

1998

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 v. CRAIG JACKSON,
Director of the Division of Occupational and
Professional Licensing, Department of Commerce,
State of Utah, in his official capacity : Petition of
Plaintiffs - Appellants for Re-Hearing

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Matthew Hilton; Attorney for Plaintiff/Appellants.

Jeffrey C. Hunt; Assistant Attorney General; Jan Graham; Attorney General; Attorneys for Defendant/Appellee.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

981554-CA

IN THE UTAH COURT OF APPEALS

HORTON HODSEN, as agent for)	
Nutriphysiology (previously known)	
as Nutribionics and Biochem)	Appellate No. 981554 — CA
Research Services), and for himself)	
personally, as Horton E. Tatarian, and)	
GAIL ANDERSON,)	
)	
Plaintiffs,)	Priority # 15
)	
vs.)	
)	
CRAIG JACKSON, Director of the)	
Division of Occupational and)	Appeal from the order of the
Professional Licensing, Department)	Fifth Judicial District Court,
of Commerce, State of Utah, in his)	Washington County, The
official capacity,)	Honorable James L. Shumate
)	
Defendant.)	

PETITION OF PLAINTIFFS — APPELLANTS
FOR RE-HEARING

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of Appeals

NOV 19 1999

Julia D'Alesandro
Clerk of the Court

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**POINT I: STATUTORY CHANGES AND U.S. SUPREME COURT
DECISIONS JUSTIFY REVIEW OF HODSEN'S CLAIM TO
QUALIFIED USE OF "M.D." DESIGNATION**

In this Court and the trial court, Hodsen sought for a ruling that he could use the designation "M.D." on business cards and journal articles after his name when he clarified such usage with disclaimers stating "Graduate of U.C.L.A. Medical School Research Biochemist Not in Medical Practice." There is no evidence in the record to either justify the statutory restriction on the use of the designation "M.D." or the basis upon which DOPL concluded a "reasonable person" would be misled by Hodsen's clarified use of the "M.D." designation. The November 4, 1999 opinion does not mention or discuss the request by Hodsen to place the qualified "M.D." designation after his name.

The November 4, 1999 opinion of this Court eliminated the need for significant written analysis by emphasizing language from a 1987 Utah Supreme opinion stating "[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."¹ Since Hoffman II did not address issues associated with using the designation of "M.D.", it is not clear why the prohibition on any future demonstration of statutory or constitutional rights would

¹ Opinion of November 4, 1999, page 2, citing State v. Hoffman II, 733 P 2d 502, 505 (Utah 1987) (emphasis in original November 4, 1999 opinion)

prohibit consideration of Hodsen's present claim. However, even if the statement in Hodsen II applied to the use of the designation "M.D." after one's name, changes made in two areas of law after the Hoffman II decision was rendered have direct relevance to Hodsen's present request to use the qualified "M.D." designation.

First, the 1996 amendments to the UMPA only prohibit the use of the designation "M.D." after one's name when it

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 branch of healing arts for which the person has a license.²

This represents a significant change from the previous exercise of state police powers that totally prohibited the use of "M.D." without licensure. This change would allow a post - Hoffman II court to review on statutory grounds Hodsen's claim for qualified use of the "M.D." designation. As Hodsen is unlicensed in another "branch of healing arts," he would not have to list anything else.

Second, several United States Supreme Court cases involving commercial speech have been decided since 1987. Two cases relied upon by Hodsen in support of his claim to qualified use of the designation "M.D." include one that specifically reviewed government restrictions on use of professional designations

² U.C.A. § 58-67-102(8)(d).

(for which one was licensed)³ and the Court's most recent decision on commercial speech.⁴ Utah courts are bound by the precedent of the United States Supreme Court.⁵ To the degree these two United States Supreme Court cases support Hodsen's claim of a right under private and commercial speech use the qualified "M.D." designation, Hodsen is entitled to have his objection to DOPL's refusal to let him to do so heard by this Court.

CONCLUSION

Because of statutory change (which lessened the degree to which state police power was to be exercised) and supervening United States Supreme Court cases affording increased protection to commercial speech, there is a significant legal basis for Hodsen to claim entitlement in a post - Hoffman II world to use the title "M.D." with the disclaimer stating "Graduate of U.C.L.A. Medical School Research Biochemist Not in Medical Practice" . This Court should address this issue that was apparently overlooked in the writing of its November 4, 1999 opinion.

³ Ibanez v. Florida Dept. of Business and Professional Regulation, 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994).

⁴ Greater New Orleans Broadcasting Association, Inc. v. United States, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999)

⁵ Arguments that are "directly contrary to the United States Supreme Court precedent . . . must be rejected". Sperber v. Galigher Ash Co., 747 P.2d 1025, 1027 (Utah 1987).

CERTIFICATE OF GOOD FAITH FILING

I hereby certify that this Petition for a Rehearing is filed in good faith and not for any improper purpose to delay the implementation of this Court's prior ruling affirming the trial court's dismissal of Plaintiffs' claims.

DATED and **EXECUTED** this 19th day of November, 1999.

A handwritten signature in cursive script that reads "Matthew Hilton". The signature is written in dark ink and is positioned above a horizontal line.

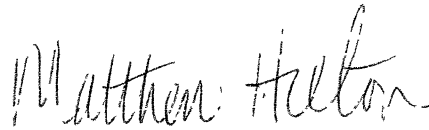
Matthew Hilton of Matthew Hilton, P.C.
Attorney for Hodsen and Anderson

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 19th day of November, 1999, two copies of the foregoing PLAINTIFFS — APPELLANTS PETITION FOR RE-HEARING was hand delivered to counsel for Appellee as follows:

Jeffrey C. Hunt
Assistant Attorney General
Jam Graham
Attorney General
160 East 300 South 5th Floor
Salt Lake City, UT 84114-0872

DATED this 19th day of November, 1999.

A handwritten signature in cursive script that reads "Matthew Hilton". The signature is written in dark ink and is positioned above a horizontal line.

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