



## Same-Sex Marriages Open A New Frontier In Fla. Tort Law

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A little-noticed byproduct of the recent, historic marriage equality rulings in Florida is that married gay and lesbian couples now enjoy equal protection under state laws protecting tort victims. Prior to the lifting of the stay on U.S. District Judge Robert Hinkle's injunction against the enforcement of Florida's laws banning same-sex marriage and denying legal recognition of same-sex marriages performed in other states, *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014), stay denied sub nom. *Armstrong v. Brenner*, 135 S. Ct. 890 (Dec. 19, 2014), same-sex couples in Florida lacked standing to sue for damages caused by the death or severe injury of their life partner as a result of a tortfeasor's misconduct. That is because the Florida Wrongful Death Act defines a "survivor" as "the decedent's spouse," § 768.18(1), Fla. Stat., and a loss of consortium claim could not be brought by an unmarried partner, *Bashaway v. Cheney Bros. Inc.*, 987 So. 2d 93 (Fla. 1st DCA 2008) (rejecting same-sex partner's loss of consortium claim).



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Until Jan. 6, 2015 — or the day before as a result of Judge Sarah Zabel's decision to lift the stay on her ruling in Miami-Dade County — no same-sex couple could claim spousal status under the Florida Wrongful Death Act, even if they were legally married in another state, due to Florida's nonrecognition statute, § 741.212, Fla. Stat. and Article I, § 27 of the state constitution. Those discriminatory provisions have since been enjoined as violative of the U.S. Constitution.

As a result of the historic same-sex marriage rulings, if a same-sex couple has lawfully wed, in Florida or elsewhere, and one spouse is killed in an accident, the survivor is no longer a stranger in the eyes of the law, but is instead entitled to the full damages a surviving spouse

may recover under the Wrongful Death Act — lost support and services, loss of companionship and protection, and mental pain and suffering. § 768.21, Fla. Stat. In addition, as a “surviving spouse,” if the decedent dies intestate, the same-sex spouse now has preference for the appointment as the personal representative of his or her deceased spouse’s estate. § 733.301(1)(b), Fla. Stat. The personal representative is the only party empowered to bring a wrongful death case. § 768.20, Fla. Stat.

This newfound legal protection should extend to cases involving a same-sex spouse who was killed before Jan. 6 as a result of tortious conduct. If the couple was married in another state, the same-sex marriage rulings have removed the obstacle to the recognition of that marriage in Florida, and hence the surviving spouse’s legal standing to sue. So long as the claim is brought within the two-year statute of limitations governing wrongful death claims, these claims for damages should be viable in Florida courts. Likewise, in the event of a catastrophic personal injury to one member of a same-sex couple who was previously married out-of-state, the spouse’s loss of consortium claims have effectively matured. Complaints in ongoing litigation involving the serious personal injury to a married gay or lesbian plaintiff can now be amended to add a loss of consortium claim for the spouse.

Cases involving the wrongful death of an unmarried member of a same-sex couple present a more difficult question. Courts in states with a history of recognition of same-sex marriages have reached different results on the question of whether marital status can be conferred retroactively for purposes of asserting tort claims. For example, the Connecticut Supreme Court recently held that a same-sex spouse could assert a loss of consortium claim even though she was not married at the time of her partner’s injury, as long as she alleged that they would have married had state law not prohibited them from doing so. *Mueller v. Tepler*, 95 A.3d 1101 (Conn. 2014). The Massachusetts Supreme Judicial Court, however, declined to allow such a claim. *Charron v. Amaral*, 889 N.E.2d 946 (Mass. 2008). In California, the legislature granted retroactive tort protection to same-sex couples. See *Armijo v. Miles*, 127 Cal. App.4th 1405 (Cal. Ct. App. 2005). It remains to be seen how Florida courts will address these new questions.

In preparation for the advent of tort litigation on behalf of same-sex married couples, litigators should also begin to consider the ramifications of public views on same-sex marriage, which will inevitably figure more prominently in the courtroom, particularly during voir dire. In 2008, over 60 percent of Florida voters — nearly 5 million potential jurors — voted in favor of the now enjoined state constitutional amendment forbidding same-sex marriage. National polling data suggests that in the intervening six years there has been a marked shift in attitudes toward same-sex marriage, with 52 percent of Americans now

favoring same-sex marriage. Pew Research Center, Changing Attitudes on Gay Marriage (Sept. 24, 2014).

Still, those polling results reveal that support for same-sex marriage varies markedly by age group, political party and religious affiliation. Accessing a venire panel's views on same-sex relationships, without overstepping constitutional prohibitions, presents its own set of delicate challenges. See Giovanna Shay, In the Box: Voir Dire on LGBT Issues in Changing Times, 37 Harvard J. of Law & Gender 407 (2014). The Ninth Circuit has held that the Constitution forbids striking a potential juror based on his or her sexual orientation. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014).

There also remains the question of what happens if Judge Hinkle's ruling is not ultimately affirmed. On Feb. 4, the Eleventh Circuit announced that it would refrain from deciding the Florida case, as well as a parallel case in Alabama, until the [U.S. Supreme Court](#) issues its decision on state same-sex marriage bans. The Supreme Court is expected to issue a ruling on the constitutionality of same-sex marriage bans by summer. In some states where there has been a reversal on appeal of marital status granted to same-sex couples, courts have held that to strip couples of their lawfully obtained marital status in the interim would itself violate due process. See *Caspar v. Snyder* (E.D. Mich. Jan. 15, 2015) (collecting cases). Should the Supreme Court's ruling definitively require the permanent injunction of Florida's same-sex marriage bans, this complex issue will not arise.

What can be said with certainty now, however, is that married same-sex couples in Florida presently enjoy a new right to sue for damages for the death or serious personal injury of their spouse, and tort lawyers should be advised of this new frontier.

—By Stephen F. Rosenthal, [Podhurst Orseck PA](#)

***DISCLOSURE: Rosenthal serves as counsel to the plaintiffs in the same-sex marriage case before Judge Hinkle now pending in the Eleventh Circuit, along with lawyers from the [American Civil Liberties Union](#).***

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