MAINE SUPREME JUDICIAL COURT
Sitting as the Law Court

DOROTHY POOLE, individually and as PR of the Estate of Tyler,
Appellants,

v.

HANCOCK COUNTY, ET AL.
Appellees

Docket No. Pen-24-535

ON APPEAL FROM THE PENBSCOT COUNTY SUPERIOR COURT

BRIEF OF APPELLEES/CROSS-APPELLANTS HANCOCK COUNTY, SCOTT KANE, NOAH LEWEY, CHRISTOPHER STANLEY, JILLIAN JONES, RUSSELL WILSON, TIMOTHY RICHARDSON, AND FRANK SHEPARD

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I. CROSS-APPEAL OF COUNTY APPELLEES

INTRODUCTION

On December 13, 2020, while he was incarcerated at the Hancock County Jail, Tyler Poole hung himself from his bed with a bedsheet and subsequently died on December 15, 2020. *App. at 64, ¶ 1.* Dorothy Poole, Tyler's mother and the Personal Representative of his Estate, served an original and an amended Notice of Claim on Hancock County pursuant to the Maine Tort Claims Act ("MTCA), 14 M.R.S. § 8101, *et seq.* on May 4, 2021, and again on July 21, 2021. *App. at 52, 54.* Poole subsequently served a Notice of Claim pursuant to the Maine Health Security Act ("MHSA"), 24 M.R.S. §§ 2501, *et seq.,* on November 15, 2022. *App. at 58*. All Notices of Claim named Hancock County, Hancock County Sheriff Scott Kane, Hancock County Jail Administrator Timothy Richardson, Assistant Hancock County Jail Administrator Frank Shepard, and Corrections Officers Michael Pileski, Patricia Rossi, Jillian Bye, Troy Frye, and Travis Young as respondents (collectively, "County Appellees"). *Id.*

STATEMENT OF FACTS

1. Procedural Facts

On November 17, 2022, Poole filed a three-count complaint against the County Appellees in the U.S. District Court for the District of Maine, alleging claims

pursuant to 42 U.S.C. § 1983 as well as a pendant wrongful death claim pursuant to 18-C M.R.S. § 2-807 and 14 M.R.S. § 8104-C. *App. at 38-51.* The District of Maine stayed Poole's the federal case until the completion of the medical malpractice pre-litigation screening process. *App. at 205-212.*

At the conclusion of discovery, the County Appellees filed a motion for summary judgment which the pre-litigation panel chair referred to the Superior Court on June 24, 2024, pursuant to M.R.Civ.P. 80M(e) and 24 M.R.S. § 2853(5). *App. at 15.* The Superior Court that Hancock County is immune from suit pursuant to § 8103 of the MTCA and granted summary judgment in part. The Superior Court otherwise denied the motion with regard to the individual County Appellees and refused to address the issue of whether the MHSA applies to government entities and employees. *App. at 13–37.*

Poole filed an appeal on November 26, 2024, and the County Appellees filed their cross-appeal on December 2, 2024. The federal case remains stayed.

2. Substantive Facts

Poole alleged in her Notices of Claim that the County Appellees failed to provide necessary medical care to Poole, thereby negligently causing his death. *App. at 52, 54, 58.* She did not allege a negligent act or omission arising out of (1) the County's ownership, maintenance, or use of vehicles, machinery, or equipment; (2) its construction, ownership, maintenance, or use of public buildings; (3) the

discharge of pollutants; or (4) road construction, street cleaning, or repair. *See id*. *See also,* 14 M.R.S. § 8104-A.

The Hancock County Jail did not directly provide health care services to inmates, but instead contracted with Chelsea Howard, NP, and Lisa Parkin, RN, to provide health care services, including reviewing all inmate medical requests and determining appropriate responses to each inmate's need; conducting a physical exam, if requested, within eight days of the inmate being admitted to the Jail; and being available for telephone consultation 24 hours per day. *App. at 271-273*; *App. at 197- 204*.

Furthermore, none of the individual County Appellees are certified, registered, or licensed in the healing arts, nor were they so certified, registered, or licensed in December 2020. *Id.* The individual County Appellees' employment at the Hancock County Jail did not require them to provide services in the healing arts, nor have they ever provided such services to prisoners at the jail. *Id.* Likewise, Sheriff Kane's position as elected Sheriff of Hancock County does not require him to provide services in the healing arts, nor has he ever provided such services to prisoners at the jail. *Id. at 277*.

Corrections officers at the Hancock County Jail are required to take a two-hour class on suicide precautions and receive a certificate upon completing the class. *Id. at 288-89.* However, 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. *Id. at 298, 301.* "Crisis Response" is the agency that the Hancock County Jail contracts with through Aroostook Mental Health Center ("AMHC"). *Id. at 300-01*. None of the individual County Appellees provided or performed skilled nursing care or medical services under the general direction of another person licensed to practice medicine in their role as employees of the Hancock County Jail, at any time. *Id*. *at 266-286.*

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(A) Does the death knell exception to the final judgment rule apply to the individual County Appellees' appeal of the Superior Court's denial of summary judgment based on their claim of discretionary function immunity?

(B) Does the collateral order exception apply to the County Appellees' appeal of the Superior Court's refusal to address whether the County Appellees are "health care providers" or "health care practitioners" under the MHSA?

(C) Are county jails and corrections officers "health care providers" or "health care practitioners" under the MHSA?

(D) Did the Superior Court err when It denied summary judgment to the individual County Appellees based on their claim of discretionary function immunity?

STANDARD OF REVIEW

The Law Court reviews a ruling on a motion for summary judgment *de novo,* "reviewing the evidence in the light most favorable to the nonmoving party, to decide whether the parties' statements of material fact and referenced record evidence reveal a genuine issue of material fact." *Rice v. City of Biddeford,* 2004 ME 128, ¶ 9, 861 A.2d 668.

ARGUMENT

1. The Death Knell Exception to the Final Judgment Rule Applies to the Individual County Appellees' Appeal.

Although an appeal from the denial of a motion for summary judgment is generally interlocutory and barred by the final judgment rule, "the denial of a motion for summary judgment based on a claim of immunity is immediately reviewable pursuant to the death knell exception to the final judgment rule." *Webb v. Haas*, 1999 ME 74, ¶ 5, 728 A.2d 1261. *See also, Rodriguez v. Town of Moose River*, 2007 ME 68, ¶ 16, 922 A.2d 484 ("appeals based on a denial of a dispositive motion asserting immunity from suit are immediately reviewable."); *Geary v. Stanley Med. Rsch. Inst.,* 2008 ME 9, ¶ 11, 939 A.2d 86. "The rationale for applying the death knell exception in [ ] civil cases is that immunity confers more than immunity from damages; it is intended to provide immunity from suit." *Webb*, 1999 ME 74, ¶ 5 (quotation marks omitted). Thus, insofar as the County Appellees claimed that they

are immune from suit and the Superior Court denied their motion, their appeal falls within the death knell exception.

2. Whether the County Appellees Are "Health Care Providers" and "Health Care Practitioners" Under the MHSA is a Preliminary Legal Issue That Is Immediately Reviewable Under the Collateral Order Exception .

Poole alleges that both the Hancock County Jail itself, as well as individual correctional officers, are "health care providers" and "health care practitioners" under the Maine Health Security Act ("MHSA"), 24 M.R.S. § 2502. The County Appellees argued at summary judgment that such an interpretation is in clear conflict with the plain language of the MHSA. *Respondents' Motion for Summary Judgment at 7* (citing, *inter alia, New Orleans Tanker Corp. v. Dept. of Transportation*, 1999 ME 67, ¶ 7, 728 A.2d 673). The Superior Court determined that it lacked the subject matter jurisdiction to rule on this question after concluding that it could not resolve the issue "in a preliminary fashion," concluded that the question was therefore not one that it could decide on referral from the Medical Malpractice Screening Panel under § 2853(5) of the MHSA, and deferred the question to the Medical Malpractice Screening Panel. *App. at 17-18 & n.4* (citing *D.S. v. Spurwink Svcs.*, Inc., 2013 ME 31, ¶ 22-24, 65 A.3d 1196).

The issue of whether jails and corrections officers are "health care providers" or "health care practitioners" under the MHSA is a question of statutory interpretation and is therefore a legal question. *See City of Bangor v. Penobscot*

County, 2005 ME 35, ¶ 9, 868 A.2d 177. *See also, Sunshine v. Brett*, 2014 ME 146, ¶ 15 at n. 9, 106 A.3d 1123 ("We reiterate that questions of statutory interpretation are legal issues . . . Statutory interpretation is a task for the courts, not juries."). Therefore, the issue of whether the County Appellees are "health care providers" and "health care practitioners" is a "preliminary matter" insofar as it raises the legal issue of whether the statute applies to the Appellants at all.

Although normally, a party cannot appeal a decision until a final judgment has been rendered in the case, the Law Court has recognized three exceptions to this rule: the collateral order exception, the death knell exception, and the judicial economy exception. *United States of America, Dept. of Agriculture, Rural Housing Svc. v. Carter,* 2002 ME 103, ¶ 7, 799 A.2d 1232 (citing *Andrews v. Dep't of Envtl. Prot.,* 1998 ME 198, ¶ 4, 716 A.2d 212, 215) (other citations omitted).

In order to invoke the collateral order exception to the final judgment rule, the appellant must establish three things: (1) the decision is a final determination of a claim separable from the gravamen of the litigation; (2) it presents a major unsettled question of law; and (3) it would result in irreparable loss of the rights claimed, absent immediate review. *Id*.

The question of whether Hancock County and its employees are "health care providers" or "health care practitioners" meets all three of these requirements: (1) it is separable from the gravamen of Poole's Notice of Claim because determining

whether the Hancock County Jail or its employees are "health care providers" is a separate question from the purely factual question of whether the Jail or its employees acted negligently prior to Tyler Poole's death or whether they breached an applicable standard of care, *see App. at 61 ¶ 27* (MHSA Notice of Claim); (2) the question concerns an ambiguity in § 2502 of the MHSA that no Maine court has yet addressed, *Dyer v. Penobscot County,* 2020 WL 5801081, at * 4 (D. Me. Sept. 28, 2020) (observing that the question of "whether the defendants are medical providers" was not yet resolved); and (3) absent immediate review, the individual County Appellees will be required to litigate the matter through the pre-litigation screening process as well as in the separate federal court case despite the fact that the underlying statute does not apply to them.

For this reason, the Court should conclude that the applicability of the MHSA is reviewable pursuant to the collateral order exception to the final judgment rule.

3. Neither Jails Nor Corrections Officers Are "Health Care Providers" or "Health Care Practitioners" Under the Maine Health Security Act.

A. The County Appellees Are Substantively Different from the Institutions Listed in the MHSA's Definition of "Health Care Provider" and "Health Care Practitioner."

The MHSA, 24 M.R.S. § 2501, *et seq.*, applies to actions for professional negligence, which are defined as "any action for damages for injury or death against any healthcare provider, its agents or employees, whether based upon tort or breach

of contract or otherwise, arising out of the provision or failure to provide health care services." 24 M.R.S. § 2502(6). A "health care provider" under the MHSA is "any hospital, clinic, nursing home or other facility in which skilled nursing care or medical services are prescribed by or performed under the general direction of persons licensed to practice medicine, dentistry, podiatry or surgery in this State and that is licensed or otherwise authorized by the laws of this State." 24 M.R.S. § 2502(2).

The Law Court has not addressed the question of whether county jails or their administrators and employees fall within the MHSA's definition of "health care provider." However, the statute's plain meaning and context compels the conclusion that county jails and their administrators and employees do not fall within this definition. *See Kneizys v. F.D.I.C.*, 2023 ME 20, ¶ 13, 290 A.3d 551 (courts look first to "the plain meaning of the statute and the context of the statutory scheme[.]").

The specific facilities identified in the statutory definition of "health care provider" contained in § 2502(2), i.e., hospitals, clinics, and nursing homes, are institutions within the health care industry that have the provision of health care services as their primary purpose. Each provides medical care directly. A jail, on the other hand, is a correctional facility that has as its primary purpose the housing of prisoners and pretrial detainees. *See Somerset County v. Dept. of Corrections*, 2016 ME 33, ¶ 46 (dissenting opinion referring to "jails' core responsibility to house

prisoners and pretrial detainees[.]"). Moreover, the Hancock County Jail does not directly provide medical care itself, as would a "hospital, clinic, [or] nursing home," but instead provides access to medical care by contracting with outside health care practitioners pursuant to its obligations under 30-A M.R.S. § 1561 (establishing a right on the part of incarcerated persons to "adequate professional medical care."). *App. 67, ¶ 15.* Thus, § 2502(2) must be interpreted according to the principle of *ejusdem generis*, "in which the meaning of general words of a phrase is limited to things or items of the same general class as those expressly mentioned." *Badler v. Univ. of Maine Sys.*, 2022 ME 40, ¶ 7, 277 A.3d 379 (quotation omitted). Stated differently, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *New Orleans Tanker Corp.*, 1999 ME 67 at ¶ 7 (quoting 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction*, § 47.17 (5th ed. 1992)). *See also*, Scalia & Garner, *Reading Law*, 1999.

Thus, the general term "other facility" as used in § 2502(2) must be construed to mean a health care facility like the specific terms that precede it, i.e., hospital, clinic, and nursing home, rather than a correctional facility such as a jail. Even if the court rejects the reasoning above, the Hancock County Jail still would not meet § 2502(2)'s definition of a "health care provider" because the Jail provides access to

medical services, not the medical services themselves. *App. at 67, ¶ 15*. Accordingly, none of the County's employees at the Hancock County Jail performed "medical services" under the general direction of persons licensed to practice medicine. *Id.*

B. The legislative intent behind the MHSA was to protect access to malpractice insurance, not to expand the liability of government entities.

The Law Court has previously discussed the statutory scheme of the MHSA at length, observing that "in the mid-1970s the Legislature was faced with an alleged national crisis in the availability and cost of medical malpractice insurance." *Salerno v. Spectrum Medical Group, P.A.*, 2019 ME 139, ¶ 10 (quoting *Butler v. Killoran*, 1998 ME 147, ¶ 9, 714 A.2d 129) (quotation marks omitted). See also, *Saunders v. Tisher*, 2006 ME 94, ¶ 15, 902 A.2d 830. As a result, "the Legislature enacted the MHSA as comprehensive tort reform within the health care industry designed to stem rising malpractice insurance costs and ensure the continued availability of malpractice insurance to Maine health care providers and practitioners." *Id.* (quoting *Butler*, 1998 ME 147 at ¶ 9) (quotation marks omitted).

Governmental entities such as counties are not part of the health care industry. Moreover, they are already immune from tort claims and have no need for malpractice insurance; in fact, they waive their immunity to the extent that they procure such insurance coverage. *See* 14 M.R.S. §§ 8103, 8116. Thus, the legislative

intent behind the MHSA as described by the Law Court in *Salerno* and *Butler*—i.e., arresting malpractice insurance costs and ensuring its availability to Maine health care providers—is at odds with an interpretation of "health care providers" that includes county jails. If a governmental entity waives immunity by obtaining malpractice insurance coverage—the affordability and availability of which was the entire purpose of the MHSA in the first place—then procuring such insurance is a disincentive, which works against the legislative intent behind the MHSA. *See Salerno*, 2019 ME 139 at ¶ 10; *Butler*, 1998 ME 147 at ¶ 9; *Saunders*, 2006 ME 94 at ¶ 15.

Where the Law Court has held that "[t]he Legislature essentially made the MHSA applicable to any case that could implicate medical malpractice insurance," *D.S. v. Spurwink Services, Inc.*, 2013 ME 31, ¶ 19 (quoting *Salerno,* 2019 ME 139 at ¶ 13), the deleterious effect on governmental entities of obtaining malpractice insurance provides clear indication that the Legislature did not intend for the MHSA to apply to governmental entities such as jails.

4. Discretionary Immunity of Corrections Officers Is Settled As a Matter of Law.

The Superior Court denied the Individual Appellants' summary judgment motion on the basis that the question of whether a governmental employee's allegedly tortious activity required the exercise of judgment or choice "is a mixed

question of fact and law" which required making certain factual findings related to Poole's allegations of professional negligence. *App. at 19, n. 5* (citing *Carroll v. City of Portland,* 1999 ME 131, ¶ 10, 736 A.2d 279). Such an exercise is unnecessary. This court has previously held that, as a matter of law, the management and care of inmates is a matter of discretion. *Roberts v. State*, 1999 ME 89, ¶¶ 9-10, 731 A.2d 855. While in other contexts an analysis of the four factors set forth in *Darling v. AMHI*, 535 A.2d 421, 426 (Me. 1987), may be required in order to determine whether an act is discretionary or ministerial, in the context of the interaction between prisoners and correctional professionals this court has finally resolved the issue.

Furthermore, the Superior Court's denial of summary judgment erred by treating the issue of the individual Hancock County Appellees' discretionary function immunity as a factual inquiry rather than a question of law, and is subject to review. *Tolliver v. Dept. of Transportation,* 2008 ME 83, ¶ 16, 948 A.2d 1223 ("Whether a defendant is entitled to discretionary function immunity is a question of law.") (quoting *Chiu v. City of Portland,* 2002 ME 8, ¶ 17, 788 A.2d 183, 189).

CONCLUSION

For the reasons discussed above, the County Appellees request that this Court reverse the Superior Court's summary judgment order as it relates to the applicability

of the MHSA and the discretionary function immunity of the individual County Appellees and remand with instructions to enter judgment for the County Appellees.

II. COUNTY APPELLEES' ANSWER TO THE BRIEF OF APPELLANT POOLE

STATEMENT OF FACTS

A. Procedural Facts

On November 17, 2022, Poole filed a three-county complaint against the County Appellees in the U.S. District Court for the District of Maine, alleging claims pursuant to 42 U.S.C. § 1983 as well as a pendant wrongful death claim pursuant to 18-C M.R.S. § 2-807 and 14 M.R.S. § 8104-C. *App. at 38-51.* The District of Maine stayed Poole's federal case until the completion of the medical malpractice pre-litigation screening process. *App. at 205-212.*

At the conclusion of discovery, the County Appellees filed a motion for summary judgment which the pre-litigation panel chair referred to the Superior Court on June 24, 2024, pursuant to M.R.Civ.P. 80M(e) and 24 M.R.S. § 2853(5). *App. at 15.* The Superior Court ruled that Hancock County is immune from suit pursuant to § 8103 of the MTCA and granted summary judgment in part. *App. at 13–37.*

Poole filed an appeal on November 26, 2024, and the County Appellees filed their cross-appeal on December 2, 2024. The federal case remains stayed.

B. Substantive Facts

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. at 65, ¶ 5*. Under 30-A M.R.S. § 2254, the Risk Pool is not an insurance company, reciprocal insurer, or insurer. *App. at 65, ¶ 7*.

Hancock County is a Named Member of the Risk Pool and is provided with insurance-type coverage pursuant to two documents, *id.* at ¶ 6: (1) the Member Coverage Certificate (hereinafter referred to as the "Member Coverage Certificate"), *App. at 134;* and (2) the "Maine County Commissioners Association Self-Funded Risk Management Pool Coverage Document" (hereinafter cited as the "Coverage Document"), *id.* at 138.

Section I of the Coverage Document issued by the Risk Pool to Hancock County is entitled "General Agreements." *Id.* 145. Section I(A)(4) of the Coverage Document issued by the Risk Pool to Hancock County is entitled "Limits of Liability" and states, in pertinent part, that:

> For all causes of action seeking tort damages pursuant to the provisions of the Maine Tort Claims Act 14 M.R.S. § 8101, et seq., coverage hereunder shall not be deemed a waiver of any immunities or limitations of damages available under the Maine Tort Claims Act, other Maine statutory law, judicial precedent, or common law.

Id. at 147.

Section I(A)(4) of the Coverage Document also states that "Coverage is limited to those areas for which governmental immunity has been expressly waived by 14 M.R.S. § 8104-A and liability otherwise limited by 14 M.R.S. § 8104-B and 14 M.R.S. § 8111." *Id.*

Section III of the Coverage Document issued by the Risk Pool to Hancock County is entitled "Casualty Coverage." *Id. at 179.* Section III(C) of the Coverage Document is entitled "Exclusions," and § III(C)(8) specifically excludes coverage of "loss or damage or any liability arising out of, or in connection with, the performance of governmental functions by Members to which sovereign immunity applies under the Maine Tort Claims Act, 14 M.R.S. § 8101, et seq." *Id. at 182.*

In addition to the Coverage Document, the Member Coverage Certificate reiterates the limit of liability for torts and contains the following language limiting coverage as follows:

> Coverage is limited to those areas for which governmental immunity has been expressly waived by 14 M.R.S.A. § 8104-A, as limited by 14 M.R.S.A. § 8104-B and 14 M.R.S.A. § 8111 . . . Liability coverage shall not be deemed a waiver of any immunities or limitation or damages available under the Maine Tort Claims Act, other Maine statutory law, judicial precedent, or common law. This coverage limitation for causes of action seeking tort damages pursuant to the provisions of the Maine Tort Claims Act shall serve as the written statement required pursuant to 14 M.R.S. § 8116.

Id. at 135-36.

Other than the insurance-type coverage provided to Hancock County under the Risk Pool's Coverage Document, Hancock County has not procured insurance against liability for any claim against the County or its employees for which immunity is not otherwise waived under the MTCA. *Id. at 261-62, ¶ 17 and at 264, ¶ 6*.

ISSUES PRESENTED FOR REVIEW

(1) Is the federal court's supplemental jurisdiction a bar to considering matters referred by the pre-litigation screening panel?

(2) Does either the death knell exception or other extraordinary circumstances apply to Poole's appeal?

(3) Was the Superior Court correct to conclude that Hancock County did not waive its MTCA immunity under 14 M.R.S. § 8116?

(4) Is the Maine Health Security Act an express waiver of immunity on account of its scope or specificity?

STANDARD OF REVIEW

The Law 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).

ARGUMENT[1]

1. The Federal Court's Supplemental Jurisdiction is Not a Bar to Litigation Referred By the Pre-Litigation Screening Panel.

Poole's argument that the County Appellees "filed their Summary Judgment Motion in the wrong court," *Appellant Brief at 24*, is misplaced, as is his argument concerning effect of the federal court's supplemental jurisdiction, *id. at 25, 26*. There is no dispute that the federal court retains supplemental jurisdiction over Poole's pendant state law claim; however, the Superior Court's summary judgment ruling does not conflict with that supplemental jurisdiction, as discussed below.

The U.S. District Court stayed Poole's federal claim "until the completion of the pre-litigation screening process." *App. at 210*. District of Maine precedent holds

[1] The County Appellees contend that Poole's appeal does not meet any exception to the final judgment rule, a dispositive issue that they address in Section 2, *infra.* However, for the ease of review, the County Appellees have addressed Poole's arguments in the same order that they were presented in her appeal brief.

that a civil action under either federal or state law is premature until the pre-litigation screening panel completes its work. *Kidder v. Richmond Area Health Center, Inc.,* 595 F. Supp.2d 139, 143 (D. Me. 2009) ("Until they do [complete their work], a civil action under either federal or state law is premature, and the removed matters are not civil actions."). Therefore, a plaintiff is barred from pursuing a medical malpractice claim in court until the MHSA's pre-litigation screening process is complete, or unless the parties agree to proceed directly with a lawsuit. *Dyer v. Penobscot County,* 2020 WL 5801081, at *3 (D. Me. Sept. 28, 2020) (quoting *Powers v. Planned Parenthood of N. New England,* 677 A.2d 534, 537-38 (Me. 1996) (quotation marks omitted).

The panel process is "merely a preliminary procedural step through which malpractice claims proceed," *Irish v. Gimbel,* 1997 ME 50, ¶ 12, 691 A.2d 664, 671, and one in which the Legislature "provided the Superior Court with limited jurisdiction to decide certain matters referred to it" by the panel chair, such as dispositive legal affirmative defenses, *Carney v. Hancock County,* 2025 ME 36, ¶ 22, --- A.3d --- (citing 24 M.R.S. § 2853(5)).

This process played out in the Superior Court below. The panel chair referred the County Appellees' motion for summary judgment to the Superior Court, which concluded that Hancock County met its burden of proving that it did not waive immunity under 14 M.R.S. § 8116, and granted summary judgment on that question

in the County's favor. *App. at 15, 37*. In so doing, the Superior Court ruled on an affirmative defense constituting a "preliminary" legal issue which required no review of the quality of the evidence expected to be presented to the panel. *Gafner v. Down East Community Hosp.,* 1999 ME 130, ¶ 19, 735 A.2d 969; *see also* 24 M.R.S. § 2853(5).

Because its summary judgment order was issued in the limited context of the pre-litigation screening panel process, the Superior Court was acting as a referee within the panel proceeding, not as a trial court. *Estate of Cox v. Eastern Maine Medical Center,* 2007 ME 15, ¶ 8, 915 A.2d 418 (discussing litigation pending in the Superior Court after the conclusion of the screening panel process, stating that the Superior Court could "ratify its prior decision made as a referee within the panel proceeding," and noting that even "that grant of [] summary judgment would not be a final judgment.").

In other words, because the summary judgment order did not constitute a final judgment on the merits, and was not accompanied by a judgment, the Superior Court's decision cannot be said to have fully decided and disposed of the whole matter. *Id.* (quoting *In re Adoption of Matthew R.,* 2000 ME 86, ¶ 5, 750 A.2d 1262, 1264). For this reason, the Superior Court's decision does not have preclusive effect in the federal litigation nor conflict with the federal court's supplemental jurisdiction. *Cutting v. Down East Orthopedic Assoc., P.A.,* 2021 ME 1, ¶ 11, 244

A.3d 226 (listing the elements of claim preclusion in federal courts, including "final judgment on the merits in an earlier proceeding[.]"). In fact, Poole herself appears to admit this in her appeal brief, where she contends that ". . . regardless of the screening panel outcome, *the entire case* is entitled to proceed to trial in the District of Maine." *Appellant Brief at 32.*

None of the case law cited by Poole contradicts this point, because none of those cases concern pendant medical malpractice claims that the federal court stayed in order for the pre-litigation screening panel process to take place. *Appellant Brief at 25-26* (citing *Nigro v. Corizon Med. Servs.,* 2020 WL 572714 (D. Id. February 5, 2020); *United Mine Workers v. Gibbs,* 383 U.S. 715, 715, 86 S. Ct. 1130 (1966); *Ferris v. County of Kennebec,* 44 F.Supp.2d 62, 66 (D. Me. 1999); *Brink v. Parhiz,* 2023 WL 2354877 (D. Id. March 3, 2023); *In re Recticel Foam Corp.* 859 F.2d 1000 (1st Cir. 1988); *Hawley v. Murphy,* 1999 ME 127, ¶ 8, 736 A.2d 268; *Landmark Realty v. Leasure,* 2004 ME 85, ¶ 6, 853 A.2d 749).

Equally distinguishable are Poole's citation of *Adams v. Magnusson,* 2022 WL 170598, at * 8 (D. Me. January 19, 2022), and *Richards v. Town of Eliot,* 2001 ME 132, ¶ 32, 780 A.2d 281. *Appellant Brief at 26 n. 2.* Both of these cases concern discretionary function immunity, whereas the Superior Court below was concerned with the general immunity afforded to government entities under 14 M.R.S. § 8103 and the lack of waiver of immunity under 14 M.R.S. § 8116. *Adams, supra*;

Richards, supra. Neither case involves the MHSA's prelitigation screening process. *Id.* Moreover, the *Richards* court held that excessive force during an arrest exceeds a police officer's discretion, negating the officer's discretionary function immunity under 14 M.R.S. § 8111(1)(C). This is not an issue in the instant case.

For these reasons, the Court should reject Poole's argument that the Superior Court interfered with the federal court's supplemental jurisdiction.

2. Neither the Death Knell Exception Nor Any Extraordinary Circumstances Apply to Poole's Appeal.

This Court's final judgment rule generally precludes the immediate review of the denial of a summary judgment. *Webb v. Haas,* 1999 ME 74, ¶ 5, 728 A.2d 1261. Generally, a judgment must be final in order for an appeal to be cognizable. *In re 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." *Sanborn v. Sanborn,* 2005 ME 95, ¶ 5, 877 A.2d 1075. As Poole herself acknowledged, *Appellant Brief at 27,* 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. *Maples v. Compass Harbor Vill. Ass'n,* 2022 ME 26, ¶ 16, 273 A.3d 358. For the reasons discussed below, Poole has failed to demonstrate that any exception to the final judgment rule applies.

A. Poole Cannot Demonstrate That Any Right Would Be Irreparably Lost Absent the Instant Appeal.

"The death knell exception to the final judgment rule justifies consideration of issues raised on an interlocutory appeal only if awaiting a final judgment will cause "substantial rights of a party to be irreparably lost." *Salerno v. Spectrum Medical Group, P.A.,* 2019 ME 139, ¶ 8, 215 A.3d 804 (quoting *Fiber Materials, Inc. v. Subilia*, 2009 ME 71, ¶ 14, 974 A.2d 918 (quotation marks omitted). 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.* (quoting *Fiber Materials, Inc.,* 2009 ME 71 at ¶ 14) (quotation marks omitted). Thus, the death knell exception is available "only when the injury to the appellant's claimed right, absent appeal, would be imminent, concrete and irreparable." *Id.* (quotation omitted).

The death knell exception does not apply to Poole's appeal because the Superior Court's summary judgment order does not have a preclusive effect upon the federal trial court, as discussed above.[2] Thus, it does not leave Poole without an effective remedy. *Cox,* 2007 ME 15 at ¶ 8. Poole suggested as much in her appeal

[2] What distinguishes the County Appellees' death knell exception argument in their cross-appeal (i.e., the death knell exception applies) from their argument in answer to Poole's appeal (i.e., it does not apply) is that the County Appellees' cross-appeal concerns the Superior Court's *denial* of summary judgment based on a claim of immunity, whereas Poole is appealing the Superior Court's *grant* of summary judgment. *Webb v. Haas*, 1999 ME 74, ¶ 5, 728 A.2d 1261.

brief when she noted that "regardless of the screening panel outcome, *the entire case* is entitled to proceed to trial in the District of Maine." *Appeal Brief at 32* (emphasis added).

In *Cox*, the Superior Court granted summary judgment to the defendant as a part of the panel proceeding.[3] *Cox*, 2007 ME 15 at ¶ 8. The Law Court ruled that the order was not reviewable on appeal, observing that, after the conclusion of the panel proceeding, the Superior Court *might* "ratify its prior decision made as a referee within the panel proceeding[.]" *Id.* In other words, once the Superior Court was acting in the role of trial court, it was not a given that it would be bound to its previous summary judgment order. *See id.*

Here, the federal court will act as the trial court rather than the Superior Court because of its supplemental jurisdiction over the state medical malpractice claim. Nevertheless, if a state trial court was not bound by its own summary judgment order issued during the panel process, then it stands to reason that the federal trial court is similarly unbound by a Superior Court decision "made as a referee within the panel proceeding[.]" *Id.* Accordingly, Poole cannot argue that she stands to irreparably lose any right absent the present appeal.

[3] The grounds for the summary judgment motion were that the Respondent "could not be held liable under any of the theories raised by the [Claimant] Estate in its notice of claim." 2007 ME 15 at ¶ 3.

Furthermore, the Law Court has held that the death knell exception applies to an interlocutory appeal from a *denial* of summary judgment that is based on a claim of immunity because "[w]hen a statute grants a party immunity, it confers more than immunity from damages; it is intended to provide immunity from suit." *Geary v. Stanley Medical Research Inst.,* 2008 ME 9, ¶ 11, 939 A.2d 86 (quoting *Webb,* 1999 ME 74 at ¶ 5) (quotation marks omitted). However, Poole has not argued, much less demonstrated, that the reverse is true, i.e., that the death knell exception applies to a *grant* of summary judgment that is based on a claim of immunity, which is the thrust of her appeal as it pertains to Hancock County. *See Appellant Brief at 27-33*; *Maples v. Compass Harbor Vill. Cond. Ass'n,* 2022 ME 26, ¶ 16, 273 A.3d 358 (quotation omitted).

B. Poole Has Not Demonstrated that "Extraordinary Circumstances" Exist to Waive the Final Judgment Rule.

The Law Court has determined that it is not "precluded from fashioning an additional exception" to the final judgment rule "where extraordinary circumstances warrant it." *Moshe Myerowitz, D.C., P.A. v. Howard,* 507 A.2d 578, 580-81 (Me. 1986) (citing *State v. Maine State Employees Association,* 482 A.2d 461, 465 (Me. 1984); *Bar Harbor Banking & Trust Co. v. Alexander,* 411 A.2d 74, 76–77 (Me.1980)). However, the Court has found such circumstances to exist only in exceedingly rare instances, such as where separation of powers concerns were at stake, *Bar Harbor Banking & Trust Co.,* 411 A.2d at 76-77; and where the ownership

of property at risk of imminent liquidation was in question, *First Nat'l Bank of Boston v. City of Lewiston,* 617 A.2d 1029, 1030-31 (Me. 1992).

Poole has not identified any case even remotely similar to the facts at issue here in which the Law Court held that "extraordinary circumstances" existed sufficient to justify an *ad hoc* exception to the final judgment rule. Instead, she hypothesizes about a "possibility of divergent outcomes" between the prelitigation screening panel and a speculative second screening panel, even as she admits that the entire case is entitled to proceed to trial in the federal court." *Appellant Brief at 32.* This falls short of her burden to demonstrate that an exception to the final judgment rule applies. *Maples,* 2022 ME 26 at ¶ 16.

3. <u>The Superior Court Was Correct to Conclude that Hancock County Did Not Waive Its MTCA Immunity By Procuring Insurance Coverage.</u>

A. The Risk Pool Coverage Certificate and Coverage Document Are Not Ambiguous.

Poole contends that a reference to "Incidental Malpractice" in Hancock County's Risk Pool Member Coverage Certificate indicates that the Risk Pool has insured the County against medical malpractice claims, and that the absence of any definition of "Incidental Malpractice" in the Coverage Document constitutes an ambiguity that should be construed in favor of coverage, thus waiving the County's immunity pursuant to 14 M.R.S. § 8116. *Appellant Brief at 37-42*.

This is a word-for-word restatement of Poole's argument at summary judgment, which the Superior Court rejected, *App. at 31,* and which is devoid of any argument as to how the Superior Court erred in rejecting it. *See Appellant Brief at 37-42.* In fact, Hancock County's Coverage Certificate contains a coverage limitation stating that "Coverage is limited to those areas for which government immunity has been expressly waived by 14 M.R.S. § 8104-A, as limited by 14 M.R.S. § 8104-B and 14 M.R.S.A. § 8111," and that "[l]iability coverage shall not be deemed a waiver of any immunities or limitation of damages available under the Maine Tort Claims Act, other Maine statutory law, judicial precedent, or common law." *App. at 135-136.* As the Superior Court noted, this is exactly the same language that the Law Court found *not* to be a waiver of immunity. *Doucette v. City of Lewiston,* 1997 ME 157, ¶ 10, 697 A.2d 1292. The Superior Court concluded that this provision, when considered in relation to the full terms of the Coverage Document, was not ambiguous. *App. at 31.* Poole made no mention of this express coverage limitation either at summary judgment or in her appeal brief, and has not offered any argument as to how the Superior Court erred in its conclusion. *Appellant Brief at 37-42; App. at 31.*

For this reason, the Court should reject Poole's argument that Hancock County's insurance-type coverage via the Risk Pool is ambiguous or that it constitutes a § 8116 waiver of the County's MTCA immunity.

B. Poole's Failure to Challenge Hancock County's Record Evidence Obviates Her Speculation Concerning Other Possible Sources of Insurance

At summary judgment, Poole surmised that Hancock County might be insured against professional liability via its written agreements with nurses Lisa Parkin and/or Chelsea Howard. *App. at 33-34.* Specifically, Parkin's agreement with the County stated that she would be reimbursed "for required liability insurance," *App. at 202,* and Howard's agreement with the County stated that she would be reimbursed "for the additional liability insurance required for treating patients that are incarcerated," *App. at 204.* The Superior Court concluded that these provisions did not create a genuine dispute of material fact concerning whether the County waived its immunity under 14 M.R.S. § 8116, noting that, while the facts in evidence demonstrated that Parkin and Howard were required to obtain liability insurance, there was no suggestion that either nurse was required to provide Hancock County with liability coverage. *App. at 33-34.* Poole now argues that the Superior Court erroneously shifted the burden of demonstrating this lack of a § 8116 waiver away from the County and onto her, as the Claimant. *Appellant Brief at 35.*

Poole's argument overlooks unchallenged record evidence that Hancock County cited at summary judgment in order to meet its burden of demonstrating the lack of any § 8116 waiver of immunity. As noted by the Superior Court, *App. at 35-36*, Hancock County submitted two affidavits to support its assertion that there was

no insurance waiver under 14 M.R.S. § 8116. The affidavits, which were sworn by (a) Malcolm Ulmer, the Risk Pool's Claims Manager, *App. at 259*, and by (b) Michael Crooker, Hancock County's County Administrator, *App. at 263*, stated that Hancock County procured only the "insurance-type coverage" described in "the Risk Pool's Coverage Document and the Member Coverage Certificate." *App. at 259, 263.* The affidavits also stated that the County "did not procure insurance for any claim . . . for which immunity is not otherwise waived under the [MTCA]." *Id. at 261-62, ¶ 17 and at 264, ¶ 6*. Thus, the affidavits stand as record evidence that Hancock County procured liability coverage only for claims falling within the express liability waiver contained in § 8104-A of the MTCA and did not waive its immunity under § 8116. *Id. at 264, ¶¶ 5, 6.*

Although Poole attempted to sidestep Ulmer's affidavit by attacking his credibility, she offered no rebuttal whatsoever to Crooker's affidavit, a fact that the Superior Court noted in its order. *App. at 35-36*. Poole has not raised or otherwise objected to Crooker's affidavit on appeal, either. *See Appellant Brief at 34-42*. In light of this undisputed record evidence, the Court should reject Poole's argument that the Superior Court erroneously shifted the burden of demonstrating the absence of insurance coverage to her and away from Hancock County.

4. The Law Court Long Ago Rejected Poole's Argument That the Maine Health Security Act Is an "Express Waiver of Immunity."

The Superior Court rejected Poole's argument that the Maine Health Security Act's ("MHSA's") broad scope renders it an "express waiver" of the immunity granted to government entities under the MTCA. *App. at 22.* It did so based on the Law Court's decision in *Hinkley v. Penobscot Valley Hosp.,* 2002 ME 70, 794 A.2d 643, which held that the MHSA does not "specifically waive state immunity as to medical malpractice actions" nor does it "expressly authorize individuals to bring medical malpractice actions against the state." 2002 ME 70 at ¶ 10.

As discussed below, Poole has not identified any reversible error by the Superior Court, nor established that extraordinary circumstances exist to justify her remarkable contention that the Court should overrule *Hinckley* and, by extension the entire line of case law stating that waivers of state immunity must be expressly waived by statute. *See, infra.*

A. There is No Express Waiver of Immunity in the MHSA

This Court has concluded that § 8103 of the MTCA constitutes an unambiguous grant of immunity to the State from tort suits, one that can only be expressly waived by statute. *Perry v. Dean,* 2017 ME 35, ¶ 12, 156 A.3d 742 (citing *New Orleans Tanker Corp. v. Dep't of Transp.*, 1999 ME 67, ¶ 5, 728 A.2d 673) ("[I]mmunity is the rule and exceptions to immunity are to be strictly construed."). *See also, Drake v. Smith,* 390 A.2d 541, 543 (Me. 1978) ("In the

absence of specific authority conferred by an enactment of the Legislature, therefore, the sovereign's immunity from suit cannot be waived ....").

Poole contends that the MHSA "controls over the MTCA" for healthcare-related claims yet she has not identified any express waiver of immunity contained the MHSA. *See Appellant Brief at 42-47.* Her argument must fail because, even where a statute "generally authorizes suits against parties that could include government entities," that authorization is insufficient on its own to constitute a waiver of sovereign immunity if the statute does not "further *expressly* waive immunity," *Perry,* 2017 ME 35 at ¶ 14 (citing *Hinkley v. Penobscot Valley Hosp.,* 2002 ME 70, ¶¶ 6, 9-10, 794 A.2d 643; *Young v. Greater Portland Transit Dist.,* 535 A.2d 417, 418 (Me. 1987)) (emphasis added).

Rather than identify an express waiver of immunity as required, *see supra,* Poole contends that the MHSA supersedes the MTCA by implication on account of its being so broad that it encompasses claims for professional medical negligence against government entities such as jails. *Appellant Brief at 42-47.* Yet all of the MHSA-related case law that Poole cited for support involves claims brought against private actors, not governmental entities, and thereby fails to actually support her argument. *Appellant Brief at 43-46* (quoting and citing *Butler,* 1998 ME 147 at ¶¶ 6, 11, 12 (claim brought against radiologist and private hospital); *Brand v. Seider,* 1997 ME 176, 697 A.2d 846 (claim brought against private mental health practitioner);

Dutil v. Burns, 674 A.2d 910 (Me. 1996) (claim brought against oral surgeons in private practice); *Thayer v. Jackson Brook Inst.,* 584 A.2d 653 (Me. 1991) (claim brought against a private corporation); *Olszewski v. Mayo Reg'l Hosp.,* 2008 U.S. Dist. LEXIS 99887 (D. Me. Dec. 9, 1998) (claim brought against a private hospital); *Saunders,* 2006 ME 94 at ¶ 9 (claim brought against psychiatrist in private practice regarding involuntary commitment to a private hospital); *Musk v. Nelson,* 647 A.2d 1198, 1201 (Me. 1994) (claim against an obstetrician in private practice)).

Poole invites the Court to subvert a long-standing rule that requires the Legislature to expressly waive the State's immunity, yet she offers anemic legal support for such a drastic step. The Court should reject her argument.

B. Neither 30-A M.R.S. § 1561 Nor 34-A M.R.S. § 1208-B Subverts the Applicability of the MTCA

Poole's observation that 30-A M.R.S. § 1561 establishes the legal right of prisoners to receive "adequate professional medical care," and that 34-A M.R.S. § 1208-B(4) requires the provision of access to substance use disorder services are similarly unsupportive. *Appellant Brief at 47-48*. There is no dispute that prisoners in county jails have a right to adequate professional medical care or to substance abuse treatment; however, §§ 1561 and 1208 stand as statements of the rights of jail inmates, not the legal status of county jails or the corrections officers who staff them.

Furthermore, Poole has neither argued nor demonstrated that either statute contains an express waiver of state immunity, *see Perry,* 2017 ME 35 at ¶ 12; *Drake,*

390 A.2d at 543, nor explained how either statute is connected to MHSA's medical malpractice procedure. *Appellant Brief at 47-48.*

C. Poole Failed to Support Her Assertion That the MHSA's Specificity Undermines the MTCA's Grant of Immunity.

Poole contends that the MHSA's specificity "thwarts a general immunity defense under the MTCA". *Appellant Brief at 48-49.* Poole did not raise this argument at summary judgment and the Superior Court did not consider it. *See App. at 13-37.* Poole appears to concede this point. *Appellant Brief at 42* ("Dorothy's legal position below was that the MHSA is so comprehensive that it controls over the MTCA."). Because this argument is raised for the first time on appeal, it is not properly preserved, and the Court need not address it. *MP Assocs. V. Liberty,* 2001 ME 22, ¶ 18, 771 A.2d 1040, 1046.

Yet even if it decides to address the "specificity" argument, the Law Court already considered and rejected it in *Hinkley,* and already considered and distinguished the same case law that Poole cites for support. *Hinkley,* 2002 ME 70 at ¶¶ 11, 13, 14 (concluding that the MHSA, unlike the statutes in *Clockedile v. State Dept. of Transportation,* 437 A.2d 187, 190-91 (Me. 1981) and *Heber v. Lucerne-in-Maine Village Corp.,* 2000 ME 137, ¶ 2, 755 A.2d 1064, does not expressly authorize suit against the State).

Poole's reliance on Justice Levy's dissent in *Fleet Nat'l Bank v. Liberty,* 2004 ME 36, ¶¶ 16-17, 845 A.2d 1183, is no more helpful to her than *Clockedile* or *Heber*

because it suggests that a more recent statute of limitations codified at § 3-1118(1) superseded the "preexisting, inconsistent period of limitations" contained in 14 M.R.S. § 751 by implication. 2004 ME 36 at ¶¶ 16-17. Given that the Legislature's "unambiguous" grant of immunity to the State from tort suits can only be expressly waived by statute, *Perry,* 2017 ME 35 at ¶ 12, the Court should reject Poole's claim that the MHSA supersedes the MTCA by implication, without any express waiver. *Hinkley,* 2002 ME 70 at ¶ 15.

CONCLUSION

For the reasons discussed above, the County Appellees respectfully request that this Court uphold the Superior Court's grant of summary judgment to Hancock County.

Dated: May 13, 2025

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CERTIFICATE OF SERVICE

Undersigned counsel represents that counsel for all parties have been provided with two paper copies of the Brief of Appellees, said copies having been sent via United States Mail to:

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Dated: May 12, 2025

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