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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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22 EAP 2022 & 23 EAP 2022

SANDRA DINARDO a/k/a SANDRA AFFATATO, AS POWER OF ATTORNEY ON BEHALF OF COSMO DINARDO,
Appellant

v.

CHRISTIAN KOHLER, M.D., HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, UNIVERSITY OF PENNSYLVANIA HEALTH SYSTEM, AND TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,
Appellees

BRIEF OF *AMICI CURIAE* PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM, AMERICAN MEDICAL ASSOCIATION, PENNSYLVANIA MEDICAL SOCIETY, PHILADELPHIA MEDICAL SOCIETY, CURI, AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF APPELLEES

Appeal from the January 26, 2022 Opinion and Order of the Superior Court of Pennsylvania (Bowes, J., **Stabile, J.**, and Musmanno, J.) at 1905 EDA 2019 & 1906 EDA 2019 Reversing the July 20, 2020 Order of the Court of Common Pleas of Philadelphia County (Tsai, J.) at CV-460-2019 Overruling Appellees' Preliminary Objections to Appellants' Complaint

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Pennsylvania Coalition for Civil Justice Reform ("PCCJR") is a statewide, nonpartisan alliance of organizations and individuals representing health care providers, professional and trade associations, businesses, nonprofit entities, taxpayers, and other perspectives. The Coalition is dedicated to bringing fairness to litigants by elevating awareness of civil justice issues and advocating for reform.

The American Medical Association ("AMA") is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty and in every state, including Pennsylvania.

The Pennsylvania Medical Society ("PAMED") is a Pennsylvania non-profit corporation that also represents physicians of all specialties and is the Commonwealth's largest physician organization. PAMED regularly participates as *amicus curiae* before the Pennsylvania Supreme Court in

cases raising important health care issues, including issues that have the potential to adversely affect the quality of medical care.

The AMA and PAMED submit this brief on their own behalf and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

The Philadelphia County Medical Society (PCMS) is a professional membership organization for physicians who live and work in the City of Philadelphia. PCMS is a non-profit corporation, with its principal place of business at 2100 Spring Garden Street Philadelphia, Pennsylvania 19130. PCMS is the largest physician organization in Philadelphia County, comprised of over 5,500 physicians and medical students, and governed by physician members, including a Board of Directors. Among its services is advocacy for physicians in medical professional liability ("MPL") insurance matters and advocacy for public health, protecting the rights and interests of physicians as well as activism on behalf of their patients.

Curi is a mutual insurance company dedicated to helping physicians in medicine, business, and life, and covers nearly two thousand Pennsylvania healthcare providers with medical professional liability insurance.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent nearly 60% of the U.S. property-casualty insurance market and write more than $15 billion in premiums covering all lines of such insurance in Pennsylvania, including medical professional liability insurance. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts, including this Honorable Court.

COUNTERSTATEMENT OF THE CASE

The factual and procedural history of this matter, as pertinent herein, is simple. In 2017, Cosmo DiNardo was charged with murder, robbery, abuse of a corpse, firearms offenses, and criminal conspiracy, all arising out of allegations that he engaged in a multi-day killing spree in Bucks County during which he and his cousin fraudulently induced four young men into a series of putative drug deals as pretexts to rob and/or brutally murder them, burned some of their bodies in a "pig roaster," and buried them on his family-farm. *See generally Commonwealth v. DiNardo*, CP-09-CR-6073-2017 (Pa. Ct. Com. Pl. Bucks Cnty. 2017); *Commonwealth v. DiNardo*, CP-09-CR-6075-2017. In 2018, he took responsibility for his crimes, pleading guilty to all charged offenses, and was sentenced to four consecutive terms of life imprisonment plus a concurrent term of five years probation. *See generally id.*

After being sued by his four victims' estates, DiNardo, via his mother and attorney-in-fact, Appellant Sandra DiNardo, sought to countermand his taking responsibility for murdering the four men, bringing the instant action alleging that it was not he, but rather his medical care providers, Appellees ("Care Providers"), who were responsible for his murdering the four young

men.[1] DiNardo alleged that Care Providers negligently treated his mental illness, that their negligence caused him to murder the four young men, and that his conduct in murdering them resulted in harm: specifically (1) his knowledge that he murdered the four young men caused him pain and emotional distress; (2) he paid to defend against the Commonwealth's prosecution; (3) his knowledge that he will be imprisoned for life has caused him pain and emotional distress; and (4) he paid to defend against his victims' estates' claims and had default judgments entered against him in those lawsuits. DiNardo seeks to have Care Providers pay him for all of his murders' consequences in this regard. *See generally* R.R. at 16aa-128a.

Before the trial court, the Care Providers filed preliminary objections asserting that Pennsylvania's common-law no-felony-conviction-recovery rule precluded DiNardo, having committed the murders, from recovering resulting damages. *See generally* R.R. at 128a-359a. After a mixed trial-court decision, *see* R.R. at 760a-779a, the parties filed interlocutory cross-appeals to the Superior Court, which, in a unanimous, published opinion authored by Judge Victor P. Stabile, and joined by Judges Mary Jane Bowes and John L. Musmanno, affirmed in part and reversed in part, agreeing with

[1] Insofar as Appellant is acting in her capacity as Dinardo's attorney-in-fact, the undersigned will use Dinardo's name except where context dictates otherwise.

Care Providers that the no-felony-conviction-recovery rule precluded DiNardo from recovering damages flowing from his criminal conduct. *See generally DiNardo v. Kohler*, 270 A.3d 1201 (Pa. 2022). In so doing, the court rejected an argument by DiNardo that the rule only applied where a murderer sought to "profit" from his crimes, whereas DiNardo was simply seeking "compensation" resulting from the alleged negligence relating to them. *See id.* at 1207. The court reasoned that the argument was a purely semantic one, and that the rule applied to preclude his recovery of any resulting damages, regardless of their characterization as "profit" or "compensation." *See id.*

DiNardo sought allocatur, and this Honorable Court granted the same, phrasing the question presented as follows, apparently focused on the aforementioned argument the Superior Court rejected:

> Does the "no felony conviction recovery" rule preclude the award of civil damages or relief where, as here, [DiNardo] alleges that he would not benefit or profit from his own criminal acts, but would rather be compensated for alleged medical malpractice relating to the crimes for which he pleaded guilty?

DiNardo v. Kohler, 62 & 63 EAL 2022 (Pa. order filed Jul. 27, 2022).

On September 6, 2022, DiNardo filed an initial brief, and on September 13, 2022, Care Providers sought and obtained an extension of time to file their responsive brief, which is currently due on November 7, 2022.

Amici now file this Brief in Support of Care Providers.

SUMMARY OF ARGUMENT

The no-felony-conviction-recovery rule is part of a broader constellation of doctrines providing that a person who commits serious misconduct, and particularly serious crime, may not call upon the courts to resolve resulting disputes in his favor. The principle is rooted in simple justice, but also protects the integrity of the courts, not only by refusing to make them conduits for pernicious awards that could undermine public confidence in the integrity of the civil justice system, but also by preventing inconsistent adjudications as to responsibility for misconduct that undermine public confidence in the civil and criminal systems alike. The principle and its goals apply equally regardless of whether the requests involve awards in the nature of "profit" or "compensation," and the facts of the instant case provide an excellent illustration of why. At bottom, allowing an avowed murderer to shift responsibility for his crimes to others and thereby obtain an award of money damages would be manifestly unjust and significantly erode public confidence in the legal system. The no-felony-conviction recovery rule wisely precludes these consequences.

Additionally, and to the extent this Honorable Court granted allocatur to consider whether to narrow the rule to exclude cases in which a felon is seeking "compensation," it should not do so. Preliminarily, this Honorable

Court's allocatur grant was phrased in descriptive terms, rather than normative terms, and DiNardo has advanced no persuasive argument that the extant rule does not apply.

More importantly, narrowing the rule in this regard would lead to not only perverse outcomes at the individual level, with convicted criminal wrongdoers using their crimes to obtain financial benefits by avoiding civil responsibility for their crimes, but also broad and disastrous public-policy impacts. Making medical care providers the guarantors of the financial costs of crimes committed by their patients would lead to a drastic expansion of "defensive medicine" practices that would exacerbate the longstanding problems of maintaining cost-containment and averting over-treatment.

At a minimum, narrowing the rule in this regard requires more thorough investigation and public policy priority-balancing than the parties and this Honorable Court can provide, and is a task better suited for the legislature, which has more competent investigative tools and is better situated to make normative judgments as to the relative priorities of permitting felons to foist the costs of their crimes onto others versus protecting the extant equilibrium in the medical-care market.

In light of all the foregoing, *Amici Curiae* respectfully request that this Honorable Court affirm the Superior Court's decision.

ARGUMENT

1. The no-felony-conviction-recovery rule and its underlying policy goals apply regardless of whether a felon is seeking damages that are characterized as "profit" or "compensation."

For centuries, the law has recognized that a person who commits a serious violation of the law is justly denied the use of the law. In the early English period, the denial was unqualified: such a person could be declared an outlaw and thereby forfeit all protection and use of the law. *See*, *e.g.*, 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 315 (Cambridge Univ. Press 1979) (1769) (noting such a person "might be knocked on the head like a wolf, by any one that should meet him"). Over the centuries, while declarations of outlawry have waned, the law in general, and Pennsylvania law in particular, have continued to recognize that a person who breaks the law takes the risk that some measure of otherwise remediable harm will befall him and he may not call upon the courts to remedy it. *See*, *e.g.*, *Feld & Sons Inc. v. Pechner, Dorfman, Wolfee, Rounick, & Cabot*, 458 A.2d 545, 552 (Pa. Super. 1983) (quoting *Fowler v. Scully*, 72 Pa. 456, 467 (Pa. 1872)) ("[N]o court will lend its aid to a man who grounds his action upon an immoral or illegal act"). Indeed, only last year, this Honorable Court again recognized the principle, affirming a trial court's application of the related doctrine of *in pari delicto* to dismiss a decedent's

estate's action against a drug store that furnished him with a fentanyl prescription for a patient, only to have the plaintiff steal the medicine for himself, take it, overdose, and die. *See generally Albert v. Sheeley's Drug Store, Inc.*, 265 A.3d 442, 448 (Pa. 2021) (noting that Pennsylvania law "precludes plaintiffs from recovering damages if their cause of action is based at least partially on their own illegal conduct").

This basic principle of justice manifests itself most broadly in tort in the maxim *ex turpi caus non oritur acio* – literally, "from a wicked cause there arises no action," which is the logical basis for such various rules as the illegal contract doctrine, whereby a party who enters into an illegal contract may not call upon the courts to enforce it, *see generally Fowler, supra*; the unclean hands doctrine, whereby a party who acts inequitably may not call upon the courts to grant him equitable relief, *see generally Shapiro v. Shapiro*, 204 A.2d 266 (Pa. 1964); and, most salient here, the doctrines of *in pari delicto* and the no-felony-conviction-recovery rule, whereby a party who commits a felony, causing damage to himself, and calls upon the courts to remedy the damage, is barred from recovery by his conviction. *Accord Albert*, 265 A.3d at 446 n.2 (noting jurisprudential confusion over proper naming conventions of *ex turpi* principles in tort law); *id.* at 452 n.1 (Dougherty, J., dissenting) (same).

Apart from the justice and deterrence of crime inherent in refusing to reward the commission of felonies, particularly by awarding felons judgments for money damages, the *ex turpi* principle and the subsidiary no-felony-conviction-recovery rule serve important institutional goals. First, they protect the integrity of the courts by refusing to make them conduits for pernicious awards that shock the public's sense of ordinary justice. *See Olmstead v. United States*, 277 U.S. 438, 483-84 (1928) (Brandeis, J., dissenting) (noting in a different context that "[a]id is denied despite the defendant's wrong. It is denied in order to maintain respect for the law; in order to promote confidence in the administration of justice; in order to preserve the judicial product from contamination."); *Albert*, 265 A.3d at 118 (noting a contrary rule "would . . . lead the public to 'view the legal system as a mockery of justice").[2] Second, they protect the integrity of the courts by affording finality and respect to the criminal justice system's allocation of responsibility and refusing to permit those determined to be at fault for

[2] Indeed, courts across the country have recognized that permitting a person who engages in a felony to recover for resulting damages "would . . . shock the public conscience, engender disrespect for courts and generally discredit the administration of justice." *Wiley v. County of San Diego*, 966 P.2d 983, 986 (Cal. 1998) (quoting *Peeler v. Hughes & Luce*, 909 S.W. 494, 497 (Tex. 1995); *see also Mahoney v. Shaheen, Cappiello, Stein & Gordon*, 727 A.2d 996, 999-1000 (N.H. 1999).

criminal behavior to relitigate the question in civil court. *Accord*, *e.g.*, *Wiley v. County of San Diego*, 966 P.2d 983, 990 (Cal. 1998) (discussing litany of practical difficulties and logical inconsistencies that would arise and ensuing deleterious effect on the administration of justice). Indeed, the need for such protection is perhaps buttressed by the significant incentive that the availability of money damages would provide to the already-robust inclination of persons convicted of felonies to re-litigate their criminal cases in other venues.

The overarching *ex turpi* principle and the no-felony-conviction-recovery rule apply with equal force regardless of whether the felon styles his damages as representing "profit" or "compensation" for losses. Indeed, Pennsylvania courts have long recognized that the no-felony-conviction-recovery rule applies to compensation for losses. *See Robinson v. Metropolitan Life Ins. Co.*, 69 Pa. Super. 274 (1918) (holding that wife's insurance-based compensation for loss of her husband was forfeit because she murdered him); *In re Griefer's Estate*, 5 A.2d 118 (Pa. 1939) (same); *Mineo v. Eureka Sec. Fire & Marine Ins. Co.*, 125 A.2d 612 (Pa. Super. 1956) (holding an arsonist's assignee's insurance-based compensation for property loss was forfeit because the arsonist set it ablaze); *Holt v. Navarro*, 932 A.2d 915 (Pa. Super. 2007) (holding mental patient's claim against

medical providers that they negligently failed to restrain him and permitted him to commit crimes, resulting in lost wages, was forfeit because he committed the crimes); *cf. Albert*, *supra* (holding decedent's claim against drugstore that it negligently failed to prevent him from stealing medicine, causing his death, was forfeit because he stole it); *cf. also, e.g.*, *Zysk v. Zysk*, 404 S.E.2d 72 (Va. 1990) (holding wife's action against her adulterous paramour for negligent intimate contact causing her to suffer a venereal disease was forfeit because she committed adultery); *Ashton v. Turner*, 1 Q.B. 137 (1981) (holding felon's action against his getaway driver for negligent getaway driving was forfeit because he was actively engaged in a felony). In each of these scenarios, the plaintiffs or their predecessors in interest committed felonies, suffered resulting losses, and sought compensation therefor, and, in each, their commission of the felony causing those losses barred their recovery.

In point of fact, this case provides an excellent illustration of how the no-felony-conviction-recovery rule serves justice and protects the integrity of the criminal and civil justice systems. As detailed above, DiNardo embarked on a multi-day killing spree, taking the lives of four young men and desecrating their bodies. In ensuing criminal proceedings, he testified under oath and penalty of perjury that he intentionally, deliberately, premeditatedly,

and maliciously did so. *Accord* 18 Pa.C.S. § 2502(a) (defining first-degree murder). He was sentenced, did not appeal, and his plea and ensuing judgment of sentence are now final. And he is barred from contradicting his sworn averment as to his responsibility for his murders even on collateral review. *See generally Commonwealth v. Pollard*, 832 A.2d 517 (Pa. Super. 2003). Yet, he now wishes to do just that: shift responsibility onto Care Providers, and be paid not only for his efforts to defeat his prosecution and litigate against his victims' estates, as well as for any sums he may have to pay them, but also for the impact of his murders upon *him*.

Such a result would shock any reasonable person's sense of justice, and one can only imagine the newspaper headlines – *e.g.,* "Serial killer gets payout to fight justice, victims' families"; "Serial killer avoids personal liability to victims"; "Serial killer takes four lives; makes millions for his trouble" – and the ensuing public outcry and its impact on the perception of Pennsylvania's justice system. And to say that the potential that DiNardo, having avowed that he was criminally responsible beyond a reasonable doubt for his murders, may be deemed not truly at fault in civil court, makes a mockery of the solemnity of his criminal proceedings, his conviction, his life sentence, and of any civil proceeding in which he might obtain an award. The no-felony-conviction-recovery rule wisely precludes these unconscionable results.

2. To the extent this Honorable Court granted allocatur to consider whether to narrow the rule to exclude cases in which a felon is seeking "compensation," it should not do so.

a. Preliminarily, this Honorable Court's allocatur grant was phrased in terms of whether the rule precludes the requested recovery, and DiNardo has advanced no persuasive argument that the rule does not apply.

As detailed above, in granting allocatur, this Honorable Court phrased the question presented as follows:

> Does the "no felony conviction recovery" rule preclude the award of civil damages or relief where, as here, [DiNardo] alleges that he would not benefit or profit from his own criminal acts, but would rather be compensated for alleged medical malpractice relating to the crimes for which he pleaded guilty?

DiNardo v. Kohler, 62 & 63 EAL 2022 (Pa. order filed Jul. 27, 2022). Thus, this Honorable Court's grant of allocatur was phrased in terms of whether the rule precludes the requested recovery. DiNardo advances no persuasive argument that the rule *does not* apply. Instead, he seizes on decontextualized quotations from the decisional law as putative support for his distinction between felony-resultant damages representing "profit" – such as punitive damages – and those purportedly representing "compensation" – such as compensatory damages. For example, DiNardo quotes *Mineo*'s language that "when one is convicted of a felony and subsequently attempts

to benefit from the commission, the record of his guilt should be a bar to his recovery," and urges that he is:

> not seeking to *benefit* or *profit* from the crime he committed. As a result of [Care Providers'] gross negligence, [DiNardo] suffered considerable losses that would not have occurred. This lawsuit seeks *compensation* for those losses, which will place Mr. DiNardo in a similar position to that which he would have been had [Care Providers] not acted in a grossly negligent and reckless manner.

DiNardo's Brief at 17-18.

First, DiNardo ignores that, as detailed above, in each of the Pennsylvania decisions applying the no-felony-conviction recovery rule, the plaintiff sought to be compensated for losses, and the rule operated as a bar. *See Robinson*, *supra* (loss of husband); *In re Griefer's Estate*, *supra* (same); *Mineo*, *supra* (involving loss of property); *Holt, supra* (lost wages); *cf. Albert, supra* (loss of life).[3] Indeed, none of these cases involved a plaintiff seeking criminally vested "profit," such as the enforcement of a valuable contract obtained through criminal duress (which would be unenforceable pursuant to the conceptually distinct illegal contract doctrine discussed above without resort to *ex turpi* principles or the no-felony-conviction-recovery rule). In

[3] Indeed, the rule is called the no-felony-conviction-*recovery* rule, which term denotes a bar on *recovering* losses.

short, the use in the decisional law of the terms "profit" and "benefit" broadly connoted any and all awards for resulting damages.[4]

But more centrally, DiNardo ignores that his felony is the *sine qua non* of the damages for which he seeks recovery. DiNardo pleads that Care Providers negligently treated him, *causing* him to murder four young men, which caused him damage. But as detailed above, centuries-old principles of symmetrical justice, as expressed in *ex turpi*, *in pari delicto*, and the no-felony-conviction-recovery rule, place responsibility for DiNardo's crimes squarely at his feet, or, at a minimum, deny him the prerogative to invoke the courts to remediate harms that would not have occurred absent his felonious acts. At no point does DiNardo meaningfully confront that point: rather, and contrary to his plea of guilt, he simply denies it. *See* Brief of Appellant at 19 ("The damages pleaded in the Amended Complaint are not the consequences of Cosmo's criminal convictions but rather the consequences of the violent psychosis brought on by Dr. Kohler's gross negligence."). But simply asserting it does not make it so.

In short, because this Honorable Court granted review to consider whether the no-felony-conviction-recovery rule *does* apply, and DiNardo

[4] In any event, DiNardo's attempt to shift his own liability for the default judgments entered against him is equally characterizable as a "benefit."

makes no persuasive argument predicated on extant law, as opposed to his vision for what the law should be, this Honorable Court should affirm and proceed no further.

b. Narrowing the rule in this regard would cause perverse outcomes at the individual level, such as criminals using their crimes to obtain financial windfalls, and broad, disastrous public-policy impacts, essentially making medical care providers the guarantors of the financial costs of crimes committed by their patients, leading to a drastic expansion of defensive medicine and exacerbating the longstanding problems of maintaining cost-containment and averting over-treatment, which is particularly concerning in the field of psychiatric care, as it promotes over-institutionalization and over-medication, features of psychiatric care's darkest days.

If this Honorable Court does consider the question, as presaged above, narrowing the no-felony-conviction-recovery rule to permit a person who commits felonies to recover for resulting "losses," ostensibly including less concrete losses such as pain and suffering, emotional distress, loss of enjoyment, loss of consortium, and so on, would lead to morally offensive and reprehensible results whereby, as a matter of simple fact, serious felons do, in fact, "profit," and obtain significant financial windfalls from, their commission of serious crimes. Indeed, in the instant case, one can readily imagine a situation in which DiNardo collects a significant sum from Care Providers for pain and suffering and emotional distress, particularly in light of his simultaneous request for Care Providers to essentially insure him

against his attorneys' fees and the default judgments obtained by his victims' estates. Such a scenario is perverse, and certainly undermines the balance of equities of vis-à-vis the imposition of criminal fines, costs, restitution and civil liability in the context of criminal acts.

And narrowing the rule to exclude recoveries for "compensation" would, as a logical matter, likely have far broader, far more disastrous public-policy impacts, as it could spur an entire new focus of litigation for convicted criminals seeking to recover for losses flowing from their crimes. It could also cause significant damage in a number of critical areas. In many cases, private and public medical care providers – it is notable that public and penal institutions provide a large percentage of mental health care in the United States – would become guarantors of the financial costs of crimes committed by their patients. In others, they would be forced to expend significant resources litigating against meritless or patently frivolous claims. And even putting aside the spike in verdicts for, settlements with, and vast resources committed to litigating against, felons for their crimes' impacts upon their earning capacity and emotional well-being (and the resulting increases in medical malpractice premiums and provider flight), narrowing the rule would significantly impact the delivery of care. Inasmuch as medical care providers, like any professional service providers, cannot always determine

the most effective course of action with precision, narrowing the rule will further exacerbate the problem of defensive medicine – *i.e.*, over-treatment. In other words, private and public medical care providers, and particularly mental healthcare providers, will err on the side of increased institutionalization and medication in order to avoid the unfortunately substantial possibility that some of their patients will commit serious crimes for which the providers may face crushing financial liabilities. This practice would only accelerate the longstanding problems of maintaining cost-containment and averting over-treatment, leading to more expensive care for patients, higher insurance premiums, and higher healthcare-adjacent taxes, but would also diminish the quality of care and patients' quality of life. Every healthcare provider would spend more time and more resources on fewer patients, likely, and ironically, to the detriment of those patients with the most limited access to quality care. And particularly in the context of mental health treatment, the average patient would be more likely to be over-institutionalized or over-medicated out of an abundance of caution. Indeed, in the end, the problem is statistically likely to drive mental health care providers from providing care to those with serious mental illness, *i.e.*, those who need it the most. And all so that individuals who commit felonies,

including the heinous offenses in the instant case, can be "compensated" for the losses occasioned when they committed them.

Narrowing the no-felony-conviction-recovery rule would be completely contrary to Pennsylvania's public-policy on medical negligence actions. Indeed, the General Assembly has most recently acted to further protect, not undermine, the integrity and perception of the judiciary as it pertains to medical liability claims by attempting to ensure that only potentially valid claims are brought, in part to avoid frivolous and unnecessary litigation and precisely the types of public-policy outcomes set forth hereinabove. *Accord*, *e.g.*, Medical Care Availability and Reduction of Error (MCARE) Act, Act of Mar. 20, 2000, P.L. 154, No. 1340, *as amended*; 40 P.S. § 1303.102(1) (noting purpose of Act is to ensure high quality healthcare and affordable medical professional liability insurance); *Pennsylvania Med. Soc. V. Dept. of Pub. Welf.*, 39 A.3d 267, 271 (Pa. 2012) ("The legislature enacted the MCARE Act in response to perceived spiraling costs of medical malpractice claims, and the alleged fear that qualified healthcare providers would choose not to practice medicine in the Commonwealth if the trend of escalating costs continued."); *Id.* (citing *Womer v. Hilliker*, 908 A.2d 269, 275 (Pa. 2006) (explaining that this Honorable Court exercised its procedural rulemaking authority to create procedures, including the extant requirement of

certificates of merit from licensed professionals, to early-identify and eliminate nonmeritorious medical professional negligence actions with similar goals in mind). Narrowing the rule as DiNardo advocates herein would represent a stark, unwarranted, and dangerous reversal of this public policy, and this Honorable Court should leave the rule as it is.

c. At a minimum, narrowing the rule in this regard requires more thorough investigation and public policy priority-balancing than the parties here can provide, and is better suited for the legislature, which has more competent investigative tools and is better situated to make normative judgments between permitting felons to recover medical-malpractice awards predicated on their own crimes and preserving both the safe and effective provision of mental health treatment and the extant equilibrium in the medical-care market.

Finally, this Honorable Court and several of its Justices have previously recognized that any moves to change substantive common-law principles, insofar as they implicate major public policy concerns, ought to be circumspect; predicated on both a fully developed record of empirical evidence and thorough argument regarding those public policy concerns; and undertaken only where there is a clear predominance favoring the change. Otherwise, any changes are best left to the legislature, which has more robust investigative competency and greater authority to weigh competing public policy interests:

> [T]his Court has recently had the opportunity to discuss the nature of common-law decision making in *Seebold v. Prison Health Servs., Inc.*, 57 A.3d 1232 (2012). One of our main points of emphasis there was that the adjudicatory process does not translate readily into the field of broad-scale policymaking. *See id.* at 1245 (citing *Official Comm. of Unsecured Creditors of Allegheny Health Educ. Research Found. v. PriceWaterhouseCoopers, LLP*, 989 A.2d 313, 333 (2010) (explaining that, "[u]nlike the legislative process the adjudicatory process is structured to cast a narrow focus on matters framed by litigation before the Court in a highly directed fashion")). For this reason, and because the Legislature possesses superior policymaking tools and resources and serves as the political branch, we took the position in *Seebold* that we would not direct the substantive common law away from well-established general norms in the absence of some clear predominance of policy justifications. *See id.* (citing [*Cafazzo v. Central Med. Health Servs., Inc.*, 668 A.2d 521, 527 (Pa. 1995)], for the proposition that, "before a change in the law is made, a court, if it is to act responsibly must be able to see with reasonable clarity the results of its decision and to say with reasonably certainty that it will serve the best interests of society" (citation omitted)). Moreover, to support a judicial pronouncement of new, policy-based facets of substantive law, we strongly suggested in *Seebold* that litigants should engage in a comprehensive discussion of the competing policies and present the sort of record (including empirical information) which would support an informed, legislative-type judgment, again, grounded in a clear predominance of justifications.

Lance v. Wyeth, 85 A.3d 434, 454 (Pa. 2014) (cleaned up). Indeed, this Honorable Court has declined to make a change to the common law in

various cases in which more investigation, better arguments, or more subtle or purely preferential value judgments were required to be brought to bear. *See*, *e.g.*, *Commonwealth v. Muniz*, 164 A.3d 1189, 1223 (Pa. 2017) (declining to resolve dispute in empirical data regarding sexual-offender recidivism rates in favor of legislative investigation and value-balancing); *Commonwealth v. Hale*, 128 A.3d 781 (Pa. 2015) (declining to address policy considerations attendant resentencing of juvenile offenders); *Lance*, 85 A.3d at 454 (declining to change certain common-law duties absent meaningful explication of the pertinent policy considerations); *Naylor v. Twp. of Hellam*, 773 A.2d 770, 777 (Pa. 2001) (recognizing legislature's superior ability to examine social issues and determine legal standards so as to balance competing concerns).

Respectfully, this is such a case. Here, not only is the record, given the case's interlocutory posture, devoid of empirical evidence demonstrating just how great the impact of narrowing the rule would be on the courts, the medical industry, the insurance industry, taxpayers, psychiatric patients, and the public at large, but DiNardo makes virtually no attempt to acknowledge, much less grapple with, those impacts. And to say that DiNardo's proposition that this change is worth its impacts is a normative judgment that does not clearly predominate over other perspectives is something of an

understatement: certainly, reasonable people can think – and have thought for centuries – that it is better that felons not have recourse for the damages resulting from their crimes. Accordingly, in the alternative, *amici* submit that the task of considering whether to narrow the no-felony-conviction-recovery rule is one better suited to the legislature, which has not only the institutional ability to engage in broad-reaching investigation into the change's public-policy dimensions, but also the constitutionally committed authority to make normative judgments on behalf of Pennsylvania citizens.

CONCLUSION

In light of all the foregoing, *Amici Curiae* respectfully request that this Honorable Court enter an order affirming the Superior Court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limits of Pa.R.A.P. 531, as it contains fewer than 7,000 words, exclusive of excluded materials, and complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania – Case Records of the Appellate and Trial Courts* requiring the filing of confidential information and documents differently than non-confidential information and documents.

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