CASE NO. 20190953-SC

IN THE UTAH SUPREME COURT

JACOB M. SCOTT,
Plaintiff-Appellant,

v.

WINGATE WILDERNESS THERAPY, LLC,
Defendant-Appellee.

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

OPENING BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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February 24, 2020

CURRENT AND FORMER PARTIES

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There are no parties to the proceeding in this matter who are not parties in this Court.

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INTRODUCTION

The Tenth Circuit seeks guidance on the appropriate interpretation of the phrase "malpractice action against a health care provider" used in Utah's Health Care Malpractice Act (the Act) to assist in a determination of whether Plaintiff Jacob Scott's claim against WinGate Wilderness Therapy, LLC is subject to the Act. The Tenth Circuit's inquiry appears directed at what constitutes "health care" and the meaning of the requirement that the claim at issue "relat[e] to or aris[e] out of health care."

WinGate operates an outdoor youth program to provide behavioral, substance abuse, and mental health services to troubled adolescents. Its services are commonly referred to as "wilderness therapy" or "outdoor behavioral therapy." Jacob has conceded that WinGate is a "health care provider" within the meaning of the Act.

Jacob was a resident–patient of WinGate's in March 2015, his parents having enrolled him for treatment of his substance abuse, disruptive behavior, anxiety, and parent-child relationship issues. At the beginning of his treatment with WinGate, a licensed marriage and family counselor met with Jacob and prepared a treatment plan for him. That treatment plan called for Jacob to participate in WinGate's therapeutic program for eight weeks, during which Jacob would "be immersed in wilderness principles and experiences." The treatment plan

identified as one of the objectives of Jacob's treatment that he would "learn and implement wilderness skills/activities that will contribute to his increased confidence, problem-solving ability, and self-care," and specifically included "hiking" among the list of activities associated with this objective.

Jacob unfortunately was injured while hiking during his participation in WinGate's therapeutic program when he fell descending a rock formation that he and six other resident–patients had hiked. Days shy of three years after the incident, Jacob filed suit against WinGate asserting a claim for "negligence and reckless conduct" based on the injury he suffered during the hike. Jacob had not complied with the notice and prelitigation process requirements of the Act. WinGate moved to dismiss Jacob's claim on this basis and on the basis his claim was untimely, filed approximately nine months after the Act's two-year statute of limitations ran.

The district court granted the motion and dismissed Jacob's claim. On appeal, Jacob conceded that WinGate is a health care provider but argued that his injury did not "relate to or arise out of health care" and, therefore, is not a "malpractice action against a health care provider" subject to the Act. After briefing and argument on that issue, the Tenth Circuit certified to this Court the question of whether Jacob's claim is a "malpractice action against a healthcare provider." It did so on the basis that interpretation of this requirement of the Act,

and the definitions subsumed within it, presents an important matter of state law that has not been decided by Utah courts.

The certified question presents an issue of statutory interpretation. Under a plain language interpretation, consistent with both the Court's prior applications of the Act and the Act's stated purpose, Jacob's claim constitutes a "malpractice action against a health care provider" that is subject to the Act.

STATEMENT OF THE QUESTION CERTIFIED

The Court has accepted the following certified question from the Tenth Circuit:

> Where WinGate is a "health care provider" under Utah Code Section 78B-3-403(12), does an injury sustained by Jacob Scott 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 Utah's Health Care Malpractice Act?

STATEMENT OF THE CASE[1]

Nature of the Case

In early March 2015, at the time the injury at issue in this case occurred, Jacob was enrolled and participating in WinGate's wilderness therapy program.

[1] For purposes of its motion to dismiss and this appeal, WinGate has accepted the allegations of Jacob's complaint as true. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). Because WinGate's motion raised challenges to the district court's subject matter jurisdiction, it was entitled to consider matters outside of the complaint.

(App. 7.) WinGate, located in Southern Utah, operates an outdoor youth program to provide behavioral, substance abuse, and mental health services to troubled adolescents. (App. 7 (citing Utah Code § 62A-2-101(45)), 8, 31-32.) It commonly treats youths with post-traumatic stress disorder, emotional trauma, depression, bipolar disorder, reactive attachment disorder, obsessive compulsive disorder, substance abuse, attention deficit disorder, suicidal ideation, borderline personality disorder, and oppositional defiance disorder, among other behavioral disorders. (App. 162.) WinGate is licensed to provide such treatment by the Utah Department of Human Services; is accredited by the Outdoor Behavioral Healthcare Council; and is a member the National Association of Therapeutic Schools and Programs. (App. 32.)

Although there is no singular definition of wilderness therapy, it is commonly understood as the "prescriptive use of wilderness experiences by licensed mental health professionals to meet the therapeutic needs of clients." Outdoor Behavioral Healthcare Council, *About Us*, https://obhcouncil.com/about/. As researchers in the field have described, wilderness therapy "involves immersion in an unfamiliar environment, group living with peers, individual and group therapy sessions, educational curricula and application of primitive skills such as fire-making and backcountry travel." Keith C. Russell et al., *How Wilderness Therapy Works: An Examination of the Wilderness Therapy Process to Treat*

Adolescents with Behavioral Problems and Addictions, USDA Forest Service Proceedings RMRS-P-15-VOL-3 at 207 (2000).[2] "These processes are all designed to address problem behaviors by fostering personal and social responsibility and emotional growth of clients." *Id.*

Participants in WinGate's program spend the entire duration of the program in the wilderness. (App. 32.) While there, residents are treated by licensed therapists, psychologists, licensed clinical social workers, and various other professionals. (*Id.*) They are immersed in all aspects of living in the wilderness.

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[2] *available at* https://www.fs.fed.us/rm/pubs/rmrs_p015_3/rmrs_p015_3_207_217.pdf; *see also* Outdoor Behavioral Healthcare Council, *About Us*, https://obhcouncil.com/about/ (describing outdoor behavioral healthcare as consisting of:

> • Extended back-country travel and wilderness living experiences long enough to allow for clinical assessment, establishment of treatment goals, and a reasonable course of treatment not to exceed the productive impact of the experience,
> • Active and direct use of clients' participation and responsibility in their therapeutic process,
> • Continuous group-living and regular formal group therapy sessions to foster teamwork and social interactions (excluding solo experiences),
> • Individual therapy sessions, which may be supported by the inclusion of family therapy,
> • Adventure experiences utilized to appropriately enhance treatment by fostering the development of eustress (i.e., the positive use of stress) as a beneficial element in the therapeutic experience,
> • The use of nature in reality as well as a metaphor within the therapeutic process, and
> • A strong ethic of care and support throughout the therapeutic experience").

(*Id.*) This includes camping, hiking, climbing, and exploring the wilderness. (*Id.*) Hiking comprises a substantial portion of the residents' time in the wilderness, as typically five days per week are "hiking days"—days during which the residents breakdown camp and hike to the next campsite located between two and five miles away in the winter or five to ten miles away in the summer. (App. 173.) These activities, as well as the immersive experience and continuous interactions with the wilderness more generally, are therapeutic by design and intention. (App. 32.)

Jacob's parents enrolled him in WinGate's wilderness therapy program on February 21, 2015. (App. 7, 43.) At the time, he was a few months shy of eighteen years old. (*See* Pl.'s 10th Cir. Br. at 9 & Attachment A at 8.) Jacob's parents sought treatment for his substance abuse, disruptive behavior, anxiety, and parent-child relationship issues. (App. 33, 179; Supp. App. [dkt. 19-7 at 2-3, 5-7].) On the day of his enrollment, Jacob was driven to the wilderness, where he hiked a short distance to a campsite to meet up with a group of patient–residents. (App. 74.)

On February 23—two days after his enrollment—Jacob met with Scott Hess, a licensed marriage and family therapist employed by WinGate, for an initial therapy session. (App. 74, 178-79.) Mr. Hess prepared a treatment plan for Jacob, identifying initial diagnostic impressions, outlining the course of treatment, and identifying his treatment areas. (App. 178-79, 182-83.) The treatment plan Mr. Hess prepared "called for, among other things, weekly individual and group

therapy sessions, daily psychoeducational and process groups, hiking (exercise), and recommended a stay in the therapeutic program for eight weeks." (App. 179, 182-83.) Specifically, the treatment plan identified the following services Jacob would participate in:

> Jacob will participate in individual and group therapy as well as daily psychoeducational and process groups. He will be immersed in wilderness principles and experiences, and will have the opportunity to learn & apply 'Leave No Trace' principles throughout his outdoor experience at WinGate. He will have the opportunity to learn outdoor survival skills as well as a variety of methods for making and utilizing primitive tools, instruments, and shelters. *Jacob will be introduced to new philosophies and strategies to assist him in creating a more effective path for himself and for his family relationships.*

(App. 182 (emphasis added).) Among the objectives for Jacob's identified treatment was that, "[e]xperientially, he will learn and implement wilderness skills/activities that will contribute to his increased confidence, problem-solving ability, and self-care (making and using a bow-drill fire set, building sleeping shelters, learning and implementing 'Leave No Trace' practices, *hiking*, cooking, etc.)" (App. 183 (emphasis added).)

On March 6, 2015, while in the wilderness, Jacob, six other patient–residents, and two staff members went on a day hike. (App. 9.) During the hike, the patient–residents noticed a rock formation they wanted to explore. (*Id.*) According to Jacob, one of the two staff members gave permission to explore and climb the rock

formation. (App. 9-10.) Jacob and the other patient–residents each successfully reached the top of the rock formation. (App. 10.)

According to Jacob, climbing down was more difficult, due in part to a dusting of snow on the rock. (*Id.*) After one of the patient–residents nearly fell, Jacob reports he became frightened and told the staff members he did not believe he could make it down. (*Id.*) The staff members told Jacob to follow the same route he had used to climb up, but did not otherwise provide assistance. (*Id.*) As he attempted to descend from the rock formation, Jacob slipped and tumbled approximately twenty-five feet to the bottom of the rock formation. (*Id.*) He landed on his left knee, sustaining a high-energy comminuted left patellar fracture. (*Id.*)

Staff reported the injury, while the other patient–residents built a fire to keep Jacob warm. (*Id.*) Help arrived to the group's location in the wilderness approximately two to three hours later. (App. 12.) Jacob was then taken to a hospital in Kanab, Utah, where he received medical for his injury. (App. 12.) He turned eighteen years old a little over three months later. (*See* Pl.'s 10th Cir. Brief at 9 & Attachment A at 8.)

Procedural History

Jacob filed the instant action on March 2, 2018—approximately nine months after the Act's two-year statute of limitations had run. (App. 6-17, 213.) He

asserted a single cause of action against WinGate for "negligence and reckless conduct." (App. 7.) Prior to filing suit, Jacob did not provide the notice required under the Act to WinGate, nor did he participate in the required prelitigation screening process.[3] (*See* App. 24.)

WinGate filed a motion to dismiss Jacob's complaint on the bases Jacob's claims were barred by the applicable two-year statute of limitations and the court lacked subject matter jurisdiction over his claims due to his failure to comply with the notice and prelitigaton process requirements of the Act. (App. 18-29.) Jacob opposed that motion, arguing the Act does not apply to his claim and the statute of limitations should be equitably tolled. (App. 36-70.)

The district court granted WinGate's motion in a July 6, 2018, docket entry. It explained,

> The Court has reviewed the briefing on Defendant Wingate Wilderness Therapy's Motion to Dismiss and has determined to grant Wingate's motion for the reasons set forth in Wingate's Motion and Reply. Dismissal is appropriate based on Plaintiff's failure to comply with the prelitigation requirements of the Utah Health Care Malpractice Act (UHCMA) Utah Code Ann. § 78B-3-401 et seq.

[3] After the district court entered its order and Jacob filed his appeal, this Court decided *Vega v. Jordan Valley Med. Ctr., LP*, 2019 UT 35, 449 P.3d 31, and held that the provisions of the Act that require a plaintiff to receive an affidavit of merit and a certificate of compliance from the Division of Occupational and Professional Licensing are unconstitutional. *Vega* did not hold that the Act's statute of limitations or its prelitigation notice requirement are unconstitutional, such that it ultimately does not affect the outcome of this case. *See id.* ¶ 24 (leaving intact the pre-2010 version of the Act).

> Furthermore, dismissal *with prejudice* is appropriate because the two-year statute of limitations period, set forth in Utah Code Ann. § 78B-3-404, has run.

(App. 3-4 (Dkt. No. 26).) The district court instructed counsel for WinGate to prepare a proposed order memorializing this ruling by July 20, 2018, to be reviewed by counsel for Jacob. (*Id.*)

Counsel for WinGate prepared and circulated the proposed order as instructed. (App. 4 (Dkt. No. 29); Supp. App. 23.) Jacob filed an objection to the proposed order asserting several objections and requested the district court enter his proposed order. (Supp. App. 33-36.)

On the same day Jacob filed his objection, Jacob filed a motion to allow limited discovery. (App. 4 (Dkt. No. 28).) On March 14, 2019, the district court denied that motion as moot in light of its prior ruling on the motion to dismiss. (App. 204-05.) It entered a memorandum decision and order granting WinGate's motion to dismiss and a separate judgment that same day. (App. 206-15, 216.) The district court explained that WinGate is a health care provider within the meaning of the Act. With respect to the second requirement—that the claim arose out of or relates to the provision of health care—the district court explained,

> The Complaint makes it clear that Scott's injury relates to or arises out of health care rendered or which should have been rendered. Scott states in the Complaint that, at the time of the injury and "for some time before[,]" Wingate was "Attempting to provide behavioral or mental health services." The provisions of the UHCMA—including its pre-litigation requirements and statute of limitations—apply here.

(App. 212.) It further held that equitable tolling did not apply to render Jacob's claim, filed outside of the two-year statute of limitations, timely. (App. 212-14.)

Jacob appealed one portion of the district court's order dismissing his claims: its "conclusion that his injuries arise out of or relate to health care that Wingate provided or should have provided." (Pl.'s 10th Cir. Br. at 11.) Jacob conceded for purposes of the appeal that WinGate is a health care provider within the meaning of the Act. He further appeared to acknowledge that if his claims are subject to the Act, dismissal is required due to the failure to comply with the Act's prelitigation requirements and as barred by the two-year statute of limitations.

The Tenth Circuit heard argument on Jacob's appeal on October 22, 2019. Following that argument, on November 13, 2019, the Tenth Circuit issued an Order Certifying State Law Question. It noted that given that the parties "do not dispute that Jacob failed to satisfy the [Act's] procedural requirements prior to filing suit" or that "Wingate is a health care provider," "[t]he only issue remaining for appeal is whether Jacob's injuries 'ar[ose] out of health care rendered or which should have been rendered' by Wingate." *Scott v. WinGate Wilderness Therapy, LLC*, --- F. App'x ----, 2019 WL 5999991 at *3 (10th Cir. Nov. 13, 2019) (unpublished) (quoting Utah Code § 78B-3-403(17)). It determined that because the question of "[w]hether and to what extent an injury sustained in the course of 'wilderness therapy' 'relat[es] to or aris[es] out of health care rendered,' within the meaning of

the [Act] has yet to be addressed by a Utah state court," "the Utah Supreme Court should be permitted to answer this question in the first instance if it should choose to do so." *Id.* at *4.

Rulings Presented for Review

The Court granted certification and accepted the question the Tenth Circuit had certified to it.

SUMMARY OF THE ARGUMENT

The Court should answer the Tenth Circuit's certified question regarding the proper interpretation of the definition of a "malpractice action against a health care provider" according to the plain language of the Act and consistent with this Court's prior application of that Act as well as its prior interpretation of a phrase similar to the Act's "relating to or arising out of" requirement.

With respect to the meaning of "health care," the Act defines that term. Under a plain language reading of that definition, "health care" includes all actions that are performed as part or in furtherance of medical care or treatment being provided. While "health care" does not extend to those actions that bear only a tangential relationship to the medical care or treatment being provided, it does include those actions undertaken with a therapeutic purpose. Although this Court has never squarely addressed this issue, this plain language interpretation is consistent with the Court's prior discussion of the reach of the Act.

Nothing in the Act indicates that "health care" does not include actions undertaken with a therapeutic purpose, in furtherance of medical care or treatment, merely because the same action could be taken outside of a treatment context.

The Court has previously interpreted the second phrase included within the definition of "malpractice action against a health care provider" that is at issue in this case: "relating to or arising out of health care." That decision and the Court's interpretation of a similar phrase contained in Utah's Governmental Immunity Act establish that the "health care" need not be the sole cause of the injury. The requirement is met as long as "health care" is at least *a* proximate cause.

Applying these interpretations to this case reveals that Jacob's claim constitutes a "malpractice action" against WinGate, an admitted health care provider. He sustained the injury at issue while participating in WinGate's therapeutic program and while engaged in one of the very activities identified as part of his treatment plan to meet his treatment objectives.

This interpretation and application of the Act is consistent with the legislature's stated purpose for enacting the Act in 1976: to mitigate against rising costs of health care resulting from increased costs associated with claims against health care providers, both in the form of increased premiums for health-related malpractice insurance as well as practicing "defensive" health care. The

legislature's inclusion of a "wide range of providers" in the definition of "health care provider" evidences that its concerns were not limited to physicians, dentists, and psychologists, but extends to all those providing health care services.

Adopting a contrary, more narrow and exacting, interpretation of the Act would render it essentially meaningless for wilderness therapy programs such as WinGate. The wilderness therapy therapeutic process is not limited to what one might consider "traditional" health care—appointments with medical doctors and one-on-one or group counseling sessions with a psychologist or licensed counselor. Instead, it involves an immersive experience in the wilderness that is, by design and intention, therapeutic in nature. Staff members who are regulated by the Department of Human Services implement the treatment plans prepared for the patient–residents by licensed health care providers. They work with the patient–residents to meet the identified treatment objectives through interpersonal interactions as well as interactions with the wilderness. Each part of the patient–student's day is specifically planned to achieve a therapeutic result.

By adopting a narrow and restrictive interpretation of the Act, wilderness therapy programs would be left in the untenable position of being "health care providers" within the meaning of the Act that do not offer "health care" that is covered by the Act. Such an interpretation would render the Act essentially meaningless with respect to these programs, as well as other "health care

providers" that provide health care that does not easily fit into the traditional notion of an in-clinic doctor-patient interaction.

ARGUMENT

THE COURT SHOULD REAFFIRM THAT THE DEFINITION OF "HEALTH CARE" IS BROAD AND SHOULD INTERPRET THE REQUIREMENT THAT THE INJURY "RELATING TO OR ARISING OUT OF" HEALTH CARE AS REQUIRING THAT HEALTH CARE BE *A* PROXIMATE CAUSE OF THE INJURY. UNDER THIS INTERPRETATION, THE COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE.

"In deciding [a] certified question[] [this Court is] not reviewing a decision of a lower court." *Zimmerman v. Univ. of Utah*, 2018 UT 1, ¶ 13, 417 P.3d 78. Instead, it is "[t]ypically . . . addressing abstract questions of law, albeit in a context and manner useful to the resolution of a pending federal case." *Id.* Because of this context, the Court "routinely refer[s] to surrounding facts and circumstances not just to set the stage for [its] resolution of questions certified by federal courts, but also to illustrate the application of our answer in the context of the case." *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 2012 UT 66, ¶ 9, 289 P.3d 502.

Here, although the certified question is written in the specific factual context of Jacob's claim, it necessarily encompasses a broader question of the proper interpretation of the reach of the Act. This presents an issue of statutory interpretation. Specifically, it requires interpretation of the definition of a "malpractice action against a health care provider," which in turn requires

interpretation of the definition of "health care" and the meaning of "relating to or arising out of."

A. Under the plain language of the Act and prior precedent, the answer to the certified question is "yes": Jacob's injuries relate to and arose out of health care provided by WinGate.

The "goal when confronted with questions of statutory interpretation is to evince the true intent and purpose of the Legislature." *Bryner v. Cardon Outreach, LLC*, 2018 UT 52, ¶ 9, 428 P.3d 1096. "It is axiomatic that the best evidence of legislative intent is the plain language of the statute itself." *Id.* (cleaned up). "The first step of statutory interpretation is to look to the plain language, and where statutory language is plain and unambiguous, [Utah] Court[s] will not look beyond the same to divine legislative intent." *Id.* (cleaned up). "Rather, [the Court is] guided by the rule that a statute should generally be construed according to its plain language" *Id.* (cleaned up).

The Act defines "malpractice action against a health care provider" as "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 § 78B-3-403(17). "Health care" is in turn defined broadly as "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." Utah Code § 78B-3-403(10).

Under the plain language of these provisions, *see Bryner*, 2018 UT 52, ¶ 9, and the Court's prior application of the same, Jacob's claim is subject to the Act.

1. *The Court should reaffirm that "health care" is broad and includes acts and treatment performed as part of a patient's treatment.*

The threshold question presented by the certified question is what constitutes "health care." Where, as here, there is no dispute that the person or entity involved is a "health care provider," this question turns on whether the person or entity was performing or furnishing "an act or treatment . . . for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement." Utah Code § 78B-3-403(10). Stated differently, this definition—by its plain language—encompasses those actions performed as part of or in furtherance of the patient's medical care, treatment, or confinement.

This understanding is consistent with *Dowling v. Bullen*, 2004 UT 50, 94 P.3d 915, where the Court discussed the nexus between provider and treatment. There, the Court rejected the notion that use of the term "any" in the definition of "malpractice action" "reveals the legislature's intent that the [Act] apply to *every* cause of action involving the provision of health care services by a health care provider." *Id.* ¶ 11 (emphasis added). Such an interpretation of the definition without any regard for whether the conduct at issue had a treatment-related or

therapeutic purpose "would lead to absurd results." *Id.* As an example, the Court explained the therapist's interpretation would render a claim by "a patient whose money is unlawfully removed from her wallet by her physician while at the physician's office for a routine examination" subject to the Act. *Id.* This is inconsistent with the purpose of the Act, which was not to "confer the benefit of a shorter statute of limitations upon medical professionals whose alleged transgressions are only tangentially related to the provision of health care services." *Id.*

Under the plain language of the Act, and consistent with *Dowling*, the determinative feature in whether an act by a health care provider constitutes "health care" is its relationship to the medical care or treatment being provided–whether it is "for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement." Where the act is done in furtherance or as part of that medical care or treatment or has something more than a tangential relationship to it, the act qualifies as "health care."

Nothing in the language of the Act nor this Court's prior discussion of the purpose of the Act indicates that as long as this relationship exists, the mere fact the action could also occur outside of the context of medical care or other treatment, it cannot qualify has "health care." Indeed, such an interpretation would be inconsistent with the Act's inclusion of "a wide range of providers" in

the definition of "health care provider." *Carter v. Millford Valley Memorial Hospital*, 2000 UT App 21, 996 P.2d 1076, ¶ 20. In addition to physicians, dentists, and psychologists, who might be viewed as the prototypical "health care providers," this includes physical therapists, audiologists, speech-language pathologists, clinical social workers, social service workers, licensed athletic trainers, and other specifically-identified providers, as well as "others rendering similar care and services relating to or arising out of the health care needs of persons or groups of persons and officers." Utah Code § 78B-3-403(12).

It is not difficult to imagine that the medical care and treatment provided by such "health care providers" includes certain activities that people engage in during ordinary life. Perhaps the most obvious examples would be physical therapists and athletic trainers, who often oversee exercises similar to what one may do on his own at a gym outside of a therapeutic setting. There is no suggestion in the Act, however, that this fact makes the physical therapist's or athletic trainer's provision of care to their patients something other than "health care." The Utah Supreme Court's decision in *Carter* appears to recognize this.

There, a widower asserted claims against the hospital that had provided ambulance services and transported his wife, who died as a result of the heart condition that had precipitated the call for emergency medical services. 2000 UT App 21, ¶ 6. During the transport, the paramedics noticed that one of the

ambulance's gauges was not working properly and were concerned this could be an indicator of a more serious issue that might lead to a mechanical breakdown. *Id.* ¶ 4. Despite the ambulance operating without issue, the paramedics transferred the patient to a different ambulance that met them en route, resulting in an approximately twenty-minute delay. *Id.* ¶¶ 4-5.

In an effort to avoid the requirements of the Act, with which he had not complied, the plaintiff sought to "recast his cause of action" as one "based on a mechanic's oversight" rather than the decisions of the paramedics. *Id.* ¶ 9. The court rejected this effort, noting that the plaintiff's "theory is wholly speculative" and there was no evidence that "points to any particular mechanic, actual mechanical breakdown, or specific maintenance oversight." *Id.* In the associated footnote, the court stated, "If [the plaintiff] were able to point to a specific mechanical failure . . . we might view the issue differently. But, in the total absence of such specificity, [his] Complaint necessarily focuses on the ambulance staff and their decision to change ambulances, and our analysis accordingly focuses on whether the Hospital's paramedics, not its mechanics, are health care providers." *Id.* ¶ 9, n.5. And, the court held that the paramedics *were* health care providers, such that the Act applied to the claim. *Id.* ¶¶ 21-22.

Although apparently not directly challenged, the court in *Carter* necessarily accepted that the plaintiff's claim related to or arose out of the paramedics'

provision of health care to his wife. And, yet, the claim was based on "the paramedics' decision to change ambulances in the face of a malfunctioning gauge," *id.* ¶ 10—not the actual administration of medical services, such as providing oxygen or giving emergency medication. The court's concluding paragraph appears to encompass an explanation for why this claim involved "health care":

> Carter does not suggest that the ambulance was called simply to transport his wife—something he could presumably have done himself. The paramedics were present to render emergency medical care for Mrs. Carter's heart condition and to attempt to preserve her life during transportation to the Hospital.

Id. ¶ 22. Although merely transporting the plaintiff's wife to the hospital is something that can be done by anyone, the transport at issue was in connection with, and in furtherance of—part and parcel of—the emergency medical services the paramedics were providing.

2. *An injury relates to or arises out of health care when the provision of health care is* a *proximate cause of the injury.*

Although the Act does not define "relating to or arising out of"—the second part of the statutory definition at issue—this Court has interpreted that phrase in the context of the Act. It has also interpreted a similar phrase in the context of Utah's Governmental Immunity Act. These interpretations establish that health care need not be the sole cause of an injury in order for the injury to relate to or

arise out of health care; instead, this requirement is satisfied when the provision of health care is *a* proximate cause of the injury.

In *Smith v. Four Corners Mental Health Center, Inc.*, 2003 UT 23, 70 P.3d 904, this Court construed the "relating to or arising out of health care" requirement of the Act broadly. There, the plaintiff asserted claims against Four Corners Mental Health Center and his former foster parents based on alleged sexual assault he suffered by another foster child placed in the home. *Id.* ¶ 1. Four Corners provided mental health care and other related services in two counties in Utah and "supervised the foster care provided by the" foster parents. *Id.* ¶ 3. The plaintiff alleged Four Corners had been negligent because it knew of the other foster child's "violent character and . . . homosexual tendencies" and "failed to properly protect [the plaintiff] from injury by inadequately supervising caseworker services provided to the [foster parents, the plaintiff, and the other foster child] and by placing [the two foster children] in a home together." *Id.* ¶ 6.

In an effort to avoid the procedural requirements of the Act—which the plaintiff had not followed—the plaintiff argued that his "injuries did not arise out of the rendering of health care" but rather "out of Four Corners' negligent provision of foster care services." *Id.* ¶ 29. The Court rejected this argument, finding Four Corners' provision of mental health services was at least *a* cause of the plaintiff's injuries, if not the primary cause. It explained,

> even if we otherwise adopt [the plaintiff's] position that Four Corners provided him foster care services, we would not be able to conclude that [his] injury arose solely, or even mostly, out of Four Corners' foster care provider role. [The plaintiff's] complaint claims that Four Corners "knew, had reason to know, or should have known that [the other foster child] possessed a violent character, and demonstrated homosexual tendencies." He alleges that Four Corners should be held liable for several reasons, including the following: failing to provide adequate caseworker services to himself and [the other foster child], failing to supervise the preparation and implementation of [his] treatment plan, and failing to inform the [foster parents] and [him] of [the other foster child]'s dangerous characteristics. These allegations all arise out of Four Corners' provision of mental health services.

Id. ¶ 35.

Under *Smith*, as long as the injury at issue arose generally out of the provision of health care, the Act applies, even if the injury arose in part (and even mostly) out of unrelated services or conduct. This is consistent with the Court's treatment of a related concept under Utah's Governmental Immunity Act.

In that context, the Court "has . . . held that the phrase 'arises out of, in connection with, or results from' . . . means 'proximate' causation." *Larsen v. Davis Cty. Sch. Dist.*, 2017 UT App 221, ¶ 12, 409 P.3d 114, *cert. denied*, 421 P.3d 441 (Utah 2018) (citing *Barneck v. Utah Dep't of Transp.*, 2015 UT 50, ¶ 44, 353 P.3d 140). It explained that the immunity-invoking condition need not be the "sole cause of the injury to except the governmental entity from liability for the injury." *Id.* (discussing holding in *Barneck*). Rather, "so long as the immunity-invoking

condition was '*a* proximate cause' of the injury, the governmental entity would be entirely immune from suit." *Id.* ¶ 23 (quoting *Barneck*, 2015 UT 50, ¶¶ 38, 46, 47).

3. Applying these legal interpretations of the Act to this case, Jacob's claim falls within the scope of the Act.

Applying the above interpretations of "malpractice action," Jacob's claim in this case falls within the meaning of that phrase, rendering his claim subject to the Act.

First, the day hike during which Jacob's injury occurred is "health care" because it occurred as part and in furtherance of WinGate's treatment of Jacob. It was a critical part of the therapy WinGate was providing to Jacob, and specifically identified as a component of the means Mr. Hess had identified to accomplish the therapeutic objectives he had identified for Jacob.

Wilderness therapy, like that provided by WinGate, is the "prescriptive use of wilderness experiences by licensed mental health professionals to meet the therapeutic needs of clients." Outdoor Behavioral Healthcare Council, *About Us*, https://obhcouncil.com/about/. Central components of this type of therapy are "immersion in an unfamiliar environment, group living with peers, individual and group therapy sessions, educational curricula and application of primitive skills such as fire-making and backcountry travel." Russell at 207. More specifically, patients typically engage in "[e]xtended back-country travel and wilderness living experiences long enough to allow for clinical assessment, establishment of

treatment goals, and a reasonable course of treatment" and "[a]dventure experiences utilized to appropriately enhance treatment by fostering the development of eustress (i.e., the positive use of stress) as a beneficial element in the therapeutic experience." https://obhcouncil.com/ about/. "These processes are all designed to address problem behaviors by fostering personal and social responsibility and emotional growth of clients." Russell at 207.

These principles are embodied in and form the basis of the treatment plan Mr. Hess, a licensed marriage and family therapist employed by WinGate, developed for Jacob. As Mr. Hess described, the treatment plan he prepared after his initial therapy session with Jacob "called for, among other things, weekly individual and group therapy sessions, daily psychoeducational and process groups, hiking (exercise), and recommended a stay in the therapeutic program for eight weeks." (App. 178-79; *see also* App. 182-83.) The treatment plan explicitly called for Jacob to "be immersed in wilderness principles and experiences," during which he would "have the opportunity to learn outdoor survival skills as well as a variety of methods for making and utilizing primitive tools, instruments, and shelters." (App. 182.) The objectives for those treatment activities included that, "[e]xperientially, [Jacob] [would] learn and implement wilderness skills/activities that will contribute to his increased confidence, problem-solving ability, and self-care (making and using a bow-drill fire set, building sleeping shelters, learning

and implementing 'Leave No Trace' practices, *hiking*, cooking, etc.)" (App. 183 (emphasis added).)

WinGate was implementing this treatment plan at the time of Jacob's injury. Stated differently, it was performing or furnishing to Jacob the very type of activities Mr. Hess had identified as part of Jacob's eight-week therapeutic program: hiking and immersive wilderness experiences designed to provide increased confidence and develop problem solving and self-care skills.

While Jacob has portrayed the group hike during which his injury occurred as a routine recreational activity unrelated to health care, it cannot be divorced from the treatment WinGate was providing. As explained in a cover story of the American Psychological Association's *Monitor on Psychology*, wilderness therapy programs "use[] the evidence-based approaches that any good short-term residential-treatment therapist would use: cognitive behavioral therapy to combat negative thinking, journaling to help shed light on depression and anxiety, and group activities to overcome social phobia and develop greater self-confidence, to name a few." Tori DeAngelis, *Therapy Gone Wild*, American Psychological Association *Monitor on Psychology*, Vol. 44, No. 8 (Sept. 2013), Addendum D.[4] The difference is that "instead of doing this work in a fluorescent-lit treatment facility,"

[4] *available at* https://www.apa.org/monitor/2013/09/therapy-wild.

it occurs in the wilderness. *Id.* But, as the PhD psychologist interviewed in that article explained, "These are not Outward Bound courses or backpacking trips . . . . 'Those things have value unto themselves, but [wilderness therapy programs] offer a layer of real therapeutic work, a traditional insight-oriented approach to addressing whatever these kids' issues happen to be.'" *Id.*

Jacob's act of hiking or climbing the rock formation at the time of his fall was not simply hiking or climbing as one may do for recreation on a weekend. Rather, it was part of a larger therapeutic program in which Jacob was—with the recommendation of a licensed marriage and family counselor—immersed in the wilderness and engaged in activities that would require him to "learn and implement wilderness skills . . . that will contribute to his increased confidence, problem-solving ability, and self-care." (App. 183.) Notably, Mr. Hess specifically identified hiking and "wilderness . . . experiences" as among those activities Jacob was to engage in as part of his treatment. (App. 182-83.) These activities, including breaking down and setting up camp, are not for pleasure or even mere necessity; instead, they are designed to instill the patient–student with the identified skills in furtherance of a therapeutic purpose. Jacob's claim against WinGate is based on alleged deficiencies in the manner in which WinGate implemented this treatment plan. (App. 13.)

Under the plain language of the Act, WinGate's implementation of its treatment plan for Jacob is "health care."

Second, under the allegations of Jacob's complaint, WinGate's provision of health care—that is, the wilderness therapy program in which he was participating, for which Jacob has conceded WinGate is a "health care provider"—was at the very least *a* proximate cause of his injury. Accordingly, under *Smith* and the Court's interpretation of the related phrase in the Governmental Immunity Act, Jacob's claim falls within the Act.

B. This answer to the certified question is consistent with the stated purpose of the Act.

Although the legislative history for the original Act enacted in 1976 is missing,[5] the Act itself contains an explicit statement of its purpose, accompanied by legislative findings and declarations. Utah Code § 78B-3-402.

The legislature found and declared that "the number of suits and claims for damages and the amount of judgments and settlements arising from health care

[5]According to the Utah Division of Archives and Records Service, "[a]ll of 1976 is missing" from its inventories of the legislative process in the house of representatives and the senate. Utah Division of Archives and Records Service, *Series 432: Legislature. House of Representatives Working bills*, https://archives.utah.gov/research/inventories/428.html; Utah Division of Archives and Records Service, *Series 432: Legislature. House of Representatives Working bills*, https://archives.utah.gov/research/inventories/432.html. The definitions of "malpractice action against a health care provider" and "health care" have not changed since the original enactment of the Act. *See* Laws of Utah 1976, c. 23, § 3.

has increased greatly in recent years," which in turn had "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." Utah Code § 78B-3-402(1). To respond to these trends, the legislature deemed it "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." Utah Code § 78B-3-402(2). It accordingly adopted the Act for the stated purpose of "provid[ing] 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 § 78B-3-402(3).

Interpreting the Act so that it applies to claims asserted against health care providers based on injuries that were proximately caused at least in part by actions undertaken as part or in furtherance of medical care or treatment being provided to the patient is consistent with this stated purpose and the findings that led to the Act's enactment. The legislature expressed a clear intent to prevent the costs

associated with such claims from increasing the cost of health care. If either "health care" was defined more narrowly or "relating to or arising out of" was defined to require a higher degree of causation, fewer (and likely substantially fewer) claims would fall within the ambit of the Act. This would be true even where, as here, the party against whom the claim is asserted undisputedly provides health care. And, these non-covered claims would carry with them the same consequences that the legislature identified as necessitating the procedural "protections" of the Act: higher insurance premiums and the costs associated with practicing "defensive" health care in anticipation of claims. The overall effect would be a return to the prospect of higher health care costs. While health care providers and their insurers could count on application of the Act to the obvious claims—think, misdiagnosis of a medical condition—they would be left with the same uncertain risks and associated costs as before enactment of the Act for the numerous other claims based on injuries not solely caused by "health care" in the strictest sense of direct application of medical or mental health treatment.

This uncertainty about whether certain aspects of a health care provider's treatment of the patient could be viewed in isolation and considered "non-health care" could further cause health care providers to focus on the Act's applicability rather than the best interests of the patient when establishing a course of treatment. Such a result is inconsistent with the purposes and focus of the Act, which is to

promote patients' access to health care. Health care providers should be focused on the therapeutic benefits of the treatment available and the supporting research when determining what course of treatment to recommend or implement for a particular patient; their decision should not be driven by a fear that just because a course of treatment does not fall within the structure of in-clinic doctor–patient appointments or involves what could be characterized as "regular activities," the protections of the Act will not apply.

In addition, this would have a disproportionate impact on the myriad specifically-identified "health care providers" that offer what could be considered "less traditional" forms of health care. Again, as but a few examples, consider physical therapists, athletic trainers, and speech pathologists. Such health care providers offer medical care and treatment that more often than a physician, dentist, or psychologist could be seen as involving more routine, every-day activities. Yet, the legislature has recognized that these providers provide *health care*. Increased costs to such forms of health care are no less problematic than increased costs of doctor visits, dentist visits, or in-office counseling sessions with psychologist/psychiatrist. They may, in fact, be worse.

The insurance available to wilderness therapy programs or outdoor behavioral health programs—which includes professional liability insurance like—is quite limited. At present, WinGate is aware of only two insurers that offer

coverage for such programs: Llyods of London and Admiralty Insurance Agency, Inc. It is not uncommon for programs in the industry to have their insurance summarily cancelled in response to a single claim asserted by a patient–student, leaving little other alternatives for coverage. As with other forms of health care, added costs associated with limited insurance options are passed on to the patients. This is likely to have an even greater impact on those seeking treatment in a wilderness therapy program given that many health insurance providers presently do not cover such treatments, or do not do so to the same degree as other forms of health care, although this is changing.[6]

This Court recently recognized that it is "completely within the purview of the legislature to decide how and where to tackle" the "tremendous problem" of "rising health care costs." *Vega v. Jordan Valley Med. Ctr., LP*, 2019 UT 35, ¶ 23, 449 P.3d 31. As explained in *Vega*, "[i]f, in the legislature's judgment, frivolous lawsuits are a major contributing factor to increased costs of care, it has the power and prerogative to attempt to mitigate any and all deleterious effects," subject to the confines of the Constitution. *Id.*

[6] Outdoor Behavioral Healthcare Council, *Insurance Coverage for Wilderness Therapy – May 2019 update*, https://obhcouncil.com/insurance-coverage-wilderness-therapy-2019-update/.

The legislature has made this determination and, in doing so, defined both "health care provider" and "health care" broadly. It did not limit the reach of the Act to specific forms of health care provided by the "wide range" of identified health care providers. Nor did it require that the provision of health care be the exclusive or direct cause of the injury at issue. Against this backdrop, the Court should not read such limitations into the Act.

C. Interpreting the definition of "malpractice action" more narrowly would render the Act essentially meaningless with respect to wilderness therapy programs such as WinGate as well as other "health care providers."

An interpretation of the definition of "malpractice action" that excludes Jacob's claim in this case has the potential to render the Act essentially ineffective for wilderness therapy programs, such as WinGate, that provide valuable, alternative treatment opportunities to adolescents. It likewise has the potential to render the Act essentially meaningless with respect to other "health care providers."

Although Jacob has conceded for purposes of appeal that WinGate is a health care provider, his argument appears to be, in large part, that the Court should interpret the Act so that it applies only to claims for injuries that occur when its patient–residents are actually meeting with its licensed clinical social workers, marriage and family therapists, mental health counselor, medical doctor, psychiatric nurse practitioner, or psychologist. (*See* Br. at 25.) This argued-for

interpretation represents a fundamental misunderstanding about the therapeutic processes of wilderness therapy programs.

Again, "residents spend 100% of their time in the wilderness." (App. 32.) While that time includes weekly individual and group therapy as well as a physical evaluation every fourteen days, much of the time is spent camping, hiking, climbing, and exploring the wilderness and participating in daily psychoeducational and process groups. (App. 32-33, 172-73.) Jacob estimates that 98.87% of the time he spent in the wilderness with WinGate "was spent camping and hiking" with what he describes as "unlicensed staff." (App. 75.)

Although field staff are not licensed therapists or medical doctors, the notion they are untrained, unregulated, and incapable of providing health care is unsupported. As a wilderness therapy program, WinGate is governed by Rule 501-8 of Utah's Administrative Code. That rule regulates many aspects of WinGate's operation, and specifically includes rigorous requirements for all levels of staff, interns, and volunteers. Senior field staff must have the following qualifications:

> (a) be at least 21 years of age,
> (b) have an associate degree or high school diploma with 30 semester or 45 quarter hours education and training or comparable experience and training in a related field,
> (c) have six months outdoor youth program field experience or comparable experience which shall be documented in the individual's personnel file,

(d) be annually trained and certified in CPR and currently certified in standard first aid,

(e) have completed an initial staff training . . . .

Utah Admin. Code R501-8-6(2)(5). Other field staff must have the following qualifications:

(a) be a minimum of 20 years of age,

(b) have a high school diploma or equivalency,

(c) have forty-eight field days of outdoor youth program experience or comparable experience which shall be documented in the individual's personnel file,

(d) exhibit leadership skill,

(e) be annually trained and certified in CPR and currently certified in standard first aid, and

(f) have completed an initial staff training.

Utah Admin. Code R501-8-6(2)(6). The initial staff training required for all field staff must be at least eighty hours and requires the staff to "demonstrate to the field director proficiency in each of the following":

(a) *counseling, teaching and supervisory skills*,

(b) water, food, and shelter procurement, preparation and conservation,

(c) low impact wilderness expedition and environmental conservation skills and procedures,

(d) *consumer management, including containment, control, safety, conflict resolution, and behavior management*,

(e) instruction in safety procedures and safe equipment use; fuel, fire, life protection, and related tools,

(f) instruction in emergency procedures; medical, evacuation, weather, signaling, fire, runaway and lost consumers,

(g) sanitation procedures; water, waste, food, etc.,

(h) *wilderness medicine, including health issues related to acclimation, exposure to the environment, and environmental elements*,

(i) *CPR, standard first aid, first aid kit contents and use, and wilderness medicine*,

> (j) navigation skills, including map and compass use and contour and celestial navigation,
>
> (k) local environmental precautions, including terrain, weather, insects, poisonous plants, response to adverse situations and emergency evacuation,
>
> (l) leadership and judgment,
>
> (m) report writing, including development and maintenance of logs and journals, and
>
> (n) Federal, state, and local regulations, including Department of Human Services, Bureau of Land Management, United States Forest Service, National Parks Service, Utah State Department of Fish and Game.

Utah Admin. Code R501-8-8(1)-(2) (emphasis added).

Nothing in the Act supports excluding from its reach Act claims based on incidents that occur while residents are participating in a wilderness therapy program—and, particularly, the specific treatment plan prepared for them—under the supervision of trained and regulated field staff simply because the incident did not occur while meeting with a licensed therapist or a medical doctor.[7]

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[7] In *Carter*, the Utah Court of Appeals explained,

> Being an EMT or other paramedic requires something beyond a chauffeur's license and the ability to lift. When an ambulance is called, the patient expects more than a blank stare from the paramedics when symptoms are explained or observed. Paramedics are a kind of medical "jack-of-all-trades" and are trained to render emergency care to stabilize the patient—i.e., to do what doctors would do if they were present, but cannot do because they are not—and then to transport the patient quickly, but safely.

2000 UT App 21, ¶ 21. Being a field staff member likewise requires more than being a babysitter, camp counselor, or commercial adventure guide.

Doing so would render wilderness therapy programs' status as a "health care provider," including WinGate's undisputed status as a "health care provider," essentially ineffective, as much of the health care (therapy) it provides does not occur in the more traditional form of individual or group therapy with a licensed therapist. Indeed, according to Jacob's own estimation, less than 2% (by time) of the activities WinGate's residents engage in while in WinGate's program would be subject to the Act.

A narrow interpretation could similarly severely limit or preclude application of the Act to other health care providers that do not provide all treatment in a "traditional" doctor-patient setting. Not only is this inconsistent with the legislature's decision to include a "wide range of providers" in the definition of "health care provider," *Carter*, 2000 UT App 2196 P.2d 1076, ¶ 20, but it is also inconsistent with the cannon of statutory interpretation that statutes should be interpreted in a manner that "renders all parts . . . relevant and meaningful," *H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 32, 203 P.3d 943 (cleaned up).

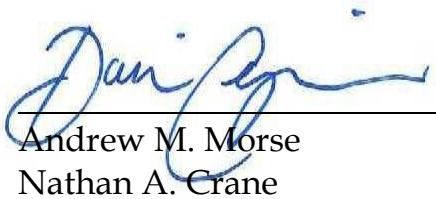
CONCLUSION

The Court should answer the Tenth Circuit's certified question by (1) reaffirming that the definition of "health care" is broad and includes those actions undertaken as part or in furtherance of the provision of medical care or treatment; and (2) consistent with prior caselaw, holding that an injury "relates to or arises

out of health care" as long as the provision of health care is *a* proximate cause of the injury. Applying these holdings, Jacob's claim is a "malpractice action against a health care provider" that is subject to the Act.

DATED this 24th day of February, 2020.

SNOW, CHRISTENSEN & MARTINEAU



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CERTIFICATE OF COMPLIANCE

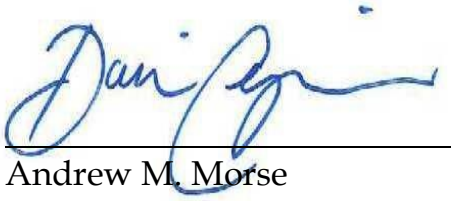
I hereby certify this brief complies with:

(A) Rule 24(g) regarding length of briefs, as it contains 8,950 words; and

(B) Rule 21 governing public and private records.

DATED this 24th day of February, 2020.

SNOW, CHRISTENSEN & MARTINEAU



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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2020, I electronically filed the foregoing **OPENING BRIEF OF APPELLEE** with the Clerk of Court using the Court's CM/ECF system, which sent notification of such filing to the following:

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ADDENDUM

A. Utah Code §§ 78B-3-402, -403

B. (i) July 6, 2018, docket entry

(ii) March 14, 2018, memorandum decision

(iii) November 13, 2019, certification order

C. Affidavit of Scott Hess with exhibits, including the treatment plan

D. Tori DeAngelis, *Therapy Gone Wild*, American Psychological Association *Monitor on Psychology*, Vol. 44, No. 8 (Sept. 2013)

Addendum A

West's Utah Code Annotated
Title 78b. Judicial Code
Chapter 3. Actions and Venue
Part 4. Utah Health Care Malpractice Act (Refs & Annos)

U.C.A. 1953 § 78B-3-402
Formerly cited as UT ST § 78-14-2

§ 78B-3-402. Legislative findings and declarations--Purpose of act

Currentness

(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.

Credits
Laws 2008, c. 3, § 708, eff. Feb. 7, 2008.

Notes of Decisions (2)

U.C.A. 1953 § 78B-3-402, UT ST § 78B-3-402
Current with Chapter 1 of the 2020 General Session. Some statutes sections may be more current, see credits for details.

End of Document

West's Utah Code Annotated
Title 78b. Judicial Code
Chapter 3. Actions and Venue
Part 4. Utah Health Care Malpractice Act (Refs & Annos)

U.C.A. 1953 § 78B-3-403
Formerly cited as UT ST § 78-14-3

§ 78B-3-403. Definitions

Effective: May 14, 2019
Currentness

As used in this part:

(1) “Audiologist” means a person licensed to practice audiology under Title 58, Chapter 41, Speech-Language Pathology and Audiology Licensing Act.

(2) “Certified social worker” means a person licensed to practice as a certified social worker under Section 58-60-205.

(3) “Chiropractic physician” means a person licensed to practice chiropractic under Title 58, Chapter 73, Chiropractic Physician Practice Act.

(4) “Clinical social worker” means a person licensed to practice as a clinical social worker under Section 58-60-205.

(5) “Commissioner” means the commissioner of insurance as provided in Section 31A-2-102.

(6) “Dental hygienist” means a person licensed to engage in the practice of dental hygiene as defined in Section 58-69-102.

(7) “Dentist” means a person licensed to engage in the practice of dentistry as defined in Section 58-69-102.

(8) “Division” means the Division of Occupational and Professional Licensing created in Section 58-1-103.

(9) “Future damages” includes a judgment creditor's damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering.

(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, physician assistant, 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.

(13) “Hospital” means a public or private institution licensed under Title 26, Chapter 21, Health Care Facility Licensing and Inspection Act.

(14) “Licensed athletic trainer” means a person licensed under Title 58, Chapter 40a, Athletic Trainer Licensing Act.

(15) “Licensed direct-entry midwife” means a person licensed under the Direct-entry Midwife Act to engage in the practice of direct-entry midwifery as defined in Section 58-77-102.

(16) “Licensed practical nurse” means a person licensed to practice as a licensed practical nurse as provided in Section 58-31b-301.

(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.

(18) “Marriage and family therapist” means a person licensed to practice as a marriage therapist or family therapist under Sections 58-60-305 and 58-60-405.

(19) “Naturopathic physician” means a person licensed to engage in the practice of naturopathic medicine as defined in Section 58-71-102.

(20) “Nurse-midwife” means a person licensed to engage in practice as a nurse midwife under Section 58-44a-301.

(21) “Optometrist” means a person licensed to practice optometry under Title 58, Chapter 16a, Utah Optometry Practice Act.

(22) “Osteopathic physician” means a person licensed to practice osteopathy under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act.

(23) “Patient” means a person who is under the care of a health care provider, under a contract, express or implied.

(24) “Periodic payments” means the payment of money or delivery of other property to a judgment creditor at intervals ordered by the court.

(25) “Pharmacist” means a person licensed to practice pharmacy as provided in Section 58-17b-301.

(26) “Physical therapist” means a person licensed to practice physical therapy under Title 58, Chapter 24b, Physical Therapy Practice Act.

(27) “Physical therapist assistant” means a person licensed to practice physical therapy, within the scope of a physical therapist assistant license, under Title 58, Chapter 24b, Physical Therapy Practice Act.

(28) “Physician” means a person licensed to practice medicine and surgery under Title 58, Chapter 67, Utah Medical Practice Act.

(29) “Physician assistant” means a person licensed to practice as a physician assistant under Title 58, Chapter 70a, Utah Physician Assistant Act.

(30) “Podiatric physician” means a person licensed to practice podiatry under Title 58, Chapter 5a, Podiatric Physician Licensing Act.

(31) “Practitioner of obstetrics” means a person licensed to practice as a physician in this state under Title 58, Chapter 67, Utah Medical Practice Act, or under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act.

(32) “Psychologist” means a person licensed under Title 58, Chapter 61, Psychologist Licensing Act, to engage in the practice of psychology as defined in Section 58-61-102.

(33) “Registered nurse” means a person licensed to practice professional nursing as provided in Section 58-31b-301.

(34) “Relative” means a patient's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half brother, half sister, or spouse's parents. The term includes relationships that are created as a result of adoption.

(35) “Representative” means the spouse, parent, guardian, trustee, attorney-in-fact, person designated to make decisions on behalf of a patient under a medical power of attorney, or other legal agent of the patient.

(36) “Social service worker” means a person licensed to practice as a social service worker under Section 58-60-205.

(37) “Speech-language pathologist” means a person licensed to practice speech-language pathology under Title 58, Chapter 41, Speech-Language Pathology and Audiology Licensing Act.

(38) “Tort” means any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another.

(39) “Unanticipated outcome” means the outcome of a medical treatment or procedure that differs from an expected result.

Credits

Laws 2008, c. 3, § 709, eff. Feb. 7, 2008; Laws 2009, c. 220, § 23, eff. July 1, 2009; Laws 2013, c. 104, § 4, eff. May 14, 2013; Laws 2019, c. 349, § 63, eff. May 14, 2019.

Notes of Decisions (20)

U.C.A. 1953 § 78B-3-403, UT ST § 78B-3-403
Current with Chapter 1 of the 2020 General Session. Some statutes sections may be more current, see credits for details.

End of Document

Addendum B(i)

		Affidavit of Ronald Truman, # 6 Exhibit Wingate Website: "Effects of Nature on Teens", # 7 Exhibit Wingate Website: Therapeutic Boarding Schools", # 8 Exhibit Wingate's release, indemnification, and Waiver Agreement, # 9 Exhibit Emails between Ronald Truman & Andrew Morse, # 10 Exhibit Wingate's enrollment Agreement, # 11 Errata Wingate's Financial Agreement)(Truman, Ronald) (Entered: 05/21/2018)
05/23/2018	14	MOTION to Strike 13 Response to Motion,,, and Memorandum in Support *or in the Alternative Request to Allow Defendant Additional Time to File a Reply* filed by Defendant Wingate Wilderness Therapy. Motions referred to Dustin B. Pead.(Crane, Nathan) (Entered: 05/23/2018)
05/24/2018	15	MEMORANDUM in Opposition re 14 MOTION to Strike 13 Response to Motion,,, and Memorandum in Support *or in the Alternative Request to Allow Defendant Additional Time to File a Reply* filed by Plaintiff Jacob M. Scott. (Truman, Ronald) (Entered: 05/24/2018)
05/24/2018	16	MOTION for Leave to File Excess Pages and Memorandum in Support filed by Plaintiff Jacob M. Scott. Motions referred to Dustin B. Pead.(Truman, Ronald) (Entered: 05/24/2018)
05/25/2018	17	ORDER granting in part and denying in part 14 Motion to Strike; granting 16 Motion for Leave to File Excess Pages; motion hearing continued. Signed by Judge David Nuffer on 5/24/18 (alt) (Entered: 05/25/2018)
05/25/2018		Reset Deadlines as to 8 MOTION to Dismiss (per 17 Order): Motion Hearing reset for 7/12/2018 at 10:00 AM in Room 2B (St George) before Judge David Nuffer (alt) (Entered: 05/25/2018)
06/08/2018	18	MOTION for Leave to File Excess Pages *in Reply Memorandum* filed by Defendant Wingate Wilderness Therapy. (Attachments: # 1 Text of Proposed Order) Motions referred to Dustin B. Pead.(Crane, Nathan) (Entered: 06/08/2018)
06/08/2018	19	REPLY to Response to Motion re 8 MOTION to Dismiss *Plaintiff's Complaint* filed by Defendant Wingate Wilderness Therapy. (Attachments: # 1 Exhibit Index, # 2 Exhibit 1 − Second Affidavit of Shayne Gallagher, # 3 Exhibit 2 − Letter dated 2−25−15, # 4 Exhibit 3 − Parent Handbook, # 5 Exhibit 4 − Affidavit of Scott Hess, # 6 Exhibit 5 − Psychology Today Article, # 7 Exhibit 6 − Application for Enrollment, # 8 Exhibit 7 − Release of Confidential Information Form)(Crane, Nathan) Modified on 6/19/2018: Exhibits 2, 4, 6, and 7 sealed per 25 Order (alt) (Entered: 06/08/2018)
06/08/2018	20	ORDER granting 18 Motion for Leave to File Excess Pages. Signed by Judge David Nuffer on 6/8/18 (alt) (Entered: 06/08/2018)
06/11/2018	21	**NOTICE VACATING SCHEDULING CONFERENCE HEARING** set for Thursday, 6/14/2018 at 10:30 a.m. before Judge David Nuffer (asb) (Entered: 06/11/2018)
06/11/2018	22	MOTION to Seal and Memorandum in Support *to Seal Exhibits* re 19 Reply Memorandum/Reply to Response to Motion,, filed by Defendant Wingate Wilderness Therapy. (Attachments: # 1 Text of Proposed Order Granting Motion to Seal Exhibits to Reply Memorandum Dkt 19) Motions referred to Dustin B. Pead.(Crane, Nathan) (Entered: 06/11/2018)
06/15/2018	23	Amended MOTION to Seal *Exhibits* re 19 Reply Memorandum/Reply to Response to Motion,, filed by Defendant Wingate Wilderness Therapy. (Attachments: # 1 Text of Proposed Order) Motions referred to Dustin B. Pead.(Crane, Nathan) (Entered: 06/15/2018)
06/15/2018	24	Motions No Longer Referred: 22 MOTION to Seal and 23 Amended MOTION to Seal will be addressed by the District Court. (amn) (Entered: 06/15/2018)
06/19/2018	25	ORDER granting 23 Motion to Seal Exhibit 2, Exhibits A, B, and C to Exhibit 4, Exhibit 6, and Exhibit 7 to 19 Reply Memorandum to 8 Motion to Dismiss. Signed by Judge David Nuffer on 6/19/18 (alt) (Entered: 06/19/2018)
07/06/2018	26	NOTICE FROM THE COURT re 8 Motion to Dismiss. The Court has reviewed the briefing on Defendant Wingate Wilderness Therapy's 8 Motion to Dismiss and has

		determined to grant Wingate's motion for the reasons set forth in Wingate's 8 Motion and 19 reply. Dismissal is appropriate based on Plaintiff's failure to comply with the prelitigation requirements of the Utah Health Care Malpractice Act (UHCMA) Utah Code Ann. § 78B−3−401 et seq. Furthermore, dismissal *with prejudice* is appropriate because the two−year statute of limitations period, set forth in Utah Code Ann. § 78B−3−404, has run. The responses to the 12 Order that requested briefing on potentially certifying a question to the Utah Supreme Court show that certification is not necessary. The language of the relevant statutes is clear. This case does not present an issue of law which would require clarification from the Utah Supreme Court. Defense counsel shall prepare a proposed order, which should outline the allegations contained in the 2 Complaint and apply the relevant statutory and other legal authorities consistent with the 8 Motion and 19 Reply. The proposed order should comply with the instructions at http://www.utd.uscourts.gov/chief−judge−david−nuffer#Orders. The order shall be prepared on or before July 20, 2018 and shall be reviewed by opposing counsel within seven days. After the order is reviewed, drafting counsel shall email a word processing copy to dj.nuffer@utd.uscourts.gov. The email shall indicate that the form of the order is stipulated or that opposing c ounsel maintains objections to the order. Within seven days after the proposed order is emailed, opposing counsel may file any objections to the form of the order, attaching PDF copies of (a) the order as submitted by drafting counsel, (b) opposing counsel's proposed version of the order in redline format, and (c) a clean copy of opposing counsel's proposed version of the order. Word processing files of documents (b) and (c) must also be emailed to dj.nuffer@utd.uscourts.gov. (akj) (Entered: 07/06/2018)
07/06/2018	27	**NOTICE VACATING MOTION HEARING and SCHEDULING CONFERENCE HEARING** set for Thursday, July 12, 2018 at 10:00 a.m. before Judge David Nuffer (asb) (Entered: 07/06/2018)
07/27/2018	28	MOTION for Discovery and Memorandum in Support filed by Plaintiff Jacob M. Scott. (Attachments: # 1 Exhibit Defendant's Proposed Order, # 2 Exhibit Second Affidavit of Kathleen Scott) Motions referred to Dustin B. Pead.(Truman, Ronald) Modified on 3/14/2019: corrected motion relief and entry text (alt) (Entered: 07/27/2018)
07/27/2018	29	NOTICE OF FILING of (proposed) Memorandum Decision Granting Defendant's Motion to Dismiss With Prejudice re 26 Notice From the Court,,,,,,,,, filed by Defendant Wingate Wilderness Therapy. (Crane, Nathan) (Entered: 07/27/2018)
07/27/2018	30	NOTICE OF FILING re 28 MOTION Discovery on jurisdictional issue re 19 Reply Memorandum/Reply to Response to Motion,, and Memorandum in Support , 29 Notice of Filing, 26 Notice From the Court,,,,,,,,, *P Objection to D proposed order* filed by Plaintiff Jacob M. Scott. (Attachments: # 1 Text of Proposed Order Defendant's Proposed Order, # 2 Text of Proposed Order Redlined version of D proposed order, # 3 Text of Proposed Order Plaintiff's proposed order)(Truman, Ronald) (Entered: 07/27/2018)
07/27/2018	31	NOTICE OF FILING re 30 Notice of Filing,, *Plaintiff's proposed order* filed by Plaintiff Jacob M. Scott. (Truman, Ronald) (Entered: 07/27/2018)
07/30/2018	32	Motions No Longer Referred: Plaintiff's Motion for Limited Discovery 28 is no longer referred to the Magistrate Judge. The District Judge will address this motion. (tmb) (Entered: 07/30/2018)
08/08/2018	33	RESPONSE to Motion re 28 MOTION Discovery on jurisdictional issue re 19 Reply Memorandum/Reply to Response to Motion,, and Memorandum in Support filed by Defendant Wingate Wilderness Therapy. (Crane, Nathan) (Entered: 08/08/2018)
08/20/2018	34	Plaintiff's MEMORANDUM in Support re 28 MOTION Discovery on jurisdictional issue re 19 Reply Memorandum/Reply to Response to Motion,, and Memorandum in Support *Plaintiff's reply memorandum in support of motion for limited discovery* filed by Plaintiff Jacob M. Scott. (Truman, Ronald) (Entered: 08/20/2018)

Addendum B(ii)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

JACOB M. SCOTT, an individual Plaintiff, vs. WINGATE WILDERNESS THERAPY, LLC, a Utah Limited Liability Company, Defendant.	**MEMORANDUM DECISION AND ORDER GRANTING [8] DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE** Case No. 4:18-CV-0002-DN District Judge David Nuffer

Defendant Wingate Wilderness Therapy, LLC ("Wingate") filed a Motion to Dismiss[1] Plaintiff Jacob M. Scott's ("Scott") complaint in its entirety because Wingate is a health care provider; the injury in this case relates to or arose out of health care rendered or which should have been rendered; Scott failed to comply with the pre-litigation requirements of the Utah Health Care Malpractice Act ("UHCMA"); and Scott failed to commence this action within the UHCMA's two-year statute of limitations.[2] Based on Wingate's Motion to Dismiss and the responsive filings[3], Wingate's Motion to Dismiss will be granted, with prejudice.

Furthermore, after considering briefing from the parties on the issues of certification to the Utah Supreme Court,[4] certification is unnecessary. Although broad, the language of the

[1] Wingate Wilderness Therapy's Motion to Dismiss and Memorandum in Support Thereof, docket no. 8, filed April 24, 2018.

[2] Utah Code § 78B-3-401 et seq.

[3] Plaintiff Jacob M. Scott's Opposition to Defendant Wingate Wilderness Therapy, LLC's Motion to Dismiss ("Opposition"), docket no. 13, filed May 21, 2018; Wingate Wilderness Therapy's Reply Memorandum in Support of Motion to Dismiss Plaintiff's Complaint ("Reply"), docket no. 19, filed June 8, 2018.

[4] *See* Docket Text Order Taking Under Advisement Defendant's Motion to Dismiss, docket no. 12, filed May 15, 2018.

relevant statutes is clear, and the case does not present an issue of law which would require clarification from the Utah Supreme Court.

BACKGROUND

Wingate, located in Southern Utah, operates an outdoor youth program to provide behavioral, substance abuse, and mental health services to troubled adolescents.[5] Wingate is a wilderness based therapy program.[6] While in the wilderness, residents are treated by licensed therapists, psychologists and various other professionals.[7] Camping, hiking, climbing, and exploring the wilderness are part of a resident's recovery and treatment.[8]

On or about February 21, 2015, Scott enrolled in Wingate's therapy program.[9] Plaintiff sought treatment for substance abuse, disruptive behavior, anxiety, and parent-child relationships.[10] On or about March 6, 2015, Scott sustained an injury to his knee.[11] Afterwards, Scott was transported to the hospital.[12] Scott initiated the instant case by filing a Complaint on March 2, 2018.[13]

STANDARD OF REVIEW—MOTION TO DISMISS

In order to withstand a motion to dismiss under *Bell Atlantic Corp. v. Twombly*,[14] and *Ashcroft v. Iqbal*[15] a plaintiff must allege enough facts, "taken as true, to state a claim to relief

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[5] Motion to Dismiss at 2.

[6] *Id.*

[7] *Id.* at 3.

[8] *Id.*

[9] Complaint at ¶10.

[10] Motion at 3.

[11] Complaint at ¶11.

[12] Complaint at ¶ 52.

[13] Complaint at 12.

[14] 550 U.S. 544 (2007).

[15] 556 U.S. 662 (2009).

that is plausible on its face." [16] A plaintiff must "offer specific factual allegations to support each claim"[17] and while the Court must "accept as true all of the allegations contained in a complaint" this requirement is "inapplicable to legal conclusions."[18] The determination of plausibility will be a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[19] Therefore, "in ruling on a motion to dismiss, a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable."[20]

In a motion to dismiss based on lack of subject-matter jurisdiction brought under Fed. R. Civ. P. 12(b)(1) "the moving party may (1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests."[21] "A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts."[22] However, "[w]hen, as in this case, a court resolves a motion to dismiss for lack of subject matter jurisdiction without an evidentiary hearing, the plaintiff is only required to make a prima facie showing of subject matter jurisdiction."[23] "All factual disputes are resolved in favor of the plaintiff[] when determining the

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[16] *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011)(internal quotation marks omitted)(quoting *Twombly*, 550 U.S. at 570).

[17] *Kansas Penn*, 656 F.3d at 1214.

[18] *Kansas Penn*, 656 F.3d at 1214 (internal quotation marks omitted)(quoting *Iqbal*, 556 U.S. at 677).

[19] *Kansas Penn*, 656 F.3d at 1214 (internal quotation marks omitted)(quoting *Iqbal*, 556 U.S. at 679).

[20] *Kansas Penn*, 656 F.3d at 1214.

[21] *Maestas v. Lujan*, 351 F.3d 1001, 1013 (10th Cir. 2003).

[22] *Stuart v. Colorado Interstate Gas Co.*, 271 F.3d 1221 (10th Cir. 2001) (*citing Holt v. United States*, 46 F.3d 1000 (10th Cir. 1995)).

[23] *Pringle v. United States, 44 F. Supp. 2d 1168, 1171 (D. Kan. 1999)*(citing *Fed. Deposit Ins. Corp. v. Oaklawn Apartments*, 959 F.2d 170, 174 (10th Cir. 1992)).

sufficiency of this showing."[24]

DISCUSSION

Plaintiff Scott alleged one cause of action against Wingate for negligence and reckless conduct.[25] Scott alleged that Wingate breached its duty of care to him and was negligent and/or reckless by, among other things, "(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) allow 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 Scott to climb down the rock formation when and where it was dangerous to do so."[26] Scott also alleged that Wingate failed to properly train or supervise its employees.[27]

Wingate's Motion asserts two grounds for dismissal, (1) Scott failed to comply with the mandatory pre-litigation provisions of the UHCMA and (2) Scott failed to file his Complaint prior to the expiration of UHCMA's applicable two-year statute of limitation. In order for the UHCMA to be applicable, Wingate must be considered a health care provider under the UHCMA definition[28] and the alleged injury must relate to or arise out of health care rendered or which should have been rendered.[29]

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[24] *Rusakiewicz v. Lowe*, 556 F.3d 1095, 1100 (10th Cir. 2009).

[25] *See* Complaint at ¶¶ 10 et seq.

[26] *Id.* at ¶¶ 67, 75.

[27] *Id.* at ¶ 69.

[28] Utah Code Ann. § 78B-3-403(12).

[29] Utah Code Ann. § 78B-3-403(17).

"The definition of 'health care provider' found in the UHCMA is a broad one."[30] The UHCMA defines health care providers as:

> "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 officer, employees, or agents of any of the above acting in the course and scope of their employment.[31]

In interpreting this statute, the Utah Supreme Court held: "We conclude that the statute in question means what it says. All those identified in the statute are 'health care providers.' All others rendering care and services similar to those so explicitly identified are also 'health care providers.'"[32] Whether an entity is a health care provider is a factual determination made by comparing the actual services rendered by the entity to services rendered by a health care provider listed in the UHCMA.[33]

As the Complaint establishes, Wingate does business as a licensed as a "Youth Program"[34] under Utah Code to provide "behavioral, substance abuse, [and] mental health

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[30] *Tools v. Red Rock Canyon Sch.*, 2005 WL 1501435 (D. Utah 2005).

[31] Utah Code Ann. § 78B-3-403(12).

[32] *Platts v. Parents Helping Parents*, 947 P.2d 658, 663 (Utah 1997).

[33] *See id.*

[34] Complaint at ¶ 10.

services."[35] Scott acknowledges that at the time of the incident, Wingate was "attempting to provide behavioral or mental health services" to him.[36]

The governing Utah administrative rules require Wingate, as a youth program, to have a "multi-disciplinary team, accessible to consumers" including various physical and mental health professionals.[37] This rule then requires Wingate to provide mental health services. Wingate employs—and Scott does not dispute that Wingate does—several licensed medical and mental health professionals, including clinical social workers, certified social workers, mental health counselors and a psychologist.[38] These health care professionals make up the clinical team responsible for providing therapeutic treatment for all of Wingate's participants[39] and Scott concedes that he met with a licensed marriage and family therapist during his time at Wingate.[40]

In light of this information,[41] it can readily be determined that the services Wingate provides "relat[e] to or aris[e] out of the health needs of persons or groups of persons[,]"[42] because it provides behavioral or mental health services. Furthermore, based on the health care professionals that Wingate employs, Wingate provides services that similar to those provided by

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[35] Utah Code Ann § 62A-2-101(40)(a).

[36] Complaint at ¶ 11.

[37] Utah Admin. Code R501-8-6(8)

[38] Motion at 9.

[39] *Id.*

[40] Opposition at 11.

[41] It should be noted that Wingate's original proposed memorandum decision and order contained a number of additional facts that Plaintiff controverted because those facts were first raised in Wingate's Reply. *See* Notice of Filing of (Proposed) Memorandum Decision and Order Granting Defendant's Motion to Dismiss with Prejudice at 5–7, docket no. 29, filed July 27, 2018; Motion for Limited Discovery at 2, docket no. 28, filed July 27, 2018. However, as the analysis makes clear, the factual determination that Wingate is a health care provider can be made based the allegations in Plaintiff's Complaint, applicable Utah statutory and administrative rule language, and the additional, undisputed evidence offered in Wingate's original Motion to Dismiss and Plaintiff's Opposition. Any fact that was first raised in Wingate's reply was deleted from the proposed order and not included in this final memorandum decision and order.

[42] Utah Code Ann. § 78B-3-403(12).

a psychologist, clinical social worker, certified social worker, and a marriage and family counselor under U.C.A. § 78b-3-403(12). Wingate therefore qualifies as a health care provider under the broad language of the UHCMA.

The Complaint makes it clear that Scott's injury relates to or arises out of health care rendered or which should have been rendered. Scott states in the Complaint that, at the time of the injury and "for some time before[,]" Wingate was "attempting to provided behavioral or mental health services."[43] The provisions of the UHCMA—including its pre-litigation requirements and statute of limitations—apply here.

The UHCMA provides that an action "may not be initiated unless and until the plaintiff" complies with the requirements of the UHCMA.[44] Under the UHCMA, prior to commencing an action against a health care provider such as Wingate, Scott was required to "(1) giv[e] notice to the health care provider ninety days before commencement of the actions, (2) participat[e] in a pre-litigation panel review, and (3) fil[e] the complaint within the abbreviated two-year statute of limitations period."[45]

Scott failed to provide Wingate with "at least 90 days prior notice of intent to commence an action" and he failed to request a pre-litigation panel review hearing with the Division of Occupational and Professional Licensing "within 60 days after the service of a statutory notice of intent to commence action."[46] The UHCMA also provides that "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

[43] Complaint at ¶ 11.

[44] Utah Code Ann. § 78B-3-412(1).

[45] *Carter v. Milford Valley Mem'l Hosp.*, 996 P.2d 1076, 1079 (Utah Ct. App. 2000).

[46] Utah Code Ann. § 78B-3-412, Utah Code Ann. § 78B-3-416.

occurs."[47] When the plaintiff is a minor at the time of their injuries, the statute of limitations is tolled until they reach the majority age.[48] The age of majority in Utah is 18 years old.[49]

Here, Scott sustained the injury to his leg [redacted] months before his 18th birthday. He was injured on March 6, 2015[50] and treated at a hospital the same day.[51] Scott knew he was injured on March 6, 2015.[52] Scott turned 18 years old on [redacted] 2015. The statute of limitations expired on [redacted], 2017, two years after Scott's 18th birthday.

Scott had until [redacted], 2017, to comply with the provisions of the UHCMA in commencing an action against Wingate. Scott did not file this action until March 2, 2018, 263 days after the statute of limitations had expired.

In summary:

Date of injury:	March 6, 2015
Date of Plaintiff's 18th birthday:	[redacted], 2015
2-year statute of limitations expired:	[redacted], 2017
Date instant Complaint was filed:	March 2, 2018

Based upon the expiration of the applicable statute of limitations, this case must be dismissed with prejudice.

Tolling the statute of limitation for equitable reasons is inappropriate in this case. Scott has not shown that Wingate did anything to prevent him from investigating and filing suit prior to the expiration of the statute of limitations. Scott knew he was injured on March 6, 2015, when he sustained the injury to his leg and was treated at a hospital. Scott was discharged from the

[47] Utah Code Ann. § 78B-3-404.

[48] Utah Code Ann. § 78B-2-108.

[49] Utah Code Ann. § 15-2-1.

[50] Complaint at ¶ 9.

[51] Reply at 13.

[52] Complaint at ¶ 9.

hospital and returned home on March 8, 2015.[53] Scott's parents were informed of his injury on March 6, 2015. His parents knew more detail about his injury on March 8, 2015, when he returned to their home. They knew he was under Wingate's care when he was injured.

Scott has failed to make a showing "that the plaintiff did not know of and could not reasonably have known of the existence of the cause of action in time to file a claim within the limitation period."[54] He knew he was injured on March 6, 2015. The two-year statute of limitations began to run on [redacted] 2015, Plaintiff's 18th birthday. There are no exceptional circumstances that exist in this case to allow tolling the statute of limitations beyond the two-year limit.

In summary, Wingate provides services similar to health care providers listed in the UHCMA and the UHCMA specifically extends the definition of "health care provider" to entities that provide these comparable services. Wingate therefore is a health care provider under the UHCMA. The injury Scott alleges relates to or arose out of health care rendered or which should have been rendered by Wingate. The terms of the UHCMA are applicable to this matter.

Here, Scott failed to adhere to the UHCMA's pre-litigation notice and panel review requirements, and failed to file his Complaint prior to the expiration of the UHCMA's two-year statute of limitations. The Complaint must be dismissed with prejudice.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that Wingate's Motion to Dismiss[55] is GRANTED. Scott's claims against Wingate are DISMISSED WITH PREJUDICE.

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[53] Reply at 13.

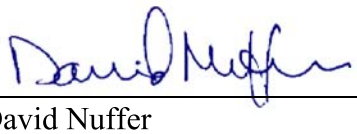
[54] *Warren v. Provo City Corp.*, 838 P.2d 1125, 1129 (Utah 1992).

[55] Wingate Wilderness Therapy's Motion to Dismiss and Memorandum in Support Thereof, docket no. 8, filed April 24, 2018.

The Clerk is directed to close the case.

Signed March 14, 2019.

BY THE COURT:



David Nuffer
United States District Court Judge

Addendum B(iii)

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JACOB M. SCOTT, an individual, Plaintiff - Appellant, v. WINGATE WILDERNESS THERAPY, LLC, a Utah limited liability company, Defendant - Appellee.	No. 19-4052 (D.C. No. 4:18-CV-00002-DN) (D. Utah)

ORDER CERTIFYING STATE LAW QUESTION

Before **TYMKOVICH**, Chief Judge, **MATHESON**, and **McHUGH**, Circuit Judges.

Jacob M. Scott was hiking in the wilderness of southern Utah as part of his participation in a program run by Wingate Wilderness Therapy, LLC, ("Wingate") when a staff member allowed him and several other boys to climb a seventy-foot-tall, snow-dusted rock formation without climbing equipment or training. Jacob[1] struggled to descend the formation, and when he tried to follow the route a staff member recommended, he slipped, fell, and shattered his left knee. Jacob sued Wingate for negligence, and Wingate moved to dismiss pursuant to the Utah Health Care Malpractice

[1] Because Appellant was a minor at the time of the incident and was consistently referred to as Jacob in the parties' briefing, we have followed that convention in this order.

Act (UHCMA), which requires plaintiffs filing complaints against health care providers to comply with certain procedural requirements, including a two-year statute of limitations period. The district court dismissed the lawsuit, reasoning that Wingate was a health care provider, Jacob's injuries arose out of health care rendered by Wingate, and Jacob failed to comply with several UHCMA provisions, including the statute of limitations. Jacob then appealed, arguing the district court erred in finding his injuries arose out of health care provided by Wingate.

Because the disposition of this appeal turns on an important and unsettled question of Utah law, we respectfully request the Utah Supreme Court exercise its discretion to accept the following certified question:

> 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 UHCMA?

I. BACKGROUND

Wingate operates an outdoor youth program offering "wilderness therapy" to troubled adolescents. Young people enrolled in Wingate's program engage in "[a]ll aspects of living in the wilderness," including hiking and camping, as well as individual and group therapy. App. at 32. They live in the wilderness during their time at Wingate and receive treatment from various professionals, including licensed therapists and psychologists.

On February 21, 2015, Jacob Scott, a seventeen-year-old minor, was enrolled in Wingate's wilderness therapy program by his parents, who sought treatment for Jacob's

substance abuse, disruptive behavior, and anxiety, among other things. That evening, staff members from Wingate met Jacob and his mother at a chiropractor's office in St. George, Utah, where Jacob received a sports physical (required for participation in Wingate's program), before the Wingate staff members drove Jacob to Kanab.

Jacob then began a fourteen-day period in the wilderness participating in Wingate's program. On February 23, 2015, he met with Scott Hess, a licensed marriage and family therapist employed by Wingate, to discuss his adjustment to the program, his fellow campers, and Wingate staff. Two days later, on February 25, 2015, Mr. Hess created a treatment plan for Jacob, which "identif[ied] initial diagnostic impressions, outlin[ed] the course of treatment, and identif[ied] his treatment areas." *Id.* at 178–79. Specifically, the treatment plan stated that during his time at Wingate Jacob would:

> participate in weekly individual and group therapy as well as daily psychoeducational and process groups. He will be immersed in wilderness principles and experiences, and will have the opportunity to learn & apply 'Leave No Trace' principles throughout his outdoor experience at WinGate. He will have the opportunity to learn outdoor survival skills as well as a variety of methods for making and utilizing primitive tools, instruments, and shelters. Jacob will be introduced to new philosophies and strategies to assist him in creating a more effective path for himself and for his family relationships.

Id. at 182. During his subsequent deposition, Mr. Hess described the treatment plan as providing for, "among other things, weekly individual and group therapy sessions, daily psychoeducational and process groups, hiking (exercise), and recommended a stay in the therapeutic program for eight weeks." *Id.* at 179.

According to Jacob's complaint, on March 6, 2015, Jacob was hiking with six other boys and two staff members. At some point during the hike, the lead staff member

left the group. After that, the boys asked the remaining staff member whether they could climb to the top of a seventy-foot-high, snow-dusted rock formation. The staff member gave them permission to do so. Four boys, including Jacob, made it to the top, but Jacob and at least one other boy found it much more difficult to climb back down. The boy in front of Jacob nearly fell fifty feet off the side of the formation. The lead staff member returned around this time to find Jacob stuck on the rock formation and scared to come down. Neither staff member offered Jacob any physical assistance, but one of them advised Jacob to follow a certain route down. As Jacob tried to do so, he slipped on the snow and fell approximately twenty-five feet to the ground, landing on his left knee.

The other boys moved Jacob under a nearby tree and built a fire to keep him warm. Two or three hours later, another staff member arrived in an off-road vehicle and transported Jacob to Kane County Hospital in Kanab, Utah, where he was diagnosed with a high-energy comminuted left patellar fracture. Jacob has undergone numerous surgeries since then, and "[h]is knee is permanently disabled and disfigured" because of the accident. Aplt. Op. Br. at 9.

Jacob turned eighteen in 2015, a few months after his fall. About three years later, Jacob filed a lawsuit against Wingate in federal district court, asserting a single cause of action for negligence and reckless conduct. He alleged Wingate breached its duty of care to him by:

> (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) allow[ing] 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.

Scott v. Wingate Wilderness Therapy, LLC, No. 4:18-CV-0002-DN, 2019 WL 1206901, at *2 (D. Utah Mar. 14, 2019) (quoting App. at 13). Jacob did not attempt to comply with the UHCMA prior to filing suit, and he filed his complaint outside the two-year statute of limitations provided under the UHCMA (but within the otherwise-applicable four-year statute of limitations, *see* Utah Code § 78B-2-307(3)).

Wingate moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction, arguing Jacob had failed to comply with the procedural requirements of the UHCMA by failing to (1) give Wingate at least ninety days prior notice of his intent to commence an action, (2) request a pre-litigation panel review hearing with the Division of Occupational and Professional Licensing, and (3) file the lawsuit within the UHCMA's truncated two-year statute of limitations. *Scott*, 2019 WL 1206901, at *4. In response, Jacob argued the UHCMA did not apply because (1) Wingate was not a health care provider within the UHCMA's meaning and (2) "Jacob's [i]njuries [d]id not [a]rise [o]ut of [o]r [r]elate to the [r]endering of [h]ealth [c]are." App. at 64. In the alternative, Jacob argued the district court should equitably toll the statute of limitations on his claim.

The district court granted Wingate's motion to dismiss, reasoning that the UHCMA applied because:

> Wingate provides services similar to health care providers listed in the UHCMA and the UHCMA specifically extends the definition of "health care provider" to entities that provide these comparable services. Wingate therefore is a health care provider under the UHCMA. The injury [Jacob] alleges relates to or arose out of health care rendered or which should have been rendered by Wingate. The terms of the UHCMA are [therefore] applicable to this matter.

Scott, 2019 WL 1206901, at *5. The district court also found that "[t]olling the statute of limitations for equitable purposes is inappropriate in this case" because Jacob had failed to show that Wingate "did anything to prevent him from investigating and filing suit prior to the expiration of the statute of limitations," and Jacob's parents knew about the details of his injury within days of the accident. *Id.* at *4. Finally, the district court denied Jacob's request to certify the question to the Utah Supreme Court, reasoning that "certification is unnecessary" because "the language of the relevant statutes is clear, and the case does not present an issue of law which would require clarification from the Utah Supreme Court." *Id.* at *1. Jacob timely appealed.

II. DISCUSSION

The UHCMA imposes a set of procedural requirements a plaintiff must satisfy prior to filing any "malpractice action against a health care provider." *See* Utah Code §§ 78B-3-404(1)–412(1). In particular, before filing a lawsuit, a plaintiff must (1) "giv[e] notice to the health care provider ninety days before commencement of the action," (2) "participat[e] in a prelitigation panel review,"[2] and (3) "fil[e] the complaint within the

[2] The Utah Supreme Court recently modified the prelitigation panel review requirement. *See Vega v. Jordan Valley Med. Ctr., LP*, 449 P.3d 31 (Utah 2019).

abbreviated two-year statute of limitations period" the UHCMA prescribes. *Carter v. Milford Valley Memorial Hosp.*, 996 P.2d 1076, 1079 (Utah Ct. App. 2000). These requirements apply to any "malpractice action against a health care provider." Utah Code § 78B-3-404(1). The UHCMA defines "malpractice action against a health care provider" as "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." *Id.* § 403(17).

The parties do not dispute that Jacob failed to satisfy the UHMCA's procedural requirements prior to filing suit. Nor do they dispute that Wingate is a health care provider. Aplt. Op. Br. at 5. The only issue remaining for appeal is whether Jacob's injuries "ar[ose] out of health care rendered or which should have been rendered" by Wingate. Utah Code § 78B-3-403(17).[3]

[3] The parties dispute whether Jacob preserved this issue for appeal. Our review of the briefing before the district court confirms that he did. In his Opposition to Wingate's Motion to Dismiss, Jacob plainly argued that "Wingate is not a provider of health care and Jacob's injuries did not arise out of or relate to the providing of health care." App. at 65. This argument sufficed to preserve the issue—which the district court squarely addressed—for appeal. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a . . . claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *U.S. Aviation Underwriters, Inc. v. Pilatus Business Aircraft, Ltd.*, 582 F.3d 1131, 1147 (10th Cir. 2009) (holding issue preserved where "[t]he parties argued, and the district court definitively ruled on, the precise objection raised on appeal"); *Century 21 Real Estate Corp. v. Meraj Int'l Inv. Corp.*, 315 F.3d 1271, 1278 (10th Cir. 2003) ("To preserve an issue for appeal, a party must alert the district court to the issue and seek a ruling.").

Jacob argues that his injuries arose out of the Wingate staff member's decision to allow him to climb a seventy-foot rock formation without climbing equipment or assistance. Even if Wingate's counseling services constitute health care, Jacob contends the relevant conduct here does not fall within the meaning of "health care rendered" in the UHMCA because the "alleged transgressions are only tangentially related to [Wingate's] provision of health care services." *Dowling v. Bullen*, 94 P.3d 915, 918 (Utah 2004); *see also Smith v. Four Corners Mental Health Ctr., Inc.*, 70 P.3d 904, 913 (Utah 2003) (distinguishing between mental health services, which are health care covered by the UHMCA, and foster care services, which are not). Wingate responds that the UHMCA broadly defines "health care" as "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." Utah Code § 78B-3-403(10). Wingate argues that Jacob was receiving health care in the form of "wilderness therapy" when he was injured and therefore his claim plainly falls within the Act's reach.

Jacob counters that none of the health care providers listed in the UHMCA provide wilderness therapy, and therefore such services were not intended by the Utah Legislature to be treated as health care. And even if wilderness therapy were included, Jacob contends that unassisted rock climbing is not wilderness therapy.

Whether and to what extent an injury sustained in the course of "wilderness therapy" "relat[es] to or aris[es] out of health care rendered," *id.* § 403(17), within the meaning of the UHMCA has yet to be addressed by a Utah state court. Because this

question is a controlling issue of law in a proceeding pending before this court, and there appears to be no controlling Utah law, the Utah Supreme Court should be permitted to answer this question in the first instance if it should choose to do so. *See* Utah Code § 78A-3-102(1) ("The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.").

III. CERTIFICATION

Accordingly, pursuant to Tenth Circuit Rule 27.4 and Utah Rule of Appellate Procedure 41, we **CERTIFY** the following question to the Utah Supreme Court:

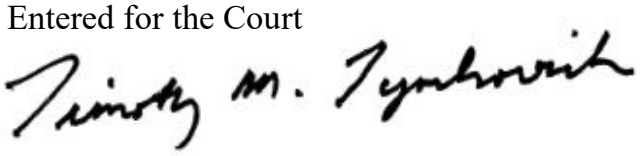
> Where Wingate is a "health care provider" under Utah Code § 78B-3-403(12), does an injury sustained by a plaintiff while climbing a rock formation during a "wilderness therapy" program operated by Wingate "relat[e] to or aris[e] out of health care rendered or which should have been rendered by [a]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

The Clerk of this court shall transmit a copy of this certification order to counsel for all parties. The Clerk of this court shall also forward to the Clerk of the Utah Supreme Court, under the Tenth Circuit's official seal, copies of this certification order, the briefs filed in this court, and the appendix filed in this court. We greatly appreciate the Utah Supreme Court's consideration of this request, and we recognize the discretion of the Utah Supreme Court to reformulate the question posed.

The appeal is **ABATED** pending resolution of the certified question. Within 30 days of the date of this order, and every 30 days thereafter, the parties shall file a joint report advising this court of the status of the proceedings before the Utah Supreme Court. The parties shall notify this court within 10 days of the Utah Supreme Court's issuance of

any orders or opinion regarding the certified question.

Entered for the Court



Timothy M. Tymkovich
Chief Circuit Judge

Addendum C

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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, SOUTHERN DIVISION

JACOB M. SCOTT, an individual, Plaintiff, v. WINGATE WILDERNESS THERAPY, LLC, a Utah Limited Liability Company; Defendant.	**AFFIDAVIT OF SCOTT HESS** Case No. 4:18-cv-002-DN Judge David Nuffer

STATE OF UTAH)

:ss.

COUNTY OF KANE)

Scott Hess, being first duly sworn deposes and states:

1. I am over 18 years of age and of sound mind.
2. At all times set forth below I was, and currently am, a licensed marriage and family therapist employed by Wingate Wilderness Therapy, LLC ("Wingate").
3. On February 25, 2015, shortly after Jacob arrived at Wingate for therapeutic treatment, I

created a Treatment Plan for Jacob identifying initial diagnostic impressions, outlining the course of treatment, and identifying his treatment areas.[1]

4. Jacob had four treatment areas: substance abuse, anxiety, disruptive behavior, and parent child relations. Jacob's Treatment Plan called for, among other things, weekly individual and group therapy sessions, daily psychoeducational and process groups, hiking (exercise), and recommended a stay in the therapeutic program for eight weeks.[2]

5. An audit of files conducted in June 2015 discovered the Treatment Plan was not digitally signed when it was created. Accordingly, the document was digitally signed on June 21, 2015.

6. I met with Jacob for individual therapy sessions on February 23, 2015 and March 2, 2015. Jacob also participated in at least two group therapy sessions.

7. On February 23, 2015, I spoke with Kathleen Scott, Jacob's mother and updated her on Jacob's arrival and initial therapeutic meeting.[3]

8. On February 27, 2015, I spoke with Jacob's parents regarding Jacob's progress including our therapy sessions, visiting Jacob, and strategies they could use in working with Jacob.[4]

9. Jacob Scott was discharged from Wingate on March 8, 2015.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

)

)

[1] Treatment Plan, attached as Exhibit A.
[2] *See id.*
[3] Wingate Family Therapy Notes dated February 23, 2015, attached as Exhibit B.
[4] Wingate Family Therapy Notes dated February 27, 2015, attached as Exhibit C.

DATED this 6 day of June, 2018.

SCOTT HESS

SUBSCRIBED AND SWORN to before me this 6th day of ~~March~~ June, 2018.

NICOLE B NELSON
Notary Public • State of Utah
Commission # 693619
My Commission Expires
February 7, 2021

Notary Public
Residing in ~~Kane~~ Washington Count, State of Utah

EXHIBIT A

WINGATE
Wilderness Therapy

TREATMENT PLAN

Student: Jacob Scott
Date of Birth: [redacted]
Admission Date: 02/21/2015
Discharge Date:
Parent/Guardian: Kathleen Scott and Daryl Scott
Educational Consultant: Josh Doyle
Wingate Therapist: Scott Hess, M.A.,LMFT

PLACEMENT ISSUES: Jacob was placed in the program due to problems encountered in school, home, and community. He has been removed from school due to substance abuse and struggles with the relationship with his father.

INITIAL DIAGNOSTIC IMPRESSIONS:

Axis I	• 313.81 Oppositional Defiant Disorder • 300.02 Generalized Anxiety Disorder (by report • 305.20 Cannabis Abuse • V 61.20 Parent/Child Relational Difficulties
Axis II	• V71.09
Axis III	• Defer to physician
Axis IV	• Problems with Primary Support Group • Problems Related to the Social Environment • Placement in Wilderness Program
Axis V	• GAF: 41-45

SUMMARY OF SERVICES:
Jacob will participate in weekly individual and group therapy as well as daily psychoeducational and process groups. He will be immersed in wilderness principles and experiences, and will have the opportunity to learn & apply 'Leave No Trace' principles throughout his outdoor experience at WinGate. He will have the opportunity to learn outdoor survival skills as well as a variety of methods for making and utilizing primitive tools, instruments, and shelters. Jacob will be introduced to new philosophies and strategies to assist him in creating a more effective path for himself and for his family relationships.

TREATMENT OBJECTIVES:
Treatment Area: Disruptive Behavior
Jacob will begin to understand the importance of rules, boundaries, and instruction from authority figures. He will engage in controlled, respectful compliance with program rules and directions. He will demonstrate a marked reduction in the intensity and frequency of disrespectful and defiant behaviors toward others. Jacob will develop a deeper understanding of the underlying issues related to the oppositional and defiant behavior, and find more effective strategies for communicating with parents and other authority figures. Experientially, as he engages in the structure of the program, Jacob will reach a level of reduced tension and increased satisfaction, as he develops and implements more effective coping strategies.

Treatment Area: Anxiety
Jacob will identify and begin to understand the nature of his worries, fears, and/or anxiety, as well as the link between ineffective thought patterns and the resulting anxiety. He will learn strategies for challenging distorted thinking and for creating more effective thinking patterns that lead to a reduction in the frequency and intensity of anxious feelings. He will begin to make significant progress toward resolving key issues that relate to the source of his anxiety or fear. Experientially, he will learn and implement wilderness skills/activities that will contribute to his increased confidence, problem-solving ability, and self-care (making and using a bow-drill fire set, building sleeping shelters, learning and implementing 'Leave No Trace' practices, hiking, cooking, etc.).

Treatment Area: Substance Abuse
Jacob will better understand the destructive nature of illicit substances, and verbalize/write a commitment to abstain from them. He will refrain from inappropriately discussing his past use with others, and more clearly recognize the negative path that illicit drug and alcohol use can lead to. Jacob will complete a substance abuse history as a strategy for understanding the pervasiveness of the substance abuse, and as an opportunity to provide an honest inventory of his substance abuse problem. He will also develop a relapse-prevention plan prior to leaving the program. He will explore the underlying reasons for his substance abuse, and develop more effective strategies for better dealing with these issues. As appropriate, he will work through various aspects of the 12-step program, and begin his path to long-term sobriety. Jacob will eliminate, or greatly reduce, his substance-seeking behavior, and begin to envision his life in a drug- and alcohol-free way.

Treatment Area: Parent Child Relational
Jacob will recognize his role in the parent child relationship challenges. He will begin to better understand negative and/or ineffective patterns of interaction, and learn strategies to reduce the conflict within the relationship. Jacob will recognize the importance of rules and boundaries, and demonstrate an increased ability to comply with rules and directives in general. Jacob will demonstrate an increased ability to communicate effectively with his parents, being more open and honest in letters home. Jacob will show an ability to recognize strengths within the family system, including identifying positive elements and strengths in himself and in his parents. Jacob will demonstrate an increased ability to be more solution focused, and increase his confidence that he can establish a healthier relationship with his parents.

LENGTH OF STAY: Approximately 8 Weeks

--Digitally Signed: 06/21/2015 05:20 pm: Clinical Director: Scott Hess, M.A.,LMFT

EXHIBIT B

WINGATE
Wilderness Therapy

WINGATE FAMILY THERAPY

Student: Jacob Scott
Date of Birth: [redacted]
Admission Date:
Discharge Date:
Parent/Guardian: Kathleen Scott and Daryl Scott
Educational Consultant: Josh Doyle
Wingate Therapist: Scott Hess, M.A.,LMFT

Person/s in Attendance: Kathleen Scott

Session Length: 30 minutes

Discussion notes:
update arrival

Needs or Planning:
update post my sessions

--Digitally Signed: 02/23/2015 11:48 am: Clinical Director: Scott Hess, M.A.,LMFT

CPT Code: 90846 Family Therapy w/out Patient

EXHIBIT C

WINGATE
Wilderness Therapy

WINGATE FAMILY THERAPY

Student: Jacob Scott
Date of Birth: [redacted]
Admission Date: 02/21/2015
Discharge Date:
Parent/Guardian: Kathleen Scott and Daryl Scott
Educational Consultant: Josh Doyle
Wingate Therapist: Scott Hess, M.A.,LMFT

Person/s in Attendance: Josh Doyle, Kathleen Scott and Daryl Scott

Session Length: 60 minutes

Discussion notes:
I updated parents regarding the progress of Jacob. I discussed a time for the parents to come out to visit Wingate and attend the seminar. I also talked about some strategies the parents can use in working with Jacob.

Needs or Planning:
I will update the parents next week on the progress of Jacob.

--Digitally Signed: 02/27/2015 09:13 pm: Clinical Director: Scott Hess, M.A.,LMFT

CPT Code: 90846 Family Therapy w/out Patient

Addendum D

AMERICAN PSYCHOLOGICAL ASSOCIATION

COVER STORY

Therapy gone wild

More psychologists are using the wilderness as a backdrop and therapeutic tool in their work.

By Tori DeAngelis

September 2013, Vol 44, No. 8
Print version: page 48

When psychologist Steve DeBois, PhD, works with groups of troubled teens, he uses the evidence-based approaches that any good short-term residential-treatment therapist would use: cognitive behavioral therapy to combat negative thinking, journaling to help shed light on depression and anxiety, and group activities to overcome social phobia and develop greater self-confidence, to name a few.

But instead of doing this work in a fluorescent-lit treatment facility, DeBois takes the teens into the Utah high desert, where they learn ways to defeat unproductive emotional and psychological patterns while camping and hiking in a stunning landscape of mountains, pine trees and juniper bushes.

These are not Outward Bound courses or backpacking trips, DeBois says. "Those things have value unto themselves, but we offer a layer of real therapeutic work, a traditional insight-oriented approach to addressing whatever these kids' issues happen to be."

DeBois is clinical director of a program called Second Nature, one of a number of "private pay" programs — they're not covered by insurance — that are bringing empirically informed therapeutic techniques and therapists into the wilderness. The trend, which began in the mid-1990s, has burgeoned over the last decade, with more and more programs offering tailored approaches for young people with clinical diagnoses or substance use problems, adults who want to move on to new life stages, and families who need interventions that pack more punch than one or two office-based sessions.

This new brand of outdoor treatment began as a reaction to some wilderness therapy programs created in the 1970s, says psychologist and adventure therapist H.L. "Lee" Gillis, PhD, of Georgia College. Those programs lacked good oversight and were run by a mish-mash of providers, many of them unqualified and unlicensed, he and others say. At the time, many such programs were state-funded, and some took the form of "boot camps" designed to create challenging and even punishing experiences for young clients, many of whom came from the juvenile justice system. This type of treatment reached a nadir in 1994, when 16-year-old Aaron Bacon died from

a treatable ulcer on a trip to southern Utah. When he complained of abdominal pain, his counselors called him a "faker," then deprived him of his sleeping bag for 14 nights and food for 11 nights.

That's when the program directors and founders of five wilderness therapy programs came together for a meeting in Salt Lake City, put their differences aside, and recognized that discussing best practices and agreeing on common principles would be best for the industry. To those ends, they created the Outdoor Behavioral Healthcare Research Cooperative (http://www.obhrc.org) to make sure these programs were properly studied and evaluated, says Keith Russell, PhD, of Western Washington University, who served as the organization's first researcher. The cooperative's members have conducted some 200 studies, currently under the direction of Michael A. Gass, PhD, of the University of New Hampshire.

"Intentionality" — planning a program's design and treatment course in thoughtful, empirically based ways — "is so important to the success of wilderness therapy," Gillis says.

How it works

Second Nature, founded in 1998, is one of the oldest of these "intentional" programs, says psychologist Andrew Erkis, PhD. He heads Erkis Consulting Group, a practice specializing in helping parents of at-risk adolescents find the most appropriate wilderness therapy and other programs, including Second Nature. Each of Second Nature's four campuses — two in Utah, one in Oregon and one in Georgia — is staffed by two or three doctoral-level psychologists as well as other mental health professionals with expertise in a variety of areas, including anxiety and depression, attention deficit disorder, Asperger's syndrome, obsessive compulsive disorder, eating disorders and trauma. (An even newer trend is to include a staff psychiatrist as part of the treatment team, Erkis notes.)

Clinical staff members conduct a thorough assessment of each child before doing anything else, says DeBois. That means young people — who have both diagnosable mental health conditions and a typical range of adolescent problems including rebellion, self-doubt and substance use — are placed with therapists and peers who match their issues, says DeBois. Most adolescent groups are single-gender, while most young adult programs are co-ed. In addition, these courses are "open enrollment," meaning that young people in various stages of the process live together in the same group, with new kids entering all the time and graduates exiting. "There's a lot of peer mentoring and peer modeling," DeBois says.

Once the teens are properly assessed, the wilderness setting, the tailored therapy and the lengthy stay — which averages eight to 10 weeks — provide a crucible for growth, says DeBois. That's because the wilderness is devoid of escape hatches: Hiding in one's room playing computer games is not an option. In addition, the longer stay helps break down defensive barriers, with young people typically going through an avoidance stage, a learning stage, and a stage in which they start to internalize healthier thinking and behavior patterns.

"A big part of this experience is helping students experience for themselves a greater sense of self-efficacy and internal locus of control," DeBois says.

Nature is a catalyst, too. That's because it's empowering to realize that you can survive in the wilderness, Erkis says. In addition, the outdoors nurtures physical health, which in turn fosters mental health.

"They're in an emotionally safe place, they're not going anywhere, and by the way, they're exercising, they're eating well, they're sleeping well — they're starting to look and feel great," Erkis says.

The setting also allows psychologists to work in fun and nonpathologizing ways. For instance, DeBois treated an extremely shy boy who was deeply anxious that others would judge him harshly. DeBois suggested the staff play charades and give the boy an assignment that made him the center of attention — an exercise that helped the boy see that being in the spotlight wasn't so scary.

"Being in this kind of setting allows therapy to happen in this backdoor way where it doesn't feel like therapy," DeBois says.

Family dynamics

Other psychologists are taking families, adults and couples out to the wilderness for therapeutic experiences. Psychologist Scott Bandoroff, PhD, launched the field of "wilderness family therapy" in 1990 when he observed that young people who had made great gains on wilderness therapy trips tended to lose ground when they got home, the result of returning to negative family dynamics.

Given the difficulty of scheduling time for a whole family, plus the cost of these ventures, Bandoroff tends to take families out for three-day weekends. These sessions can make a big impact, he has found, thanks to a combination of being removed from daily life and its distractions; doing exercises to build trust and teamwork; taking solo trips where family members have a chance to ponder their individual issues and roles; and participating in group activities that end with a reward, like a beautiful mountain view. Families also set and agree on goals based on what they've learned, so they can continue to work on issues raised during their time out, says Bandoroff, who heads Peak Experience, a wilderness therapy training and practice firm in Ashland, Ore.

Looking to the future

These programs aren't perfect, those involved admit. For one thing, they're expensive, costing from $20,000 to $30,000 for two months. As such, they tend to be available only to wealthier clients, since insurance doesn't pay for anything but discrete therapy sessions in the wilderness, and publicly funded programs generally dried up with the 2008 recession. For another, the quality of these programs remains variable. While many programs are reputable state-licensed programs with top-notch therapists, others have more questionable credentials, Erkis says. Because so much time is spent outdoors without parental supervision, ethical, safety and health issues may also arise, so it behooves parents to find well-vetted programs, Erkis says. Finally,

follow-up is a problem with some programs, though good programs make sure clients receive recommendations for additional care or placement if needed.

That said, research is starting to show that some of these programs can be effective. A 2010 *Journal of Therapeutic Schools and Programs* article by Ellen Behrens, PhD, and colleagues, for instance, examined several large-scale, multi-center longitudinal studies and found that youth in these programs improved significantly in mood and behavior during treatment, and that those improvements continued when they returned home. Meanwhile, in six years of tracking participants and parents over a number of programs, Second Nature researchers found significant improvements in the youngsters' overall motivation, life skills, interpersonal relationships, hope, self-confidence and emotional control both at graduation and at six-month follow-ups. Importantly, parents perceived those differences, too.

For Bandoroff, there is no doubt that the combination of being in a beautiful natural setting and working on your issues with highly trained professionals is a winning one that more psychologists should consider exploring.

"You get spoiled for life when you see how quickly change can occur," he says.

Tori DeAngelis is a writer in Syracuse, N.Y.