

No. 04-0838

IN THE SUPREME COURT OF TEXAS

C.L. WESTBROOK, JR.,

Petitioner,

vs.

PEGGY LEE PENLEY,

Respondent.

**On appeal from the 67th District Court of Tarrant County, Texas
The Honorable Don Cosby, Presiding**

RESPONSE TO PETITION FOR REVIEW

**Darrell L. Keith
State Bar No. 11186000**

**Courtney S. Keith
State Bar No. 00787814**

**KEITH LAW FIRM, P.C.
1705 West Seventh Street
Fort Worth, Texas 76102
(817)338-1400 - Telephone
(817) 870-2448 - Telefax**

ATTORNEYS FOR RESPONDENT, PEGGY LEE PENLEY

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STATEMENT OF THE CASE

This is a professional negligence suit instituted by Peggy Lee Penley (“Penley” hereinafter) against C.L. “Buddy” Westbrook (“Westbrook” hereinafter).¹ The suit seeks damages from Westbrook arising, inter alia, from his negligent professional counseling services provided to Penley, including damages for Westbrook’s disclosure to the Crossland Community Bible Church (the “Church” or “CCBC” hereinafter) elders and the CCBC congregation information communicated to him by Penley during secular counseling.

Westbrook defends the suit by using his status as CCBC’s pastor to mischaracterize this dispute as a religious liberties case. Since Penley filed this action, Westbrook has continually distorted the allegations in effort to transform the case into a dispute requiring the review of church doctrine and ecclesiastical authority. Westbrook entered a plea challenging the court’s jurisdiction over the case, based on First Amendment grounds. (CR, p. 549). During discovery, Westbrook and the church elders filed motions to quash Penley’s deposition notices. (CR, p. 549-550). When Penley served a subpoena on Westbrook to testify at the hearing on his motion to dismiss for lack of subject matter jurisdiction, he filed for a protective order. *Penley v. Westbrook*, 146 S.W.3d 220, 225 (Tex. App.–Fort Worth 2004, pet. filed). However, Westbrook did not file any special exceptions to Penley’s amended pleadings and thus waived any other error in Penley’s pleadings, pursuant to this Court’s ruling in *Shoemake v. Fogel, Ltd.*, 826 S.W. 2d 933, 937 (Tex. 1992).

¹ Penley also sued CCBC and the church elders Dr. John Young, Mike Thatcher, and Aaron Johnson. Penley did not appeal the dismissal of her claims against CCBC and the church elders.

The Honorable Don Cosby, 67th Judicial District Court, Tarrant County, conducted a hearing on Westbrook’s jurisdictional challenges. Penley attempted to call Westbrook to testify, but his counsel objected on First Amendment grounds. (RR, p. 28). The trial court sustained Westbrook’s objection and did not allow him to testify. (RR, p. 33). The trial court also sustained Westbrook’s objections to Penley testifying. (RR, pp. 47-49). The trial court did allow Penley to make a bill of exception. (RR, p.72). Despite Westbrook’s First Amendment concerns, his counsel cross-examined Penley during her bill of exception. (RR, pp. 109-133; 136-37).² After hearing the arguments from both sides, Judge Cosby dismissed Penley’s claims against the Petitioner for lack of subject matter jurisdiction. (CR, pp. 548-550).

The Court of Appeals for the Second District of Texas at Fort Worth, in an opinion authored by Justice Anne Gardner, and joined by Justices Sue Walker and Lee Ann Dauphinot, reversed the trial court’s judgment on the professional negligence cause of action alleged by Penley against Westbrook in her Second Amended Original Petition. (CR, pp. 517-536). The court of appeals found that Penley’s pleadings contained sufficient factual information to establish a professional negligence action against Westbrook, based on the parties’ secular counseling relationship. *Penley*, at 233. The court of appeals subsequently denied Westbrook’s Motion for Rehearing and, Alternatively, Motion for Rehearing En

² Westbrook’s First Amendment concerns also did not prevent him from introducing at the hearing CCBC’s “What We Believe” statement of faith and the “Who We Are Constitution,” and the notes from Penley’s initial membership interview. (CR 463, 472).

Banc. (Pet. Br., Appendix 5).

STATEMENT OF JURISDICTION

The Court should decline to exercise jurisdiction over this matter because the court of appeals correctly ruled that this is a professional negligence case. Since Penley's claims are based on professional negligence, Westbrook's motion to dismiss for lack of subject matter jurisdiction was without merit; Penley is entitled to an opportunity to establish that Westbrook failed to meet reasonable and prudent standards of care applicable to licensed professional counselors in Texas. Contrary to the Petitioner's assertions, the court of appeals correctly ruled that confidentiality provisions of the Texas Licensed Professional Counselor Act, TEX. OCCUPATIONS CODE ANN. § § 503.001 et seq. (Vernon 2004) ("TLPCA" hereinafter), apply to a licensed professional counselor even if that counselor is also a pastor.

By mischaracterizing the court of appeals' opinion and other relevant court decisions, the Petitioner argues that the ecclesiastical abstention doctrine bars the trial court from exercising jurisdiction over Westbrook. Actually, a judicial resolution of this case requires no review of CCBC's policies or doctrine. A court would simply inquire into the parties' relationship and determine whether Westbrook's secular counseling meets the applicable standards of care for licensed professional counselors in Texas. The court of appeals correctly ruled that the First Amendment's religion clauses provide no defense to allegations of professional negligence where the claims arise from a pastor's secular counseling activities. The court of appeals' interpretation of the First Amendment is

congruent with the United States and Texas Supreme Courts' decisions in *Serbian Eastern Orthodox Diocese v. Milojevich*, 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976), and *Tilton v. Marshall*, 925 S.W. 2d 672 (Tex. 1996), respectively, and the Fifth Circuit Court of Appeals' decision in *Sanders v. Casa View Baptist Church*, 134 F.3d 331 (1998).

Furthermore, Westbrook's assertion that this case presents a matter of first impression in this and any other jurisdiction is somewhat misleading. Courts in several jurisdictions – including Texas – have established that the First Amendment does not protect a minister from allegations stemming from secular counseling activities. See *Hawkins v. Trinity Baptist Church*, 30 S.W.3d 446 (Tex. App.-Tyler 200, no. pet.); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 337-38 (5th Cir. 1998); *Dausch v. Ryske*, 52 F.3d 1425, 1435 (7th Cir. 1994); *Odenthal v. Minn. Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 441 (Min. 2002); *Barnes v. Outlaw*, 188 Ariz. 401, 937 P.2d 323, 327-28 (1996). In fact, Westbrook asks this Court to extend the ecclesiastical abstention doctrine beyond the scope of any published decision, by finding that once a plaintiff admits that a person is both her secular counselor and pastor, the First Amendment bars the trial court from adjudicating the claims. (Pet. Br., p. 12). Cases like *Sanders* demonstrate that the proper method of resolving this dispute is through a trial, where Penley can attempt to develop the facts and legal issues that give rise to her professional negligence action.

RESPONDENT'S ISSUES

Issue No. 1

Whether a licensed professional counselor, who is also a pastor, is protected by the First Amendment, when he is sued for professional negligence based on services rendered during secular counseling sessions and misuse of information he obtained while performing secular counseling activities?

Issue No. 2

Whether Penley's pleadings are legally sufficient, when Westbrook failed to file a special exception and Penley's Second Amended Original Petition alleges that Westbrook held himself out as a licensed professional counselor, engaged in secular counseling with Penley, and was bound by reasonable and prudent standards of care applicable to licensed counselors in Texas?

STATEMENT OF FACTS

In August 1998, Respondent Penley sought and obtained the services of Petitioner Westbrook, a licensed professional counselor in the business of providing secular marriage and family counseling. (RR, p. 81). Westbrook entered into a counseling relationship with Penley and acquired influence and gained her trust. (CR, p. 521). Penley paid Westbrook for two or three counseling sessions, which were conducted at Westbrook's office. (RR, p. 82). However, Penley continued to experience difficulties in her marriage with Benjamin Stone ("Stone"), and temporarily ceased attending counseling sessions. (RR, p. 84.).

In October 1999, Penley, Westbrook and several other parishioners of McKinney Memorial Bible Church formed CCBC, where Westbrook served as pastor. (RR, pp. 76-77). Westbrook was aware of Penley's continued marital problems, and in October 2000, he invited her to attend his secular group counseling sessions to resolve her marital difficulties. (CR, p. 521). Therefore, Westbrook conducted his professional counseling services at his private residence, which is where the group sessions transpired. (RR, p. 85). Penley and Stone attended four or five secular group counseling sessions, along with other couples who were experiencing marital difficulties. (*Id.*). Although the sessions included other members of CCBC, neither the Bible nor church precepts were referenced. (RR, p. 86). Even Westbrook describes the sessions as an opportunity to seek guidance "on how to improve their marriages, including how to avoid, if possible, and resolve, if necessary, marital disputes." (Pet. Br., p. 2).

By late October 2000, Penley realized that her marriage to Stone was irreconcilable. Having come to this sad realization, she engaged in a sexual relationship with her current husband Bobby Penley, while she was in Tennessee. (RR, p. 93). As soon as Penley returned from Tennessee, she drove to Westbrook's house to attend a group counseling session. However, Westbrook arranged for a private meeting with Penley, so they could discuss her trip to Tennessee. (RR, p. 90). Upon arrival, Westbrook took Penley outside to the patio of his home, where he used the influence he had acquired over her, as he inquired about the details of her trip. (RR, p. 91.). After prodding by Westbrook, Penley told him that she had engaged in a sexual relationship with Bobby Penley and planned to divorce Stone. (RR, p. 90). Penley testified that she believed this communication was confidential. (RR, p. 92). Westbrook counseled Penley that she should quickly pursue a divorce and recommended a family law attorney for Penley to consult. (CR, p. 522).

As the conversation continued, Westbrook turned to the subject of CCBC disciplining Penley for her extramarital relationship. (RR, p. 91). Penley, fearing she and her family would be humiliated if she continued participating in CCBC, immediately informed Westbrook that she was terminating her membership with CCBC. (CR, p. 523). Westbrook's November 2000 letter to the CCBC congregation confirms Penley's resignation.³ (Pet. Br., Ex. 2).

After Penley terminated her CCBC membership, Westbrook told the church elders

³ The letter states, "Peggy has agreed that it is best for her to resign her membership with CCBC and for her no longer to attend CCBC." (Pet. Ex. 1).

about Penley’s extramarital affair. (CR, p. 523). Westbrook and the elders later wrote and published a letter to the congregation, in which they explained that Penley decided to end her marriage to Stone and engaged in a “biblically inappropriate relationship with another man.” (*Id.*). The letter also instructed the congregation to shun and ostracize Penley. (*Id.*)

SUMMARY OF THE ARGUMENT

The Court should deny Westbrook’s Petition for Review because the court of appeals correctly ruled that the First Amendment does not protect Westbrook from Penley’s professional negligence claims. *Penley*, at 229. Contrary to Westbrook’s assertions, this case does not present an issue of first impression, as decisions are available from other state and federal courts that specifically involve a clergy member who also provides secular counseling services. *See Hawkins*, 30 S.W.3d 446; *Sanders*, 134 F.3d 331, 337-38; *Dausch*, 52 F.3d 1425, 1435; *Odenthal*, 649 N.W.2d 426, 441; *Barnes*, 188 Ariz. 401. In each of those cases, the court ruled that the clergy member is subject to suit for his secular counseling. The logic at the core of these decisions is both simple and applicable to the instant case. The First Amendment bars courts from reviewing, interpreting, and ruling on religious doctrine. *Tilton*, 925 S.W.2d, at 679. Reviewing a dispute such as a defrocked bishop’s wrongful termination action, requires interpretation of church doctrine – a task that would, no doubt, offend the First Amendment. *Milojeveich*, 426 U.S., at 696. On the other hand, where a court is reviewing a pastor’s conduct to determine if it constitutes actionable secular counseling and whether the secular counseling meets the applicable standards of care,

the same dangers are not present. *Sanders*, 134 F.3d, at 334.

However, Westbrook's Petition for Review, mischaracterizes this dispute as an issue of internal church government in effort to invoke the ecclesiastical abstention doctrine. The case is actually about Westbrook's secular professional counseling activities, which included several individual and group sessions with Penley. Therefore, the court of appeals correctly held that Penley's cause of action is based on allegations of negligent professional counseling, not church discipline. *Penley*, 146 S.W.3d, at 231. Penley was not even a member of the CCBC when Westbrook published the November 2000 letter.

Westbrook distorts *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002), in arguing that conduct must be "purely secular" for a court to adjudicate a dispute resulting from it. However, the Fifth Circuit correctly ruled that a "purely secular" standard is unacceptable because it serves to insulate secular components of otherwise religious relationships in violation of the Establishment Clause. *Sanders*, 134 F.3d, at 334. When the roles of secular counselor and pastor are involved, as they are in the instant case, identifying which actions are secular and which are pastoral, is the fact-finder's task. *Id.*

Westbrook also argues that the court of appeals misapplied this Court's "fair notice" analysis in *Texas Department of Parks and Wildlife v. Miranda*, 133 S.W. 3d 217 (Tex. 2004). However, Penley's pleadings describe the parties' secular counseling relationship and set forth the elements of a negligence cause of action. Furthermore, Westbrook waived his right to challenge the sufficiency of Penley's pleadings by failing to file any special

exceptions to Penley's pleadings. *Shoemake v. Fogel, Ltd.*, 826 S.W. 2d 933 (Tex. 1992).

ARGUMENT

I. The Court Should Deny Westbrook's Petition for Review Because the Court of Appeals Correctly Ruled that Penley's Professional Negligence Cause of Action is not Barred by the First Amendment

The court of appeals correctly held that Penley's claim is not barred by the First Amendment, as incorporated through the Fourteenth Amendment, because (1) Penley's claims stem from a secular counseling relationship, not an act of church discipline; (2) judicial resolution of Penley's claims does not require any review of church doctrine or policy; and (3) the "purely secular" standard is inappropriate since it lacks the qualities of the *Sanders* approach and favors Westbrook over other counselors because he is a minister.

A. The Petitioner Mischaracterizes Penley's Claim as One Arising Out of a Single Act of Publishing the November 2000 Letter in Effort to Invoke the Ecclesiastical Abstention Doctrine

Application of the ecclesiastical abstention doctrine is not proper because (1) the legal dispute between Penley and Westbrook is not based on a single act of church discipline; and (2) Penley's claims stem from Westbrook's secular professional counseling activities.

1. Westbrook's Attempt to Invoke the Ecclesiastical Abstention Doctrine is Based on the "Faulty Foundation" that Penley's Claims Stem from a Single Act of Church "Discipline"

Westbrook's Petition for Review magnifies the scope of the ecclesiastical abstention doctrine, so that it would apply to practically any dispute involving a pastor or religious entity. However, the Supreme Court has consistently held that the doctrine merely bars

courts from adjudicating “questions of discipline, or of faith, or ecclesiastical rule, custom, or law [that] have been decided by the highest of these church judicatories to which the matter has been carried.” *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952) (citing *Watson v. Jones*, 80 U.S. (Wall.) 679, 727, 20 L.Ed 666 (1871)).

Not surprisingly, Westbrook argues that the instant case is a matter of CCBC’s authority by stating that all of Penley’s “damages” arise from a single act of “religiously-motivated” church discipline. (Pet. Br., p. 9). He then cites the court of appeals’ statement that the exercise of jurisdiction is inappropriate if “all of Penley’s *claims* stem from a single religious act, that being the publication of November 2000 disciplinary letter as part of CCBC’s membership policy.” *Penley*, 146 S.W.3d, at 224 (emphasis added). Considering the court of appeals ruled that jurisdiction was proper, it obviously believed Penley’s claims stemmed from more than a single religious act. The court of appeals even stated that Penley’s second amended petition “alleges facts and conduct independent of CCBC’s disciplinary process, which if taken as true, support Penley’s complaints that Westbrook was negligent in providing her *secular* professional counseling services.” *Id.*, at 231.

The court of appeals correctly held that Westbrook’s argument is built on the “faulty foundation” that all of Penley’s claims stem from a single religious act. *Id.*, at 230. In reaching this conclusion, the court simply looked to Penley’s pleadings and determined that Westbrook “had a duty under Texas law to exercise ordinary care and act as a family counselor of reasonable and ordinary prudence under the same or similar circumstances in

his family counseling services, advice, statements, and representations to and/or for Penley.”

Id. The court correctly held that Westbrook:

“breached that duty by committing one or more of the following acts or omissions of negligence...:

1. “In that, Westbrook negligently failed to provide proper counseling services, advice, statements, and representations to, and for Peggy Lee Penley;
2. In that, Westbrook negligently failed to provide adequate counseling services, advice, statements, and representations, to and for Peggy Lee Penley;
3. In that, Westbrook negligently failed to provide safe counseling services, advice, statements, and representations, to and for Peggy Lee Penley;
4. In that, Westbrook negligently made misrepresentations and statements to and about Peggy Lee Penley;
5. In that, Westbrook negligently engaged in other inappropriate conduct and comments with his counseling services, advice, statements, and representations to, for, and about Peggy Lee Penley.”

Penley, 146 S.W.3d, at 230.

The court of appeals held that Penley’s pleadings, cited above, “set forth sufficient factual allegations to support her professional negligence claim against Westbrook...” *Id.* While Westbrook focuses on the November 2000 letter, the court of appeals only mentions the letter in dismissing the argument that Penley’s claims is based on solely on it.

Westbrook’s own words reveal that there is more substance to Penley’s claims than publication of the November 2000 letter. In his Petition for Review, Westbrook admits he informed the church elders of Penley’s affair. (Pet. Br., p. 3). Therefore, Westbrook violated his statutory and common law duty of confidentiality prior to publishing the letter, by

communicating Penley's statements to the church elder and others.

2. Westbrook Distorts the Nature of Penley's Allegations to Establish that Her Suit is Barred by the Ecclesiastical Abstention Doctrine

The Petitioner Westbrook distorts the nature of Penley's claims in a vain effort to establish that her suit is barred by the First Amendment, as a result of the "publication" of the November 2000 letter, rather than focusing upon his secular counseling breach of confidentiality. Penley's claims stem from Westbrook's disclosure of confidential information to the church elders, which in turn, led to the publication of the letter.

Westbrook acquired influence over Penley, and she developed trust in Westbrook through their secular counseling relationship, which began with paid sessions at his office and continued with group sessions at his home. (CR, p. 521). Although Westbrook tries to label the group counseling as non-secular, the Bible was never quoted and church doctrine was not discussed. (RR, p. 86).

When Penley returned from her trip to Tennessee with Bobby Penley, she drove to Westbrook's house to attend his group counseling session. Upon arrival, Penley noticed that the other members of the group were not present. (RR, p. 90). Westbrook told Penley that she needed to talk to her about her trip to Tennessee, so he took her outside to the patio. (RR, p. 91). After a few minutes of Westbrook prodding Penley, she told him that she had engaged in a sexual relationship with Bobby Penley and planned to divorce Stone. (*Id.*). During this conversation, Westbrook told Penley that she should quickly pursue a divorce

and recommended a family law attorney for Penley to consult. (CR, p. 522). Westbrook then violated his duty of confidentiality by revealing Penley's extramarital affair to the church elders and others. (CR, p. 523-24).

B. Penley's Case is not Proper for Application of the Ecclesiastical Abstention Doctrine Because Her Cause of Action does Not Require a Court to Review Church Doctrine or Policy

The purpose of the ecclesiastical abstention doctrine is to prevent courts from analyzing church doctrine. However, Penley's case is a professional negligence action that has nothing to do with church precepts or policy.

Westbrook cites several cases while describing the historical implications of the ecclesiastical abstention doctrine. However, none of the cited cases involve a clergy member who is also a secular counselor. Instead, the Petitioner cites cases such as *Mitchell v. Helms*, which holds that courts should not delve into a religious-based academic institution's beliefs to determine if it is "pervasively sectarian." (Pet. Br., p. 7, citing *Mitchell*, 530 U.S. 793, 828, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (plurality)).

Cases such as *Mitchell* establish that courts find inquiry into a person or entity's religious beliefs to be offensive. However, the instant case does not require a court to inquire into CCBC's or Westbrook's religious beliefs. It merely requires the fact-finder to determine whether Westbrook was negligent in his provision of secular counseling services. A court would look to principles of negligence law and determine whether Westbrook breached the duty of reasonable and prudent care applicable to licensed professional counselors in Texas.

As the court of appeals held, the fact finder would inquire into issues such as whether Westbrook “obtained confidential information from Penley while in the context of a secular counseling relationship, and whether without obtaining proper consent, he disclosed such information to outside parties.” *Penley*, 146 S.W.3d, at 231. This case does not require a judicial review of such issues as “the decision to discipline [Penley], whether Westbrook followed the church constitution in disciplining her, or how to properly interpret the statement that she ‘engaged in a biblically inappropriate relationship with another man.’” *Id.* Considering that the court does not have to review church doctrine, the dispute presents none of the dangers that are present in First Amendment cases such as *Mitchell v. Helms*.

Of course, the Petitioner’s discussion of ecclesiastical abstention doctrine does not include reference to cases such as *Hawkins*, *Dausch*, *Odenthal*, or *Barnes*. Each of those cases establish that the doctrine does not bar review of a minister's secular counseling activities. The *Barnes* court held that even where the pastor's counseling included spiritual guidance, the claim is not barred because the court does not have to review church doctrine to determine whether the pastor violated a duty of confidentiality. *Barnes*, 937 P.2d, at 328.

C. Westbrook’s “Purely Secular” Standard is Inappropriate Because it Distorts Case Law, Lacks the Qualities of *Sanders v. Casa View Baptist Church*, and Favors Westbrook Over Other Professional Counselors

In his Petition for Review, Westbrook asks this Court to establish a standard that only allows judicial resolution of cases that are “purely secular.” (Pet. Br., pp. 10-12). However, Westbrook’s “purely secular” standard should not be applied because (1) Westbrook’s

concept of the standard is not an accurate reflection of the case law he is citing; (2) *Sanders v. Casa View Baptist Church* provides a sound basis for rejecting a “purely secular” standard; and (3) application of the standard would result in licensed professional counselors having no duty of confidentiality if they are also ministers.

1. The “Purely Secular” Standard is Not a Threshold Question for Courts Adjudicating Ecclesiastical Disputes

A Review of the cases Westbrook cites in support of his “purely secular” standard reveals that he is distorting the holdings to support his flawed First Amendment defense.

According to Westbrook, the Tenth Circuit, in *Bryce*, held that the relationship between a religious entity and a third party must be “purely secular” for a court to exercise jurisdiction. (Pet. Br., p. 11). In actuality, *Bryce* merely states that the ecclesiastical abstention doctrine “does not apply to purely secular decisions.” *Bryce*, 289 F.3d, at 657. It is one thing to suggest that the ecclesiastical abstention doctrine does not bar courts from adjudicating purely secular actions. It is quite different to suggest that, in disputes involving a religious entity, courts can only review “purely secular” conduct. This is an important distinction because under Westbrook’s “purely secular” standard, once Penley admitted Westbrook’s “mixed role” as counselor and pastor, the trial court was not allowed to adjudicate her claims. (Pet. Br., p. 12). Under Westbrook’s standard, a person who serves as both licensed professional counselor and pastor, could never be sued for professional negligence by someone who is both his counseling patient and parishioner.

The Petitioner seeks a standard where the threshold question is whether the alleged

conduct or parties' relationship is "purely secular." However, the threshold question in disputes that involve a religious entity, is "whether the dispute ... is an ecclesiastical one about 'discipline, faith, internal organization, or ecclesiastical rule, custom or law.'" *Bryce* 289 F.3d, at 657, citing *Bell v. Presbyterian Church*, 126 F.3d 328, 331 (4th Cir. 1997). In other words, the threshold question is whether the ecclesiastical abstention doctrine applies.

2. *Sanders v. Casa View Baptist Church* Establishes that Courts Should Determine Whether Conduct is Actionable Secular Conduct or Protected Ecclesiastical Conduct

According to Westbrook, the "purely secular" standard avoids the danger of courts determining "which acts are done in a secular capacity and which acts are done in an ecclesiastical capacity." (Pet. Br., p. 12). While the Petitioner cites *Sanders v. Casa View Baptist Church*, 134 F.3d 331 (5th Cir. 1998), to support his position, the Fifth Circuit's decision actually holds that courts *should* determine which acts are done in a secular capacity.

Like the instant case, *Sanders* involved a pastor who was also a licensed professional counselor. In *Sanders*, the pastor engaged in sexual relationships with two women who were both his parishioners and counseling patients. *Id.* at 332. The *Sanders* court held that, "the constitutional guarantee of *religious* freedom cannot be construed to protect *secular* beliefs and behavior, even when they comprise part of an otherwise religious relationship between a minister and a member of his or her congregation." *Id.* at 336 (emphasis in original).

Sanders establishes that when the roles of counselor and pastor are blended, the first step is extracting the secular components of the relationship. Then, the fact-finder

determines what a reasonably prudent counselor would have done under the same or similar circumstances. *Id.* at 337. While Westbrook attempts to persuade this Court that extracting the secular components of his relationship with Penley is dangerous, it is actually simple and quite harmless. Westbrook learned of Penley’s extramarital relationship completely outside of CCBC. The conversation between he and Penley that occurred on the patio of his private residence was one of many instances where Westbrook counseled Penley outside of church. Westbrook cannot escape the TLPCA simply by “mixing” the roles of pastor and counselor. If Westbrook’s relationship with Penley is “mixed,” as he argues, then *Sanders* provides the perfect solution – let the court determine which components of the relationship are secular and what a reasonably prudent counselor would have done in the context of that relationship.

3. Westbrook’s Argument that a Pastor Licensed as a Professional Counselor Should Not be Subject to a Duty of Confidentiality is Untenable

Westbrook states that by imposing a duty of confidentiality on a pastor who “happens to be” a licensed professional counselor, the TLPCA “effectively prohibits him from exercising ecclesiastical discretion in disciplining a member when he learns of non-conforming conduct in a pastoral counseling situation.” (Pet. Br., p. 10). However, proscribing a different set of laws for a licensed professional counselor because he is also a minister is unconstitutional, pursuant to several United States Supreme Court decisions.

Westbrook’s argument directly conflicts with *Employment Division v. Smith*, 494 U.S. 872, 876 (1990), which states that laws burdening religious practices need not be justified

by a compelling government interest if they are neutral and generally applicable. Furthermore, to hold that Westbrook, in his role as secular counselor, is not subject to a duty of confidentiality, “would impermissibly place a religious leader in a preferred place in our society.” *County of Allegheny v. ACLU*, 492 U.S. 593-94, 109 S.Ct. 3086 (1989). Additionally, cases such as *Sanders*, *Hawkins*, *Dausch*, *Odenthal* and *Barnes* establish that ministers who engage in secular counseling are subject to statutes and common law doctrines, such as the duty of confidentiality, when they are engaged in secular counseling.

II. Penley’s Pleadings Satisfy the “Fair Notice” Standard; Regardless, Westbrook Waived any Defects by Not Filing a Special Exception

Penley’s pleadings satisfy the “fair notice” standard under *Texas Department of Parks and Wildlife v. Miranda*, 133 S.W. 3d 217 (Tex. 2004), because her Second Amended Original Petition provided Westbrook with the ability to ascertain the “nature and basic issues of the controversy” and what “testimony will be relevant at trial.” *Miranda*, 133 S.W.3d, at 230-31. Furthermore, under this Court’s ruling in *Shoemaker v. Fogel, Ltd.*, 826 S.W. 2d 933, 937 (Tex. 1992), Westbrook waived his right to challenge any defects in the pleadings by not filing a special exception to Penley’s Second Amended Original Petition.

“A petition is sufficient if gives fair and adequate notice of the facts upon which the pleader bases his claims.” *Horizon v. Auld*, 34 SW.3d 887, 896 (Tex. 2000). The court should look to the pleader’s intent and supply every fact “that can be reasonably inferred from what is specifically stated.” *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993).

Despite this Court’s holdings noted above, Westbrook argues that the court of

appeals misapplied *Miranda* by stretching “boilerplate, conclusory allegations of negligence against Pastor Westbrook to recast the publication of an internal church disciplinary letter, as actionable professional counseling negligence.” (Pet. Br., p. 14). Westbrook’s statements do not accurately reflect the allegations and facts contained in Penley’s pleadings. The pleadings describe a fair summary of the nature of Westbrook and Penley’s counseling relationship, and they also set forth the elements of a professional negligence action against Westbrook. (CR, p. 523-24). As the court of appeals stated, Penley’s pleadings allege that, “Westbrook held himself out as a licensed professional counselor, engaged in secular counseling with Penley, and was bound by reasonable and prudent standards of care applicable to licensed counselors in Texas.” *Penley*, 146 S.W.3d, at 232. Therefore, the court of appeals correctly ruled that the allegations in Penley’s pleadings were “broad enough to encompass Penley’s claim that Westbrook’s secular counseling to her fell below the standards of care set forth in the TLPCA and other governing administrative regulations.”

Furthermore, the Petitioner waived his right to challenge the sufficiency of Penley’s pleadings by failing to file any special exceptions to Penley’s pleadings. *Shoemaker*, 826 S.W.2d, at 937. If no special exceptions are filed to challenge the pleadings, the court must construe the pleadings liberally in favor of the pleader. *Horizon*, 34 S.W.3d, at 896.

PRAYER

For the reasons stated in this response, Respondent asks the Court to deny the Petition For Review.

_____ Respectfully Submitted,

KEITH LAW FIRM, P.C.
1705 West Seventh Street
Fort Worth, Texas 76102
(817) 338-1400 - Telephone
(817) 870-2448 - Telefax

By: _____

Darrell L. Keith, Attorney in Charge and Lead-Counsel
SBN: 11186000
Courtney S. Keith, Attorney of Record
SBN: 00787814

**ATTORNEYS FOR RESPONDENT
PEGGY LEE PENLEY**

CERTIFICATE OF FILING AND SERVICE

THIS CERTIFIES that a true and correct copy of the above and foregoing Appellant's Reply Brief has been filed this day pursuant to Tex. R. App. P. 9.2(b) and has been served upon Appellee as noted below via hand delivery on the 3rd day of March, 2005.

Ms. Kelly J. Shackelford
Mr. Hiram S. Sasser III
LIBERTY LEGAL INSTITUTE
FREE MARKET FOUNDATION
903 East 18th Street, Suite 230
Plano, Texas 75074

Mr. J. Wade Birdwell
Mr. James G. Stouffer, Jr.
Ms. Stacy R. Welch
WALLACH, ANDREWS,
FLORSHEIM & STOUFFER, P.C.
1300 Summit Avenue, Suite 300
Fort Worth, Texas 76102

By: _____
Darrell L. Keith
Attorney for Respondent
