STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. PEN-24-535

DOROTHY POOLE, Individually and as Personal Representative of the ESTATE OF TYLER POOLE,
Plaintiff/Appellant

v.

HANCOCK COUNTY, *et al.*,
Defendants/Appellees

ON APPEAL FROM THE PENOBSCOT SUPERIOR COURT

BRIEF OF THE PLAINTIFF/APPELLANT

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II. STATEMENT OF PROCEDURAL HISTORY AND FACTS.

On December 5, 2020, Tyler Poole (hereinafter "Tyler") was arrested, brought to the Hancock County Jail, and placed on a probation hold for new criminal conduct of domestic violence assault, criminal mischief, and obstructing government administration. (PENCD-CR-2019-00897) Tyler's underlying conviction was for felony assault with a sentence of four years with all but one year suspended followed by two years of probation. (PENCD-CR-2019-00897)

On December 8, 2020, the Shift Commander at the Hancock County Jail, Sgt. Shane Gross, sent a memorandum to the jail nurse, Lisa Parkin, R.N., stating:

> On 12/07/20 at approx. 0745, I was conducting a population check in D Block, when stopped by Poole. Poole claimed he was detoxing off Suboxone and not doing well. Claimed to have not eaten since the previous morning and that he was shaking uncontrollably and experiencing restless leg. I contacted Chelsea Howard, FNP who advised to place Poole on clonidine Detox Protocol and to then let nursing know. I started a MAR sheet for the inmate and started a clonidine detox protocol, with him receiving his first dose that morning.

(App. 101, 111, 112, 277)

Sgt. Gross administered Clonidine to Tyler under the direction of Nurse Practitioner Howard. (App. 101, 103, 112, 118, 277) The Jail Employees[1] are under the general direction of Lisa Parkin, R.N. and Chelsea Howard, F.N.P. in administering prescription medication, the consideration of suicide watch, and the Jail Employees generally defer to their decisions with respect to inmate care. (App. 92)

Also, on December 8, 2020, at 9:30 a.m., Tyler submitted his first Inmate Medical Request Form to the Hancock County Jail, stating:

> I am freaking out having crazy mood swings and can't sleep. I feel like everything I do I lose my breath. I haven't slept in days without my Remeron, and my acid reflux is making me throw up. I take Prilosec OTC twice a day on the streets. I feel like I'm losing it! I haven't eaten or anything my anxiety is so bad I cant focuse [sic] I'm losing my mind! Cant sleep and keep losing my breath.

(App. 102, 112, 278)

Additionally, at 10:37 a.m. on December 8, 2020, Tyler submitted his second Inmate Medical Request Form to the Hancock County Jail stating: "I am in detoxin bad I can't eat or sleep or anything Please

[1] The Superior Court used the reference "Jail Employees" when referring to individual defendants Scott A. Kane, Timothy Richardson, Frank L. Shepard, Shaine J. Gross, Michael R. Pileski, Patricia E. Rossi, Jillian Jones Bye, and Travis Young in its Order dated October 31, 2024. (App. 14)

I'm begging for help I was taking 3 subs a day now nothing. I am having restless legs bad. (App. 102, 113, 280)

On December 10, 2020, Tyler submitted his third Inmate Medical Request Form to the Hancock County Jail, stating:

> I cant sleep at all even with the Melatonin. I still haven't slept I have tried sleeping on the floor exts. [sic] My anxiety is so high I cant focuse [sic] at all throughout the day Please someone talk to me help I cant focus and my anger is getting worse now that I cant sleep I keep having anxiety attack all day n night makes me scream!

(App. 102, 114, 282)(poor copy quality of this document is as it was received).

The Hancock County Jail has a mandatory policy, No. D-243, entitled "Special Management Inmates", that requires an inmate to be placed on suicide watch when "information is received regarding an inmate and/or an inmate's behavior indicates a risk of suicide." (App. 102, 115, 238) The same policy states that inmates placed on suicide watch will be housed in Holding and provided a suicide smock, one suicide blanket, and a mattress without sheets. (App. 102, 116, 238)

If an inmate exhibits suicidal ideation, corrections officers at the Hancock County Jail are trained to call Crisis Response and refer the inmate for professional help. (App. 81, 91) Pursuant to mandatory

Hancock County Jail Policy No. D-243, entitled "Special Management Inmates", the corrections officers are also required to place the inmate on suicide watch if the inmate exhibits a risk for suicide. (App. 91, 238) The Shift Supervisor is also required to review any "Suicide Assessment" before leaving shift. (App. 92, 238)

Despite Tyler's medical requests, no screening for suicidality was performed by the Hancock County Jail (Cox Depo. Exh. 52, p. 6) and Tyler was never placed on suicide watch. (App. 103, 116) Because Tyler demonstrated multiple risk factors associated with suicide that required constant supervision, the standard of care required Tyler to be placed on suicide watch until he was cleared by a mental health professional. (App. 103, 105, 117, 129)

On December 13, 2020, Tyler hung himself from his bed with a bedsheet and subsequently died on December 15, 2020. (App. 78, 103, 118) Had he been placed on suicide watch as required, he would not have had access to a bedsheet. (App. 106, 144)

According to Hancock County Jail Policy No. F-322, a Community Corrections Sargent is required to arrange an inmate appointment with a mental health worker when required. (App. 227) In December 2020, Hancock County Jail had a vacancy in the

Community Corrections Sargent position. (App. 103, 120) According to Hancock County Jail Policy No. F-322, when an inmate requests psychiatric services, the Shift Supervisor is required to implement procedures to provide the inmate access to psychiatric services. (App. 103, 120, 227) From an operational standpoint at the Hancock County Jail, "psychiatric services" is synonymous with "mental health services". (App. 103, 121)

Hancock County Jail Policy No. F-320 entitled "Psychiatric Services", requires the Shift Supervisor and jail personnel to implement procedures to provide an inmate access to psychiatric services when an inmate's behavior indicates the need for it or upon request from an inmate. (App. 103, 122, 229) The Hancock County Jail was required to assess the behavioral health needs of the inmate and employ mental health screening tools as appropriate. (App. 103, 104, 122, 230) Pursuant to the same policy, Hancock County Jail was required to use the nationally recognized "Collaborative Care Model" which mandates consultation with the psychiatrist concerning necessary interventions for an inmate with a mental health problem. (App. 104, 124, 230)

The Maine Criminal Justice Academy requires Hancock County Jail employees to be certified in suicide prevention and this is reported on a training attendance roster form. (App. 104, 125, 275, 276) According to Hancock County Jail Policy No. C-112, entitled "Prisoner Screening, Referrals, (Mental Health, Substance Abuse, Suicide)", the Hancock County Jail recognizes that the sooner an inmate's mental health and substance abuse issues are identified, the greater the likelihood that psychotic and substance abuse crises may be averted. (App. 104, 126, 231) According to Hancock County Jail Policy No. A-130, entitled "Staff Training", Assistant Jail Administrator Shepard was required to ensure that all staff undergo training in the recognition of the symptoms of mental illness, substance abuse, and suicidal ideation. (App. 104, 126, 127, 241)

An essential tool for suicide prevention in jails is communication among health practitioners and corrections staff, regarding the safe management of incarcerated inmates. (App. 105, 130) The Detention and Correction Facilities Standards for Maine Counties and Municipalities requires this coordination. (App. 105, 132) In contravention of this requirement, there was no such

coordinated communication with respect to Tyler's safe housing and supervision needs. (App. 105, 133)

The Maine Code of Regulations requires that Maine County Jails "shall provide inmates with medical and mental health services" and that such services may be contracted for with a separate provider but must be "in coordination" with the county jail's administrator. 03-201 C.M.R. ch. 1 § 2(K)(2017).

30-A M.R.S. § 1561 provides that "[a]ny person incarcerated at a county jail has a right to adequate professional medical care." 34-A M.R.S. § 1209-B, entitled "Standards, policies, and procedures applicable to Jails", states that: "Each jail shall provide mental health treatment…."

The suicide prevention policy at the Hancock County Jail focuses on the post-suicide-attempt time period and does not provide procedures to guide staff in the prevention of inmate suicide. (App. 105, 135) Hancock County's suicide prevention policy was developed by the jail without input or approval from health care professionals. (App. 105, 136) (Cox Depo. Exh. 52, p. 8)

Tyler's multiple inmate medical request forms evidence his high risk for suicide. (App. 106, 138) Despite Tyler's cries for help, jail

personnel failed to address Tyler's mental health crisis. (Cox Depo. Exh. 52, p. 6)

Following Tyler's conversation with Sgt. Gross on December 7, 2020, Tyler should have been placed on suicide watch until his needs were adequately assessed. (App. 106, 139, 140) Had Tyler Poole been placed on suicide watch, he would not have had access to a sheet and accordingly could not have hanged himself. (App. 106, 144)

The corrections officers at the Hancock County Jail provide key mental health screening functions for jail inmates, as is common in small jails. (App. 106, 145) When an inmate requests mental health attention, the jail nurse or the Community Corrections Sergeant must "relay the inmate Request for Medical Attention to the Mental Health Worker who comes in to see the inmate." (App. 106, 146)

Hancock County requires the jail's nursing provider to have liability insurance with respect to patient-inmates and reimburses the nursing provider annually for the cost of that insurance. (App. 104, 128) Documentation of this additional liability insurance coverage related to the nursing provider (Parkin) has never been produced. (App. 104, 128)

Hancock County likewise requires the jail's medical provider to maintain such "additional liability insurance" and reimburses the medical provider annually for the cost of that insurance. (App. 105, 128) Documentation of this additional liability insurance coverage related to the medical provider (Howard) has likewise not been produced. (App. 105, 129)

The Maine County Commissioners Association Self-Funded Risk Management Pool ("Risk Pool") is a public, self-funded pool established pursuant to 30-A M.R.S. § 2251-2256. (App. 79, 86) A named member of the Risk Pool, Hancock County has insurance coverage pursuant to two documents: (1) the first is entitled "Maine County Commissioners Association Self-Funded Risk Management Pool Coverage Document" (hereinafter the "Coverage Document"); (2) the second is the Member Coverage Certificate (hereinafter the "Member Coverage Certificate"). (App. 79, 87)

The Member Coverage Certificate states in the "Liability Coverage" section that coverage is provided to Hancock County for "Incidental Malpractice". (App. 88, 149) "Incidental Malpractice" is not listed as an exclusion from coverage under Section III of the Coverage Document, nor is "Incidental Malpractice" subject to the

limitation contained in Section III(C)(8) of the Coverage Document. (App. 196)

On May 4, 2021, Carl D. McCue, Esq. prepared a Notice of Claim pursuant to the Maine Tort Claims Act, 14 M.R.S. § 8101 *et seq.*, with respect to the claimant Dorothy Poole (hereinafter "Dorothy") Individually and as Personal Representative of the Estate of Tyler Poole. (App. 52, 85, 99, 108) Attorney McCue mailed that Notice of Claim by certified mail to: Jail Administrator Hancock County Jail (Timothy Richardson); Hancock County Sheriff (Scott Kane); the Hancock County Commissioners Office; the Office of the Attorney General (Aaron Frey); and the Maine Department of Corrections (Randall Liberty). (App. 85, 86, 99, 100, 109)

On July 21, 2021, Attorney McCue completed an Amended Notice of Claim pursuant to the Maine Tort Claims Act, 14 M.R.S. § 8101 *et seq*. (App. 54, 86, 100, 109) Attorney McCue mailed the July 21, 2021, Amended Notice of by certified mail to: Jail Administrator Hancock County Jail (Timothy Richardson); Assistant Hancock County Jail Administrator (Frank Shepard); Hancock County Sheriff (Scott Kane); the Hancock County Commissioners Office; the Office of the Attorney General (Aaron Frey); and the Maine Department of

Corrections (Randall Liberty). (App. 86, 110) The green cards certified mail receipts all indicate that they were delivered. (App. 86, 100, 101, 110) A medical malpractice notice of claim was filed on November 17, 2022. (App. 58)

On November 17, 2022, Dorothy filed a three count complaint in federal court against Hancock County, the Jail Employees, and others. That case was docketed as case 1:22-cv-00364. (App. 38, 101, 110) Count One seeks recovery against Hancock County and the Jail Employees pursuant to 42 U.S.C. § 1983, asserting violation of Tyler's constitutional right to life under the Fourteenth Amendment of the United States Constitution. (App. 45, 101, 111) Count Three is a pendant state claim for wrongful death. The complaint alleges both professional negligence and ordinary negligence. (App. 49, 101, 111)

The District of Maine requires all pendant state medical malpractice claims to proceed through the pre-litigation screening panel. On August 31, 2023, the District of Maine issued a stay so that the pendant state court claims could proceed through the panel. (Case 1:22-cv-00364-JDL (ECF #38)) Neither Hancock County nor the Jail Employees have ever filed a motion requesting that the Federal District Court decline to exercise its supplemental

jurisdiction. Instead, the District of Maine has required the parties to submit periodic status reports with respect to the progress of the pre-litigation screening panel. (Case 1:22-cv-00364-JDL (ECF #38, 39, 41, 43, 45))

On June 20, 2024, Hancock County and the Jail Employees filed a Motion for Summary Judgment, not in Federal District Court, but in the Penobscot County Superior Court. (App. 64) Dorothy filed a timely objection which raised the supplemental jurisdiction issue. The parties also filed their respective M.R.Civ.P. 56(h) statements. (App. 78-147) On October 31, 2024, the Superior Court issued an order that granted Hancock County's Motion for Summary Judgment on immunity grounds but "otherwise denied" the motion with respect to the Jail Employees. (App. 37)

Dorothy filed this timely appeal on November 26, 2024. Hancock County and the Jail Employees filed a timely cross appeal on December 2, 2024. The entire case in the Federal District Court remains under stay pursuant to the most recent progress report filed by the parties on February 21, 2025. (Case 1:22-cv-00364-JDL (ECF #45))

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

A. Did the Superior Court Ignore that the Civil Complaint is Within the Exclusive Supplemental Jurisdiction of the Federal District Court?

B. Does the "Death Knell" Exception or the "Extraordinary Circumstances" Exception to the Final Judgment Rule Authorize this Appeal?

C. Did the Superior Court Err in Granting Hancock County Summary Judgment on Immunity Grounds When There are Multiple Sources of Insurance Coverage?

D. Is the Maine Health Security Act So Comprehensive that it Constitutes an Express Waiver of Immunity?

IV. STANDARD OF REVIEW.

This Court reviews *de novo* a trial court's decision on summary judgment. *Struck v. Hackett*, 668 A.2d 411, 416 (Me. 1995).

Summary judgment is appropriate only when the moving party has shown that no genuine dispute exists concerning material facts and that it is entitled to judgment as a matter of law. M.R.Civ.P. 56(c). The Court considers those facts in the light most favorable to the non-moving party. *Cormier v. Genesis Healthcare, LLC*, 2015 ME 161, ¶7, 129 A.3d 944; *Jenness v. Nickerson*, 637 A.2d 1152, 1154 (Me. 1984)("[T]he party seeking the summary judgment has the burden of demonstrating clearly that there is no genuine issue of fact. Any

doubt on this score will be resolved against him and the opposing party will be given the benefit of any inferences which might reasonably be drawn from the evidence.")(quoting 2 Field, McKusick & Wroth, *Maine Civil Practice* § 56.4 at 39 (2d ed. 1970).

When the moving party is a defendant seeking summary judgment on the ground that the evidence proves that the defendant is entitled to judgment based on an affirmative defense, the defendant bears "the burden of proving the affirmative defense." *York Cty. v. Property Info. Corp.*, 2019 ME 12, ¶16, 200 A.3d 803; *Ouellette v. Beaupre*, 977 F.3d 127, 135 (1st Cir. 2020)(the defendant bears the burden of proof and cannot attain summary judgment on an affirmative defense unless the evidence is conclusive).

V. SUMMARY OF ARGUMENT.

First, the Superior Court erred in granting summary judgment to Hancock County while the civil complaint remains subject to the supplemental jurisdiction of the Federal District Court.

Second, pursuant to the death knell exception and the extraordinary circumstances exception to the final judgment rule, Dorothy's appeal is immediately reviewable.

Third, the Superior Court erred in concluding that Hancock County is entitled to immunity from suit. Hancock County failed to meet its burden of proving an absence of insurance and the summary judgment record shows that there are multiple sources of insurance coverage.

Fourth, the Superior Court erred in failing to find that the Legislature intended to waive governmental immunity for claims for wrongful death against governmental employees that fall within the MHSA's definition of "action for professional negligence".

VI. ARGUMENT.

A. The Superior Court Ignored that the Civil Complaint is Within the Exclusive Supplemental Jurisdiction of the Federal District Court.

When a complaint is filed in federal court alleging both federal and state causes of action, the question of jurisdiction must be considered. The federal statute, commonly referred to as the "Supplemental Jurisdiction" statute, 28 U.S.C. §1367(a), enables federal courts to entertain claims not otherwise within their adjudicatory authority when the claims are so related to claims within federal court competence that they form part of the same case or controversy. Included within this supplemental jurisdiction are

state claims brought along with federal claims arising from the same episode. *Van Eck v. Am.Sec.Ins.Co.*, 2022 U.S. Dist. LEXIS 204650 *7 (Dist.Me. November 9, 2022)("A federal court exercising jurisdiction over an asserted federal question claim must also exercise supplemental jurisdiction over asserted state law claims that arise from the same nucleus of operative facts."); *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249 (1st Cir. 1996)(same).

This jurisdiction issue was raised with the Superior Court in Dorothy's response to the Motion for Summary Judgment but it appears to have been completely disregarded. (App. 101, 111)

Simply stated, Hancock County and the Jail Employees filed their Motion for Summary Judgment in the wrong court. The Federal District Court was never asked to relinquish nor has it ever relinquished jurisdiction over the wrongful death/medical malpractice claims. The civil complaint is pending only in the Federal District Court. This case will never be tried in a Maine Superior Court and will be tried in the federal system in the District of Maine. The Federal District Court has simply granted a stay so that the pre-litigation screening panel requirements could be met on the pendant state medical malpractice claims against Hancock County, the Jail

Employees and the remaining defendants (RN Parkin, NP Howard, and NP Willey). Jurisdiction accordingly remains in the Federal District Court. *See*, *e.g.*, *Nigro v. Corizon Med. Servs.*, 2020 U.S. Dist. LEXIS 22021 (D. Idaho February 5, 2020) "The supplemental jurisdiction power extends to all state and federal claims ordinarily expected to be tried in one judicial proceeding." *citing United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); *Ferris v. County of Kennebec*, 44 F.Supp.2d 62, 66 (D.Me. 1999)(federal court "retains" supplemental jurisdiction over state law claims at its discretion); *Brink v. Parhiz*, 2023 U.S. Dist. LEXIS 38228, *4 (D. Idaho March 3, 2023)(state law negligence claims described as "anchor[ed]" to 8th amendment federal claim).

Indeed, it would be unusual for a Federal District Court to relinquish its supplemental jurisdiction. One court recently observed:

> The Court finds that declining to exercise supplemental jurisdiction at this time would not be proper as the state law claims do not raise a novel or complex issue of state law; the district court has not dismissed all claims over which it has original jurisdiction; and [the movants] have not established a "compelling reason" to decline jurisdiction. While the state law claims may predominate over the federal law claims, the Court finds that in the interest of judicial economy, convenience, fairness, and comity, it would be inefficient to sever the claims and create two parallel proceedings litigating the same facts.

Bailey v. Blue Cross & Blue Shield of Tex., Inc., 2022 U.S. Dist. LEXIS 39582, *37, S.D.Tex. January 14, 2022).

The same is true here. The Federal District Court has never declined to exercise its supplemental jurisdiction over the merits of this case.[2] The Superior Court, however, failed to address this issue. The Court should address the issue of supplemental jurisdiction now because a "court has an obligation to inquire *sua sponte* into its subject matter jurisdiction." *In re Recticel Foam Corp.*, 859 F.2d 1000, 1002 (1st Cir. 1988); *Hawley v. Murphy*, 1999 ME 127, ¶8, 736 A.2d 268 (same); *Landmark Realty v. Leasure*, 2004 ME 85, ¶6, 853 A.2d 749 ("hallmark" of subjection matter jurisdiction is that it can be raised at any time, including on appeal).

At the very least, prior to filing the Motion for Summary Judgment in the Superior Court, Hancock County and the Jail Employees were required to request that the Federal District Court

[2] In *Adams v. Magnusson*, 2022 U.S. Dist. LEXIS 9472 (D.Me. February 19, 2022), a Recommended Decision by the Magistrate Judge on a motion for summary judgment, the Court scrutinized the interplay between the federal causes of action and the state law causes of action: "When a question of fact exists as to whether a governmental employee acted with deliberate indifference, the employee is not entitled to summary judgment on the state law tort claim based on the assertion of discretionary function immunity." *Id.* at *21 *citing Richards v. Town of Elliot*, 2001 ME 132, ¶32, 780 A.2d 281(if officer uses excessive force, discretionary function immunity in MTCA does not apply).

abstain from exercising jurisdiction. *See* 28 U.S.C. § 1367(c)(setting forth statutory factors that federal court must apply before declining supplemental jurisdiction).

Accordingly, the Order should be vacated to the extent it granted Hancock County summary judgment.

B. This Interlocutory Appeal is Proper Under Both the "Death Knell" and "Extraordinary Circumstances" Exceptions to the Final Judgment Rule.

Generally, a judgment must be final in order for an appeal to be cognizable. *In re Estate of Hiller*, 2014 ME 2, ¶17, 86 A.3d 9. "A court order that adjudicates less than all the claims or the rights and liabilities of less than all the parties does not terminate the action as to any of the claims or parties." *Estate of Ackley*, 2023 ME 44, ¶7, 299 A.3d 23. Such an order is not a final judgment and an appeal of such an order is interlocutory. *Id.* A party urging that this Court reach the merits of an otherwise interlocutory appeal has the burden of demonstrating that one of the exceptions to the final judgment rule applies. *Maples v. Compass Harbor Vill. Cond. Ass'n*, 2022 ME 26, ¶16, 273 A.3d 358.

The death knell exception to the final judgment rule justifies consideration of issues raised on an interlocutory appeal when

awaiting final judgment will cause "substantial rights of a party to be irreparably lost." *Fiber Materials, Inc. v. Subilia*, 2009 ME 71, ¶14, 974 A.2d 918. "A right is irreparably lost if the appellant would not have an effective remedy if the interlocutory determination were to be vacated after a final disposition of the entire litigation." *Id.*

Prior to the motion for summary judgment, this case was scheduled for hearing with the medical malpractice pre-litigation screening panel. This Court has held that the screening panel process affords the litigants substantial rights. In *Salerno v. Spectrum Med. Grp., P.A.*, 2019 ME 139, 215 A.3d 804, this Court gave a lengthy discourse on those rights:

> Pursuant to the MHSA, a party bringing a claim for medical negligence, in contrast to a conventional tort claim, must comply with a number of distinct procedural requirements. Most significantly for present purposes, the MHSA requires that before the claim may be heard by a court, it must be presented to a prelitigation screening panel constituted of a judicial officer, an attorney, and a health care practitioner or provider. The purpose of the panel proceeding is to allow panel members to identify and separate meritorious claims from nonmeritorious claims and encourage the parties to achieve an early resolution of the litigation. Additionally, pursuant to the MHSA, the notice of claim for professional negligence, the proceedings before the panel, and the panel's final determinations are generally confidential.

Id. at ¶11; *see also* 24 M.R.S. §§ 2851(1), 2854.

Dorothy asserts that she will lose the rights and due process protections provided by the MHSA if she is denied immediate appellate review of the Superior Court's summary judgment order here. If this appeal is not heard now, the case will proceed to panel against all the individual "Jail Employees"[3], Nurse Parkin, Nurse Practitioner Howard and Nurse Practitioner Willey.

The evidence against Hancock County, however, will not be screened by the panel even though there is substantial overlap in that evidence. Dorothy's right to an adjudication of her claims against Hancock County will be irreparably lost if this appeal is not heard now. *Fiber Materials v. Subilia*, 2009 ME 71, ¶14, 974 A.2d 918 ("a right is irreparably lost if the appellant would not have an effective remedy if the interlocutory determination were to be vacated after a final disposition of the entire litigation.")

Commentators have examined whether there is an additional exception to the final judgment rule for "extraordinary

[3] The Superior Court's Order is captioned "Order Denying Respondents' Motion for Summary Judgment in Part and Granting in Part". (App. 13) The Superior Court stated it would refer to Hancock County separately as "Hancock County" and that it would refer to the named individual corrections officers as the "Jail Employees". (App. 14) The Court Superior Court only granted summary judgment to "Hancock County" and "otherwise denied" the Motion for Summary Judgment. (App. 37)

circumstances". *See* Harvey, 3A Maine Prac., Maine Civil Practice §A2C.5 (3d ed.)("It is not entirely clear from the opinions of the Law Court whether there is a separate exception from the final judgment rule for extraordinary circumstances or whether opinion using this term are merely a subset of the judicial economy exception.")

In *Salerno*, this Court inserted a lengthy footnote in its opinion implying that such a separate exception exists, stating that "the circumstances of this appeal are not so extraordinary as to add an ad hoc exception to the final judgment rule." *Salerno,* at ¶7, n.1. The Court then string cited a series of cases addressing the issue of extraordinary circumstances. *Id. citing Fitzgerald v. Bilodeau*, 2006 ME 122, ¶5, 908 A.2d 1212 ("concluding that absent extraordinary circumstances, 'an appeal from a denial of a motion to dismiss for forum *non conveniens* under the Uniform Child Custody Jurisdiction Act … is inappropriate'"); *IHT Corp. v. Paragon Cutlery Co.*, 2002 ME 68, ¶7, 794 A.2d 651(concluding that the denial of a motion to dismiss for lack of personal jurisdiction does not constitute extraordinary circumstances); *First Nat'l Bank of Bos. v. City of Lewiston*, 617 A.2d 1029, 1030-31 (Me. 1992)("concluding that 'extraordinary circumstances' are present where an appeal is taken

from an interlocutory order permitting the sale of property for the benefit of an interest holder but in which the appellant claims to have a senior interest because 'a later finding that the appellant was indeed the holder of a senior interest would be hollow.'"); *Bar Harbor Banking & Tr. Co., v. Alexander*, 411 A.2d 74 (Me. 1980)(finding extraordinary circumstances existed to avoid interference with apparently legitimate executive department activity and to safeguard the separation of powers.)

The procedural posture of this case is most unusual. The complaint is presently pending in the Federal District Court. The count alleging violation of 42 U.S.C. § 1983 is subject to the Federal District Court's original jurisdiction and the claim for ordinary and professional negligence is subject to the Federal District Court's supplemental jurisdiction. The District of Maine requires that litigants with pendant state claims alleging medical malpractice complete the pre-litigation screening panel process. Thereafter, adjudication of the claims returns to the Federal District Court for a trial before a federal jury.

If this interlocutory appeal is not heard now, the case will proceed to the screening panel against a truncated group of

defendants (the individual "Jail Employees", Nurse Parkin, Nurse Practitioner Howard and Nurse Practitioner Willey). Thereafter, regardless of the screening panel outcome, the entire case is entitled to proceed to trial in the District of Maine. Any appeal from that judgment (including questions of immunity) would be heard by the First Circuit Court of Appeals, raising the possibility that there might have to be a second pre-litigation screening panel proceeding on remand, with Hancock County as the sole respondent. This presents the distinct possibility of divergent outcomes between the first screening panel's findings with respect to the Jail Employees, Nurse Parkin, and Nurse practitioners Howard and Willey, and the second screening panel's findings with respect to Hancock County. Moreover, convening two separate panel hearings for the same case would waste scarce panel resources.

Indeed, avoiding the possibility of duplication of proceedings and judicial economy was at the heart of the Federal District Court's first procedural order in this case:

> Accordingly, weighing the interests of judicial economy, potential prejudice to the Defendants, and potential hardship or inequity to Poole—including that in the absence of a stay, Poole would be compelled to divide her claims into state and federal court proceedings—I

> conclude that a stay of this action until the completion of the pre-litigation screening process is warranted.

Poole v. Hancock Cnty., 2023 U.S. Dist. LEXIS 153900, *6-7 (D.Me., August 31, 2023).

Given the extraordinary circumstances of this case, there need be no concern that allowing this appeal to proceed would open the floodgates for other interlocutory appeals of this type. Only four cases have been reported involving a federal court action that contained pendent state court medical malpractice claims that proceeded through the pre-litigation screening panel process. *Carney v. Hancock Cty.*, 2021 U.S. Dist. LEXIS 47311(D.Me. March 14, 2021; *Dyer v. Penobscot Cty.*, 2020 U.S. Dist. LEXIS 178047 (D.Me. September 28, 2020); *Hewett v. Inland Hosp.*, 39 F.Supp.2d 84 (D.Me. 1999); *Kidder v. Richmond Area Health Ctr., Inc.,* 595 F.Supp.2d 139. (D.Me. 2009).

Accordingly, this appeal is proper under both the death knell exception and the extraordinary circumstance exception to the final judgment rule.

C. The Superior Court Erred in Granting Summary Judgment to Hancock County on Immunity Grounds When There are Multiple Sources of Insurance Coverage.

(i) Insurance Policies Other than the Maine County Commissioners Risk Management Pool ("MCCRMP").

A governmental entity otherwise immune from suit waives its immunity to the extent it procures insurance for the acts asserted in the complaint. 14 M.R.S. § 8116; *Danforth v. Gottardi*, 667 A.3d 847, 848 (Me. 1995); *Rippett v. Bemis*, 672 A.2d 82, 88 (Me. 1996). In MTCA cases involving the sovereign immunity defense, this court has stated that the governmental entity, as the party asserting the affirmative defense, has the burden of demonstrating the absence of insurance coverage for the event in question. *See Perry v. Dean*, 2017 ME 35, ¶24, 156 A.3d 742; *Hilderbrand v. Washington Cnty. Comm'rs*, 2011 ME 132, ¶7, 33 A.3d 425; *King v. Town of Monmouth*, 1997 ME 151, ¶7, 697 A.2d 837.

The discovery responses provided by Hancock County point to the existence of insurance policies other than the MCCRMP coverage that applies to this occurrence. The contract between Hancock County and Chelsea Howard, NP, entitled "Agreement for Medical Services Provided to the Hancock County Jail" represents the

existence of additional liability insurance expressly providing that Howard "will be reimbursed up to Two Thousand ($2,000.00) for the additional liability insurance *required for treating patients that are incarcerated*." (App. 218)(emphasis added). Likewise, the "Agreement for Nursing Services Provided to the Hancock County Jail" required Nurse Parkin to procure liability insurance, and Hancock County reimbursed her annually with taxpayer funds for the cost of that insurance. (App. 211-216) Hancock County has failed to produce these policies as part of the summary judgment record.

Without examining these insurance policies, it is impossible to know whether Hancock County is a named insured or an additional insured. It was solely Hancock County's burden of production to conclusively demonstrate the absence of coverage under these additional insurance policies. The Superior Court erred by shifting this burden of production to Dorothy.

Far from being speculative, the existence of these insurance commitments is established by the service contracts between Hancock County and NP Howard and Nurse Parkin. With respect to these two providers, we know a) that insurance was a condition of the service contracts, b) the effective dates of the required coverage,

c) the premium reimbursement costs, and d) that the coverage relates to "patients who are incarcerated". (App. 218) Hancock County (and the Jail Employees) should not be allowed to benefit from their failure to produce the actual coverage documents. *See Carney, et al. v Hancock County, et al.*, PENSC-CIV-2021-00074, Order Denying All Motions for Summary Judgment, at 8 (April 19, 2024) (warning Hancock County that liability coverage documents must be attached to the affidavits in support of a motion for summary judgement or must otherwise be attached to the Statement of Material Facts).

As occurred last year in *Carney*, all the pertinent insurance contracts were not attached to Hancock County's summary judgment pleadings.

The party seeking refuge under the affirmative defense of immunity has the burden of demonstrating the basis for the defense including that the entity does not have insurance to cover the event in question. *Estate of Bean v. City of Bangor*, 2022 ME 30, ¶6, 275 A.3d 324. This summary judgment record has "left unresolved the question of the applicability of insurance to *indemnify* the City for the claims presented in this case." *Wilcox v. City of Portland*, 2009 ME 53, ¶12, 970 A.2d 295. (Emphasis added).

ii. Insurance Through the MCCRMP.

Hancock County argued below that membership in the Maine County Commissioners Association Self-Funded Risk Management Pool "MCCRMP") does not constitute the procurement of insurance. (App. 79, 87) This Court has conclusively rejected the argument that risk pools are not to be regarded as insurance. In 2017, this Court stated that "we join several other jurisdictions that have treated similar risk pools as insurers for purposes of analyzing coverage issues." *City of S. Portland v. Me. Mun. Ass'n Prop. & Cas. Pool*, 2017 ME 57, n.2, 158 A.3d 11.

In determining whether coverage exists with the MCCRMP, a Court must evaluate "the instrument as a whole." *Maine Drilling & Blasting v. Insurance Co. of N.Am.*, 665 A.2d 671, 675 (Me. 1995). "Definitions, exclusions, conditions and endorsements are necessary provisions in insurance policies." *Purk v. Farmers Ins. Co.*, 628 S.W.3d 714, 724 (Ct.App.Mo. 2021).

Here, the Member Coverage Certificate, much like the declaration page of an insurance policy, provides a summary of coverage. Under Section III, the certificate states that there is "Liability Coverage" for "Incidental Malpractice". (App. 149)

"Insurance policies consist of several parts. The first part is the declarations page, colloquially known as the 'dec page'. The dec page sets forth the most basic facts regarding the policy—its nature, limits, effective period, and who it insures." Thomas, J., *New Appleman on Insurance Law Library Edition*, § 21.01 (2013). The declarations page of an insurance policy, "in terms of the construction of the policy as a whole and in terms of its capacity to define the insured's expectations of coverage," has "signal importance". *Lehrhoff v. Aetna Cas. & Sur. Co.*, 271 N.J.Super. 340, 346 (App.Div. 1994). The declarations page is generally the portion of an insurance policy to which the insured looks first, and "is the most crucial section of the policy for the typical insured." *Folkman v. Quamme*, 2003 WI 116, ¶37, 665 N.W.2d 857.

Here, any reader of the Member Coverage Certificate would conclude that there is coverage for something entitled "Incidental Malpractice." That language is plainly present on the face of the document. The term "Incidental Malpractice" is not defined in either the Member Coverage Certificate nor within the Coverage Document. A close examination of Section III entitled "Casualty Coverage" of the Coverage Document does not define nor mention the meaning of

"Incidental Malpractice". In the absence of a specific definition, the terms in an insurance policy are given their plain meaning. "Incidental Malpractice" is generally understood in the insurance industry as referring to "the liability exposure created by the offering of medical services by an entity not engaged primarily in the offering of such services." International Risk Management Institute (IRMI), "Definition: Incidental Malpractice" IRMI.com (2020-2024). Any reader of the declarations page would clearly conclude that there is coverage for "Incidental Malpractice" and the failure to screen for suicide and to institute measures to protect from suicide fall squarely within the confines of the plain meaning of that term.

A reader of the fifty-two page Coverage Document will not encounter the term "Incidental Malpractice" in the four corners of that document. Significantly, that term is not expressly excluded from coverage in Section III(C), entitled "Exclusions" from "Casualty Coverage" (App. 195-198). Indeed, a reader of both the Member Coverage Certificate and the Coverage Document would be reassured that there is coverage for "Incidental Malpractice" in a jail suicide scenario because the Coverage Document states in bold, all capital letter, and fourteen point font that **"AS RESPECTS TO LAW**

ENFORCEMENT OPERATIONS AND ACTIVITIES ONLY THE DEFINITION OF PERSONAL INJURIES IS EXTENDED TO INCLUDE DISCRIMINATION AND VIOLATION OF CIVIL RIGHTS."

The right to life is certainly a civil right and this is, in fact, a wrongful death action for the deprivation of life pending in the Federal District Court.

Importantly, ambiguous language in a contract of insurance is to be construed in favor of coverage. *York Ins. Group v. Van Hall*, 1997 ME 230, ¶8, 704 A.2d 366. Thus, where an ambiguity in the declarations page leads the insured to reasonably expect coverage, and "[o]nly a full, careful, sophisticated and experienced reading of the full policy would inform the insured otherwise, the policy will be interpreted as providing such coverage." *Lehrhoff v. Aetna Cas. and Sur., Co.*, 638 A.2d 889, 994 (N.J.App. 1994) Here, not only does the Member Coverage Certificate expressly state that there is coverage for "Incidental Malpractice", but the Coverage Document does not say otherwise.

There is only one reported case in the nation construing the question of "Incidental Malpractice" in the setting of a claim of governmental immunity. *Dawes v. Nash County*, 584 S.E.2d 760 (N.C.

2003) is a case arising out of a negligence claim against emergency medical technicians employed by a county. The plaintiff contended that the county waived the defense of sovereign immunity by purchasing insurance. The county argued that a proper interpretation of the policy did not provide insurance coverage for the county and that sovereign immunity mandated summary judgment in its favor. The North Carolina Supreme Court vacated the trial court's summary judgment award, concluding that the "Incidental Malpractice" section provided coverage for the services rendered or that should have been rendered by the county employees. The Court commented that the "various terms of the policy are to be harmoniously construed, and if possible, every word and every provision given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company." *Id.* at 764.

Likewise, the Member Coverage Certificate and the Coverage Document should be construed to give the term "Incidental Malpractice" its commonly understood meaning. Any doubts with

respect to that term and any possible exclusions should be resolved against the insurer and in favor of coverage.

In the face of the ambiguity between the Member Coverage Certificate and the Coverage Document, the Superior Court erred in granting Hancock County's Motion for Summary Judgment.

D. The All Encompassing Maine Health Security Act Thwarts the MTCA Because It is More Specific.

In 1977 the Maine State Legislature had a momentous session. That year, both the Maine Tort Claims Act (PL 1977, c. 493, § 3) and the Maine Health Security Act (PL 1977, c.2, § 2) were first adopted. The MTCA abolished, in part, the common law of sovereign immunity. At the same time, in enacting the MHSA the Legislature set forth a scheme for adjudicating medical malpractice claims. These are both stout statutory titans in Maine law. Neither the MTCA nor the MHSA instructs on which scheme is predominant in adjudicating claims arising when a governmental entity (and its employees and agents) provides health care services to an inmate.

Dorothy's legal position below was that the MHSA is so comprehensive that it controls over the MTCA.

At the onset, it is important to note that the pleading error committed by the claimant in *Hinkley v. Penobscot Valley Hosp.*, 2002 ME 70, 794 A.2d 643 does not exist here. In that case, the claimant complied with the Notice of Claim provisions of the MHSA, but did not comply with the Notice of Claim provisions within the MTCA. *Id.* at ¶3. At bottom, in *Hinkley*, this Court concluded that the claimant had to do both. *Id.* at ¶15. Here, Dorothy provided separate notices consistent with both the MHSA and the MTCA. (App. 52, 54, 58)

This Court has previously determined that the Legislature intended the MHSA to "fully occupy" the field of medical malpractice claims brought against healthcare providers and practitioners. *Butler v. Killoran*, 1998 ME 147, ¶6, 714 A.2d 129. In *Butler*, this Court concluded that the three-year statute of limitations contained in the MHSA took precedence over the two-year statute of limitations contained in the Wrongful Death Act, citing "the principle of statutory construction that a statute dealing with a subject specifically prevails over another statute dealing with the same subject generally." *Id.* at ¶11, *citing* 2B Sutherland, Statutory Construction § 51.05, at 174 (1992 & Supp. 1998)(where one statute deals with a subject in general terms, and another deals with a part of the same subject in

a more specific way, then the later will prevail); *see*, *e.g.*, *South Portland Civil Service Comm'n v. City of Portland*, 667 A.2d 599 (Me. 1995); *Swan v. Sohio Oil Co.*, 618 A.2d 214 (Me. 1992); *State v. Anderson*, 409 A.2d 1290 (Me. 1977).

Pursuant to this principle, this Court concluded that the Wrongful Death Act's general provisions "must yield" to the MHSA's "more specific provisions, which pertain only to claims arising from professional negligence by health care providers or practitioners." *Id.* at ¶11. This Court concluded:

> In summary, the broad language of section 2502, the legislative history surrounding its enactment, and the specificity of the [M]HSA persuade us that the Legislature intended to mean exactly what it said: that an action for professional negligence is "*any action* for damage for injury or death … arising out of the provision or failure to provide health care services."

Id. at ¶12. (Emphasis added).

We begin by examining the language of 24 M.R.S. § 2502's definition of an "action for professional negligence" to determine whether the Legislature intended that phrase to encompass actions for wrongful death arising from the failure of Hancock County and its corrections officers, trained in suicide prevention, to intercede and prevent an inmate's self-harm. In seeking to determine legislative

intent, we must look first to the language of the statute itself. *Labbe v. Nissen Corp.*, 404 A.2d 564, 567 (Me. 1979). Section 2502's broad language, particularly its inclusion of the words "or death" and "or otherwise," provides strong evidence of the Legislature's intention that the MHSA fully occupy the field of claims brought against those responsible for preventing suicide in Maine's county jails.

Indeed, this Court has expressly noted the broad scope of section 2502's definition of an action for professional negligence, and has found the MHSA's provisions to be controlling over multiple areas of substantive law and in a wide variety of contexts. *See Brand v. Seider*, 1997 ME 176, 697 A.2d 846 (MHSA governs breach of confidentiality claims); *Dutil v. Burns*, 674 A.2d 910, 911 (strict liability and breach of warranty claims governed by contents of MHSA); *Thayer v. Jackson Brook Inst.*, 584 A.2d 653 (Me. 1991)(suit by visitor who was attacked while visiting care facility is governed by MHSA); *Olszewski v. Mayo Reg'l Hosp.*, 2008 U.S.Dist. LEXIS 99887 (D. Me. December 9, 2008)(observing that a lawsuit brought by family members of deceased persons whose brains were removed post-mortem by defendant were subject to the MHSA).

If there was any doubt that the Legislature intended that the MHSA completely control the legal outcome when a county jail is responsible for mental health care of an inmate, one need only look at the sweep of the language utilized in two cases. In *Saunders v. Tisher*, 2006 ME 94, ¶9, 902 A.2d 830, this Court determined that the MHSA was controlling law in a wrongful involuntary commitment case and described the MHSA as "broadly worded and all-encompassing." The Court added that "the language of the MHSA regarding the scope of its applicability is very broad. It is made to apply to *all* 'actions for professional negligence,' which are defined as '*any* action[s] for damages for injury or death against any health care provider, its agents or employees, … whether based upon tort or breach of contract *or otherwis*e ….'" *Id.* at ¶12 (Emphasis in original).

In *Brand v. Seider*, 1997 ME 176, 697 A.2d 846, a plaintiff sued a psychologist for wrongfully releasing her confidential medical information. The Superior Court dismissed the action for failure to comply with the MHSA. The patient argued that the psychologist's disclosure of the confidential information after the relationship with the provider concluded meant that the disclosure had nothing to do with the provision of health care services. This Court found no merit

to the argument that the MHSA applied only to traditional negligence actions and did not govern a claim for breach of confidentiality. *Id.* at ¶4, 697 A.2d 846. The Court reiterated that the MHSA statute was intended to "fully occupy the field of claims" brought against providers. *Id. citing Dutil*, 674 A.2d 910 at 911 (Me. 1996); *Musk v. Nelson*, 647 A.2d 1198 at 1201 (Me. 1994).

In *Carney et al., v. Hancock County, et al.*, Penobscot Superior, PENSC-CIV-00074 (April 19, 2024), this same Superior Court Justice noted in another jail suicide involving Hancock County that other statutes spoke to the import of the MHSA in patient-inmate settings. First, the Superior Court discerned that 30-A M.R.S. § 1561 provides, "[a]ny person incarcerated in a county jail has a right to adequate professional medical care, …" *Id.* at 15, n.9. Second, the Superior Court cited 34-A M.R.S. § 1208-B, that specifies:

> Each jail shall provide mental health treatment, including at a minimum providing a licensed clinician or licensed professional organization that will be available to assist an inmate who is a person receiving mental health treatment. Mental health treatment required by this paragraph may be provided at the jail at which the person resides or at another jail or correctional facility or by a service provider or entity working under a contract with the jail at which the person resides.

Id. citing § 1208-B(4)(C).

Third, subsection 1208-B(4) also specifically requires county jails to provide access to substance use disorder services and requires county jails to operate in accordance with the standards and policies adopted by the Commissioner of Corrections. Pertinent to this case, the *Carney* Court noted that the policies adopted by the Commissioner of Corrections, which are found in the Maine Code of Regulations, specify that Maine's county jails, must adopt policies and practices which "shall provide inmates with … medical and mental health services" and that such services shall be provided by contracting with a medical provider who will be responsible for providing those services to inmates "in coordination" with the county jail's administrator. *Id. citing* 03-201 C.M.R. ch.1 § 2(K) (2017).

To finish, this Court has previously held that the terms of a more specific statute thwart a general immunity defense under the MTCA. *Clockedile v. State Dep't of Transp.*, 437 A.2d 187 (Me. 1981)(MTCA immunity did not bar claim based on Highway Defect Statute, 23 M.R.S. § 3655); *Heber v. Lucerne-in-Maine Village Corp.*, 2000 ME 137, 765 A.2d 1064 (in interaction between MTCA and more specific 1961 statute, the more specific statutory construct governs

and waives immunity); *Fleet Nat'l Bank v. Liberty*, 2004 ME 36, 845 A.2d 1183(Levey, J. *dissenting*)(more specific negotiable instrument statute should govern over more general promissory note statute for purposes of the statute of limitations).

Clearly, the Legislature has shown through its numerous enactments that Hancock County should be held accountable for its actions as a health care provider when it delivers or fails to deliver mental health care to a patient inmate. When Hancock County provides health care services to patient inmates, its actions should be governed exclusively by the MHSA and not the MTCA. To the extent *Hinkley* holds otherwise, it should be overruled.

VII. CONCLUSION.

For the reasons noted herein, the Superior Court Order dated October 31, 2024, granting summary judgment to Hancock County, should be vacated. All dispositive motions should be filed with and decided by the Federal District Court which retains supplemental jurisdiction over the state law claims.

Dated: March 27, 2025

Respectfully submitted,

_____

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VIII. CERTIFICATE OF SERVICE.

I, Scott J. Lynch, Esq., hereby certify that two (2) paper copies of the Brief for Plaintiff/Appellant and one (1) paper copy of the Appendix were served on the following at the addresses set forth below by pre-paid first-class mail on March 27, 2025:

Peter T. Marchesi, Esq. Wheeler & Arey, P.A. 27 Temple Street Waterville ME 04901 peter@wheelerlegal.com	Kady C. Huff, Esq. Eaton Peabody P.O. Box 1210 80 Exchange Street Bangor ME 04402 khuff@eatonpeabody.com
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An electronic copy of the Brief of Plaintiff/Appellant and of the Appendix has also been forward electronically to counsel at the aforesaid email addresses.

_____

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