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

REPLY BRIEF OF THE PLAINTIFF/APPELLANT

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Dorothy repeats and incorporates by reference herein the Statement of Procedural History and Facts contained in her prior Brief of Plaintiff/Appellant dated March 27, 2025.

ISSUES PRESENTED FOR REVIEW.

1. Whether the Court's Recent Decision in *Carney* Presents a Threshold Issue To the Cross-Appellants' Claim that They Fall Within the Death Knell Exception to the Final Judgment Rule?

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STANDARD OF REVIEW.

The standard of review on the cross-appeal[1] is *de novo*. *Rice v. City of Biddeford*, 2004 ME 128, ¶9, 861 A.2d 668.

[1] On the one hand, it is unclear how Hancock County can appeal a Motion for Summary Judgment Order that was favorable to it. On the other hand, if the underlying issue is that the individual Jail Employees are alleging that the Superior Court did not articulate the reasons that their portion of the Motion for Summary

ARGUMENT.

1. The Court's Recent Decision in *Carney* Presents a Threshold Issue to the Cross-Appellants' Claim that They Fall within the Death Knell Exception to the Final Judgment Rule.

At the time Dorothy filed her initial brief, this Court had not yet issued its decision in *Carney v. Hancock County*, 2025 ME 36, ___ A.3d ___. The Court has since issued the *Carney* opinion on April 15, 2025. Dorothy previously argued that the Superior Court lacked jurisdiction to enter summary judgment because the matter was pending in the Federal District Court pursuant to that court's supplemental jurisdiction. (Blue Brief pp. 23-27).

The Cross-Appellants argue that their cross-appeal asserting immunity under the Maine Tort Claims Act is proper under the death

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Judgment was denied, then they have not preserved that issue for appeal. The Jail Employees failed to file a motion pursuant to M.R.Civ.P. 59(e) requesting the Superior Court alter and amend its judgment. Where specificity is the claimed issue, a motion is a condition precedent to an appeal because the trial court must be afforded the opportunity to weigh the request. The deadline to file such a motion was fourteen (14) days from the entry of the summary judgment. M.R.Civ.P. 59(e).

This Court has held multiple times that M.R.Civ.P. 59(e) is the "proper vehicle" for curing what is asserted to be an ambiguous or incomplete judgment. *Gen. Holdings, Inc. v. Eight Penn Partner*s, L.P., 2025 ME 20, n. 4, 331 A.2d 445; *Medelka v. Watts*, 2008 ME 163, ¶7, 957 A.2d 980, 981 (explaining that a motion to amend or alter the judgment is the proper vehicle for curing alleged ambiguities in a judgment); *Hoche v. Hoche,* 560 A.2d 1086, 1088 (Me. 1989)(Rule 59(e) must be utilized before a party may assert a judgment is "not adequately specific" on appeal).

knell exception to the final judgment rule. (Red Brief p. 16) Prominently, on that very same immunity issue, *Carney* presciently held as follows:

> We, however, perceive a threshold issue that must be resolved before contemplating any review of the immunity issue. There is pending comprehensive federal action that includes a state law claim …. When a plaintiff files a civil right claim under § 1983 with a pendent state law claim, involving as here, a nucleus of operative fact in common with the federal claims, there is no jurisdictional impediment to the federal court deciding whether immunity prevents the pursuit of the pendent state claim. Hence, the federal court can and presumably will decide the issue when addressing the pendent state claim.
>
> The issue, then, is whether it is appropriate to forgo ruling on the immunity issue in deference to ongoing federal litigation. That question depends on whether deference to the federal court serves the interest of justice. We believe that it does.

Id. at ¶¶24-25. (Citations omitted).

In *Carney*, this Court concluded that the prelitigation screening process should proceed and "after that screening process is completed, it is our understanding that the federal district court intends to proceed with the litigation pending before it." *Id.* at ¶26. Exactly so.

The Federal Court continues to have supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). As in *Carney*, this case involves a

comprehensive federal action. That comprehensive federal action contains a pendent state law claim for wrongful death. That state law claim has a nucleus of operative fact in common with the federal claims. Several of the defendants in *Carney* are also defendants in this action. As this Court has held, "there is no jurisdictional impediment" to the federal court addressing "all immunity issues with respect to the pendent state claim." *Id.* at ¶24.

Accordingly, the Cross-Appeal should be denied.

2. The Cross-Appeal Does Not Fall Within the Collateral Order Exception to the Final Judgment Rule.

The Cross-Appellants also argue that their interlocutory appeal is proper under the collateral order exception to the final judgment rule. The three elements to the collateral order exception are: (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. *United States of America, Dept. of Agriculture, Rural Housing Svc. v. Carter*, 2002 ME 103, ¶7, 799 A.2d 1232. Here, the second and third elements are not satisfied.

With respect to the question of whether there exists "a major unsettled question of law", *Carney* is weighty precedent because it held:

> We also reiterate that the Superior Court has limited jurisdiction regarding the issues referred by the prelitigation screening panel. Once a claim is pending before the prelitigation screening panel, the matters that may be appropriately referred to the Superior Court include statute of limitations defenses, allegations of failed notice, res judicata defenses, and 'other issues' that can be adjudicated in a 'preliminary fashion'". These other issues include "[a] motion based on the assertion that the cause of action upon which the claims has based her claim before the panel does not exist."

Carney, 2025 ME 36 at ¶21 *citing Gafner v. Down E. Cmty. Hosp.*, 1999 ME 130, ¶¶29-30, 735 A.2d 969.

By "reiterating" the role of the Superior Court, this Court was repeating the well settled law in *Gafner*, that discrete factual inquiries are the province of the prelitigation screening panel. Thus, the second element of the collateral order exception is not satisfied.

With respect to the third element of the collateral order exception, in *Carney*, the Court concluded that the same county and similarly situated county employees were not exempt from the panel process. Specifically, the Court held that "[t]he Legislature declined to provide a procedure for parties seeking exemption from the panel

process and instead provided the Superior Court with limited jurisdiction to decide certain matters referred to it." *Id.* at ¶22.

As was the case with the county employees in *Carney*, the Cross-Appellants are seeking to avoid a mandated procedure; however, "[a] desire to avoid the codified procedures of the MHSA does not rise to a substantial right being irreparable lost, especially because the MHSA provides no procedure for exempting claims from the panel process other than the procedure already used by the parties." *Id.*

As a result of *Carney* holding that the county employees were not exempt from the panel process, the issue of whether or not the Cross-Appellants are "health care providers" or "health care practitioners" is a prelitigation screening panel factual determination.

Indeed, the prelitigation screening panel has the statutory responsibility to answer specific questions:

> A. Whether the acts or omissions complained of constitute a deviation from the applicable standard of care by the *health care practitioner* or *health care provider* charged with that care;
>
> B. Whether the acts or omission complained of proximately caused the injury complained of; and

C. If the negligence of the health care practitioner or health care provider is found whether any negligence on the part of the patient was equal to or greater than the negligence on the part of the practitioner or provider.

24 M.R.S. § 2855(1)(A)-(C). (Emphasis added).

Thus, the prelitigation screening panel is charged with determining first whether or not the party accused of negligence is a "health care practitioner" or "health care provider". If that issue is resolved in the affirmative, then the panel must determine whether the acts or omissions violate the standard of care, as well as the issues of proximate cause, and comparative fault.

Fact finding on these precise issues is at the core of the screening panel's purpose.

3. Hancock County Jail and Its "Agents or Employees" are "Health Care Providers" or "Health Care Practitioners" under the Maine Health Security Act.

Even if *Carney* was not dispositive of this case on comity grounds, the Cross-Appellants still cannot prevail. The Maine Health Security Act applies to the Hancock County Jail and its "agents or employees" in the context of suicide screening and prevention.

The central legal question is whether the prevention of suicide in a county jail is a health care duty owed to jail inmates by Hancock

County Jail and its agents or employees who are trained and certified in suicide anticipation and prevention. The MHSA, several other Maine statutes, a renowned secondary source, and other reliable authorities strongly suggest that there is such a duty.

First, the language of the MHSA is to be broadly construed. An action for professional negligence, as that term is defined by the MHSA, is defined as "*any* action for injury or death against any health care provider, its *agents or employees*, or health care practitioner, his 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). (Emphasis added). This broad statutory definition, by including the term "or otherwise", reflects a legislative intention that the MHSA "fully occupy the field of claims brought against health care providers." *Dutil v. Burns*, 674 A.2d 910, 911 (Me. 1996).

Second, the Cross-Appellant's claim that the term "other facility" must be construed under the principle of *ejusdem generis* is too narrow. The definition of a "health care provider" is broad, and includes "*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 person 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). (Emphasis added).

Hancock County Jail had a policy that required Cross-Appellants to follow the instruction of a mental health professional for needed intervention. (App. 229) This policy required that Hancock County Jail and its supervising providers to engage in "Care Coordination" using the "[n]ationally recognized 'Collaborative Care Model'" to consult about what interventions were needed. (App. 229)

Similarly, Hancock County Jail had a contract with Nurse Parkin to "review all inmate medical requests and determine appropriate responses to each inmates need." (App. 213, 215) NP Howard was required to train jail staff to administer medication and Hancock County Jail was required to follow those instructions regarding the administration of medication. (App. 218) Sgt. Gross, the Shift Supervisor, reported Tyler Poole's condition to NP Howard and followed her instructions. (App. 277) Put another way, the Cross-Appellants were clearly acting under the "general direction" of Nurse Parkin and NP Howard and were required to collaborate with

those providers with respect to Tyler Poole's medication and mental health care.

Third, it is black letter law in Maine that "[a]ny person incarcerated in a county jail has a right to adequate professional medical care. …" 30-A M.R.S. § 1561.

Fourth, if there ever was any doubt about whether or not the Hancock County Jail and/or its agents acted as health care providers with respect to suicide prevention, then that doubt is eliminated by the plain language of 34-A M.R.S. § 1208-B, which specifically states that "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." *Id.* (Emphasis added).

The statute provides that while a jail may contract with another service provider to facilitate this health care, it cannot delegate away the responsibility of providing mental health care. Section 1208-B uses language similar to that used in the MHSA ("provide" or "provider") and expressly makes each jail a provider of mental health treatment, stating that each jail "shall" provide mental health treatment. In a similar vein, 34-A M.R.S. § 3031 states, "Any person

residing in a correctional or detention facility has the right to … [a]dequate professional mental health care …". Indeed, the term "provide" and its definition mean more than just "access to care" as insinuated by the Cross-Appellants. *Merriam-Webster Dictionary* (11th ed. (2022 rev.)) includes among the synonyms for "provide" the verbs "give", "supply", "furnish" and "deliver".

Simply put, it stretches credulity to argue that the Hancock County Jail and its agents or employees are not mental health care providers with respect to the limited issue of suicide prevention. Not only does Maine have a statute expressly mandating that jail personnel are such persons or entities responsible for delivery of this care, the ordinary meaning of the term "provide" can lead to no other reasonable conclusion.

Fifth, the Maine Code of Regulations regarding the administration of county jails likewise acknowledges that jail facilities are mental health care providers. CMR 03-201, chpt. 1 (2017 ed.) sets forth the "Maine Detention and Correctional Standards for Counties and Municipalities," which includes a subsection entitled "Medical and Mental Health Services." This subsection states in capital letters that that it is "MANDATORY" that

county jails provide mental health care. The regulation also states, in pertinent part: "Written policy, procedure and practice *shall provide* inmates with medical and mental health services." *Id.* (Emphasis added).

Sixth, although this Court has not addressed the question of whether county jails and their agents or employees "provide" health care to inmates, this issue was squarely addressed by the Kansas Supreme Court in *Thomas v. County Comm'rs*, 262 P.3d 336 (Kan. 2011). In that case, a corrections officer was sued for failing to prevent an inmate suicide. The Court succinctly held that "[c]laims arising from a jail suicide are considered and treated as claims based on the failure of jail officials to provide medical care for those in their custody." *Id. citing Estate of Siske v. Manzaneres*, 262 F.Supp.2d 1162, 1175 (D. Kan. 2002) and *Barrie v. Grand County*, 119 F.3d 862, 866 (10th Cir. 1997).

In *Thomas*, a jail guard, like the individual Cross-Appellants, asserted that she did not owe a health care duty to an inmate who died by suicide while in custody. The Kansas Supreme Court noted that a state statute existed that required corrections officers to "treat a prisoner with humanity". *Id.* at 346. The Court also noted that a

majority of courts in other jurisdictions imposed on the "sheriff or other officer" a duty owed to the prisoner "to keep him safely and to protect him from unnecessary harm, and it has also been held that an officer must exercise reasonable and ordinary care for the life and health of the prisoner." *Id.*; *see also* 14 A.L.R. 353 § 2(a)(*citing* series of cases including: *Smith v. Miller*, 40 N.W.2d 597 (Iowa 1950)(recognizing sheriff's duty to protect prisoners from harm); *City of Belen v. Harrell*, 603 P.2d 711 (N.M. 1979)(recognizing jail custodian's duty to protect inmate's life and health).

In support of its holding in *Thomas*, the Kansas Supreme Court reasoned that the Restatement (Second) of Torts § 341A(4) recognizes that certain "special relationships", such as that between custodian and inmate, give rise to an affirmative duty to mitigate the risk of suicide: "One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other." Comment d to this subsection explains that "the duty to protect the other against unreasonable risk of harm extends to risks arising out of the actor's own conduct" and that "[t]he duty to give aid to one who is ill or injured extends to cases where the

illness or injury is due to … the negligence of the plaintiff himself." *Id.* at comment d.

This Court favorably cited to the Restatement (Second) of Torts § 314A in *Estate of Cummings v. Davie*, 2012 ME 43, ¶10, 40 A.3d 971, stating in a parenthetical that the section "describ[es] the types of special relationships generally recognized at common law and by the drafters of the Restatement" and noting that the "jailor-inmate" relationship is such as to give rise to a duty to anticipate and prevent suicidal conduct. *Id.* at n.3

In *Thomas*, the Kansas court held that suits arising from a jail suicide constitute claims based on "the failure of jail officials to provide medical care." The court reasoned that the duty to provide medical care arose from three foundations: 1) a state statute mandating that inmates be treated humanely; 2) the persuasive precedent of a majority of cases; and 3) the provisions of the Restatement (Second) of Torts § 341A. These same three factors militate in favor of Dorothy in this case. Indeed, Maine law includes not just one, but three statutes, as well as a regulation requiring county jails and their agents or employees to provide for the mental health of their inmates. The Cross-Appellants are health care

providers at least to the extent that they are charged with the task of suicide prevention.

Seventh, while the MHSA does not itself provide a definition for "health care services" under its provisions, this Court has indicated that courts may use the definition of health care provided in 22 M.R.S. § 1711-C (1)(C)(2005) when interpreting the MHSA to determine if a claim is subject to the statute.

This Court recognized in *Saunders v. Tisher*, 2006 ME 94, 902 A.2d 830, a case involving the applicability of the MHSA, that § 1711-C broadly defines health care as:

> Preventative, diagnostic, therapeutic, rehabilitative, maintenance or palliative care, services treatment, procedures or counseling … that affects an individual's physical, mental or behavioral condition, including individual cells or their components or genetic information, or the structure or function of the human body or any part of the human body… .

Id. at ¶11 *citing* 22 M.R.S. § 1711-C (1)(C)(2005).

This is precisely the type of preventative care jails and their agents or employees deploy to avert suicide.

4. Discretion Function Immunity Issues Should be Decided by the Federal Court.

In *Carney*, this Court properly concluded that when there is a pendant state law claim in Federal Court all issues of discretionary function immunity should also be deferred to the Federal Court. This Court cited directly to the discretionary function immunity statute, 14 M.R.S. § 8111(1)(C), as an immunity issue that is more properly within the authority of the Federal Court. *Carney*, 2025 ME 36, ¶¶23-24. This Court further concluded that it was "appropriate" to "forgo ruling on the immunity issue in deference to the ongoing federal litigation." *Id.* at ¶25. The Superior Court failed to defer to the Federal Court and its Order should be vacated.

Even if this Court decided to reach the issue of discretionary function immunity, the Cross-Appellants would still not prevail.

"Defining the scope of an employee's discretionary function immunity begins with a determination of the employee's duties." *Hilderbrand v. Wash. County Comm'rs*, 2011 ME 132, 33 A.3d 425. The facts in this case reveal that Cross-Appellants had no discretion to prevent suicidality. In *Tolliver v. DOT*, 2008 ME 83, 948 A.2d 1223, this Court held that the DOT's employees' decision on when to stripe

the white line along the break-down lane was not the kind of governmental policy decision or judgment to which discretionary function immunity was intended to apply. Instead, the Court found that the decision was aligned with a "ministerial act" and thus DOT was not entitled to discretionary function immunity. *Id.* at ¶20, 948 A.2d 1223. The Court reasoned that permitting discretionary function immunity to apply to operational decisions, such as when to stripe the lines of a newly paved way, by lower level employees, would essentially undercut discretionary immunity.

A similar case of a ministerial function by a lower level employee was *Jorgensen v. DOT*, 2009 ME 43, 969 A.2d 912. In that case, the Court held that the decision of how to slope an onsite road construction zone was a decision that was not entitled to discretionary function immunity. The Court again noted that this function "did not involve decision making that required the exercise of "basic policy evaluation, judgment, and expertise on the part of the governmental agency involved" within the meaning of discretionary function immunity. *Id.*; *see also Adriance v. Town of Standish*, 687 A.2d 238 (Me. 1996)(operational decision of transfer station

attendant not essential to realization or accomplishment of a governmental program or objective).

It is axiomatic that in order for a governmental employee to assert discretionary function immunity, they must first have "discretion" in decision making. A "ministerial act" is defined as "those to be carried out by employees, by the order of others or of the law with little personal discretion as to the circumstances in which the act is done." *Eide v. Cumberland County*, 2021 Me. Super. LEXIS 128 (Cumberland March 22, 2021).

The case of *Thomas v. County Comm'rs*, 262 P.3d 336, 293 Kan. 208 (2011) is again helpful to the analysis of the issue at bar. *Thomas* is a county jail suicide case. In that case, the plaintiffs claimed that the housing guard on duty was negligent in guarding, supervising, and observing the inmate before the suicide. As is the case here, there were mandatory procedures regarding mental health screening, placement, observation and reporting. The Kansas Supreme Court put emphasis on the mandatory versus permissive character of direction given to the defendant housing officer. The court denied the discretionary immunity defense to the jail guard concluding "easily" that the discretionary function exception does not apply since

the nature and quality of any latitude granted to the corrections officer in dealing with the decedent was strictly, and mandatorily, circumscribed. *Id.* at 238. (Citations omitted). The Kansas Supreme Court then held that the "discretionary function exception under the Kansas State Tort Claims Act … is not applicable to immunize defendants from liability for negligence in this lawsuit." *Id.* at 356.

The Cross-Appellants rely on *Roberts v. State*, 1999 ME 89, 731 A.2d 855 for the proposition that they are entitled to discretionary function immunity as a matter of law. This reliance is mistaken. In *Roberts*, the corrections officers had discretion about when to place an inmate and how to place an inmate in a particular cell. Here, the Cross-Appellants had no such discretion with respect to implementing a suicide watch. In fact, they had no discretion at all. HCJ Policy C-112 states that 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. 231) HCJ Policy C-112 states that "When an inmate is deemed to be suicidal, the Corrections Officer shall implement the procedures outline in Policy D-243 [suicide watch procedure]." (App. 231) The suicide watch

protocol further mandates: "When information is received regarding an inmate and/or inmates behavior indicates a risk for suicide, the inmate will be placed on Suicide Watch." (App. 238)

Tyler Poole was required to be placed on suicide watch pursuant to the mandatory Hancock County Jail Procedures. Accordingly, the Cross-Appellants' attempts to immunize themselves must fail.

The Cross-Appellants did not have any discretion with respect to suicide watch in the first place.

5. There were Multifarious Reasons for Enactment of the Maine Health Security Act.

Although the Cross-Appellants argue that the MHSA was only intended to be applicable to cases that could implicate medical malpractice insurance (Red Brief at p. 22), the legislative history plainly states that there was no such singular concern; instead, the legislation balanced many interests. Before enacting the MHSA in 1977, the Legislature appointed a commission, chaired by the late Justice Pomeroy,[2] to study what measures the Legislature could take to reform professional liability claims. As Representative Morton of Farmington, one of two legislative members to the commission,

[2] The commission was informally referred to as the "Pomeroy Commission".

reported to the House of Representatives, the commission sought by its recommendation to satisfy four considerations: "Reassure the medical community, to assure the public of controlled quality of health care delivery, to avoid the erosion of legal rights and to demonstrate to the insurance industry remains a viable market for their essential services." 2 Legis. Rec. 1947 (1977).

Accordingly, the purpose of the MHSA was not just to apply to cases where medical malpractice insurance might be implicated, but to reassure the public of quality control for health care delivery and to avoid the erosion of legal rights, for claimants such as Dororthy, in prosecuting cases. *Brand v. Seider,* 1997 ME 176, ¶8, 697 A.2d 846 (concurring opinion).

CONCLUSION.

With respect to the Cross-Appeal, as in *Carney*, all dispositive motions should be decided by the Federal District Court which retains supplemental jurisdiction over the state law claims. This Court should again defer to the Federal Court.

III. APPELLANT'S REPLY BRIEF.

STATEMENT OF PROCEDURAL HISTORY AND FACTS.

Dorothy repeats and incorporates by reference herein the Statement of Procedural History and Facts contained in her prior Brief of Plaintiff/Appellant dated March 27, 2025.

ISSUES PRESENTED FOR REVIEW.

1. Whether *Carney* is Clear that the Superior Court should have Deferred to the Federal Court on All Immunity Issues?

2. Whether Dorothy will Irrevocably Lose the Rights Afforded by the Prelitigation Screening Panel Absent the Instant Appeal?

3. Whether *Doucette* is Distinguishable because It did not Involve "Incidental Malpractice"?

ARGUMENT.

1. *Carney* is Clear that the Superior Court Should have Deferred to the Federal Court on All Immunity Issues.

In *Carney*, this Court declined to address the issues of general immunity (14 M.R.S. § 8103), waiver of that immunity by purchase of insurance (14 M.R.S. § 8116), and discretionary function immunity (14 M.R.S. § 8111(1)(C)). *Carney*, 2025 ME 35 at ¶¶23-24. The Court instead deferred to the Federal Court for resolution of those questions after the conclusion of the prelitigation screening panel. *Id.* at ¶26.

The question here is the same as it was in *Carney*: Does deferring to the federal court serve the interest of justice? The answer to that question is "that it does." *Id.* at ¶25. This is not a unique procedural posture. In our federalist system, just as this Court may decide claims under § 1983, the federal court may decide pendent state claims. *Id.* at ¶26 citing *Hicks v. City of Westbrook*, 649 A.2d 328, 329-31 (Me. 1984); *Haywood v. Drown*, 556 U.S. 729, 731, 734 (2009); *Felder v. Casey*, 487 U.S. 131, 139 (1988). "Comity, in a legal sense is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other." *Fitch v. Whaples*, 220 A.2d 170, 173 (Me. 1966). Instead, the "chief test as to what is or is not proper in a proper exercise of judicial discretion is whether in a given case it is in furtherance of justice." *Id.*

Hancock County relies on *Estate of Cox v. E. Me. Med. Ct.*, 2007 ME 15, 915 A.2d 418 in opposition to Dorothy's appeal. However, that case is inapposite. In *Estate of Cox*, at the time of that interlocutory appeal, the Court observed that "the pre-litigation screening process has been concluded, the complaint has been filed [in Superior Court] and the case is pending in [Superior Court]." *Id.* at ¶7. Unlike in *Estate of Cox* and contrary to the expectation of the

Federal Court, this case has not yet proceeded to a panel hearing. More importantly, the state court claims will never be tried in the Superior Court. A complaint is not pending in Superior Court. A complaint is only pending in the Federal Court. The Superior Court is not the "referee" in this case. That responsibility resides with the United States District Court Judge assigned to the case. The Federal Court is awaiting completion of the prelitigation screening panel process to complete the trial of the federal claims and the pendent state court claims in that forum. That court should be allowed to make its own decisions about immunity.

Accordingly, applying the same principles of comity and justice, the Court should defer to the Federal Court's supplemental jurisdiction and vacate the Order dated October 31, 2024. Many of the defendants in *Carney* are also defendants in this case. It would be incongruous for this Court to reach disparate outcomes in two nearly identical cases decided in a six month period. As in *Carney*, for consistency purposes alone, this Court should leave dispositive motions to the province of the Federal Court.

2. Dorothy will Irrevocably Lose the Rights Afforded by the Prelitigation Screening Panel Absent the Instant Appeal.

Cross-Appellants argue that the death knell exception does not apply to Dorothy's appeal because she will not "suffer an irreparable loss to a substantial right." *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.*

The Cross-Appellants seemed to have missed the entire point of this Court's holding in *Salerno v. Spectrum Med. Grp., P.A.*, 2019 ME 139, 215 A.3d 804. Therein, this Court concluded that the death knell exception applied because if the appeal were not granted, the appellant "would be denied the rights and protections provided by the MHSA screening process." *Id.* at ¶12. Here, not granting Dorothy's appeal would allow Hancock County to bypass the panel process. In *Carney*, this Court repeated the *Salerno* holding that "allowing [a party] to bypass the screening process would irreparably deprive the appellant of the statutory mechanism designed to encourage settlement, dissuade meritless litigation, and maintain confidential pre-suit protections." *Carney*, 2025 ME 36, ¶19. The

Court then concluded that it is central whether or not the "panel protections remain available to the parties." *Id.* at ¶20. Here, not granting Dorothy's appeal deprives her of the statutory mechanisms designed to evaluate her claims against Hancock County.

The Federal Court has already articulated to the litigants in this case what it expects to happen: that "judicial economy" weighs in favor of proceeding through the "pre-litigation screening process". *Poole v. Hancock Cnty.*, 2023 U.S. Dist. LEXIS 153900 (D.Me. August 31, 2023). Excluding Hancock County from that prelitigation screening panel process ignores that expectation and is contrary to this Court's holding in *Carney*.

Accordingly, Dorothy's appeal satisfies the death knell exception to the final judgment rule.

3. *Doucette* is Distinguishable because It did not Involve "Incidental Malpractice".

Hancock County places principal reliance on *Doucette v. City of Lewiston*, 1997 ME 157, ¶10, 697 A.2d 1292, where this Court discussed a coverage limitation in a Coverage Certificate that summarized coverage contained in a Coverage Document. However, unlike this case, the Coverage Certificate in *Doucette* did not have a

contradictory statement that coverage was provided for "Incidental Malpractice". The Cross-Appellants simply cannot wish away the reality that "Incidental Malpractice" coverage was intended to be afforded to Hancock County and its employees. The insurance pool had an affirmative duty to be clear about the scope of the coverage. 14 M.R.S. § 8116. The statute declares that the pool "shall maintain as part of its public records a written statement setting forth "the scope of the liability assumed by the governmental entity, or the pool …." *Id.* The record demonstrates that the scope of the liability assumed was acts or omissions constituting "Incidental Malpractice". (App. 149)

Any doubts with respect to the term "Incidental Malpractice", should be resolved against the insurer and in favor of coverage.

V. CONCLUSION.

For the reasons noted herein, the Superior Court Order dated October 31, 2024, granting summary judgment to Hancock County, should be vacated.

Dated: May 27, 2025

Respectfully submitted,

_____

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VI. CERTIFICATE OF SERVICE.

I, Scott J. Lynch, Esq., hereby certify that two (2) paper copies of the Reply Brief for Plaintiff/Appellant were served on the following at the addresses set forth below by pre-paid first-class mail on May 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 Reply Brief of Plaintiff/Appellant has also been forward electronically to counsel at the aforesaid email addresses.

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