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JACOB M. SCOTT, Plaintiff/ Appellant, v. WINGATE WILDERNESS THERAPY, LLC, Defendant/ Appellee. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JACOB M. SCOTT, Plaintiff/Appellant, v. WINGATE WILDERNESS THERAPY, LLC, Defendant/Appellee.	Case No. 20190953-SC

BRIEF OF APPELLANT

Review of a Certified Question from the
United States Tenth Circuit Court of Appeals, Case No. 19-4052

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ORAL ARGUMENT REQUESTED

CURRENT AND FORMER PARTIES

The parties to the proceeding in this Court are as follows:

Name	**Counsel**
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There are no parties to the proceedings in the United States District Court for the District of Utah and no parties to the proceedings in the United States Tenth Circuit Court of Appeals who are not parties to this proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Rules

Other Authorities

INTRODUCTION

Wingate's Negligence

Wingate Wilderness Therapy, LLC ("Wingate"), sent Jacob Scott and six other boys on a hike in southern Utah with two members of its field staff. The senior field staff member then left, leaving the boys alone with one staff member. That field staff member then detoured from the planned hike and allowed the boys to climb a snow-dusted rock formation that appeared to be over 70 feet tall. He gave no direction about how to climb; provided no safety equipment; and did not climb with the boys. Jacob reached the top of the rock formation. But as he descended, Jacob slipped on the snow and fell 25 feet onto his knee, shattering it.

Jacob's injury required five surgeries, significant follow-up care, and rehabilitation. Jacob turned 18 a few months after his fall. For more than two years after his eighteenth birthday, Jacob and his parents focused on getting him through his five surgeries and rehabilitative care. Then Jacob filed a Complaint against Wingate in the United States District Court for the District of Utah, alleging negligence claims based on Wingate's following breaches of duty:

- "allowing the youth to . . . detour from the designated route";
- "allowing the lead staff member to leave the group";
- "not doing anything to determine whether the climbing of the rock formation would be safe for the youth";

- "not properly assessing the danger of allowing the youth to climb the rock formation";
- "allowing the youth to climb the dangerous rock formation without supervision";
- "allowing the youth to climb the dangerous rock formation without any safety gear";
- "not assisting Jacob with his descent"; and
- "instructing Jacob to climb down the rock formation when and where it was dangerous to do so."

Wingate's Argument

Because Jacob waited for more than two years after his eighteenth birthday to bring his claim, Wingate argues that its negligent conduct—i.e., failing to keep to a designated hiking route, failing to adequately inspect a rock formation, failing to provide climbing safety gear, etc.—amounts to medical malpractice, thus triggering the two-year statute of limitations and other procedural requirements of the Utah Health Care Malpractice Act.

Jacob's Argument

Wingate is licensed as an Outdoor Youth Program. As an Outdoor Youth Program, Wingate provides both a wilderness experience and counseling. To provide counseling, Wingate employs several mental health professionals, whom it calls its "clinical team." Wingate acts as a health care provider under the Utah Health Care Malpractice Act when its clinical team is providing counseling.

To provide its wilderness experience, which it calls "wilderness therapy," Wingate employs "field staff." When Wingate's field staff is leading boys on hikes (and unplanned rock climbs), Wingate is not acting as a health care provider, and the Act does not apply.

Utah Health Care Malpractice Act

In 1976, the Utah Legislature found that "the insurance industry ha[d] substantially increased the cost of medical malpractice insurance" and that it was therefore "necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide health-related malpractice insurance." Utah Code Ann. § 78B-3-402(1) & (2). Thus, the Legislature enacted the Utah Health Care Malpractice Act (the "Act") "to provide a reasonable time in which actions may be commenced against health care providers . . . and to provide other procedural changes to expedite early evaluation and settlement of claims." Utah Code Ann. § 78B-3-402(3).

Under the Act, "[a] malpractice action against a health care provider [must] be commenced within two years," Utah Code Ann. § 78B-3-404(1), instead of within the otherwise applicable four-year statute of limitations, Utah Code Ann. § 78B-2-307(3); and a malpractice action "may not be initiated unless and until the plaintiff . . . gives the prospective defendant . . . at least 90 days' prior notice of intent to commence an action" and "the plaintiff receives a certificate of

compliance from the [Division of Occupational and Professional Licensing]," Utah Code Ann. § 78B-3-412(1).

To obtain a certificate of compliance, the plaintiff must present his case to a prelitigation panel that includes a licensed provider "who is practicing and knowledgeable in the same specialty as the proposed defendant." Utah Code Ann. § 78B-3-416(4). If the panel decides the claim is non-meritorious, the plaintiff must submit an affidavit from another health care provider who (if the defendant is a physician) is licensed "to practice medicine in all its branches" or who (if the defendant is not a physician) is licensed "in the same specialty" as the defendant and affirms the claim is meritorious. Utah Code Ann. § 78B-3-423(4).

Utah Supreme Court Precedent

This Court has rejected the notion that the Utah Health Care Malpractice Act and its foregoing provisions "apply to every cause of action involving the provision of health care services by a health care provider." *Dowling v. Bullen*, 2004 UT 50, ¶ 11, 94 P.3d 915. Rather, the Court has said that the Act does not apply to claims against health care providers that "are only tangentially related to [the] provision of health care services." *Id.*

Moreover, in the analogous context where a mental health service center provided foster care services (which do not qualify as "health care" under the Act) in conjunction with mental health services (which do qualify as "health

care" under the Act), the Court analyzed whether the plaintiff's claim arose out of the mental health services he received or out of the foster care services he alleged. *See Smith v. Four Corners Mental Health Center, Inc.*, 2003 UT 23, ¶¶ 29-36, 70 P.3d 904. This Court did not conclude that the service provider's provision of foster care services in conjunction with mental health services transformed foster care services into "health care." *See id.*

Jacob's Claim

Jacob's claim against Wingate arises from acts and omissions that occurred while he was climbing a rock formation during a detour from a wilderness hike.

CERTIFIED QUESTION

This Court has accepted the following certified question from United States Tenth Circuit Court of Appeals:

> Where Wingate is a "health care provider" under Utah Code § 78B-3-403(12), does an injury sustained by a plaintiff while climbing a rock formation during a "wilderness therapy" program operated by Wingate "relat[e] to or aris[e] out of health care rendered or which should have been rendered by [a] health care provider" within the meaning of the [Utah Health Care Malpractice Act]?

STATEMENT OF THE CASE

Facts[1]

Wingate Wilderness Therapy, LLC

Wingate is a Utah limited liability company licensed as an Outdoor Youth Program.[2] As an Outdoor Youth Program, Wingate provides both a wilderness experience and traditional counseling.[3] To provide counseling, Wingate employs "several . . . mental health professionals, including clinical social workers, certified social workers, mental health counselors and a psychologist," who "make up the clinical team responsible for providing therapeutic treatment."[4] "Typically, insurance covers all individual and group [counseling] sessions."[5]

To provide the wilderness experience component of its program, Wingate employs a "field program director" and "field staff" who conduct wilderness "expeditions" with Wingate's "students."[6] Wingate's director of admissions told

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[1] This case was resolved in federal district court on a rule 12(b)(1) motion to dismiss. *See* App. at 206. That court was presented with the complaint, affidavits, and other written materials. *See* App. at 6-191. This Facts section relies on the allegations of the complaint and on uncontroverted facts in the affidavits and other written materials. Record citations are to the Appendix.

[2] App. at 7, 19, 35.

[3] *See* App. at 8, 20; Response Br. of Appellee in the 10th Circuit at 21, 44; Utah Admin. Code R501-8-3(d) and -6(8).

[4] App. at 32, 168.

[5] App. at 165.

[6] App. at 9, 19, 131; Utah Admin. Code R501-8-5 and -6.

Jacob's mother that "wilderness therapy is not considered health care and insurance does not cover it."[7]

Wingate Admits Jacob as a Student

Wingate admitted Jacob as a "student" on February 21, 2015.[8] Early that evening, Wingate personnel met Jacob and his mother at a chiropractor's office in St. George, where a "sports physical" was performed on Jacob.[9] After Jacob's mother left, Wingate personnel drove Jacob to a small home in Kanab, where they gave him some gear before taking him to a wilderness site to join a group of campers.[10]

Counseling Sessions

Two days after Jacob arrived, Scott Hess, one of Wingate's marriage and family therapists, met with Jacob for an hour to discuss how Jacob was adjusting to the outdoors, other campers, and Wingate's staff.[11] Mr. Hess met with Jacob again for about 30 minutes one week later.[12] Their second meeting was mostly spent discussing an altercation between Jacob and a camper who had punched

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[7] App. at 43, 79.

[8] App. at 7, 43, 131.

[9] App. at 74.

[10] *Id.*

[11] App. at 46, 74-75.

[12] *Id.*

him.[13] On the two days he met individually with Jacob, Mr. Hess also conducted an hour-long group session that Jacob attended along with the other campers.[14]

At some point, Mr. Hess created a treatment plan for Jacob that said that treatment for Jacob's anxiety would include "hiking" and other wilderness activities.[15] Neither Jacob nor his parents received a copy of the treatment plan, and the plan was never discussed with Jacob or his parents.[16] In fact, Mr. Hess did not sign the plan until more than three months after Jacob was injured and left Wingate's program.[17]

Other than the two group meetings and two one-on-one sessions with Mr. Hess, Jacob did not meet with, and was not treated by, any therapist, doctor, psychiatrist, psychologist, nurse practitioner, or other licensed health care provider during his time at Wingate.[18] The balance of Jacob's roughly two weeks in the program was spent hiking and camping with other youth and members of Wingate's unlicensed field staff.[19]

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[13] App. at 46, 75.

[14] *Id.*

[15] App. at 179, 183.

[16] App. at 75, 79.

[17] App. at 179, 183.

[18] App. at 46, 75.

[19] App. at 46-47, 75.

Staffing Requirements

Wingate was required to have at least two field staff members supervising each youth group; one was required to be a senior field staff member.[20]

Climbing on March 6, 2015

On March 6, 2015, two Wingate field staff members took a group of seven youths, including Jacob, on a hike.[21] Partway into the hike, the senior field staff member left, leaving only one field staff member with the boys.[22] The boys then saw a rock formation that they wanted to explore.[23] Once they arrived at the rock formation, some of the boys wanted to climb it.[24]

The rock formation was dusted with snow and appeared to be over 70 feet tall.[25] Yet the staff member still with the boys did not evaluate the formation for safety.[26] He gave no direction on how to climb it.[27] He provided no safety

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[20] App. at 9, 13.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] App. at 10.

[25] *Id.*

[26] *Id.*

[27] *Id.*

equipment, and he did not climb with the boys.[28] But he gave the boys permission to climb it.[29]

Four boys, including Jacob, made it to the top.[30] Climbing down proved to be much more difficult, and extremely dangerous.[31] The formation was steep.[32] The snow made the rocks slippery.[33] The boy in front of Jacob nearly fell 50 feet off the right side of the formation.[34]

Jacob Falls

By this time, the senior field staff member had returned.[35] Jacob was scared and told the field staff that he did not think he could make it down.[36] They told him to go down the route he had taken going up, but they offered no assistance.[37]

As Jacob descended, one field staff member told him to climb from where he was to a ledge lower down.[38] When Jacob followed this instruction and

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] App. at 11.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

attempted to climb to the lower ledge, he slipped on the snow and fell the remaining 25 feet, landing on his knee.[39] The fall shattered Jacob's knee, leaving him with a high-energy comminuted left patellar fracture.[40]

The Aftermath

The other boys pulled Jacob from the side of the rock formation and put him under a tree.[41] Then they built a fire to keep him warm.[42] Help did not arrive for two to three hours.[43]

During that time, no licensed medical care provider was available to give Jacob care, and no one took his pulse or blood pressure to determine if he was going into shock.[44] No one took his temperature, even though he was freezing cold.[45] No one gave him medication, although he was in excruciating pain.[46]

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[39] *Id.*

[40] App. at 11, 40, 75.

[41] App. at 11.

[42] *Id.*

[43] *Id.*

[44] App. at 47, 75, 76.

[45] *Id.*

[46] *Id.*

When help did arrive, it was another unlicensed Wingate field staff member on an off-road utility vehicle.[47] Jacob was loaded onto the off-road vehicle and taken to the Kane County Hospital in Kanab.[48]

On the way to the hospital, Wingate lost Jacob's prescriptions.[49] It then checked him into the hospital under the wrong name.[50] When Wingate called Jacob's mother that night, it told her that Jacob had simply twisted or dislocated his knee and been taken to the hospital as a precaution.[51]

Jacob's Injuries

In reality, Jacob's injury required five surgeries, significant follow-up care, and rehabilitation.[52] His knee is permanently disabled and disfigured.[53] Jacob has lost earning potential, anticipates a need for additional medical care, and has endured the pain and other losses that accompany this type of injury.[54]

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[47] App. at 48, 76.

[48] *Id.*

[49] App. at 80.

[50] App. at 76.

[51] App. at 80.

[52] App. at 80-81.

[53] App. at 16.

[54] *Id.*

Procedural History

A few months after his fall, in 2015, Jacob turned 18.[55] For more than two years after his eighteenth birthday, Jacob and his parents focused on getting him through his five surgeries and rehabilitative care.[56] Then on March 2, 2018, Jacob filed a Complaint against Wingate in the United States District Court for the District of Utah, alleging a negligence claim based on Wingate's following breaches of duty:

> (i) allowing the youth to take a detour from the designated route; (ii) allowing the lead staff member to leave the group with only one staff member remaining with the group; (iii) not doing anything to determine whether the climbing of the rock formation would be safe for the youth; (iv) not properly assessing the danger of allowing the youth to climb the rock formation; (v) allowing the youth to climb the dangerous rock formation without supervision; (vi) allowing the youth to climb the dangerous rock formation without any safety gear; (vii) not assisting Jacob with his descent down the rock formation; and (viii) instructing Jacob to climb down the rock formation when and where it was dangerous to do so.[57]

In response, Wingate filed a Motion to Dismiss, arguing that it is a "health care provider" under the Utah Health Care Malpractice Act; that Jacob's injures arose out of or relate to health care that Wingate provided or should have provided; and, thus, that the Act's notice and pre-litigation screening panel requirements, as well as its two-year statute of limitations, apply to Jacob's

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[55] App. at 22, 33.

[56] App. at 80-81.

[57] App. at 13.

claim.[58] Because Jacob did not give Wingate prior notice, present his case to a screening panel, or file his Complaint within two years of his eighteenth birthday, Wingate argued that the district court lacked jurisdiction.[59]

Jacob opposed Wingate's Motion, arguing that his injuries did not arise out of or relate to health care that Wingate provided or should have provided.[60] Thus, Jacob asserted, the Act does not apply to his claim.[61]

Federal Court Rulings

The federal district court granted Wingate's Motion, concluding that (1) Wingate is a health care provider since it "provides behavioral or mental health services" and employs "health care professionals"; and (2) Jacob's "injury relates to or arises out of health care rendered or which should have been rendered."[62] Jacob appealed to the United States Tenth Circuit Court of Appeals, which received briefing, heard oral argument, and then sent the certified question to this Court.[63]

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[58] App. at 18-29.

[59] Id.

[60] App. at 62-65, 196

[61] App. 52-65.

[62] App. at 206-15.

[63] App. at 217; https://www.ca10.uscourts.gov/oralarguments/19/19-4052.MP3 (link to audio of Tenth Circuit oral argument); Tenth Circuit Order Certifying State Law Question; Utah Supreme Court Order of December 27, 2019.

SUMMARY OF THE ARGUMENT

The Utah Health Care Malpractice Act imposes extra procedures and a short limitation period on plaintiffs bringing malpractice claims against a health care provider. But not all claims against a health care provider sound in medical malpractice and trigger the Act.

Wingate provides both traditional counseling and wilderness therapy. Jacob's claim arises solely out of the wilderness therapy Wingate provided, which Wingate defines as the "prescriptive use of wilderness experiences," including "back-country travel," "wilderness living," "[a]dventure experiences," and the "application of primitive skills such as fire-making."

The Act defines health care as "any act or treatment performed or furnished . . . by any health care provider [listed in the Act]" and any act or treatment similar to the care and services rendered by one of the listed providers. Because none of the providers listed in the Act—i.e., physicians, dentists, physical therapists, marriage and family counselors, etc.—provide back-country travel, wilderness living, adventure experiences, the application of primitive skills such as fire-making, or other similar services, wilderness therapy does not qualify as "health care."

Nor does that conclusion change because Wingate offers wilderness therapy in conjunction with counseling. This Court has acknowledged that an

entity may provide health care in conjunction with other, non-health care services, and that whether a particular claim against such a provider is covered by the Act depends on whether it arises from the health care provided or from the other, non-health care services rendered. The provision of both services by the same provider does not convert all of the provider's services into health care.

Additionally, the Act's express purpose is the preservation of affordable medical malpractice insurance. Because wilderness therapy appears not to implicate medical malpractice insurance, it would be an unwarranted judicial expansion of the Act to conclude that a claim based on wilderness therapy triggers the Act. The Act requires a plaintiff bringing a claim under the Act to present his case to a prelitigation panel that includes a licensed health care provider practicing "in the same specialty as the proposed defendant." To require Jacob to have obtained a marriage and family counselor's opinion on the safety of a rock climb would be an absurd result. The Legislature has expressed its intent for the Act not to apply to claims of ordinary negligence such as "slip-and-fall or [other] non-malpractice" claims. And courts from other jurisdictions have concluded that claims arising from activities that do not require the exercise of medical judgment (like hiking) do not trigger those states' analogous statutes.

For these reasons, an injury suffered during wilderness therapy does not relate to or arise out of the provision of health care under the meaning of the Act.

ARGUMENT

AN INJURY SUSTAINED WHILE ROCK CLIMBING DURING A WILDERNESS EXPERIENCE DOES NOT "RELAT[E] TO OR ARIS[E] OUT OF" THE PROVISION OF "HEALTH CARE" WITHIN THE MEANING OF THE UTAH HEALTH CARE MALPRACTICE ACT, EVEN IF WINGATE WAS A HEALTH CARE PROVIDER WHEN PROVIDING TRADITIONAL COUNSELING SERVICES.

A. Wingate provides its students with both wilderness therapy and traditional counseling as two separate components of its Outdoor Youth Program.

Wingate provides its students with a wilderness experience that it calls "wilderness therapy."[64] The State of Utah regulates such wilderness experiences as one component of an Outdoor Youth Program. *See* Utah Admin. Code R501-8-3(d). The "executive director," "field director," "field staff," and "assistant field staff" who provide the wilderness experience component of an Outdoor Youth Program are not required to have medical licenses. *See* Utah Admin. Code R501-8-6. Instead, they need only have completed, at most, "a BA or BS degree or equal training and experience in a related field," "30 semester . . . hours education in recreational therapy," CPR training, and some "Outdoor Youth Program field experience." *Id.*

[64] *See* App. at 8 (alleging that Wingate offers a "wilderness program" and "is paid . . . for providing wilderness services"); Response Br. of Appellee in the 10th Circuit at 21 (asserting that "Wingate was providing . . . wilderness therapy" to Jacob).

The other component of an Outdoor Youth Program is traditional counseling, *see* Utah Admin. Code R501-8-3(d), and Wingate provides its students with traditional counseling as part of its Outdoor Youth Program.[65] In order to provide the counseling component of its Outdoor Youth Program, Wingate is required to have, in addition to its field staff, a "clinical and therapeutic" team consisting of "a licensed physician or consulting licensed physician" and "a treatment professional who may be one of the following: (i) a licensed psychologist, (ii) a licensed clinical social worker, (iii) a licensed professional counselor, (iv) a licensed marriage and family counselor, or (v) a licensed school counselor." Utah Admin. Code R501-8-6(8).

B. Jacob's claim arises solely out of the wilderness therapy component of Wingate's Outdoor Youth Program.

Wingate acknowledges that "Jacob's claim [in this case] relates to or arises out of . . . the wilderness therapy in which he was participating," Response Br. of Appellee in the 10th Circuit at 21, not out of the traditional counseling that he was also ostensibly receiving, *see id.* at 44. Indeed, Jacob's claim is based solely on allegations that Wingate's wilderness therapy field staff members caused injury by committing the following breaches of duty in the way they conducted a hike:

[65] *See* App. at 20 (alleging that Jacob "participated in weekly individual and group therapy sessions with therapists and psychologists"); Response Br. of Appellee (filed in the 10th Circuit) at 44 (acknowledging that Wingate also "provides . . . the more traditional form of individual or group therapy with a licensed therapist," and distinguishing that type of traditional counseling from wilderness therapy).

> (i) allowing the youth to take a detour from the designated route; (ii) allowing the lead staff member to leave the group with only one staff member remaining with the group; (iii) not doing anything to determine whether the climbing of the rock formation would be safe for the youth; (iv) not properly assessing the danger of allowing the youth to climb the rock formation; (v) allowing the youth to climb the dangerous rock formation without supervision; (vi) allowing the youth to climb the dangerous rock formation without any safety gear; (vii) not assisting Jacob with his descent down the rock formation; and (viii) instructing Jacob to climb down the rock formation when and where it was dangerous to do so.

App. at 13. Jacob makes no allegation that his injuries were a result of the counseling (if any) that Wingate's clinical and therapeutic team provided him. *See* App. at 6-17.

C. Wilderness therapy is not "health care."

1. Wilderness therapy does not fit within the Utah Health Care Malpractice Act's plain definition of "health care."

While traditional counseling is "health care" under the Utah Health Care Malpractice Act, wilderness therapy is not. The Utah Health Care Malpractice Act defines "health care" as "any act or treatment performed or furnished . . . by any health care provider," Utah Code Ann. § 78B-3-403(10), and it defines "health care provider" as

> a hospital, health care facility, physician, physician assistant, registered nurse, licensed practical nurse, nurse-midwife, licensed direct-entry midwife, dentist, dental hygienist, optometrist, clinical laboratory technologist, pharmacist, physical therapist, osteopathic physician, osteopathic physician and surgeon, audiologist, speech-language pathologist, clinical social worker, certified social worker, social service worker, marriage and family counselor, practitioner of obstetrics,

> licensed athletic trainer, or others rendering similar care and services relating to or arising out of the health needs of persons.

Utah Code Ann. § 78B-3-403(12). Thus, for something to qualify as "health care," it must be an act or treatment performed or furnished by one of the expressly named providers, or an act or treatment "similar [to the] care and services" provided by one of those providers. *Id.*

Traditional counseling qualifies as health care because it is an act or treatment performed by social workers and marriage and family counselors, both of whom are among the health care providers listed in the Act. *See id.* On the other hand, according to Wingate, wilderness therapy is the "'prescriptive use of wilderness experiences,'" including "'back-country travel,'" "'wilderness living,'" "'[a]dventure experiences,'" and the "'application of primitive skills such as fire-making.'" Response Br. of Appellee in the 10th Circuit at 23 (citations omitted). No provider listed in the Act furnishes back-country travel, wilderness living, adventure experiences, the application of primitive skills, or other similar services. Thus, wilderness therapy is not "health care."

2. *Wingate's provision of wilderness therapy in conjunction with services that do qualify as "health care" does not transform wilderness therapy into "health care."*

Admittedly, Wingate provides wilderness therapy in conjunction with traditional counseling, which does qualify as "health care." *See* App. at 32, 168.

But the fact that Wingate provides wilderness therapy in conjunction with traditional counseling does not transform wilderness therapy into "health care."

In *Smith v. Four Corners Mental Health Center, Inc.*, 2003 UT 23, 70 P.3d 904, Four Corners Mental Health Center provided both foster care services and mental health services to its clients. *See id.* ¶ 3. The foster care services that Four Corners provided did not qualify as "health care," while the mental health services that it provided did qualify as "health care." *See id.* ¶ 31.

The plaintiff in *Four Corners* sued for injuries sustained when he was assaulted while he was allegedly receiving both foster care and mental health services from Four Corners. *See id.* ¶¶ 3-4, 31, 35. The plaintiff did not comply with the requirements of the Utah Health Care Malpractice Act. *See id.* ¶ 1.

Four Corners argued that the plaintiff's claim arose out of its provision of mental health services, which qualified as "health care," that the plaintiff's failure to comply with the Health Care Malpractice Act barred his claim. *See id.* The plaintiff argued that his claim arose out of Four Corner's provision of foster care services, which did not qualify as "health care," and that he was, thus, not required to comply with the requirements of the Act. *Id.* ¶ 29.

This Court analyzed whether the plaintiff's claim arose out of the mental health services he received or out of the foster care services he alleged. *See id.* ¶¶ 29-36. The Court observed that the plaintiff's claim was based on allegations that

Four Corners "fail[ed] to provide adequate [mental health] caseworker services," "[f]ailed to supervise the preparation and implementation of [the plaintiff's mental health] treatment plan," and "fail[ed] to inform [the plaintiff's parents] of [the] dangerous characteristics" of another child in the foster home where plaintiff stayed. *Id.* ¶ 35. Because "[t]hese allegations all [arose] out of Four Corner's provision of mental health services," the Court concluded that the Health Care Malpractice Act applied to the plaintiff's claim. *See id.* ¶¶ 35-36.

Although Four Corners provided foster care services (which do not qualify as "health care") in conjunction with mental health services (which do qualify as "health care"), this Court did not conclude that Four Corner's provision of both types of services transformed foster care services into "health care." *See id.* Instead, to determine whether the Health Care Malpractice Act applied to the plaintiff's claim, the Court analyzed whether the plaintiff's injury arose from the mental health services he received or from the foster care services he alleged. *See id.* The Court's *Four Corners* analysis confirms that services that are not health care—i.e., foster care services and wilderness therapy—are not transformed into health care when they are provided in conjunction with services that do qualify as health care—i.e., mental health services and counseling.

The Act's definition of "[m]alpractice action against a health care provider" supports this principle. Under that definition, the Act applies when (1)

the defendant is a "health care provider" and (2) the action is "based upon alleged personal injuries relating to or arising out of health care." Utah Code Ann. § 78B-3-403(17). By including both prongs of this test, the Act presupposes that some entities, like Wingate and Four Corners, will be engaged in both activities that qualify as health care and activities that do not qualify as health care; and that an action must be based upon injuries relating to or arising out of the activities constituting health care for the Act to apply. *See id.*

This principle is also supported by this Court's opinion in *Dowling v. Bullen*, 2004 UT 50, 94 P.3d 915. There, a husband and wife each began one-on-one marriage counseling with the same therapist. *Id.* ¶ 2. After about a year, "the couple could not resolve their differences and [the husband] filed for divorce." *Id.* On "the date the divorce became final, [the wife] learned that [the therapist] and [husband] had developed a romantic attachment and were dating." *Id.* ¶ 3. "Later, [she] discovered that [the therapist] had initiated an intimate relationship with [the husband] prior to the filing of the divorce petition." *Id.*

More than two years later, the wife filed a complaint against the therapist, alleging, among other things, a claim for alienation of affections. *Id.* ¶¶ 3-4. The therapist filed a motion for summary judgment, arguing that the wife's alienation of affections claim arose out of or related to health care rendered by

the therapist and, thus, that the Utah Health Care Malpractice Act's two-year statute of limitations applied to block the wife's claim. *Id.* ¶ 5.

This Court disagreed and expressly rejected the therapist's assertion that the Utah Health Care Malpractice Act "appl[ies] to every cause of action involving the provision of health care services by a health care provider." *Id.* ¶ 11. Such an interpretation, the Court said, would not be "consistent with either the plain language or legislative intent" of the Act. *Id.* Instead, it would render parts of the Act "'nonsensical or absurd.'"[66] *Id.* (citation omitted). Thus, the Court said, the Act does not apply to claims arising from conduct that is "only tangentially related to [the] provision of health care services." *Id.*

Wingate's alleged negligent acts in this case—i.e., failing to provide safety gear for a climb, failing to adequately inspect a rock formation, etc.—are only tangentially related to the counseling (if any) that it provided to Jacob.[67] Thus, Jacob's claim does not fall under the Act.

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[66] *See infra* at pp. 26-28.

[67] *See infra* at pp. 34-40; *Carter v. Milford Valley Mem'l Hosp.*, 2000 UT App 21, ¶¶ 9 n.5, 13-22, 996 P.2d 1076 (holding, in a case where a patient's delayed hospital arrival caused injury, that the hospital paramedics were health care providers under the Act when they decided it was advisable to transfer the patient to a second ambulance while en route to the hospital, but stating a willingness to "view the issues differently" if the plaintiff had alleged a mechanical failure, "e.g., the back wheels [of the ambulance] fell off because the lug nuts were not replaced when new tires were mounted" by the hospital's mechanics).

3. *Classifying wilderness therapy as "health care" would be at odds with the express purpose of the Act.*

Classifying wilderness therapy as "health care" would also be at odds with the express purpose of the Utah Health Care Malpractice Act. The express purpose of the Health Care Malpractice Act is to keep medical malpractice insurance available and affordable. Utah Code Ann. § 78B-3-402.[68] Wingate has not claimed or demonstrated that at the time the Act was passed medical malpractice insurance covered hiking, fire-making, backcountry travel, or the other adventure experiences that make up a wilderness therapy program. And it remains unlikely that medical malpractice insurance covers wilderness therapy today. *See* NFP Insurance Brokerage and Consulting, https://www.nfp.com/commercial-insurance/specialty-programs/wilderness-medical-society (last visited Feb. 24, 2020) (offering "wilderness liability

[68] Utah Code section 78B-3-402 states in relevant part:

> (1) The Legislature finds and declares that the number of suits and claims for damages and the amount of judgments and settlements arising from health care has increased greatly in recent years. Because of these increases the insurance industry has substantially increased the cost of medical malpractice insurance. . . . Further, certain health care providers are discouraged from continuing to provide services because of the high cost and possible unavailability of malpractice insurance.
>
> (2) In view of these recent trends and with the intention of alleviating the adverse effects which these trends are producing in the public's health care system, it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide health-related malpractice insurance . . . .

insurance . . . to cover the liability exposures . . . [that are] excluded from . . . clinical coverage"). Because wilderness therapy appears not to be or have been a treatment covered by medical malpractice insurance, it does not implicate the public policy concerns at which the Act is aimed. If application of the Act is to be enlarged to encompass claims not implicated by its express purpose, the Legislature is the body to bring about that expansion, not the courts. *See Adkins v. Uncle Bart's, Inc.*, 2000 UT 14, ¶ 40, 1 P.3d 528 (holding that "[a]ny expansion of the . . . [the state's Dramshop Act] must be undertaken by the legislature, not the courts").

4. Classifying wilderness therapy as "health care" would yield absurd results.

A plaintiff suing under the Utah Health Care Malpractice Act must first obtain a certificate of compliance from the Division of Occupational and Professional Licensing. *See* Utah Code Ann. § 78B-3-412(1). To obtain a certificate of compliance, the plaintiff must present his case to a prelitigation panel that includes "a licensed health care provider . . . who is practicing and knowledgeable in the same specialty as the proposed defendant." Utah Code Ann. § 78B-3-416(4). If the panel decides that the claim is non-meritorious, the plaintiff must submit an affidavit from another health care provider who (if the defendant is a physician) is licensed "to practice medicine in all its branches" or who (if the defendant is not a physician) is licensed "in the same specialty" as the

defendant and affirms that the claim is meritorious. Utah Code Ann. § 78B-3-423(4).

Requiring a slip-and-fall plaintiff to get a cardiologist's opinion that an unaddressed soda spill in the hospital hallway caused the fall before the plaintiff is allowed to sue would be an absurd result. Requiring a plaintiff injured in an ambulance crash to obtain a paramedic's opinion that missing lug nuts caused the accident would be an absurd result. *See Carter*, 2000 UT App 21, ¶ 9 n.5, 996 P.2d 1076. Similarly here, where the only licensed health care provider to interact with Jacob during his time at Wingate was Mr. Hess, a licensed marriage and family counselor, requiring Jacob to have obtained a marriage and family counselor's opinion that the rock formation was unsafe to climb would also be an absurd result.[69] To avoid absurd results, the Utah Health Care Malpractice Act

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[69] Interpreting a similar statute, the Indiana Court of Appeals identified other "absurd results" that would occur if "every claim by a patient against a qualified health care provider comes within the Medical Malpractice Act":

> [A]ll of the following claims would be subject to the requirements and procedures of the Act: (1) the claim of a patient who was injured when a light fixture fell on him in his hospital bed; (2) the claim of an ambulatory patient who, while walking down a hospital hallway with a visiting friend, was injured when he slipped and fell on soapy water left on the floor by a hospital janitor, even though the visitor's claim would not be subject to the Act if he also fell and was injured; (3) the claim of a patient who was slandered by a hospital employee; and (4) the claim of a patient who was assaulted by a hospital employee.

Winona Mem'l Found. of Indianapolis v. Lomax, 465 N.E.2d 731, 734-35 (Ind. Ct. App. 1984).

must not be read to apply to claims of ordinary negligence stemming from a hike or rock climb.

5. Classifying wilderness therapy as "health care" would be at odds with the legislative history of the Act.

In 2002, the Utah Legislature passed a bill that added birthing centers, hospices, end stage renal disease facilities, and other additional facilities to the list of expressly enumerated health care providers under the Act. *See* 2002 Utah Laws 427. While debating that bill, some legislators questioned whether the Act's two-year statute of limitations, notice provision, and prelitigation panel requirement, applied to ordinary negligence claims against health care providers. *See* Utah Senate Floor Debate, 2002 General Legislative Session, Day 39, Feb. 28, 2002, https://le.utah.gov/av/floorArchive.jsp?markerID=43730, at 1:53:05 to 2:09:11 (unofficial transcript attached as Attachment D). Some legislators initially expressed a desire to amend the 2002 bill to say that the Act applied only to claims of professional malpractice and not to claims of ordinary negligence. *Id.* However, after the bill's Senate sponsor, and others, explained their understanding that the Act already applied only to claims of professional malpractice, the 2002 bill passed the Senate unanimously and without amendment. *Id.* Following are the relevant portions of the 2002 Senate debate confirming the Legislature's understanding that the Act applies only to claims of professional malpractice:

Waddoups: Thank you. House Bill 112 is the legislation that we discussed yesterday that have amendments to the Health Care Malpractice Act. It specifically puts in statute the member organizations, the health care agencies, hospices, nursing care facilities, assisted living facilities, all of those acute care hospitals, end renal disease facilities – all of those in there – to specify that they are indeed meaning – included in the definition "Health Care Facility."

. . . .

Now there was some concern expressed yesterday, and I believe those that expressed it have had the opportunity to talk to the counsel and clarify that. . . . Senator Valentine and our counsel have talked for some time now about the issue and have agreed to it. But he and I both agree that something needs to be said on the floor to make sure that the record is clear what we're not intending to do also.

. . . .

Valentine: Thank you, Mr. President. . . . I do need to ask [Senator Waddoups] a couple of questions . . . .

Waddoups: I yield.

Pres. Pro Tem: That would be just fine.

Valentine: **Is it your intent with this bill to extend the statute of limitations for other types of causes of actions to these health care facilities, including hospitals, such as a slip-and-fall case?**

Waddoups: **Definitely not. . . . As far as their liability for negligence in a slip-and-fall or a non-malpractice issue, I'm not intending to change that at all.** And that is the issue that we were discussing previously. We do not intend to extend that – or shorten that statute of limitations.

Valentine: So it would be your intent as the sponsor of the bill on the Senate floor to say that the statute of limitations – the short statute of limitations – would only apply to

medical malpractice for the delivery of health care services. Is that correct?

Waddoups: That's a hundred percent correct.

Valentine: Would that also include things like the notice of intent to commence action, the prelitigation screening panel – that those provisions would not apply to non-professional malpractice cases? Would that also be your intent?

Waddoups: Our intent is only for medical malpractice.

. . . .

Pres. Pro Tem: Thank you, Senator. Are there any other questions? . . .

Bramble: Thank you President Pro Tem. I have a question for Senator Valentine or Senator Waddoups, I'm not sure which. I received an email from an attorney in Provo, questioning the issue of prelitigation notification and such for a hospice worker. Would they be included in this? And I'm not certain whether your intent language just covered that issue or not. There was an expectation that there would be an amendment that would clarify that, and I just wanted to make certain that that situation of a hospice worker who rear-ended someone – was the example that was being used – that they would be brought into this potentially.

. . . .

Waddoups: Yes. It's not our intention to cover the worker. We're extending this only to the facility itself.

Bramble: Well, my question specifically – this email made reference to Senator Valentine – a representation that Senator Valentine was intending to bring an amendment to the floor today regarding the issue that this attorney had.

. . . .

Valentine: I had considered adding an amendment on line thirty nine to say that it was limited to just the delivery of medical services. In meeting with the attorney who helped draft this bill, he showed me the existing language that is now re-codified as section fifteen. And

that existing language provides that it only deals with malpractice actions against a health care provider – going on further – which arises out of health care rendered, or which should have been rendered – that the shortened two-year statute of limitations was only limited to those types of causes of action. Therefore, the language that I had proposed adding to the definition of the facility was duplicative of the very language that I've just read that is now being renumbered as section fifteen.

It therefore appeared, based upon the intent of the sponsor of the bill, that that proposed amendment was not needed because the existing language was already there and it was very clear from the sponsor that it was not intended to expand the statute of limitation coverage – that shortened statute of limitations coverage – or the notice of intent, or the prelitigation screening panel, or any of the other protections for medical malpractice, to other causes of action. So based upon the representations given on the floor today, I can support the bill without the amendment because it's already in the statute.

Bramble: Thank you. And that was the clarification that I was seeking. So it's my understanding then – perhaps this is redundant – but **this only applies to medical malpractice situations; it does not apply to other causes of action that someone may bring in a course of their activities. Is that correct?**

Waddoups: **Yes, it is.**

Bramble: Thank you.

. . . .

Allen: I do have a question, and actually it's to Senator Valentine. And I don't remember seeing this use of floor debate being used quite this clearly, and I'd be interested in knowing how you practically, as an attorney, use it. Is it in the courtroom? Or is it in the office? Or how do you practically use floor debate to decide an issue of question in a courtroom?

Valentine: I'll yield to that, and thank you for asking. Often times when attorneys are seeking to try to understand the intent of the legislature they'll go to the very tapes that are being made right now to hear what the debate was to try to understand what the sponsor of the bill was intending with the bill. That's why we felt like it was really important to make a very clear record as to what we really intend. That's why I asked the questions we did and made the statements we did, and I appreciate the question Senator Allen.

. . . .

Julander: I just need clarification from the Sponsor. When this bill came through committee, and as I read it, we aren't changing anything except bringing in other facilities that the hospitals have already had?

Waddoups: That's correct. And we're not actually even bringing them in. We're just putting it in the definition of what was implied –

Julander: That's right.

Waddoups: – in another part of the code. Yes.

Julander: Okay. But we're not changing the malpractice –

Waddoups: Correct.

Julander: – or any of that.

Waddoups: Correct.

Julander: Thank you.

. . . .

Pres. Pro Tem: Thank you, Senator. Are there any other questions or comments of Senator Waddoups? Seeing none: Senator.

Waddoups: Thank you. I call the question on House Bill 112.

Pres. Pro Tem: Motion is: Shall House Bill 112 be up for final passage? Roll call vote.

[Roll Call Vote]

> Pres. Pro Tem: House Bill 112 having received twenty seven aye votes and zero nay votes will be signed by the President in open session and returned to the house.

Id. (emphasis added). The Legislature's understanding is that the Health Care Malpractice Act applies only to claims of professional malpractice, not to claims of ordinary negligence like a slip-and-fall claim. *Id.* Jacob's claim is that he fell off a rock formation due to Wingate's ordinary negligence. *See* App. at 13. None of Wingate's alleged wilderness therapy-related conduct giving rise to Jacob's claim—failing to assess the safety risks for climbing a rock formation, allowing youth to climb without safety gear, etc., *see id.*—included the exercise of professional medical judgment; and, thus, they do not amount to medical malpractice.[70] Holding that a claim arising from wilderness therapy is a medical malpractice claim under the Act would be at odds with legislative history.

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[70] *See, e.g., Perry v. Valerio*, 143 A.3d 1202, 1206 (Conn. App. Ct. 2016) (holding that "relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment"); *B.R. ex rel. Todd v. State*, 1 N.E.3d 708, 714-15 (Ind. Ct. App. 2013) (holding that "where the factual issues are capable of resolution by a jury without application of the standard of care prevalent in the local medical community" the claim is for ordinary negligence); *Blevins v. Hamilton Med. Ctr., Inc.*, 959 So.2d 440, 445 (La. 2007) (holding that factors for determining whether the state's malpractice act applies include "whether the pertinent act or omission involved assessment of the patient's condition"); *Cannon v. McKen*, 459 A.2d 196, 198, 201 (Md. 1983) (holding, in a case where a dental patient was injured when "a part of the chair and/or x-ray

6. The conclusion that wilderness therapy is not "health care" is supported by case law from other jurisdictions with statutes similar to the Utah Health Care Malpractice Act.

In the New York case of *Coursen v. New York Hospital-Cornell Medical Center*, 499 N.Y.S.2d 52, 53 (N.Y. App. Div. 1986), a plaintiff was admitted to a hospital for a hernia operation. *Id.* at 53. Soon after the operation, a doctor at the hospital instructed the plaintiff to "get out of bed and walk around." *Id.* "About 10 minutes later, a nurse's aide assisted [the] plaintiff out of bed and accompanied him on a walk through the hall, allegedly providing needed physical support." *Id.* "While in the hall, [the] plaintiff expressed a desire to use the bathroom, whereupon . . . the nurse's aide permitted him to enter the bathroom unaccompanied, during which time [the] plaintiff fainted, sustaining serious personal injuries as he fell to the floor." *Id.*

The *Coursen* court distinguished the advice of the doctor, who "instructed [the] plaintiff 'to get out of bed and "walk around" starting the same day as [his] surgery,'" from the conduct of the nurse's aide, who "allow[ed] the patient to enter and remain in the bathroom unattended or without assistance." *Id.* at 54. As

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wall attachment broke loose and fell on her," that the state's medical malpractice act "covers only those claims for damages arising from the rendering of or failure to render health care where there has been a breach by the defendant, in his professional capacity, of his duty to exercise his professional expertise or skill"). *See generally* Holly Piehler Rockwell, Annotation, *What patient claims against doctor, hospital, or similar health care provider are not subject to statutes specifically governing actions and damages for medical malpractice*, 89 A.L.R. 4th 887 (1991).

to the nurse's aide, "expert opinion [was] unnecessary to enable the trier of the facts to determine whether there was negligence in allowing the patient to enter and remain in the bathroom unattended or without assistance." *Id.* Thus, the state's medical malpractice statute of limitations did not apply to the plaintiff's claims against the aide. *See id.* But it did apply to the plaintiff's claim that the doctor's advice to get out of bed and walk around on the same day as the surgery "amounted to a departure from sound medical practice." *Id.* at 54-55.

So here, if Jacob's claims were based on an allegation that Wingate committed medical malpractice in its therapy sessions or by recommending hiking and other wilderness activities as a treatment for anxiety, the Utah Health Care Malpractice Act might apply. But that is not the basis for Jacob's claims. *See* App. at 13. Rather, like the *Coursen* plaintiff's claims based on the aide's decision to leave that plaintiff unattended and without assistance, Jacob's claims are based on Wingate's field staff members' decision to allow him and others to detour from a designated hiking route to climb a dangerous rock formation unattended and without assistance. *See id.* These are claims for ordinary negligence, not claims arising from the provision of health care to which the Health Care Malpractice Act applies.

Additional analogous cases from other jurisdictions support this conclusion. For example, Jacob alleges that Wingate was negligent when it

"allow[ed] [a] lead staff member to leave [a] group [of youth] with only one staff member"; when the remaining staff member "allowed the youth to take a detour from [a] designated [hiking] route" to climb a tall rock formation "without supervision." App. at 13. Similarly, in *Dispenzieri v. Hillside Psychiatric Hospital*, 724 N.Y.S.2d 203 (N.Y. App. Div. 2001), a hospital admitted for treatment a patient who had attempted suicide several days before. *Id.* at 203. The hospital then failed to prevent the patient from jumping out of a second-floor window. *Id.* at 204. The court observed that "[t]he gravamen of the complaint [was] that the defendants were negligent in 'permitting [the] plaintiff to remain unattended, unobserved, and unguarded,'' not that they were "negligen[t] in furnishing medical treatment." *Id.* "Whether the defendants breached their duty to exercise due care in their efforts to guard the plaintiff and to prevent another suicide attempt [did] not depend on an analysis of any medical treatment rendered." *Id.* Thus, the shorter limitation period for medical malpractice actions did not apply. *Id.* So here, Wingate's breach of its duty to supervise and prevent injury to youth on a hike does not depend on an analysis of any health care rendered and the Health Care Malpractice Act does not apply.

Jacob next alleges that Wingate was negligent when it did nothing "to determine whether climbing the rock formation would be safe for the youth" and did not "properly assess[] the danger of allowing the youth to climb the rock

formation." App. at 13. In *Lake Shore Hospital, Inc. v. Clarke*, 768 So.2d 1251 (Fla. Dist. Ct. App. 2000) (per curiam), the court held that a plaintiff's claim based on "injuries suffered . . . when she fell as she walked from her hospital bed to the bathroom" was not a "cause of action for medical negligence" and, therefore, that the state's medical malpractice act did not apply. *Id.* at 1251-52. In *Balascoe v. St. Elizabeth Hospital Medical Center*, 673 N.E.2d 651, 652-53 (Ohio Ct. App. 1996), the court similarly held that the claim of a plaintiff who was injured when she slipped and fell "[o]n her way back to her [hospital] bed . . . , allegedly on a piece of plastic," after using the bathroom, did not implicate the state's medical malpractice act because the claim "did not arise directly from the 'medical diagnosis, care or treatment' of [the plaintiff] but rather arose from the alleged negligent maintenance of [the] premises." *Id.* at 652-53. And in *Brodie v. Gardner Pierce Nursing & Rest Home, Inc.*, 403 N.E.2d 1184 (Mass. Ct. App. 1980), when a patient "slipped, fell and injured herself" while walking up some nursing home stairs, the court rejected the idea "that the very use of the premises by patients constitutes a part of their treatment." *Id.* at 1185-86. Instead, it held that an "action for negligent maintenance of a stairway, a conventional building component, does not raise a question requiring expert medical evaluation." *Id.* at 1186.

Likewise here, Wingate's staff members were not exercising medical expertise when they decided to do nothing to determine whether climbing the rock formation would be safe for the youth. Nor were they exercising medical expertise when they did not properly assess the danger of allowing the boys to climb the rock formation. In these respects, Wingate's conduct was analogous to that of the foregoing health care providers who failed to assess and discover the dangerous conditions on their stairs and walkways, leading to the falls of their patients.

Finally, Jacob alleges that Wingate was negligent when it "allow[ed] the youth to climb the dangerous rock formation without any safety gear"; did not "assist[] Jacob with his descent"; and "instruct[ed] Jacob to climb down the rock formation when and where it was dangerous to do so." App. at 13. The case of *Feifer v. Galen of Fla., Inc.*, 685 So.2d 882 (Fla. Dist. Ct. App. 1996), is similar. There an elderly patient who "walked in slow, shuffling steps with his hand upon the rear of his hip" was told by a hospital's "admission area employee or employees, none of whom were employed in any professional capacity," to "walk on [his] own power to . . . various areas of [a hospital], all at considerable distances from the reception area and each other, down long corridors with hard floors, no handrails, and no benches or chairs for sitting or resting, with neither a wheelchair nor an escort having been provided to assist [him]." *Id.* at 883. "After

walking a great distance to the various areas of the [hospital] to which [he] had been directed, [the elderly man] suddenly fell to the floor, suffering a broken hip[.]" *Id.* at 884. The court held that the elderly man's subsequent lawsuit against the hospital was "one for premises liability based upon unreasonably dangerous conditions and/or practices," not one for medical malpractice; therefore, the requirements of the state's health care malpractice act did not apply. *Id.* at 885.

So here, Wingate's unlicensed staff exercised no professional medical judgment when they allowed Jacob to climb a tall, dangerous rock formation without training, supervision, or safety gear; instructed him on where to climb down; but failed to assist him in his descent. In this conduct, Wingate's unlicensed field staff was like the hospital's unlicensed admissions employees who instructed a vulnerable, elderly patient to walk long distances without safety aids or support.

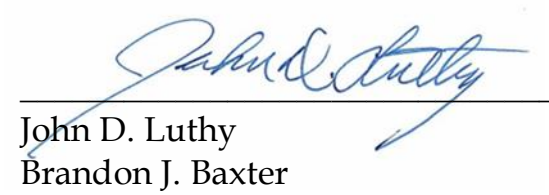
In sum, each of the foregoing cases from other jurisdictions with statutes similar to Utah's Health Care Malpractice Act support the conclusion that wilderness therapy, including hiking and/or a detour to go rock climbing, is not "health care."

CONCLUSION

For the foregoing reasons, this Court should conclude that, although Wingate is a "health care provider" under the Utah Health Care Malpractice Act when it is providing counseling, it was not acting as a "health care provider" while rendering the wilderness therapy that caused Jacob's injuries. The injuries sustained by Jacob while climbing a rock formation during wilderness therapy do not "relat[e] to or aris[e] out of health care rendered or which should have been rendered by [a] health care provider" within the meaning of the Act.

RESPECTFULLY SUBMITTED this 24th day of February 2020.

PECK HADFIELD BAXTER & MOORE, LLC



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CERTIFICATE OF COMPLIANCE

The foregoing Brief of Appellant complies with the type-volume limitation of rule 24(g) of the Utah Rules of Appellate Procedure as it has been prepared using 13-point Book Antiqua, a proportionally-spaced typeface, and contains 9,253 words according to the undersigned counsel's word processing system, Microsoft Word 2010. The foregoing Brief of Appellant also complies with rule 21 of the Utah Rules of Appellate Procedure governing public and private records.

DATED this 24th day of February 2020.

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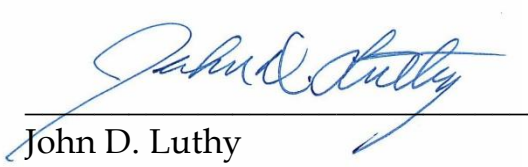

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I hereby certify that on the 24th day of February 2020, I caused a true and correct copy of the foregoing Brief of Appellant to be served via email upon the following:

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ADDENDUM

Addendum A

Determinative Statutory Provisions
Utah Code Ann. § 78B-3-401
Title

This part shall be known and may be cited as the "Utah Health Care Malpractice Act."

Utah Code Ann. § 78B-3-402
Legislative findings and declarations – Purpose of act

(1) The Legislature finds and declares that the number of suits and claims for damages and the amount of judgments and settlements arising from health care has increased greatly in recent years. Because of these increases the insurance industry has substantially increased the cost of medical malpractice insurance. The effect of increased insurance premiums and increased claims is increased health care cost, both through the health care providers passing the cost of premiums to the patient and through the provider's practicing defensive medicine because he views a patient as a potential adversary in a lawsuit. Further, certain health care providers are discouraged from continuing to provide services because of the high cost and possible unavailability of malpractice insurance.

(2) In view of these recent trends and with the intention of alleviating the adverse effects which these trends are producing in the public's health care system, it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide health-related malpractice insurance while at the same time establishing a mechanism to ensure the availability of insurance in the event that it becomes unavailable from private companies.

(3) In enacting this act, it is the purpose of the Legislature to provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated; and to provide other procedural changes to expedite early evaluation and settlement of claims.

Utah Code Ann. § 78B-3-403
Definitions

. . . .

(10) "Health care" means any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

(11) "Health care facility" means general acute hospitals, specialty hospitals, home health agencies, hospices, nursing care facilities, assisted living facilities, birthing centers, ambulatory surgical facilities, small health care facilities, health care facilities owned or operated by health maintenance organizations, and end stage renal disease facilities.

(12) "Health care provider" includes any person, partnership, association, corporation, or other facility or institution who causes to be rendered or who renders health care or professional services as a hospital, health care facility, physician, registered nurse, licensed practical nurse, nurse-midwife, licensed direct-entry midwife, dentist, dental hygienist, optometrist, clinical laboratory technologist, pharmacist, physical therapist, physical therapist assistant, podiatric physician, psychologist, chiropractic physician, naturopathic physician, osteopathic physician, osteopathic physician and surgeon, audiologist, speech-language pathologist, clinical social worker, certified social worker, social service worker, marriage and family counselor, practitioner of obstetrics, licensed athletic trainer, or others rendering similar care and services relating to or arising out of the health needs of persons or groups of persons and officers, employees, or agents of any of the above acting in the course and scope of their employment.

. . . .

(17) "Malpractice action against a health care provider" means any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider.

. . . .

Utah Code Ann. § 78B-3-404
Statute of Limitations – Exceptions – Application

(1) A malpractice action against a health care provider shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence.

. . . .

Utah Code Ann. § 78B-3-412
Notice of intent to commence action

(1) A malpractice action against a health care provider may not be initiated unless and until the plaintiff:

(a) gives the prospective defendant or his executor or successor, at least 90 days' prior notice of intent to commence an action; and

(b) except for an action against a dentist, the plaintiff receives a certificate of compliance from the division in accordance with Section 78B-3-418.

. . . .

Utah Code Ann. § 78B-3-416
Division to provide panel – Exemption – Procedures – Statute of limitations tolled – Composition of panel – Expenses – Division authorized to set license fees

. . . .

(2)(a) The party initiating a medical liability action shall file a request for prelitigation panel review with the division within 60 days after the service of a statutory notice of intent to commence action under Section 78B-3-412.

. . . .

(4) The division shall provide for and appoint an appropriate panel or panels to hear complaints of medical liability and damages, made by or on behalf of any patient who is an alleged victim of medical liability. The panels are composed of:

(a) one member who is a resident lawyer . . . ;

(b)(i) one member who is a licensed health care provider listed under Section 78B-3-403, who is practicing and knowledgeable in the same specialty as the proposed defendant . . . ; or

(ii) in claims against only hospitals or their employees, one member who is an individual currently serving in a hospital administration position directly related to hospital operations or conduct that includes responsibility for the area of practice that is the subject of the liability claim . . . ; and

(c) a lay panelist who is not a lawyer, doctor, hospital employee, or other health care provider, and who is a responsible citizen of the state . . . .

. . . .

Utah Code Ann. § 78B-3-423
Affidavit of Merit

. . . .

(1)(b) The claimant shall file an affidavit of merit:

(i) within 60 days after the day on which the pre-litigation panel issues an opinion, if the claimant receives a finding from the pre-litigation panel in accordance with Section 78B-3-418 of non-meritorious . . . .

(2) The affidavit of merit shall:

. . . .

(b) include an affidavit signed by a health care provider who meets the requirements of Subsection (4) . . . .

. . . .

(4) A health care provider who signs an affidavit under Subsection (2)(b) shall:

(a) if none of the respondents is a physician or an osteopathic physician, hold a current unrestricted license issued by the appropriate licensing authority of Utah or another state in the same specialty or of the same class of license as the respondents; or

(b) if at least one of the respondents is a physician or an osteopathic physician, hold a current unrestricted license issued by the appropriate licensing authority of Utah or another state to practice medicine in all its branches.

. . . .

Addendum B

Senate Floor Debate
2002 General Legislative Session
House Bill 112
3rd Reading, Final Passage, Signed

Day 39 – February 28, 2002

https://le.utah.gov/av/floorArchive.jsp?markerID=43730

at

1:53:05 to 2:09:11

(Unofficial Transcript)

President Pro Tem: Senator Waddoups.

Senator Waddoups: Thank you, Mr. President Pro Tem. I move to un-circle House Bill 112.

President Pro Tem: Motion is that we un-circle House Bill 112. All in favor say: Aye.

Senators: Aye.

President Pro Tem: Any opposed?

Senators: [Silence]

President Pro Tem: Senator Waddoups.

Senator Waddoups: Thank you. House Bill 112 is the legislation that we discussed yesterday that have amendments to the Health Care Malpractice Act. It specifically puts in statute the member organizations, the health care agencies, hospices, nursing care facilities, assisted living facilities, all of those acute care hospitals, end renal disease facilities – all of those in there – to specify that they are indeed meaning – included in the definition "Health Care Facility."

The intent of this is to make it clear that these are, indeed, considered Health Care Facilities. There's been some litigation, some effort, to differentiate between some of these things – that they aren't included in the definition that we have. And, as far as I know, there have been no cases where they've won, but it – the purpose of this will cut down on the number of legal cases that are filed, probably, and it will certainly cut down on the arguments that are made.

I believe this will help reduce the cost to these health care providers. It will reduce the risk, as the aging population grows, of long-term health care services not being available. I believe this is a necessary thing. It's

covered vaguely in other parts of the statute now, so I don't think we're changing anything. We're just clarifying it. Think it's the right thing to do. Now there was some concern expressed yesterday, and I believe those that expressed it have had the opportunity to talk to the counsel and clarify that. But to address their concerns we have also concurred that the problem that they're addressing does need to be addressed. Senator Valentine and our counsel have talked for some time now about the issue and have agreed to it. But he and I both agree that something needs to be said on the floor to make sure that the record is clear what we're not intending to do also.

And so after Senator Valentine has made his comments regarding this issue, I'm going to emphasize them myself, and I concur with what I've heard he's going to say. I'll certainly not put that in affirmative fashion until he has said them because sometimes you're surprised. But that's where I think we're going.

President Pro Tem: Well he's currently standing behind you, Senator, and if you think you've clearly stated what he intended to say, there's no need for me to –

Senator Waddoups: No, I haven't. I just rambled long enough for him to finish his phone call.

President Pro Tem: I see. Well, you certainly did an excellent job. Senator Valentine.

Senator Valentine: Thank you, Mr. President. Yes, my twin, Senator Waddoups, did an excellent job. I do need to ask him a couple of questions, if he would yield to a couple of questions however.

Senator Waddoups: I yield.

President Pro Tem: That would be just fine.

Senator Valentine: Is it your intent with this bill to extend the statute of limitations for other types of causes of actions to these health care facilities, including hospitals, such as a slip-and-fall case?

Senator Waddoups: Definitely not. I believe that we're dealing only with the structure of the facility itself. As far as their liability for negligence in a slip-and-fall or a non-malpractice issue, I'm not intending to change that at all. And that is the issue that we were discussing previously. We do not intend to extend that – or shorten that statute of limitations.

Senator Valentine: So it would be your intent as the sponsor of the bill on the Senate floor to say that the statute of limitations – the short statute of limitations – would only apply to medical malpractice for the delivery of health care services. Is that correct?

Senator Waddoups: That's a hundred percent correct.

Senator Valentine: Would that also include things like the notice of intent to commence action, the prelitigation screening panel – that those provisions would not apply to non-professional malpractice cases? Would that also be your intent?

Senator Waddoups: Our intent is only for medical malpractice.

Senator Valentine: And would it also be true that if someone attempted to put forward the idea that because they are a health care facility, as defined on line thirty six, that – and they asserted that they had a short statute of limitations because of that status, even in a case that was not a medical malpractice case – that that would arise to the level of being bad faith because it does not – it does not meet what you intend?

Senator Waddoups: I'm glad you used those words. That's exactly what I have heard has happened in the past. I believe that is bad faith, and it is certainly not our intent to allow for that extension.

Senator Valentine: Thank you very much, Senator. Thank you, Mr. President.

President Pro Tem: Thank you, Senator. Are there any other questions? Senator Bramble. Be patient. Okay.

Senator Bramble: Thank you President Pro Tem. I have a question for Senator Valentine or Senator Waddoups, I'm not sure which. I received an email from an attorney in Provo, questioning the issue of prelitigation notification and such for a hospice worker. Would they be included in this? And I'm not certain whether your intent language just covered that issue or not. There was an expectation that there would be an amendment that would clarify that, and I just wanted to make certain that that situation of a hospice worker who rear-ended someone – was the example that was being used – that they would be brought into this potentially.

Senator Valentine: I think that should probably be answered by the sponsor.

President Pro Tem: Senator Waddoups?

Senator Waddoups: Yes. It's not our intention to cover the worker. We're extending this only to the facility itself.

Senator Bramble: Well, my question specifically – this email made reference to Senator Valentine – a representation that Senator Valentine was intending to bring an amendment to the floor today regarding the issue that this attorney had.

Senator Valentine: If I may, Mr. President?

President Pro Tem: Senator.

Senator Valentine: I had considered adding an amendment on line thirty nine to say that it was limited to just the delivery of medical services. In meeting with the attorney who helped draft this bill, he showed me the existing language that is now re-codified as section fifteen. And that existing language provides that it only deals with malpractice actions against a health care provider – going on further – which arises out of health care rendered, or which should have been rendered – that the shortened two-year statute of limitations was only limited to those types of causes of action. Therefore, the language that I had proposed adding to the definition of the facility was duplicative of the very language that I've just read that is now being renumbered as section fifteen.

It therefore appeared, based upon the intent of the sponsor of the bill, that that proposed amendment was not needed because the existing language was already there and it was very clear from the sponsor that it was not intended to expand the statute of limitation coverage – that shortened statute of limitations coverage – or the notice of intent, or the prelitigation screening panel, or any of the other protections for medical malpractice, to other causes of action. So based upon the representations given on the floor today, I can support the bill without the amendment because it's already in the statute.

Senator Bramble: Thank you. And that was the clarification that I was seeking. So it's my understanding then – perhaps this is redundant – but this only applies to medical malpractice situations; it does not apply to other causes of action that someone may bring in a course of their activities. Is that correct?

Senator Waddoups: Yes, it is.

Senator Bramble: Thank you.

President Pro Tem: Thank you, Senator Bramble. Senator Spencer.

Senator Spencer: And perhaps this question can be answered by Senator Valentine as well. Looking at lines thirty three to thirty five, which are not being amended in this bill, there is a definition of health care. Perhaps that would be a good place to identify things which are not considered health care, such as intentional torts by doctors, nurses, or whoever. Because I know that issue has been brought up in litigation numerous times: exactly what does health care mean in the context of an intentional tort, either in or outside the facility? That may be the place to clarify what you are talking about.

Senator Valentine: I looked at that as well and felt like that was probably moving outside of what the sponsor had intended in the bill, and therefore resisted that temptation to amend section ten. Because I think, based upon what the sponsor just indicated on the floor to my questions and to Senator Bramble's questions, the intent is to not expand it to other sorts of causes of action, whether they be in tort, or contract, or anything else, other than the delivery of health care services – medical malpractice.

President Pro Tem: Senator Spencer.

Senator Spencer: Going to that specific point, should then health care be defined as not including intentional torts? And then I think you get to the individuals and the facility as well if we put that clarification in there. I would like to make that amendment.

President Pro Tem: Would you repeat the amendment then, Senator?

Senator Spencer: Yes. The amendment would go at the end of line thirty five, and it's – we're inside the definition of healthcare. The amendment would be: Healthcare does not include intentional torts.

President Pro Tem: Intentional –

Senator Spencer: Intentional torts.

President Pro Tem: Torts. With a T?

Senator Spencer: With a T.

President Pro Tem: Thank you. Motion to amend has been placed. Any discussion? Senator Waddoups?

Senator Waddoups: Yes.

President Pro Tem: Senator Valentine? Any discussion to that?

Senator Waddoups: Yes.

President Pro Tem: Senator Waddoups, go ahead.

Senator Waddoups: Thank you. I think my first comment is to reiterate what Senator Valentine says. That's going beyond the scope of what we were trying to address here. It is a problem that I think is legitimate for Senator Spencer to raise, and I'm almost tempted to use a comment that I've heard used in the past, except that it sounds sort of offensive when you say it, and I don't mean to be at all offensive. But my comment is – please don't take this offensively,

I'm not – it's a good issue, and it probably needs to be addressed, but use your own bill.

Senator Spencer: Based on that, I'll withdraw that amendment.

President Pro Tem: Thank you, Senator. The motion to amend has been withdrawn. Are there any other questions or comments? I think Senator Allen had some – a question or comment.

Senator Allen: I do have a question, and actually it's to Senator Valentine. And I don't remember seeing this use of floor debate being used quite this clearly, and I'd be interested in knowing how you practically, as an attorney, use it. Is it in the courtroom? Or is it in the office? Or how do you practically use floor debate to decide an issue of question in a courtroom?

Senator Valentine: I'll yield to that, and thank you for asking. Often times when attorneys are seeking to try to understand the intent of the legislature they'll go to the very tapes that are being made right now to hear what the debate was to try to understand what the sponsor of the bill was intending with the bill. That's why we felt like it was really important to make a very clear record as to what we really intend. That's why I asked the questions we did and made the statements we did, and I appreciate the question Senator Allen.

President Pro Tem: Senator Julander, did you have a question? I'm sorry. I'm not very good at this part of it yet. Now you can go ahead.

Senator Julander: Thank you, Mr. President. I just figured you couldn't look over here and – but we wanted you too.

President Pro Tem: I was – I honestly was looking over there, but you kept standing up, and then you'd sit down, and then you'd stand up and –

Senator Julander: I was trying –

President Pro Tem: I was very confused.

Senator Julander: I just need clarification from the Sponsor. When this bill came through committee, and as I read it, we aren't changing anything except bringing in other facilities that the hospitals have already had?

Senator Waddoups: That's correct. And we're not actually even bringing them in. We're just putting it in the definition of what was implied –

Senator Julander: That's right.

Senator Waddoups: – in another part of the code. Yes.

Senator Julander: Okay. But we're not changing the malpractice –

Senator Waddoups: Correct.

Senator Julander: – or any of that.

Senator Waddoups: Correct.

Senator Julander: Thank you.

Senator Waddoups: But we're trying to cut down the court arguments that said maybe they weren't met.

Senator Julander: Okay, thank you. Thank you –

President Pro Tem: Thank you, Senator. Are there any other questions or comments of Senator Waddoups? Seeing none: Senator.

Senator Waddoups: Thank you. I call the question on House Bill 112.

President Pro Tem: Motion is: Shall House Bill 112 be up for final passage? Roll call vote.

[Roll Call Vote]

President Pro Tem: House Bill 112 having received twenty seven aye votes and zero nay votes will be signed by the President in open session and returned to the house.