

CASE NOTE

Curing Discrimination: May Doctors Refuse to Treat Lesbian Patients?

CHRISTINA MORTENSEN AND KARIN STOECKENIUS*

“Do the rights of religious freedom and free speech, as guaranteed in both the federal and California Constitutions, exempt a medical clinic’s physicians from complying with California’s Unruh Civil Rights Act (Civ. Code, § 51) prohibition against discrimination based on a person’s sexual orientation? Our answer is no.”¹

I. Introduction

The California Supreme Court granted certiorari and in 2008 heard *North Coast Women’s Care Medical Group v. Superior Court*.² The key issue in *North Coast* was whether physicians could assert a constitutionally-based affirmative defense to a lesbian patient’s claim of sexual orientation discrimination.³ If such a defense were allowed, equal access to medical treatment for gay and lesbian patients could be at risk. Further, plaintiff’s counsel warned that a ruling for the physicians “would open a path for health care providers to opt out of treating certain patients based on characteristics such as race or gender.”⁴ Conflicting lower court rulings created uncertainty, so the California Supreme Court heard the case.⁵ In its deci-

* Christina Mortensen and Karin Stoeckenius are both Juris Doctorate candidates at Empire College School of Law.

1. *North Coast Women’s Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1150 (2008).

2. *North Coast Women’s Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145 (2008).

3. *North Coast Women’s Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1152-1153 (2008) (The defendants’ affirmative defense was based on the First Amendment of the U.S. Constitution and article I, section 4 of the California Constitution. The plaintiff’s claims were based on a violation of California’s Unruh Civil Rights Act.).

4. Greg Moran, *Doctors’ Beliefs Don’t Trump Gay’s Civil Rights, Court Rules*, THE SAN DIEGO UNION-TRIBUNE, May 29, 2008 at A1 (summarizing counsel’s assertion in the California Supreme Court oral argument).

5. *North Coast*, 44 Cal. 4th at 1150 (2008).

sion, the *North Coast* court did not allow the defense under either the U.S. Constitution or the California Constitution.⁶

In 2001, the case began when Guadalupe Benitez, a lesbian, sued two fertility clinic doctors.⁷ She claimed they had refused a specific treatment to her on the basis of her sexual orientation, a violation of California's Unruh Civil Rights Act (hereinafter "Unruh").⁸ Unruh prohibits businesses, including medical clinic practitioners, from discriminating on this basis.⁹ The doctors, who were both Christians, asserted a controversial affirmative defense.¹⁰ They claimed that even if they *had* failed to treat Benitez because of her sexual orientation, their constitutionally-based religious freedom rights exempted them from complying with Unruh.¹¹

The trial court granted summary adjudication for Benitez on the affirmative defense issue.¹² The California Court of Appeal reversed, holding the defense was not fully disposed of due to factual disputes over the reason for the discriminatory treatment.¹³ The California Supreme Court reversed, holding that the appellate court had improperly applied the rules of summary adjudication.¹⁴ The state supreme court clarified that an affirmative defense of religious freedom could not be asserted as a matter of law.¹⁵ The court gave further guidance to medical providers. Doctors with religious freedom objections to treating homosexual patients could avoid violating Unruh by refusing to offer a particular treatment to *any* patient.¹⁶ Alternatively, doctors could refer patients to another doctor within the same clinic or office.¹⁷ However, doctors who referred patients *outside* their practices on the basis of a religious objection could be subject to Unruh violations.¹⁸

6. *Id.* at 1152-1153.

7. *Id.* at 1152.

8. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1152-1153 (2008) (quoting CAL. CIV. CODE § 51(a) (West 2006)).

9. *Id.* at 1152-1153.

10. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1152-1153 (2008) (This case generated numerous amicus curiae briefs and press articles from both religious groups and gay rights groups. Religious groups thought doctors should be allowed to "follow their consciences" while gay rights groups wanted to ensure equal access to medical care for gays and lesbians.).

11. *Id.* at 1152-1153.

12. *Id.* at 1153.

13. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1150-1151 (2008) (The parties disputed the reason for the discrimination. One of the physicians, Dr. Brody, claimed Benitez had been discriminated against because she was unmarried, not because of her sexual orientation.).

14. *Id.* at 1161.

15. *Id.*

16. *Id.* at 1159.

17. *Id.*

18. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1159, 1162-1163 (2008) (Baxter, J., concurring) (explaining that the same result may not be reached in the case of a sole practitioner).

II. Facts of the Case

Plaintiff Guadalupe Benitez was living with her partner in San Diego County.¹⁹ After being domestic partners for many years, the two women decided to start a family together.²⁰ Benitez required fertility treatment.²¹ At the time, North Coast Women's Care Medical Group (hereinafter "Medical Group") had an exclusive contract with Benitez's employer to provide fertility treatment.²² As a result, there was only one "in network" provider available and Ms. Benitez had little choice but to use Medical Group as her fertility clinic.²³

In August 1999, Benitez met with Dr. Christine Brody of the Medical Group.²⁴ Dr. Brody informed Benitez that intrauterine insemination (hereinafter "IUI") may be necessary in order for Benitez to become pregnant, and if so, Dr. Brody's religious beliefs prevented her from performing the procedure on a woman in a same-sex relationship.²⁵ Benitez was assured that another doctor in the facility without these same religious views would be available to perform the procedure, if necessary.²⁶

In the following eleven months, Dr. Brody prescribed Clomid,²⁷ followed by self-insemination by Benitez at her home.²⁸ Other tests were performed on Benitez, as well as exploratory surgery.²⁹ Benitez did not become pregnant through self-insemination, so she decided to try the IUI procedure using a friend's fresh sperm.³⁰ Dr. Brody told Benitez this caused a "licensing" problem for the clinic, so Benitez decided to use frozen sperm to avoid this issue.³¹ In July 2000, Dr. Brody went on vacation, which left Benitez in the care of Dr. Fenton during her cycle.³² Dr. Fenton was under the incorrect belief that Benitez still planned on using her

19. Brief for Petitioner-Appellant at 5, *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, No. S142892 (Cal. Sup. Ct. Sept. 21, 2006).

20. *Id.*

21. *Id.*

22. *Id.* at 6.

23. *Id.*

24. *Id.*

25. Brief for Petitioner-Appellant at 6, *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, No. S142892 (Cal. Sup. Ct. Sept. 21, 2006) (Dr. Brody claimed it was Benitez's unmarried status that kept her from performing the IUI procedure, not the fact that Benitez was in a same-sex relationship.).

26. *Id.* at 6.

27. Physicians' Desktop Reference, <http://www.pdrhealth.com/drugs/rx/rx-mono.aspx?contentFileName=Clo1088.html&contentName=Clomiphene&contentId=129> (Generic name: Clomiphene Citrate; Brand name: Clomid. Clomid is a fertility drug prescribed to promote ovulation, thereby increasing a woman's chance for pregnancy.) (last visited February 28, 2009).

28. Brief for Petitioner-Appellant at 6, *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, No. S142892 (Cal. Sup. Ct. Sept. 21, 2006).

29. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1151 (2008).

30. *Id.* at 1152.

31. *Id.*

32. *Id.*

friend's fresh sperm, thereby igniting the licensing issue again.³³ Dr. Fenton was the only Medical Group physician licensed to perform the fresh sperm procedure, but like Dr. Brody, he had religious objections.³⁴ He referred Benitez to a doctor outside of the Medical Group.³⁵

By now, Benitez had been a Medical Group patient for almost a year. She was forced to seek fertility treatment outside the network.³⁶ Benitez argued that she had to undergo many of the same tests and treatments, paying the bill herself without insurance coverage.³⁷ Eventually she became pregnant and gave birth to a healthy baby.³⁸ In August 2001, Benitez filed suit against the Medical Group and physicians Brody and Fenton seeking damages and injunctive relief.³⁹ She claimed sexual orientation discrimination in violation of California's Unruh Act.⁴⁰

III. Unruh Act: Description and Purpose

In the time period relevant to Benitez's medical treatment, Unruh stated, "all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."⁴¹

Unruh's prohibitions apply to "business establishments of every kind whatsoever."⁴² Medical offices providing services to the public have been held to be "business establishments" for the purposes of Unruh.⁴³ The Act defines a violator as "[w]hoever denies, aids, or incites a denial, or makes any discrimination or distinction contrary to [the Act]."⁴⁴ Thus, individual physicians working within a clinic can be held responsible for their own discriminatory conduct.⁴⁵

Unruh did not expressly list sexual orientation as a prohibited basis for discrimination at the time Benitez was treated by the Medical Group. How-

33. *Id.*

34. *Id.*

35. *Id.*

36. Brief for Petitioner-Appellant at 6, *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, No. S142892 (Cal. Sup. Ct. Sept. 21, 2006).

37. *Id.*

38. *Id.*

39. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1152 (2008).

40. *Id.*

41. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1153 (2008) (quoting CAL. CIV. CODE § 51(b) (West 2000), *amended by* CAL. CIV. CODE § 51(b) (West 2006)).

42. *Id.* at 1153.

43. *Leach v. Drummond Medical Group, Inc.*, 144 Cal. App. 3d 362 (1983).

44. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1154 (2008) (quoting CAL. CIV. CODE § 51(a) (West 2006)).

45. *Id.* at 1154.

ever, the relevant case law had established that sexual orientation discrimination was prohibited by the Act.⁴⁶ Unlike sexual orientation, marital status discrimination was not prohibited by Unruh at the time period in question.⁴⁷ Thus, if the physicians had discriminated against Benitez because she was unmarried, not because she was a lesbian, there would be no Unruh violation. The main issue in *North Coast* was not whether sexual orientation discrimination was prohibited. The larger issue was whether the physicians could assert at trial a constitutionally-based affirmative defense to Benitez's discrimination claims.⁴⁸ The California Supreme Court did not allow such a defense based on either the U.S. Constitution or the California Constitution.⁴⁹

IV. Establishment of Religion and Free Speech Provisions of the First Amendment

The First Amendment of the U.S. Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ." ⁵⁰ This provision applies to the states, as well as the federal government, via its incorporation in the Fourteenth Amendment.⁵¹ The freedom of religion provision protects the "right to believe and profess whatever religious doctrine one desires."⁵² It does not, however, provide an absolute right to act in accordance with those beliefs.⁵³

In analyzing whether the defendants could use the First Amendment to avoid Unruh's prohibitions on discrimination, the California Supreme Court discussed the 1990 test used by the U.S. Supreme Court in *Employment Division, Oregon Department of Human Resources v. Smith*.⁵⁴ The *North Coast* court explained that the *Smith* test had been applied in another case, *Lukumi Babalu Aye, Inc. v. Hialeah*.⁵⁵ The state supreme court then articulated the standard from the prior decisions to be applied in *North Coast*.

46. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1153 (2008) (citing *Curran v. Mount Diablo Council of Boy Scouts*, 17 Cal. 4th 670, 703 (1998) (Mosk, J., concurring); *Harris v. Capitol Growth Investors XIV*, 52 Cal. 3d 1142, 1155 (1991); *Hubert v. Williams*, 133 Cal. App. 3d Supp. 1, 5 (1982)).

47. CAL. CIV. CODE § 51(b) (West 2006) (In 2005, the California legislature amended Unruh to expressly prohibit discrimination based on sexual orientation.).

48. *North Coast*, 44 Cal. 4th at 1160-1161.

49. *Id.* at 1152-1153.

50. U.S. CONST. amend. I.

51. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1154 (2008) (citing *Employment Div., Ore. Dept. of Human Resources v. Smith*, 494 U.S. 872, 876-877 (1990)).

52. *Smith*, 494 U.S. at 877.

53. *Id.* at 876-877.

54. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1155 (2008) (citing *Employment Div., Ore. Dept. of Human Resources v. Smith*, 494 U.S. 872, 879 (1990)).

55. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

“Thus, under the United States Supreme Court’s most recent holdings, a religious objector has *no federal constitutional right* to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector’s religious beliefs.”⁵⁶

The *North Coast* court explained that the California Supreme Court had used this standard in a 2004 case, *Catholic Charities of Sacramento, Inc. v. Superior Court*.⁵⁷ In *Catholic Charities*, the state supreme court held that a nonprofit entity affiliated with the Catholic Church could not use the First Amendment’s free exercise of religion clause to avoid complying with the Women’s Contraception Equity Act (hereinafter “WCEA”).⁵⁸ The WCEA was a California state law requiring those employers that offer prescription drug coverage to extend coverage to contraceptives.⁵⁹ In *Catholic Charities*, the California Supreme Court explained that WCEA’s provisions “appl[ied] neutrally and generally to all employers.”⁶⁰ In addition, the law involved an issue that the state may validly regulate, the elimination of sex discrimination in health insurance benefits.⁶¹

As in *Catholic Charities*, the California Supreme Court in *North Coast* applied the *Smith* test to the defendants’ First Amendment claim to decide that the physicians were not exempt from their obligation to comply with the law.⁶² In doing so, the court declined the defendants’ invitation to avoid the “categorical approach of *Smith*,” which defendants argued “had been criticized by many scholars and justices alike.”⁶³ In applying *Smith* in *North Coast*, the court confirmed its holding for these types of First Amendment cases.

[Unruh] requires business establishments to provide “full and equal accommodations, advantages, facilities, privileges, or services” to all persons notwithstanding their sexual orientation. (Civ. Code, § 51, subds. (a), (b).) Accordingly, the First Amendment’s right to the free exercise of religion does not exempt defendant physicians here from conforming their conduct to the Act’s antidiscrimination requirements even if compliance poses an incidental conflict with defendants’ religious beliefs.⁶⁴

The *North Coast* court rejected the defendants’ additional argument that their free speech claim when coupled with their free exercise of religion claim presented a “hybrid rights” situation, which would exempt them from

56. *North Coast*, 44 Cal. 4th at 1155.

57. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527 (2004).

58. *Id.* at 547-559.

59. Women’s Contraception Equity Act, CAL. HEALTH & SAFETY CODE § 1367.25 (West 2000) and CAL. INS. CODE § 10123.196 (West 2000).

60. *Catholic Charities*, 32 Cal. 4th at 549.

61. *Id.*

62. *North Coast Women’s Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1156 (2008).

63. Defendant’s Answer Brief on the Merits at 62, *North Coast Women’s Care Medical Group v. Super. Ct. of San Diego County*, No. S142892 (Cal. Sup. Ct. Dec. 21, 2006).

64. *North Coast*, 44 Cal. 4th at 1156.

complying with Unruh's prohibition on discrimination.⁶⁵ The "hybrid rights" theory originated in the *Smith* decision and suggested that a claim that invoked more than one constitutional protection might create an exemption to the obligation to comply with a neutral and valid law of general applicability.⁶⁶ First, the *North Coast* court questioned the validity of the theory itself, pointing out that no U.S. Supreme Court case after *Smith* had invoked the theory and other decisions had been critical of its use.⁶⁷ Second, the court held that even if the hybrid rights theory was valid, the defendants' free speech claim was without merit since the act of complying with Unruh was not speech.⁶⁸ The California Supreme Court rejected a similar claim by the defendants in *Catholic Charities* and reiterated its holding in *North Coast*.

For purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition.⁶⁹

V. California Constitution Article I, Section 4

In addition to their religious freedom rights guaranteed by the U.S. Constitution, the physicians also invoked similar rights provided by the California state constitution in asserting their defense.⁷⁰ The California Constitution, article I, section 4 says "free exercise and enjoyment of religion without discrimination or preference are guaranteed."⁷¹

The California Supreme Court in *North Coast* used the strict scrutiny standard of review for the state constitutional issues as it had in its *Catholic Charities* decision.⁷² Like *North Coast*, *Catholic Charities* involved a challenge to both the U.S. Constitution and the California Constitution's free exercise clause.⁷³ Because construing a state's constitution is left up to the state, *Smith* did not control in this case.⁷⁴ The *North Coast* court explained that under the strict scrutiny standard, "a law could not be applied in a

65. *Id.* at 1156-1157.

66. *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 881-882 (1990).

67. *North Coast*, 44 Cal. 4th at 1156-1157.

68. *Id.* at 1157.

69. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1157 (2008) (citing *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 558-559 (2004)).

70. *Id.* at 1158.

71. CAL. CONST. art. I, § 4.

72. *North Coast*, 44 Cal. 4th at 1158.

73. *Catholic Charities*, 32 Cal. 4th at 562.

74. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1158 (2008) (quoting *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 559-561 (2004)) (The *North Coast* court explained that the court had not yet determined the appropriate standard of review for a state law "of valid and neutral applicability." The court did not need to do so here because the defendants' claim failed even under strict scrutiny.).

manner that substantially burden[s] a religious belief or practice unless the state show[s] the law represent[s] the least restrictive means of achieving a compelling state interest”⁷⁵ Also, because California had a compelling interest in “ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal,” the defendants needed to show they were “substantially burdened” by the act.⁷⁶ Under the strict scrutiny standard, a law substantially burdens a religious belief if it “conditions receipt of an important benefit upon conduct proscribed by a religious faith, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs”⁷⁷ The *North Coast* court said the defendants’ burden was insufficient to allow them to “engage in such discrimination.”⁷⁸

The *North Coast* court emphasized the defendants could have easily avoided such conflicts between their professional practice and religious practice.⁷⁹ They could have refused to perform the IUI procedure on *all* the clinic’s patients, leaving such procedures to colleagues comfortable performing them, regardless of a patient’s orientation or marital status.⁸⁰ A simpler option would have been to ensure a doctor without religious objections was available to perform the procedures at issue.⁸¹ Thus, the discrimination was completely avoidable.

The defendants had urged the *North Coast* court to adopt an even *stricter* standard than strict scrutiny, which the court was unwilling to accommodate.⁸² The court analyzed the defendants’ argument, starting with the defendants’ reliance on particular language from the California Constitution’s article I, section 4: “Free exercise and enjoyment of religion without discrimination or preference are guaranteed. *This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State.*”⁸³ The defendants contended the italicized portion of the quote gave “religious objectors . . . free[dom] to disregard a particular state law unless doing so compromises the peace or safety of the state or is licentious”⁸⁴ The court rejected the defendants’ contention.⁸⁵

75. *North Coast Women’s Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1158 (2008) (quoting *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004)) (alterations in original).

76. *Id.* at 1158.

77. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004) (quoting *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707, 717-718 (1981)).

78. *North Coast*, 44 Cal. 4th at 1158.

79. *Id.* at 1159.

80. *Id.*

81. *Id.*

82. *Id.* at 1159-1160.

83. *Id.* at 1159.

84. *North Coast Women’s Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1159 (2008) (BLACK’S LAW DICTIONARY 932 (7th ed. 1999) (licentious: “lacking or ignoring moral or legal restraint”)).

85. *North Coast*, 44 Cal. 4th at 1159.

The defendants also supported their proposal for an even stricter scrutiny by pointing to the California Supreme Court's *Catholic Charities* decision, which stated a future case might lead to an adoption of "an as-yet unidentified rule that more precisely reflects the language and history of the California Constitution and our own understanding of its import."⁸⁶ In the analysis of the defendants' argument, the *North Coast* court described the three tests to which *Catholic Charities* referred: (1) the strict scrutiny test used by the U.S. Supreme Court, where in order for a state to burden a religious belief or practice, even with a neutral law of general applicability, the law must serve a compelling governmental interest and must be narrowly construed;⁸⁷ (2) the U.S. Supreme Court's subsequent decisions in *Smith* and *Lukumi*, "under which religious objectors' challenges to valid and neutral laws of general applicability are rejected out of hand;"⁸⁸ and (3) an intermediate standard between the two.⁸⁹

The defendants' proposed standard for review of the California Constitution would allow religious exemptions to "a valid and neutral law of general applicability regardless of a compelling state interest supporting the law, and regardless of the absence of lesser restrictive means for furthering that compelling state interest"⁹⁰ According to the *North Coast* court, the proposed standard did not qualify as an "intermediate" test, but instead was a stricter scrutiny than strict scrutiny itself. Therefore, it was not what the California Supreme Court was referring to in *Catholic Charities* as a potential "as-yet unidentified rule"⁹¹

VI. Summary Adjudication of Affirmative Defense

The California Supreme Court explained its holding in *North Coast* with a detailed explanation of the earlier conflicting rulings.⁹² The trial court had granted plaintiff's motion for summary adjudication of defendants' religious freedom affirmative defense. According to section 437c of the California Code of Civil Procedure, "a party may move for summary adjudication as to . . . one or more affirmative defenses A motion for summary adjudication shall be granted only if it completely disposes of . . . an affirmative defense."⁹³ In finding for the plaintiff, the trial court held that the physicians' rights of free speech and freedom of religion did not

86. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1159 (2008) (quoting *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004)) (italics omitted).

87. *Id.* at 1159.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1160.

92. *Id.* at 1160-1161.

93. *North Coast Women's Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1160 (2008) (quoting CAL. CIV. PROC. § 437c(f)(1) (West 2004)).

provide an affirmative defense, as a matter of law, to sexual orientation discrimination as prohibited by Unruh.⁹⁴ Since the affirmative defense had been entirely disposed of, the trial court ruled that summary adjudication was proper.⁹⁵

The state supreme court explained that the appellate court had erred when it reversed the trial court.⁹⁶ The state appellate court had ruled that the motion for summary adjudication should not have been granted “[b]ecause there is a triable issue of fact as to whether Dr. Brody and Dr. Fenton refused to perform the procedure for Benitez based on her marital status or her sexual orientation”⁹⁷ The California Supreme Court made it clear that the California Court of Appeal had incorrectly applied summary adjudication rules.⁹⁸ There was no constitutional basis on which the affirmative defense could be asserted against Benitez’s claim of *sexual orientation* discrimination.⁹⁹ Thus, the defense *had* been entirely disposed of and the plaintiff’s motion for summary adjudication should have been granted.¹⁰⁰ The state supreme court further clarified that the trial court’s decision had only narrowed the issues to be litigated.¹⁰¹ The trial court’s ruling did not preclude the doctors from explaining at trial why they had discriminated against Benitez. The defendants could still explain their conduct even if they could not offer the religious freedom defense.¹⁰² Because the appellate court had erred, the California Supreme Court reinstated the trial court decision.¹⁰³

VII. Conclusion

The California Supreme Court heard *North Coast* to clarify the confusion from the conflicting rulings of the trial court and the California Court of Appeal. After the earlier conflicting rulings, it was not clear whether the physicians could use freedom of speech and freedom of religion as affirmative defenses to Benitez’s claim of sexual orientation discrimination.¹⁰⁴ The California Supreme Court found there was no issue of material fact

94. *Id.* at 1153.

95. *Id.* at 1160-1161.

96. *Id.*

97. *North Coast Women’s Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1161 (2008) (quoting *North Coast Women’s Care Medical Group v. Super. Ct. of San Diego County*, 137 Cal. App. 4th 781, 790 (2006)) (As previously discussed, marital status discrimination was not prohibited by Unruh at that time.).

98. *Id.* at 1161.

99. *Id.*

100. *Id.*

101. *Id.*

102. *North Coast Women’s Care Medical Group v. Super. Ct. of San Diego County*, 44 Cal. 4th 1145, 1161 (2008) (If the physicians proved they refused the IUI treatment because the plaintiff was unmarried, not because she was a lesbian, they could show that they had not violated Unruh at all.).

103. *Id.* at 1161.

104. *Id.* at 1150.

regarding whether defendants could offer an affirmative defense based on religious freedom, thereby preventing the physicians from asserting the defense as a matter of law.¹⁰⁵

The California Supreme Court's *North Coast* decision was widely viewed as a victory for gay rights in California.¹⁰⁶ The dispute set off a battle between religious conservatives and gay rights activists at a time when sexual orientation discrimination was under intense scrutiny. Over forty groups, working individually and together, had filed amicus curiae briefs with the state supreme court.¹⁰⁷ In addition, the California Supreme Court was in the process of deciding the landmark *In re Marriage Cases* when *North Coast*'s petition for review was granted.¹⁰⁸ Thus, the decision was highly anticipated by a number of interested parties and lauded by those who decried the doctors' attempt to insulate themselves from discrimination claims.

Discrimination based on sexual orientation is an important and visible issue in California, in which the state courts play a critical role. Had the California Supreme Court allowed the appellate court decision to stand, equal access to medical care for gay patients under Unruh would have potentially disappeared. If a medical provider wanted to discriminate against a gay person, he or she would merely need to claim a religious objection. After *North Coast*, exemptions to sexual orientation discrimination under Unruh will not be granted on the basis of freedom of speech or freedom of religion.¹⁰⁹ The *North Coast* case gave strength to the Unruh Act, protecting California residents from discrimination based on sexual orientation.

The California Supreme Court continues to respond to the issue of gay rights. In November 2008, the court agreed to hear three cases challenging Proposition 8, California's ballot measure banning same-sex marriage.¹¹⁰ This is a high profile issue: the court has received sixty-three amicus curiae

105. *Id.* at 1161.

106. Maura Dolan, *Doctor's Faith Must Yield to Gay's Rights, Court Says*, LOS ANGELES TIMES, August 19, 2008, at A1; Bob Egelko, *Doctors Can't Use Bias to Deny Gays Treatment*, SAN FRANCISCO CHRONICLE, August 19, 2008, at B3; Greg Moran, *Doctors' Beliefs Don't Trump Gay's Civil Rights, Court Rules*, THE SAN DIEGO UNION-TRIBUNE, August 19, 2008, at A1.

107. Mike McGee, *Calif. Supreme Court to Hear Contentious Gay Rights Case*, Law.com, July 7, 2007, <http://www.law.com/jsp/article.jsp?id=900005556111> (last visited February 28, 2009).

108. *In re Marriage Cases*, 43 Cal. 4th 757 (2008) (These six cases ultimately gave same-gender couples the right to marry. California State Proposition 8 passed on November 4, 2008, defining marriage as between a man and a woman. This proposition has created uncertainty as to the future of same sex marriage in California.).

109. *North Coast*, 44 Cal. 4th at 1161.

110. *Strauss v. Horton*, S168047 (Cal. Sup. Ct. argued March 5, 2009), *Tyler v. California*, S168066 (Cal. Sup. Ct. argued March 5, 2009), *San Francisco v. Horton*, S168078 (Cal. Sup. Ct. argued March 5, 2009), available at <http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.html> (last visited April 10, 2009).

briefs related to these cases.¹¹¹ The court will decide the validity of Proposition 8 itself, as well as the validity of the same-sex weddings performed before the proposition went into effect. Although *North Coast* was a step in the direction toward equal protection for gays, it remains to be seen whether the progress continues.

111. *Strauss v. Horton*, S168047 (Cal. Sup. Ct. argued March 5, 2009), *Tyler v. California*, S168066 (Cal. Sup. Ct. argued March 5, 2009), *San Francisco v. Horton*, S168078 (Cal. Sup. Ct. argued March 5, 2009), available at <http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.html> (last visited April 10, 2009).