IN THE SUPREME COURT OF THE STATE OF UTAH

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

REPLY BRIEF OF APPELLANT

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

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ARGUMENT

A. Wingate argues for a boundless definition of "health care" that was not contemplated by the Legislature.

Wingate acknowledges that "[t]he threshold question presented by the certified question is what constitutes 'health care' [under the Act]." Br. of Appellee at 17. The Act 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 Ann. § 78B-3-403(10). The Act then enumerates a list of persons and entities that qualify as "health care providers." *See* Utah Code Ann. § 78B-3-403(12). Additionally, before a person may bring a medical malpractice claim for injury arising from "health care," a licensed medical professional who is "practicing and knowledgeable in the same specialty as the proposed defendant" must opine regarding the merits of the person's claim. *See* Utah Code Ann. §§ 78B-3-416(2), -416(4)(b)(i), & -418(2)(a).[1]

[1] Although the affidavit of merit and certificate of compliance portions of the Act have been deemed unconstitutional, the prelitigation panel requirement remains intact. *See Vega v. Jordan Valley Med. Ctr., LP*, 2019 UT 35, ¶ 24, 449 P.3d 31. That requirement provides for a three-person panel that includes "one member who is a licensed health care provider listed under Section 78B-3-403, who is practicing and knowledgeable in the same specialty as the proposed defendant," Utah Code Ann. § 78B-3-416(4)(b)(i), to opine on the merits of a malpractice claim before the claim is filed, *see* Utah Code Ann. §§ 78B-3-416(2) & -418(2)(a); *Vega*, 2019 UT 35, ¶ 24, 449 P.3d 31. Additionally, although the affidavit of merit provisions have been deemed unconstitutional, they still shed light on the Legislature's intent.

Jacob contends that these provisions plainly indicate that "health care" under the Act is limited to acts or treatment of a type performed or furnished by the health care providers listed in the Act or acts similar to those performed or furnished by the health care providers listed in the Act. *See* Br. of Appellant at 19-20. Jacob contends that a particular act is not "health care" if the act does not require the exercise of medical judgment or expertise. *See id.* at 33. Finally, Jacob contends that an act that is not otherwise health care does not become health care simply because it is performed by an employee or associate of a licensed health care provider. *See id.* at 20-24.

In contrast, Wingate urges the Court to conclude that "health care" is any arguably therapeutic activity provided by any associate or employee of a "health care provider," even if (1) the activity is not one provided by any class of "health care provider" listed in the Act, and (2) the activity does not involve the exercise of medical judgment or expertise. *See* Br. of Appellee at 17, 24-28. In Wingate's words:

> [If] the person or entity is a "health care provider," [then the] question [of what constitutes "health care"] 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."

Id. at 17 (citation omitted).

> [T]he 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 . . . specifically identified as a component of the means Mr. Hess[, a marriage and family therapist,] had identified to accomplish the therapeutic objectives he had identified for Jacob.

Id. at 24. According to Wingate, as long as its marriage and family therapist prescribes it, any arguably therapeutic activity that Wingate's *field staff* provides is health care, including learning to use a bow-drill fire set, building sleeping shelters, and outdoor cooking. *Id.* at 24-26.

Thus, under Wingate's definition of health care, if one of its campers gets burned while using a bow-drill fire set, the camper's claim is for medical malpractice, and a marriage and family therapist like Mr. Hess must opine on the standard of care for teaching the use of bow-drill fire sets before the camper can bring his claim.

According to Wingate, if one of its campers is injured when a lean-to sleeping shelter collapses, his claim is for medical malpractice, a marriage and family therapist must opine regarding the standard of care for lean-tos before the camper can bring his claim.

According to Wingate, if one of its campers is injured while Dutch oven cooking, his claim is for medical malpractice, and a marriage and family therapist must opine on the standard of care for handling Dutch ovens before the camper can bring his claim.

That is not all. Under Wingate's definition of health care, a nursing home could successfully assert that a resident who is injured while playing bingo or weeding in the community garden as part of a treatment plan has a claim for medical malpractice. *See* Utah Code Ann. § 78B-3-403(11) & (12) (defining "nursing care facilities" as health care providers); All About Seniors, https://www.allaboutseniorsinc.net/stimulating-activities-seniors-dementia (last visited April 3, 2020) (observing that bingo can have a therapeutic effect on dementia patients); Aspen Senior Care, https://aspenseniorcare.com/gardening-therapy-and-seniors-with-dementia (last visited April 3, 2020) (observing that "[h]orticulture [t]herapy professionals believe[] that therapeutic gardening has an important place [in] the care and treatment of patients suffering from Alzheimer's disease").[2] And again, a licensed nursing care provider would have to opine on the standard of care for picking up bingo pieces or garden safety before the resident could bring her claim.

Wingate's foregoing definition of "health care" is boundless. Under it, any entity with a health care provider on staff could provide, on recommendation of the health care provider but through non-medical staff members, any number of activities that do not require medical expertise to administer but which are

[2] For the proposition that activities like fire making, hiking, and shelter building are therapeutic, Wingate similarly relies on industry websites. *See* Br. of Appellee at 24-25.

arguably therapeutic, and those activities would become "health care." *See, e.g.*, Origami Resource Center, https://www.origami-resource-center.com/health-benefits.html (last visited April 6, 2020) (stating that "therapists have found that origami helps those with low self esteem, anxiety, ADHD, [and] autism"); Psychology Today, https://www.psychologytoday.com/us/blog/lets-reconnect/201806/its-slime-time (last visited April 6, 2020) (suggesting that playing with slime is a "soothing activity" that facilitates the "meditative practice" of "[m]indfulness"); Harvard Health Publishing, https://www.health.harvard.edu/mental-health/the-healing-power-of-art (last visited April 6, 2020) (observing that "[s]tudies have shown that expressing themselves through art can help people with depression, anxiety, or cancer").

That this boundless definition of health care was not intended by the Legislature is clear from the Act's requirement that a licensed medical professional opine on the merits of a malpractice claim before the claim is brought. *See* Utah Code Ann. §§ 78B-3-416(2), -416(4)(b)(i), & -418(2)(a). It would be absurd to require a licensed medical professional to opine on the merits of an ordinary negligence claim arising from birdwatching, bingo, origami, gardening, outdoor cooking, fire making, or a slime activity administered by unlicensed, non-medical professionals. *See Dowling v. Bullen*, 2004 UT 50, ¶ 11, 94 P.3d 915 (refusing to interpret the Act in a way that yields absurd results).

That this definition of health care was not intended by the Legislature is also shown by the fact that medical malpractice insurance does not cover the administration of birdwatching, bingo, hiking, fire making, or other activities that require no medical expertise to provide. *See* Utah Code Ann. § 78B-3-402.

To nevertheless support its reading of "health care," Wingate observes that some of the health care providers listed in the Act provide treatment that includes "activities that people engage in during ordinary life"; specifically, "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." Br. of Appellee at 19. However, physical therapists and athletic trainers exercise medical judgment and expertise as they engage with and monitor patients to have the patients perform specific exercises to rehabilitate specific injuries.

In contrast, there is no suggestion that Wingate's wilderness activities were administered in a specific way to treat a camper's specific diagnosis—a moderate 3-mile hike for anxiety, a strenuous 6-mile hike for ADHD, primitive fire making for substance abuse, for example. And there is no suggestion that the wilderness activities were administered or overseen by Mr. Hess or any other medical professional on Wingate's clinical staff. Indeed, by state regulation, Wingate's "field director," "executive director," and "field staff" are not required to have a medical license of any kind. *See* Utah Admin. Code R501-8-6. Thus, like the

doctor who recommends generally that a patient get exercise but who does not administer the exercise himself, Mr. Hess prescribed boilerplate wilderness activities, *see* App. at 197, and left it to Wingate's field staff, who "are not licensed therapists or medical doctors," Br. of Appellee at 34, to conduct such activities, without exercising medical judgment or expertise.

As suggested in Jacob's initial brief, this is akin to the case of *Coursen v. New York Hospital-Cornell Medical Center*, 499 N.Y.S.2d 52 (N.Y. App. Div. 1986), where a doctor instructed a post-operative patient to "get out of bed and walk around," and a nurse's aide then took the patient for a walk. *Id.* at 53. When the patient was injured after being left unattended by the aide, the patient's claim based on the aide's negligence was not deemed a medical malpractice claim, while the claim against the doctor for allegedly prescribing a walk too soon after surgery was deeded a medical malpractice claim. *See id.* at 54-55. The fact that the doctor and the nurse's aide both worked for the same hospital did not turn the aide's ordinary negligence into medical malpractice. *See id.*

Here, Jacob has made no claim that Mr. Hess negligently prescribed wilderness activities. *See* App. at 13. Rather, his claim is based solely on the manner in which the field staff, who exercised no medical judgment or expertise, conducted those activities. *See id.* The fact that Wingate's clinical staff and field

staff both work for the same entity does not transform the field staff's ordinary negligence into medical malpractice. *See Coursen*, 499 N.Y.S.2d at 52-54.

The Utah Court of Appeals' case *Carter v. Milford Valley Memorial Hospital*, 2000 UT App 21, 996 P.2d 1076, also is consistent with the view that not all arguably therapeutic acts qualify as health care by virtue of the fact that they are provided by an associate of the health care provider that recommends them. The hospital in *Carter* argued that the Health Care Malpractice Act applied to a claim arising from decisions made by its ambulance EMT's simply because "its ambulance services are an extension of the Hospital." *Id.* ¶ 17. The Court of Appeals disagreed, saying that it did "not regard this characterization as dispositive." *Id.* Instead, the Court of Appeals looked to whether the ambulance EMT's were themselves health care providers. *See id.*

Similarly, the fact that Wingate's clinical team and field staff are two arms of the same entity is not dispositive of whether the field staff members are health care providers or whether the activities they provide are health care. Rather, as the Court of Appeals did with the EMT's in *Carter*, this Court should look to whether Wingate's field staff members are health care providers or exercising medical judgment when they provide wilderness activities.

In *Carter*, the Court of Appeals noted that the hospital's EMT's were not merely chauffeurs with the ability to lift. *Id.* ¶ 21. Instead, the EMT's were

licensed medical professionals who exercised medical judgment in deciding whether their ill heart patient should be moved to a different ambulance. *See id.* ¶¶ 1-5, 9, 9 n.5. In contrast, Wingate's field staff are not medically licensed and exercise no medical judgment as they lead boys on hikes, teach them to build shelters, and allow them to climb rock formations without gear or training.

For the foregoing reasons, this Court should reject Wingate's definition of "health care" as any arguably therapeutic activity recommended by a health care provider and administered by associated but unlicensed staff members who exercise no medical judgment or expertise.

B. The health care Wingate provided to Jacob was not a proximate cause of Jacob's injury.

Wingate argues that Jacob's claim arose out of or related to the provision of health care because "under the allegations of Jacob's complaint, WinGate's provision of health care . . . was at the very least a proximate cause of his injury." Br. of Appellee at 28; *see also id.* at 21-24. This argument, however, is based on the mistaken assertion that "Jacob has conceded" that "the wilderness therapy program in which he was participating" constitutes "health care." *See id.* Jacob has conceded only that the "traditional counseling [Wingate provides] is 'health care'" and that "Wingate acts as a health care provider . . . when its clinical team is providing counseling." Br. of Appellant at 2, 19. As set forth above and in his opening brief, Jacob has not conceded that wilderness therapy is health care or

that Wingate's field staff are health care providers. *See id.* at 3, 17-20. And Wingate's counseling was not the proximate cause of his injury.

"Proximate cause is 'that cause which, in a natural and continuous sequence, unbroken by any new cause, produced the injury[.]'" *Dee v. Johnson*, 2012 UT App 237, ¶ 4, 286 P.2d 22 (quoting *Bunker v. Union Pac. R.R. Co.,* 114 P. 764, 775 (Utah 1911)). "Furthermore, 'foreseeability is an element of proximate cause.'" *Id.* ¶ 5 (quoting *Steffensen v. Smith's Mgmt. Corp.,* 862 P.2d 1342, 1346 (Utah 1993)). "[I]n the context of proximate cause, foreseeability is not concerned with categorical inquiries such as whether 'a reasonable person could anticipate a *general risk of injury* to others.'" *Id.* (quoting *B.R. ex rel. Jeffs v. West,* 2012 UT 11, ¶ 27, 275 P.3d 228). "Rather, the appropriate inquiry focuses on 'the specifics of the alleged tortious conduct,' such as 'whether the *specific mechanism of the harm* could be foreseen.'" *Id.* (quoting *Normandeau v. Hanson Equip., Inc.,* 2009 UT 44, ¶¶ 18, 20, 215 P.3d 152).

Here, while a reasonable person might anticipate that Mr. Hess's recommendation for Jacob to engage in wilderness activities could create a general risk of injury, Jacob's injury did not flow from that recommendation in a natural and continuous sequence, unbroken by any new cause. To the contrary, Wingate's field staff's negligence in "allowing the youth to take a detour from the designated route"; "allowing the youth to climb the dangerous rock

formation without supervision"; etc., App. at 13, interrupted the anticipated sequence and provided a new and independent cause of harm to Jacob. Thus, the only conceded "health care" that Wingate rendered—i.e., Mr. Hess's counseling and associated recommendations—was not the proximate cause of Jacob's injury; the field staff's ordinary negligence was.

This conclusion is consistent with, not contrary to, this Court's opinion in *Smith v. Four Corners Mental Health Center, Inc.*, 2003 UT 23, 70 P.3d 904, as Wingate suggests. In *Smith*, this Court held that the defendant's rendering of mental health services was a proximate cause of the plaintiff's injuries where the plaintiff's specific allegations of negligence "all [arose] out of [the defendant's] provision of mental health services," allegations such as that the defendant failed to provide adequate mental health services and failed to supervise the preparation of the plaintiff's treatment plan. *Id.* ¶ 35.

In contrast, none of Jacob's allegations of negligence arise out of Wingate's mental health counseling services. He claims nowhere that his injuries were a result of negligence in the preparation of his treatment plan, negligence in the medical advice he was given to participate in wilderness activities, or negligence in the frequency or content of his counseling sessions with Mr. Hess. Instead, Jacob's allegations of negligence, which follow, all arise out of Wingate's provision of a wilderness experience by unlicensed field staff:

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

App. at 13. In short, unlike the injury in *Smith*, which (according to the plaintiff's own allegations) was proximately caused by the negligent rendering of mental health care, Jacob's injury was not proximately caused by the rendering of mental health care but, rather (according to Jacob's allegations), by Wingate's ordinary negligence in the rendering of a wilderness experience.

C. It is for the Legislature, not the courts, to define "health care" to include wilderness therapy and other arguably therapeutic activities not administered by medical professionals.

Finally, Wingate argues that to exclude claims arising out of wilderness therapy from the reach of the Utah Health Care Malpractice Act "would render the Act essentially meaningless with respect to wilderness therapy programs such as WinGate as well as other 'health care providers.'"[3] Br. of Appellee at 33.

[3] Wingate does not identify the other providers it refers to. *See* Br. of Appellee at 33. They may include entities like the Utah Cultural Alliance, which appears to have "[a]n epilepsy nurse specialist and licensed therapist" on staff during its art therapy summer camps. *See* Utah Cultural Alliance, https://www.utahculturalalliance.org/camps_art_access_studio_e_art_therapy

To the extent Wingate's assertion is true,[4] it is because the Legislature has chosen not to include "wilderness therapy" as "health care" or wilderness therapy providers as "health care providers" under the Act. Nor has it chosen to include as health care providers under the Act any other persons or entities who provide services similar to "'back-country travel,'" "'wilderness living,'" "'[a]dventure experiences,'" and the "'application of primitive skills such as fire-making.'" Response Br. of Appellee in the 10th Circuit at 23 (citations omitted) (defining "wilderness therapy").

As Wingate has observed, when the Legislature wants to, it knows how to include as "health care providers" under the Act providers who are not "prototypical," Br. of Appellee at 19, including physical therapists and athletic trainers. *See* Utah Code Ann. § 78B-3-403(12). The Legislature also knows how to amend the Act to add to, or clarify, the persons and entities that qualify as "health care providers," as it did in 2002 by adding "hospices," "birthing centers," "home health agencies," and other entities to the express list of "health care providers." *See* 2002 Utah Laws 427; Utah Code Ann. § 78B-3-403(11) & (12).

(last visited April 7, 2020).

[4] Wingate's assertion that excluding wilderness therapy from the reach of the Act would render the Act "essentially meaningless" for entities like Wingate is true only to the extent that the traditional counseling Wingate's clinical staff provides, which undisputedly qualifies as "health care" and is covered by the Act, *see supra* p. 9, is deemed essentially meaningless.

On the other hand, courts "cannot by construction liberalize [a] statute and enlarge its provisions." *Hanchett v. Burbidge*, 202 P. 377, 380 (Utah 1921). As this Court has explained: "[W]e have nothing to do with what the law ought to be. We must be guided by the law as it is." *Id.* In sum, it is for the Legislature, not the courts, to expand the definition of "health care" under the Act to include "wilderness therapy" or other arguably therapeutic activities not administered by medical professionals.

CONCLUSION

For the foregoing reasons, the Court should conclude that, although Wingate is a "health care provider" under the Utah Health Care Malpractice Act when it is providing traditional counseling, the injury sustained by Jacob while climbing a rock formation during "wilderness therapy" does not "relat[e] to or aris[e] out of health care rendered or which should have been rendered by [a] health care provider" within the meaning of the Act.

RESPECTFULLY SUBMITTED this 8th day of April 2020.

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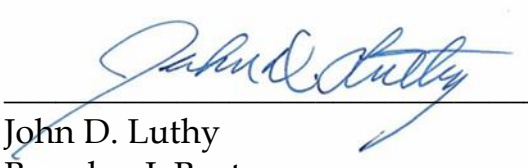

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CERTIFICATE OF COMPLIANCE

The foregoing Brief of Appellant complies with the type-volume limitation of rule 24(g) of the Utah Rules of Appellate Procedure as it has been prepared using 13-point Book Antiqua, a proportionally-spaced typeface, and contains 3,300 words according to the undersigned counsel's word processing system, Microsoft Word 2010. The foregoing Brief of Appellant also complies with rule 21 of the Utah Rules of Appellate Procedure governing public and private records.

DATED this 8th day of April 2020.

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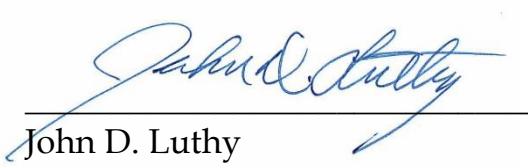

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February 2020, I caused a true and correct copy of the foregoing Brief of Appellant to be served via email upon the following:

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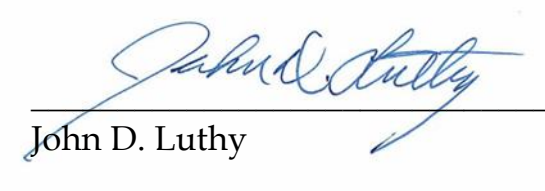

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