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7 **IN THE SUPREME COURT OF THE STATE OF MONTANA**
8 **SUPREME COURT CAUSE NO. DA 24-0554**

9 THE ESTATE OF RICHARD)
10 MABEE,)

11 Appellant,)

**APPELLANT’S PETITION FOR
REHEARING**

12 WHEATLAND COUNTY,)
13 WHEATLAND COUNTY SHERIFF’S)
14 OFFICE,)

15 Appellee.

16 The Appellant Estate of Richard Mabee, respectfully petitions for rehearing
17 of this Court’s Opinion in *Estate of Mabee v. Wheatland County*, 2025 MT 252,
18 pursuant to M. R. App. P. 20(1)(a).

19
20 This Petition is grounded solely in subsection (i): the Court *overlooked*
21 *material facts* that were part of the trial record and that go directly to (1) whether
22 “special circumstances” elevated Wheatland County’s duty under *Pretty On Top v.*
23 *Hardin*, and (2) whether comparative negligence could properly be applied in light
24

1 of the County’s speculative rectal-condom theory. Those overlooked facts, if
2 acknowledged, undermine the Court’s conclusion that Wheatland County could
3 rely on comparative negligence to escape liability for the death of a person in its
4 custody.

5
6 **I. MATERIAL FACT #1: THE JAILER’S DEROGATORY
7 STATEMENTS TO A DYING PRISONER**

8 The Opinion found that “Deputy Sweet testified that she noticed Mabee’s
9 strange behavior, but she did not believe that Mabee was in danger because she had
10 observed similar behavior from him in the past.” (Op., ¶ 5).

11 Why did this Court not even mention these un rebutted facts:

12 6. Richard Mabee started exhibiting bizarre and frenzied behavior, swatting
13 at nonexistent torments, talking to invisible people, what Deputy Sweet
14 characterized as “tripping balls” and hallucinating from 6:46 a.m. until his
15 death at 8:09 a.m. Plaintiff’s Exhibit 5 was admitted into evidence and is
16 attached in the Appendix consisting of 12 still photographs in chronological
17 order taken from the video monitors. These photos show graphically his
18 struggle to live and death.

19 7. A Highway Patrolman, Officer Boots, came on duty and Detention
20 Officer Sweets called Richard Mabee a “piece of shit” and told him to
21 “knock it the fuck off”. (Tr., pg. 22 of Day Two of Jury Trial
22 8/20/2024). Mabee was frothing at the mouth. At 7:53 a.m., Richard Mabee
23 fell to the ground, struggling to get up, and remaining on the floor.
24 Richard Mabee remained on the floor until 8:03 looks wrong”.

Source: Statement of Facts, App. Opening Brief, pg. 2.

25 The Court’s characterization of the facts is used to support the conclusion
26 that “special circumstances” did not necessarily exist and that comparative
27 negligence could therefore be applied.

1 The Court should at least acknowledge the uncontroverted evidence about
2 what Deputy Sweet actually did and said while Mabee was in a visible medical
3 crisis. As the testimony and video evidence showed, while Mr. Mabee was
4 suffering a methamphetamine overdose, Deputy Sweet referred to him as a “piece
5 of s---” and told him to “knock it the f---off.” She did so instead of entering the
6 cell, checking his condition, or summoning medical assistance, all while jail policy
7 required in-person hourly checks for signs of life.
8

9 That evidence is critical for at least three reasons:

10 **1. Subjective awareness of abnormal, serious distress.**

11 A jailer does not say “knock it the f---off” to a person who is merely pacing
12 or talking to himself in an ordinary way. Those words reflect recognition
13 that the behavior was extreme, disturbing, and demanded a response. They
14 show actual awareness that something was seriously wrong—precisely the
15 kind of “special circumstance” that transforms the jailer’s duty from
16 ordinary care to an elevated duty to act decisively to protect life, as
17 described in *Pretty On Top v. Hardin*.

18 **2. Breach of the duty to treat prisoners humanely and refrain from**
19 **oppressing them.** The Opinion quotes the governing standard: a jailer
20 must “render [a prisoner] medical aid when necessary, and treat him
21 humanely and refrain from oppressing him.” Opinion ¶ 12. A dispatcher
22 who watches a detainee in obvious distress and responds by calling him a
23 “piece of s—” instead of checking on his condition is not “treat[ing] him
24 humanely” and is, in fact, “oppressing him.” That conduct deepens the
breach of duty and underscores that this is not a case of innocent
misperception, but a conscious choice to demean rather than assess and aid.

3. Evidence supporting “special circumstances” that the Court declined
to reach. The Opinion concludes that, because no further “special
circumstances” instruction was requested, this Court “do[es] not determine
whether the evidence could have supported a finding that such
circumstances arose.” Opinion ¶ 21. But in reaching that posture, the Court
relied on a selective description of the evidence—i.e., that Sweet “was not
concerned” and had seen similar behavior in the past. By overlooking her

1 actual words to a dying man in her care, the Court ignored strong evidence
2 that she *did* know Mabee was at risk of serious harm.

3 This is not a request to reweigh evidence. It is a request to acknowledge
4 the *existence* of material trial evidence--Sweet's own words--showing actual
5 knowledge of crisis and a conscious decision to respond with contempt instead of
6 care. Under M. R. App. P. 20(1)(a)(i), the Court's omission of that evidence is a
7 paradigmatic example of an "overlooked fact material to the decision."
8

9 **II. MATERIAL FACT #2: THE "RECTAL CONDOM" THEORY**
10 **WAS AFFIRMATIVELY UNDERCUT BY EVIDENCE THAT**
11 **THE CONDOM WAS FOUND UNOPENED**

12 At ¶ 6, the Opinion recites the County's theory that "Mabee concealed a
13 condom containing methamphetamine in his rectum prior to his confinement, and
14 the condom ruptured shortly after Mabee entered his cell." Footnote 2 references
15 the "likely insertion of a hastily wrapped package into his anal cavity" and treats
16 that scenario as the factual foundation for the comparative negligence analysis.
17 Opinion ¶ 20.

18 The trial record, however, contains a key piece of evidence that the Opinion
19 does not mention: **the condom recovered during the investigation was found**
20 **unopened and intact.** In other words, the sole condom associated with Mr.
21 Mabee—the same unopened condom package the County invoked as the container
22 for methamphetamine—was never used at all. This fact was developed in the
23 evidence and argued at trial.
24

1 That overlooked fact is material because:

2 **1. It directly contradicts the factual premise the Court credits.**

3 If the only condom in evidence was recovered *unopened*, then the
4 County’s rectal-concealment theory is not merely “uncertain”; it is
5 affirmatively undermined by physical evidence. The Court’s acceptance of
6 the theory in ¶ 6 and footnote 2, without acknowledging the contradictory
7 evidentiary record, materially misstates the evidentiary picture.

8 **2. It alters the comparative-negligence calculus.**

9 The rectal-condom theory is what allows the County to argue—and the
10 jury to find—that 95% of the fault rests with Mabee for hiding a “large
11 dose of methamphetamine within his body” and failing to warn jail
12 personnel. Opinion ¶ 8. But if the only condom was unopened, there is no
13 concrete evidentiary basis for the inference that Mabee clandestinely
14 smuggled a lethal quantity of methamphetamine into the jail in that
15 manner. Without that factual predicate, the jury’s 95/5 apportionment rests
16 on speculation that the Court should not endorse, and the legal conclusion
17 that comparative negligence properly applied in this jailer–detainee
18 context becomes untenable.

19 **3. It bolsters the argument that special circumstances and jailer
20 responsibility predominated.**

21 Once the rectal-condom theory is undercut, what remains is
22 uncontroverted evidence that:

- 23 ○ Mabee exhibited classic, escalating signs of methamphetamine
24 overdose over hours;
- Jail policy required in-person checks that were not performed; and
- The dispatcher responded not with medical evaluation but with
profane contempt.

In that light, treating this as primarily the “fault” of a man in custody,
rather than of the custodians who failed to act in the face of a medical
emergency, is inconsistent with the elevated duty recognized in *Pretty On
Top*.

Because the unopened condition of the condom squarely contradicts the
factual scenario the Court accepted as the foundation for instructing the jury on

1 comparative negligence, that fact is “material to the decision” within the meaning
2 of M. R. App. P. 20(1)(a)(i) and warrants rehearing.

3 The trial testimony of Dr. Huffman established this fact:

4 Q. You seem to discount the notion that it was – Mr. Mabee inserted the
5 meth into his rectum. Is that true?

6 A. I don’t think that completely explains all the events that happened
7 thereafter. I’m not going to say that – discount. Yeah, that’s a pretty good
8 word. I would discount that that is an explanation supported by evidence.

9 Q. Why?

10 A. Well, it doesn’t seem to be the right timing for when the effects
11 occurred. It – it presupposes that – as I read his report, it presupposes that
12 he takes it, gets it out of his rectum at one point and then rewraps it, and then
13 it doesn’t leak the first time but leaked the second time.

14 **It makes mention of a condom, but the only condom or condom
15 wrapper that I saw was an unopened condom that was found in his
16 pants I think when he was being checked in. I don’t think that there
17 was a place that he could have hidden a condom in his jail outfit.**

18 Tr., pg. 49

19 **III. A JAILER CANNOT ESCAPE RESPONSIBILITY BY
20 WATCHING A PERSON DIE AND BLAMING HIS DISEASE**

21 Even apart from the technical “special circumstances” label, the overlooked
22 facts expose a deeper problem with allowing comparative negligence to absolve
23 Wheatland County here: **addiction is not a moral failing—it is a recognized
24 medical disease—and jailers cannot avoid their duty to render aid by faulting
the prisoner for having that disease.**

Modern medicine and science uniformly recognize that substance use
disorder/addiction is a chronic, relapsing brain disease characterized by

1 compulsive drug use despite harmful consequences and long-lasting changes in the
2 brain.

3 In this case:

- 4 • Wheatland County accepted custody of Mr. Mabee, knowing his history and
5 knowing that detainees are often under the influence of drugs or alcohol.
- 6 • When he began to exhibit obvious signs of overdose, a trained EMT watched
7 him via monitor, violated policy by not checking on him in person, and
8 demeaned him with profanity instead of treating his condition as the
9 medical emergency it was.
- By the time she finally entered his cell, he was motionless on the floor and
could not be revived.

10 Permitting comparative negligence to erase liability on these facts
11 effectively says: “*Because addiction is the prisoner’s fault, the jailer’s decision to*
12 *stand by and watch him die is excused.*” That is precisely the result *Pretty On*
13 *Top* sought to avoid when it held that, once “special circumstances” exist--whether
14 suicide, helpless intoxication, or mental crisis—the jailer’s duty to act supersedes
15 the detainee’s own negligence.

17 **The *USS Indianapolis* Analogy: When Warnings Are Ignored**

18 Doug Stanton’s bestselling book, *In Harm’s Way*, recounts the story of the
19 *USS Indianapolis*, torpedoed in the Pacific near the end of World War II after
20 delivering components of the atomic bomb. Survivors managed to send distress
21 messages. Declassified records later showed that three SOS messages were in fact
22 received by different commands, but were not acted upon—one dismissed as a
23 probable Japanese trick, another ignored by a commander who was drunk, and a
24

1 third disregarded under standing orders not to be disturbed. Hundreds of sailors
2 died in the water who could have been saved had responsible officials simply acted
3 on the information in front of them.

4 The point of the analogy is narrow but powerful: **when lives are at stake,**
5 **those in positions of responsibility do not get to excuse their inaction by**
6 **speculating that the distress is somehow illegitimate or self-inflicted.**

7 Here, Mr. Mabee’s body was the distress call. His shaking, bizarre
8 movements, and eventual collapse were his SOS. The dispatcher’s response --
9 “knock it the f---off” is the functional equivalent of dismissing a distress signal as
10 “probably an enemy trick.” That response cannot be squared with Montana law
11 imposing on jailers a duty to “render medical aid when necessary” and to protect
12 detainees from foreseeable harm, even harm precipitated by the detainee’s own
13 prior negligence.
14

15 Addiction made Mabee vulnerable. The County’s choice not to act in the
16 face of that vulnerability is what turned his vulnerability into a death sentence.
17 Comparative negligence doctrine cannot be used as a shield to convert a jailer’s
18 deliberate inaction into legal immunity.
19

20 **IV. RELIEF REQUESTED**

21 The two facts outlined above --

- 22 1. Deputy Sweet’s demeaning and profane statements to Mr. Mabee while he
23 was in obvious medical crisis; and
24

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, do hereby certify that on the 18th day of November, 2025,
3 a true and correct copy of the foregoing was served upon the following as
4 indicated:

5 U.S. Mail Hand Delivery Facsimile Electronic

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12 /S/ ADAM J. GARDNER
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CERTIFICATE OF SERVICE

I, Patrick F. Flaherty, hereby certify that I have served true and accurate copies of the foregoing Petition - Rehearing to the following on 11-18-2025:

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Electronically signed by Adam Gardner on behalf of Patrick F. Flaherty
Dated: 11-18-2025