UTAH SUPREME COURT

JANE DOE H.P.; JANE DOE P.H.; JANE DOE C.H.; JANE DOE B.K; JANE DOE B.B.; JANE DOE S.M.; JANE DOE R.U.; JANE DOE H.M.; JANE DOE K.H.; JANE DOE E.B.; JANE DOE A.S.; JANE DOE M.T.; JANE DOE A.G.; JANE DOE S.B.; JANE DOE K.S.; JANE DOE M.P.; JANE DOE S.P.; JANE DOE B.H.; JANE DOE A.W.; JANE DOE S.O.; JANE DOE M.Z.; JANE DOE M.R.; JANE DOE C.G.; JANE DOE T.M.; JANE DOE M.M.; JANE DOE K.W.; JANE DOE J.S.; JANE DOE C.S.; JANE DOE C.C.; JANE DOE M.C.; JANE DOE K.A.; JANE DOE S.A.; JANE DOE R.D.; JANE DOE D.B.; JANE DOE J.C.; JANE DOE L.W.; JANE DOE C.W.; JANE DOE S.L.; JANE DOE E.M.; JANE DOE A.F.; JANE DOE A.M.; JANE DOE A.A.; JANE DOE B.W.; JANE DOE W.D.; JANE DOE M.I.; JANE DOE L.B.; JANE DOE S.E.; JANE DOE D.M.; JANE DOE J.B.; JANE DOE K.C.; JANE DOE J.A.; JANE DOE I.A.; JANE DOE C.Y.; JANE DOE R.P.; JANE DOE G.A.; JANE DOE S.S.; JANE DOE R.B.; JANE DOE R.A.; JANE DOE J.D.; JANE DOE D.F.; JANE DOE M.A.; JANE DOE T.L.; JANE DOE T.A.; JANE DOE T.G.; JANE DOE A.T.; JANE DOE S.I.; JANE DOE K.B.; JANE DOE L.C.; JANE DOE J.T.; JANE DOE R.C.; JANE DOE A.I.; JANE DOE A.D.; JANE DOE H.Z.; JANE DOE E.N.; JANE DOE L.H.; JANE DOE C.M.;	**APPELLANTS' BRIEF** Appellate Case No. 20220917-SC District Court Case No. 220400226

JANE DOE N.A.; JANE DOE H.G.; JANE DOE F.A.; JANE DOE R.M.; JANE DOE A.B.; JANE DOE S.C.; JANE DOE A.J.; JANE DOE A.E.; JANE DOE S.N.; JANE DOE M.E.; JANE DOE A.L.; JANE DOE T.S.; JANE DOE C.L.; JANE DOE S.U.; JANE DOE C.T.; JANE DOE C.I.; JANE DOE T.H.; JANE DOE L.S.; and JANE DOES 1–100, Plaintiffs/Appellants, vs. DAVID H. BROADBENT, M.D.; INTERMOUNTAIN HEALTHCARE, INC., dba UTAH VALLEY HOSPITAL; HCA HEALTHCARE, INC. dba MOUNTAINSTAR HEALTHCARE, a Delaware corporation; and DOES 1–50, Defendants/Appellees.	

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
THE HONORABLE ROBERT C. LUNNEN

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IDENTIFICATION OF PARTIES

Appellants

The Plaintiffs/Appellants, referred to collectively herein as the "Survivors," include the following:[1]

JANE DOE H.P.; JANE DOE P.H.; JANE DOE C.H.; JANE DOE B.K; JANE DOE B.B.; JANE DOE S.M.; JANE DOE R.U.; JANE DOE H.M.; JANE DOE K.H.; JANE DOE E.B.; JANE DOE A.S.; JANE DOE M.T.; JANE DOE A.G.; JANE DOE S.B.; JANE DOE K.S.; JANE DOE M.P.; JANE DOE S.P.; JANE DOE B.H.; JANE DOE A.W.; JANE DOE S.O.; JANE DOE M.Z.; JANE DOE M.R.; JANE DOE C.G.; JANE DOE T.M.; JANE DOE M.M.; JANE DOE K.W.; JANE DOE J.S.; JANE DOE C.S.; JANE DOE C.C.; JANE DOE M.C.; JANE DOE K.A.; JANE DOE S.A.; JANE DOE R.D.; JANE DOE D.B.; JANE DOE J.C.; JANE DOE L.W.; JANE DOE C.W.; JANE DOE S.L.; JANE DOE E.M.; JANE DOE A.F.; JANE DOE A.M.; JANE DOE A.A.; JANE DOE B.W.; JANE DOE W.D.; JANE DOE M.I.; JANE DOE L.B.; JANE DOE S.E.; JANE DOE D.M.; JANE DOE J.B.; JANE DOE K.C.; JANE DOE J.A.; JANE DOE I.A.; JANE DOE C.Y.; JANE DOE R.P.; JANE DOE G.A.; JANE DOE S.S.; JANE DOE R.B.; JANE DOE R.A.; JANE DOE J.D.; JANE DOE D.F.; JANE DOE M.A.; JANE DOE T.L.; JANE DOE T.A.; JANE DOE T.G.; JANE DOE A.T.; JANE DOE S.I.; JANE DOE K.B.; JANE DOE L.C.; JANE DOE J.T.; JANE DOE R.C.; JANE DOE A.I.; JANE DOE A.D.; JANE DOE H.Z.; JANE DOE E.N.; JANE DOE L.H.; JANE DOE C.M.; JANE DOE N.A.; JANE DOE H.G.; JANE DOE F.A.; JANE DOE R.M.; JANE DOE A.B.; JANE DOE S.C.; JANE DOE A.J.; JANE DOE A.E.; JANE DOE S.N.; JANE DOE M.E.; JANE DOE A.L.; JANE DOE T.S.; JANE DOE C.L.; JANE DOE S.U.; JANE DOE C.T.; JANE DOE C.I.; JANE DOE T.H.; and JANE DOE L.S..

Represented by Terence L. Rooney, Jefferson W. Gross, and J. Adam Sorenson of Gross & Rooney

[1] The Survivors proceeded by pseudonyms before the district court to protect their anonymity. If the Court would like the Survivors' names, those can be provided.

Appellees

1. Defendant/Appellee David H. Broadbent, M.D.

   Represented by Karra J. Porter, Rebecca L. Hill, and Anna P. Christiansen of Christensen & Jensen, P.C., as well as Christian W. Nelson, Courtney Kochevar, Sean C. Miller, and Kristina H. Ruedas of Nelson Naegle, PLLC.

2. Defendant/Appellee HCA Healthcare, Inc., dba MountainStar Healthcare

   Represented by Eric P. Schoonveld, Tawni J. Anderson, and Tucker F. Levis of Hall Prangle & Schoonveld, LLC.

3. Defendant/Appellee Intermountain Healthcare, Inc., dba Utah Valley Hospital

   Represented by David J. Jordan, Jordan C. Bledsoe, and Kelsey C. Boehm of Foley & Lardner, LLP.

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ADDENDA

A. Utah Code § 78B-3-403.
B. *Ruling and Order Re: Defendants' Motions to Dismiss* (the "Ruling"). (R. 463–81.)

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Rules

Content Warning: The following brief contains detailed accounts of sexual abuse.

I. INTRODUCTION

Sexual abuse is not health care. When the Survivors opposed the Appellees' attempt to classify the sexual abuse they endured as "health care," they saw that Utah case law was on their side and assumed that the truth of the statement "sexual abuse is not health care" was self-evident. Unfortunately, the district court entered its *Ruling and Order Re: Defendants' Motions to Dismiss* (the "Ruling") finding that it lacked jurisdiction because the Survivors' claims fell under the Utah Health Care Malpractice Act ("UHCMA") and the Survivors had not completed the UHCMA's prelitigation requirements. That Ruling is incorrect under the UHCMA, Utah case law, and a common-sense review of the issue, so the Survivors ask this Court to reverse the Ruling and declare in no uncertain terms that sexual abuse is not health care under the UHCMA. Such a declaration will correct the Ruling and prove that Utah law protects survivors—not abusers and enablers.

Sexual abuse is one of the most debase acts one human can perpetrate against another, and the UHCMA was not created to act as a shield behind which serial sexual abusers—or the institutions who profit from and enable those abusers—can hide. For forty years, a medical doctor specializing in obstetrics and gynecology ("OBGYN") sexually abused women and concealed that abuse under the guise of medical care. Those acts of abuse were not "treatment" that should have been

"performed or furnished" to the Survivors. Nor were they within the Survivors' scope of care. **Acts of sexual abuse never can and never will be part of "treatment" as such acts are the opposite of care.** They are acts deserving of an orange jumpsuit, not the protection of a white coat. And they did not result in improving the Survivors' health, but caused pain and trauma which has not faded. Therefore, such acts can never be "health care" under the UHCMA, which is why the Survivors did not characterize them as such in this lawsuit.

Regardless of what the Appellees say, this issue is not blurry—the Appellees just do not want to admit as much because they want to avail themselves of the UHCMA's protections and begin litigation with a sizeable advantage over the Survivors. In their efforts to secure advantages provided by the UHCMA, the Appellees threaten to create destructive precedence which would allow sexually abusive health care providers to use the UHCMA as a shield (and at times a sword) from behind which they can better fend off patients they abuse. With IHC's and MountainStar's positions as leaders in Utah's health care community, it is surprising that they would seek to protect a sexual abuser at the expense of their patients.

There is also real trauma caused by what the Ruling says to the Survivors. After everything it took for these ninety-four women to come forward, speak about the abuse they endured, re-live the mental and emotional anguish which followed, and take a stand against their abuser and his enablers, the first thing they heard from the district court was

that the abuse they endured was "health care." Such a demoralizing and re-victimizing message inflicts its own trauma. That message is one which the Survivors do not believe the UHCMA is intended to send, so they now look to this Court to reverse the Ruling.

With that request, the Survivors do not expect this Court to draw a bright line that can be used in every case to determine whether a claim falls under the UHCMA. Rather, the Survivors ask this Court to reverse the Ruling and clarify that, wherever the line between acts of health care and non-health care may lie, sexual abuse falls definitively on the side of non-health care.

II. STATEMENT OF THE ISSUES

Issue: Do claims against a health care provider and associated health care facilities, which arise from the provider's acts of sexual abuse of patients who also received some care, fall under the Utah Health Care Malpractice Act, Utah Code Section 78B-3-401, *et seq.*?

In determining this issue, one main question which must be answered is whether acts of sexual abuse meet the definition of "health care" under Utah Code Section 78B-3-403(11), merely because the acts are inflicted/perpetrated by a health care provider and associated health care facilities.

Standard of Review: "We review the grant of a motion to dismiss for correctness, granting no deference to the decision of the district court." *Hudgens v. Prosper, Inc.*, 2010 UT 68, ¶ 14, 243 P.3d 1275; *see also Shell v. Intermountain Health*

Servs. Inc., et al., 2022 UT App 70, ¶ 12, 513 P.3d 104. "Also, we review the interpretation and application of a statute for correctness, granting no deference to the district court's legal conclusions." *Berneau v. Martino*, 2009 UT 87, ¶ 9, 223 P.3d 1128; *see also Shell*, 2022 UT App 70, ¶ 12.

Preservation: The Appellees filed motions to dismiss arguing that the Survivors' claims fall under the UHCMA. (R. 135–59.)[2] The Survivors opposed the motions to dismiss, arguing that sexual abuse is not health care and cannot arise out of treatment as it forms no part of any treatment provided to patients. (R. 160–83.) All of the motions to dismiss were addressed in one opposition and one ruling from the district court.

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

For more than four decades, Dr. David H. Broadbent, a Utah OBGYN, took advantage of his position, the Survivors' vulnerability, and the relationship of trust between a patient and provider as he sexually battered and abused the Survivors and numerous other women who presented to him for care. This dispute arises from Broadbent's acts of sexual abuse against the Survivors, and IHC's and MountainStar's knowledge of, failure to stop, and enablement of that abuse.

All ninety-four Survivors presented to Broadbent at his University Avenue clinic in Provo, or presented to Utah Valley Hospital or Timpanogos Regional Medical Center

[2] For ease of reference, the Survivors will only cite to Part I of the Record.

where Broadbent worked and had privileges. (R. 35–128 & 307–78.) While some also received medical care or treatment during the time of their appointments, all of them were sexually abused by Broadbent. (*Id.*) In each instance, the Survivors felt horrible and violated, but Broadbent concealed the true nature of his sexual misconduct under the guise of medically necessary care and hid behind the protected position of authority and trust inherently given to physicians. In doing so, Broadbent created enough doubt and uncertainty in the minds of the Survivors to prevent them from recognizing his sexual misconduct for what it was. For decades, Broadbent conducted this scheme less than a mile from tens of thousands of young women with little or no prior experience with obstetrical and gynecological care or appointments—young women who had no understanding of what was "normal" or medically necessary—and used his white coat as a cloak under which he could commit repeated acts of abuse.

To make it worse, IHC and MountainStar held him out as one of their doctors, affiliated with him, profited from him, enabled him, and failed to stop him. (R. 37.) Multiple formal and informal complaints of sexual abuse were made against Broadbent, but neither IHC or MountainStar properly responded. In fact, formal complaints made it all the way to the Chief Administrator of Utah Valley Hospital, Steve Smoot, and Utah Valley Hospital's Chief Medical Officer, Tracy Hill, M.D., and yet, years later, IHC was still sending women to Broadbent's private clinic. (*Id.*)

It was not until December 2021, when a Broadbent survivor took a stand and related her experience on a podcast, that someone finally paid attention to the survivors. (*Id.*) After the podcast went live, numerous survivors came forward with their accounts of being abused by Broadbent. Those survivors learned that they were not alone in their feelings of horror and violation, and they finally realized and appreciated that the "medically necessary" cover Broadbent used was a fraud—what they experienced was undoubtedly sexual abuse. Over the course of several months, hundreds of women came forward, and ninety-four women joined the lawsuit.

The Survivors complaints, as later consolidated, consist of 47,000 words which form 1,278 harrowing paragraphs laid out over 165 pages detailing disturbing experiences from ninety-four survivors Broadbent abused. And while the Court should read every word of the Survivors' complaints in order to appreciate the nature and gravity of the claims, below are examples of the allegations made therein:

1. Beginning with the first account of abuse, every account contains the following allegations with a few non-substantive variations:

> Jane Doe H.P. felt violated, distraught, and gross, but it was not until news of his abuse of other women came out in February and March 2022 that she realized that **what she experienced in Broadbent's office was not part of a medically necessary exam, but unlawful actions Broadbent performed for no other reason than his own sexual gratification**.
>
> As she saw others' stories coming forward, she also realized he was not just a gross and insensitive OBGYN, and **she was not the victim of an isolated event, but rather of a series of abuses at the hands of a sexual predator**.

Suddenly, the pain and trauma she felt from those appointments made sense as **she realized the true nature of what Broadbent did.**

(R. 43–44, ¶¶ 76–78 (emphasis added).)

2. The various survivor-accounts include the following:

Broadbent then proceeded to warn her about how sex hurts the first time and said "the size of a man's penis was equivalent to 3 to 4 fingers in width," and that because she did not use tampons, she was unprepared for what she was going to experience. Jane Doe P.H. looked over at the nurse and the nurse was holding up 3 fingers and nodding with what he was saying.

Then Broadbent said "watch this" and proceeded to stick 3 fingers up into her vagina without asking. Jane Doe P.H. tensed up and tried not to cry. She did not know what to do, and did not know what was "normal" for these exams.

Broadbent asked, "how's that feel?" Jane Doe P.H. responded that it was uncomfortable. Broadbent took his fingers out of her and told her that she would need to work on stretching herself in a warm bath.

(R. 45, ¶¶ 85–87.)

[In response to a request for a second to calm down:] Broadbent chuckled and said "Oh you need a minute to get ready to get assaulted?"

(R. 53, ¶ 145.)

Toward the end of the visit, while talking about something related to the actual delivery, Broadbent slid his hand down Jane Doe S.O.'s hospital gown and pinched the nipple on her right breast.

(R. 76, ¶ 330.)

Broadbent then said he had to make sure Jane Doe C.G.'s nipples could get hard. He rubbed, squeezed, and played with them until they got hard.

Broadbent then had her lay down and, as he asked about her cramps, put his ungloved middle finger in her vagina and pressed on her pelvis with his other hand.

He then pulled out his finger as she was still explaining her symptoms, then reinserted his middle and ring finger into her vagina, moving them in and out, quickly and repeatedly as he dug down into her pelvis again. He then reached up through the gown and fondled her right breast again. Jane Doe C.G. winced in pain, but as her husband started to stand up to say something, Broadbent stopped and pulled his fingers out.

Broadbent then put on gloves and said, "I'm going to stick a finger in your vagina and one in your rectum. If you enjoy this, I'm going to question you!" This made Jane Doe C.G. very uncomfortable, both what he said and what he was going to do, but she did not think she could say no.

Broadbent proceeded to insert his index finger into her vagina, his middle finger in her rectum, and pushed them deep enough to rest his thumb on her clitoris. Broadbent then began moving them in a circular motion which caused excruciating pain.

(R. 79–80, ¶¶ 360–63.)

Talking to Jane Doe M.C., Broadbent said:
[] "You're so attractive that your fiancé won't be able to help himself on your wedding night even if you're on your period."

(R. 93, ¶ 471.)

Then, suddenly, without warning, notice, or explanation, Broadbent roughly penetrated her rectum with his finger to the point that his entire finger was inserted inside Jane Doe W.D.

This action caused Jane Doe W.D. physical pain, shock, and humiliation. Her entire body jerked upwards on the table in response to Broadbent roughly inserting his finger.

Broadbent then stood over her leering at her naked body and said, "I bet your boyfriend really likes those tan lines."

(R. 107, ¶¶ 579–81.)

Once undressed, Jane Doe T.S. laid on the table and put her feet in the stirrups. Broadbent came up to her, thrust his fingers in her vagina and, with his other hand, spread her gown open. Broadbent started feeling her breasts as he kept thrusting his fingers in her vagina.

Jane Doe T.S. cannot remember if he then took his fingers out of her vagina and inserted them into her rectum, or put a finger in her rectum

simultaneous to his other fingers being in her vagina, but he digitally penetrated her rectum without warning as he continued to feel her breasts.

(R. 361, ¶¶ 430–31.)

During one appointment, Jane Doe C.T. went into the room, undressed from the waist down, and got on the table. Broadbent put his fingers in her vagina and started to rotate and pulsate his hand inside her, making grunting and moaning noises as if he was having sex.

Broadbent's voice was loud, aggressive, and rhythmic as it would be during sex.

Jane Doe C.T. cried out loud in pain, telling him to stop.

Jane Doe C.T. hoped someone outside the room would hear her, but Broadbent continued and became louder and more aggressive. Jane Doe said PLEASE STOP! But Broadbent continued.

Jane Doe C.T. finally reached down and grabbed his arm and pulled his hand out of her. She said that is enough, and Broadbent pulled his hand up in the air, pulled his glove off, threw it in the trash, and said, "I'll see you later," as he walked out.

(R. 364–65, ¶¶ 461–65.)

B. PROCEDURAL HISTORY

On February 15, 2022, the first complaint was filed in Case No. 220400226, Fourth District Court, Utah County, before Judge Thomas Low (the "first underlying case"). Judge Low recused himself a few days later, and the case was reassigned to Judge Robert C. Lunnen. On March 14, 2022, the Survivors filed an amended complaint in the first underlying case, bringing the total to 50 plaintiffs. (R. Part I, 35–128.) On April 26, 2022, another complaint was filed as a separate case, Case No. 220400634, Fourth District Court, Utah County, before Judge Sean Petersen (the "second underlying case"). This new complaint added thirty-three plaintiffs with their own individual accounts and

allegations, but the causes of action asserted were the same as those in the first underlying case, as were the defendants and general nature of the allegations. On May 26, 2022, an amended complaint was filed in the second underlying case, bringing the total to ninety-four plaintiffs. (R. 307.) On September 1, 2022, the district court consolidated the second underlying case into the first underlying case, and the parties agreed that argument on the motions to dismiss in the first underlying case was sufficient for both cases and no additional argument was necessary to address additional issues or facts in the second underlying case. (R. 448.)

Based on their ninety-four accounts, the Survivors asserted seven claims: 1) Sexual Battery; 2) Sexual Assault; 3) Negligent Supervision; 4) Fraudulent Misrepresentation; 5) Joint Venture; 6) Intentional Infliction of Emotional Distress; and 7) Negligent Infliction of Emotional Distress. (R. 119–28 & 368–77.) The complaints never referenced the UHCMA or asserted that it was in any way applicable.

The Appellees responded by filing substantively identical motions to dismiss arguing that the Survivors' claims fell under the UHCMA and should be dismissed because the Survivors did not fulfill the mandatory prelitigation requirements. (HCA's Mot. to Dismiss, R. 135; Broadbent's Mot. to Dismiss, R. 143; IHC's Mot. to Dismiss, R. 151.) The Survivors opposed all three motions in one opposition, arguing that sexual abuse is not health care, and claims arising therefrom do not fall under the UHCMA. (R. 160.) On June 16, 2022, the district court held a hearing on the motions. (Tr., at R. 501.)

On June 24, 2022, the Survivors filed a notice of supplemental authority to bring *Shell v. Intermountain Health Servs. Inc.*, 2022 UT App 70, 513 P.3d 104, to the district court's attention, and to point out that, despite a number of arguments to the contrary at the hearing on the motions to dismiss, abusive acts are not "health care" just because they occur in a health care facility. (R. 395.) Each of the Appellees responded. (R. 412–24.)

On September 24, 2022—almost five months after the motions to dismiss were submitted for decision—the district court entered its *Ruling and Order Re: Defendants' Motions to Dismiss*. (R. 463.) The district court ruled in relevant part:

> Here, the allegations paint a particularly appalling view of Dr. Broadbent and his conduct as an OBGYN. Indeed, accepting all allegations as true, Dr. Broadbent is cast in a most egregious light. It is an understatement to refer to the events as appalling. Dr. Broadbent's treatment of his patients is insensitive, disrespectful and degrading. Such narrow-minded perspectives are both delusional and destructive. However, the question before the Court cannot be decided based on the Court's repugnance, anger or other equally justifiable reactions.

(R. 475.)

> The Court finds, for reasons described below, Dr. Broadbent provided "health care" to Plaintiffs within the meaning of the UHCMA. Plaintiffs either independently scheduled appointments to see Dr. Broadbent at his Provo office or were referred to Dr. Broadbent for the purpose of a medical examination. Plaintiffs sought medical advice and treatment related to obstetrics. Dr. Broadbent is an OBGYN, which, in light of the alleged misconduct, is a critical fact. All alleged misconduct occurred within the confines of a medical facility where Dr. Broadbent worked. . . . The Amended Complaint describes Dr. Broadbent using medical instruments and examinations often occurred on an exam table.
>
> The Court reiterates and emphasizes that Dr. Broadbent was an OBGYN who was purportedly performing OBGYN services and that the alleged misconduct occurred during appointments aimed at addressing

> obstetrical issues. When the Court questioned Plaintiffs' counsel as to the propriety of a standard of care expert for this case, Plaintiffs' counsel did not summarily reject that notion. Although Plaintiffs argue intentional tortious conduct, such does not mean that the allegations, when read in whole, do not fall within the purview of the UHCMA.

(R. 477.)

> The Court reiterates the allegations against Dr. Broadbent are disturbing and reprehensible, nevertheless, the Court must dismiss the Amended Complaint for lack of jurisdiction, based on the Court's finding that the alleged injuries *arose from health care* rendered by Dr. Broadbent and that the allegations form a medical malpractice action that must adhere to UHCMA prefiling requirements.

(R. 480 (emphasis in original).)

On October 12, 2022, the district court entered a final judgment, (R. 494–95), and on October 14, 2022, the Survivors filed their notice of appeal. (R. 589–90.)

IV. SUMMARY OF THE ARGUMENT

The Ruling incorrectly found that acts of sexual abuse fall under the UHCMA's definition of "health care," and that the Survivors' claims fall under the UHCMA because they relate to or arise out of health care rendered. That Ruling must be reversed because sexual abuse is not health care, and the Survivors' claims relate to and arise out of acts of sexual abuse, not acts of health care.

One initial fact that seemed to get lost in the district court's analysis is the fact that the Survivors pleaded sexual abuse claims and framed their case as a sexual abuse action. Like all plaintiffs, the Survivors are the masters of their complaint, and while the Appellees may try to argue that Broadbent's sexually abusive acts were

somehow "medically necessary," their choice of defense does not alter the nature of the allegations, convert this case to a medical malpractice case, or change non-health care into health care. The district court erred when it accepted Appellees' defenses and framing of the Survivors' claims, rather than the Survivors' actual allegations, as true.

Regarding the district court's analysis under the UHCMA, not every act by a health care provider during the time of an appointment is "health care." In order for acts of sexual abuse to be considered "health care," a court would have to find that Broadbent's acts of sexual abuse were "done for, to, or on behalf of" the Survivors' "during [the Survivors'] medical care [or][3] treatment." *Shell*, 2022 UT App 70, ¶ 16 (quoting *Scott v. Wingate Wilderness Therapy, LLC*, 2021 UT 28, ¶ 36, 493 P.3d 592). That determination requires:

> examining the scope of the care or treatment that the health care provider prescribed, ordered, or designed for the patient. It also requires examining whether the act from which the injury arose occurred *during* that treatment or care—**that is, whether that act occurred "in the course of" the treatment**.

Id. (quoting *Scott*, 2021 UT 28, ¶ 36) (italics in original, bolding added).

The analysis here should be simple. Acts of sexual abuse by a physician against a patient are not prescribed, ordered, or designed for the patient. They are never diagnostic or therapeutic or part of a treatment plan. Such acts never are and never will be within the scope of a patient's care since they are the opposite of care. Moreover, Broadbent's acts

[3] Alteration in original.

of sexual abuse did not occur "in the course" of the Survivors' treatment just because some actual treatment may have been provided to the Survivors. Sexual abuse of a patient, no matter when it occurs or where it occurs, is an act separate and apart from any treatment plan or course. Therefore, Broadbent's acts of sexual abuse cannot fall under the definition of "health care."

Unfortunately, throughout the Ruling and during the hearing on the motions to dismiss, the district court focused on Broadbent's specialty as an OBGYN and how a visit with an OBGYN can include sensitive exams and the touching of "sensitive parts." But Broadbent's sexually abusive actions are the ones the Survivors complain of, not the obstetrical/gynecological care that some Survivors received. And a sexually abusive OBGYN should not receive special treatment. In fact, the sensitive nature of obstetrical/gynecological care allows ample room to argue that OBGYNs should be even more careful to avoid improper conduct.

The Ruling also incorrectly lumped all of the Appellees' actions into one pile and determined that because acts of health care might be found in the pile, the claims related to or arose out of health care. But medical malpractice claims are based on the improper performance of health care which breached the standard of care and proximately caused damages. Here, in contrast, the acts underlying the Survivors' claims were neither related to nor necessary to the provision of health care. They are separate acts, even if they

occurred at a similar place and time, and the Survivors here complained of sexual abuse, not negligent health care.

Finally, the purpose of the UHCMA and the public policy concerns underlying this case support reversing the Ruling. The UHCMA is meant to keep the cost of health care down for patients, and to protect good health care providers who make honest mistakes, not sexual predators hiding under white coats. By making it clear that acts of sexual abuse by a health care provider never fall under the UHCMA, this Court will allow survivors abused by health care providers the opportunity to walk into court at the same starting position as the abuser.

The Utah Legislature decries sexual abuse, and Utah courts should not offer sexual abusers the protection of the UHCMA. Sexual abuse is not health care, and the Survivors' claims relate to and arise out of acts of sexual abuse, so the UHCMA does not apply to the Survivors' claims. The Ruling should be reversed and vacated, and this case should be remanded for further proceedings on the Survivors' claims.

V. ARGUMENT

"We review the grant of a motion to dismiss for correctness, granting no deference to the decision of the district court." *Hudgens*, 2010 UT 68, ¶ 14; *see also Shell*, 2022 UT App 70, ¶ 12. "Also, we review the interpretation and application of a statute for correctness, granting no deference to the district court's legal conclusions." *Berneau*, 2009 UT 87, ¶ 9; *see also Shell*, 2022 UT App 70, ¶ 12.

"Because dismissal of a claim based on either a motion to dismiss or a motion for summary judgment denies the nonmoving party of the right to litigate his claim on the merits, the threshold for surviving such a motion is relatively low." *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 49, 116 P.3d 323. "A motion to dismiss should be granted only if, **assuming the truth of the allegations in the complaint and drawing all reasonable inferences therefrom in the light most favorable to the plaintiff**, it is clear that the plaintiff is not entitled to relief." *Simmons Media Grp., LLC v. Waykar, LLC*, 2014 UT App 145, ¶ 15, 335 P.3d 885 (emphasis added) (internal citations omitted).

With this low threshold in mind, the Court must first look at the UHCMA's definition of a medical malpractice action. A "[m]alpractice action against a health care provider" is "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(18). "In other words, the Act applies when a plaintiff files suit against a 'health care provider,' and the alleged injuries 'relate[e] to or aris[e] out of the health care rendered . . . by the health care provider.'" *Scott*, 2021 UT 28, ¶ 23 (quoting Utah Code Ann. § 78B-3-403(18)).

The district court's decision should have been simple because the deciding whether acts of sexual abuse can fall under the definition of "health care" is not a close call. It is as clear and simple as knowing right from wrong. And the issue was a narrow

one, as the Survivors do not dispute that the Appellees are health care providers and health care facilities under the UHCMA. The Survivors also do not dispute that a plaintiff bringing a medical negligence claim must satisfy the UHCMA's preconditions to filing suit (serving the proper notices and obtaining a certificate of compliance) before filing a complaint. Finally, the Survivors do not dispute that some health care (separate and apart from the acts of sexual abuse which underly the Survivors' claims) was provided to some of the Survivors.

With no dispute on the above issues, the questions for the Court are whether Broadbent's acts of sexual abuse were "health care," and whether the Survivors' claims relate to or arise out of "health care." The legal, logical, and moral answer is "No," so the Ruling must be reversed.

A. The Survivors Pleaded Sexual Abuse Claims, Not Malpractice Claims.

One important fact that seemed to get lost in the district court's analysis is the fact that the Survivors pleaded sexual abuse claims and framed their case as a sexual abuse action. As the plaintiffs, the Survivors are "the master[s] of the[ir] complaint" and thus have "the prerogative of identifying the claims or causes of action [they] seek to sustain in court." *Ramon v. Nebo Sch. Dist.*, 2021 UT 30, ¶ 16, 493 P.3d 613. While the Appellees may try to argue that Broadbent's sexually abusive acts were somehow medically necessary, it is the Survivors' allegations, not the Appellees' arguments, which govern the analysis here.

The district court and the Appellees acknowledged that the Survivors claim that Broadbent sexually abused them. Everyone admits that. The district court even included a paragraph in the Ruling on its "repugnance" regarding the "insensitive, disrespectful and degrading" events alleged and how "Such narrow-minded perspectives," as those described in the complaints, "are both delusional and destructive." (R. 475.) Despite such statements, the district court declined to accept the Survivors' allegations as true, as was demonstrated when the district court asked the Survivors' counsel if the Survivors' claims could have been brought as medical malpractice claims. (R. 567:3–4.)

That question is problematic because when ruling on a motion to dismiss, it does not matter how claims *could have been brought*—what matters is how they *were brought*, *i.e.*, the plain language of the complaints. The Survivors responded, "Theoretically, of course, Your Honor; absolutely, [] someone could have framed them that way if they wanted to. **And we did not because we don't believe they are medical malpractice. We believe it's in a whole different category**." (R. 567:3–25 (emphasis added).)

The district court erred when it accepted Appellees' defenses and framing of the Survivors' claims, rather than the Survivors' allegations, as true. The fact that the Survivors pleaded Broadbent's acts as acts of sexual abuse must stay front of mind now, as it was forgotten below.

B. Acts of Sexual Abuse, Even When Committed by a Health Care Provider at a Health Care Facility, Are Not "Health Care" Under the UHCMA.

Acts of sexual abuse are not health care. "'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***." Utah Code § 78B-3-403(11) (emphasis added). In order to determine whether a health care provider's act was "done 'for, to, or on behalf of a patient during the patient's medical care [or][4] treatment," the Court must:

> examin[e] the scope of the care or treatment that the health care provider prescribed, ordered, or designed for the patient. It also requires examining whether the act from which the injury arose occurred *during* that treatment or care—that is, whether that act occurred "in the course of" the treatment.

Shell, 2022 UT App 70, ¶ 16 (quoting *Scott*, 2021 UT 28, ¶ 36) (emphasis in original).

It should also be noted that these limits on the definition of "health care" "presuppose[] that health care providers will engage in some activities that qualify as "health care" and some activities that do not." *See Scott*, 2021 UT 28, ¶¶ 28–30 (emphasis added). This Court "**expressly rejected the notion that the Act applies to 'any' and 'every' act a health care provider performs.**" *Id.* ¶ 32 (emphasis added).

As explained below, Broadbent's acts of sexual abuse were not "done 'for, to,' or on behalf of [the Survivors] during the [the Survivors'] medical care [or][5] treatment," because such acts are never treatment; they are never "prescribed, ordered, or designed for" patients, and thus they do not occur "in the course of" treatment. *See Shell*, 2022 UT

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[4] Alteration in original.
[5] Alteration in original.

App 70, ¶ 16 (quoting *Scott*, 2021 UT 28, ¶ 36). Therefore, Broadbent's acts of sexual abuse were not health care, and the Ruling must be reversed.

i. Sexual abuse is not "prescribed, ordered, or designed for the patient."

Acts of sexual abuse by a physician against a patient are not prescribed, ordered, or designed for the patient. They are never diagnostic or therapeutic or part of a treatment plan. Such acts are never and will never be within the scope of a patient's care as they are the opposite of "care." Therefore, Broadbent's acts of sexual abuse cannot fall under the definition of "health care."

To say otherwise would be to ask the following questions and say "yes:" Is demonstrating the "size of a man's penis," saying "watch this," and then sticking three fingers in a woman's vagina, causing her to cry, and asking how it feels, part of her care?[6] Is asking a woman if she needs a minute to get ready to be assaulted before digitally penetrating her vagina prescribed care? Is telling a woman her vagina smells good and then digitally penetrating her vagina while rubbing her clitoris with a thumb, stroking her vagina, and using the free hand to press on her lower pubic area something that is designed to help the patient? Is sliding a hand under a woman's gown and pinching her nipple while she is recovering from delivering a child designed for the patient? Is

[6] The Survivors do not seek to be graphic in this argument and others for the sake of being graphic or for shock and awe—what happened to them is by its nature, graphic, and it is those graphic events which the Appellees and the district court avoided discussing in large part as they categorized them as health care. The Survivors will not avoid discussing Broadbent's abusive acts as they are—graphic and disturbing—because when discussed as they are, it is clear that those acts are not acts of health care.

squeezing and playing with a woman's nipples to see if they could get hard and then moving two fingers in and out of her vagina repeatedly while also fondling her breast something a physician should order? Or is it health care to comment on a woman's tan lines and tell a woman she is "so attractive that your fiancé won't be able to help himself on your wedding night even if you're on your period?" Are any of the hundreds of sexual acts Broadbent committed against the Survivors, all just as or more terrible and gruesome than these, acts which could or should ever be ordered, prescribed, or designed for a patient? **Of course not**. And while the Appellees and the Ruling may avoid addressing these necessarily blunt questions as they reason that the Survivors' claims fall under the UHCMA, common sense and the UHCMA show that their reasoning is wrong.

At the motion to dismiss hearing, the district court stated:

> What I don't have, and although I have some general understanding because I have children -- I have a general understanding what children do, but in this case I don't have detailed information about whether or not OB-GYN practices include everything that (Unintelligible) in this Complaint. Now, that has some significant but it also has -- the same kinds of things could be brought under the Medical Malpractice Act, and that is, something outside the reasonable duty of care that a physician should provide. But I don't have that standard yet before me, at least not in this case. It's simply missing that.

(R. 523:2–14.) This statement reveals multiple issues with the district court's analysis. First, a district court's knowledge of an OBGYN appointment is not what is important—the allegations that Broadbent's actions were not medically necessary or part of care are what are important. Second, a district court should not need personal experience with obstetrical/gynecological care to know that the acts of sexual abuse complained of were

not and can never be considered part of a patient's care. Moreover, the district court's comments about its repugnance toward Broadbent's actions acknowledge the district court's understanding that the alleged acts were not normal "OBGYN practices." Therefore, because the acts of sexual abuse at issue were not "prescribed, ordered, or designed for the" Survivors, such acts cannot be considered "health care."

ii. Acts of sexual abuse do not occur "'in the course of' the treatment."

Broadbent's acts of sexual abuse did not occur "in the course" of the Survivors' treatment just because some treatment may have been provided to some of the Survivors. Sexual abuse of a patient, no matter when it occurs or where it occurs, is an act separate and apart from any treatment plan or course. An act of sexual abuse may occur during the *time* of a scheduled appointment, but not in the course of treatment. For example, if an appointment lasts from 1:00 pm to 2:00 pm, and Broadbent abuses a patient from 1:24 to 1:54, that abuse occurred during the time of an appointment. But occurring during the time of an appointment, and occurring in the course of treatment, are two different things. Sexual abuse is not part of the patient's treatment, medical care, or confinement, so it cannot occur "in the course of the treatment."

This fact is demonstrated in *Dowling v. Bullen*, 2004 UT 50, 94 P.3d 915, and emphasized in this Court's analysis of *Dowling* in *Scott* where this Court explained:

> For example, the *Dowling* court hypothesized that the Act would *not* apply to a patient's tort claim for conversion against their doctor who stole money from the patient's wallet **during a medical examination**. We agree. **Even if the doctor is a "health care provider" and had provided "health care"**

> **during the patient's visit, the patient's loss of cash is not an injury that originated from the provision of health care.** Theft cannot reasonably be said to be an act or treatment "for, to, or on behalf of" the patient, nor in the course of or "during the patient's medical care, treatment, or confinement." Even using the broadest view of "medical care, treatment, or confinement," **there is no conceivable medical or health purpose of theft; nor is theft an omission of or a negligent version of an act that does have a medical or health purpose.**

Scott, 2021 UT 28, ¶ 69 (internal citations and quotation marks omitted) (italics in original, other emphasis added). This analysis should not change just because a physician is an OBGYN or because the health care providers intend to defend the care by arguing that the alleged acts were all done as part of an OBGYN's care.

Applying *Scott* and *Dowling* to this case, the UHCMA does not apply to the Survivors' sexual abuse claims regardless of whether the underlying acts of abuse occurred during a medical examination. Even if Broadbent provided health care during some of the Survivors' visits, the injuries caused by Broadbent's sexual abuse are not injuries that originated from the provision of health care. Sexual abuse "cannot reasonably be said to be an act or treatment 'for, to, or on behalf of' the patient, nor in the course of or 'during the patient's medical care, treatment, or confinement.'" *See id.* "Even using the broadest view of 'medical care, treatment, or confinement,' **there is no conceivable medical or health purpose of [sexual abuse]; nor is [sexual abuse] an omission of or a negligent version of an act that does have a medical or health purpose.**" *See id.* (emphasis added) (inserting "sexual abuse" in the place of "theft" in the original quote).

The Ruling missed this point, and what should have been a simple analysis of whether acts of sexual abuse occurred in the course of treatment became a convoluted discussion focusing on multiple issues and points that were not relevant to the analysis or which were improperly framed. Several of these are discussed below, and each played a part in the district court reaching the wrong conclusion.

Throughout the Ruling and during the hearing on the motions to dismiss, the district court focused on the fact that Broadbent was an OBGYN and a visit with an OBGYN can include sensitive exams and the touching of "sensitive parts." (*See* R. 477–78 & 528:16–529:3.) But the touching of "sensitive parts" complained of by the Survivors was sexual in nature and "not part of a medically necessary exam, but unlawful actions which Broadbent performed for no other reason than his own sexual gratification." (*See* R. 163.) Yes, an OBGYN touches "sensitive areas" as part of medically necessary care, but the "touching" complained of was not part of any medically necessary care. That is what separates this case from a medical malpractice case.

The district court seemed to realize this on some level, but that realization did not result in the correct ruling:

> **On one hand, it is true that not all alleged improper acts performed during a medical exam must constitute medical malpractice. The Utah Supreme Court has made that clear.** However, upon scrutinizing the factual allegations of the case and despite the nature of the allegations, the Court does not find that the alleged misconduct is only tangentially related to the medical services Dr. Broadbent provided to Plaintiffs. Instead, in considering the allegations (the acts alleged, where the alleged acts occurred, and when the alleged acts occurred) and because OBGYNS commonly

> examine sensitive, otherwise private areas of a woman's person, including the pelvic area generally, the vaginal area, and breasts, the Court opines that the alleged misconduct occurred "in the course of" obstetrical "treatment."

(R. 478 (emphasis added).) Not only does this reasoning conflict with the reasoning from *Dowling* and *Scott* set forth above, but the district court's statement that the claims are related to medical services "despite the nature of the allegations" seems a concession that the Ruling is not in accord with the Survivors' allegations and the district court did not accept those allegations as true.

There is also harm in the rationalization that "because OBGYNS commonly examine sensitive, otherwise private areas of a woman's person . . . the alleged misconduct occurred 'in the course of' obstetrical 'treatment.'" (R. 478.) Such rationalization ignores the differences between actual obstetrical/gynecological care and sexual abuse and is the kind of rationalization that enables sexual predators like Broadbent to continue to disguise their abuse as medically necessary care. Broadbent's sexually abusive actions are the ones the Survivors complain of, not the obstetrical/gynecological care that some Survivors received. And a sexually abusive OBGYN should receive no more special treatment, protection, or leniency than any other health care provider. Moreover, the sensitive nature of the care OBGYNs provide allows ample room to argue that they should be even more careful to avoid even the appearance of improper conduct—an argument only strengthened by the recent epidemic of serial sexual abusers in this country who specialize in obstetrics and gynecology. *See*

University of Southern California's Dr. George Tyndall; Columbia University's Dr. Robert Hadden; UCLA's Dr. James Heaps; Johns Hopkins' Dr. Nikita Levy.

Like a physician's theft of a patient's wallet, hypotheticals illustrate the problems with the district court's logic. For example, if a patient went into a fertility doctor and the fertility doctor raped the patient. The arguments from the Appellees and the Ruling's flawed reasoning would suggest that the fertility doctor's actions were acts of health care and claims arising therefrom must be filed under the UHCMA. After all, a fertility doctor is supposed to be in "sensitive areas" and his purpose is to impregnate the patient. While this example should and does seem absurd, it is no more absurd than holding that sexual abuse by an OBGYN is health care because an OBGYN is supposed to touch a patient's "sensitive parts."

The Ruling also incorrectly framed some of the Survivors' mentions of medical devices used during their appointments. The Ruling states: "Dr. Broadbent is also accused of improperly using a swab inside the vaginal area, as well as improperly using a speculum to, essentially, shield inappropriate sexual contact from view." (R. 476.) The Survivors, however, did not allege that Broadbent improperly used a swab and/or speculum as part of a procedure. They alleged that he sexually abused them, and any statement about a swab or speculum was contextual.

For example, Jane Doe H.P.'s account states in part:

> Suddenly, without explanation, Broadbent grabbed her and pulled her to the edge of the table in a sexual manner.

> He then inserted a ***speculum***, but Jane Doe H.P. soon realized that the ***speculum*** was gone and his fingers were inside her.
>
> Jane Doe H.P. was shocked and left the appointment feeling uncomfortable and violated, but she questioned herself and reasoned that maybe she just misunderstood.

(R. 42, ¶¶ 65–67 (emphasis added).)

Other accounts referencing speculums state:

> While Broadbent moved a ***speculum*** around inside her, she felt one of his fingers moving back and forth on her crotch area. Her husband was in the room, but it was so subtle that he could not see what was happening.

(R. 46, ¶ 96 (emphasis added).)

> Broadbent started the pap smear and gave little warning when he stuck the ***speculum*** in. She was in pain, and she felt very anxious because it was jarring and uncomfortable. The nurse got upset at her for not paying attention and scolded her for it.
>
> Then as the ***speculum*** was still inserted, Jane Doe B.K. felt Broadbent put his finger in her rectum. When he finished, she started to cry.

(R. 48, ¶¶ 107–108 (emphasis added).) In each of these accounts, the speculum was not the problem, it was Broadbent's digital penetration of the Survivors' rectums and vaginas—acts of sexual abuse—that were the problem.

The Ruling also improperly focused on the fact that many of the Survivors initially presented for appointments and medical examinations. To that end, the Ruling states, "There is no material dispute that all of the events alleged in the Amended Complaint occurred during medical examinations." (*See* R. 465.) The Ruling then quotes selected allegations; italicizing the use of the word "appointment" in those allegations, and goes so far as to note the number of times the word "appointment" was used in the complaints.

(*See id.*) These statements show that the district court focused on why the Survivors were in Broadbent's presence, rather than the allegations that he abused the Survivors once he was with them. (R. 465–69.) Moreover, not all of the acts of abuse occurred during appointments. (*See e.g.* Jane Doe T.M.'s Account, R. 81–85.) But perhaps most importantly, presenting for an appointment does not make all of the acts which take place during the time of that appointment acts of "health care." *See Scott*, 2021 UT 28, ¶ 69. Such a finding would allow any form of behavior to be categorized as "health care" so long as it occurred "during" an "appointment." Certainly, that is not what the legislature intended, and not what this Court has held.

The Ruling is also misleading in its recounting of an exchange at the hearing between the district court and the Survivors' counsel in which the district court again showed that it was focused on Broadbent's profession instead of his actions. The Ruling states: "When the Court questioned Plaintiffs' counsel as to the propriety of a standard of care expert for this case, Plaintiffs' counsel did not summarily reject that notion. Although Plaintiffs argue intentional tortious conduct, such does not mean that the allegations, when read in whole, do not fall within the purview of the UHCMA." (R. 477.) The referenced exchange, however, went as follows:

> THE COURT: Would you envision in this case, if it went forward as it's charged, as it's claimed in the claims, would you envision presenting an expert witness that would testify to the (Unintelligible) standard of care and in order to prove that this had a sexual purpose? (Unintelligible) specific, an OB-GYN expert come and say look, I would never do this procedure; it's not medically necessary; it's outside the standard of

> practice -- or standard of care – for OB-GYN's? Wouldn't you have to call someone to testify like that?
>
> MR. ROONEY: That's a great question, Your Honor. I don't think we're dealing with standard of care in an intentional (Unintelligible) sexual abuse type of claim. That said, I'm certain there will be experts that will come in. Obviously, we've heard what the defenses are in this case, but I don't know that -- what would apply in a typical medical malpractice claim would apply to an intentional tort for sexual assault. That type of testimony may be relevant, but as the Court's obviously aware, in medical malpractice cases there's essentially three elements you have to prove. One's (Unintelligible) the standard of care, is there a breach in the standard of care and that that breach caused some injury resulting in damages. That's not the -- that's not the elements that would apply in our case, Your Honor, so do I expect there will be testimony from the experts in that field talking about standard practice? Most likely there will be. But I don't think that governs whether or not this is something that falls within the Malpractice Act. I think what governs that is the allegations in our Complaint.

(R. 558:11–559: 18.) By analogy, multiple criminal complaints have been filed against Broadbent. Expert witnesses may not be required to prove criminal conduct, but they may be utilized. Whether an expert is utilized, however, does not reduce a criminal allegation to negligence.

Finally, the Ruling provides, "All alleged misconduct occurred within the confines of a medical facility where Dr. Broadbent worked." (R. 477.) But as stated throughout this section, the fact that abusive acts occur in a health care facility does not make acts of sexual abuse health care. The prior explanations from *Dowling* and *Scott* prove as much, and the Utah Court of Appeals' recent decision in *Shell v. Intermountain Health Services Inc. et al.*, 2022 UT App 70, 513 P.3d 104, also supports that conclusion.

In *Shell*, Mr. Shell presented to an IHC facility, was escorted to an exam room, asked to remove his clothes and put on a hospital gown, and told by a social worker to take a sedative. *Id.* ¶ 2. After he refused to take a sedative, he was assaulted. *Id.* ¶¶ 3–7. Mr. Shell asserted claims against Intermountain HealthCare and others almost identical to those the Survivors assert in this case: "battery []; assault []; false imprisonment []; intentional infliction of emotional distress []; negligent infliction of emotional distress []; negligent hiring, supervision, and/or retention []; and breach of fiduciary duty []." *Id.* ¶ 8.

The defendants in *Shell* moved to dismiss the complaint on the same grounds which form the basis of the Appellees' motions to dismiss in this case, arguing "that '[t]his case is a medical malpractice case' 'against a health care provider' and that the torts allegedly committed arose 'during the course of [Shell's] visit for medical attention.'" *Id.* ¶ 9. The district court agreed and dismissed the case, saying that because Mr. Shell presented to IHC for treatment and was harmed while there, the claims fit under the UHCMA.

The *Shell* court disagreed. First, the *Shell* court noted that it "review[s] the facts only as they are alleged in the complaint. We accept the factual allegations as true and draw all reasonable inferences from those facts in a light most favorable to plaintiff." *Id.* ¶ 1 n.1. It then reaffirmed that "not every act a 'health care provider' performs is 'health care' within the Malpractice Act's meaning." *Id.* ¶ 16. Finally, the *Shell* court held:

> Appellees' argument does not comport with the plain language of the Act. The Act specifically directs that for a plaintiff's claims to fall under the Act's

> purview, the plaintiff's injuries must have arisen from actions taken for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement. Thus, merely seeking treatment is not enough; **there must be something done, or something that should have been done, by a provider, specifically on the patient's behalf.**

Shell, 2022 UT App 70, ¶ 23 (internal citations and quotation marks omitted) (emphasis added). The facts in *Shell* differ from the facts here in that Shell was assaulted before any health care was provided, and the *Shell* court's analysis did not consider whether the claims would fall under the UHCMA if any health care had been rendered. But ***Shell* proves that an act does not fall under the UHCMA simply because the victim presented to a health care facility seeking treatment and the abusive actions occurred in the facility.**

In the end, the key to this analysis is the recognition that Broadbent's acts of sexual abuse were never, and could never be, part of any diagnosis, treatment, or medical care. As demonstrated by *Scott* and *Dowling*, an act can occur during the time period of an examination without being in the course of treatment when "there is no conceivable medical or health purpose" for the act. *See Scott*, 2021 UT 28, ¶ 69. Health care providers should not be allowed to use the guise of a medical appointment as a shield to protect them from acts that are intentional and criminal. When Broadbent began abusing a patient, any health care he may have been providing ended. What he then engaged in was the opposite of health care and caused harm that will stay with the Survivors forever. For

these reasons, Broadbent's acts of sexual abuse cannot fall under the definition of "health care," and the Ruling must be reversed.

C. The Survivors' Claims "relat[e] to or aris[e] out of" Acts of Sexual Abuse, Not "health care rendered."

The Survivors' claims do not arise out of any acts of health care—they relate to and arise solely out of acts of sexual abuse against the Survivors, so they do not fall under the UHCMA. "There is no magic, nor hidden meaning, in the phrase 'relating to or arising out of.' 'Arising' out of means to 'originate from.' 'Relating to' means to have a connection with. When read in context, it becomes evident that the terms 'health care' and 'health care provider' do the heavy lifting in defining when the Act applies." *Scott*, 2021 UT 28, ¶ 64 (internal citations omitted). The phrase "relating to or arising out of," as used in the definition of a "malpractice action against a health care provider," and read in context, "**does not shield a health care professional whose alleged transgressions are only tangentially related to their provision of health care services.**" *Id.* ¶ 55 (quoting *Dowling*, 2004 UT 50, ¶ 11) (internal quotation marks omitted) (emphasis added).

The Survivors' injuries do not originate from acts of health care—they originate from various acts of sexual abuse perpetrated against them by Broadbent. Unfortunately, the Ruling incorrectly lumped all of the Appellees' actions into one pile and determined that, because acts of health care were in the pile, the claims related to or arose out of health care.