

MASSACHUSETTS SUPREME JUDICIAL COURT

Charron v. Amaral

451 Mass. 767 (2008) · Decided July 10, 2008

OPINION

Charron v. Amaral

451 Mass. 767

IRELAND, J.

Ireland, J. We transferred this case from the Appeals Court after a Superior Court judge reported the propriety of his ruling allowing the defendants' motion for partial summary judgment in a medical malpractice action involving a same-sex couple. Mass. R. Civ. R 64 (a), as amended, 423 Mass. 1403 (1996). In the motion, the defendants contended that the plaintiff Cynthia Kalish's claims for the loss of consortium of the plaintiff Michelle Charron could not be proved because Kalish was not married to Charron at the time the alleged cause of action accrued. The judge concluded that summary judgment was "required based upon the current state of the law." The judge reported the following questions: "A. Did the court err in allowing the defendants' Motion for Summary Judgment? "B. Can a same sex spouse pursue a claim for the loss of an injured spouse's consortium where the couple was not married when the personal injury cause of action accrued but can demonstrate that they would have been married if so permitted by law, and the couple did in fact marry when permitted following *Goodridge v. Department of Pub. Health*, 440 Mass. 309 (2003) [(*Goodridge*)]? "C. Can the marital rights recognized by *Goodridge*, including the loss of spousal consortium, be retroactively applied to a same sex married couple who can demonstrate that they would have been married when the cause of action for personal injuries on behalf of one of them accrued had the Commonwealth recognized such a union?"³

1. We set forth the following agreed-on facts contained in the judge's report. Kalish and Charron met in 1986, started dating in, March 1990, and dated monogamously for two years. In 1992, they decided to live together. They first moved into an apartment *769and later jointly purchased a house. In 1994, "they exchanged rings in a private ceremony." Through an anonymous donor program, Kalish conceived a child, who was bom in 1998 and was "jointly adopted" by Kalish and Charron.

The couple shared all household expenses, including the expenses for the child, and Charron obtained a family health insurance policy. In 1999, they executed legal documents, including durable powers of attorney, wills, health care proxies, and life insurance policies, each granting the other the necessary legal authority or naming the other as her beneficiary. In December, 2002, Charron sought treatment for a lump in her breast and was diagnosed with breast cancer in July, 2003. At that time she and Kalish were not married. Pursuant to the *Goodridge* holding, however,

they applied for a marriage license on the first day the Commonwealth permitted it, May 17, 2004, and were married on May 20, 2004.

2. Some discussion of the law of loss of consortium and of our decision in *Goodridge* is in order.

a. Loss of consortium. “When a spouse suffers personal injury as a result of the negligence of a third party, the other spouse may recover damages from the third party for loss of consortium.” *Olsen v. Bell Tel. Lab., Inc.*, 388 Mass. 171, 176 (1983), citing *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 167-168 (1973). Historically, a claim for a loss of consortium was a man’s right to recover for the loss of consortium of his wife. See *Diaz v. Eli Lilly & Co.*, *supra* at 154-156 (discussing history of loss of consortium). Over time, the appellate courts have expanded the class of persons that has the right to a claim for a family member’s loss of consortium. See *id.* at 167 (wife for husband); *Ferriter v. Daniel O’Connell’s Sons*, 381 Mass. 507, 516 (1980) (dependent child for parent); *Angelini v. OMD Corp.*, 410 Mass. 653, 661-662 (1991) (fetus, later born alive, for parent). See also *Morgan v. Lalumiere*, 22 Mass. App. Ct. 262, 270 (1986) (disabled adult, dependent on parent). Accord *Angelini v. OMD Corp.*, *supra* at 655-656 (discussing decisions from Appeals Court that clarify persons eligible to recover). In addition, the Legislature enacted G. L. c. 231, § 85X, inserted by St. 1989, c. 259, § 1, to allow a parent to recover for the loss of consortium of a child in response to this court’s decision in **770Norman v. Massachusetts Bay Transp. Auth.*, 403 Mass. 303, 306 (1988). A claim for a loss of consortium cannot arise unless the family member has, *inter alia*, a legal relationship with the injured third party. See, e.g., *Fitzsimmons v. Mini Coach of Boston, Inc.*, 440 Mass. 1028 (2003). In the case of adult couples, the legal relationship is established by marriage. *Feliciano v. Rosemar Silver Co.*, 401 Mass. 141, 142 (1987). This court consistently has rejected the idea that cohabiting adults, even those who could demonstrate a commitment to each other, could recover. In *Feliciano v. Rosemar Silver Co.*, *supra* at 141-142, an unmarried couple lived together for approximately twenty years. They were married two years after the husband was injured. The wife argued that she should be allowed to recover for loss of consortium, despite the fact that she and her husband were unmarried at the time the injury accrued, because they had held themselves out as husband and wife, jointly had a bank account and house, filed joint tax returns, and, to the exclusion of others, turned to each other for, among other things, companionship. This court stated that its recognition of a spouse’s right to recover for the loss of consortium promoted the values inherent in marriage: “the foundation of the family ... a social institution of the highest importance.” *Id.* at 142, quoting *French v. McAnarney*, 290 Mass. 544, 546 (1935). The court rejected the wife’s argument that it should instead allow the right to recover for a loss of consortium in a “ ‘stable and significant’ relationship.” *Feliciano v. Rosemar Silver Co.*, *supra*, quoting *Butcher v. Superior Court*, 139 Cal. App. 3d 58, 70 (1983). The court said, “[A]s a matter of policy . . . tort liability cannot be extended without limit. Distinguishing between the marriage relationship and the myriad relationships that may exist between mere cohabitants serves the purpose of limiting protection of interests and values that are reasonably ascertainable.” *Feliciano v. Rosemar Silver Co.*, *supra*,

citing *Diaz v. Eli Lilly & Co.*, supra at 165. Accord *Angelini v. OMD Corp.*, supra at 661-662 (limiting scope of recovery for loss of parental consortium for fetus, later born alive, to child conceived when parent was injured and who demonstrates expectation of dependent relationship). In *Fitzsimmons v. Mini Coach of Boston, Inc.*, supra, a case *771decided after our *Goodridge* decision, this court rejected the plaintiff's invitation to reconsider the *Feliciano* holding in light of greatly changed social mores concerning cohabitation. Noting that the couple could have married, but chose not to, the court stated, "A loss of consortium claim presupposes a legal right to consortium of the injured person." *Fitzsimmons v. Mini Coach of Boston, Inc.*, supra at 1028. The court concluded by stating that the Commonwealth has a "deep interest" in upholding the integrity of marriage.⁴ *Id.*, quoting *Feliciano v. Rosemar Silver, Co.*, supra at 142-143. Moreover, the Legislature has not seen fit to enact a statute overruling our decisions and to allow those who cohabitate to recover for loss of consortium. Contrast G. L. c. 231, § 85X, enacted in response to *Norman v. Massachusetts Bay Transp. Auth.*, supra. We recognize that, in all of these cases, the couples could have married had they chosen to do so. That option was not available to Kalish and Charron until our decision in *Goodridge*. We therefore discuss the *Goodridge* decision and then consider Kalish's argument that our decision entitles her to a loss of consortium claim.

b. The *Goodridge* decision. In *Goodridge*, this court declared that because the marriage licensing statute, G. L. c. 207, limited the "protections, benefits, and obligations of civil marriage" to opposite sex couples, it violated "the basic premises of individual liberty and equality under the law protected by the Massachusetts *772Constitution." *Id.* at 313, 342. The court did not strike down the marriage statute; instead, it "refined the common-law meaning of [civil] marriage ... to mean the voluntary union of two persons as spouses, to the exclusion of all others." *Id.* at 343. "[M]indful that [its] decision mark[ed] a change in the history of [the Commonwealth's] marriage law," the court stayed the entry of judgment of its decision "for 180 days to permit the Legislature to take such action as it may deem appropriate." *Id.* at 312,344. "The purpose of the stay was to afford the Legislature an opportunity to conform the existing statutes to the provisions of the *Goodridge* decision." *Opinions of the Justices*, 440 Mass. 1201, 1204 (2004). The *Goodridge* court devoted more than one page of its opinion to a nonexhaustive list of the numerous benefits that flowed from the legal status of marriage, including a right to claim the loss of consortium of a spouse. *Goodridge*, supra at 323-325. The court stated that these "benefits [were] accessible only by way of a marriage license" (emphasis added). *Id.* at 323. It also stated that "civil marriage has long been termed a 'civil right' " because of the many benefits that are accessible and "for its intimately personal significance." *Id.* at 325, citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

3. For ease in understanding, we do not address the reported questions in sequence. Kalish argues that we should answer the second and third reported questions in the affirmative because it would violate the equal protection and due process provisions of the Massachusetts Constitution to deny her the right to recover for the loss of consortium and because, although she and Char-ron were prohibited from marrying, her relationship with Char-ron satisfies the other criteria this court uses

to determine whether someone can recover.

Kalish contends that because the denial of the right of same-sex couples to marry violated the Massachusetts Constitution, all the laws that required (exclusively opposite sex) marriage as a prerequisite to certain rights were derivatively unconstitutional. We need not analyze this assertion because, in any event, it does not aid her position. As Goodridge recognized, where a change in law is so radical that the consequences of that change realistically require time for the Legislature to act, a court may make the *773remedy for unconstitutional laws prospective only. *Id.* at 312, 344, citing *Michaud v. Sheriff of Essex County*, 390 Mass. 523, 535-536 (1983) (court mindful that it changed history of marriage law). It is obvious that Goodridge was intended to apply prospectively; thus, it is not necessary for us to address Kalish's contention that we should apply Goodridge retroactively. We also reject Kalish's argument that we should allow her to recover for the loss of consortium because she meets all other criteria for recovery and would have been married but for the legal prohibition. Goodridge granted same-sex couples the right to choose to be married after a specific date; the court never stated that people in same-sex, committed relationships (including the Goodridge plaintiffs, who had applied for, and were denied, marriage licenses) would be considered married before they obtained a marriage license. Nor did it state that it was amending, in any way, the laws concerning the benefits available to couples who marry to make up for past discrimination against same-sex couples. Instead, as discussed, one of the grounds on which the Goodridge court based its decision regarding the constitutionality of the marriage licensing statute was that so many benefits flowed only from being married. Goodridge, *supra* at 323. Moreover, however sympathetic we may be to the discriminatory effects the marriage licensing statute had before our Goodridge decision, as counsel conceded at oral argument, to allow Kalish to recover for a loss of consortium if she can prove she would have been married but for the ban on same-sex marriage could open numbers of cases in all areas of law to the same argument. As Goodridge pointed out, "[t]he benefits accessible only by marriage are enormous, touching nearly every aspect of life and death. The [Department [of Public Health] states that 'hundreds of statutes' are related to marriage and marital benefits." *Id.* at 323.

4. Conclusion. For the reasons set forth above, we answer all the reported questions in the negative and affirm the grant of summary judgment concerning Kalish's claims for a loss of consortium. The case is remanded for further proceedings consistent with this opinion.

So ordered. Pursuant to Mass. R. Civ. P. 64, as amended, 423 Mass. 1403 (1996), a trial judge "may not report a question of law, but may report the propriety of an interlocutory order." *Connors v. Boston*, 430 Mass. 31, 34 n.9 (1999), quoting *Colella v. Commonwealth*, 417 Mass. 433, 434 (1994). As an amicus brief submitted by the Gay & Lesbian Advocates & Defenders in *Fitzsimmons v. Mini Coach of Boston, Inc.*, 440 Mass. 1028 (2003), pointed out, by 2003, this court had recognized numerous types of families and had developed relationship-oriented tests in other areas of law. See, e.g., *Blixt v. Blixt*, 437 Mass. 649, 654-655, 657-659 (2002), cert. denied, 537 U.S. 1189 (2003) (difficult to speak of average American family; test for significant

preexisting relationship between grandparent and child); *Turner v. Lewis*, 434 Mass. 331, 334-336 (2001) (civil protective order statute must be applicable to reality of diverse family relationships); *E.N.O. v. L.L.M.*, 429 Mass. 824, 829-831, cert. denied, 528 U.S. 1005 (1999) (increasing number of same-sex couples having children; discussing de facto parenthood); *Adoption of Tammy*, 416 Mass. 205, 206 (1993) (same-sex couple may jointly adopt children). Despite its recognition of the diverse nature of family relationships, and its decision in *Goodridge v. Department of Pub. Health*, 440 Mass. 309 (2003) (*Goodridge*), this court affirmed the marriage requirement for loss of spousal consortium. *Fitzsimmons v. Mini Coach of Boston, Inc.*, *supra*. See *Goodridge*, *supra* at 334 (discussing changing nature of families).