IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0602

SUMMER STRICKER, Personal Representative of the Estate of ALLEN J. LONGSOLDIR, JR.,

Plaintiff and Appellee

v.

BLAINE COUNTY, and STATE OF MONTANA,

Defendants

HILL COUNTY,

Defendant and Appellant.

DEFENDANT and APPELLANT HILL COUNTY'S OPENING BRIEF

On Appeal from the Eighth Judicial District Court, Cause No. DV 12-0937, the Honorable Matthew J. Cuffe presiding.

APPEARANCES:

MAUREEN H. LENNON, GREGORY L. BONILLA, MACO DEFENSE SERVICES, 2717 Skyway Drive, Suite F, Helena, MT 59602-1213
Attorneys for Defendant - Appellant

DANIEL J. FLAHERTY, PATRICK F. FLAHERTY, PAUL GALLARDO
PO Box 1968, Great Falls MT 59403
Attorneys for Plaintiff – Appellee
STEVEN T. POTTS, 625 Central
Ave. W, Ste. 200, Great Falls, MT 59404
Attorneys for Plaintiff – Appellee

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STATEMENT OF THE ISSUE

Whether the District Court properly granted summary judgment to Plaintiff by holding that Hill County is liable for the medical negligence of Northern Montana Hospital because Montana jails have a nondelegable duty to ensure inmates are not subjected to medical negligence by independent healthcare providers even where the jails have not contracted with and have no control over the provider.

STATEMENT OF THE CASE

The issue in this appeal is to what extent jails are responsible for the healthcare of their inmates. There is no question that jails have a duty to provide inmates with reasonable access to medical care. In this case, Hill County had Blaine County transport inmate Allen J. Longsoldier, Jr. to the Northern Montana Hospital (NMH) emergency room where the medical record indicates he was misdiagnosed and sent back to custody. When Longsoldier's condition worsened, Hill County (through Blaine County) sought medical advice from NMH and was told there was nothing physically wrong with Longsoldier. This catastrophic advice delayed Longsoldier's return to NMH. By the time Longsoldier was taken back to NMH, his condition was intractable. Litigation ensued.

The district court determined that jails have a nondelegable duty to provide reasonable medical care to inmates and are therefore vicariously liable for the medical negligence of healthcare providers. Employers are generally not liable for the torts of independent contractors except where there is a nondelegable duty, which may arise from contract, an inherently dangerous activity, or where the

employer exercises control over the workplace. The lower court properly determined that the provision of medical services is not an inherently dangerous activity but engaged in no further analysis of the nondelegable duty exceptions. There is no evidence that there was a contract between Hill County and NMH so that exception cannot apply. Further, Hill County obviously has no control over the NMH emergency room or its staff, so that exception cannot apply, either.

The district court attached a nondelegable duty to jails for the provision of perfect medical care to inmates based on *Hartman v. Correctional Medical Services, Inc.*, 960 F.Supp. 1577 (M.D. Fla. 1996.) The lower court stated, "*Hartman* is persuasive to the fundamental significance of the government's duty to provide adequate medical care for incarcerated persons irrespective of whether the duty is a constitutional, statutory, or common law duty." (Order at 59.)

However, *Hartman* was a § 1983 deliberate indifference case involving a contracted medical provider, not an independent medical provider as is the case here. Further, in contradiction to the district court's sweeping and unprecedented holding in this case, the United States Supreme Court has determined that a healthcare provider's medical negligence in diagnosing and treating an inmate's condition is not, by itself, a constitutional violation on the part of the jail. *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976.) Thus, the lower court's reliance on *Hartman* is misplaced.

STATEMENT OF THE FACTS

The facts of this case have already been litigated and are not subject to dispute. Longsoldier was a Native American man who was eighteen years old in November 2009. (Hearing Officer Decision and Sealing Order on Remand (HOD) dated March 19, 2013, Finding of Fact (FOF) No. 1.)[1] Longsoldier was an alcoholic. (*Id.* FOF No. 3.) Because of prior juvenile court proceedings in 2009, Longsoldier was under the supervision of Juvenile Probation Officer Tina Mord, an employee of the State of Montana. (*Id.* FOF No. 4.) Longsoldier had been out of state but returned to Montana in October of 2009. (*Id*. FOF No. 5.) Mord attempted to contact Longsoldier when he returned to Montana in order to close her file on him since Longsoldier was no longer a juvenile. Longsoldier never responded to her. (*Id.* FOF No. 6.)

On November 10, 2009, Mord requested that Longsoldier be arrested for his failure to report and to obtain an order terminating the State's supervision of Longsoldier. (*Id.* FOF No. 7.) Longsoldier was arrested on Thursday, November 19, 2009, at approximately 3:30 a.m. by Blaine County Deputy Sheriff Timothy Richman. (*Id*. FOF No. 8.) Blaine County adult prisoners are, pursuant to an

[1] There are two Hearing Officer Decisions due to the fact that the Human Rights Commission (HRC) required Hearing Officer Terry Spear to amend his first order on remand.

agreement between the Counties, held at the Hill County Detention Center (HCDC.) Thus, Richman transported Longsoldier to the HCDC. (*Id*.)

There is no evidence that HCDC personnel knew or reasonably should have known at the time of Longsoldier's arrival at the HCDC that he was an alcoholic. (*Id.* FOF No. 9.) At the time he was placed in the custody of the HCDC, Longsoldier showed no signs of intoxication. (*Id.* FOF No. 11.) It is unknown when Longsoldier last had alcohol or how much alcohol, if any, was present in his system when he arrived at the HCDC. (*Id.*)

For the first 24 hours of his incarceration, Longsoldier appeared to have no medical issues. (*Id.* FOF No. 29.) However, by 3:28 a.m. on Friday, November 20, 2009, Longsoldier was complaining he could not hold water down and asked to go to the hospital. (*Id*.) Detention Officer (D.O.) Klobofski indicated in his log note that he had not heard Longsoldier throw up. (*Id*.) No action was taken on Longsoldier's request to go to the hospital and there is no evidence that the HCDC would routinely take an inmate to the hospital based upon a report that the inmate could not hold water down without sensory observation that the inmate had vomited. (*Id*.)

At 6:58 p.m. that day, D.O. Ellis indicated in the log, "Allen Longsoldier says he has the wrong hands [and] he's yellow. Still having DT's." (*Id.* FOF No.

34.) This is the first documentation that Longsoldier was suffering from what HCDC staff called the "DTs." (*Id.* FOF No. 35.)

On Saturday, November 21, 2009, D.O. Sharon Skyberg was directed by a supervisor, Jeremy Schmidt, to have Longsoldier seen at the hospital because Schmidt thought Longsoldier's condition was getting worse. (*Id.* FOF No. 43.) At 6:03 p.m., shortly after she came on shift, Skyberg called the Blaine County Sheriff's Office to begin the process of getting Longsoldier transported to the hospital. (*Id.* FOF No. 44.)[2] Blaine County Sheriff's Deputy Frank Billmayer arrived at the HCDC at 6:57 p.m. to transport Longsoldier to NMH. (*Id.* FOF Nos. 48-49.)

At NMH, Longsoldier was initially seen by Nurse Neil Wiken and then examined by Ronald Peterson, MD. (*Id.* FOF Nos. 52-53.) Dr. Peterson either was, or had been, certified in addiction medicine. (*Id.* FOF No. 53.) Dr. Peterson was aware that the HCDC had reported that Longsoldier had hallucinated, had been nauseated, and was unable to hold fluids. Dr. Peterson ordered some lab tests, administered a shot of Ativan, and had Longsoldier observed while awaiting the lab results. Longsoldier seemed to improve. He was able to drink a lot of water with no apparent difficulty and without nausea. The lab results did

[2] Pursuant to the interlocal agreement, Blaine County was responsible for transporting inmates to seek medical care.

not indicate any alcohol in Longsoldier's system. (*Id.* FOF No. 61.) Dr. Peterson released Longsoldier back to Blaine County's custody with prescriptions for Cymbalta and Ativan. (*Id.* at FOF No. 62.) The Ativan was prescribed for anxiety, not for alcohol withdrawal. (Transcript of Hearing (TOH), at 99, 6-23.)

Billmayer does not recall getting any spoken instructions from Dr. Peterson or anyone else from NMH. (HOD, FOF No. 65.) He was not given any medication to take back to the HCDC for Longsoldier to take. (*Id*.) The hand-written instructions provided by NMH to Billmayer did not contain instructions regarding when it would be prudent to seek additional care for Longsoldier and the note dictated by Dr. Peterson that night also contained no such reference. (*Id*.) Longsoldier was returned to the HCDC at approximately 9:00 p.m. on November 21, 2009. (*Id*. FOF No. 67.)

Shortly after 2:30 a.m. on November 22, 2009, Longsoldier's symptoms deteriorated. (*Id*. FOF No. 72.) Skyberg was alarmed at the deterioration in Longsoldier's condition, so she called her supervisor who told her to call Blaine County. Skyberg did so, at 2:37 a.m. (*Id*. FOF No. 73.) Skyberg spoke to Blaine County Dispatcher Debbie Cornell who, after speaking with Skyberg, called the NMH Emergency Room and spoke to Nurse Wiken. (*Id*. FOF No. 74.) Cornell informed Wiken that Longsoldier was "on the floor . . . really hot, kinda burning up. And he's got the dry heaves, basically." (*Id*. FOF No. 75.)

Wiken responded by saying, in part, "He just needs to drink fluids and uh, I mean if they need to bring him back for re-evaluation, but I think he's playing them." (*Id*.) Cornell asked, "You think so?" and Wiken responded, "Oh, yeah. Yeah." (*Id*.) Wiken later added, "I'm not sure what he's got going on, but he's not ill. He's not physically ill." (*Id*.) Wiken further added, "He just doesn't like being there." (*Id*.)

Cornell had no reason to disbelieve the conclusions expressed by Wiken and she did, in fact, believe those conclusions. (*Id*. FOF No. 76.) Cornell called Skyberg back and reported what Wiken had said. (*Id*. FOF Nos. 77 and 78.) Longsoldier's condition deteriorated throughout the day on November 22, 2009. Skyberg entered the HCDC at approximately 10:44 p.m. that night and checked on Longsoldier. She found him shivering and unresponsive. (*Id*. FOF No. 101.) At 11:17 p.m., it was determined Longsoldier would have to be transported to NMH by ambulance because he was unresponsive. (*Id*. FOF No. 103.) Longsoldier was transported back to NMH sometime within the next half hour. (*Id*. FOF Nos. 104-106.) By the time this occurred, Longsoldier was irretrievably dying. (*Id*. FOF No. 110.) He died at NMH at approximately 2:00 a.m. on November 23, 2009. (*Id*. FOF No. 111.)

After these tragic events, Longsoldier's Estate filed a discrimination complaint with the Montana Human Rights Bureau (HRB) seeking damages for

wrongful death and survival against the Counties and NMH alleging that Longsoldier had been discriminated against on the bases of race (Native American) and disability (alcoholism). NMH settled with the Estate just prior to the contested case hearing in September 2011. The Counties obtained a defense verdict. A series of appeals concerning the human rights matter followed which ultimately resulted in this Court deciding *Blaine County v. Stricker*, 2017 MT 80, 387 Mont. 202, 394 P.3d 159 in favor of the Counties.

Concurrent with the HRB process, the Estate filed this action against the State of Montana and the Counties. The Estate filed a motion for partial summary judgment against each of the defendants alleging that each defendant had a nondelegable duty to provide Longsoldier with reasonable medical care. The district court determined in an Order dated February 2, 2015, that Hill County had a nondelegable duty and was liable for the medical negligence of NMH.

STANDARD OF REVIEW

This Court reviews a district court's ruling on a motion for summary judgment *de novo* and uses the same criteria used by the district court from Rule 56 of the Montana Rules of Civil Procedure. *Chapman v. Maxwell*, 2014 MT 35, ¶ 7, 374 Mont. 12, 322 P.3d 1029. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the

moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3); *Tvedt v. Farmers Ins. Group of Companies*, 2004 MT 125, ¶ 18, 321 Mont. 263, 91 P.3d 1. A motion for summary judgment is properly granted if the moving party has met its burden of showing that no genuine issues of material fact exist. *Rosenthal v. Cnty. of Madison*, 2007 MT 277, ¶ 22, 339 Mont. 419, 170 P.3d 493; Mont. R. Civ. P. 56(e.) A party opposing summary judgment may not rely on mere allegations or denials but must set out specific facts, supported by affidavits or other means provided for in Rule 56, which demonstrate there is a genuine issue for trial. *Pilgeram v. GreenPoint Mortgage Funding, Inc.*, 2013 MT 354, ¶ 14, 373 Mont. 1, 313 P. 3d 839.

SUMMARY OF ARGUMENT

The lower court held Hill County vicariously liable for the medical negligence of NMH and its staff. It found public policy requires counties to assume responsibility for medical negligence because inmates are unable to seek medical care for themselves due to the government's interruption of their freedoms. It is Hill County's position that the lower court turned its back on well-settled principles of negligence, particularly the element of duty and the nondelegable duty exception, placing an onerous burden on counties whereby they are liable for the medical negligence of independent, third party medical professionals with whom they have no contractual or employment relationship.

ARGUMENT

This interlocutory appeal presents an issue of first impression concerning the application of the doctrines of nondelegable duty and vicarious liability. The decision in this matter will either affirm, or upend, well-settled precedent and determine whether a county has a nondelegable duty to ensure that an inmate for whom it secures emergency care at a local hospital is not the victim of malpractice.

This appeal does not involve the alleged direct negligence of Hill County. Plaintiff alleges Hill County should have obtained medication for Longsoldier and should have taken him back to the hospital despite NMH's diagnosis and advice. It also alleges negligent hiring, supervision, and training. The discussion herein is directed toward errors in the lower court's Order as it pertains to the conclusion that Hill County has a nondelegable duty to provide medical care and is therefore vicariously liable for the negligence of NMH. The arguments which follow do not pertain to the alleged direct negligence of Hill County, which is not before the Court at this time.

I. The Nondelegable Duty Doctrine is an Exception to the General Rule Assigning Liability to the Tortfeasor.

In the absence of specific circumstances, employers are not liable for the torts of independent contractors. Exceptions to the general rule arise where (1) there is a nondelegable duty based on a contract; (2) the activity is inherently or

intrinsically dangerous; or (3) the general contractor negligently exercises control reserved over a subcontractor's work. *Beckman v. Butte-Silver Bow Cty.*, 2000 MT 112, ¶ 12, 299 Mont. 389, 1 P.3d 348 (citations omitted). Under these circumstances, the contractor has a "nondelegable duty" giving rise to vicarious liability for the negligence of its independent contractor.

The district court erroneously held that "[B]y common law contract, Hill County contracted with Northern Montana Hospital to provide necessary professional medical care to Hill County detention center detainees." (Order at 46.) This statement is without citation to the record because it is wholly inaccurate. Hill County did not have a contract of any kind with NMH. Its use of the local hospital's emergency room was born of necessity not contract. As is the case in most small towns and cities in Montana, NMH offered the only available after-hours emergency care in the area. The existence of a contract is insufficient to meet the first nondelegable duty exception unless it provides a basis for imposing a nondelegable duty. Thus, the absence of a contract altogether establishes the nonexistence of a nondelegable duty based on contract.

The second exception to the general rule applies where the subject activity is inherently or intrinsically dangerous. Whether an activity is an abnormally dangerous activity is a question of law. *Chambers v. City of Helena*, 2002 MT

142, ¶ 18, 310 Mont 241, 49 P.3d 587 (overruled on other grounds by *Giambra v. Kelsey*, 2007 MT 158, ¶ 16, 338 Mont. 19, 162 P.3d 134).

One engaged in an abnormally dangerous activity is subject to liability for harm resulting from the activity regardless of the care he or she exercised to prevent the harm. *Restatement (Second) of Torts* § 519 (1976); *Matkovic v. Shell Oil Co*. (1985), 218 Mont. 156, 159, 707 P.2d 2, 3–4. "This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." *Id*.

Montana law mandates the court explicitly consider each of the following factors in determining whether an activity is abnormally dangerous:

> (1) the existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (2) the likelihood that the harm that results from it will be great;
>
> (3) the inability to eliminate the risk by the exercise of reasonable care;
>
> (4) the extent to which the activity is not a matter of common usage;
>
> (5) the inappropriateness of the activity to the place where it is carried on; and
>
> (6) the extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts § 520 (1976); *Chambers*, ¶ 16. Essential to the analysis is whether the risk created by the activity is sufficiently unusual, either because of its magnitude or because of the circumstances surrounding it, to

justify the imposition of strict liability for the harm that results from it. “In other words, are its dangers and inappropriateness for the locality so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.” *Restatement (Second) of Torts* § 520, comment f.

The activity for which Plaintiff seeks to hold Hill County liable is the provision of health care to Longsoldier through the use of independent medical professionals. This activity is the polar opposite of inherently dangerous. It is specifically designed to prevent or abate harm with little risk to the inmate. The fact that medical professionals commit malpractice does not render the act of providing an inmate with professional medical care an abnormally or inherently dangerous activity.

The third exception giving rise to a nondelegable duty is when a general contractor negligently exercises control reserved over a subcontractor's work. Hill County did not and could not exercise control over any aspect of the medical care provided to Longsoldier by NMH and its medical staff nor is there an allegation or a judicial finding that it did so.

The lower court saddled Hill County with a nondelegable duty to provide non-negligent medical care to Longsoldier and held the County vicariously liable for the medical negligence of NMH when the medical professionals did not

satisfy this duty. It did so without finding any of the three exceptions under which a contractor may be liable for the negligence of a subcontractor to be in play. Other than to acknowledge that providing medical care to an inmate *is not* an inherently dangerous activity, the district court did not address these exceptions. Rather, it imposed a nondelegable duty in their absence. (*See* Order at 50.)

This Court has refrained from imposing a nondelegable duty in cases that do not meet the long-standing criteria set out herein and in multiple Montana cases. In *Maguire v. State*, it declined to extend the nondelegable duty doctrine to the employer in the wake of an intentional tort in the workplace, holding:

> In summary, we have limited the application of the non-delegable duty exception to the respondeat superior doctrine to instances of safety where the subject matter is inherently dangerous. We decline to extend the exception to the facts here. There are a number of reasons for and against extending the liability of the employer, such as here, when an intentional tort is committed only because of or by virtue of the employment situation. The employer is better able to attempt to avoid such wrongs. The employer has the ability to minimize them, while the victim has no control over the situation. Such a burden is incidental to running a business. However, such a major change to the respondeat superior doctrine is best left to the legislature.

Maguire v. State, 254 Mont. 178, 185, 835 P.2d 755, 759 (1992).

Before this Court is a much less compelling reason to upend the doctrine of respondeat superior than it faced in *Maguire*. In this case, Hill County had absolutely no control over the conduct of NMH and its medical staff. There is no precedent to support extending the non-delegable duty to the cover the medical

negligence of professional medical providers and hold counties vicariously liable for such negligence.

II. Because Medical Negligence Was Not a Foreseeable Result of Hill County's Actions, the County Had No Duty of Care to Longsoldier Relative to Medical Negligence.

The district court held Hill County had a nondelegable duty to provide reasonable medical care to Longsoldier and therefore was liable for the medical negligence of NMH and its professional medical staff. The lower court's rationale for expanding a county's duty from one of reasonable care to protect the health and safety of an inmate to one of absorbing liability for the medical negligence of a third-party health care provider is rooted primarily in a fundamental misapplication of the concept of duty as an element of negligence.

Although the district court treated the matter of duty in the context of custodial relationship as something in need of a major overhaul, Montana has applied the same standard to these relationships for decades and continues to do so. The duty is one of reasonable care for the health and safety of the inmate *unless* the county knows or reasonably should know the inmate is at risk of a particular harm or danger.

The duty is well illustrated in *Pretty On Top v. City of Hardin* (1979), 182 Mont. 311, 597 P.2d 58 (citations omitted). The case involved the suicide of an inmate who gave no indication to jailers that he was suicidal. In that case, this

Court held the County has a duty to keep an inmate "safe and to protect him from unnecessary harm. Reasonable and Ordinary care must be exercised for the life and health of the prisoner." This duty includes the duty to render medical care when necessary. *Pretty On Top*, 597 P.2d at 60.

A heightened duty arises under "special circumstances" when the custodian knows or has reason to know the inmate is at risk of harm. If the jailers knew or had reason to know Pretty On Top was suicidal, they would have had a duty to take reasonable precautions to prevent him from harming himself. *Pretty on Top*, 597 P.2d at 62.

Although couched in terms of "special circumstances," *Pretty On Top* illustrates the foreseeability element of duty. The extent of a duty in the context of negligence depends on "what the reasonably prudent person would then have foreseen as likely to happen." *Schafer v. State Dept. of Institutions* (1979), 181 Mont. 102, 106, 592 P.2d 493, 495, (overruled in part on other grounds by *Estate of Strever v. Cline* (1996), 278 Mont. 165, 178, 924 P.2d 666, 674) (quoting *Mang v. Eliasson* (1969), 153 Mont. 431, 436–37, 458 P.2d 777, 781). This concept of foreseeability "constitutes a limitation on the otherwise potentially infinite liability which would follow every alleged negligent act." Foreseeability is of prime importance in establishing the element of duty. *Mang*, 458 P.2d at

781. If a reasonably prudent person can foresee no risk of injury, that person is not negligent. *Mang*, 458 P.2d at 781.

The district court short-circuited the need for analysis on this point by holding, as a matter of law, that "the risk of professional malpractice is not ordinarily a natural and probable consequence of obtaining medical care from a medical care professional." (Order at 62.) Rather than acknowledge Hill County had no further duty vis-à-vis providing Longsoldier with reasonable medical care, the lower court moved into a discussion of policy considerations, in particular the special relationship between involuntarily incarcerated persons and their government custodians, that ultimately weighed in favor of recognizing that the government's duty to provide inmates with adequate medical care is nondelegable. (Order at 63.)

Foreseeability as an element of duty cannot be eliminated by policy considerations. "[T]he existence of a duty of care in a negligence-based action depends not only 'upon a weighing of policy considerations for and against the imposition of liability,' but also 'upon the foreseeability of the risk' involved. *Jackson v. State*, 1998 MT 46, ¶ 53, 287 Mont. 473, 956 P.2d 35 (citations omitted).

The district court committed reversible error by expanding Hill County's duty of care to include medical negligence while acknowledging medical

negligence "is not ordinarily a natural and probable consequence of obtaining medical care from a medical professional" (Order at 62), essentially admitting that medical negligence is not "what the reasonably prudent person would then have foreseen as likely to happen" under the circumstances. *See Schafer*, 592 P.2d at 495. Labeling a duty "nondelegable" does not negate the need to determine the extent of the duty nor does it create a larger duty than the one originally imposed.

III. Policy Considerations Do Not Favor Imposition of an Expanded Duty.

Issues to be weighed in determining whether to impose a duty include (1) the moral blame attached to a defendant's conduct; (2) the prevention of future harm; (3) the extent of the burden placed on the defendant; (4) the consequences to the public of imposing such a duty; and (5) the availability and cost of insurance for the risk involved. *Phillips v. City of Billings* (1988), 233 Mont. 249, 253, 758 P.2d 772, 775.

Even though the district court conceded the absence of duty when it conceded the risk of harm was unforeseeable, thereby making policy considerations moot, the lower court's musings concerning policy considerations merit careful analysis by this Court.

The district court gave counties the benefit of assigning moral blame to those who actually malpractice on the inmates and provided a nod to the fact that

physicians and hospitals are significantly better off than the average bear (the court does note that malpractice insurance is not cheap). From that point forward, the court weighed all policy considerations in favor of imposing the duty of healthcare provider on to the County, a duty so specialized that expert medical testimony is a necessary element of proof in a medical negligence case.

With all due respect to the district court, counties are not in as good a position as doctors and hospitals to absorb the cost of medical negligence. Medical professionals are in the business of making profits. Counties are in the business of putting tax dollars to work for by building infrastructure, maintaining roads, providing emergency and protective services, and a host of other things necessary to run a county. The lower court's solution? "Counties are generally solvent, have judgment levy authority, and have readily available liability insurance." (Order at 63.) Since the majority of Montana counties obtain liability insurance through a risk sharing pool, if the counties are unable to absorb the costs of medical negligence, an addition to the already high cost of operating jails, there is a risk that county jails will close and thereby creating a safety risk for communities around the state. To suggest that counties should pull out the checkbook and cover doctor's malpractice is incomprehensible.

Counties are not medical providers and therefore not covered by the express language of the statutory noneconomic damage cap for medical

malpractice claims. This makes counties an especially attractive target for such claims and creates a subset of plaintiffs (inmates) who are entitled to recover more than other Montanans who has sustained noneconomic damages as a result of malpractice.

The district court expressed particular concern over the loss of an inmate's freedom and therefore the loss of choice with regard to his or her medical care. A New York appellate court in *Rivers v. State* addressed this very concern. In *Rivers*, an inmate was transported to an independent medical provider for hernia surgery. The surgeon committed malpractice and the inmate sued the prison on the theory that it had a nondelegable duty to provide reasonable and adequate medical care. The appellate court held:

> It is fundamental law that the State has a duty to provide reasonable and adequate medical care to the inmates of its prisons. Whether the State can be held to be the guarantor of the adequacy of medial service under all circumstances, including those beyond its control, as the decision of the Court of Claims proposes, is to lift prisoners' rights vis-à-vis malpractice beyond the rights afforded to all others. Claimant's status as a prisoner and his impaired ability to make health-related decisions totally on his own hardly justifies such an extreme result in terms of the State's responsibility. We note that inmates such as claimant are not left without remedies in situations such as the instant one. Claimant has a cause of action against Cally which was settled to his benefit. Instead, we find a better rationale of a defendants' responsibility as seminally enunciated in *Mduba v. Benedictine Hosp.*, 52 A.D.2d 450, 384 N.Y.S. 2d 257, and more recently in *Sledziewski v. Cioffi*, 137 A.D.2d 186, 188, 528 N.Y.S 2d 913, where we stated that '[t]he premise for imputing liability is the element of control.' We consider that rationale the appropriate test of responsibility.

Rivers v. State, 159 A.D. 2d 788, 789, 552 N.Y.S.2d 189-90 (N.Y. App. Div.

1990).

Hill County maintains that the *Rivers* rationale, expressed above, is far more consonant with existing Montana law than the result reached by the lower court. In both *Rivers* and this case, the inmate was not only "not left without remedies," but we know, here, that the Estate in fact settled with NMH for an undisclosed sum. In addition, in both *Rivers* and in this case, the entity to whom a nondelegable duty was being considered had no control over the entity providing the independent medical services.

Further, the County notes that courts have declined to impose upon health care centers a nondelegable duty for the medical negligence of its independent contractor emergency room personnel. *See, e.g., Smith v. Regional Center of Orangeburg and Calhoun Counties*, 394 S.C. 110, 713 S.E.2d 656 (2011); *Renown Health, Inc. v. Vanderford*, 126 Nev. 221, 235 P.3d 614 (2010); *Baptist Mem'l Hosp. System v. Sampson*, 969 S.W.2d 945 (1998); *Kelly v. St. Luke's Hosp.*, 826 S.W.2d 391 (1992). This Court, in fact, has expressly rejected the imposition of a nondelegable duty on a hospital for the acts of its independent contractor radiologist, *Milliron v. Franke* (1990), 243 Mont. 200, 204-05, 793 P.2d 824, 827, and refused to hold the State responsible for the medical services of doctors at the Montana State Prison. *Kyriss v. State* (1985), 218 Mont. 162, 176, 707 P.2d 5, 14. If courts are unwilling to impose a nondelegable duty upon medical facilities

having at least some measure of control over the selection and performance of the professional medical staff, one has to seriously question the wisdom and fairness of imposing such a duty on law enforcement entities having no such control.

Although it is difficult to predict, it seems unlikely that shifting liability to the entity with no control over the medical care being administered will improve the quality of medical care provided to inmates by third-party professionals.

The district court misspoke when it said counties have a choice as to whether to put people in jail, presumably suggesting they could minimize their exposure by not incarnating as many people. To the contrary, state-employed judges put the vast majority of people in jail and a county that refuses to take someone a court has ordered to jail faces liability of any harm that comes to members of the public during the time he or she should have been incarcerated. *See Prindel v. Ravalli County*, 2006 MT 62, ¶ 39, 331 Mont. 338, 133 P.3d 165 (jail staff had a duty to Prindel, injured by a former inmate who should have been incarcerated at the time, because it was "foreseeable that if a convicted criminal is not incarcerated as ordered and is left to his own devices, he will commit additional crimes and injure members of the community in the process."); *Lopez v. Great Falls Pre–Release Servs., Inc.*, 295 Mont. 416, 986 P.2d 1081, ¶¶ 5, 31 (1999) (overruled on other grounds) (defendant had a duty to prevent the escape of an inmate from the Great Falls Pre–Release Center because it was foreseeable

that the inmate could harm a member of the public even though he had been incarcerated for non-violent property offenses). Thus, contrary to the district court's assumption, counties frequently do not have the choice, and certainly did not have the choice in this case, when the State ordered Longsoldier incarcerated.

IV. The District Court's Unprecedented Expansion of the Duty of Care is Unsupported by Law.

In addition to failing to determine the parameters of the actual duty, the district court set about the business of cobbling together a new duty. While (initially) acknowledging that the duty of care a governmental entity owes to an inmate is "the common law duty to provide them reasonable medical care," the lower court quickly moved into a preview of duties to come with a brief review of select constitutional requirements and the enlightened state of the federal courts with regard to the nondelegable duty to provide medical care to prisoners under the Eighth Amendment. (Order at 15.) The district court wrapped up its initial discussion of duty with a passing nod to two sections from the Restatement of (Second) of Agency and concluded that "the threshold recognition of the existence of these general legal duties of care is not necessarily determinative of whether and to what extent they are nondelegable or which particular government entity owes the duty for purposes of vicarious liability in a particular case." (Order 15-16.)

This is a negligence case. The Estate has not alleged a violation of Longsoldier's constitutional rights under either the Montana or the United States Constitutions. (*See* Compl. and Jury Demand (Nov. 16. 2012) at 9 – 12.) Nevertheless, with the above introduction, the district court signaled its intent to conflate the duty of care under a negligence paradigm with the right of prisoners to be free from cruel and unusual punishment under the Eighth Amendment. These rights and duties are separate and distinct, leading reasoned courts to take care not to muddle those concepts and muddy the waters.

The district court found two cases particularly persuasive in its search for a duty more to its liking than that enunciated in *Pretty On Top*; i.e. the duty to exercise reasonable care to protect the life, health and safety of an inmate, and to render necessary medical care, unless special circumstances require a heightened duty of care. The first, *Hartman v. Correctional Medical Services, Inc.*, is a Florida federal district court case involving defendants' motions for summary judgment on the issue of qualified immunity. The case stands for little other than to illustrate that the custodian cannot escape liability for constitutional violations by contracting for medical services. *See Hartman v. Correctional Medical Services, Inc.*, *supra*, 960 F. Supp. at 1583. The lower court found *Hartman*, "persuasive as to the fundamental significance of the government's duty to

provide adequate medical care to incarcerated persons irrespective of whether the duty is a constitutional, statutory, or common law duty." (Order at 59.)

A significant problem with the district court's "coat of many colors" approach to duty, particularly with regard to federal constitutional claims and state tort claims, is that the duties are born of historically distinct roots, have different elements of proof, damages and defenses. With specific reference to the Eight Amendment, the District of Columbia Court of Appeals noted:

> The present case, however, does not involve the kind of conduct which gives rise to an Eighth Amendment claim. The defendants are alleged to have been negligent not cruel. "It is obduracy and wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited by the Cruel and Unusual Punishment Clause . . ." *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 89 L.Ed. 2d 51 (1986) "[A]n inadvertent failure to provide adequate medical care cannot be said to constitute [a violation of the Eighth Amendment]." *Estelle*, supra, 429 U.S. at 105, 97 S.Ct. 285. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id.* at 106. 97 S.Ct. 285. On the contrary, a plaintiff seeking to establish a constitutional violation must prove "deliberate indifference to serious medical needs." *Id.*
>
> To hold that the duty not to be cruel or wanton or obdurate cannot be delegated away is one thing; to expand that doctrine to make the District liable for the ordinary negligence of a contract health care provider, without proof of lack of due care on the part of the District, is quite another. The present case involves medical malpractice, and Ms. Herbert has neither alleged nor proved anything more.

Herbert v. District of Columbia, 716 A.2d 196, 200 (D.C. App. 1998)

The second case the lower court found persuasive is *Medley v. North Carolina Dept. of Correction*, 330 N.C. 837, 412 S.E. 2d 654 (1996). Although

not a Section 1983 case, the North Carolina Court quoted extensively from federal Eighth Amendment cases. It, like *Hartman*, involved contractual relationships between the institution and the health care provider. There was no contractual relationship between Hill County and NMH.

Federal constitutional violations are actionable under 42 U.S.C. Section 1983. Statutory violations are actionable under a theory of negligence *per se* or as evidence of negligence. Common law violations are actionable under the duty as enunciated in *Pretty On Top* and its progeny. Combining the duties required of each into a "super duty" for the purpose of holding counties liable for conduct over which they have no control either by contract or employment relationship is a deviation from Montana negligence standards and federal constitutional norms.

CONCLUSION

The district court expanded the duty set forth in *Pretty on Top* to the point that Hill County--and effectively all incarcerating entities in the State--are responsible for the medical negligence of independent third-party healthcare providers. The decision is without support under Montana law, and with very little support across the county. To make this unprecedented jump, the district court dismissed well-settled law concerning the nondelegable duty exception and the scope of duty as it applies to negligence claims. Hill County respectfully requests this Court reverse the district court's Order insofar as it holds 1) Hill County has a

nondelegable duty to ensure that inmates are not the victims of negligent medical care at the hands of independent third-party healthcare providers; and 2) that the County is vicariously liable for damages arising from such negligence.

DATED this 19th Day of March 2019.

MACo Defense Services

/s/ Maureen H. Lennon
Maureen H. Lennon

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 6458 words, excluding certificate of compliance.

/s/ Maureen H. Lennon
Maureen H. Lennon

CERTIFICATE OF SERVICE

I, Maureen H. Lennon, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-20-2019:

Gregory L. Bonilla (Attorney)
2717 Skyway Dr., Ste. F
Helena MT 59602
Representing: Hill County
Service Method: eService

Paul Gallardo (Attorney)
1714 4th Ave. No
Great Falls MT 59401
Representing: Summer Stricker
Service Method: eService

Daniel J. Flaherty (Attorney)
PO Box 1968
Great Falls MT 59403
Representing: Summer Stricker
Service Method: eService

Steven T. Potts (Attorney)
625 Central Avenue West, Suite 200
Great Falls MT 59404
Representing: Summer Stricker
Service Method: eService

Patrick F. Flaherty (Attorney)
1026 1st Ave. S.
P.O. Box 1968
Great Falls MT 59403
Representing: Summer Stricker
Service Method: E-mail Delivery

Electronically Signed By: Maureen H. Lennon
Dated: 03-20-2019