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Images

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Attorney Sean McElligott said the state Supreme Court ruling had a symbolic message as well as a practical one, sending a message to the insurance industry about basic fairness.

Court Ruling Strengthens Insurance Safety Net

Justices say quasi-public agency improperly tried to limit coverage

By THOMAS B. SCHEFFEY

Sean McElligott is having a pretty good year.

Earlier this month, he won a state Supreme Court case that improved his clients' chances of recovering from the state's insurer of last resort. Back in May, he won a $10 million medical malpractice verdict, evidently the highest ever in New London. And just last week, he made partner at Koskoff, Koskoff & Bieder, the state's best-known plaintiffs' personal injury firm.

For McElligott, the high court win in *Christopher Johnson et al. v. Connecticut Insurance Guaranty Association*, has both symbolic and practical benefits. As a bottom-line matter, McElligott doubled the potential wrongful death recovery, from $1.6 million to $3.2 million, for his client, the estate of Debra Johnson. The case has yet to go to trial.

For the past seven years, Johnson's widower and children have been waiting for a chance to recover from the insurance and medical system. Johnson, a former bank teller, was 27 and the

mother of four when she died, allegedly as a result of medical negligence, five days after giving birth to twin daughters.

Adding to the misfortune, the medical malpractice insurer for her doctors, Middlesex Obstetrics and Gynecology Associates, was insolvent. That left the estate with just the safety-net substitute of the Connecticut Insurance Guaranty Association, or CIGA. This quasi-public agency is the insurers' backup, and is funded with contributions from healthy Connecticut-licensed insurance companies.

CIGA's remedy is not as good as real coverage. By state statute, it has limits of $400,000 per claim, and is immune from "bad faith" liability if it unreasonably refuses to settle. It also is immune, under the terms of the state statute creating it, from other punishments, such as sanctions ordered by the workers' compensation commission.

The CIGA statute, Connecticut General Statutes Sec. 38a-850, says it shall have "no liability on the part of and no cause of action of any nature shall arise against [it] or its agents or employees ... for any action taken or any failure to act by them in the performance of their powers and duties. . .." The state Supreme Court, for example, recently refused to uphold workers comp commission sanctions against CIGA, on grounds that the legislature has provided immunity.

That creates a temptation for CIGA to act unreasonably, says McElligott. And, he contends, it sometimes yields to that temptation.

Nurse's Instructions

In Debra Johnson's case, both a doctor and a nurse were allegedly to blame for her death.

She gave birth by Cesarean section to her twin daughters at the John Dempsey Hospital in Farmington on March 18, 2000, and was discharged March 21. That evening, she began experiencing headaches so severe that they prevented her from visiting her premature babies, who remained at the hospital.

On March 23, she called the office of Dr. Sally Irons, her treating obstetrician-gynecologist at Middlesex Obstetrics and Gynecology Associates. She described the headaches and said they weren't responding to medication. Instead of making arrangements for her to be treated, the office nurse who took the call reportedly told Johnson to just go back to the hospital.

There is conflicting testimony about what the nurse told Dr. Irons — fact questions for a jury. What does seem apparent is that Johnson was driven to John Dempsey Hospital by her mother, visited her babies and then was driven home.

She went to bed about 9:30 with her husband and died in her sleep. An autopsy found she had died of a cerebral edema, a complication of pre-eclampsia, a condition that results from inflammation of the placenta.

After her estate filed a medical malpractice lawsuit, CIGA went to court in 2009 to get a declaratory ruling on what it had to cover. Then-trial Judge Stuart Bear, now an Appellate Court judge, concluded CIGA had to cover negligence of nurses as well as doctors. On appeal, the Supreme Court unanimously upheld Bear.

CIGA had contended that when Middlesex Obstetrics and Gynecology Associates purchased corporate and partnership medical malpractice coverage, this didn't cover the practice's nurses and paraprofessionals. The cryptic and convoluted policy language seemed ambiguous, but CIGA contended that it wasn't liable for coverage.

McElligott, in his Supreme Court brief, argued that Bear's reading of the policy should prevail – that there was coverage for nurse malpractice. In the alternative, McElligott argued, the same result should be achieved "under the doctrine of contra preferentem, which provides that an ambiguous insurance policy is interpreted in favor of the insured."

Supreme Court Justice Lubbie Harper, writing for the full court, was unimpressed by CIGA's interpretation. CIGA claimed the alleged negligence of a nurse, Kathy Hoffman, would be covered only if she was individually named as a defendant in the lawsuit, and that the medical group was not automatically covered for her acts as part of its corporate-partnership policy coverage. It even argued that doctors' acts were not covered under the corporate-partnership policy.

"We cannot help but note at the outset the seemingly bizarre result called for by [CIGA's] position," wrote Harper. It didn't make sense, he stated, that a medical practice group would buy such unpredictable coverage for its professional employees, and that "actual coverage would depend on the way a given plaintiff happens to formulate its claim."

Still, the justices concluded that, odd as it might seem to have insurance coverage depend on who the plaintiff names, the court would have to uphold the policy language if it "unambiguously and inexorably led to the conclusion that the parties manifested such an intention."

However, this was not the case. The justices relied instead on the insurance law principle that policy language will be construed as laymen would understand it. It certainly wasn't clear that the policy meant to exclude coverage of non-physician employees, Harper wrote.

'Symbolic Angle'

In deciding the Johnson case, the Supreme Court wasn't being asked to impose sanctions on CIGA, or find it operated in bad faith – it simply had to interpret contract language, a task well within its powers.

CIGA, though it is a Connecticut quasi-public agency, has its headquarters in Boston. It was represented by Mark D. Robins, of NixonPeabody in Boston. He did not return calls for comment.

But for McElligott, the Supreme Court ruling was heartening. The legal principles that apply to CIGA, as the insurance companies' backup insurer, can set the tone for the basic fairness of the system, he said. "It has a symbolic angle. They are sort of like the government," McElligott said. "They have this immunity, and how they conduct themselves sends a signal to the insurance industry."

On the other hand, there was a practical application. For McElligott's client, the Supreme Court ruling means the medical malpractice case will continue with four counts each against the doctor and the nurse. With a limit of $400,000 per count, that brings the total potential damages to $3.2 million, or twice the amount possible if the nurse's coverage had been excluded.

As for the future, McElligott said there is now new case law governing language in insurance policies. "It's kind of a neat rule," McElligott said. "The court was saying, even if CIGA's contract interpretation doesn't make sense, if the language really says that, we'll interpret it that way. But we'll give [insurers] this higher burden, [which is] the language has to inexorably lead to that result. If not, we're going to interpret it in a way that makes sense." •