

March 24, 2008

Chief Justice Ronald George and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *North Coast Women's Care Medical Group, Inc., et al. v. Superior Court (Benitez)*, Case No. S142892– Plaintiff's Supplemental Letter Brief re Code of Civil Procedure section 437c

Dear Chief Justice George and Associate Justices:

This letter brief on behalf of Plaintiff and Real Party in Interest Guadalupe Benitez (“plaintiff”) responds to the court’s March 12, 2008 order requesting supplemental briefing on the following question decided by the Court of Appeal: “Was the trial court’s grant of summary adjudication of defendants’ affirmative defense No. 32 inconsistent with Code of Civil Procedure section 437c?”

For the following reasons, the answer is “no.” The trial court’s grant of summary adjudication was entirely consistent with Code of Civil Procedure section 437c,¹ and the Court of Appeal erred when it held that the purely legal question posed by plaintiff’s motion must not be answered until after unrelated factual issues are resolved at trial.

I. The Trial Court’s Grant Of Summary Adjudication Of The Defendants’ Affirmative Defense Was Fully Consistent With Section 437c.

Section 437c(f)(1) provides in relevant part that “a party may move for summary adjudication as to ... one or more affirmative defenses ... if that party contends that ... there is no merit to an affirmative defense A motion for summary adjudication shall be granted only if it completely disposes of ... an affirmative defense” Plaintiff’s motion for summary adjudication of defendants’ thirty-second affirmative defense

¹ Subsequent code references are to the Code of Civil Procedure unless stated otherwise.

complied with this rule, as the trial court found, because the motion sought complete disposition of that affirmative defense.

Section 437c(f)(2) provides that a summary adjudication motion “shall proceed in all procedural respects as a motion for summary judgment.” Section 437c(c) states the procedural rule for summary judgment motions and provides that such motions “*shall* be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (*Id.*, italics added.) Because of the mandatory “shall” (see *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443), trial courts do not have discretion to deny a motion for summary judgment — or to postpone it until after trial — when the moving party has satisfied this rule. By virtue of Section 437c(f)(2), the same is true for summary adjudication motions when — as here — the moving party shows that there are no material facts in dispute and she is entitled to the adjudication as a matter of law.

Hall v Superior Court (2003) 108 Cal.App.4th 706 illustrates proper application of the rule and why the inconsistent action the Court of Appeal took in this case creates untenable procedural situations. *Hall* involved a legal malpractice claim brought against a lawyer by the husband of the lawyer's client in a prior action. The husband claimed the attorney should have advised the husband of his legal rights or included him as a party in the prior action. Under Section 437c(c), the attorney was entitled to an order granting his summary judgment motion and dismissing the husband's claim without trial because the attorney owed no duty to the husband. When the trial court denied his motion, the attorney was entitled to writ relief in the Court of Appeal because there were no factual disputes material to the motion and the attorney was entitled to an answer to the legal question whether he owed any duty to the husband *before* bearing the burdens of a trial, irrespective of whether there were other factual disputes in the case not bearing on the issue of duty. By contrast, applying the approach mistakenly adopted by the Court of Appeal in this case, the attorney in *Hall* would not have been permitted to obtain summary adjudication that he had owed no duty until *after* trial of the factual issues about whether and how much the husband had been harmed.

Knowles v Superior Court (2004) 118 Cal.App.4th 1290 further illustrates the point. In *Knowles*, a defendant physician faced medical malpractice claims by four plaintiffs. After the superior court denied his motion for summary judgment based on his statute of limitations affirmative defense, he was entitled to writ relief directing the trial court to grant his motion and dismiss the malpractice claims of three plaintiffs because the limitations period had expired as to them. Importantly, in the absence of any factual disputes material to the affirmative defense as to those plaintiffs, the physician was not required to participate in a trial of disputed facts relating to each plaintiff's case-in-chief *before* receiving an answer to the legal question whether his

affirmative defense was valid. By contrast, the physician was *not* entitled to a pre-trial adjudication of his statute of limitations defense to the fourth plaintiff's claim because there were factual disputes about whether the limitations period had expired with respect to that party. Accordingly, the Court of Appeal applied the nondiscretionary standard of Section 437c and upheld the trial court's denial of the defendant's motion as to that plaintiff, while reversing the lower court as to the other three.²

These are straightforward, statutorily-mandated pre-trial procedures on which parties are entitled to rely to narrow the issues requiring trial. Courts may not create new procedural rules that limit litigants' ability to obtain appropriate pre-trial rulings as provided by statute. (See, e.g., *Lokeijak v City of Irvine* (1998) 65 Cal.App.4th 341 [holding invalid local court practice requiring parties to consult with judge and opposing side and agree on an extra-statutory procedure before moving for summary judgment, because the practice hindered pre-trial adjudication of legal issues].)

Litigants similarly cannot prevent standard pre-trial adjudication by separating or combining elements of claims or defenses improperly; rather, trial courts are charged to identify the elements of claims or defenses targeted by a summary adjudication motion and determine if the motion will dispose of what would be an entire claim or defense if properly pleaded. (See, e.g., *Exxon Corp. v Superior Court* (1997) 51 Cal.App.4th 1672 [holding that, where plaintiffs had split causes of action improperly, defendant was entitled to move for summary adjudication with respect to allegations that should have been presented as a single cause of action].)

As stated in plaintiff's Reply Brief on the Merits (RBOM), the elements of a religious freedom affirmative defense to an Unruh Act claim are obvious from *Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal.4th 527 (*Catholic Charities*) and *Smith v. Fair Employment & Housing Comm'n* (1996) 12 Cal.4th 1143 (*Smith v. FEHC*). (RBOM 2-3; see also plaintiff's Opposition to Defendants' Motion to Dismiss Review (ODMDR) 4-7.) These elements include that (i) a party holds sincere religious beliefs; (ii) enforcement of a state rule substantially burdens the party's exercise of those religious beliefs; and either (iii) the state lacks adequate interests to justify enforcement

² *Hall* and *Knowles* obviously differ from the present case in that pre-trial adjudication in defendants' favor ended litigation in those cases, and summary adjudication of defendants' affirmative defense does not do so here. But Section 437c(f)(2) does not limit its application to when a pre-trial ruling will end litigation between particular parties. Instead, the rule is explicit that summary adjudication motions address only parts of an opponent's pleading and the rule facially contemplates both motions seeking to validate and enforce a defense and those contending there is no merit to an affirmative defense.

of the rule; or (iv) the rule sweeps more broadly than can be justified by the state's interests. (See RBOM 2-3, 13-15; Opening Brief on the Merits (OBOM) 20-25, 33-34.)

As explained in plaintiff's ODMDR, plaintiff's summary adjudication motion presented only legal questions, with no material factual issues. (ODMDR 4-7.) Even assuming arguendo that the California Constitution requires strict scrutiny review when a religiously neutral, generally applicable law imposes a substantial burden on the religious exercise rights of individuals, the law still must be enforced if it serves a compelling public purpose in a properly tailored way. (See RBOM 2-3, citing *Catholic Charities, supra*, 32 Cal.4th at pp. 562-66.) Thus, we assume the material facts of the first two elements in defendants' favor for the sake of argument (i.e., that defendants are sincere in their beliefs and that the Unruh Act burdens their religious practices substantially), leaving the last two elements (the strength of the government's interests and adequacy of the statute's tailoring), which are dispositive legal questions. If the state's interests in preventing harm are compelling, and the statute is deemed properly tailored, then physicians and others engaged in business must comply with the Unruh Act, notwithstanding any religiously motivated objections. In other words, factual disputes about individual religious sincerity and burden are *never* material to whether there is a religious freedom affirmative defense to this statute.³

The party briefs to this court thus debate the relevant, novel legal issues presented by this case that this court did not decide in *Catholic Charities, Smith v. FEHC*, or other decisions — whether the California Constitution requires a more rigorous form of review than was applied in *Catholic Charities* and *Smith v. FEHC*, whether California's interests in enforcing the Unruh Act's prohibition against sexual orientation discrimination are as compelling as the state's interests in preventing the sex and marital status discrimination at issue in *Catholic Charities* and *Smith v. FEHC*, and whether the unique concerns that arise in medical settings require analysis different from prior cases. The parties' intense disagreements on these points reflect most notably the confusion and sharply divergent views common in California today about whether discrimination against lesbians and gay men — especially differential treatment motivated by religious

³ Going one step further, the specifics of defendants' particular religious beliefs are even less relevant to whether the Constitution privileges them to violate the Unruh Act. The religious freedom defense is either valid or not based on its elements, and questions of fact and law involved in plaintiff's case-in-chief make no difference to the defense's validity. Accordingly, as discussed in Section II, *post*, on plaintiff's motion in this case, it does not matter (i) whether these defendants discriminated only against lesbians or against lesbians and other unmarried women, and (ii) whether or not the Unruh Act prohibited marital status discrimination in August, 1999 and through July, 2000.

beliefs about gay people — is or should be governed by the same standards as other discrimination in commercial contexts. But resolution of these legal questions of statewide importance does not depend in any measure on factual issues relating to the religious beliefs that may be held by particular individuals engaged in licensed professional activities.⁴

Accordingly, the trial court applied Section 437c(f)(1) correctly when it ascertained that there are no material issues of fact and plaintiff is entitled to summary adjudication of defendants' affirmative defense. The Court of Appeal then misapplied the summary adjudication rule when reversing the trial court's order. Specifically, the intermediate court appropriately cited Section 437c(f)(1) for the proposition that summary adjudication can be granted only when doing so will dispose of an entire claim or an entire affirmative defense (see slip op. at pp. 10, 19-20), but then erroneously failed to recognize that the trial court's order *did* dispose of the religious free exercise defense in its entirety because that defense fails as a matter of law.

The Court of Appeal's other authorities similarly do not reconcile its decision with Section 437c. For example, in *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, the appellate court issued a writ to reverse a summary adjudication order because it did *not* dispose of an entire claim for punitive damages. By contrast, in this case, the summary adjudication order *did* dispose of the entire affirmative defense. In *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, the Court of Appeal ruled that summary adjudication should have been granted, explaining that trial courts should reject the "pleading tactic of combining two claims in the same cause of action" to avoid adjudication of what should be a separate claim subject to summary disposition in its entirety. (*Id.* at p. 1852.) The issue of improper pleading is not present here and, unlike in *Lilienthal*, the trial court was able to see clearly that the affirmative defense was insufficient as a matter of law.

As confirmation that the courts are charged to parse through improper pleadings in order to apply the summary adjudication standard prescribed by Section 437c, the Court of Appeal in *Lilienthal* considered the legislative history of the 1990 amendment to Section 437c. As the Court of Appeal noted in the decision below in this case, the

⁴ This accurate parsing between affirmative defense and cause of action also is in harmony with the principle of religious free exercise doctrine that it generally is unwise, and often improper, for courts to probe the details of individual religious beliefs. (See *Catholic Charities*, 32 Cal.4th at pp. 563-564.) In contrast, the religious testimony for which the Court of Appeal forestalled a ruling on plaintiff's motion insists upon precisely the sort of close examination of individual beliefs that is to be avoided.

Senate Judiciary Committee comment on the 1990 amendment highlighted that the amended rule would “require summary adjudication of issues only where an entire cause of action, affirmative defense or claim for punitive damages can be resolved.” (Slip op. at p. 20.) Both *Catalano* and *Lilienthal* emphasized the point as follows:

“[The] statement and the wording of subdivision (f) show clearly that the Legislature wished to narrow summary adjudication from its broad focus on “issues” (sometimes interpreted to mean only asserted “facts”) to a more limited focus on causes of action, affirmative defenses, claims for punitive damages and claims that defendants did not owe plaintiffs a duty.”

(*Catalano, supra*, at p. 97, quoting *Lilienthal, supra*, 12 Cal.App.4th at p. 1854.) But this focus on the text of Section 437c(f), as amplified by the review of legislative history, simply underscores that the trial court here was *correct* because its summary adjudication order *did* dispose of defendants’ entire thirty-second affirmative defense.

Unlike in *Lilienthal, supra*, there is no issue of improper pleading in this case. The defendants’ affirmative defense is adequately stated and is readily tested under Section 437c, which explicitly states that summary adjudication “shall” be granted when it will dispose of an entire claim or defense. While there is no ambiguity in the statute warranting resort to legislative history, the history of the 1990 amendment nonetheless confirms that the trial court’s order in this case was consistent with the statute.

II. A Dispute Of Fact Material To A Plaintiff’s Case-in-Chief Does Not Prevent Summary Adjudication Of A Defendant’s Affirmative Defense.

The defendants argued to the Court of Appeal, and the Court of Appeal agreed, that material factual disputes concerning plaintiff’s case-in-chief — such as whether defendants’ discrimination was based on sexual orientation, marital status or both — give the trial court discretion to deny summary adjudication of the defendants’ affirmative defense. This is wrong. A defendant who has pleaded an invalid affirmative defense cannot escape pre-trial summary adjudication of the defense by pointing to disputes of fact that, if resolved in his favor, would mean he did not do the alleged wrong. *Whether or not one did the wrong charged is a separate legal issue from having been privileged to do so.* Here, because there are no disputed facts that are material to whether the defendants’ religious reasons for wanting to discriminate among patients exempt them from the Unruh Act, and plaintiff’s motion disposed of the entire affirmative defense as a matter of law, summary adjudication was both proper and required.

It is true, as the Court of Appeal noted, that the policy behind Section 437c is to reduce trial time and cost by paring down the claims and defenses that must be tried. (Slip op. at p. 19, citing *Catalano* and *Lilienthal*.) But the intermediate court erred when it ruled that summary adjudication must not be granted when some of the evidence that might have been introduced to establish defendants' affirmative defense might also be relevant to an element of plaintiff's case-in-chief. The Court of Appeal said, "Here, the summary adjudication of defendants' 32d affirmative defense does not serve the legislative objective underlying Code of Civil Procedure section 437c, subdivision (f), of reducing the cost and length of litigation, as the adjudication does not preclude Dr. Brody and Dr. Fenton from presenting evidence of their religious beliefs . . . Specifically, Dr. Brody and Dr. Fenton are entitled to present evidence that their religious beliefs prohibited them" (Slip op. at p. 20 [emphasis omitted].) This approach was misguided. Section 437c(f) unambiguously states that summary adjudication "shall" be granted when doing so will dispose of an entire affirmative defense. The statute does not authorize trial courts to examine whether any evidence the non-moving party sought to introduce to oppose the motion might be admissible for some other purpose, and to deny the motion on the legal question because some common evidence might come in. Entirely separate from the evidence questions considered at trial, the analysis of dispositive motions is controlled by the plain text of Section 437c(f).

Moreover, pre-trial adjudication of the thirty-second affirmative defense *does* reduce the length and cost of this litigation by providing clarity: It tells the trial court and all counsel what evidence of defendants' beliefs is admissible for what purpose and what the jury instructions should be. The Court of Appeal appears to have assumed, incorrectly, that the evidence the defendants may wish to introduce about their beliefs to counter plaintiff's Unruh Act case-in-chief (that is, to support their claim that they refused plaintiff solely due to her marital status) will be the same as they would seek to introduce on their affirmative defense. (See slip op. at pp. 20-21.) But, as explained above, while the details of what defendants believe might illuminate their reasons for treating plaintiff differently from other patients, those details are not pertinent to whether the state's interests must yield to defendants' free exercise rights in this context.

III. If Evidence Is Admissible To Prove Or Disprove An Element Of A Triable Cause Of Action, It Remains Admissible Even If It Also Pertains To An Invalid Affirmative Defense Or A Different, Invalid Cause-Of-Action.

Defendants have argued that plaintiff's summary adjudication motion should have been denied because they should be allowed to testify about the religious reasons for their conduct. The Court of Appeal concluded that evidence that is admissible to rebut

plaintiff's case-in-chief might be deemed excludable if it also were relevant to an invalid affirmative defense. (Slip op. at p. 20.) That is mistaken. Evidence generally can be given if it is admissible for a valid purpose, even if it no longer is admissible for a second purpose because a different cause-of-action, affirmative defense, claim of duty or punitive damages claim has been eliminated before trial as invalid.

The Court of Appeal's decision that plaintiff's motion had to be deferred until after defendants testified about the religious reasons for their treatment of plaintiff was inconsistent not only with Section 437c, as discussed above, but also with the rules of evidence because it precluded all objections about relevance, weight, probative value, and prejudicial effect. The Court of Appeal's error underscores why decisions about admissibility of evidence are left in the first instance to the sound discretion of the trial judge, who makes them *after* deciding which claims and which defenses are to be tried, and by applying the proper evidentiary and other legal standards. By deciding in the abstract and without qualification that the defendants' religious testimony must be admitted, the Court of Appeal preempted the trial court's authority not just to decide admissibility but generally to manage the case. Once this case returns to the superior court with an answer to the legal question accepted for review, the trial court should be permitted to discharge its usual case-management duties, including to ensure that evidence is admitted only if it complies with the rules of evidence.⁵

IV. Both Procedural And Substantive Clarity Are Especially Important In Emerging Areas Of Law, Such As The Rights Of Lesbians And Gay Men.

The Court of Appeal's decision that any ruling on plaintiff's motion must be deferred until after trial of plaintiff's case-in-chief ensured that there would be

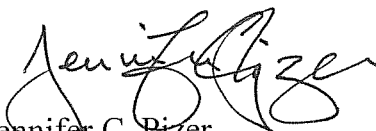
⁵ If the doctors attempt to contend on remand that they refused plaintiff because she was unmarried, and in no measure because she is a lesbian in a same-sex relationship, plaintiff will respond that they are judicially estopped to do so, based on their many sworn statements that they acted based on plaintiff's "homosexual orientation" and her being in a "homosexual couple" and a "gay couple" — and, indeed, the trial court specifically noted in its order dated April 12, 2004 that it was undisputed that the doctors' religious objection was to performing insemination for a "homosexual couple." (Petition for Review, Att. 2, at pp. 2-9; Plaintiff's Request for Judicial Notice, Exh. 1, at pp. 2-5, 8, Exh. 2, at p. 2, Exh. 3, at p. 6, Exh. 5, at pp. 3-4, 7, Exh., 6, at pp. 2-3, 6, Exh. 7, at pp. 2-3, 5, Exh. 8, at p. 1 [request granted June 14, 2006]; Plaintiff's Supplemental Request for Judicial Notice, Exh. 1, at p. 3 [pages 155-157 of Brody deposition transcript], Exh. 2, at pp. 3-4 [pages 51-52 of Fenton deposition transcript] [request granted June 14, 2006]; see also ODMDR 4-7, 10; RBOM 3-4.)

disagreement among counsel and confusion within the jury about the purpose or purposes for which defendants' religious testimony could be considered. Such lack of clarity is especially problematic in cases such as this, which involve emerging areas of the law. It is an unfortunate reality that sexual orientation discrimination remains common, including in health care settings, and that there is widespread public confusion about how California law does or should treat lesbians and gay men. (See Petition For Review 10-17; Reply In Support Of Petition For Review 4-7, OBOM 8 fn. 2, 23-25, 36-37.) Where greater confusion or conflict is likely within the jury, courts should be more vigilant, not less, about providing clear guidance throughout litigation — including by making timely decisions about which causes of action and defenses are to be tried — so counsel and the court know what is relevant, how the jury will be instructed, and which evidence is admissible for what purposes. And in cases like this one where religious beliefs may play a role, counsel and the court have the additional duty to ensure that evidence of a witness's religious beliefs is employed only for proper purposes, and not for the improper purpose of bolstering or undermining credibility. (Evid. Code, § 789.)

There is a pressing need to avoid prejudicial error at trial in this case. The case also highlights the urgent public need for guidance on the substantive issue accepted for review, given the arguments specific to sexual orientation discrimination, and the problem that so many Californians believe religious conviction excuses or should excuse differential treatment of lesbians and gay men, including in medical care.

For the foregoing reasons, the trial court's order granting summary adjudication of defendants' thirty-second affirmative defense was consistent with Code of Civil Procedure, section 437c and the Court of Appeal's contrary decision was not. There being no material disputes of fact, the court should reject as a matter of law the notion that the constitutional protection for free exercise of religion authorizes sexual orientation discrimination against patients.

Respectfully submitted,



Jennifer C. Pizer

Counsel for Plaintiff and Real Party In Interest
Guadalupe T. Benitez

cc: All counsel listed on the attached proof of service

DECLARATION OF SERVICE

I, Jamie Farnsworth, declare:

That I am a resident of the County of Los Angeles, California; that I am over eighteen (18) years of age and not a party to this action; that I am employed in the County of Los Angeles, California; and that my business address is 3325 Wilshire Blvd., Suite 1300, Los Angeles, CA 90010.

On March 24, 2008, I served copies of the attached document, described as **Supplemental Letter Brief**, on the parties of record by placing true and correct copies thereof in sealed envelopes, addressed as follows:

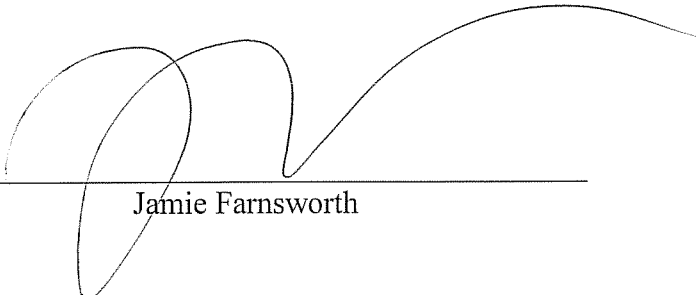
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 24, 2008



Jamie Farnsworth