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

RESPONSE BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The Tenth Circuit has sought guidance on the proper interpretation and application of Utah's Health Care Malpractice Act (the Act) in the context of a claim based on an injury Jacob Scott suffered while participating in WinGate Wilderness Therapy, LLC's wilderness therapy program. Although the certified question is written in the specific factual context of Jacob's claim, it necessarily 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."

In urging the Court to hold that his claim is *not* a "malpractice action against a health care provider," Jacob argues that wilderness therapy is not "health care" and WinGate is not a "health care provider" when providing such therapy as compared to "traditional counseling." This argument is not only inconsistent with Jacob's prior, unqualified concession that WinGate is a health care provider, which informed the Tenth Circuit's certified question, but it is also inconsistent with the Act's broad definition of both "health care provider" and "health care."

Contrary to Jacob's characterizations, the wilderness aspect of wilderness therapy cannot be disengaged from the therapeutic services Jacob and his parents sought from WinGate for treatment of his mental health and behavioral issues. The care and services provided by WinGate are services that are substantially

similar to the care and services provided by others specifically identified as "health care providers," such that WinGate *is* a health care provider in its provision of wilderness therapy.

Given WinGate's status as a health care provider and because Jacob's injury was at least proximately caused by an action taken with a therapeutic purpose and in furtherance of treatment, his claim is a "malpractice action against a health care provider" subject to the Act. Interpreting and applying the Act in this manner, as more fully detailed in WinGate's opening brief, is consistent with the purpose and intent of the Act. Although Jacob argues otherwise, his arguments are based on an unsupported narrow view of the Act's purpose and intent, a similarly narrow view of his own claim and wilderness therapy, and legislative history that is both unnecessary and inapplicable.

Jacob then urges the Court to hold that "simple negligence" cases do not fall within the Act based on certain holdings from other jurisdictions. Although the cases on which Jacob relies support the notion that not all injuries that are spatially or temporarily related to the provision of health care fall within the scope of the Act, they do not support the broad principle Jacob advances. Those cases turn on a distinction not applicable here—that where an injury is *not* caused by an action taken as part of treatment or with a therapeutic purpose, the claim does not trigger provisions applicable to malpractice actions. Jacob's injury occurred during his

participation in the very type of activities prescribed in his treatment plan; that, is, immersion and participation in wilderness experiences, including hiking, designed to achieve therapeutic objectives for each of Jacob's treatment areas. The actions leading to his injury are related to his treatment; they were taken in furtherance of that treatment and with a therapeutic purpose.

Interpretation and application of the Act, as informed by its plain language, its stated intent and purposes, and prior Utah caselaw, compel answering the certified question in the affirmative: where WinGate is a "health care provider" under Utah Code Section 78B-3-403(12), the injury sustained by Jacob while climbing a rock formation during a wilderness therapy program operated by WinGate relates to or arises out of health care rendered or which should have been rendered by a health care provider within the meaning of the Act.

ARGUMENT

I. JACOB'S CLAIM IS A "MALPRACTICE ACTION AGAINST A HEALTH CARE PROVIDER" SUBJECT TO THE ACT. HE HAS NOT ESTABLISHED THAT THE COURT SHOULD INTERPRET AND APPLY THE ACT IN A MANNER TO HOLD OTHERWISE.

A. Wilderness Therapy Is Health Care. The Immersive Wilderness Experience Cannot be Disengaged from the Therapeutic Purpose and Process of Wilderness Therapy.

Jacob's argument that his claim is not subject to the Act is based primarily on an effort to characterize wilderness therapy as non-health-care; a form of recreational, scouting-type program for youths that includes limited, discrete

therapeutic interactions with mental health providers. But, the immersive wilderness experience cannot be severed from the therapeutic purpose and process of wilderness therapy. Nor does the fact that this therapeutic process occurs almost entirely in the wilderness mean that it is any less therapeutic than "traditional counseling" (Appellant's Br. at 18). In fact, wilderness therapy has helped thousands of youth. The entire process of wilderness therapy has helped its participants heal and overcome their mental health challenges.

As an initial matter, many of the arguments Jacob raises in his opening brief are inconsistent with his prior, unqualified concession that "Wingate is a health care provider." (Appellant's 10th Cir. Br. at 5.) Jacob did not argue, as he now does, that WinGate is a health care provider *only* when it is providing "traditional counseling" (Appellant's Br. at 20). If he had, the briefing to the Tenth Circuit would have been quite different. It is possible the Tenth Circuit's certified question would have been different as well. That question is framed in terms of WinGate *being* a health care provider, presumably for the very type of treatment that gave rise to the claim—wilderness therapy:

> 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?

Scott v. WinGate Wilderness Therapy, LLC, 792 F. App'x 590, 591 (10th Cir. Nov. 13, 2019) (unpublished) (quoting Utah Code § 78B-3-403(17)). Indeed, the Tenth Circuit noted, without qualification, that the parties do not "dispute that Wingate is a health care provider," such that "[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." *Id.* at 594.

It is clear that Jacob's claim has never been based on something that happened during a one-on-one session with Scott Hess, a licensed marriage and family therapist employed by WinGate . And, yet, Jacob appears to ask the Court to accept that when he conceded "Wingate is a health care provider," that concession was limited to when WinGate is providing such "traditional counseling" to its patient–residents. That is, that by conceding WinGate—which operates a wilderness therapy program—is a "health care provider," Jacob was *not* conceding that "wilderness therapy" is health care; only that WinGate is a health care provider *when and to the extent* it offers "traditional counseling." Such a limited view of Jacob's concession is not borne out by the briefing to the Tenth Circuit or the Tenth Circuit's certification order. It is further substantively inconsistent with the Act.

Jacob argues that WinGate cannot be considered a health care provider when providing wilderness therapy because none of the specifically-enumerated

providers identified as "health care providers" "furnish[] back-country travel, wilderness living, adventure experiences, the application of primitive skis, or other similar services." (Appellant's Br. at 20.) But, the definition of "health care provider" does not turn on the modality used to provide treatment; rather it focuses on the type of "care and services relating to or arising out of the health needs" that is provided. Utah Code § 78B-3-403(12); *see also Platts v. Parents Helping Parents*, 947 P.2d 658, 663 (Utah 1997) ("[T]he statute does not address the similarity of *titles*, but rather the similarity of *care and services*.").

Since the enactment of the Act in 1976, the Legislature's view of the types of "care and services" offered by health care providers has been quite broad. *See* Utah Session Laws 1976, c. 23, § 3(1) (listing almost all of the same providers now included in the definition of "health care provider").[1] The specifically-enumerated

[1] The original Act defined "health care provider" as including

> 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, physician, registered nurse, licensed practical nurse, nurse-midwife, dentist, dental hygienist, optometrist, clinical laboratory technologist, pharmacist, physical therapist, podiatrist, psychologist, chiropractic physician, naturopathic physician, osteopathic physician, osteopathic physician and surgeon, audiologist, speech pathologist, certified social worker, social service worker, social service aide, marriage and family counselor, or practitioner of obstetrics, and 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.

list of "health care providers" has, since the beginning, included "a wide range of providers." *Carter v. Milford Valley Memorial Hospital*, 2000 UT App 21, ¶ 20, 996 P.2d 1076. And, as this Court has explained, the plain language of the statute includes within the definition of "health care provider" "all persons and entities rendering the same or similar care and services as those providers expressly enumerated." *Platts*, 947 P.2d at 662. "[T]he 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.'" *Id.* at 663.

As a provider of wilderness therapy, WinGate renders care and services similar to specifically-enumerated providers. Indeed, WinGate's multi-disciplinary therapy team *includes* licensed clinical social workers, licensed marriage and family therapists, an associate clinical mental health counselor, a licensed clinical mental health counselor, a medical doctor, and a psychiatric nurse practitioner. A psychologist, who works part-time, is also a member of Wingate's therapy team. WinGate provides behavioral, substance abuse, and mental health services to adolescent males and females. Wingate commonly treats youth with post-traumatic stress disorder, emotional trauma, anxiety, depression, bi-polar disorder, reactive attachment disorder, obsessive compulsive disorder, substance

abuse, attention deficit disorder, suicide ideation, borderline personality disorder, oppositional defiance disorder, and other behavioral disorders.

Mr. Hess, a primary therapist, conducted an initial one-on-one session with Jacob, after which he made initial diagnostic impressions, including identification oppositional defiant disorder, generalized anxiety disorder, cannabis abuse, and parent/child relational difficulties. Mr. Hess prepared a treatment plan for Jacob that called for an eight-week participation in WinGate's wilderness therapy program that would include "weekly individual and group therapy *as well as daily psychoeducational and process groups*." (App. 182 (emphasis added).) Mr. Hess's summary of services explained that Jacob would "be immersed in wilderness principles and experiences" that would "introduce[him] to new philosophies and strategies to assist him in creating a more effective path for himself and his family relationships." (*Id.*) Mr. Hess then set out specific treatment objectives for each of the four identified treatment areas, explaining how participation in the program as a whole and the immersive wilderness experience—not only the "traditional counseling" sessions— would further each of those objectives.

In arguing that these services are unlike those provided by other specifically-enumerated health care providers, Jacob ignores the therapeutic purpose and process that drives wilderness therapy programs. As a PhD psychologist interviewed in a cover story of the American Psychological

Association's *Monitor on Psychology* 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.'" Tori DeAngelis, *Therapy Gone Wild*, American Psychological Association *Monitor on Psychology*, Vol. 44, No. 8 (Sept. 2013), Addendum D to Br.[2] As discussed in that article, 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." *Id.* The difference is that "instead of doing this work in a fluorescent-lit treatment facility," it occurs in the wilderness. *Id.*

The Utah Court of Appeals has rejected an effort, similar to Jacob's, to focus narrowly on the services provided when determining whether an individual or entity is a health care provider. In *Carter*, the plaintiff argued that the paramedics who transported his wife to the hospital where she passed away were not "health care providers." The Court rejected this argument, holding "ambulance

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

paramedics render services sufficiently similar to those rendered by several of the practitioners explicitly identified in the Act's definition." *Carter*, 2000 UT App 21, ¶ 21. It 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. In fact, ambulance paramedics are expected to recognize and begin treating conditions later more comprehensively addressed by almost all health care providers mentioned in the statutory definition of "health care provider."

Id. ¶ 21. The Court noted that the plaintiff "does not suggest that the ambulance was called simply to transport his wife—something he could presumably have done himself." *Id.* ¶ 22. Rather, "[t]he paramedics were present to render emergency medical care for [his wife's] heart condition and to attempt to preserve her life during transportation to the Hospital." *Id.* In light of this, the Court "readily conclude[d] they were 'health care providers' for purposes of the Malpractice Act." *Id.*

Just as paramedics are not chauffeurs, wilderness therapy programs are not summer camps. They are not recreational youth programs. They are not a scouting troop. They are intensive therapeutic programs for youths, many of whom have been unsuccessful in other forms of treatment.

Notably, Jacob does not argue or allege that his parents enrolled him in WinGate's wilderness therapy program for fun or to make him a better camper. Rather, his parents sought treatment for his substance abuse, disruptive behavior, anxiety, and parent-child relationship issues. (App. 33, 179, 182; Supp. App. 7-8, 5-13.) His parents identified the following "specific goals for [Jacob] while receiving treatment": "Jake understands why he (1) takes risk taking behavior (drugs) and determines that he won't continue it, (2) doesn't like himself and learns to love himself, and (3) engages in self destructive behavior and corrects it. Jake needs to come to terms with why he was bullied and the relationship he has with his Dad." (Supp. App. 11.) Jacob and his parents did not seek the assistance of WinGate to help Jacob get exercise or teach him scouting-style skills—things they presumably could have done on their own. Rather, he and his parents turned to WinGate to address Jacob's mental health and behavioral issues through a therapeutic process; a therapeutic process that, as described in the treatment plan prepared by Mr. Hess, utilizes wilderness experiences to "contribute to [Jacob's] increased confidence, problem-solving ability, and self-care" and "introduce[him] to new philosophies and strategies to assist him in creating a more effective path for himself and for his family relationships." (App. 182-83.)

Relying on the Department of Human Services' regulations applicable to "Outdoor Youth Programs," Jacob appears to argue that "wilderness experiences"

are nevertheless distinct from "traditional counseling" and cannot be considered "health care." The regulations do not support that position.

"Outdoor youth program" is defined as "a 24-hour intermediate outdoor group living environment with regular formal therapy including group, individual, and the inclusion of supportive family therapy." Utah Admin. Code R501-8-3(d). This definition recognizes that "formal therapy" is a component of the program. But, it does not, as Jacob appears to argue, establish that the "formal therapy" is separate and distinct from the "outdoor group living environment," or that *only* the "formal therapy" is health care.

To the contrary, the remainder of the regulations confirm that *all* aspects of the program are regulated and that individuals other than those licensed by the Division of Professional Licensing are involved in the therapeutic process, even outside of "formal therapy." For instance, the executive director and field or program director must have, among other things, a bachelor's degree or equal training and experience "in a related field," a "minimum of two years of outdoor youth program field experience," and a "minimum of 30 semester or 45 quarter hours education in *recreational therapy or related field*, or one year Outdoor Program field experience." Utah Admin. Code R501-8-6(2), (3) (emphasis added). And, other field and support staff must have demonstrated proficiency in "counseling, teaching and supervisory skills," and "consumer management, including

containment, control, safety, conflict resolution, and behavior management," among other topics. Utah Admin. Code R501-8-8(2).

The fact that wilderness therapy programs in Utah are licensed by the Department of Health rather than DOPL and rely on non-DOPL-licensed staff (in addition to DOPL-licensed professionals) does not mean that wilderness therapy providers are not "health care providers." This Court has previously rejected a similar focus on "the type of license that a defendant possesses" in determining whether that person or entity is a "health care provider." *Platts*, 947 P.2d at 662-63.

In *Platts*, the Court of Appeals reversed the district court's ruling that the defendant, a "treatment program for troubled youths that was licensed by the Utah Department of Human Services," *id.* at 660, is a "health care provider" within the scope of the Act. The decedent had been admitted to the program for treatment of "problems associated with running away, truancy, depression, substance abuse, and feelings of inadequacy." *Id.* On appeal from the district court's ruling, the Court of Appeals interpreted the term "health care provider" narrowly, "justif[ying] its narrow interpretation on the ground that it is important for a clear distinction to be made so that a potential plaintiff may know whether a potential defendant is a 'health care provider.'" *Id.* at 662. "In making this distinction, the court of appeals placed importance on the type of license that a defendant

possesses, drawing attention to the fact that nearly all of those listed in the Act are licensed by the Division of Professional Licensing under title 58." *Id.* This Court held doing so was improper; it "ignores the plain language of the statute." *Id.* at 662-63.

"[T]he statute makes no mention of the status or origin of the license under which a health care provider operates as a determining factor for inclusion within the statute." *Id.* at 663. "In fact, such a narrow interpretation would exclude any defendant not licensed under title 58, even if that defendant clearly rendered care or services similar to those rendered by the providers"—a result that is inconsistent with the plain language of the Act. *Id.* Thus, neither the fact that WinGate is licensed by the Department of Health rather than DOPL, nor the fact that those involved in the provision of treatment include both staff licensed by the Department of Health and DOPL-licensed professionals renders WinGate outside of the definition of a "health care provider." It further does not alter the fact that the wilderness therapy services WinGate provides are "sufficiently similar to those rendered by several of the practitioners explicitly identified in the Act's definition," *Carter*, 2000 UT App 21, ¶ 21, such that it falls within the "catchall" provision of the definition of a "health care provider" for the provision of such services.

In light of Jacob's unqualified concession that "Wingate is a health care provider," the question of whether it is a health care provider for its wilderness therapy program as a whole rather than merely the "traditional counseling" that is but one component of that program is beyond the scope of the certified question before the Court. However, even if the Court were to now consider whether WinGate is a health care provider, Jacob's efforts to sever the wilderness experiences from the therapy provided is unavailing. Again, as explained by the Outdoor Behavioral Council, wilderness therapy or outdoor behavioral health care 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/ (emphasis added). The immersive wilderness experiences, including "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," "*are all designed to address problem behaviors by fostering personal and social responsibility and emotional growth of clients*." 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).[3]

The wilderness in wilderness therapy is not separate or separable from the therapy. It is not merely the location where the therapy occurs. Rather, the wilderness serves as a "crucible for growth," "a catalyst" for therapeutic change. Tori DeAngelis, *Therapy Gone Wild*. As explained in the American Psychological Association *Monitor on Psychology*, "the wilderness is devoid of escape hatches," which results in an intensive participation that "helps break down defensive barriers." *Id.* This setting also "'allows therapy to happen in this backdoor way where it doesn't feel like therapy.'" *Id.* (quoting psychologist Steve DeBois, PhD). And, the wilderness experiences with which the patient–residents are faced foster "'a greater sense of self-efficacy and internal locus of control'"; "it's empowering to realize that you can survive in the wilderness." *Id.* (quoting psychologist Steve DeBois, PhD).

WinGate is a health care provider with respect to its wilderness therapy program. As detailed in WinGate's opening brief, the question raised by the certified question, then, is whether Jacob's claim constitutes a "malpractice action." Under the broad definition of "health care," which encompasses actions

[3] *available at* https://www.fs.fed.us/rm/pubs/rmrs_p015_3/rmrs_p015_3_207_217.pdf.

taken with a therapeutic purpose or in furtherance of treatment, the answer is yes: Jacob's participation in WinGate's wilderness therapy program—and more specifically the immersive wilderness experiences, including hiking that were identified as part of his treatment plan to meet his treatment objectives—was at least *a* proximate cause of his injury. Such an interpretation and application of the Act is consistent with and supported by *Smith v. Four Corners Mental Health Center, Inc.*, 2003 UT 23, 70 P.3d 904 and *Dowling v. Bullen*, 2004 UT 50, 94 P.3d 915, as set out in WinGate's opening brief.

B. Recognizing the Immersive Wilderness Experience in Which Jacob Was Participating as "Health Care" Is Consistent with the Act.

1. *Interpreting the Act in a manner that excludes Jacob's claim would undercut the explicit intent and purpose of the Act.*

Relying exclusively on an insurance broker's website discussing coverage for "Wilderness and Backcountry Medical Professional Services," Jacob assumes that medical malpractice insurance does not cover wilderness therapy and argues, as a result, that wilderness therapy "does not implicate the public policy concerns at which the Act is aimed." (Appellant's Br. at 25-26.) Answering the certified question in the negative, however, would directly implicate the public policy concerns of the Act.

As an initial matter, Jacob's assumption about the interplay between medical malpractice insurance and insurance coverage for wilderness therapy is

not supported by the sole website on which he relies. That website appears to discuss an offering of insurance for *wilderness medicine*, which, according to the website, may be "excluded from your clinical coverage." Wilderness medicine and wilderness therapy, also referred to as outdoor behavior health care, are not the same thing. Wilderness medicine is a field of medicine generally considered to "focus[] on medical problems and treatments in remote environments." Howard D. Backer, M.D., *What is Wilderness Medicine?*, Wilderness and Environmental Medicine, Vol. 6, Issue 1, Feb. 1995, at 4.[4] Essentially, it is the practice of "traditional medicine" in the wilderness.

Wilderness therapy, by contrast, involves 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/ (emphasis added). Given this distinction, the website on which Jacob relies appears to say nothing about the insurance coverage available and applicable to wilderness therapy programs.

Regardless of the relevance, or lack thereof, of the website on which Jacob relies, his argument takes an unduly myopic view of the intent and purpose of the Act, focusing exclusively on the cost of "medical malpractice insurance." As set

[4] *available at* https://www.wemjournal.org/article/S1080-6032(13)80003-8/pdf.

out in Section 78B-3-402, the intent and purpose of the Act was to ensure the continued availability of health care at affordable prices. Utah Code § 78B-3-402(2). To accomplish this, the Act was designed to, among other things, "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). The concern over the availability and cost of health care, and the associated cost of "health-related malpractice insurance," must be understood in the context of what the Legislature considered to be "health care."

Contrary to Jacob's apparent argument, the Legislature was not concerned only with what one would view as "traditional medicine." This is evidenced by the definition of "health care provider," which, as discussed above, has from the enactment of the Act in 1976 been quite broad, *see* Utah Session Laws 1976, c. 23, § 3(1).

As discussed in WinGate's opening brief, adopting a narrow interpretation of "malpractice action against a health care provider" that would exclude Jacob's claim would, in fact, directly undermine the purposes and intent of the Act. Doing so is likely to make wilderness therapy—a form of health care—less available and more costly. It is also likely to have similar effects on other forms of health care

the Legislature has specifically included in the Act that are not "traditional medicine," such as social services workers, licensed athletic trainers, speech-language pathologists, and physical therapists and physical therapist assistants.

In resolving any ambiguity in the Act, the congruence between the effect of the interpretation to be adopted and the stated intent and purposes of the Act is a useful interpretative tool. But, that analysis does not turn, as Jacob appears to believe, simply on whether "medical malpractice insurance" is at play. Consider the types of health care providers mentioned above that are specifically enumerated as "health care providers" within the scope of the Act. It is not necessary for them to have "medical malpractice insurance" in order for them to experience the very conditions that led the Legislature to enact the Act in the first instance—increased insurance premiums, a lack of coverage for certain forms of health care practice, and a perceived need to practice "defensive medicine because [the provider] views a patient as a potential adversary in a lawsuit," Utah Code § 78B-3-402(1). WinGate would surmise that they do *not* have such insurance; at least not the same type of "medical malpractice insurance" that, say, an orthopedic surgeon would have.

2. Applying the Act to Jacob's claim would not create "absurd" results.

Focusing on the Act's requirement that a plaintiff obtain a certificate of compliance from DOPL and the associated process for obtaining an affidavit of

merit, Jacob argues applying the Act to his claim would "yield absurd results." (Appellant's Br. at 26.) As an initial matter, the requirements that serve as the basis of Jacob's arguments no longer apply. This Court recently held that Section 78B-3-412(1)(b), which requires a plaintiff to obtain a certificate of compliance, and Section 78B-3-423 governing the issuance of an affidavit of merit are unconstitutional. *Vega v. Jordan Valley Med. Ctr., LP*, 2019 UT 35, ¶ 25, 449 P.3d 31.

Vega did, however, leave in place the prelitigation review process described in Section 78B-3-416. That process includes a requirement that DOPL appoint a panel that consists of identified categories of individuals including "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 § 78b-3-416(4)(b)(i).

Either considering the pre-*Vega* or post-*Vega* requirements, Jacob has failed to meaningfully explain how those requirements make application of the Act to his claim "absurd." His examples of the absurdity of requiring a cardiologist to opine that unaddressed spilled soda caused a patient to slip or a paramedic to opine that missing lug nuts caused an accident (Appellant's Br. at 27) ignore the nature of his claim. As explained in detail in WinGate's opening brief and above, this is not a simple slip and fall claim. Jacob was not hiking for fun or as part of a recreational youth camp. He was engaged in treatment, participating in the

therapeutic process prescribed to address the various mental health and behavioral issues he was experiencing.

Jacob's argument that because Mr. Hess was "the only licensed health care provider to interact with Jacob during his time at Wingate," he would have been required to "have obtained a marriage and family counselor's opinion that the rock formation was unsafe to climb would also be an absurd result" not only ignores his concession that WinGate is a health care provider, but also ignores the inextricable link between his hiking and the treatment he was receiving. First, because WinGate is a "health care provider" and is licensed by the Department of Human Services, Jacob could have satisfied the affidavit of merit requirement by obtaining an affidavit of merit from another licensed wilderness therapy program. *See* Utah Code § 78B-3-423(4)(a). And, regardless of whether another wilderness therapy program or a licensed marriage and family therapist were to provide the affidavit of merit and serve on the prelitigation panel, it would not be absurd to have those individuals evaluate the merits of Jacob's claim. That individual would not be offering an opinion, as Jacob maintains, about whether the rock formation was unreasonably dangerous to climb. Rather, they would be offering an opinion about whether WinGate breached its standard of care in the manner in which it implemented Jacob's treatment plan; namely the manner in which it exposed Jacob

to an immersive wilderness experience with the intent of obtaining the therapeutic benefits identified in his treatment plan.

This is not all that different from the opinions the plaintiffs in *Smith* and *Carter* would have had to have obtained to proceed with their claims in light of the determination the Act applied to both. In the former, the plaintiff presumably would have had to obtain an opinion from a mental health service provider that the plaintiff had a meritorious claim the defendant had been negligent in supervising the plaintiff and his foster parents, including by "fail[ing] to adequately provide caseworker services and to prepare and implement his mental health treatment plan," resulting in the plaintiff being abused by a foster sibling. *See Smith*, 2003 UT 23, ¶¶ 35-36. And, in *Carter*, the plaintiff presumably would have had to have obtained an opinion from a hospital, ambulance service provider, or paramedic that the plaintiff had a meritorious claim the paramedics' decision to transfer ambulances given the mechanical issues was negligent. *Carter*, 2000 UT App 21, ¶ 10. Neither involves the type of pure "medical standard of care" analysis that Jacob appears to maintain is the only kind that can sensibly be made under the Act.

If the certificate of compliance and affidavit of merit procedures were still in effect, Jacob could satisfy those requirements in this case, and it would not be "absurd" for him to do so. He could likewise without any "absurdity" comply

with the prelitigation panel process, which this Court has noted "functions to guide and solidify claims before they reach court," *Vega*, 2019 UT 35, ¶ 24. Notably, that panel contains only one "licensed health care provider" with the two other members consisting of a lawyer (not necessarily one who practices medical malpractice) and a "lay panelist who is not a lawyer, doctor, hospital employee, or other health care provider." It seems no more absurd that a health care provider would be asked to opine on whether a claim for which an action taken in furtherance of treatment was a proximate cause is meritorious even when that claim may not involve traditional "medical malpractice" than it is to *in every* malpractice action have a lawyer and a lay person offer an opinion on the merits of the claim.

3. ***The legislative history surrounding H.B. 112 (2002) is not applicable to resolution of the certified question and does not support answering that question in the negative.***

Jacob additionally relies on an excerpt from the floor debate of House Bill 112 in 2002 to argue that the Act is limited to "professional malpractice" claims involving the "exercise of professional medical judgment," which, in his view, cannot possibly encompass claims based on wilderness therapy. (Appellants' Br. at 28-33.) This argument fails to provide useful guidance in answering the certified question.

First, Jacob has failed to identify any ambiguity in the Act that would require consulting legislative history. As this Court has explained, "[i]t is axiomatic that the best evidence of legislative intent is the plain language of the statute itself." *Bryner v. Cardon Outreach*, LLC, 2018 UT 52, ¶ 9, 428 P.3d 1096. (quotation marks omitted). "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.* (quotation marks and brackets omitted). "Rather, we are guided by the rule that a statute should generally be construed according to its plain language" *Id.* (quotation marks omitted).

Second, even if there were some ambiguity in the Act, "where the legislative purpose is expressly stated and agreed to as part of the legislation, [the Court] do[es] not look to the views expressed by one or more legislators in floor debates, committee minutes, or elsewhere, in determining the intent of the statute." *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 19, 67 P.3d 436. That is the case here. Section 78B-3-402 contains express findings and declarations regarding the purpose of the Act. This express statement of intent precludes reliance on legislative history. *Wood*, 2002 UT 134, ¶ 19 ("Because the legislature expressly set forth its intent and purpose in section 78–11–23 in enacting the instant legislation, we do not look at its legislative history.").

Even if the Court were to consider legislative history despite the lack of ambiguity and the section explicitly detailing the Act's intent and purpose, the legislative history from 2002 is of little interpretative value.

As Jacob acknowledges, the scope of the 2002 amendments to the Act were quite limited. H.B. 112 merely added "health care facility" as a defined term to what is now Section 78B-3-403 and included "health care facility" in the list of "health care provider[s]." Utah H.B. 112 (2002). It did not otherwise alter the reach of the Act. As a result, statements during the floor debate about what then-current legislators understood regarding the types of claims covered by the Act say nothing of the 1977 Legislature's intent when *it* originally enacted the Act.

Further, courts have been hesitant to rely too heavily on the statements of individual legislatures in discerning legislative intent. *See R.P. v. K.S.W.*, 2014 UT App 38, ¶ 19 n.8, 320 P.3d 1084, *overruled on other grounds by Castro v. Lemus*, 2019 UT 71, 456 P.3d 750. Thus, Senator Valentine's and Senator Bramble's statements and questions revealing their interpretation or understanding of the types of claims covered by the Act have little interpretive value. This is particularly true given the Act explicitly identifies that it applies to any "malpractice action against a health care provider" and defines that term as well as "health care provider" and "health care." To the extent any of the Senators' statements during the floor debate can be read as limiting the defined meaning of those terms, their statements should

not be given any weight. *See, e.g.*, *State v. Davis*, 2011 UT 57, ¶ 65, 266 P.3d 765 (Lee, J., dissenting) ("But non-statutory statements of legislative intent should never be considered when they are aimed at supplanting the language enacted into law.").

Setting all of these issues aside, the Senators' statements on which Jacob relies do not ultimately support his argument that the Act applies only to claims requiring "exercise of professional medical judgment," and that this cannot possibly encompass claims based on wilderness therapy. Again, the Act explicitly defines "malpractice action against a health care provider." Nothing in that definition or the definition of its included terms ("health care provider" and "health care") limits the Act's reach to claims that required the exercise of medical judgment.

Indeed, in *Smith* and *Carter*, this Court and the Utah Court of Appeals, respectively, applied the Act without any discussion of the claim turning on the "exercise of professional medical judgment." Again, both involve what could be considered more "ordinary negligence" than "professional medical judgment." *Smith* involved a claim the defendant 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." *Smith*, 2003 UT 23, ¶ 6. And, *Carter* involved a claim challenging "the paramedics' decision to change ambulances in the face of a malfunctioning gauge." *Carter*, 2000 UT App 21, ¶ 10.

The Senators' comments further appear directed to claims of a different type than those at issue here; that is, claims involving injuries caused by actions *not* taken with a therapeutic purpose or in furtherance of treatment. Senator Bramble, for example, referred to a possible claim where "a hospice worker . . . rear-ended someone." (*See* Appellant's Br. at 30.) There is no discussion, let alone a meaningful discussion, of how the Act would apply to injuries caused while an individual was actively involved in a course of treatment set out by a licensed marriage and family therapist.

As discussed in WinGate's opening brief, the Court should reaffirm 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, consistent with prior caselaw, hold 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. The legislative history on which Jacob relies does not indicate otherwise.

C. The Caselaw from Other Jurisdictions on Which Jacob Relies Does Not Compel the Court to Answer the Certified Question in the Negative.

Jacob cites several cases from other jurisdictions that he argues support answering the certified question in the negative; that his claim is not a "malpractice action against a health care provider" subject to the Act. These extrajurisdictional cases offer little support for Jacob's argument and proffered interpretation of the Act. Certain of the cases apply what appears to be a different framework than that adopted by Utah's Act. And, those that interpret and apply terms similar to those contained in the Act evidence a distinction not present in this case; that actions related only tangentially (such as spatially or temporally) to the provision of health care do not constitute "malpractice actions" subject to specified procedural requirements.

Jacob relies on two cases from New York: *Coursen v. New York Hospital–Cornell Medical Center*, 499 N.Y.S.2d 52 (App. Div. 1986) and *Toledo v. Mercy Hospital of Buffalo*, 994 N.Y.S.2d 298 (Sup. Ct. 2014). The test adopted in New York for determining whether the two-and-a-half-year statute of limitations for an "action for medical, dental or podiatric malpractice"—an undefined term—found in NY CPLR Section 214-a, however, differs from whether a claim is a "malpractice action against a health care provider" under the Act.

Under New York law,

> a claim sounds in medical malpractice when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician. By contrast, when the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the failure in fulfilling a different duty, the claim sounds in negligence.

Toledo, 994 N.Y.S.2d at 975 (cleaned up). The determination of in which of these two categories a claim falls "turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of common everyday experience of the trier of the facts." *Id.* (cleaned up).

In contrast, the Act, by its definitions, applies to "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 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). Unlike New York law, application of the Act does not turn on whether the conduct at issue requires specialized training and skills, but rather whether the injury relates to or arose out of "health care." Indeed, the inclusion of claims based on

contract is inconsistent with New York's principle that cases that can "be assessed on the basis of common everyday experience of the trier of the facts" are not "actions for medical, dental or podiatric malpractice."

As a result, New York cases applying its law regarding the distinction between "medical malpractice" and "ordinary negligence" is of little value in interpreting the Act and applying its terms. To the extent those cases are useful, they actually support an ultimate conclusion that Jacob's claim *is* a "malpractice action" as defined by and subject to the Act. Although applying a different and inapplicable test, *Coursen* and *Toledo* reflect that where the injury occurs in the course and as part of treatment being provided, the claim sounds in medical malpractice, whereas when the injury is removed from that treatment, it sounds in negligence.

In *Coursen*, the court differentiated the claim against the nurse's aide and the hospital from the claim against the doctor, holding the latter sounded in medical malpractice because "as part of the course of treatment and recuperation [the doctor] instructed plaintiff to get out of bed and 'walk around' starting the same day as plaintiff's surgery." 499 N.Y.S.2d at 54 (quotation marks omitted). And, in *Toledo*, the court relied on the fact the fall "did not occur during the 'postoperative period' . . . where a physician's specialized knowledge would be involved" in holding the claim at issue did not sound in medical malpractice.

While the remaining cases on which Jacob relies involve application of statutes similar to the Act, Jacob overstates their representation of a bright-line rule that claims involving "ordinary negligence" that could occur outside of the context of medical treatment, such as a slip and fall, never fall within the ambit of a statute governing malpractice actions.

Lake Shore Hospital, Inc. v. Clarke, 768 So. 2d 1251 (Fla. Dist. Ct. App. 2000) (per curiam) and *Feifer v. Galen of Florida, Inc.*, 658 So. 2d 882 (Fla. Dist. Ct. App. 1996) both involved claims that were unrelated to medical treatment aside from the fact the injury occurred while at a hospital. The limited facts set out in *Lake Shore* indicate only that the plaintiff, "while a patient in Lake Shore Hospital," suffered injuries "when she fell as she walked from her hospital bed to the bathroom." 768 So. 2d at 1251. And, the plaintiff in *Feifer* suffered an injury when he fell while walking from the admission area of the hospital to other parts of the hospital without assistance through corridors without handrails, all apparently prior to being admitted or seeing a medical professional. 658 So. 2d at 883-84. These cases reflect the principle of Florida law "that merely because a wrongful act occurs in a medical setting does not necessarily mean that it involves medical malpractice." *Nat'l Deaf Acad., LLC v. Townes*, 242 So. 3d 303, 310 (Fla. 2018).

Other Florida cases, however, establish that even injuries that could occur outside of the context of medical treatment are considered malpractice claims

when they occur during or as the direct result of treatment being provided. *See, e.g.*, *Stubbs v. Surgi-Staff, Inc.*, 78 So. 3d 69 (Fla. Dist. Ct. App. 2012) (holding the plaintiff's claim based on an injury suffered when she fell after a nurse instructed her to move from a test bed to a gurney while responding to a possible allergic reaction the plaintiff was having *is* a malpractice claim because the "gravamen of the negligence alleged . . . arose from the provision of medical care and services"); *Corbo v. Garcia*, 949 So. 2d 366 (Fla. Dist. Ct. App. 2007) (holding claim based on burns suffered when the defendant–physical therapy center attached an electrical stimulation machine that had allegedly been improperly maintained to the plaintiffs arms *is* a malpractice claim because it directly related to the rendering of medical treatment to her).

The same is true with respect to Jacob's reliance on *Balascoe v. St. Elizabeth Hospital Medical Center*, 673 N.E.2d 651 (Ohio Ct. App. 1996). The plaintiff in that case brought a claim for an injury she suffered when she slipped and fell while walking unassisted from the bathroom to her hospital bed. The court held that this claim was not a malpractice claim because "it did not arise directly from the medical diagnosis, care, or treatment" of the plaintiff. *Id.* at 653 (quotation marks omitted). This again reflected the principle that "not all injuries sustained by a patient on hospital premises are 'medical claims.'" *Id.* (brackets omitted).

But, other Ohio cases recognize that even claims that are similar to the ordinary slip-and-fall negligence case constitute a malpractice claim where the injury arose as part of treatment being provided. *See, e.g.*, *Summers v. Midwest Allergy Assocs., Inc.*, 2002-Ohio-7357 (collecting cases and distinguishing them from the plaintiff's claim based on an injury suffered when a cabinet fell from the wall and struck her while sitting on a medical table); *Long v. Warren Gen. Hosp.*, 700 N.E.2d 364 (Ohio Ct. App. 1997). For instance, in *Long*, the Ohio Court of Appeals distinguished *Balascoe* and held the plaintiff's claim for an injury he suffered when he fell while walking unassisted from his bed to a gurney per an orderly's instructions *is* a malpractice claim. It explained that this transport of the plaintiff to his colonoscopy test was "ancillary to and an inherently necessary part of his diagnosis and treatment." *Id.* at 366.

Finally, *Brodie v. Garnder Pierce Nursing and Rest Home, Inc.*, 403 N.E.2d 1184 (Mass. App. Ct. 1980) reflects the same principle that an injury does not give rise to a malpractice claim merely because it occurs on hospital property. There, the plaintiff slipped and fell in a stairwell while walking unattended from the basement to the first floor. The court determined this was not a "treatment-related claim"; the only types of claims to be referred to a malpractice tribunal under Massachusetts law.

Unlike each of these claims, Jacob's injury arose while he was participating in the very activities prescribed for his treatment. The hiking in which he was engaged was not recreational. It was part of the immersive wilderness experience designed to "contribute to [Jacob's] increased confidence, problem-solving ability, and self-care" and "introduce[him] to new philosophies and strategies to assist him in creating a more effective path for himself and for his family relationships." (App. 182-83.)

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 8th day of April, 2020.

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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 8,176 words; and

(B) Rule 21 governing public and private records.

DATED this 8th day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2020, I electronically filed the foregoing **RESPONSE 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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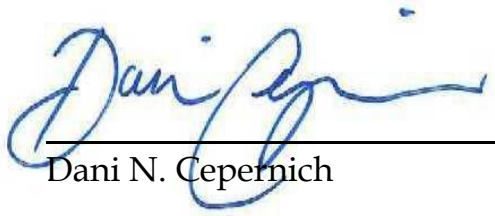

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