

2000

# Horton Hodsen v. Craig Jackson : Appellant's Petition for Writ of Certiorari

Utah Supreme Court

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Jeffrey C. Hunt; Assistant Attorney General; Jan Graham; Attorney General; Attorneys for Appellee.  
Matthew Hilton; Participating Attorney for the Rutherford Institute.; Attorneys for Appellants.

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UTAH SUPREME COURT  
BRIEF

2000 0005

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IN THE UTAH SUPREME COURT

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HORTON HODSEN, as agent for	)	
Nutriphysiology (previously known	)	
as Nutribionics and Biochem	)	
Research Services), and for himself	)	Case No. <u>20000005</u>
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.	)	

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APPELLANTS' PETITION FOR WRIT OF CERTIORARI

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IN THE UTAH SUPREME COURT

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HORTON HODSEN, as agent for	)	
Nutriphysiology (previously known	)	
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of Commerce, State of Utah, in his	)	November 4, 1999 and December
official capacity,	)	2, 1999
	)	
Defendant.	)	

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APPELLANTS' PETITION FOR WRIT OF CERTIORARI

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## **I. Questions Presented for Review**

1. Does rejection by the Utah Supreme Court in 1976 and 1983 of certain constitutional arguments when upholding a criminal application of the Utah Medical Practices Act (“UMPA”) freeze the nature of the constitutional protections afforded under the Utah or United States Constitution to any person seeking to challenge on constitutional grounds any future enactment of UMPA by the Utah Legislature or application of the same by the Department of Occupational and Professional Licensing (“DOPL”)?

2. When the UMPA definition of the practice of medicine does not include “advice,” and other law allows individualized and group advice to be given regarding nutrition without licensure, do the provisions of the Utah Constitution Article I § § 1,4, 7, 15 and Article III § 1, and the First and Fourteenth Amendment of the United States Constitution, protect Hodsen’s and Anderson’s exercise of personal, commercial, and religious speech, exercise of religion, and formulation of religious belief when they are exchanging truthful and non-misleading information regarding Anderson and lawfully sold herbs and other products of nature?

3. When the 1996 UMPA prohibited the use of the designation "M.D." only when its use "might cause a reasonable person to believe the individual using the designation is a licensed physician and surgeon," and Hodsen, seeks to use the designation "M.D." on business cards or published articles with the written clarification of "Graduate of UCLA School of Medicine" and "Research Biochemist not in Medical Practice," is the claim by DOPL (without any other evidence) that such language may be deceptive or misleading sufficient to justify the prohibition on Hodsen's clarified use and override the presumptions under the United States Constitution that truthful and non-misleading information about lawful conduct is to be allowed?

## **II. Reference to Opinions of the Utah Court of Appeals**

The Utah Court of Appeals issued two opinions in this case. On November 4, 1999, the Court of Appeals ruled that the Utah Supreme Court's previous denial of constitutional challenges to the Utah Medical Practices Act in 1976 and 1987 governed challenges raised by Appellants to the 1996 Act in the context of a civil action seeking declaratory and injunctive relief. Efforts to show Hodsen and Anderson were entitled to additional or different



protection under the Utah Constitution were not persuasive. This opinion is included in the Appendix.

On November 19, 1999, Hodsen and Anderson filed a petition for re-hearing insofar as the original opinion did not address Appellant Hodsen's claim to a qualified use of the "M.D." designation. On December 2, 1999, the petition for a re-hearing was denied. This opinion is included in the Appendix.

### **III. Jurisdiction of Utah Supreme Court**

The Utah Court of Appeals filed its opinion in this case on November 4, 1999. A petition for re-hearing was filed by Appellants on November 19, 1999. The Utah Court of Appeals denied the petition for re-hearing filed in this case on December 2, 1999. On January 3, 2000, a petition for certiorari was filed with the Utah Supreme Court. The Utah Supreme Court has discretionary jurisdiction to grant or deny a petition for writ of certiorari from a judgment of the Utah Court of Appeals.<sup>1</sup>

---

<sup>1</sup> U.C.A. §§ 78-2-2(3)(a); (5).

#### **IV. Controlling Provisions of Law**

Hodsen and Anderson rely on the following provisions of the Utah Constitution to vindicate their rights of speech, religion, and self-determination:

All men have the inherent and inalienable right . . .to worship according to the dictates of their conscience; . . . to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Utah Const., Article I § 1.

The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . . .

Utah Const., Article I § 4.

No person shall be deprived of life, liberty, or property without due process of law.

Utah Const., Article I § 7.

No law shall be passed to abridge or restrain the freedom of speech or of the press.

Utah Const., Article I § 15

Perfect toleration of religious sentiment is guaranteed.

Utah Const., Article III § 1.

Hodsen and Anderson rely on the following provisions of the United States Constitution to vindicate their rights of speech, religion, and self-determination:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . .

U.S. Const., First Amendment.

[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

U.S. Const., Fourteenth Amendment.

The state statute used to justify deprivation of the constitutional rights of Hodsen and Anderson is the Utah Medical Practices Act (hereinafter referred to as the “UMPA”). Relevant portions of UMPA include the following:

(4) “Diagnose” means:

(a) to examine in any manner another person, parts of a person’s body, substances, fluids, or materials excreted, taken, or removed from a person’s body, or produced by a person’s body, to determine the source, nature, kind, or extent of disease or other physical or mental condition; . . .

(d) to make an examination or determination as described in Subsection 4(a) upon or from information supplied directly or indirectly by another person, whether or not in the presence of the person or attempting to make the diagnosis or examination.

U.C.A. § 58-67-102(4).

Practice of medicine” means:

(a) to diagnose, treat, correct, or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, or to attempt to do so, by any means or instrumentality, and by an individual in Utah or outside the state upon or for any human within the state; . . .

(d) to use, in the conduct of any occupation pertaining to the diagnosis or treatment of human diseases or conditions in any printed material, stationary, letterhead, envelopes, signs, or advertisements, the designation “doctor,” “doctor of medicine,” “physician,” “surgeon,” “physician and surgeon,” “Dr.,” M.D.,” or any combination of these designations in any manner 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 and surgeon, the designation must additionally contain the description of the branch of the healing for which the person has a license.

U.C.A. § 58-67-102(8)(a) and (d).

In addition to the exemptions of licensure in Section 58-1-307, the following individuals may engage in the described acts or practices without being licensed under this chapter: . . .

(3)(a)(i) a person engaged in the sale of vitamins, health foods, dietary supplements, herbs, or other products of nature, the sale of which is not otherwise prohibited by state or federal law; and

(ii) a person acting in good faith for religious reasons, as matter a matter of conscience, or based on a personal belief, when obtaining or providing any information regarding health care and the use of any product under Subsection 3(a)(i); and

(b) Subsection 3(a) does not:

(i) allow a person to diagnose any human disease, ailment, injury, infirmity, deformity, pain, or other condition; or

(ii) prohibit providing truthful and non-misleading information regarding any and all of the products under Subsection (3)(a)(i);

(4) a person engaged in good faith in the practice of the religious tenets of any church or religious belief, without the use of prescription drugs; . . . .

U.C.A. § 58-67-305(3) and (4).

There are no administrative rules interpreting these statutes.

## **V. Statement of the Case**

### **A. Nature of the Case**

This case was brought as a civil rights action challenging the application to Hodsen and Anderson of 1996 amendments to the Utah Medical Practices Act (“UMPA”) in such a manner as to prohibit the exchange of truthful and non-misleading information regarding Anderson and herbs and other products of nature. A graduate of the School of Medicine at UCLA, Hodsen also sought a limited use of the designation “M.D.” Declaratory and injunctive relief was sought along with fees and costs.

After submission of stipulated facts and an affidavit, memorandum and oral argument, on June 30, 1998, the trial court granted DOPL's motion for summary judgment and dismissed the complaint of Hodsen and Anderson. (R. at 373.) Hodsen and Anderson timely served a motion to alter or amend the judgment which was eventually denied on July 30, 1998 (R. at 404.) An appeal was timely filed on August 27, 1998. (R. at 418).

After briefing and argument, on November 2, 1999, the Utah Court of Appeals affirmed the decision of the trial court. (Addendum.) Hodsen and Anderson filed a petition for re-hearing was filed on November 13, 1999; the Court of Appeals denied the same on December 2, 1999. (Addendum.) Appellants' filed a petition for writ of certiorari on Monday, January 3, 2000.

### **B. Facts Relevant to Petition for Certiorari**

Hodsen has a M.D. degree from University of California at Los Angeles and a biochemistry degree from University of California at Berkeley. (R. at 273.) Since the early 1980's, he has studied and engaged in research regarding various biochemicals and their natural occurrence in herbal or nutritional (non-prescription) supplements lawfully sold on the open market. (R. at 273.) In 1983, staff of DOPL had determined that Hodsen was not practicing

medicine. (R. at 273.) Hodsen distributes these products to chiropractors, physicians, other health professionals, health food stores, and individuals. (R. at 273.)

In various administrative hearings held from 1992 to 1993, DOPL determined that Hodsen's use of information provided by a purchaser of herbs and other natural products to determine what Hodsen recommended be purchased constituted the practice of medicine. (R. at 275.) Hodsen appealed that decision to the Fifth Judicial District Court. (R. at 275.) In March of 1995, Judge Eves determined that Hodsen was statutorily exempt from UMPA. (R. at 276.)

Anderson consulted with Hodsen during the time period that DOPL staff had determined he was exempt from licensure requirements. Anderson had a health condition which had not responded to conventional medical treatment that had been applied. She followed the recommendation of Hodsen. Her condition became manageable and the quality of her life vastly improved. (R. at 274.) While Anderson is and has been under the care of a licensed physician and acupuncturist, she also seeks additional truthful and non-

misleading information from Hodsen regarding herbs and other non-prescription products of nature. (R. at 274.)

In 1996, the Utah Legislature amended the UMPA and revised the exemption Judge Eves had relied upon in 1995 to find Hodsen exempt from medical licensure. The Legislature provided that

[i]n addition to the exemptions from licensure in Section 58-1-307, the following individuals may engage in the described acts or practices without being licensed under this chapter: . . . .

(3)(a)(i) a person engaged in the sale of vitamins, health foods, dietary supplements, herbs, or other products of nature, the sale of which is not otherwise prohibited by state or federal law; or

(ii) a person acting in good faith for religious reasons, as a matter of conscience, or based on a personal belief, when obtaining or providing any information regarding health care and the use of any product under Subsection 3(a)(i); and

(b) Subsection 3(a) does not:

(i) allow a person to diagnose any human disease, ailment, injury, infirmity, deformity, pain, or other condition; or

(ii) prohibit providing truthful and non-misleading information regarding any of the products under Subsection 3(a)(i);<sup>2</sup>

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<sup>2</sup> U.C.A. § 58-67-305(3).



In addition, DOPL has decided that Hodsen's desired use of the designation M.D. on business cards or articles for journals (with an explanation included stating "Graduate of UCLA School of Medicine" and "Research Biochemist not in Medical Practice") constitutes the unlicensed practice of medicine. (R. at 280-81.) This is so because DOPL fears that the use of the designation and disclaimer might cause a reasonable person to believe that Hodsen was a licensed physician or surgeon and, in connection with Hodsen's business, may be deceptive or misleading regarding Hodsen's status or qualifications insofar as it relates to licensure. (R. at 281.)

DOPL's absolute prohibitions on the ability of Anderson to exchange truthful and non-misleading information about herself with Hodsen, their sharing of information regarding herbs and other products of nature, and Hodsen's inability to use the title "M.D.", as clarified above, have interfered with Hodsen's on-going business of consulting, selling, and working with herbs and other products of nature. (R. at 281-82.)

Anderson has also been damaged by DOPL's refusal to allow her to exchange truthful and non-misleading information about herself with Hodsen or any other person Anderson chooses. She desires to receive directly from

Hodsen truthful and non-misleading information regarding what would be appropriate use of herbs and other products of nature for her. (R. at 330.) Anderson desires to obtain information in an effort to formulate her religious beliefs regarding the use of wholesome herbs and other products of nature with “prudence and thanksgiving” pursuant to Doctrine and Covenants 89:10-11.<sup>3</sup> (R. at 330.) By obtaining and sharing information regarding the prudent use of herbs Anderson will more fully live her religious beliefs, entitling her to both physical and spiritual blessings. (R. at 330.) Anderson believes that Hodsen has received and will receive divine inspiration regarding her needs. (R. at 330.) Anderson cannot formulate her religious beliefs and exercise them without exercising her free speech right to obtain and share truthful and non-misleading information about her health condition from Hodsen. (R. at 331.) Anderson believes that the restrictions of UMPA has harmed her, damaged her physically and spiritually, and diminished her quality of life. (R. at 331)

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<sup>3</sup> “And again, verily I say unto you, all wholesome herbs God hath ordained for the constitution, nature, and use of man - Every herb in the season thereof, and every fruit in the season thereof; all these to be used with prudence and thanksgiving.” Doctrine & Covenants 89:10 - 11.

Another religious tenet of Anderson is to obey the law. (R. at 331). Anderson was afraid that if she did exchange information with Hodsen, she would be soliciting a felony, a criminal act in and of itself. (R. at 331.) She seeks clarification of the law to ensure that her efforts to formulate and live her religious beliefs regarding a health code do not cause her to violate another religious tenet prohibiting civil disobedience. (R. at 331.)

Being unsure of the status of the law and the lawful exercise of their rights, both Anderson and Hodsen sought injunctive and declaratory relief to ensure that the UMPA did not infringe on their fundamental rights of speech and religion. (R. at 281-82 and 331.)

## **VI. Rationale for Granting of the Petition for Writ of Certiorari**

**As to Issue # 1:** The Court of Appeals relied on language from the 1976 and 1983 opinions of the Utah Supreme Court to conclude that there are no state or federal constitutional protections available to any person seeking to challenge on constitutional grounds a post-1983 enactment UMPA by the Utah Legislature or application of the same by DOPL.

This Court has previously held that

neither the due process clause nor the open courts provision constitutionalizes the common law or otherwise freezes the law governing private rights and remedies as of the time of statehood. It is, in fact, one of the important functions of the Legislature to change or modify the law that governs relations between individuals as society evolves and conditions require.<sup>4</sup>

In this case, in 1996 the Legislature did change the text of UMPA; many cases increasing the protections of individual rights of speech and religious conduct have been decided on both state and federal grounds since 1983. To reject a 1999 challenge to the application of UMPA by DOPL to Hodsen and Anderson on the grounds that overly broad dicta in a 1983 ruling rejected any ability of a criminal defendant to show his conduct was constitutionally protected, denigrates the power of this Court, the Legislature and the constitutional freedoms of the individuals involved.

Clarification of how overly broad dicta in previous constitutional adjudications applies to new statutes and intervening case law is an important question of state and federal law which has not been but should be settled by the Utah Supreme Court.<sup>5</sup>

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<sup>4</sup> Berry v. Beech Aircraft Corporation, 717 P.2d 670, 676 (Utah 1985).

<sup>5</sup> Rule 46(a)(4) U.R.App.P.

**As to Issue # 2:** In 1996, the Utah Legislature has removed the word “advice” from its definition of the practice of medicine. In the absence of the use of initials “C.D.” or “R.D.”, the legislature has allowed significant personalized advice to be given regarding nutrition.<sup>6</sup> Hodsen and Anderson seek to exchange truthful and non-misleading information regarding both Anderson and information about herbs and other lawful products of nature are truthful and non-misleading. The use of the “M.D.” designation is allowed when its use would not cause a reasonable person to misconstrue the status of the individual insofar as licensure is concerned. These are all significant changes in the context of law and fact that exist in this case that have not been present in others.

Thus, this case raises novel questions under the Utah Constitution including (1) whether or not private, religious, and commercial speech receive greater, similar or different protections under the Utah provisions than the respective speech is afforded by the United States Constitution, and (2) whether or not the State may regulate or prohibit the exchange of truthful and

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<sup>6</sup> See Dietician Certification Act, § 58-49-2(4) U.C.A.

non-misleading information when it is used to formulate religious belief or matters of conscience involving lawful products sold on the open market.

These are important questions of questions of state and federal law that should be decided by the Utah Supreme Court.<sup>7</sup>

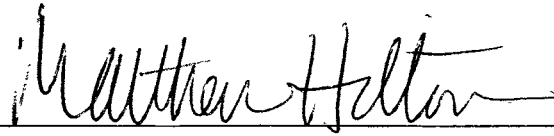
As to Issue # 3: The 1996 UMPA prohibits the use of the designation “M.D.” only when its use “might cause a reasonable person to believe the individual using the designation is a licensed physician and surgeon.” In Hodsen’s business, he does not offer prescriptions or engage in surgery. Hodsen, seeks to use the designation “M.D.” on business cards or published articles with the written clarification of “Graduate of UCLA School of Medicine” and “Research Biochemist not in Medical Practice.” Without any other evidence, DOPL has claimed that such language may be deceptive or misleading to a reasonable person and justifies the prohibition on Hodsen’s clarified use and overrides the presumption that truthful and non-misleading information about lawful conduct is allowed.<sup>8</sup>

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<sup>7</sup> Rule 46(a)(4) U.R.App.P.

<sup>8</sup> See Greater New Orleans Broadcasting Association, Inc. v. United States, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999). Arguments that are “directly contrary to the United States Supreme Court precedent. . . must be rejected.”

DATED this 3<sup>rd</sup> day of January, 2000.



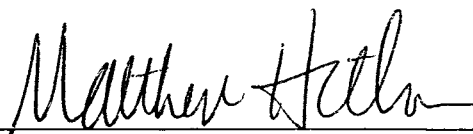
Matthew Hilton of Matthew Hilton, P.C.  
Attorney for Hodsen and Anderson

### **CERTIFICATE OF HAND DELIVERY**

I hereby certify that under my direction on the 3<sup>rd</sup> day of January, 2000, the foregoing Petition for Writ of Certiorari was hand delivered to the foregoing counsel for DOPL, Appellee in this case:

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Assistant Attorney General  
Jan Graham, Attorney General  
Attorney General  
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Salt Lake City, UT 84114-0872  
Attorneys for Defendant-Appellee

DATED this 3<sup>rd</sup> day of January, 2000.



Matthew Hilton of Matthew Hilton, P.C.  
Attorney for Hodsen and Anderson

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Sperber v. Galigher v. Ash Co., 747 P.2d 1025 (Utah 1987).

## Appendix

1. Order Granting Summary Judgment in Favor of Defendants, dated and docketed June 30, 1999.
2. Order Denying Motion to Alter or Amend, dated July 29, 1999 and entered on July 30, 1999.
3. Memorandum Decision of Utah Court of Appeals, dated and docketed November 4, 1999.
4. Order Denying Petition for Re-hearing, dated and docketed December 2, 1999.



... COURT  
JUN 30 PM 4 46  
... COUNTY  
...

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IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH

HORTON HODSEN, as agent for  
Nutriphysiology, (previously known as  
Nutribionics and Biochem Research  
Services), and for himself personally, as  
Horton E. Tatarian; and GAIL  
ANDERSON,

Plaintiffs,

vs.

CITY OF ST. GEORGE, a municipality  
under Utah Law; and CRAIG JACKSON,  
Director of the Division of Occupational and  
Professional Licensing, Department of  
Commerce, State of Utah in his official  
capacity,

Defendants.

ORDER GRANTING SUMMARY  
JUDGMENT IN FAVOR OF  
DEFENDANTS

Civil No. 960500182

Judge James L. Shumate

The above-entitled matter having come on regularly for hearing on Plaintiff's  
Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment.

Wednesday, May 13, 1998, at the hour of 2:30 p.m.. Plaintiffs appearing in person through Horton Hodsen, and through counsel, Matt Hilton. Defendants appearing through counsel, Thom D. Roberts, Assistant Attorney General, and the Court having reviewed the pleadings on file herein, including the Memorandums in support of both parties motions, and the affidavit of Gail Anderson, and the agreed statement of facts, having been received the arguments of counsel, including the presumption of constitutionality of state statutes, and good cause appearing, it is hereby

ORDERED. ADJUDGED AND DECREED that the Plaintiffs' Motion for Partial Summary Judgement shall be and the same is hereby denied; it is further

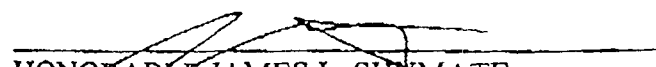
ORDERED. ADJUDGED AND DECREED that the Motion for Summary Judgment of the Defendants shall be and the same is hereby granted; it is further

ORDERED, ADJUDGED AND DECREED that based upon the prior stipulation between the Plaintiffs and Defendant City of St. George, that this Order grants final relief and resolves all issues pending in the litigation; it is further

ORDERED, ADJUDGED AND DECREED that each party shall bear their own costs and attorney fees incurred herein.

DATED this 30 day of June, 1998.

BY THE COURT:

  
HONORABLE JAMES L. SHUMATE  
District Court Judge

Approved as to form:

\_\_\_\_\_  
Attorney for Plaintiff

IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

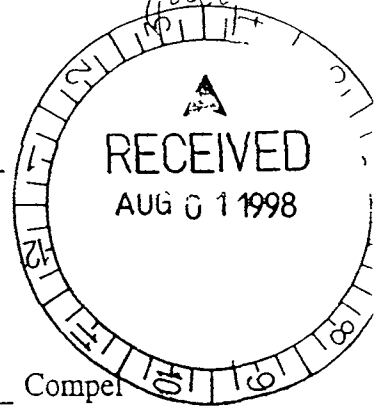
TO: ☒ JUDGE JAMES L SHUMATE  
☐ JUDGE G. RAND BEACHAM  
☐ JUDGE J. PHILIP EVES

30 JUL 29 PM 4 42  
Re: Case # 960500132  
Plaintiff: Hodsen  
vs  
Defendant: City of St. George

A Notice to Submit for Decision/ Request for Ruling was filed on the 28 day of July,  
19 98, by ☒ attorney for plaintiff \_\_\_\_\_  
\_\_\_\_\_ attorney for defendant \_\_\_\_\_  
\_\_\_\_\_ other \_\_\_\_\_

The following motions are submitted for decision:

\_\_\_\_\_ PLA's \_\_\_\_\_ DEF's Motion for Summary Judgment  
\_\_\_\_\_ PLA's \_\_\_\_\_ DEF's Motion for Judgment on the Pleadings  
\_\_\_\_\_ PLA's \_\_\_\_\_ DEF's Motion to \_\_\_\_\_ Dismiss \_\_\_\_\_ Continue \_\_\_\_\_ Compel  
\_\_\_\_\_ PLA's \_\_\_\_\_ DEF's Objection to \_\_\_\_\_



COURT'S RULING:

Plaintiff's motion is over-ruled  
and denied.

Dated this 29 day of Jul, 1998.

[Signature]  
District Court Judge

I hereby certify that on the 31 day of July, 19 98, I mailed a copy of  
the foregoing Court's Ruling to the following:

Thom Roberts  
Blaine Ferguson  
P.O. Box 140857  
Salt LAKE City, Utah 84114

Matthew Hilton  
P.O. Box 781  
Springville, Utah 84663

Mr. Horton Hodsen  
P.O. Box 1900  
St. George, Utah 84770

Gary Kuhlmann  
175 E. 200 N.  
St. George, Utah 84770

Gail Anderson

FILED

NOV 04 1999

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

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Horton Hodsen, as agent for	)	MEMORANDUM DECISION
Nutriphysiology (previously	)	(Not For Official Publication)
known as Nutribionics and	)	
Biochem Research Services) and	)	Case No. 981554-CA
for himself, personally, as	)	
Horton E. Tatarian; and Gail	)	
Anderson,	)	F I L E D
	)	(November 4, 1999)
Plaintiffs and Appellants,	)	
	)	
v.	)	1999 UT App 321
	)	
Craig Jackson, Director of the	)	
Division of Occupational and	)	
Professional Licensing,	)	
Department of Commerce, State	)	
of Utah, in his official	)	
capacity,	)	
	)	
Defendant and Appellee.	)	

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Fifth District, St. George Department  
The Honorable James L. Shumate

Attorneys: Matthew Hilton, Springville, for Appellants  
Jan Graham and Jeffrey C. Hunt, Salt Lake City, for  
Appellee

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Before Judges Wilkins, Bench, and Davis.

BENCH, Judge:

Appellants argue at length<sup>1</sup> that their "fundamental rights  
of personal, religious, and commercial speech, formulation of

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1. We share the disapproval expressed earlier this year by the Utah Supreme Court concerning the length, form, and content of counsel's briefs. See Springville Citizens v. City of Springville, 979 P.2d 332, 334 n.1 (Utah 1999) (disapproving counsel's circumvention of fifty-page limit and his cursory and incomplete discussion of central points). Counsel is again reminded to comply with the rules of appellate procedure when submitting briefs.

religious belief, and exercise of religiously motivated conduct" have been violated by the Utah Medical Practice Act. We disagree.

Despite appellants' urging to the contrary, Utah case law is dispositive of this appeal. The Utah Supreme Court has twice affirmed the power of the State to regulate the practice of medicine in the face of First Amendment challenges. See State v. Hoffman, 558 P.2d 602 (Utah 1976) (Hoffman I); State v. Hoffman, 733 P.2d 502 (Utah 1987) (Hoffman II). We are not persuaded by appellants' attempt to distinguish the instant case from the Hoffman cases, given that:

The right to practice medicine, to diagnose maladies, and to prescribe for their treatment is not constitutionally superior to the state's power to impose comprehensive and rigid regulations on the practice. [Appellants have] not shown and cannot show that a criminal violation of the Act by the unlicensed prescription of treatments and cures . . . rises to the level of a constitutionally protected activity.

Hoffman II, 733 P.2d at 505 (emphasis added); see also id. (citing People v. Jeffers, 690 P.2d 194, 198 (Colo. 1984) ("The practice of medicine itself is not protected by the first amendment. Therefore, reasonable regulation of medical practice does not conflict with first amendment protections.")). The practice of medicine is a privilege, not a right, and is subject to governmental regulation. See Hoffman I, 558 P.2d at 605; see also State Dep't of Health v. Hinze, 441 N.W.2d 593, 596-97 (Neb. 1989) ("There exists no vested right to practice medicine; rather, it is a conditional right subordinate to the police power of the State to protect and preserve the public health."). Moreover, the legislature is "not only authorized to regulate the healing arts but a failure to do so could be a direct derogation of the implied power of the State to promote the health, safety, comfort, morals and welfare of the people." Hoffman I, 558 P.2d at 605.

Appellants also mention select provisions of the Utah Constitution and assert that these provisions demonstrate "a basis for inferring an intent to provide maximum protection" to them. (Emphasis added.) Appellants must make "an argument for different analysis under the state and federal constitutions." State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988). Appellants' effort to demonstrate that additional or different protection is afforded under the Utah Constitution is unpersuasive.

Regulating the practice of medicine is a valid exercise of the police power, and is not subject to First Amendment scrutiny. Accordingly, we affirm the trial court's decision.



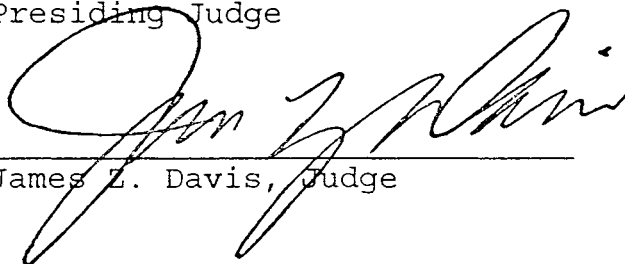
Russell W. Bench, Judge

-----

WE CONCUR:



Michael J. Wilkins,  
Presiding Judge



James L. Davis, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 4th day of November, 1999, a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to:


MATTHEW HILTON  
ATTORNEY AT LAW  
1220 N MAIN ST #5A  
PO BOX 781  
SPRINGVILLE UT 84663

and a true and correct copy of the attached MEMORANDUM DECISION was hand-delivered to a personal representative of the Attorney General's Office to be delivered to:

JAN GRAHAM  
ATTORNEY GENERAL  
JEFFREY C. HUNT  
ASSISTANT ATTORNEY GENERAL  
160 E 300 S 6TH FL  
PO BOX 140854  
SALT LAKE CITY UT 84114-0854

and a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to the judge listed below:

HONORABLE JAMES L. SHUMATE  
FIFTH DISTRICT, ST GEORGE  
WASHINGTON CO HALL OF JUSTICE  
220 N 200 E  
ST GEORGE UT 84770

  
\_\_\_\_\_  
Judicial Secretary

TRIAL COURT: FIFTH DISTRICT, ST GEORGE, 960500182  
APPEALS CASE NO.: 981554-CA

**FILED**

Utah Court of Appeals

**DEC 2 - 1999**

**Julia D'Alesandro  
Clerk of the Court**

IN THE UTAH COURT OF APPEALS

---oo0oo---

Horton Hodsen, as agent for )  
Nutriphysiology, (Previously )  
known as Nutribionics and )  
Biochem Research Services), )  
and for himself personally, as )  
Horton E. Tatarian, and Gail )  
Anderson, )

Plaintiffs and Appellants, )

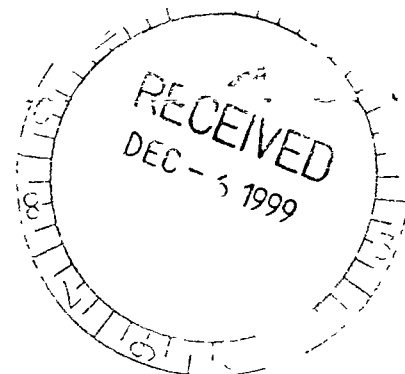
v. )

City of St. George, a )  
municipality under Utah Law, )  
and Craig Jackson, Director of )  
the Division of Occupational )  
and Professional Licensing, )  
Dept. Of Commerce, State of )  
Utah, in his official )  
capacity, )

Defendants and Appellees. )

ORDER

Case No. 981554-CA



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This matter is before the court upon appellants' petition for rehearing, filed November 19, 1999.

IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 2<sup>nd</sup> day of December, 1999.

FOR THE COURT:

*Russell W. Bench*  
\_\_\_\_\_  
Russell W. Bench, Judge



CERTIFICATE OF MAILING

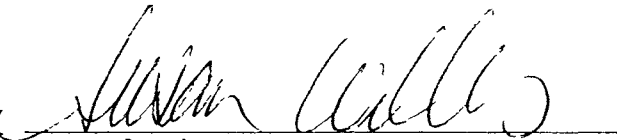
I hereby certify that on December 2, 1999, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

MATTHEW HILTON  
ATTORNEY AT LAW  
1220 N MAIN ST #5A  
PO BOX 781  
SPRINGVILLE UT 84663

and a true and correct copy of the foregoing ORDER was hand-delivered to a personal representative of the Attorney General's Office to be delivered to the party listed below:

JEFFREY C. HUNT  
ASSISTANT ATTORNEY GENERAL  
160 E 300 S 6TH FL  
PO BOX 140854  
SALT LAKE CITY UT 84114-0854

Dated this December 2, 1999.

By   
Deputy Clerk

Case No. 981554-CA