of analysis, which I think is what the CA did here, you first have to look at the policies itself and see what the result is under those policies. Here we have the interplay which we believe was absent in the majority of the cases relied upon by the CA of definitions of total disability and partial disability.

SCHNEIDER: Are you going to require a bottom line in your definition that a person just can't perform any duty?

WHITAKER: We believe that the definitions read together in the Provident policies provide that the individual must be unable to do all of the duties of his occupation. Otherwise...

O'NEILL: The language specifically says unable to perform B duties. Our earlier cases say we have to that a reasonable construction. You're asking us to put in all duties or any duties.

WHITAKER: I don't know that we're asking the court to rewrite it. We're just asking the court to find that in order to be totally disabled somebody must be unable to do the duties of the occupation. And whenever you look at the definition of partial or residual disability, which cover against the inability to preform one or more of the important daily business duties, or provide for a loss of time...

O'NEILL: But doesn't that comport with our early definitions because early definitions said unable to do a substantial portion of those duties, which is more than partial disability definition which is one or more. They seem to dovetail nicely here. I don't see how they don't.

WHITAKER: I don't believe that the earlier cases that the CA relied on involved definitions of partial or residual disability. And in fact they involved entirely different definitions than the definition before the court now. For example in the Tate and Johnson cases, those cases involved any occupation definitions...

O'NEILL: I understand there are differences in the policies. Based on your plain meaning argument, when this policy was drafted we presumed that the insurance company knew the common law definition of total disability. And there is nothing here by saying unable to perform the duties of your occupation that ostensibly seems to try to do something different than that.

WHITAKER: Other than the presence of the definition right below it of partial disability that covers against the inability to preform one or more.

O'NEILL: You're saying those are inconsistent. It's hard for me to see how one or more verses substantial is different.

WHITAKER: Frankly, I don't know that there has really been any discussion in the cases of what substantial necessarily means. And I think that's one of the problems, that if the CA's decision is allowed to stand there are going to be policies across the state that are going to be rewritten. On the notion of if you're unable to perform a substantial portion of the work, is that a qualitative? Is that a quantitative? We just don't know.

PHILLIPS: Here's my problem with your argument. Had the doctor come in to Provident and bought a policy and said I only want total disability. Then it seems to me your argument is he would be entitled to get that coverage here under a long line of Texas cases. But because he got additional coverage for something less than total disability, which presumably that's a more expensive policy. Hands up getting less.

WHITAKER: I disagree with that. I think by including - most disabilities tend to be of a short term or temporary or partial nature. And by buying partial or residual coverage, the individual

is actually getting additional coverage by being able to recover benefits if he's only able to work part time. Or if he's able to do some of what he used to do but not all of what he used to do under the policies he gets benefits. Under the Provident policies that are at issue here. But if he had not elected to get those additional coverages, then he would not be covered against the inability if he was only working part time for example, or if there was some duty that he was unable to do.

JEFFERSON: Let's assume that part of the function of this doctor, for this business, for this PA is billing for example. And he can't perform surgery anymore because of back injuries, etc, but he can do some of the administrative tasks. Under your argument today, if he's able to do that small portion of administrative tasks for the job, would he be totally disabled given that he can't do any of the medical operations?

WHITAKER: Assuming that they do constitute a duty of the occupation, it is going to be something that makes that occupation what it is. And by virtue of his ability to do that duty, which means he's going into the same office doing some of the same things that he used to do, and presumably driving some sort of financial benefit from doing that, then in fact he is not going to be totally disabled.

ENOCH: It seemed that one of the concerns of our early cases was not so much that there wasn't other coverage for partial disability or the like, but that to take the statement of total disability to mean not being able to perform any of the duties of the occupation would virtually make that provision worthless. It didn't cover anything because I think as some would say you didn't have to be dead before you would be disabled. In that regard in this case even if the policy still provides coverage for partial disability or residual disability wouldn't that concern still apply to the total disability if the court thought that they way it was to be literally read meant that if you could perform any function of being a doctor then you would have no coverage. And as a result that provision would never be reached short of the doctor being an invalid in bed and not literally being able to function at all.

WHITAKER: I think one difference between the older cases and this case is the focus on the word duties. And that is it focuses on what it is that makes that occupation what it is. Certainly it is not difficult at all to come up with circumstances under which Dr. Knott would qualify as totally disabled but still be able to do some of the tasks that he used to do.

ENOCH: Well he could consult in gynecology. He could be a quadriplegic in a wheelchair and not even be able to speak. But if he could tap out the notes on a typewriter and look on a video screen he could consult. And that's one of the duties of being a Gynecologist. So he would not be totally disabled from the reading of the statute but he would be partially disabled because he could not perform one or more duties.

WHITAKER: I think that what's important to note about the consulting aspect of it is Dr. Knott advised us that consulting was one of his duties. But I think distilled to its essence, the duties of the occupation of Gynecologist may well properly defined not include that. That is there may be

a way and certainly and insurance company who takes that position that a doctor who is physically disabled from doing any aspect of what he used to do other than possibly typing on a typewriter or a computer denies that claim at its peril basically. And I think one way around that is to seek refuge in the policy to say what are the duties of this occupation? what makes the occupation of gynecologist what it is? And I don't think there is any question that performing surgeries and seeing patients are going to qualify under any set of circumstances as the duties of his occupation. And what we have here is a doctor, Dr. Knott, who at all times has been able to see patients and at all times has been able to perform at least some types of surgeries.

HECHT: I'm unclear what your position is. If he can't perform some essential duty of the occupation, then what is your position? Let's just make it easy. There is A, B, C, D, and E and he can do A, B, C, and D, but he can't do E and you can't be what he is if you can't do E. Is that total disability or not?

WHITAKER: I would think that that is not necessarily this case.

HECHT: First of all with respect to the definition, if there is essential thing that you can't do but you could do other things, which may be essential or not essential, but there's one essential thing you can't do, then does that meet your definition of total disability?

WHITAKER: I would think if properly analyzed there was one duty and the doctor was unable to do that duty...

HECHT: No. There is multiple duties. But one of them makes the job what it is.

WHITAKER: The duties from which the other duties flow. An orthopaedic surgeon who cannot do surgery, I would think that doctor would be totally disabled.

HECHT: There's no dispute in this record that he cannot do some things. Is that true?

WHITAKER: There is no dispute for purposes of summary judgment that there are certain surgical procedures that Dr. Knott is unable to do.

HECHT: And so now we're talking about how broad is the category of the occupation perhaps. Because if any one of those surgical procedures was essential to his occupation, then your position would be he's totally disabled.

WHITAKER: I would analyze it in terms of duties. And I would again rely on what the policy says about that term. And the policy says duties. So I would analyze surgery as being duties. If Dr. Knott is unable to perform certain types of surgical procedures, but can, and we in fact know he performed other types of surgical procedures, he is not unable to perform that duty, therefore, not totally disabled.

HECHT: But if we define the occupation as microsurgery, we define it down so that one essential part of the occupation is something he can't do, you would say he was disabled?

WHITAKER: Assuming for purposes of your hypothetical that his occupation entailed the performance of only one type of surgery, which he could not do from which all of his other duties flowed, then I think duties of his occupation he is unable to perform those, because surgery is the duty of that occupation. And that's why I think I tend not to want to get too sidetracked on the extreme case of the person who could shuffle the paperwork, or clip documents together, because I don't think properly analyzed that is a duty of that occupation. It may be something that he did, but it's not going to qualify as a duty of that occupation.

O'NEILL: How would you define the duty of the occupation? Is that a question of law, or does the jury decide that?

WHITAKER: I think if the facts are undisputed as to what the individual was doing, I think it becomes a question of law.

O'NEILL: At what level? How far down do you define what the duties are? Do you define categories of surgery, or do you divide it surgery, consultation, administrative? How do you come up with categories of duty?

WHITAKER: In the first instance we check with the plaintiff. And one of the forms that we send the plaintiff at the time they want to submit a claim, we ask them list the duties of your occupation. Here on that form and during his deposition, Dr. Knott repeatedly identified having four duties: surgery; seeing patients; consulting with physicians; and performing administrative duties. For purposes of this analysis, we will adopt his listing of his duties as being the duties that he provided.

O'NEILL: What if under the surgery duty you did perform - 100% of what you did was a type of microsurgery, and after the disability you can't do that anymore, but you retool yourself and do some other type of surgery.

WHITAKER: He would at best qualify as residual or partial, which covers against the inability to do one or more of your material duties. So if Dr. Knott was unable to do the surgeries that he used to do and was suffering an income loss, he would potentially qualify as residually disabled. And if he's lost income during the changeover to his new type of surgery he would be entitled to residual disability benefits up to age 65.

ABBOTT: You're not saying that he has to be unable to perform all duties in order to be totally disabled?

WHITAKER: We are saying that due to the presence of the definitions of partial and residual, that he must be unable to perform the duties.

ABBOTT: Can you explain your footnote in your petition, footnote 9, which says that you are not making that argument. Are you taking a different position now?

WHITAKER: That footnote was put there by me. That footnote was in error. When we were before the TC we said he needed to be unable to perform all. We said that in our summary judgment motions, summary judgment brief, and that was what our corporate representative testified as well. So that is solely a situation of my making and I apologize for that.

PHILLIPS: Can we take your company's payments from 1996 to 1998 as an admission that his condition at that time was total disability?

WHITAKER: I don't think so. First of all, under this court's...

WAINWRIGHT: Did Provident seem to send mixed signals to Dr Knott? Your position is there was a denial sent in 1986, then there was a waiver of premiums from 1989 to 1995 suggesting total disability. There was an agreement to pay Dr. Knott from 1986 to 1989, again suggesting total disability according to Dr. Knott's physician. Was Provident sending mixed signals?

WHITAKER: I don't think so. I think what Provident was doing was bending over backwards in a customer service move to provide benefits that would not otherwise - that Dr. Knott would not otherwise be entitled to. We let Dr. Knott know in Feb. 1986 that because he was working on a part-time basis within that 90 day elimination period he was not totally disabled. But to bend over backwards to Dr. Knott, we added a residual disability rider which he had declined to apply for that enabled him to get benefits. And so for that first three year period, we were providing benefits that he would not have been entitled to absent our good faith decision to add a residual disability rider. In 1991 when we resumed billing Dr. Knott for the premiums, Dr. Knott complained of that decision and we sent him a letter which is in the record where we said we don't think you are entitled to the waiver of your premiums. But as a customer service move, we will agree to go ahead and do that, and that's what we did from that point forward

Returning to J. Phillips's question, from 1996 to 1998, Dr. Knott advised us on his initial claim statement that he was not working. I think now we know a little bit more about Dr. Knott's activities during that 1996-1998 time period that if we knew then what we know now, we might have had a different result there. But we went ahead and took Dr. Knott at his word and went ahead and paid him for that entire period. But we paid him for that period because he told us that his disability arose after his 65th birthday which meant that he was only entitled to the 24 months of total disability benefits at that point.

WAINWRIGHT: You've explained what you believe is a good motive for bending over backwards as you called it. Notwithstanding your motive, does that still create a potential, reasonable difference of opinion as to what Provident's conduct constitutes, whether they deny that there was total disability, or could a reasonable fact finder have looked at the evidence and said irrespective of what may be in your terms a good motive, that the signal was sent that it was not a

denial of total disability.

WHITAKER: I think we have been consistent since the letter in Feb. 1986 telling Dr. Knott that if he is going in to the office as a Gynecologist doing some, if not all, of what he used to do as a gynecologist, he's not totally disabled. And the fact that we took steps to give Dr. Knott the benefit of the doubt, I don't think changed that fundamental premise in terms of waiving premiums, or in terms of providing more residual disability benefits those were done by agreement to accommodate Dr. Knott. And in fact the fact that Dr. Knott did not receive total disability benefits from 1986 through 1996, I think speaks volumes about the message that Provident was trying to send at that point in time.

WAINWRIGHT: Do you think there are limits on what Provident could have done after sending the 1986 denial letter that would have taken Provident's position from arguably not one of agreeing there is total disability, to one of there is total disability. In other words, are there things Provident could have done after sending that letter that would have meant that de facto it was not in agreement with the letter that there was total disability?

WHITAKER: No question. Instead in response to Dr. Knott's complaint about that letter, we could have said you're right Dr. Knott. You are totally disabled and we will resume paying you total disability benefits.

WAINWRIGHT: Short of that, is there a line that this court can look at as to where to draw Provident's statement as compared to its conduct?

WHITAKER: I think the only aspect of conduct that I think is inconsistent with the position announced in Feb. 1986 is the point made by J. Phillips regarding the payment of benefits in 1996 to 1998. I think the other events when they are analyzed in the context in which they arose were not a admission by Provident that Dr. Knott was totally disabled at all. I think to the contrary they were saying we think you are not totally disabled, but we are going to go ahead and accommodate you in this way. And I don't think it's good policy or good result to punish Provident or somehow estop Provident at this point by virtue of those good faith decisions that resulted in benefit to Dr. Knott.

O'NEILL: Tell me how you think this opinion should read. We should say that the plain language of the policy says that you have to be unable to perform the duties of your occupation. Meaning all duties of your occupation.

WHITAKER: I don't know necessarily that the court has to reach that point in this opinion. The policies do cover against the duties. Duties appears in the partial, total, and residual definition. And it is undisputed that there is no one single duty that Dr. Knott is unable to perform.

O'NEILL: Depending upon how you define duty.

WHITAKER: Dr. Knott told us that surgery is one of his duties. And the policy does not

cover against the inability to do procedures. It covers against the inability to do duties. And we have a surgical log that shows that Dr. Knott performed more surgeries in the 7 months after the plane crash than he did...

O'NEILL: I'm still trying to figure out how you would - you would write this opinion as you're unable to perform the duties of your occupation. Surgery is a duty of the occupation. Undisputed evidence is you could perform some surgery, therefore, plain language no total disability.

WHITAKER: That would be fair. And I don't think the court has to go any further than that.

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RESPONDENT

MARTIN: I would first address J. Wainwright's inquiry regarding the mixed messages and the mixed signals that Dr. Knott was given. In fact, he was given mixed signals. Back in 1986, he was put on waiver of premium. Waiver of premium in accordance with the policy definition means that they are considering him to be totally disabled. What they additional did was in their internal documents had indicated he is to put on permanent waiver of premium because he had a continuing total disability. At the same time the initial denial which we take the position was certainly not an outright denial was withdrawn effectively a month later when Provident said you really don't owe us this money back that we previously last month said you do because - the only reason could be because we're putting you on waiver of premium. We consider you to be totally disabled. At the same time they give him an illusory benefit. The illusory benefit in effect takes away from him the perception that he can in fact do anything. Because they are saying what we're going to do is we're going to concede you totally disabled and we're going to give you this residual disability rider, effectively paying you for being partially disabled, yet at the same time telling you you are totally disabled.

O'NEILL: And he didn't complain for ten years about that.

MARTIN: He didn't complain for 10 years - there is no evidence as to whether or not he has taken the position that back in 1986 he should have...

O'NEILL: My only point is the estoppel argument can work both ways. He took the partial disability payment and didn't say anything about it for 10 years. There is some level of estoppel there as well I would think if we're going to go the estoppel route.

MARTIN: We do not think that Provident can put an insured in the position of giving him an illusory benefit. Even though he is a doctor, he is an educated individual. They are in the superior position to tell Dr. Knott for instance, Look, we're going to give you this benefit. It was in fact not a benefit. It was a detriment because Dr. Knot was indeed entitled to total disability benefits if in fact he was totally disabled. We are not saying that there is evidence that conclusively establishes or otherwise establishes because it's not an issue in this case what his disability was back

then, which is why we take the position on the statute of limitations issue, that he didn't file suit until 1996 or 1998 because of the fact that at that point in time we said yes he can no longer do anything.

O'NEILL: It strikes me that the old cases where we interpreted this language didn't have partial disability definitions in them. They were total disability policies. I'm having a hard time figuring out how we are to construe both of these together, which admittedly we would have to do. Can you tell me what the difference is between inability to perform one or more important daily business duties verses a substantial portion of the work?

MARTIN: First of all, the cases all indicate that it is a jury question.

O'NEILL: I'm talking about legal definition. What's the difference between a substantial portion of the work and one or more important daily business duties?

MARTIN: I think they are completely compatible and completely consistent. The jury could think what are one or what is one or more important daily tasks, or important tasks of the occupation, which is the partial definition. There is certainly a major qualitative difference I believe between one or more important daily tasks, and then the substantial or material duties of an occupation. For instance in this very case, one or more daily tasks might be some administrative task that he cannot do. He may be considered partially disabled for that. But I would point to the fact that the evidence contrary to Provident's position in this case is the fact that there is a multitude of surgical and nonsurgical things he cannot do. The evidence as pointed out in the brief is he can't do any micro-surgery. He could have done it before. He can't do any obstetrics that he was considering going back in to because of Dr. Koon's withdrawal from the partnership. He can't do most laser surgery. He was unable at all to perform any vaginal surgery. And he can't do any surgeries involving bending.

O'NEILL: If he was able to do any sort of surgery before that required a lot of physical activity, and after the injury he was somehow precluded from doing very physical sort of surgery and could only do micro-surgery, which was much more lucrative and he ended up tripling his income, under your argument he would still be entitled to total disability for the rest of his life.

MARTIN: Total disability is not income determinative. So that would be the first response. The second response is, if the court is looking at the facts of this specific case, in fact the opposite is true with regard to his microsurgery.

O'NEILL: It could work the other way. It could work the way I posed it.

MARTIN: The other way being could he make more money and still be totally disabled?

O'NEILL: Working full-time in surgery, doing a different type of surgery, making three times the money, he would still be drawing total disability?

MARTIN: I would think that would be a possibility. However, I do no think that it would be a very good case to put in front of a jury. Truthfully, that's why I believe that it should be a jury question because of that very case. I don't know as a matter of law he would be totally disabled under those circumstances.

HECHT: Every case is a jury case in your view?

MARTIN: Every case unless it is conclusively established.

HECHT: But you just said it couldn't be.

MARTIN: I think it would be very difficult for a situation to arise where on either side an individual could be considered totally disabled or conclusively established that he was not totally disabled especially when the fact issues are presented in this case.

HECHT: A person goes back to work after an accident and is doing something like what he was doing before, a physician here, and is fully occupied and making more money than he was making before, you don't usually think of that as totally disabled under any definition.

MARTIN: I can say this. That in this particular case, there were occasions where he was making more money, there were occasions where he was making less money. In fact, the insurance company paid him very few months for this residual disability because in fact he was making slightly more money than the 20% loss that he was incurring. He had at times greater than a 20% loss in income and in fact they paid him the residual disability benefits.

HECHT: But it seems to me your argument says that unfortunately as a result of the plane accident he had been crippled and really could not show up for work. He would be in the same position vis a vis this policy with respect to the benefits as he is if he can do everything except perhaps one kind of surgery.

MARTIN: If the one kind of surgery is considered to be in accordance with SC law for 80 years now...

HECHT: But doesn't that strike you as odd that total disability would encompass everything from you can't move to you can do everything you could do before except maybe just this little bit.

MARTIN: No. I would disagree for the reason that I think that it is inconsistent for the definition of partial disability to encompass everything except laying on your back unable to do anything. That's what I think is more bothersome.

O'NEILL: If you had Michael Jordan couldn't dribble, he could no longer play basketball, and he goes and plays baseball and signs a great big contract to play baseball, would he

draw full total disability?

MARTIN: I don't know. But I will say this, that I think the chances of Michael Jordan not being able for a physical reason to not to be able to dribble and still be able to be a major league baseball player would be so rare that it shouldn't work as a disservice to an individual like Dr. Knott. Because of the circumstances in this case those aren't even close. I believe the example would be if Michael Jordan couldn't dribble, and therefore, dribbling is a part of the professional basketball game such as I would suspect he couldn't play at all, but he could go play exhibitions for a few minutes and make money playing exhibitions at a high school or college gym for instance, he would probably make a lot of money I suspect. But he's not able to dribble. I think in that certain circumstance Michael Jordan certainly should be entitled, because he has lost any substantial material duty, he should be entitled to recover his total disability benefits for which he paid, and in this case for which Dr. Knott paid for many, many, many years.

PHILLIPS: Do you agree that your client would have been better off only to buy a total disability policy?

MARTIN: Absolutely. However, with Provident if they acted as they did in this case, it wouldn't matter if he bought a total disability policy. I suspect they could have again given him to use the term that Provident likes to use a residual disability rider. And then could take that residual rider on the total disability policy and use it against him just as they are using it against him today and just as they have used it against him throughout.

PHILLIPS: Give us an example within the confines of these facts of what you believe partial disability would have been?

MARTIN: When he filled out the duties of his occupation, what they were for prior to his plane crash, I believe there was something like 30% was a certain type of micro-surgery, 30% was maybe another type of laser surgery which I believe was different than micro-surgery. A certain percentage was endoscopic procedures. A smaller percentage were administrative duties. A partial disability might be that he could see, and he was seeing I think 25 patients prior to his plane crash where he broke his back. And afterwards, if he had been able to see because of the fatigue involved, he may have been able to see 12 patients or 15 patients. And he was still able to do his surgeries. But because of the fatigue involved he could see only a certain number of patients as opposed to the number he could before, I believe that would be a situation where he could still see patients. He couldn't see any many of them and that would be I believe a case where he could be entitled to partial disability as opposed to total disability payments.

HECHT: Under those same facts, he could also be totally disabled.

MARTIN: If the jury were to consider that the numbers of patients that he was unable to see and his physical condition with the medical testimony that would be at hand, the jury certainly could and should be able to make a determination as to whether or not that is a material or a

substantial duty of his job.

WAINWRIGHT: You are in a difficult situation in this case. On the one hand your client would like to have the total disability determination prior to him turning age 65, because then he would get lifetime benefits. On the other hand, if that determination goes back prior to August 1995 when your client turned 65, you may have a problem with the statute of limitations which the CA talked about. Since there is no precipitating event in 1995 or occurrence that led to the disability claim in 1996, you've got to kind of bridge that gap. And it is a tightrope walk. Do you walk that rope?

MARTIN: I would disagree that it's a tightrope. I feel confident...

WAINWRIGHT: What kind of rope is it?

MARTIN: I think it's a wide plank. And I hope it's a plank going into the ship as opposed to off the ship.

WAINWRIGHT: Tell us how you walk that plank?

MARTIN: The key in this case is that he certainly could - one of the points that the court has made is what about the fact that he didn't have a precipitating event. That's our very point. He didn't have a precipitating event. I'm not talking about the plane crash. But I'm talking about a precipitating event between the time of the plane crash and the time he sought disability to benefits and filed suit in the late 1990s. Because that supports the argument in fact that his disability, and it's not total disability that must commence before age 65, the policy says disability that commences prior to age 65. So his condition did in fact - I believe the summary judgment evidence is worsened to the fact that he couldn't do it any longer. At that point in time he makes a determination to institute suit, file a claim, institute suit. We are not seeking any benefits nor have we ever sought any benefits for any total or partial disability that went unpaid prior to the time that he filed his lawsuit. In fact they had paid him total disability benefits for 2 years and stopped paying him total disability benefits when he turned - he was past 65. That's why I don't think it's a tightrope. We're not seeking any benefits that a statute of limitations would be applicable to at all in this case nor have we ever.

JEFFERSON: You mentioned a moment ago that total disability is not income derivative. So somebody could be total disabled and yet make a substantially larger income in the general area of the person's occupation. Where does that statement come from? Is that pursuant to your construction of the policy, or are there cases that you rely on for that?

MARTIN: It is pursuant to the policy itself. The policy has no - there is nothing in the definition of total disability that deals with income. In a residual rider case or a partial disability case they are income determinative

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MARTIN: ...unable to perform "the duties of your occupation". I would like to point out to the court these three Texas SC cases 1920, 1931 and 1961 those cases dealt with - what actually used to be the language in Provident's policy way back when until it changed. They changed it twice. And it used to be that if you were unable to - the policy said you must be unable to do any task in your gainful occupation. It used to be what the Bright case and what Take and what the Johnson case actually overruled as against public policy to have that type of language in the policy because you would never be able to have a total disability claim. They in two or three separate occasions significantly improved the definition of total disability. They took that definition of total disability away. Now I would make the argument that what they are trying to do is to get this court to submit or to insert a new definition that goes back to essentially what the law was before 1920.

SCHNEIDER: Are you contending then that this insurance contract is ambiguous?

MARTIN: I am not contending it's ambiguous. I am contending that its definition comports with what the SC on several occasions has indicated is the definition of what it means to be totally disabled. The duties of the occupation as set out previously in our briefing and as set out previously in the definitions that the SC has given us in the past is consistent with the new and improved definition that Provident gave Dr. Knott.

O'NEILL: Under your argument then could the parties ever come up with any contractual language to define total disability other than that _____ in our common law?

MARTIN: I believe the SC has outlined a good rule. I believe that there is language that could be constructed that's somewhat between what the new and improved definition in Provident's policy is, the duties of your occupation that they would like to read as all of the duties of your occupation, and what the SC back from 1920 has said is language that we can't live with. I believe there is a...

O'NEILL: So if this definition of total disability said unable to perform all duties of your occupation, you think then the parties would have contracted around the common law language?

MARTIN: I believe that that would be essentially the same language that the SC throughout all of these years has said it can't live with. And I think the SC would have to change the law.

O'NEILL: Disability then becomes a common law definition regardless of what the parties contract for?

MARTIN: That is what this court has done on three separate occasions. That is what the court has done in the past. So based upon that, I would say the court would have to do it in the future. But not for this definition and not in this case.

WAINWRIGHT: Do you think that's an appropriate method of construction, interpreting the contract?

MARTIN: Yes. I think it is appropriate in the circumstances that the SC has talked about in the past where you've got a case where someone contracts for something that they really don't get a benefit from. Which is what the court in Johnson said, the court in Tate said and the court in Bryant said is you're getting paid money as an insurance company for a benefit that doesn't exist.

SCHNEIDER: So it's an illusory contract?

MARTIN: That's what I would say. Those definitions are in fact a illusory as far as anybody being able to get a total disability benefit in the State of Texas.

Shortly before Provident bent over backwards and gave Mr. Knott its benefit of the residual right of the residual rider, it was sending him advertisements for the residual rider and it cost about $100 a year for the residual rider, which I would assume would be some evidence of an economic benefit of the residual rider. And in this very case actually took a way a benefit from Dr. Knott. It's much higher to buy a total disability policy - it was in this case than to buy $100 residual disability right.

O'NEILL: If the parties had a contract that said we've adjusted our premium and taken this into account, this policy is going to have various levels of coverage, and we're going to define total disability as you've got to be completely incapable of doing anything. And we're going to define partial disability and residual disability. We're going to break these definitions down and this is taken into account in the premium. In your opinion within the common law cases trump total disability is still in the definition there?

MARTIN: If the insurance company is getting paid for total disability, if they are giving the illusory benefit of total disability, or if they are giving a benefit and it's to be determined and it is in fact is not going to be an illusory benefit, then the SC has to stick with the language...

O'NEILL: Posit the contract that says total disabilities you can't do anything. Partial disability is something less. Residual disability is something less. We've broken this down, we've taken into account in the premium, this is our agreement. In your opinion total disability would still be bound to the common law definitions? Yes or no.

MARTIN: When you say it's less do you mean less money to buy it?

O'NEILL: No. The contract just says this has been taken into account in the policy premiums.

MARTIN: I believe that in fact is done in this case. I believe in fact you pay more for something with a residual disability and a total disability.

O'NEILL I just want to make sure your answer is yes the common law definition would usurp.

MARTIN: Yes it would.

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REBUTTAL

WAINWRIGHT: Isn't it true that neither your client's position nor Dr. Knott's position on the definition of total disability is stated explicitly in this contract? Neither one is stated explicitly in this contract.

WHITAKER: I believe ours is. To the extent adding the word all of would be another way to write that to make it...

WAINWRIGHT: All of is not in your policy provision.

WHITAKER: I agree completely.

WAINWRIGHT: So then we are going to have to look at something and follow some appropriate contract interpretation to figure out in the context of this contract which definition, which position or some other position the right to _____ an appropriate position. What is it we should look to and follow in your opinion?

WHITAKER: We cite the court to the Rousch opinion, Northern District of Texas, J. Lindsey. J. Lindsey faced a similar situation interplay between total and partial. He said because duties is plural, it implies you are unable to do more than one duty if it's just analyzed in a vacuum. And then he said further support for that conclusion is found in the definition of partial, which covers the inability to cover one or more. I think Provident and not Dr. Knott and not the CA is the only party that can actually give meaning to both the definitions of total disability and partial disability and read them in such a way as to give meaning to all the terms. This court has in a series of cases that we cited in the briefing set forth standards of construction to follow in contract cases. And they include among other things, giving meaning to all the terms, not reading out any part of the definition, and only reaching public policy grounds once you have examined the contract to see what result yields.

O'NEILL: You're distinguishing the old common law cases, the old Texas SC cases based on policy language that contains the definition of partial disability.

WHITAKER: Among other reasons, yes.

O'NEILL: So if this were only a total disability policy would you agree that the definition in the old SC cases applies?

WHITAKER: I would not.

O'NEILL: Do we have to overrule those cases to go your way?

WHITAKER: I don't think so necessarily because those were any occupation policies. And so they cover a - using different language. And I think that the notion that there is this body of insurance out there, disability insurance, that should have the wholesale importation of this common law definition into it, even though that's not done in life, auto, health any of the other cases that this court has recently decided and articulated these standards of construction. I'm at some what of a loss to understand why disability insurance should be treated differently than all those other types of insurance where we just wholesale, rewrite the language.

ENOCH: You don't have to rewrite the language do you - if partial disability is the inability to perform one or more of the duties of the office, and total disability is to be unable to perform the duties of the occupation, the duties of the occupation doesn't necessarily mean all, but it certainly implies a substantial number of the duties to the point that you can't adequately perform the occupation. So the duties of the office - it doesn't say all the duties, but it certainly implies a number of duties that you can't perform wouldn't be totally inconsistent for the court to say total disability is the substantial inability to perform the duties of the office. It's not inconsistent with that language.

WHITAKER: I would think on these facts the same result may be reached. That is because Dr. Knott is only unable to perform certain types of surgeries that as a matter of law that does not constitute a substantial part. And so in some circumstances you could get to the same result. My problem with this is there are different policies out there in the marketplace today at different premium rates which have presumably if Texas law is being complied with have been submitted to the Texas Dept. of Insurance for either approval or the opportunity to disapprove, and which probably didn't exist because it was created in 1951 back at the time of those earlier policies on the earlier opinions that the court issued. And if the CA and Dr. Knott are correct it doesn't matter what those other total disability policies say in its total disability clause. It doesn't matter what rates have been charged. So I think if the CA is correct, what the smart consumer should do is go find the cheapest policy that has the most difficult to meet definition of total disability and is priced accordingly armed with the knowledge that as a matter of cases decided a long time ago all of those are automatically rewritten to include a definition that is much more favorable to him. And I think that that notion is just completely inconsistent with all of the recent opinions of this court in the insurance area giving meaning - at least taking a look at and seeing if you can reconcile and make sense of the definitions themselves.

To date, I don't think either Dr. Knott or the CA have offered an alternative explanation for how total and partial disability can be read in conjunction. Instead the CA's position is just it should be rewritten in toto.

PHILLIPS: You're saying his initial application before the 90 days had run that you turned

down because of that was merely for partial?

WHITAKER: No. Back in 1970 and 1974 when he applied for coverage. We added the residual later. But he applied for partial coverage, paid an extra premium for partial coverage and knew when he got the policy that that would cover him against the inability to perform one or more but not all important daily business duties.