

## Discrimination or Patient Privacy? Federal Court in Florida Dismisses Suit Brought By Gay Woman Denied Access to Her Dying Partner

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A dismissal of a federal case in Florida last fall could potentially affect the way hospitals treat patients in nonmarital relationships, including same-sex partners, older couples who choose not to marry, and even single individuals who rely on the support of close friends to assist in making medical decisions on their behalf. The case received significant media attention<sup>1</sup> over the course of last year and pitted gay-rights advocacy groups, arguing that the hospital employed discriminatory policies, against hospital officials who stated they are constrained by patient privacy laws that can restrict giving visiting access and medical information to nonrelatives.

### Background

Before Janice Langbehn and her partner of nearly 20 years, Lisa Marie Pond, could leave Miami, Florida, on a cruise with their four adopted children in 2007, Pond suffered a massive stroke and was taken by ambulance to nearby Jackson Memorial Hospital and admitted to the facility's Ryder Trauma Center.<sup>2</sup> After arriving at the Center with the children shortly thereafter, Ms. Langbehn informed the admitting clerk that she was Pond's life partner and offered to provide relevant medical history information. She additionally requested that she and the children see Pond as soon as it was possible. The admitting clerk rejected Langbehn's offer to provide the information on Pond's medical history and refused to allow her and the children to see or be with Pond for the next eight hours.<sup>3</sup>

Shortly thereafter, a social worker with the hospital spoke to Ms. Langbehn and informed her that because she was in "an anti-gay state" she was not going to get to see her partner or be able to know her condition.<sup>4</sup> The social worker also told Langbehn that, because it was a holiday weekend, she would not be able to get before a court to secure legal documentation in order to gain access to Ms. Pond.

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<sup>1</sup> See e.g., Tara Parker-Pope, *Kept From a Dying Partner's Bedside*, N.Y. Times, May 18, 2009, [http://www.nytimes.com/2009/05/19/health/19well.html?\\_r=1&scp=1&sq=Kept%20from%20a%20Dying%20Partner's%20Bedside&st=cse](http://www.nytimes.com/2009/05/19/health/19well.html?_r=1&scp=1&sq=Kept%20from%20a%20Dying%20Partner's%20Bedside&st=cse); Susan Donaldson James, *Lesbians Sue When Partners Die Alone*, ABC NEWS.COM, May 20, 2009, <http://abcnews.go.com/Health/story?id=7633058&page=1>; Mike Clary and Bob LaMendola, *Lawsuit: Jackson Memorial Barred Lesbian From Seeing Dying Partner*, SOUTH FLA. SUN SENTINEL, June 26, 2008, <http://www.sun-sentinel.com/news/local/southflorida/sfl-flrxgaysuit0626sbjun26,0,3396801.story>; Steve Rothaus, *Lesbian's Case Against Jackson Memorial Hospital Tossed*, Sept. 30, 2009, <http://www.miamiherald.com/460/story/1258772.html>.

<sup>2</sup> *Langbehn v. Public Health Trust of Miami-Dade Cty.*, 2009 WL 3247185 at \*1 (S.D.Fla.).

<sup>3</sup> *Id.*

<sup>4</sup> Susan Donaldson James, *Lesbians Sue When Partners Die Alone*, ABC NEWS.COM, May 20, 2009, <http://abcnews.go.com/Health/story?id=7633058&page=1>.

Approximately an hour after Pond was admitted to Ryder, facility personnel received by fax, a copy of Pond's executed power of attorney – which authorized Langbehn to act as Ms. Pond's guardian and to make medical decisions on her behalf. Although the admitting clerk at Ryder had receipt of Pond's power of attorney, she refused to acknowledge its legal effect and denied Langbehn the ability to sign admission and consent for treatment forms as well as refused her access to Pond's medical records.<sup>5</sup> Despite the stance taken in the admitting office, Ryder personnel did allow Pond's father to sign some authorization forms for his daughter's treatment. Around 5:20 p.m., physicians did speak with Ms. Langbehn however about the need for a brain monitor and again around 6:10 p.m., when physicians spoke to Ms. Langbehn about possible surgical options. During that conversation, physicians and Ms. Langbehn learned that Ms. Pond's condition had deteriorated significantly. Though it was alleged that a physician admitted that there was “no medical or other legitimate reasons to prevent the family from being with Ms. Pond,” Langbehn and the children were not taken to the restricted area where Ms. Pond was located.<sup>6</sup>

About 40 minutes later, a priest escorted Ms. Langbehn into the trauma area where he administered last rites to Ms. Pond. Langbehn recalled seeing other families, including those with minor children, being given information by the admitting clerk and being escorted in and out of the restricted area. Throughout the evening, Ms. Pond was placed in restraints “for her own protection and because no family members were allowed to provide care and supervision.”<sup>7</sup>

At 10:30 p.m., Ms. Pond was transferred from Ryder to Jackson's Neurosurgery Intensive Care Unit; however, Ms. Langbehn was never told. An hour later, Ms. Pond's sister arrived and was immediately informed of the transfer and room number. Ms. Langbehn and the children were subsequently able to visit Pond, who was then unconscious, in the new room around midnight. Ms. Pond was declared brain dead at 10:45 a.m., the following morning.

*Langbehn v. Public Health Trust of Miami-Dade County*

In her complaint, Ms. Langbehn asserted eight claims under Florida law – all arising out of alleged improper treatment by personnel at Ryder and Jackson Memorial during the ordeal. Additionally, all counts focused on hospital personnel's interaction with Ms. Langbehn and did not question the medical care actually provided to Ms. Pond.

For the most part, Langbehn's claims alleged that the healthcare facilities acted negligently in some respect or another – whether it failed to provide her access to Ms. Pond, failing to recognize Langbehn as Pond's surrogate, or failing to furnish Langbehn with Pond's medical condition or documentation. Each, it was alleged, resulted in Langbehn suffering emotional distress, exacerbation of her multiple sclerosis, trauma, nausea, etc.

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<sup>5</sup> *Langbehn v. Public Health Trust of Miami-Dade Cty.*, 2009 WL 3247185 at \*2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

a. A Hospital's Duty to Provide Medical Condition Information

The court agreed that doctors and hospitals owe a general duty to a patient to give her material information necessary for her to make an informed decision; this duty additionally, the court noted, extends to “a person who is available and is legally able to make medical decisions on the part of the patient” if the he or she is incompetent or unconscious.<sup>8</sup> The court reasoned that Ms. Langbehn did make such determinations when she met with physicians to discuss the placement of a brain monitor on Ms. Pond as well as during the discussion regarding surgical options.

Furthermore, the court went on to hold that this duty to provide such information does not extend to relatives, friends, or loved ones who do not have decision-making authority as to a patient's medical treatment. Even those friends or family who are concerned about someone receiving treatment in a hospital are not owed a duty, under Florida law, to receive medical status updates.<sup>9</sup>

b. A Hospital's Duty to Allow Visitation

The court separated Langbehn's claims regarding a right to visitation and her claim of receiving sufficient information to allow an informed decision as to medical care. In sum, the court fashioned a very limited right regarding such visitation with broad discretion in the hands of the hospital:

...I would predict that the Florida Supreme Court would hold that doctors at a trauma unit do not have a freestanding legal duty, untethered to informed consent by a patient or health care surrogate, to allow visitation with a patient who is in critical condition and undergoing treatment...or to allow visitation with a terminal patient...It may sometimes make sense for doctors to allow close relatives to visit a patient inside a hospital, even in a trauma unit or an intensive care unit, unless they have medical reasons for not allowing visitation...[but] decisions as to visitation should be left to the medical personnel in charge of the patient, without second-guessing by juries and courts...A decision to not allow visitation in a trauma unit setting, where emotions are already at their breaking point and where lives may literally hang in the balance, does not create ‘unreasonable risks’ of harm to the patient or to the putative visitors so as to establish a legal duty in tort.<sup>10</sup>

The court dismissed all of Ms. Langbehn's claims against Ryder and Jackson Memorial – although it admonished the healthcare facilities for their “lack of compassion” during a time of anguish and vulnerability. Unfortunately, the court noted, no relief was available under Florida law for the facilities' failures.

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<sup>8</sup> *Id.* at \*5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*7.

## The Aftermath: Jackson Memorial's Statement

Following the media attention devoted to the case, Jackson Memorial Hospital attempted to salvage its image through a public relations piece entitled: *A Message to the Community*, which stated, in part:

Jackson Memorial Hospital does not restrict visitation on account of a person's sexual orientation. In fact, the hospital grants visitation to ALL individuals equally, no matter who they are and regardless of their relationship – as long as doing so does not interfere with the care being given to the patient or the other patients in the area. A friend or a colleague is viewed no differently than a partner, spouse, or parent for purposes of visitation.

It is important to point out, though, that the Trauma Resuscitation Unit at the Ryder Trauma Center is more like a large operating room with multiple beds separated by glass partitions than a traditional hospital floor. Ryder is the only level 1 trauma center for both children and adults in Miami-Dade County, meaning the most critically injured patients are brought here for life-saving care -- more than 4,000 patients annually. This includes those who have been stabbed, shot, or injured in serious automobile accidents. In fact, Ryder is so busy, and the medical teams are so experienced, that the United States Army trains its surgical teams at Ryder before they are deployed to war zones. Because of the nature of the work performed at Ryder, access for visitors, and even for hospital staff, is limited.<sup>11</sup>

## Reed v. ANM Health Care

In a case with facts strikingly similar to those involving Janice Langbehn and Lisa Marie Pond, a Washington state court of appeals held that a patient's life partner could bring state claims for outrage and negligent infliction of emotional distress against a critical care nurse who excluded her from the partner's hospital room on the night before her death.<sup>12</sup> However, in that case, the court highlighted that the issue was not whether the nurse's "decision to exclude [the partner] breached the standard of care. Rather,...the critical question is whether [the nurse's] actions in excluding [the partner] were medically motivated."<sup>13</sup>

Sharon Reed and Jo Ann Ritchie were life partners for 17 years when Ritchie, who had been ill and periodically hospitalized for several years at the University of Washington Medical Center, was hospitalized there in 2005 because she was having difficulty

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<sup>11</sup> Jackson Health Sys., *A Message to the Community*, <http://www.jhsmiami.org/body.cfm?id=10287> (last accessed Jan. 16, 2010).

<sup>12</sup> *Reed v. ANM Health Care*, 2008 WL 5157869 (Wash.App.Div.1) (unpub. opinion).

<sup>13</sup> *Langbehn v. Public Health Trust of Miami-Dade Cty.*, 2009 WL 3247185, \*8 (S.D.Fla.).

breathing.<sup>14</sup> Ritchie had previously executed a durable power of attorney giving Reed authority to make medical care decisions on her behalf and additionally authorized Reed to:

...provide for companionship for me and to be accorded the status of a family member for purposes of visitation...and...to provide for such companionship for me as will meet my needs and preferences at a time when I am disabled or otherwise unable to arrange for such companionship.<sup>15</sup>

During Ritchie's first few days in the hospital, Reed had unrestricted access to her. After about five days however, Ritchie's condition deteriorated and she was admitted to the facility's intensive care unit. For approximately seven hours thereafter, Reed was allowed to see her partner in the ICU, which was consistent with her prior experiences during Ritchie's brief hospitalizations. At approximately 11:00 p.m., that night, Ritchie's treating pulmonologist advised Reed that the prognosis was very grim, but that he was hopeful Ritchie would live through the night. He also stated, according to Reed, that she could continue to stay with Ritchie in her room.<sup>16</sup>

Karen Hulley, the critical care nurse assigned to Ritchie that night told Reed she would have to leave her room shortly after 11:00 p.m. According to Hulley, Reed was supposed to telephone Hulley from the waiting room prior to entering Ritchie's room and that Reed "interfered with Ritchie's rest by talking to her and touching her."<sup>17</sup> Additionally, "Reed was agitating Ritchie and compromising her respiratory status and that her oxygen status was very unstable."<sup>18</sup>

Not surprisingly, Reed disputes Hulley's version of events. According to Reed, Hulley would scream at her to get out of Ritchie's room and when she advised the nurse that she had power of attorney, "Hulley responded that it did not matter."<sup>19</sup> Once Hulley's shift ended the following morning, Reed rejoined her partner who, at that point, was in "an extremely drugged state," and died a few hours later.<sup>20</sup>

Reed filed suit against Hulley, her nurse placement agency (ANM Health Care) and the University of Washington Medical Center,<sup>21</sup> asserting claims for outrage and negligent infliction of emotional distress based on Hulley's refusal to allow Reed into Ritchie's room. Thereafter, Hulley filed a motion for summary judgment, arguing Reed's "injuries

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<sup>14</sup> *Id.* at \*8; *Reed v. ANM Health Care*, 2008 WL 5157869, \*4 (Wash.App.Div.1) (unpub. opinion).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Susan Donaldson James, *Lesbians Sue When Partners Die Alone*, ABC NEWS.COM, May 20, 2009, <http://abcnews.go.com/Health/story?id=7633058&page=1>; *Reed v. ANM Health Care*, 2008 WL 5157869, \*2 (Wash.App.Div.1) (unpub. opinion).

<sup>20</sup> *Reed v. ANM Health Care*, 2008 WL 5157869, \*2 (Wash.App.Div.1) (unpub. opinion).

<sup>21</sup> A motion for summary judgment filed on behalf of the University of Washington Medical Center was granted by the trial court.

occurred as a result of health care” and there was no viable claim.<sup>22</sup> The trial court denied Hulley’s motion and an appellate court reviewed the matter.

On appeal, the court summarized the issue as follows: “...the issue is whether Hulley’s decision to exclude Reed was part of her efforts to treat and care for Ritchie or whether the exclusion was motivated by something other than her medical judgment.”<sup>23</sup> The appellate court concluded that Reed had presented sufficient evidence to create a genuine factual dispute regarding Hulley’s motivations for excluding Reed. Consequently, the court denied Hulley’s motion for summary judgment.

### Conclusion

Though The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) defines “family” as “the person(s) who plays a significant role in the individual’s life [which] may include a person(s) not legally related to the individual,” some state courts appear to resist embracing this definition to include same-sex partners.<sup>24</sup>

Earlier this month, a federal trial began in California over the constitutionality of Proposition 8, a 2008 ballot measure which ultimately overturned gay and lesbian couples’ right to marry. The measure added the following provision to the state’s constitution: “only marriage between a man and a woman is valid or recognized in California.”<sup>25</sup>

In the Proposition 8 case, the lead attorney representing the gay couples who filed suit is surprisingly Ted Olson, former United States Solicitor General under President George W. Bush, and whose wife, Barbara, died on American Airlines Flight 77 that crashed into the Pentagon on September 11, 2001. In his opening statement, Mr. Olsen stated the following:

[t]his case is about marriage and equality. Plaintiffs are being denied both the right to marry, and the right to equality under the law. The Supreme Court of the United States has repeatedly described the right to marriage as ‘one of the vital personal rights essential to the orderly pursuit of happiness by free men;’ a basic civil right; a component of the constitutional rights to liberty, privacy, association, and intimate choice; an expression of emotional support and public commitment; the exercise of spiritual unity; and a fulfillment of one’s self.<sup>26</sup>

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<sup>22</sup> *Reed v. ANM Health Care*, 2008 WL 5157869, \*2 (Wash.App.Div.1) (unpub. opinion).

<sup>23</sup> *Id.* at \*4.

<sup>24</sup> JOINT COMM’N ON ACCREDITATION OF HEALTHCARE ORGS., JOINT COMM’N RESOURCES, HOSPITAL PATIENT ASSESSMENT: MEETING THE CHALLENGES at 12 (2003).

<sup>25</sup> CAL. CONST. art. I, § 7.5.

<sup>26</sup> Am. Found. for Equal Rights, *Text of Ted Olson’s Opening Statement in Prop. 8 Trial – As Prepared*, Jan. 11, 2010, available at <http://www.equalrightsfoundation.org/news/text-of-ted-olsons-opening-statement-in-prop-8-trial-as-prepared/>.

The use of medical powers of attorney may be insufficient to secure either the medical decision-making such documents support or, and perhaps more importantly in the case of a dying person, emotional support during a time of need. Recent cases suggest that prejudice continues to trump the carefully considered wishes of some individuals. There may be no remedy in tort until that denial results in a bad medical decision grounded in a refusal to accept information and assistance from the person the patient designates to help in such a critical time.

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