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Can Same-Sex Partner Claim Loss Of Consortium?

Unusual malpractice case could find way to state Supreme Court

By CHRISTIAN NOLAN



Charlotte Stacey, right, maintains that had same-sex marriage been legal in the state in 2001 when her partner, Margaret Mueller, was diagnosed with cancer, the couple would have been married. That means Stacey could have made a claim of loss of consortium in the medical malpractice case that followed Mueller's death last year.

Margaret Mueller battled through 24 cycles of chemotherapy over a 3 ½ year span, with little improvement to her condition. Growing desperate, she sought out a different oncologist to ask about other treatment options.

The new doctor, however, made a shocking revelation. Mueller didn't have ovarian cancer, as she had been told. She had been misdiagnosed and actually had cancer of the appendix. The truly tragic news was that the cancer was too far along to be treated. She wouldn't survive. She died last year at age 62.

Mueller's estate sued her original doctor for medical malpractice and won. She was awarded \$2.45 million earlier this month by a Stamford jury.

It may sound like a sad but legally straightforward malpractice case. But an interesting appeal is expected in the coming months on an issue that lawyers say has never been taken up anywhere in the country.

When Mueller died, she left behind her lifelong same-sex partner Charlotte Stacey, on whose behalf the malpractice lawsuit included a claim of loss of consortium. But a state judge in 2006 dismissed the claim on the grounds that the same-sex pair was not married when the negligence occurred.

Stacey maintains that had it been legal for same-sex couples to wed in 2001, when Mueller was misdiagnosed, they would have been married at the time. If that had been the case, Stacey, as the surviving spouse, would have been eligible to make a claim for her lost relationship.

But it was not until 2008 that the state Supreme Court ruled that same-sex couples have the right **to marry. It wasn't until 2005 that the state legislature passed a civil union law that gave same-sex** couples the same legal rights as heterosexual married couples in Connecticut. Mueller and Stacey had a civil union ceremony.

"Certainly it's an interesting argument," said attorney Ken Bartschi, of Horton, Shields & Knox in Hartford. Bartschi is not involved in this case but is no stranger to this type of law, having helped draft appellate briefs in the *Kerrigan v. Commissioner of Public Health* case that paved the way for same-sex marriage in Connecticut.

"The couple was prevented from marrying, should there be some recognition of that in terms of the loss of consortium claim?" asked Bartschi. "I imagine this would go up to the Connecticut Supreme Court and who knows what they would do with it."

'Every Sense'

Mueller and Stacey were together for 25 years. "We were a complete couple in every sense of the word," said Stacey after the recent verdict in the malpractice case.

But everything changed after Dr. Iris Wertheim diagnosed Mueller as having ovarian cancer in 2001 **and performed a surgical procedure that involved cutting out the tumor's** cells. The cells are then studied under a microscope to determine the specific type of cancer. The pathology report stated that Mueller had cancer of the appendix, but Wertheim stuck with her original diagnosis and continued to treat her patient with chemotherapy cycles for nearly four years.

Eric Stockman, an attorney with Neubert, Pepe & Monteith in New Haven, represented the doctor. **He said Wertheim "acted thoroughly and reasonably under the circumstances."**

Stockman said that Wertheim did seek input from other doctors along the way, including Dr. Isidore Tepler, who was also found negligent but settled before trial. He said Mueller's medical records were even reviewed by the Stamford Hospital Tumor Board, which consists of a range of physicians, including oncologists and pathologists.

He said the board agreed with Wertheim's diagnosis and treatments for Mueller. Stockman said studies determining that this type of cancer originated in the appendix did not reach mainstream medical practice until the mid-2000s.

"This wasn't a doctor who arrived at her own isolated conclusion of what this was," said Stockman. He added that his client cared about Mueller as a patient and still agonizes over what happened to her.

Stockman, who said Mueller's cancer at one point went into remission for 18 months under Wertheim's care, also argued at trial that even with the different diagnosis, Mueller would still have died.

However, Sean K. McElligott, who represented the couple, along with attorney Joshua Koskoff, said that patients who receive timely treatment – chemo and surgery – for appendix cancer have a 75 percent chance of the cancer not recurring.

"That's as close to a cure as you get with cancer," said McElligott, of Koskoff, Koskoff & Bieder in Bridgeport.

'Right Thing'

Now that the plaintiffs won their malpractice claim, McElligott said it's time to challenge the trial court's ruling and argue that the jury should have been allowed to consider Stacey's loss of consortium claim.

"We want to pursue it because it's the right thing to do," said McElligott. "The idea is they actually had the right to be married.

"I saw three and a half years of Marge literally sleeping her life away," Stacey said in 2006 when her loss of consortium claim was dismissed, according to the Associated Press.

The couple said virtually every aspect of their lives changed because of the cancer. Mueller could no longer trek up the 27 steps to their Stamford condo so the couple moved to Norwalk. Stacey then had to commute two hours each way to her insurance job in New York.

Mueller had to use a colostomy bag and could no longer perform simple chores like mowing the lawn and housekeeping. She also had trouble singing in the church choir, the passion that had initially sparked the couple's relationship. "Charlotte has been there for everything," Mueller said in 2006, according to the Associated Press. "She kept me going. There's a lot we can't do anymore. She has to do an awful lot by herself."

McElligott explained that he and Koskoff will have to prove that "but for the state of the law at that time, these two individuals would've been married."

"We were prepared to show evidence of that...they shared finances, shared a house together. As soon as the civil union law passed, they were in a civil union. These were two individuals who made a lifelong commitment to each other and would've been married."

Stockman, however, said the judge's decision to strike the loss of consortium complaint from the case was based on a "very simple principle of law."

"It's not a comment on anybody's level of commitment to their loved one, nor is it meant to be," said Stockman. "It's just the way the law was at the time and that's it."

But Bartschi, the Horton, Shields & Knox attorney, said that the trial court's decision to disallow the loss of consortium claim was unlikely to sway the appellate courts one way or another because it's such a novel issue. He predicted that the state Supreme Court would ultimately decide what the law should be, and might take the case before it's even heard by the Appellate Court. .

"When the legislature has spoken, the court has to work within that framework. I'm not aware of a statute on loss of consortium," said Bartschi. "That's decisional law, bound by precedent."

But in the case of same-sex couples, there's "no precedent...[We're] writing on a clean slate, as it were." •