State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711 or gspencer@nycourts.gov.

To be argued Wednesday, November 15, 2017

No. 124 Global Reinsurance Corporation of America v Century Indemnity Co.

Century Indemnity Co. provided general liability insurance to Caterpillar Tractor Company for many years under policies that obligated it to pay up to $1 million per occurrence for third-party claims against Caterpillar and, in addition, to reimburse Caterpillar for its legal defense expenses. From 1971 to 1980, Century obtained reinsurance from Global Reinsurance Corporation of America to cover part of that risk under a series of nine reinsurance certificates, which require Century to cover the first $500,000 of liability under the Caterpillar policy. The "Reinsurance Accepted" section of the certificates require Global to cover half of the excess liability, or up to $250,000 of the next $500,000. The certificates also provide, "All claims involving this reinsurance, when settled by [Century], shall be binding on [Global], who shall be bound to pay its proportion of such settlements, and in addition thereto..., [Global's] proportion of expenses ... incurred by [Century] in the investigation and settlement of claims or suits."

Beginning in 1988, thousands of lawsuits alleging asbestos-related injuries were filed against Caterpillar, triggering Century's liability policies. When Century sought reimbursement from Global for a share of its payments to Caterpillar, the companies disagreed about the liability limits set by the reinsurance certificates. Global brought this action against Century in federal court, arguing that the "Reinsurance Accepted" section places a $250,000 cap on the amount it can be required to pay for both losses due to claims and litigation expenses. Century argued that the limit applies only to indemnity losses and that Global must pay its share of litigation expenses in any amount. Global said Century has paid more than $60 million to Caterpillar and has agreed to pay another $30.5 million. Global said only about 10 percent of that cost represents losses on claims and the other 90 percent represents expenses.

U.S. District Court ruled in favor of Global, holding that Global's "total liability for both loss and expenses is capped at the dollar amount stated in the 'Reinsurance Accepted' section of each certificate," or $250,000. It relied on decisions of the U.S. Court of Appeals for the Second Circuit in Bellefonte Reinsurance Co. v Aetna Casualty & Surety Co. (903 F2d 910 [1990]) and Unigard Security Insurance Co. v North River Insurance Co. (4 F3d 1049 [1993]).

On appeal, the Second Circuit found it was unclear whether Bellefonte and Unigard were correctly decided, and it is asking this Court to resolve the key issue of New York law with a certified question: "Does the decision of the New York Court of Appeals in Excess Insurance Co. v Factory Mutual Insurance Co., 3 NY3d 577 ... (2004), impose either a rule of construction, or a strong presumption, that a per occurrence liability cap in a reinsurance contract limits the total reinsurance available under the contract to the amount of the cap regardless of whether the underlying policy is understood to cover expenses such as, for instance, defense costs?"

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For respondent Global Reinsurance: David C. Frederick, Washington, D.C. (202) 326-7900

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No. 125 Matter of Terranova v Lehr Construction Co.

Joseph Terranova was employed by Lehr Construction Co. in July 2009, when he tripped on a raised floor tile at work and injured his right knee. He applied for workers' compensation benefits and, in July 2010, he was awarded benefits for a work-related injury. In May 2011, an orthopedist examined him and reported that he had a 10 percent schedule loss of use of his right leg, but no other compensation was awarded at that time. Meanwhile, Terranova brought a negligence action against the contractor that installed the defective floor tile. The suit was settled for $173,500 in March 2012. Lehr's workers' compensation carrier, New Hampshire Insurance Co., consented to the settlement and agreed to accept $14,018.75 in satisfaction of its lien under Workers' Compensation Law § 29(1), which entitled it to recoup the cost of benefits it had already paid to Terranova minus its equitable share of litigation expenses that he incurred to obtain the settlement. The statute also entitled the insurer to a credit against its future compensation payments, but the parties did not agree on whether a share of litigation expenses would be apportioned against the insurer based on those future credits. Both parties reserved their rights under Burns v Varriale (9 NY3d 207), which applies where the value of future compensation benefits are speculative and an insurer's equitable share of litigation costs cannot be accurately assessed at the time of a third-party recovery. Burns said that "if a claimant does not receive benefits for death, total disability or schedule loss of use, the carrier's future benefit cannot be quantified by actuarial or other reliable means," and the carrier can instead be required to make periodic payments for its share of litigation costs as future benefits accrue.

After further proceedings, the Workers' Compensation Board ruled in April 2014 that Terranova suffered a 10 percent schedule loss of use of his leg, but held that no further compensation payments would be due because Terranova's settlement exceeded the amount of his award. The Board subsequently determined that Terranova was not entitled to ongoing payments for litigation expenses under Burns because he received a schedule loss of use award, and thus his case was one of "those classes of cases to which [Matter of Kelly v State Ins. Fund (60 NY2d 131)] continues to apply (total disability, death benefits, and schedule loss of use)." Under Kelly, an insurer's share of litigation costs based on past and future benefits is assessed at the time of a third-party recovery.

The Appellate Division, Third Department affirmed, finding Terranova was not entitled to ongoing payments for litigation expenses. It said Kelly "controls the apportionment of the carrier's equitable share of litigation expenses in a case such as this where claimant has obtained a schedule loss of use award."

Terranova argues his case is governed by Burns because the Board had not determined that he suffered a schedule loss of use of his leg nor set the amount and duration of his award until two years after the third-party settlement. He says "the decision below permitted the carrier to take full credit for [his] net third-party recovery while contributing nothing to the litigation expense incurred by [him] in securing that recovery. The court below erroneously focused on the character of the compensation award as a 'schedule loss,' rather than the fact that it was undetermined and thus speculative at the time the third-party action was settled."

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For respondent New Hampshire Insurance: J. Evan Perigoe, Manhattan (212) 227-0347
For respondent Workers' Compensation Bd.: Asst. Solicitor Genl. Patrick Woods (518) 776-2020

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To be argued Wednesday, November 15, 2017

No. 126 B.F. v Reproductive Medicine Associates of New York, LLP
No. 127 Dennehy v Copperman

These medical malpractice actions were brought separately by couples seeking damages for "wrongful birth." The couples were treated for infertility by Dr. Alan Copperman at Reproductive Medicine Associates of New York (RMA), and underwent in vitro fertilization using donated eggs. Both couples allege that RMA and Copperman negligently failed to test the egg donors for a chromosomal abnormality known as "fragile X," which can produce intellectual disability and other injuries, until after their children were born. When tests were conducted months after the births, the donors were found to be fragile X carriers and a child born to each couple had the full fragile X mutation.

RMA and Copperman moved to dismiss both lawsuits as untimely under CPLR 214-a, which requires that a medical malpractice claim be filed within two and a half years "of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." The outcome depends on whether the limitations period began to run when the defendants ended their treatment of the plaintiffs or when the children were born. In Case No. 126, embryos produced by the donated eggs were implanted in January 2009, RMA discharged the mother to the care of her own obstetrician in March 2009, and she gave birth in September 2009. The suit was filed in December 2011. In Case No. 127, the embryos were implanted in August 2008, RMA discharged the mother in September 2008, and she gave birth in April 2009. The suit was filed in October 2011. Supreme Court denied motions to dismiss both suits.

The Appellate Division, First Department affirmed, ruling the suits were timely because a wrongful birth claim "accrues upon the birth of the impaired child." For a wrongful birth, "'the parents' legally cognizable injury is the increased financial obligation' of raising an impaired child...," it said. "Only if there is a live birth will the injury be suffered. Thus, until there is a live birth, the existence of a cognizable legal injury that will support a wrongful birth cause of action cannot even be alleged.... Without legally cognizable damages, there is no legal right to relief, and 'the Statute of Limitations cannot run until there is a legal right to relief'...."

The defendants argue that the limitations period began to run on the date they last treated each plaintiff and expired before the suits were filed, and that any new exceptions to CPLR 214-a must be enacted by the Legislature. RMA says the Appellate Division decision "creates a distinct 'discovery rule' for 'wrongful birth'" actions. "Uninterrupted precedent, however, instructs that only the Legislature may properly engraft a new 'discovery' exception onto the malpractice statute of limitations," and the Legislature has "consistently rejected" such a rule.

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For respondent B.F.: Wendy R. Fleishman, Manhattan (212) 355-9500
For respondent Dennehy: James N. LiCalzi, Manhattan (212) 233-8100