

(Cite as: 97 Cal.App.4th 198, 118 Cal.Rptr.2d 264)

**Briefs and Other Related Documents**

Court of Appeal, Fourth District,  
California.  
JACQUELINE R. et al., Plaintiffs and Appellants,  
v.  
HOUSEHOLD OF FAITH FAMILY CHURCH,  
INC., Defendant and Respondent.  
Jacqueline R. et al., Plaintiffs and Appellants,  
v.  
Orlando Barela, Defendant and Respondent.  
**No. G028495.**

March 28, 2002.  
Rehearing Denied April 16, 2002.  
Review Denied July 10, 2002.

Husband and wife brought action against church and pastor on various claims including negligence and sexual battery, arising out of wife's sexual relationship with pastor. The Superior Court, Orange County, No. 806678 c/w 00CC01792, David H. Brickner, J., granted summary judgment for defendants. Husband and wife appealed. The Court of Appeal, Rylaarsdam, J., held that: (1) pastor did not owe heightened duty of care applicable to professional counselors, and (2) plaintiffs could not maintain action for sexual battery.

Affirmed.

## West Headnotes

**[1] Judgment ⚡185(6)**

228k185(6) Most Cited Cases

When a defendant moves for summary judgment contending that the action has no merit, the motion must be granted if all the papers submitted show that there is no triable issue as to any material fact

and, ultimately, the law, and that the moving party is entitled to a judgment as a matter of law. West's Ann.Cal.C.C.P. § 437c(a, c).

**[2] Judgment ⚡185(2)**

228k185(2) Most Cited Cases

On motion for summary judgment, the court must view the evidence, and all inferences reasonably drawn from therefrom, in the light most favorable to the opposing party. West's Ann.Cal.C.C.P. § 437c(c).

**[3] Negligence ⚡202**

272k202 Most Cited Cases

To prove facts sufficient to support a finding of negligence, a plaintiff must show that defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate cause or legal cause of the resulting injury; without such a duty, any injury is *damnum absque injuria*, injury without wrong.

**[4] Judgment ⚡181(5.1)**

228k181(5.1) Most Cited Cases

Duty, being a question of law, is particularly amenable to resolution by summary judgment. West's Ann.Cal.C.C.P. § 437c.

**[5] Husband and Wife ⚡322**

205k322 Most Cited Cases

The gist of the tort of alienation of affections is not sexual intimacy but an interference with the marital relation that changes one spouse's mental attitude toward the other.

**[6] Husband and Wife ⚡322**

205k322 Most Cited Cases

Tort liability formerly covered by alienation of affections is not precluded if the alleged sexual misconduct breached an independent duty of care.

**[7] Health ⚡643**

198Hk643 Most Cited Cases

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(Formerly 299k15(5.1) Physicians and Surgeons)

A physician who engages in sexual relations with a patient may be liable for professional negligence if his conduct constitutes a breach of the duty of care owed to the patient by the physician within the scope of the patient-physician relationship.

#### [8] Religious Societies 30

332k30 Most Cited Cases

Church pastor who allegedly engaged in improper sexual relationship with parishioner he was counseling could not be held to the heightened duty of care applicable to professional counselors; pastor was counseling parishioner as part of his church ministry, not as professional counselor. West's Ann.Cal.Bus. & Prof.Code § 4980.10.

#### [9] Assault and Battery 11

37k11 Most Cited Cases

Sexual relationship between pastor and parishioner he was counseling was consensual, and thus parishioner could not maintain action for sexual battery, although parishioner rejected some of pastor's sexual advances; her resistance was not based on the offensiveness of the advances, an element of sexual battery. West's Ann.Cal.Civ.Code § 1708.5.

#### [10] Assault and Battery 2

37k2 Most Cited Cases

A cause of action for sexual battery under requires the batterer intend to cause a harmful or offensive contact and the batteree suffer a sexually offensive contact. West's Ann.Cal.Civ.Code § 1708.5.

\*\*265 \*200 Law Offices of Philip P. DeLuca and Philip P. DeLuca, Huntington Beach, for Plaintiffs and Appellants.

McKay, Byrne & Graham, Michael A. Byrne, Los Angeles, and April Paradise-Switzer for Defendants and Respondents.

#### OPINION

RYLAARSDAM, J.

In what appears to be a case of first impression in California, the trial court granted summary

judgment in favor of defendants Household of Faith Family Church, Inc. (the church) and Pastor Orlando Barela (the pastor) after concluding the pastor was not liable in tort as a \*201 matter of law for engaging in sexual conduct with the wife of a parishioner who came to him for marriage counseling. Plaintiffs Jacqueline R. and Abel R. argue the same tort liability imposed on licensed marriage counselors for similar conduct should apply to unlicensed, pastoral marriage counselors, despite the holding in *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948, which refused to impose a professional duty of care on pastoral counselors who provided spiritual counseling to a suicidal church member before he committed suicide. They further argue the trial court improperly decided an issue of fact regarding the consensual nature of the sexual activity.

Defendants contend *Nally* controls the outcome of this case and the trial court did not improperly weigh the evidence. We agree *Nally* precludes us from holding the pastor to the same standard of care applicable to a licensed marriage counselor under the facts of this case. We further conclude the evidence, viewed in the light most favorable to plaintiffs, shows the sexual activity was consensual, and we therefore affirm.

#### FACTS

The pastor denied engaging in sexual misconduct with Jacqueline; however, any disputed facts are construed here, as they were below, in plaintiffs' favor.

Plaintiffs were members of the church. They had been experiencing marital problems, and Abel went to the pastor for marriage counseling; Jacqueline subsequently joined in the counseling sessions. After only a few sessions, Abel moved out of the home. Before the couple's first joint counseling session, the pastor approached \*\*266 Jacqueline and indicated his interest in her. He hugged and kissed her several times that day; she "half resisted" by putting her hand on his chest. She told him she was afraid they would be caught. After the couple's first joint counseling session, the sexual

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contact between the pastor and Jacqueline increased for a short period of time and then ended altogether.

In their initial complaint (Super.Ct., 1999, No. 806678), plaintiffs alleged the following causes of action against defendants: (1) fraud and deceit--intentional misrepresentation; (2) gross professional negligence; (3) gross general negligence; (4) general negligence; (5) sexual harassment; (6) sexual battery; (7) intentional infliction of emotional distress; (8) negligent infliction of emotional distress; and (9) loss of consortium. They further alleged the church was liable for the pastor's conduct as his employer under the theory of respondeat superior.

\*202 The pastor was dismissed from the initial complaint for tactical reasons; plaintiffs filed a new complaint containing identical allegations against him in a second action (Super.Ct., 2000, No. 00CC01792), and the cases were consolidated in the trial court. Before the second complaint was filed, however, defendants moved for summary judgment or, alternatively, for summary adjudication. The motion was granted in part on the causes of action for fraud, sexual harassment, and loss of consortium, but denied as to the other causes of action.

Seven months later, the pastor moved for summary judgment in the second case, raising the same arguments made in the earlier motion. This time, the court concluded that, even construing all of the disputed facts in plaintiffs' favor, they failed to state a cause of action against the pastor. "This is true because the plaintiff's case is essentially a complaint alleging tortious liability where two consenting adults freely and mutually consent to some sexual foreplay and various discussions of sexual activity, notwithstanding they are both married to other persons. [¶] Plaintiff's theory hangs on the fact that Orlando was a pastor of her church and the sexual activities and conversations occurred in the context of marital counseling to plaintiff by her pastor. Morally reprehensible as Orlando's advances were under the subterfuge of marital counseling (if, indeed, they occurred), his status as a pastor/counselor does not, under the law, bestow

upon him any duty beyond that of the ordinary lay person. Where consensual sexual activity is undertaken between lay persons under the circumstances urged by this plaintiff, no cause of action arises."

Having granted summary judgment in the pastor's favor, the court subsequently granted the church's second motion for summary judgment concluding that, because the pastor's conduct was not actionable, "the church is off the hook, too."

#### DISCUSSION

*Summary Judgment Was Properly Granted as a Matter Of Law*

##### 1. *An Independent Legal Duty Is Required to Hold the Pastor Liable*

Plaintiffs contend that they suffered an actionable injury and that the court erred by granting summary judgment for defendants as a matter of law. They argue defendants should not be immunized by the pastor's status as a clergyman because he held himself out as a marriage counselor and, in that \*203 capacity, he owed them a duty of care not to engage in sexual relations with Jacqueline. They further contend " '[m]arriage counseling' by its very nature is secular, not religious." Their arguments are not supported by the evidence or the law.

\*\*267 [1][2] When a defendant moves for summary judgment contending the action has no merit, the motion must be granted " 'if all the papers submitted show' that 'there is no triable issue as to any material fact' [citation]--that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law [citations]--and that the 'moving party is entitled to a judgment as a matter of law' [citation]." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 107 Cal.Rptr.2d 841, 24 P.3d 493; Code Civ. Proc., § 437c, subds. (a) & (c).) The court must view the evidence, and all " 'inferences' reasonably drawn therefrom [citation], ... in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843, 107 Cal.Rptr.2d 841, 24 P.3d 493; Code Civ.

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Proc., § 437c, subd. (c).)

[3][4] Defendants were entitled to summary judgment if the trial court correctly concluded the pastor owed plaintiffs no legal duty. "[T]o prove facts sufficient to support a finding of negligence, a plaintiff must show that defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate cause or legal cause of the resulting injury. [Citation.]" (*Nally v. Grace Community Church, supra*, 47 Cal.3d at pp. 292-293, 253 Cal.Rptr. 97, 763 P.2d 948.) "Without such a duty, any injury is 'damnum absque injuria,'--injury without wrong. [Citations.]" (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 6, p. 61.) For that reason "[d]uty, being a question of law, is particularly amenable to resolution by summary judgment. [Citation.]" (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 465, 63 Cal.Rptr.2d 291, 936 P.2d 70.)

[5] Duty is the crux of this case. Without it, all that remains is a lawsuit for alienation of affections--a "long-dead cause[ ] of action. [Citations.]" (*Smith v. Pust* (1993) 19 Cal.App.4th 263, 269, 23 Cal.Rptr.2d 364, fn. omitted [discussing anti-heart-balm statutes].) "The gist of the tort is not sexual intimacy but an interference with the marital relation that changes one spouse's mental attitude toward the other." (Prosser & Keeton, Torts (5th ed.1984) § 124, p. 918, fn. omitted.) The Legislature abolished this and other related causes of action in 1939 when it enacted Civil Code section 43.5. As we have previously noted, "[a]t common law, the right of action for damages for alienation of a wife's affection is in some measure based upon the same obsolete idea that the wife is one of the husband's chattels, and that \*204 her companionship, her services and her affection are his property, for the loss of which, by wrongful inducement on the part of another man, the husband ought to be compensated with money...." [Citation.]" (*Smith v. Pust, supra*, 19 Cal.App.4th at p. 269, fn. 5, 23 Cal.Rptr.2d 364.)

[6][7] Nonetheless, tort liability is not precluded if the alleged sexual misconduct breached an independent duty of care. (*Smith v. Pust, supra*, 19

Cal.App.4th at p. 269, 23 Cal.Rptr.2d 364; *Richard H. v. Larry D.* (1988) 198 Cal.App.3d 591, 595, 243 Cal.Rptr. 807.) "For instance, a physician who engages in sexual relations with a patient who is liable for professional negligence if his conduct constitutes a 'breach of the duty of care owed to the patient by the physician within the scope of the patient-physician relationship.' [Citation.]" (*Richard H. v. Larry D., supra*, 198 Cal.App.3d at p. 595, 243 Cal.Rptr. 807.) In *Richard H.*, the court concluded the plaintiff could state causes of action for fraud, professional negligence, and negligent infliction of emotional distress against the psychiatrist who had a sexual relationship with the plaintiff's wife because the misconduct \*\*268 took place while the psychiatrist was treating the couple for marital problems. (*Id.* at p. 596, 243 Cal.Rptr. 807.) In *Smith*, however, we concluded a therapist who engaged in sexual conduct with a patient did not owe a duty of care to her husband because the husband was not a patient and the therapy was not intended to improve the marriage. (*Smith v. Pust, supra*, 19 Cal.App.4th at p. 272, 23 Cal.Rptr.2d 364.)

Both of these cases recognized that, even when the substance of the suit was alienation of affections, a cause of action may exist based on an independent duty of care if a plaintiff can show there was a professional relationship and a connection between the purpose of the professional relationship and the wrongful conduct. (*Smith v. Pust, supra*, 19 Cal.App.4th at pp. 269-270, 23 Cal.Rptr.2d 364 [conduct not immune from tort liability if it breached duty of care independent of obsolescent causes of action]; *Richard H. v. Larry D., supra*, 198 Cal.App.3d at p. 595, 243 Cal.Rptr. 807 [when such a duty exists, fraud claim not barred by Civil Code, section 43.5 and breach of duty supports action for professional negligence].)

In this case, Abel first sought marital counseling from the pastor for himself and, in the course of that counseling, revealed that there were sexual problems in the marriage. The pastor then purportedly used that information to interfere with plaintiffs' marriage while continuing to provide them with marital counseling. Under these facts,