

2000

Hodsen v. Jackson : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

HORTON HODSEN, as agent for)
Nutriphysiology (previously known)
as Nutribionics and Biochem)
Research Services), and for himself) Case No. 20000005 – SC
personally, as Horton E. Tatarian,)
and GAIL ANDERSON,)
)
Plaintiffs,) Priority # 13
)
vs.) Appellate No. 981554 — CA
)
CRAIG JACKSON, Director of the)
Division of Occupational and) Writ of Certiorari Appeal from the
Professional Licensing, Department) Orders of the Utah Court of
of Commerce, State of Utah, in his) November 4, 1999 and December
official capacity,) 2, 1999
)
Defendant.)

APPELLANTS' REPLY BRIEF IN FAVOR OF
PETITION FOR WRIT OF CERTIORARI

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I. THE PETITION FOR CERTIORARI SATISFIES RULE 46(a)(4) U.R.A.P.

In 1976¹ and 1987² the Utah Supreme Court upheld the criminal convictions of Wendall H. Hoffman for violating the Utah Medical Practices Act. Relying on this precedent, the Court of Appeals ruled that the Plaintiffs can not raise constitutional challenges to the application of portions of the Utah Medical Practices Act (“UMPA”) to them. This abbreviated decision leaves unaddressed important questions of state and federal law that should be settled by the Utah Supreme Court.

A. Free Exercise of Religion Is Open to Review

In Hoffman I, Hoffman claimed that his free exercise of religion was being violated. The Court rejected the claim, finding

[t]here is no evidence that appellant is a member of any valid religious organization or that he has valid religious beliefs to do what he did. In any event, such belief wouldn't justify the conduct he advocates.³

Defendant DOPL has stipulated that

¹ State v. Hoffman, (Hoffman I) 558 P.2d 602 (1976).

² State v. Hoffman, (Hoffman II) 733 P.2d 502 (1987).

³ Hoffman I, supra, at 606.

Anderson's claimed need for information, advice, and recommendations from Hodsen regarding herbal treatments and other forms of natural healing. . . were related to her religious beliefs and practices as well as the determination of her own and her family's health care.⁴

Hodsen's conduct was in accordance with his "personal, religious, and commercial beliefs."⁵ Since Hoffman I, the Utah Supreme Court has assumed, but not determined, that strict scrutiny applied when interpreting Article I § 4 of the Utah Constitution.⁶ Significant constitutional questions are presented by the application of Article I § 4 and Article III § 1 to the sharing of truthful and non-misleading information regarding lawfully sold products.

B. Rendering of Advice Regarding Lawful Over the Counter Nutritional Products

Hoffman II left open the possibility of lawful communication under the UMPA:

Defendant did not render gratuitous advice regarding a "domestic" or "over the counter remedy" and may not avail himself of the argument that the statute might prohibit others from such conduct.

⁴ Agreed Statement of Stipulated Facts, ¶ 12.

⁵ Id.

⁶ Jeffs v. Stubbs, 970 P.2d 1234, 1249-1250 (Utah 1998), cert. denied Fundamentalist Church of Jesus Christ of Latter-day Saints, 119 S.Ct. 1803, 143 L.Ed.2d 1007 (1999).

Cf State v. Yee Foo Lun, 45 Utah 531, 147 P. 488 (1915); State v. Shaffer, 725 P.2d 1301 (Utah 1986). His opinion and advice to the complainant, for which he was paid, could not be construed as the equivalent of a innocuous suggestion that she “go home and rest” or “take an aspirin.”⁷

Even if this did not leave open an option for analysis, the present UMPA and facts of this case are significantly different than Hoffman II. The word “advice” is deleted from the definition of the practice of medicine. Individual and group advice regarding nutrition can be given so long as “C.D.” or “R.D.” are not used.⁸ Anderson remains under the care of a licensed primary physician and acupuncturist. She wants information for religious and personal autonomy reasons. Hodsen is a medical school graduate. Hodsen’s recommends lawful products is truthful and non-misleading; Hodsen need not be paid; Anderson need not purchase product from Hodsen.

C. First Amendment Protections Apply

The 1996 UMPA allows the use of the “M.D.” designation when used in such a manner

⁷ Hoffman I, supra, 733 P.2d at 505.

⁸ U.C.A. § 58-49-2(4).

which might cause a reasonable person to believe the individual using the designation is a licensed physician and surgeon, and if the party using the designation is not a licensed physician or surgeon, the description must additionally contain the description of the branch of the healing arts for which the person has a license.⁹

Hodsen wanted to use the designation "M.D." with the clarification that he was a graduate of U.C.L.A. medical school, a research biochemist, and not in medical practice.¹⁰ DOPL contended that this clarified use might

cause a reasonable person to believe that Hodsen's is a licensed physician surgeon and that such use, in connection with Hodsen's businesses, may be deceptive or misleading regarding Hodsen's status or qualifications as it applies to DOPL's regulatory function.¹¹

Hodsen contends that this is a restriction on commercial speech and that DOPL cannot rely on

'mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that the restriction will in fact alleviate them to a material degree.' . . .¹²

⁹ U.C.A. § 58-67-102(8)(d).

¹⁰ Agreed Statement of Undisputed Facts, ¶ 19.

¹¹ Id. at ¶ 20.


¹² Greater New Orleans Broadcasting Ass'n. v. U.S., 527 U.S. 173, 177 (1999).

The Utah Supreme Court should review this federal standard, determine its applicability, and whether or not the new, 1996 "M.D." regulation as applied to Hodsen satisfies the First Amendment of the United States Constitution.

CONCLUSION

This case presents several issues that should be determined by the Utah Supreme Court under Rule 46(a)(4) U.R.App.P. The Hoffman I and Hoffman II opinions left open for review issues associated with religion and the recommendation of over-the-counter products. Deleting prohibitions regarding "advice" in the UMPA and allowing the giving of individual nutritional advice without license allow Hodsen and Anderson to challenge DOPL's application of UMPA to them. In addition, DOPL's prohibition of Hodsen's use of a clarified "M.D." designation violates the First Amendment.

DATED this 10th day of February, 2000.



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CERTIFICATE OF MAILING

I hereby certify that under my direction on the 10th day of February, 2000, the foregoing Petition for Writ of Certiorari was mailed to the following counsel for DOPL, Appellee in this case:

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