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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NORTH COAST WOMEN'S CARE MEDICAL GROUP, INC. et al., Petitioners, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent.	D045438 (San Diego County Super. Ct. No. GIC770165)
GUADALUPE T. BENITEZ, Real Party in Interest.	

Proceedings in mandate after the superior court granted a motion for summary adjudication, Ronald S. Prager, Judge. Petition granted.

DiCaro, Coppo & Popcke, Robert C. Coppo, Gabriele M. Prater; and Robert H. Tyler, Douglas L. Edgar, Timothy Chandler for Petitioners North Coast Women's Care Medical Group, Inc., Christine Z. Brody and Douglas K. Fenton.

Duane Morris and Mitchell Lathrop for Catholic Exchange, Inc., and Human Life International as Amici Curiae on behalf of Petitioners.

Karen Dean Milam for Christian Medical and Dental Association as Amicus Curiae on behalf of Petitioners.

Thelen Reid & Priest and Curtis A. Cole for California Medical Association as Amicus Curiae on behalf of Petitioners.

O'Melveny & Meyers, Robert C. Welsh, Margaret C. Carroll, Lee K. Fink, Jennifer C. Pizer and Albert C. Gross for Real Party in Interest Guadalupe T. Benitez.

Winston & Strawn, Benjamin Russell Martin and Gail Standish for Anti-Defamation League; American Academy of HIV Medicine; American Medical Students Association; Asian Pacific American Legal Center of Southern California; Bienestar Human Services; California Latinas for Reproductive Justice; California Pan-Ethnic Health Network; California Women's Law Center; Coalition for Humane Immigrant Rights of Los Angeles; Gay and Lesbian Medical Association; International Association of Physicians in AIDS Care; Latino Coalition for a Healthy California; Mautner Project; National Center for Lesbian Rights; Mexican American Legal Defense and Educational Fund; and National Health Law Program; as Amici Curiae on behalf of Real Party in Interest.

Plaintiff Guadalupe T. Benitez filed the instant action against North Coast Women's Care Medical Group, Inc. (North Coast) and two of its employee physicians, Dr. Christine Brody and Dr. Douglas Fenton (collectively defendants), based on the

physicians' alleged refusal to perform intrauterine insemination (IUI) on her because of her sexual orientation. Among other causes of action, Benitez alleged that defendants' denial of services to her violated California's Unruh Civil Rights Act (the Unruh Act or the Act). Defendants asserted their federal and state constitutional right to the free exercise of religion as an affirmative defense. The court granted Benitez's motion for summary adjudication of that affirmative defense, and defendants filed a petition for writ of mandate challenging that order. We conclude the summary adjudication was erroneous because evidence presented by defendants in opposition to Benitez's motion raises a triable issue of fact as to whether Dr. Brody's and Dr. Fenton's religiously-based refusal to perform IUI for Benitez was based on her marital status and not her sexual orientation, and marital status discrimination was not prohibited by the Unruh Act when defendants' alleged violation of the Act occurred.

FACTUAL AND PROCEDURAL BACKGROUND

Benitez received health insurance through defendant Sharp Health Plan (Sharp) as a benefit of her employment, and North Coast contracted with Sharp to provide obstetrical and gynecological services to Sharp enrollees.[1] After Benitez tried unsuccessfully for about two years to become pregnant through intravaginal insemination (IVI) performed at home, her primary care physician referred her to North Coast for fertility treatment.

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1 Benitez's first amended complaint, her operative pleading, includes a cause of action against Sharp for breach of contract to provide Benitez medical benefits under an employees' benefit plan. However, Sharp is not a party to these proceedings.

In August 1999, Benitez began fertility treatment with Dr. Brody. Benitez informed Dr. Brody of her sexual orientation at their first meeting. Dr. Brody told Benitez that if her treatment reached the point where IUI was the next recommended step, Dr. Brody would not perform the procedure because it would be against her religious beliefs. Dr. Brody's explanation of why her religious beliefs precluded her from performing IUI for Benitez is a matter of dispute. Benitez claims Dr. Brody told her it was against her religious beliefs to perform IUI for a lesbian. Dr. Brody claims she told Benitez it was against her religious beliefs to perform IUI for any unmarried woman, regardless of sexual orientation, and she was certain Dr. Fenton would share her religious convictions regarding the IUI issue because they attended the same church.[2] In any event, Dr. Brody told Benitez that other doctors at North Coast would be available to perform IUI on Benitez if it became necessary, and with that understanding, Benitez began treatment with her.

Dr. Brody's initial treatment plan called for Benitez to take the medication Clomid to stimulate her ovaries to produce and release eggs, and to continue to perform IVI at home for three monthly cycles. According to Benitez, the next step in Dr. Brody's plan, if she was not pregnant after three cycles of self-insemination, was to undergo a number of cycles of taking Clomid followed by IUI at North Coast. In accordance with that plan, Benitez performed IVI at home for three cycles using frozen sperm from an anonymous

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[2] Dr. Brody claims she told Benitez that with the exception of participating in IUI, she would provide care to Benitez from ovulation induction through full-term delivery.

donor purchased at a sperm bank. After Benitez completed those cycles, Dr. Brody recommended that before progressing to IUI, Benitez undergo a hysterosalpingogram (HSG) – a test to determine whether her fallopian tubes were blocked.

According to Benitez, although her HSG showed her fallopian tubes were clear, Dr. Brody recommended she continue taking Clomid and performing IVI at home, and she underwent seven Clomid/IVI cycles under Dr. Brody's care between August 1999 and April 2000. In March 2000, Dr. Brody recommended that before attempting IUI, Benitez undergo laparoscopic surgery to determine whether her infertility was the result of endometriosis. During the same visit, Benitez told Dr. Brody she wanted to use fresh sperm donated by a friend instead of frozen sperm for her IUI, as she understood using fresh sperm was more likely to result in pregnancy. At Dr. Brody's direction, Benitez's friend underwent blood tests for certain conditions, including hepatitis and HIV. Benitez underwent laparoscopic surgery in April 2000. The surgery revealed no problem that would interfere with her fertility.

The parties relate different versions of the events leading to North Coast's referral of Benitez to an outside physician. Dr. Brody and Dr. Fenton aver that "live non-spousal donor sperm" had never been used at North Coast and that no North Coast patient before Benitez had ever requested to use such sperm for IUI. Consequently, an inquiry into the requirements for using such sperm was necessary to ensure that North Coast did not violate any laws. According to Dr. Brody, because Benitez was aware that the details and protocol of preparing the live non-spousal donor sperm had not been clarified as of July 5, 2005, the date of Benitez's last office visit with Dr. Brody before Dr. Brody left on a

vacation, Benitez decided to proceed with IUI using frozen, prewashed, IUI-ready sperm from a sperm bank. Dr. Brody noted this in her dictated chart notes of July 5, 2005, but the dictated notes were not placed in Benitez's chart until after Dr. Brody returned from her vacation on July 17, 2005. According to defendants, the absence of Dr. Brody's July 5 notes from Benitez's chart during her vacation caused a misunderstanding between Benitez and Dr. Fenton that resulted in Dr. Fenton's referral of Benitez to an outside physician. While Dr. Brody was on vacation, Benitez called her office to obtain a refill of her Clomid prescription in anticipation of undergoing IUI about 14 days later. Because Dr. Brody was away, Benitez was referred to Dr. Fenton, who thought Benitez still intended to undergo IUI with live non-spousal donor sperm. Dr. Fenton claims Benitez did not tell him she had agreed during her last office visit with Dr. Brody to undergo IUI with frozen, IUI-ready sperm. If live donor sperm rather than frozen, IUI-ready sperm is used for IUI, the live sperm must go through a preparation process that only two people at North Coast – Dr. Fenton and nurse Dana Landsparger – were qualified and licensed to perform. Because it was against Dr. Fenton's moral and religious beliefs to perform IUI or prepare live donor sperm for Benitez, he asked Landsparger if she would be willing to prepare the live donor sperm for Benitez's IUI. Landsparger informed Dr. Fenton that it was also against her moral and religious beliefs to prepare live donor sperm for Benitez.. Unaware that Benitez was willing to undergo IUI with frozen IUI-ready sperm, Dr. Fenton referred her to outside physician Dr. Michael Kettel for IUI. Dr. Fenton asserts that had he known Benitez was willing to proceed with frozen sperm, the referral would have been unnecessary because there were

two other doctors at North Coast who could have performed IUI for Benitez with frozen sperm. He claims he told Benitez that North Coast would absorb any additional costs she incurred as a result of the referral.

According to Benitez, in May 2000, Dr. Brody told her North Coast did not have a "tissue license" required by state law for insemination with known-donor sperm. When Benitez visited Dr. Brody on July 5 and tested negative for pregnancy, Dr. Brody promised she would undergo IUI at North Coast, but with frozen sperm because North Coast still did not have a tissue license. Dr. Brody told Benitez to call the office when her menstrual cycle resumed so Dr. Brody could prescribe Clomid, to be followed by IUI when Benitez ovulated.

On July 7, 2000, Benitez began her menstrual cycle and telephoned Dr. Brody's office for a refill of her Clomid prescription. A receptionist relayed Benitez's request to Dr. Fenton because Dr. Brody was on vacation. Later that day "Shirley" at North Coast telephoned Benitez and told her Dr. Fenton would not refill her prescription. The following day Dr. Fenton telephoned Benitez and told her that due to the beliefs of Dr. Brody and other North Coast staff members, he could not help her. He explained that Dr. Brody and her staff did not feel comfortable with Benitez's sexual orientation and that although he personally had no bias against performing IUI for her, she would not be treated fairly at North Coast and would not get timely care from staff members who had objections to her sexual orientation. Dr. Fenton offered to refer Benitez to an outside physician, telling her she was entitled to care that was not discriminatory.

Benitez claims she had to beg Sharp for an "off plan" referral to another obstetrician and gynecologist, and that although Sharp ultimately authorized reproductive therapy with Dr. Michael Kettel, the cost of receiving treatment from him was substantially greater than the cost of continuing treatment with North Coast would have been. In her answer to the petition for writ of mandate, Benitez denies that Dr. Fenton offered to pay the additional costs she incurred as a result of his referral to Dr. Kettel and alleges defendants have not paid any of those costs. In her first amended complaint, Benitez alleges that she ultimately became pregnant under Dr. Kettel's care by the process of in vitro fertilization. Benitez eventually gave birth to a healthy boy.

Benitez filed the instant action in August 2001. In the first cause of action of her first amended complaint she alleges defendants violated the Unruh Act (Civ. Code, § 51.)[3] by discriminating against her on the basis of her sexual orientation.[4] Defendants

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3 The Unruh Act consists solely of Civil Code section 51, as reflected by the following language in subdivision (a) of that statute: "This *section* shall be known, and may be cited, as the Unruh Civil Rights Act." (Italics added.). (See *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 757.)

Civil Code section 51, subdivision (b) provides: " 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."

Civil Code section 52, subdivision (a), provides: "Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51 . . . is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, ..."

answered the first amended complaint and asserted in their 32d affirmative defense that Benitez is barred from recovery because their alleged misconduct was "justified and protected by [their] rights of free speech and freedom of religion" under the federal and state Constitutions.[5] Benitez moved for summary adjudication of the 32d affirmative defense and the court granted the motion, precluding defendants from raising the defense at trial.

Defendants filed the instant petition, seeking a peremptory writ of mandate compelling the superior court to vacate its order granting Benitez's summary adjudication motion and enter an order denying the motion.[6] We issued an order to show cause as to

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4 Plaintiff's first amended complaint also includes causes of action against defendants for breach of contract, deceit, negligence and intentional infliction of emotional distress.

5 In its entirety, defendants' 32d affirmative defense states: "DEFENDANTS are informed and believe, and based thereon allege, that Plaintiff is barred in whole or part from recovery under the Complaint and each purported cause of action sustained therein, in that DEFENDANTS' alleged misconduct, if any, occurred during the assertion by DEFENDANTS of conduct which is justified and protected by the DEFENDANTS' rights of free speech and freedom of religion, as found in the Constitution of the United States of America, including but not limited to the First Amendment in the Bill of Rights, and the Constitution of the State [of] California."

6 Amici curiae briefs in support of defendants' petition have been filed by the California Medical Association and the Christian Medical and Dental Associations. An amici curiae brief supporting Benitez and the trial court's summary adjudication ruling was filed by the following organizations: Anti-Defamation League; American Academy of HIV Medicine; American Medical Students Association; Asian Pacific American Legal Center of Southern California; Bienestar Human Services; California Latinas for Reproductive Justice; California Pan-Ethnic Health Network; California Women's Law Center; Coalition for Humane Immigrant Rights of Los Angeles; Gay and Lesbian Medical Association; International Association of Physicians in AIDS Care; Latino Coalition for a Healthy California; Mautner Project; National Center for Lesbian Rights;

Dr. Brody and Dr. Fenton only and stayed all trial court proceedings. We grant the petition as to Dr. Brody and Dr. Fenton.[7]

DISCUSSION

A motion for "[s]ummary adjudication of an affirmative defense is properly granted when there is no triable issue of material fact as to the defense, and the moving party is entitled to judgment on the defense as a matter of law. (Code Civ. Proc., § 437c, subds. (c), (f)(1).) . . . On review, we independently assess the correctness of the trial court's ruling, applying the same legal standard as the trial court." (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 977-978.) We construe Benitez's papers strictly and defendants' liberally and resolve any doubts as to the propriety of granting the motion in favor of Dr. Brody and Dr. Fenton. (*Id.* at p. 978.) The motion was properly granted only if it completely disposes of the affirmative defense. (Code Civ. Proc., § 437c, subd. (f)(1).)

The evidence in the record raises a triable issue of fact as to whether Dr. Brody and Dr. Fenton refused to perform IUI for Benitez because she was unmarried and not because of her sexual orientation. In opposition to Benitez's summary adjudication motion, defendants presented deposition testimony of Benitez and her domestic partner

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Mexican American Legal Defense and Educational Fund; and National Health Law Program.

[7] We disregard Benitez's demurrer to the writ petition as she presented no argument in support of any of the asserted grounds for the demurrer. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 785-785 [asserted point that is not supported by reasoned argument and citations to authority may be treated by a reviewing court as waived].)

Joanne Clark, both of whom testified that Dr. Brody told them her religious beliefs prohibited her from performing IUI on any unmarried woman, regardless of whether the woman was heterosexual or homosexual. Clark testified that Dr. Brody's statements "implied marriage was the factor."[8]

The existence of a triable issue of fact as to whether Dr. Brody's and Dr. Fenton's refusal to perform IUI for Benitez was based on her marital status is significant because the Unruh Act did not prohibit discrimination based on marital status when Benitez's claim under the Act accrued.[9] Although on its face, Civil Code section 51 at that time prohibited discrimination only on the bases of "sex, race, color, religion, ancestry, national origin, disability or medical condition," it had been extended by case law to discrimination based on various other classifications, including sexual orientation. (*Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 703; *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1154-1162; *Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836.) In *Beaty v. Truck Ins. Exchange* (1992) 6 Cal.App.4th 1455, 1462, the Court of Appeal declined to expand the Unruh Act to include marital status as an additional category of prohibited discrimination. Later opinions approved *Beaty's* construction of the Unruh Act. (See

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8 Clark further testified: "Marriage was one of the issues, that she would only perform [IUI] on married people, because she also said she wouldn't perform it on a single woman. So marriage was definitely an issue, be it singles, heterosexual or gay or single gay."

9 On September 29, 2005, the Governor approved Assembly Bill No. 1400 (2005-2006 Reg. Sess.), which amends Civil Code section 51 to expressly include both marital status and sexual orientation as prohibited bases of discrimination under the Unruh Act.

Brown v. Smith (1997) 55 Cal.App.4th 767, 787; *Hessians Motorcycle Club v. J.C. Flanagans, supra,* 86 Cal.App.4th at p. 836; *King v. Hofer* (1996) 42 Cal.App.4th 678, 682-683.)

For purposes of this case, we construe the Unruh Act as prohibiting discrimination based on sexual orientation but not prohibiting discrimination based on marital status. We recognize that certain discussion in the California Supreme Court's recent decision in *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824 (*Koebke*) arguably supports application of the Act to marital status discrimination *generally* under certain circumstances, and that the Legislature recently amended the Act to include marital status as a prohibited basis of discrimination. (*Ante*, fn. 9.) However, as we explain below, we conclude that neither *Koebke* nor the statutory amendment affects the applicability of the Act to marital status discrimination in this case, as both effected changes in the law that operate prospectively only. Accordingly, if a jury were to find that Dr. Brody's and Dr. Fenton's refusal to perform IUI for Benitez was based solely on the fact she was unmarried without regard to her sexual orientation, Benitez's Unruh Act cause of action would be defeated.[10]

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10 The first cause of action of Benitez's first amended complaint does not allege a marital status discrimination claim; it alleges defendants violated the Unruh Act by discriminating against her because she is homosexual. Our conclusion that the Unruh Act does not apply to marital status discrimination for purposes of this case precludes Benitez from amending her first cause of action to allege marital status discrimination as an additional basis of liability under the Act. The parties appear to tacitly agree that the only cause of action to which the 32d affirmative defense applies is Benitez's first cause of action.

Koebke Does Not Affect the Applicability of the Unruh Act to Marital Status Discrimination in This Case

In *Koebke*, the California Supreme Court considered an Unruh Act claim by a lesbian couple who were registered domestic partners. The plaintiffs alleged the defendant country club committed marital status discrimination in violation of the Unruh Act by refusing to extend to them certain benefits it extended to its married members. *Koebke* held "that the Unruh Act prohibits discrimination against domestic partners registered under the Domestic Partner Act [of 2003] in favor of married couples." (*Koebke*, *supra*, 36 Cal.4th at p. 850.)

Although *Koebke* did not disapprove *Beaty's* refusal to extend the Unruh Act to discrimination based on marital status *generally*, it left that issue unsettled, stating: "*Beaty* found that the policy favoring marriage precluded recognition of marital status as a protected category under the Unruh Act. We need not decide whether that categorical statement is correct because even if we assume that marital status discrimination, outside the context of the Domestic Partner Act, is cognizable under the Unruh Act, such discrimination would nonetheless be permissible if justified by 'legitimate business interests.' " (*Koebke, supra,* 36 Cal.4th at p. 851.) This language suggests that whether a claim of marital status discrimination is cognizable under the Unruh Act must be decided on a case-by-case basis, and that marital status discrimination is unlawful under the Act unless it is justified by a legitimate business interest.

We do not view *Koebke* as changing the applicability of the Unruh Act to marital status discrimination in this case; we apply the Unruh Act as it existed and was

interpreted by judicial decisions at the time defendants' alleged acts of discrimination occurred – i.e., as prohibiting sexual orientation discrimination but not marital status discrimination. "Although as a general rule judicial decisions are to be given retroactive effect [citation], there is a recognized exception when a judicial decision changes a settled rule on which the parties below have relied. [Citations.] '[C]onsiderations of fairness and public policy may require that a decision be given only prospective application. [Citations.] Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule. [Citiations.]' " (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 372.)

Koebke did not clearly change case law regarding the applicability of the Unruh Act to marital status discrimination, as it expressly stated it was not deciding whether "marital status discrimination, outside the context of the Domestic Partner Act, is cognizable under the Unruh Act . . . ." (*Koebke*, *supra*, 36 Cal.4th at p. 851.) However, to the extent *Koebke* can be read as a change in case law on that point, the change was to a settled rule on which the parties have relied in pleading and litigating this case. Consequently, such change operates prospectively only.

The 2005 Amendment to the Unruh Act Does Not Affect the Applicability of the Unruh Act to Marital Status Discrimination in This Case

We also conclude the Legislature's 2005 amendment of Civil Code section 51 does not apply to actions that occurred before its enactment. A statutory amendment that

merely clarifies, rather than changes, existing law is deemed to not operate retrospectively, even if it is applied to actions that predate its enactment, "'because the true meaning of the statute remains the same.' [Citation.] In that event, personal liability would have existed at the time of the actions, and the amendment would not have changed anything. But if the amendment changed the law and imposed personal liability for earlier actions, the question of retroactivity arises. 'A statute has retrospective effect when it substantially changes the legal consequences of past events.' " (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471-472 (*McClung*).)

The question of retroactive application arises here because "applying the amendment to impose liability [for marital status discrimination] that did not otherwise exist . . . would 'attach[ ] new legal consequences to events completed before its enactment.' [Citation.] Specifically, it would 'increase a party's liability for past conduct . . . .' " (*McClung*, *supra*, 34 Cal.4th at p. 472.) Accordingly, *McClung* instructs that we must decide two questions: (1) Did the amendment extending liability under the Unruh Act to marital status discrimination change or merely clarify the law? (2) If the amendment changed the law, does it apply retroactively? (*Ibid.*)

We conclude the amendment changes the law. We acknowledge that Assembly Bill No. 1400 includes the following legislative declaration suggesting otherwise: "The Legislature affirms that the bases of discrimination prohibited by the Unruh Civil Rights Act include, but are not limited to, marital status and sexual orientation, as defined herein. By specifically enumerating these bases in the Unruh Civil Rights Act, the Legislature intends to clarify the existing law, rather than to change the law, as well as

the principle that the bases enumerated in the act are illustrative rather than restrictive." (Assem. Bill No. 1400 (2005-2006 Reg. Sess.) § 2(c).) It is settled, however, that even if the courts have not conclusively interpreted a statute, " 'a legislative declaration of an existing statute's meaning' is but a factor for a court to consider and 'is neither binding nor conclusive in construing the statute.' [Citations.] This is because the 'Legislature has no authority to interpret a statute. That is a judicial task. The Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive. But it has no legislative authority simply to say what it *did* mean.' [Citations, original italics.] A declaration that a statutory amendment merely clarified the law 'cannot be given an obviously absurd effect, and *the court cannot accept the Legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms*.' " (*McClung, supra,* 34 Cal.4th at p. 473, italics added.)

As we noted and as reflected in the briefing by the parties and amici curiae in this writ proceeding, before the passage of Assembly Bill No. 1400 it was settled case law that the Unruh Act did not apply to marital status discrimination. (*Beaty v. Truck Ins. Exchange, supra,* 6 Cal.App.4th at p. 1462; *Brown v. Smith, supra,* 55 Cal.App.4th at p. 787; *Hessians Motorcycle Club v. J.C. Flanagans, supra,* 86 Cal.App.4th at p. 836; *King v. Hofer, supra,* 42 Cal.App.4th at pp. 682-683.) Because California appellate courts had already definitively interpreted the Unruh Act as not applying to marital status discrimination, "the Legislature had no power to decide that the later amendment merely declared existing law." (*McClung, supra,* 34 Cal.4th at p. 473.) Thus, we conclude the

amendment of Civil Code section 51 by Assembly Bill No. 1400 changed, rather than clarified, the law regarding the applicability of the Act to marital status discrimination.

McClung explained that deciding a statutory amendment changes rather than clarifies the law does not decide the question of whether the amendment applies to conduct occurring before its enactment in a particular case; it simply means that applying the amendment to preenactment conduct would be a retroactive application. (*McClung, supra,* 34 Cal.4th at p. 474.) Having decided that the 2005 amendment to the Unruh Act changed the law, we must now consider whether the amendment applies retroactively. (*McClung,* at p. 475.)

"'Generally, statutes operate prospectively only.' [Citations.] '[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . . For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."' [Citations.] 'The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact.' " (*McClung, supra,* 34 Cal.4th at p. 475.) "[I]t has long been established that a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' [Citations.] '[A] statute may be applied retroactively only if it contains express language of retroactively or if other

sources provide a clear and unavoidable implication that the Legislature intended retroactive application.' " (*Ibid.*)

The legislative statement in Assembly Bill No. 1400 that the amendment was intended "to clarify the existing law, rather than to change the law" is insufficient to overcome the strong presumption against retroactivity. As we discussed, the amendment *does* change the law regarding the applicability of the Unruh Act to marital status discrimination. *McClung* supports the proposition that "an erroneous statement that an amendment merely declares existing law is [insufficient] to overcome the strong presumption against retroactively applying a statute that responds to judicial interpretation." (*McClung, supra*, 34 Cal.4th at p. 476.) The Legislature's assertion that the amendment was intended to clarify existing law does not show "clear and unavoidable intent to have the statute retroactively impose liability for actions not subject to liability when taken. 'Requiring clear intent assures that [the legislative body] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.' " (*Ibid.*) Because retroactive application of the 2005 amendment to Civil Code section 51 would impose liability for actions not subject to liability when taken and there is no showing of clear, unequivocal legislative intent to impose such after-the-fact liability, we conclude the amendment does not apply retroactively to conduct that predates its enactment.

Dr. Brody and Dr. Fenton Are Entitled to Assert Their Constitutional Right to Free Exercise of Religion and Introduce Evidence of Their Religious Beliefs As Part of Their Proof that Their Refusal to Perform IUI for Benitez was Based on Her Marital Status

As noted, a motion for summary adjudication of an affirmative defense is properly granted only if it completely disposes of the affirmative defense. (Code Civ. Proc., § 437c, subd. (f)(1); *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 96-97 (*Catalano*).) *Catalano* offers the following insight into the legislative intent underlying Code of Civil Procedure section 437c, subdivision (f), based on discussion in *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848 (*Lilienthal*): "[T]he clear intent of Code of Civil Procedure section 437c, subdivision (f) is '"to stop the practice of . . . adjudication of issues that do not completely dispose of a cause of action or defense."' [Citation.] Code of Civil Procedure section 437c, subdivision (f) was meant to 'eliminate summary adjudication motions that would not reduce the costs and length of litigation.' [Citation.] [*Lilienthal*] noted the following comment, which was written by the Senate Committee on the Judiciary when Code of Civil Procedure section 437c, subdivision (f) was amended in 1990: '"According to the bill's sponsor [(The California Judges Association)], it is a waste of court time to attempt to resolve issues if the resolution of those issues will not result in summary adjudication of a cause of action or affirmative defense. Since the cause of action must still be tried, much of the same evidence will be reconsidered by the court at the time of trial. This bill would instead require summary adjudication of issues only where an entire cause of action, affirmative defense or claim for punitive damages can be resolved. [¶] . . . [¶] The sponsor believes that the bill will save court time, reduce the cost of litigation for plaintiffs and defendants,

and reduce the opportunity for abuse of the summary judgment procedure." The August 1990, report of the Assembly Committee on Judiciary adopted the Senate's analysis.' " (*Catalano, supra,* 82 Cal.App.4th at p. 96 citing *Lilienthal, supra,* 12 Cal.App.4th at pp. 1853-1854.)

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 concerning the provision of infertility services to unmarried women and asserting their constitutional right to freely exercise those beliefs. Specifically, Dr. Brody and Dr. Fenton are entitled to present evidence that their religious beliefs prohibited them from performing IUI on *any* unmarried woman, regardless of the woman's sexual orientation, to show that the Unruh Act does not apply to their alleged acts of discrimination. Because that factual issue is germane to defendants' 32d affirmative defense, the court erred in granting summary adjudication of that affirmative defense as to Dr. Brody and Dr. Fenton.[11]

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11 In light of our conclusion that summary adjudication of the 32d affirmative defense was erroneous because it did not completely dispose of that defense, we decline to address the broader constitutional issues raised by Benitez's petition. Those issues are better decided on a more complete record than that presented to us in this writ proceeding.

DISPOSITION

Let a writ of mandate issue directing the superior court to vacate its order of October 28, 2004, granting plaintiff Guadalupe Benitez's motion for summary adjudication of defendants' 32d affirmative defense as to defendants Dr. Brody and Dr. Fenton, and to enter an order denying the motion for summary adjudication as to those defendants. The parties are to bear their own costs in the writ proceeding. The stay issued on March 2, 2005, will be vacated when the opinion is final as to this court.

CERTIFIED FOR PUBLICATION

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.