In the United States Court of Appeals for the Third Circuit

No. 16–2821

KENNETH MANN and ROSE MANN, as parents and co–plenary guardians of the estate of SHELDON MANN, an incapacitated person, and in their own right,
Appellants

v.

PALMERTON AREA SCHOOL DISTRICT; CHRISTOPHER WALKOWIAK, individually and in his official capacity as a football coach

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On appeal from the judgment entered June 2, 2016 in the U.S. District Court for the Middle District of Pennsylvania, Civil Action No. 3–14–cv–00068

BRIEF FOR APPELLANTS AND VOLUME ONE OF THE JOINT APPENDIX (Pages 1a–28a)

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I. STATEMENT OF SUBJECT–MATTER AND APPELLATE JURISDICTION

Because plaintiffs have asserted federal civil rights claims against defendants arising under 42 U.S.C. §1983, the district court possessed subject–matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1343.

On June 2, 2016, the U.S. District Court for the Middle District of Pennsylvania entered summary judgment in favor of defendants Palmerton Area School District and Christopher Walkowiak, individually and in his official capacity as that school district's football coach. App.3a.

While defendants' summary judgment motion was pending, but before it was fully briefed, plaintiffs had voluntarily dismissed all of the other parties originally named as defendants in this civil action. App.1908a–09a. As a result, the district court's order granting summary judgment in favor of the remaining two defendants, entered June 2, 2016, constituted a final, appealable order.

This Court possesses appellate jurisdiction over this appeal pursuant to 28 U.S.C. §1291. Plaintiffs filed their timely notice of appeal from the district court's adverse summary judgment order on June 15, 2016. App.1a.

II. STATEMENT OF THE ISSUES ON APPEAL

1. Did the district court err as a matter of law in holding that high school student Sheldon Mann's right to bodily integrity, to be free from devastating traumatic brain injury as the result of being affirmatively directed to return to football practice by coach Walkowiak after Walkowiak had observed Sheldon exhibit concussion–like symptoms as the result of suffering a devastating collision with another player, was not clearly established as of November 1, 2011, and thus defendant Walkowiak was entitled to qualified immunity for his actions, notwithstanding that the evidence plaintiffs presented in opposition to defendants' motion for summary judgment was correctly determined by the district court to be sufficient to reach a jury on plaintiffs' state–created danger claim arising under 42 U.S.C. §1983?

Where preserved: *See* Plaintiffs' answer in opposition to defendants' motion for summary judgment and accompanying brief in opposition and counter–statement of facts. App.1377a–1907a.

2. Did the district court err in granting summary judgment against plaintiffs, and in favor of defendant Palmerton Area School District, on plaintiffs' municipal liability claim, notwithstanding that the school district

had no concussion policy in effect at the time of Sheldon Mann's devastating injuries, the football team's coaching staff had a custom and practice of ignoring students' serious head injuries, the school district failed to train the football team's coaching staff on how to recognize and respond to students displaying the symptoms of concussions and other head injuries, and imposing "single incident liability" against the school district would be proper viewing the evidence in the light most favorable to plaintiffs.

Where preserved: *See* Plaintiffs' answer in opposition to defendants' motion for summary judgment and accompanying brief in opposition and counter–statement of facts. App.1377a–1907a.

III. STATEMENT OF RELATED CASES AND PROCEEDINGS

Plaintiffs–appellants are unaware of any related cases or proceedings.

IV. STATEMENT OF THE CASE

A. Relevant Factual History

The relevant facts based on the evidence of record in this matter, viewed in the light most favorable to plaintiffs as the parties opposing a motion for

summary judgment, which the applicable standard of review requires, are as follows.

On Tuesday, November 1, 2011, Sheldon Mann, a 17–year–old senior on the Palmerton High School football team, was participating in the football team's practice as a member of the defensive scout team. App.1471a. The "scout" designation was given to those students whose role on the team primarily was to serve as the practice squad against which the team's starting line–up — consisting of the larger, more talented, and more experienced football players — would practice. App.1504a.

As the district court concluded, the evidence of record shows that Mann sustained two staggering, violent, incapacitating blows to the head on nearly successive plays during a practice scrimmage on that date. App.5a. After the first major hit that he sustained, Mann displayed the unmistakable signs of a concussion–related injury, including stumbling, dizziness, and disorientation. App.5a. Mann's injuries were described in detail by his teammates and the team's manager. App.1477a–83a.

Defendant Christopher Walkowiak, Palmerton High School's head football coach, observed the first major hit that Mann sustained and saw first–hand the concussion–like symptoms that Mann exhibited after

sustaining that hit. App.1479a–85a. Nevertheless, instead of ensuring that the team's training staff evaluated Mann or declaring that Mann could not resume practice until he was cleared by competent medical professionals, coach Walkowiak ordered Mann to return to the field immediately and resume participating in the scrimmage practice. App.1478a–79a.

Shortly after coach Walkowiak had ordered Mann to return to the practice field, Mann sustained a second brutal direct helmet–to–helmet collision with a player on the offensive first team, rendering Mann severely and permanently injured and producing the devastating, incurable neurological injuries that are at issue in this lawsuit. App.1484a–87a.

The evidence in the summary judgment record of this case establishes that coach Walkowiak recognized that Mann was exhibiting concussion–like symptoms after the first major hit that Mann sustained. App.1479a–85a. A player exhibiting those symptoms of disorientation is rendered significantly more vulnerable to sustaining an even more damaging neurological injury because the player is in a helpless state, unable to take precautions against subsequent injury. App.1474a–75a.

With regard to plaintiff's municipal liability claim against defendant Palmerton Area School District, plaintiffs placed before the district court in

the summary judgment record admissible evidence that the school district had a policy and custom of failing to medically clear student athletes who appeared injured and failing to enforce and enact proper and adequate policies for head injuries. App.1527a–29a. Indeed, the concussion–related policies that the school district adopted in 2012 did not come into effect until after Sheldon's injuries and after the district undertook to survey its neighboring districts and copy their protocols. App.1529a–33a. The school district's approved 2011 Athletic Handbook does not even mention concussions or head injuries in its injury management materials, even though neighboring school districts had incorporated concussion policies and training before Mann's injuries. App.1528a–33a.

The evidence before the district court at the summary judgment stage demonstrated that the school district had a custom or practice of failing to train the coaching and training staff on proper procedures and safety protocols for head injuries. App.1534a–37a. The school district had no concussion policy at the time of Sheldon's incident, and had a custom of having non–medically trained coaches clear players without needing to be seen by a trainer. App.1549a–51a. While Coach Walkowiak's actions toward Sheldon on November 1, 2011 were shocking, they were set in place

well before that date by the district's failure to adopt and enforce a concussion management system and train its coaches and trainers to comply with that system. App.1536a.

The school district's official athletic handbook for 2011 does not even mention concussions within its 20 pages. App.1528a. Only after the school district was investigating Sheldon's injury did then–superintendent Carol Boyce ask the school's athletic director if any written protocols were in place for head injuries. App.1528a.

A day later, athletic director Andrew Remsing emailed the neighboring school districts asking to see their written policies "dealing with concussions." App.1528a. In 2012, the Palmerton Area School District did what it could have and should have done before Sheldon's November 1, 2011 life changing injuries: obtain and implement written protocols for concussion management as neighboring districts had already done. App.1529, 1539a.

The evidence plaintiffs placed before the district court on summary judgment evidenced that the school district had a custom of failing to recognize and educate on the causes, symptoms, and dangers of traumatic brain injuries, and that the football team's coaching staff consequently had

a custom of failing to require that steps be taken to remove and medically evaluate players who displayed signs of having suffered traumatic brain injuries. App.1540a. Sheldon's first hit occurred in open view of players and coaches. App.1477a–83a. What followed thereafter was the implementation of the accepted custom at Palmerton: allowing coaches with no medical training to send injured players back into practice without being medically cleared. App.1540a.

Scott Bruce, a certified athletic trainer who provided services to both high school and college football players for 32 years (including the University of Miami during its 2001 national championship season), issued an expert report and would testify at trial on behalf of the plaintiffs that the Palmerton Area School District lacked adequate concussion management policies and had a broken system that failed to ensure appropriate health care was provided to student–athletes. App.1535–36a.

The school district's lack of adequate concussion–related policies, along with the school district's established custom and practice of ignoring the harmful and often irreversible consequences of head injuries, directly facilitated and caused the severe, permanent neurological injuries that Sheldon Mann suffered that give rise to this suit. App.1815a–16a.

Based on the facts and evidence described above — facts that plaintiffs' alleged in their amended complaint and thereafter introduced proof of using admissible evidence at the summary judgment stage — the district court has twice ruled, at the motion to dismiss and summary judgment stages, that plaintiffs have successfully alleged and established the elements of a federal constitutional violation by coach Walkowiak under the state–created danger doctrine that this Court has recognized as giving rise to liability under 42 U.S.C. §1983. App.16a, 80a–81a.

B. Relevant Procedural History

On January 13, 2014, the Honorable Joseph J. Matika of the Carbon County Court of Common Pleas Orphans' Court found that Sheldon Mann's traumatic brain injury suffered on November 1, 2011 "totally impairs his capacity and ability to receive and evaluate information effectively and to communicate decisions concerning the management of his financial affairs and his estate." App.1470a–71a.

Judge Makita found that the injury "caused [Sheldon] the following symptoms and conditions: slowed motor activity; altered sleep patterns; auditory hallucinations; recurrent headaches and head pain; nausea;

dizziness; balance problems; nihilistic delusions; impaired concentration; poor short–term memory; hypersensitivity to light, sounds, and smells; social isolation; difficulty with following conversations; episodic aggressive behaviors; impaired peripheral vision; seizure activity; impaired logical reasoning; impaired common sense reasoning; and overall moderate brain dysfunction suggestive of bilateral diffuse axonal injury secondary to a traumatic brain injury." App.1471a.

Judge Makita also found that "[b]ecause of this injury and the appurtenant symptoms and conditions, it is necessary to appoint plenary co–guardians of the estate of Sheldon Mann." App.1471a. The Carbon County, Pennsylvania trial court thus conferred that responsibility on Sheldon's parents, who initiated this lawsuit in the U.S. District Court for the Middle District of Pennsylvania on January 15, 2014. App.36a, 1826a.

In a published opinion issued July 17, 2014, *see Mann* v. *Palmerton Area Sch. Dist.*, 33 F. Supp. 3d 530 (M.D. Pa. 2014), the district court denied defendants' motions to dismiss plaintiffs' claims under 42 U.S.C. §1983 arising under the state–created danger theory and alleging a policy or custom of failing to medically clear injured student athletes and failing to enact proper and adequate policies applicable to head injuries, along with

failing to train the coaches on proper procedures and safety protocols evidencing a deliberate indifference to recurring head injuries. The district court's opinion also concluded that it was "premature" to consider defendants' assertion of qualified immunity. 33 F. Supp. 3d at 542.

This case thereafter proceeded to discovery. Following the conclusion of discovery, defendants filed a motion for summary judgment. App.106a. Before the summary judgment motion was fully briefed, the parties entered into a stipulation whereby plaintiffs voluntarily dismissed all defendants other than Christopher Walkowiak, Palmerton High School's head football coach, and the Palmerton Area School District. App.1908a–09a.

In ruling on defendants' motion for summary judgment, the district court first ruled that plaintiffs had introduced sufficient evidence to reach a jury on plaintiffs' state–created danger claim under §1983 against coach Walkowiak. App.16a. In holding that plaintiffs' evidence would permit a jury to find that coach Walkowiak violated Sheldon Mann's federal constitutional due process right to bodily integrity, the district court first ruled that the harm alleged was foreseeable and fairly direct. App.9a–12a. The district court next ruled that the evidence permitted a jury to find that coach Walkowiak's degree of culpability shocked the conscience under the

deliberate indifference standard that is applicable in the absence of a hyper–pressurized situation, where a decisionmaker is not required to make a hurried judgment. App.12a–14a.

Next, the district court ruled that the evidence would allow a reasonable jury to find that Sheldon Mann was a foreseeable victim of coach Walkowiak's affirmative decision to order Mann back onto the practice field after coach Walkowiak saw Mann suffer the initial hard hit and then display concussion–like symptoms. App.14a–15a. And finally, the district court ruled that coach Walkowiak's affirmative exercise of authority in ordering Sheldon Mann to reenter the practice field and resume participating in the scrimmage satisfied the fourth and final requirement of a state–created danger claim, that the state actor must affirmatively exercise authority in a manner that created the danger or rendered the plaintiff more vulnerable to the danger than had the state actor refrained from acting. App.15a–16a.

After ruling that plaintiffs' evidence was sufficient to reach a jury on plaintiffs' state–created danger claim arising under §1983, and thus that plaintiffs' evidence sufficed to allow a jury to find that coach Walkowiak violated Sheldon Mann's federal constitution right to bodily integrity, the

district court proceeded to hold that coach Walkowiak was nevertheless entitled to the entry of summary judgment in his favor because the right in question was not clearly established as of November 1, 2011. App.16a–18a.

The district court also ruled that the Palmerton Area School District was entitled to the entry of summary judgment in its favor because it was not deliberately indifferent to a student athlete's risk of concussion, plaintiffs could not establish liability against the school district on a failure–to–train theory, the school district could not be held liable under a single–incident theory of liability, and the school district's failure to have in place a policy that specifically addressed concussions and head injuries was not the moving force behind Sheldon Mann's devastating injuries. App.18a–27a.

Following the district court's entry of final judgment at the summary judgment stage in favor of the final two defendants in this case, plaintiffs filed a timely notice of appeal to this Court. App.1a.

V. SUMMARY OF THE ARGUMENT

This Court's precedents leave no doubt that the district court erred when it granted summary judgment in favor of coach Walkowiak on plaintiffs' state–created danger claim and when it granted summary

judgment in favor of Palmerton Area School District on plaintiffs' municipal liability claim.

This Court's recent ruling in *L.R.* v. *School Dist. of Phila.*, 836 F.3d 235 (3d Cir. 2016), demonstrates that the substantive due process right to bodily integrity to be free from harm at the hands of a third–party in a school setting, which is at the heart of plaintiffs' state–created danger claim, was clearly established as of November 2011. The specific right that this Court held to be clearly established in *L.R.* was "an individual's right not to be removed from a safe environment and placed into one in which it is clear that harm is likely to occur, particularly when the individual may, due to youth or other factors, be especially vulnerable to the risk of harm." *L.R.*, 836 F.3d at 249. That is precisely the same right at stake in plaintiffs' substantive due process state–created danger claim against coach Walkowiak.

The cases on which this Court relied in arriving at its holding in *L.R.*, including most notably this Court's ruling in *Kneipp* v. *Tedder*, 95 F.3d 1199 (3d Cir. 1996), demonstrate that the right that this Court recognized as clearly established in *L.R.* was likewise clearly established as of the date pertinent to this case, November 2011. Although the trial court did not

have the benefit of this Court's ruling in *L.R.* when it granted summary judgment in favor of coach Walkowiak on qualified immunity grounds, this Court's ruling in *L.R.* leaves no doubt that the district court's grant of summary judgment based on qualified immunity on plaintiffs' state–created danger claim should be reversed.

This Court's precedents likewise dictate the reversal of the trial court's entry of summary judgment in favor of Palmerton Area School District on plaintiffs' municipal liability claims. Here, the school district's policy concerning football players (and athletes generally) who suffered from or exhibited signs of a concussion was not merely inadequate —it was nonexistent. The lack of any concussion–related policy shocks the conscience given how frequently such injuries occur and how widespread such policies were among neighboring school districts.

The school district's abject failure to train its football and medical staffs about diagnosing and treating head injuries is similarly conscience–shocking. Three directly on–point, precedential rulings in which this Court reversed the entry of summary judgment in favor of the defendant on a municipal liability claim demonstrate that the trial court erred in granting summary judgment on that claim here. *See Thomas* v. *Cumberland Cnty.*, 749

F.3d 217, 219 (3d Cir. 2014); *A.M. ex rel. J.M.K.* v. *Luzerne Cnty. Juvenile Detention Ctr.*, 372 F.3d 574 (3d Cir. 2004); *Berg* v. *County of Allegheny*, 219 F.3d 261 (3d Cir. 2000) (per curiam). The relevant holdings of these three cases, examined in detail below, require the reversal of the district court's entry of summary judgment in favor of Palmerton Area School District on plaintiffs' municipal liability claim.

Courts should not and cannot allow the lives and futures of our nation's public schoolchildren to be permanently destroyed without legal recourse as the result of indefensible and conscience–shocking disregard by athletic coaches for the health and safety of those entrusted into their care. And school districts cannot be allowed to escape liability when they fail to adopt policies or provide adequate training to address and avoid the very sort of devastating injuries that are certain to occur in the absence of such policies and training. Fortunately, this Court's precedents do not permit the trial court's entry of summary judgment to withstand appellate scrutiny, and therefore this Court should reverse and remand this case for trial.

VI. ARGUMENT

A. The District Court Erred In Holding That Sheldon Mann's Due Process Right To Be Free From Acts Of School Officials Placing Him At Substantial Risk Of Serious Injury Perpetrated By Third–Parties In A School Setting Was Not Clearly Established As Of November 2011

1. Standard of review

This Court exercises plenary review of a district court's entry of summary judgment. *See Acumed LLC* v. *Advanced Surgical Servs., Inc.*, 561 F.3d 199, 211 (3d Cir. 2009) (this Court's "review of a grant of summary judgment is plenary, and in making that review we use the same standard as a district court: whether there are genuine issues of material fact precluding entry of summary judgment").

2. Coach Walkowiak Violated Sheldon Mann's Clearly Established Right To Bodily Integrity By Directing Sheldon To Resume Football Practice Immediately After Sheldon Had Sustained The First Big Hit And Was Displaying Concussion Symptoms Including Dizziness, Wobbling, And Disorientation

The doctrine of qualified immunity protects government officials from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009) (internal

quotations omitted). Where a defendant has raised the defense of qualified immunity, a court ordinarily must address two questions: (1) has the plaintiff adequately alleged facts or placed sufficient evidence before the court to establish the violation of a constitutional right?; and (2) if so, was the right clearly established at the time of the defendant's actions giving rise to suit? *See Estate of Lagano* v. *Bergen Cnty. Prosecutor's Ofc.*, 769 F.3d 850, 858 (3d Cir. 2014).

In this case, the district court ruled on summary judgment that plaintiffs had placed before the court sufficient evidence to establish that coach Walkowiak had violated Sheldon Mann's constitutional right to bodily integrity under the state–created danger doctrine by ordering Sheldon to resume football practice after Sheldon had sustained the first major hit and was displaying concussion–related symptoms of dizziness, wobbling, and disorientation. Plaintiffs agree with, and certainly are not aggrieved from, that aspect of the district court's ruling in plaintiffs' favor at the summary judgment stage.

Accordingly, plaintiffs' appeal focuses solely on the second step of the qualified immunity analysis: whether Sheldon Mann's federal due process right to bodily integrity in the school setting that plaintiffs assert coach

Walkowiak violated was clearly established at the time of the defendant's actions giving rise to suit from the viewpoint of what a reasonable person in coach Walkowiak position should have known.

This Court "has adopted a broad view of what constitutes an established right of which a reasonable person would have known." *Kopec* v. *Tate*, 361 F.3d 772, 778 (3d Cir. 2004) (quoting *Burns* v. *County of Cambria*, 971 F.2d 1015, 1024 (3d Cir. 1992)). In particular, this Court has recognized that "there does not have to be precise factual correspondence between the case at issue and a previous case in order for a right to be clearly established, and we would not be faithful to the purposes of immunity by permitting officials one liability–free violation of a constitutional or statutory requirement." *Id.* (quoting *People of Three Mile Isl.* v. *Nuclear Regulatory Comm'rs*, 747 F.2d 139, 144–45 (3d Cir. 1984)) (internal quotations and ellipsis omitted).

In other words, while a court's qualified immunity inquiry must be undertaken in the context of a specific case rather than as a general proposition, there need not be "a previous precedent directly in point" for a right to be clearly established. *Aciero* v. *Cloutier*, 40 F.3d 597, 620 (3d Cir. 1994) (en banc) (internal quotations omitted). "Relatively strict factual

identity" between a prior ruling and the case at bar is simply not necessary. *Stoneking* v. *Bradford Area Sch. Dist.*, 882 F.2d 720, 726 (3d Cir. 1989) (internal quotations omitted). This Court has also recognized that "[d]istrict court opinions may be relevant to the determination of when a right was clearly established for qualified immunity analysis" *Doe* v. *Delie*, 257 F.3d 309, 321 (3d Cir. 2001).

This Court's recent precedential ruling in *L.R.* v. *School Dist. of Phila.*, 836 F.3d 235 (3d Cir. 2016), which this Court issued after the district court granted summary judgment based on qualified immunity in this case, is highly instructive regarding the qualified immunity inquiry that this Court should undertake in this case. *L.R.* presented the question whether a substitute teacher who released a kindergarten student to a complete stranger, resulting in the horrific sexual abuse of the child and the child's subsequent abandonment, alone in a suburban playground in the middle of the night, was entitled to qualified immunity on plaintiff's state–created danger claim. *Id.* at 239–40.

Notwithstanding the existence of no factually analogous precedent from either the U.S. Supreme Court or this Court holding that it violated the state–created danger doctrine for a public school teacher to release a very

young student to an adult without confirming the adult's relationship with the student and the adult's authority to take custody of the student, this Court held that the claim at issue in *L.R.* alleged the violation of a clearly established right. *Id.* at 247–50. Moreover, in *L.R.* this Court held (*id.* at 246–47) that the right at stake was clearly established even though the U.S. Court of Appeals for the Fifth Circuit, in a case presenting essentially identical factual allegations and legal theories, had held that the teacher's conduct in repeatedly releasing a very young student to an unauthorized adult, who each time sexually abused the child, did not violate the child's federal due process rights under the state–created danger doctrine. *See Doe ex rel. Magee* v. *Covington Cnty. Sch. Dist.*, 675 F.3d 849 (5th Cir. 2012) (en banc).

For purposes of deciding whether the federal constitutional right at issue in *L.R.* was clearly established as of January 2013, this Court first defined the precise right at stake as "an individual's right not to be removed from a safe environment and placed into one in which it is clear that harm is likely to occur, particularly when the individual may, due to youth or other factors, be especially vulnerable to the risk of harm." *L.R.*, 836 F.3d at 249.

This Court's specific description of the right at issue in *L.R.* precisely encompasses the very same right that is at issue in this case. Sheldon Mann would have discontinued participating in the practice absent Coach Walkowiak's affirmative instruction and mandate that Sheldon continue practicing despite being visibly dazed and disoriented after the first major hit that he sustained on November 1, 2011. Coach Walkowiak, after observing the first hit that Sheldon sustained and its aftermath, including Sheldon's dazed and disoriented state, ordered Sheldon back onto the practice field in a helpless condition. App.1478a–85a.

Because of Sheldon's dazed and disoriented condition, Sheldon was helpless to avoid or protect himself against any further major hits. As had been clearly foreseeable at the time Coach Walkowiak ordered a dazed and disoriented Sheldon back onto the practice field,[1] in either the very next play or two plays later, Sheldon suffered a second brutal helmet–to–helmet collision with a larger player from the team's starting line–up, directly

[1] In opposing defendants' motion for summary judgment, plaintiffs placed before the district court admissible evidence establishing that Coach Walkowiak encouraged, or at the very least tolerated, violently brutal hits on "scout" squad players such as Sheldon Mann during practice sessions. App.1509a–11a.

resulting in the devastating, permanent neurological injuries that give rise to this lawsuit. App.1484a–87a.

Applying the facts of this case to the federal constitutional right that this Court found to be clearly established in *L.R.*, when Coach Walkowiak ordered Sheldon in his dazed and disoriented condition back onto the practice field after the first major hit, Coach Walkowiak "removed [Sheldon] from a safe environment" away from the field. 836 F.3d at 249. Because Sheldon, in his dazed and disoriented condition, was obviously helpless to all who had observed him to avoid or protect against a second major head injury, by ordering Sheldon to continue practicing, Coach Walkowiak placed Sheldon into an environment "in which it is clear that harm is likely to occur, particularly when the individual may, due to * * * other factors, be especially vulnerable to the risk of harm." *Id.*

To be sure, this Court recognized the right at stake in *L.R.* as clearly established as of January 2013. But the cases on which this Court relied in holding that the right was clearly established in *L.R.* all predated November 1, 2011, the date on which coach Walkowiak violated Sheldon's federal due process rights under the state–created danger doctrine. *Id.* at 247–50.

The "key" precedent (*id.* at 249) on which this Court relied in holding that the right at stake in *L.R.*, and similarly in this case, was clearly established was this Court's 1996 ruling in *Kneipp* v. *Tedder*, 95 F.3d 1199 (3d Cir. 1996). In *Kneipp*, this Court held that Philadelphia police violated a woman's federal due process rights under the state–created danger doctrine when police stopped the woman, who was walking home in a clearly inebriated state with the assistance of her husband. *Id.* at 1201. The police sent the husband home to relieve the babysitter and then later abandoned the wife, alone, to attempt to walk the rest of the way home on her own. *Id.* at 1201–02. The wife was subsequently found, passed–out, in a culvert having suffered a severe brain injury due to having been forced by the police officer to attempt to make her way home in a clearly helpless state (*id.* at 1203) paralleling the state in which Sheldon Mann was ordered by coach Walkowiak back into practice to resume the scrimmage.

The facts at issue in this Court's rulings in *L.R.* and *Kneipp* had nothing in common. *L.R.* involved a kindergarten student being released from a public school classroom to an apparent stranger. *Kneipp* involved an intoxicated mother walking home on a city street beside her husband. Notwithstanding the lack of any readily apparent factual parallel between

those two cases, this Court ruled in *L.R.* that this Court's 1996 ruling in *Kneipp* clearly established the right at issue in *L.R.*

In this case, the district court defined the right at stake for purposes of its qualified immunity inquiry as a case alleging "that a state–created danger arises when coaches fail to take certain precautions in athletic practice or in any analogous situation." App.17a. In describing the right at stake so narrowly, the district court violated this Court's teachings in *Estate of Lagano* v. *Bergen Cnty. Prosecutor's Ofc.*, 769 F.3d 850, 859 (3d Cir. 2014), that a district court should not use an "unduly narrow construction of the right at issue" in performing the qualified immunity analysis. This Court proceeded to hold in *Lagano* that it was immaterial that the Third Circuit had never "applied the state–created danger theory in the context of a confidential informant" because "similar facts * * * are not necessary" to hold that the law was clearly established. *Id.* (internal quotations omitted).

The district court also relied heavily on this Court's unpublished, non–precedential opinion in *Hinterberger* v. *Iroquois Sch. Dist.*, 548 Fed. App. 50 (3d Cir. 2013), for the proposition that the law was not clearly established as of November 2011 that the state–created danger doctrine would apply in the context of a school athletic practice. App.17a–18a. To begin with,

Hinterberger involved a very different factual setting, in which a high school gymnast was injured while participating in attempts to perform a new, risky gymnastic maneuver. *Hinterberger* did not involve an athlete who sustained an initial head injury in the view of the head coach, after which the athlete exhibited obvious signs of concussion–related injury that the head coach observed, only to be ordered by the head coach to resume practice immediately in an obviously helpless state.

Equally as important, this Court's 2013 ruling in *Hinterberger* was an unpublished, non–precedential decision that was therefore only binding on the parties to that case, while this Court's recent ruling in *L.R.* is a published, precedential ruling. Because the precedential analysis that this Court conducted in *L.R.* establishes that the district court erred in holding that the right at stake in this case was not clearly established as of November 2011, it is immaterial that this Court's unpublished, non–precedential ruling in *Hinterberger* could be viewed as supporting the district court's ruling.[2]

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[2] Because this Court's non–precedential ruling in *Hinterberger* did not issue until December 2013, there can be no legitimate suggestion that *Hinterberger* demonstrates whether the right that coach Walkowiak is alleged to have violated was or was not clearly established as of November

Consider a hypothetical that mirrors the facts of Sheldon Mann's case in all relevant respects. A blind student, completely without sight, attends a public school that is located adjacent to a six–lane road on which cars drive by at a high rate of speed. A brutally sadistic teacher decides it would be amusing to see whether the student could safely walk across all six lanes of traffic and back again without being run over by a motor vehicle.

Even though there are no cases remotely close to presenting this fact pattern within the Third Circuit, if this fact pattern were to present itself in an actual case, could the teacher or the federal district court assigned to hear and decide the case reasonably conclude that the right to bodily integrity under the state–created danger doctrine that was at stake in that case was not clearly established merely because the case arose in a school setting? This Court's recent decision in *L.R.* confirms the answer to be "no," just as the answer to the first question presented in this appeal must be that coach Walkowiak violated clearly established Third Circuit law in ordering

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2011. As noted above, this Court's ruling in *L.R.* held that precisely the same right at stake here was clearly established in January 2013, relying on a body of case law that was in existence as of November 2011. If the right at issue in *L.R.* was clearly established as of January 2013 based on pre–2011 case law, then that same right was also clearly established as of November 2011, the date relevant to this appeal.

Sheldon back onto the practice field in a helpless condition under the facts alleged and evidence presented by plaintiffs in this case.

Although this Court's recent ruling in *L.R.* should suffice to necessitate a reversal of the district court's grant of qualified immunity in this case in favor of coach Walkowiak, additional case law spanning the past 15 years further supports the propriety of a reversal here on the qualified immunity issue.

In *Moeck* v. *Pleasant Valley Sch. Dist.*, 983 F. Supp. 2d 516 (M.D. Pa. 2013), the district court held that a wrestling coach would violate a smaller student's federal due process right to bodily integrity by setting up a practice wrestling match with a 70–pound heavier student who was known to lose his temper. The coach was alleged to have told the smaller student to resume wrestling after the coach saw the smaller student sustain an initial injury and it was clear the larger student was intent on physically injuring the smaller student. The right to bodily integrity at stake in *Moeck* was clearly established as of December 2012, the federal district court ruled.

Moving back in time to the next most relevant case, in *Hilliard* v. *Lampeter–Strasburg Sch. Dist.*, 2004 WL 1091050 (E.D. Pa. 2004), the district

court addressed a state–created danger claim in which a public school student sustained a serious head injury when the tape that was intended to secure the student to a wall in gym class gave way, causing the student to strike her head on a concrete floor, below. The district court held that the right to bodily integrity at stake in *Hilliard* was clearly established as of the fall of 2002.

And in *Sciotto* v. *Marple Newtown Sch. Dist.*, 81 F. Supp. 2d 559 (E.D. Pa. 1999), the district court confronted a state–created danger claim in which a public school student was seriously injured as the result of being required to wrestle against alumni wrestlers who returned to the school each year as part of an annual tradition. In its 1999 ruling in *Sciotto*, the district court observed:

> Thus, since *Ingraham* was decided two decades ago, it has been clearly established that a student's right to bodily integrity must be respected in the school setting. * * * Furthermore, since *D.R.*, *Hunter*, and *Kneipp*, it has been clear in this circuit that school officials may be held liable for a constitutional violation where they affirmatively act to place a student in danger of harm by a third party non–state actor.
>
> Individually and taken as a whole, these cases clearly were sufficient to "give fair warning" to school officials that when they affirmatively acted to place a student in danger of physical harm at the hands of third parties, or were deliberately

> indifferent to such danger, a constitutional violation would be found.

81 F. Supp. 2d at 571.

What Senior U.S. District Judge Lowell A. Reed, Jr. held in *Sciotto* back in 1999 rings even truer today in the aftermath of this Court's recent ruling in *L.R.* Based on this Court's ruling in *L.R.* and the relevant federal court rulings cited and discussed above, it is readily apparent that the district court in this case erred as a matter of law in holding that coach Walkowiak was entitled to summary judgment on the basis of qualified immunity on Sheldon Mann's claim of state–created danger to his federal constitutional right to bodily integrity at issue in this suit.

The district court's entry of summary judgment in favor of coach Walkowiak should therefore be reversed, and this case should be remanded for trial.

B. The District Court Also Erred In Holding That The Evidence Plaintiffs Presented In Support Of Their Municipal Liability Claim Would Fail To Allow A Reasonable Jury To Find In Favor Of Plaintiffs On That Claim

1. Standard of review

This Court exercises plenary review of a district court's entry of summary judgment. *See Acumed LLC* v. *Advanced Surgical Servs., Inc.*, 561 F.3d at 211.

2. Viewed In The Light Most Favorable To Plaintiffs, The Evidence In The Summary Judgment Record Suffices To Allow Plaintiffs' Municipal Liability Claim To Reach A Jury

The evidence before the district court established that the Palmerton Area School District did not have a concussion–related policy until 2012, in reaction to the aftermath of the permanent, life–altering injuries that Sheldon Mann sustained on November 1, 2011. App.1528a–30a. By contrast, numerous other school districts in the region that Palmerton officials consulted with in the aftermath of Sheldon's head injury did have concussion–related athletic policies in effect as of November 2011. App.1530a–33a. As plaintiffs' expert witness, Scott L. Bruce, Ed.D., AT, ATC, explained in his expert report, "[b]y the start of the 2011 season it was

established practice in athletic training for schools to have a written concussion policy." App.1803a.

In *Colburn* v. *Upper Darby Twp.*, 946 F.2d 1017 (3d Cir. 1991), this Court discussed the legal principles relevant to maintaining a viable municipal liability claim:

> A municipality is liable under §1983 when a plaintiff can demonstrate that the municipality itself, through the implementation of a municipal policy or custom, causes a constitutional violation. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 691–95 (1978). Liability will be imposed when the policy or custom itself violates the Constitution or when the policy or custom, while not unconstitutional itself, is the "moving force" behind the constitutional tort of one its employees. *Polk County v. Dodson*, 454 U.S. 312 (1981).

946 F.2d at 1027.

In *Colburn*, this Court also proceeded to explain that even when a municipality's policy itself is not unconstitutional, "if a concededly valid policy is unconstitutionally applied by a municipal employee, the city is liable if the employee has not been adequately trained and the constitutional wrong has been caused by that failure to train." *Id.* at 1028 (quoting *City of Canton* v. *Harris*, 489 U.S. 378, 387 (1989)).

Similarly, in *Stoneking* v. *Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989), this Court, again relying on *City of Canton*, *supra*, explained that

where "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, 'the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.'" *Id.* at 726 (quoting *City of Canton*, 489 U.S. at 390).

In the district court's view, because Palmerton High School had a general handbook addressing how injured athletes should be properly handled, the mere fact that the handbook did not address head injuries failed to demonstrate that the school district was deliberately indifferent to the risks that head injuries and concussions presented. App.21a–22a.

The district court also ruled that the school district could not be held liable on a failure to train theory in the absence of a pattern of similar violations involving students suffering from obviously apparent concussion–related symptoms, and that any "single–incident" theory of liability could not be established in the absence of a risk of harm to athletes that was "so patently obvious." App.24a–26a.

Lastly, the district court ruled that plaintiffs had failed to show that the absence of adequate concussion–related policies was the "moving force" behind the permanent, devastating brain damage injuries that Sheldon Mann sustained. App.27a.

Addressing that last point first, the expert report from Scott Bruce that plaintiffs provided to the district court in opposing defendants' motion for summary judgment would have allowed a reasonable jury to find that if the football team's coaching staff had received adequate concussion training for a sport in which concussions were well known as of November 2011 to be a recurring plague, they would have recognized that Sheldon Mann could not have safely been ordered to resume practicing after having sustained an initial serious hit and then displaying obvious signs of concussion–related distress. App.1802a–06a. Thus, plaintiffs' expert report and the testimony of Dr. Bruce would provide a reasonable jury with more than adequate evidence on which to find the necessary causation. Indeed, in the "Summary" section of Dr. Bruce's expert report that plaintiffs submitted in opposition to defendants' motion for summary judgment, Dr. Bruce opines that "PASD's failure to have adequate policies, practices and protocols resulted in Sheldon's injuries." App.1816a.

Similarly, if the school district had in place a written concussion policy as of November 2011, it would have been clear to the team's coaching staff that Sheldon Mann could not have safely been ordered to resume practicing after having sustained an initial serious hit and then displaying

obvious signs of a concussion. The school district merely had a generic policy about athletic injuries targeted toward physical injuries in the nature of a broken leg, a broken finger, or a dislocated shoulder. App.1751a–52a. A serious head injury causing concussion–like symptoms is unlike other injuries to a player's body, in that the consequence is that the player is left in a dizzy and disoriented state, instead of suffering from excruciating pain and unable to move his body or a limb.

Although a student athlete can describe the effects of a physical injury, the very nature of a concussion is that a medically trained individual must perform testing to determine whether the brain has been injured. This necessity was omitted completely from the school's athletic policies at the time of Sheldon's injuries. The school district's and football coaching staff's lack of focus and awareness of head injuries, their signs, and the consequences of ignoring them clearly and unquestionably resulted in the decision by coach Walkowiak to order Sheldon Mann back onto the practice field after Sheldon had suffered the first brutal blow and required medical observation and analysis.

Knowledge of the risk of concussions from football was widespread by 2011. In the January 31, 2011 issue of *The New Yorker*, Ben McGrath had a

lengthy article titled "Does Football Have a Future: The N.F.L. and the concussion crisis." *See* http://www.newyorker.com/magazine/2011/01/31/does-football-have-a-future. On July 20, 2011, CNN.com published an article headlined "Former NFL players: League concealed concussion risks." *See* http://www.cnn.com/2011/HEALTH/07/20/nfl.lawsuit.concussions/. On January 18, 2011, Shankar Vedantam published online at Slate an article titled "The National Brain–Damage League: The epidemic of head injuries in football is even worse than you thought." *See* http://www.slate.com/articles/health_and_science/the_hidden_brain/2011/01/the_national_braindamage_league.html.

Moreover, the very fact that numerous other school districts neighboring the Palmerton Area School District had already adopted and implemented specific concussion–related policies as of November 2011 would allow a reasonable jury to conclude that the Palmerton Area School District's failure to have such a policy in place rose to the level of deliberate indifference. App.1530–33a.

The adequacy of the athletic injury policy that the Palmerton Area School District had in place as of November 2011, which contained no express discussion of concussion–related injuries, presents a factual issue

for the jury. Moreover, even if the 2011 athletic injury policy could somehow be characterized as adequate as a matter of law, as the district court concluded, the school district's failure to train the athletic staff on diagnosing and treating concussion–related head injuries, as evidenced by the failure of coach Walkowiak and the remainder of his coaching staff to recognize that Sheldon Mann had sustained a concussion–related injury as the result of the first hard hit and needed to be observed and analyzed by a medical professional, constitutes more than sufficient evidence to reach a jury on plaintiffs' failure to train claim.

Plaintiffs are not asking this Court to hold as a matter of law that summary judgment should be entered in favor of plaintiffs, and against defendant Palmerton Area School District, under the facts of this case on plaintiffs' municipal liability claim. Rather, all that plaintiffs are asking this Court to rule is that, when the evidence before the district court is viewed in the light most favorable to plaintiffs, that evidence would allow a reasonable jury to hold that the Palmerton Area School District's failure to have in place a concussion–related policy as of November 2011 would allow a reasonable jury to find the school district liable under a deliberate indifference theory.

A review of three indistinguishable precedential rulings in which this Court held that summary judgment should not have been granted to dispose of plaintiffs' municipal liability claims under 42 U.S.C. §1983 demonstrates that reversal of the district court's dismissal of plaintiffs' municipal liability claim in this case is necessary.

Most recently, in *Thomas* v. *Cumberland Cnty.*, 749 F.3d 217, 219 (3d Cir. 2014), this Court considered an appeal in which the plaintiff "brought suit against Cumberland County and policymakers at the prison * * * for, among other things, their failure to properly train corrections officers in conflict de–escalation and intervention techniques." As in this case, the plaintiff in opposing summary judgment relied on an expert's report establishing the need for the training that had not been provided in order to address and avoid inmate–on–inmate violence that would obviously arise in the absence of such training. *Id.* at 221.

This Court held that because the evidence showed that the municipality failed to equip its employees with the training necessary to handle recurring situations — there, "fights occurring between inmates" in the correctional facility; here concussive head injuries that are a regularly recurring feature of football games and practices — "the District Court

should not have precluded the factual issues underlying the deliberate indifference determination from going to a jury." *Id.* at 225–26.

After holding that plaintiff came forth with sufficient evidence to allow a reasonable jury to rule in plaintiff's favor on the issue of deliberate indifference, this Court in *Thomas* proceeded to hold that the plaintiff also presented sufficient evidence to reach a jury on whether the failure to train had "a causal nexus with the plaintiff's injury." *Id.* at 226 (internal quotations and brackets omitted). The evidence this Court held sufficient to reach a jury in *Thomas* consisted of "expert opinion evidence that the lack of [adequate] training, among other things, contributed to the serious injuries that Thomas sustained." *Id.*

Similarly, in this case, the expert report of Dr. Bruce on which plaintiffs relied in opposing defendants' motion for summary judgment contained the expert's opinion that the Palmerton Area School District's "failure to have adequate policies, practices and protocols [regarding head injuries and possible concussions] resulted in Sheldon's injuries." App.1816a.

In holding that the district court had improperly granted summary judgment on a failure to train claim in favor of the municipal defendant in *Thomas*, this Court relied heavily on its ruling in *A.M. ex rel. J.M.K.* v.

Luzerne Cnty. Juvenile Detention Ctr., 372 F.3d 574 (3d Cir. 2004), in which this Court likewise reversed a district court's entry of summary judgment in favor of a defendant on a municipal liability claim in a 42 U.S.C. §1983 case.

In *A.M.*, based on the evidence from plaintiff's corrections expert, this Court held that the district court erred in granting summary judgment against plaintiff's municipal liability claims alleging inadequate training and the lack of policies for residents' safety and physical and mental health needs. *See A.M.*, 372 F.3d at 582–85.

In reinstating plaintiff's inadequate training claim in *A.M.*, this Court explained:

> [Plaintiff's corrections expert] DeMuro opined that the Center did not have an adequate training program for its staff and did not meet nationally recognized standards for training, which included having forty hours of pre–service training. In DeMuro's opinion, the Center's failure to train its staff and follow other recognized standards for the operation of juvenile detention facilities directly contributed to the inappropriate treatment of A.M. while he was detained.

Id. at 582. This Court then went on to observe, "[t]aken as a whole, we believe the evidence concerning the Center's failure to train its child–care workers in areas that would reduce the risk of a resident being deprived of

his constitutional right to security and well–being was sufficient to prevent the grant of summary judgment." *Id.* at 583. This Court further ruled in *A.M.* that because the link between adequate training and policies at issue in that case was "not too tenuous," the "issue of causation should have been left to a jury." *Id.* at 585. This Court's ruling in *A.M.* thus likewise necessitates reversal of the district court's entry of summary judgment in favor of the Palmerton Area School District on plaintiffs' municipal liability claim.

The third and final indistinguishable case, in addition to *Thomas* and *A.M.*, that necessitates reversal of the district court's grant of summary judgment as to plaintiffs' municipal liability claim is *Berg* v. *County of Allegheny*, 219 F.3d 261 (3d Cir. 2000) (per curiam). The plaintiff in Berg brought a federal civil rights claim against Allegheny County after he was taken into police custody and then put in jail pursuant to an erroneously issued arrest warrant. *Id.* at 266–67.

In *Berg*, this Court reversed the district court's entry of summary judgment in favor of Allegheny County on plaintiff's failure to train and failure to implement adequate policies, *id.* at 275–77, recognizing that "where the slip of a finger [inputting into a computer an incorrect criminal

complaint number] could result in wrongful arrest and imprisonment, there remains an issue of fact whether the County was deliberately indifferent to an obvious risk." *Id.* at 277.

This Court concluded its analysis in *Berg* by observing that "[w]hen such a simple mistake can so obviously lead to a constitutional violation, we cannot hold that the municipality was not deliberately indifferent to the risk as a matter of law." *Id.*

Similarly here, the failure of the Palmerton Area School District to adequately train its football coaching staff to recognize and understand the dangers and consequences of concussion–related injuries, which as this case sadly illustrates can inflict much more harmful and permanent injuries than a short stint wrongfully incarcerated in jail, should result in this Court's reversal — in accordance with this Court's precedential rulings in *Berg*, *A.M.*, and *Thomas* — of the district court's entry of summary judgment on plaintiffs' municipal liability claims against the Palmerton Area School District.

As the report of plaintiffs' athletic trainer expert witness demonstrates, the horrific injuries that Sheldon Mann sustained as the result of Palmerton Area School District's inadequate concussion–related policies and training

was clearly and obviously a tragedy waiting to happen as of 2011. App.1794a–1816a. As a result, the trial court's entry of summary judgment on plaintiffs' municipality liability claims should be reversed.

VII. CONCLUSION

For all the foregoing reasons, this Court should reverse the district court's entry of summary judgment in favor of defendants and remand so that plaintiffs' claims may proceed to trial.

Respectfully submitted,

Dated: November 14, 2016

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CERTIFICATION OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type–volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,593 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14–point Book Antiqua font.

Dated: November 14, 2016

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: November 14, 2016

/s/ *Howard J. Bashman*
Howard J. Bashman

CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

Counsel hereby certifies that the electronic copy of this Brief for Appellants is identical to the paper copies filed with the Court.

A virus check was performed on the PDF electronic file of this brief using McAfee virus scan software.

Dated: November 14, 2016

/s/ Howard J. Bashman
Howard J. Bashman

In the United States Court of Appeals for the Third Circuit

No. 16–2821

KENNETH MANN and ROSE MANN, as parents and co–plenary guardians of the estate of SHELDON MANN, an incapacitated person, and in their own right, Appellants

v.

PALMERTON AREA SCHOOL DISTRICT; CHRISTOPHER WALKOWIAK, individually and in his official capacity as a football coach

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On appeal from the judgment entered June 2, 2016 in the U.S. District Court for the Middle District of Pennsylvania, Civil Action No. 3–14–cv–00068

JOINT APPENDIX
Volume One of Four
(Pages 1a–28a)

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KENNETH and ROSE MANN as parents and co plenary guardians of the estate of SHELDON MANN, an incapacitated person, and In Their Own Right	**CIVIL ACTION NO.: 3:14-CV-00068**
Plaintiffs	
vs.	**Hon. A. Richard Caputo**
PALMERTON AREA SCHOOL DISTRICT; et. al	
Defendants	

NOTICE OF APPEAL

Notice is hereby given that Kenneth and Rose Mann, as parents and co plenary guardians of the estate of Sheldon Mann, an incapacitated person, and in their own right, plaintiffs in the above named case, hereby appeal to the United States Court of Appeals for the Third Circuit from the final judgment and order granting summary judgment in favor of defendants entered June 2, 2016.

Respectfully submitted,

SALTZ, MONGELUZZI, BARRETT & BENDESKY, P.C.

BY: /s/ *(RJM9362)*
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CERTIFICATE OF SERVICE

I, Robert J. Mongeluzzi, do hereby certify that a true and correct copy of the foregoing Notice of Appeal was served upon all parties by electronic filing on the 15th day of June, 2016.

/s/ Robert J. Mongeluzzi

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KENNETH and ROSE MANN as parents and co plenary guardians of the estate of SHELDON MANN, an incapacitated person,

Plaintiffs,

v.

PALMERTON AREA SCHOOL DISTRICT et al.,

Defendants.

CIVIL ACTION NO. 3:14-CV-00068

(JUDGE CAPUTO)

ORDER

NOW, this 2nd day of June, 2016, **IT IS HEREBY ORDERED** that the Motion for Summary Judgment (Doc. 56) filed by Defendants Palmerton Area School District and Christopher Walkowiak is **GRANTED**. Judgment is **ENTERED** in favor of Defendants and **AGAINST** Plaintiffs on all claims. The Clerk of Court is directed to mark this case as **CLOSED**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KENNETH and ROSE MANN as parents and co plenary guardians of the estate of SHELDON MANN, an incapacitated person,

Plaintiffs,

v.

PALMERTON AREA SCHOOL DISTRICT et al.,

Defendants.

CIVIL ACTION NO. 3:14-CV-00068

(JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is a Motion for Summary Judgment (Doc. 56) filed by Defendants Palmerton Area School District and Christopher Walkowiak ("Defendants").[1] Plaintiffs assert a state-created danger claim arising out of injuries sustained by their son during a high school football practice. Because Defendant Walkowiak is entitled to qualified immunity and because there is insufficient evidence to establish municipal liability against the School District, Defendants' Motion for Summary Judgment will be granted.

I. Background

The facts presented in the summary judgment record, viewed in the light most favorable to Plaintiffs, are as follows:

Sheldon Mann ("Sheldon") was a student at Palmerton Area High School and

[1] The Palmerton Area School; Palmerton Area High School; football coaches Travis Fink, Pat Morgans, Mike Falcone, Will Kunkle, Avery Weber, and Ryan McGrath; athletic director Andrew Remsing; and Palmberton School District Board directors Michael Ballard, Carl Bieling, Susan Debski, Carol Dwyer, Stuart Henritzy, Charles Myers, Barry Scherer, Christina Snyder, and Darlene Yeakel were also named defendants who joined in the initial motion for summary judgment. However, shortly after the motion was filed, Plaintiffs agreed to dismiss these parties with prejudice. (Docs. 72 & 74.) Palmerton Area School District and Christopher Walkowiak are the only remaining defendants in this action.

participated in the school's football program beginning in July, 2008. His parents, Kenneth and Rose Mann ("Plaintiffs"), were appointed co-plenary guardians of his estate on January 13, 2014. Beginning in 2006, Defendant Christopher Walkowiak ("Coach Walkowiak") was the Assistant Coach of the school's football team and in 2011, he was the Head Football Coach. (Doc. 57, Defendants' Statement of Facts ("DSF"), ¶¶ 30-31.) In 2011, in preparation for his Head Football Coach position, Coach Walkowiak received concussion safety training from DeSales University. (*Id.* ¶ 32.) Based on this training, he was aware of the signs and symptoms of a concussion prior to the 2011 football season. (*Id.* ¶ 34.)

On November 1, 2011, Sheldon was participating in football practice at Palmerton Area High School. At some point during the practice, Sheldon sustained a hit, after which he ceased practicing. Sheldon suffered traumatic brain injury, including second impact syndrome. There is some evidence that Sheldon sustained two (2) hits at this practice, and that after the first hit, was told to continue practicing by Coach Walkowiak. Some players testified that after this first hit, Sheldon appeared dazed, confused, and disoriented.

At the time of Sheldon's incident in November 2011, the Palmerton Area School District (the "School District") was using a series of policies and procedures outlined in its 2011-2012 Athletic Handbook (the "Handbook") to inform the coaches and parents about the School District's policies, procedures, rules and regulations, and general guidelines relating to its athletic program. (*See* Doc. 57-1, Def. Ex. A.) The Handbook outlines several policies requiring, *inter alia*, the exclusion of any player from play who has suffered injury or illness until that player is pronounced physically fit by a physician. (Doc. 57, DSF, ¶ 3; *see also* Doc. 57-1, Def. Ex. A, at 6.) The Handbook also details the duties and responsibilities of various employees in the athletic program, including the head coach, who is required to inform the athletic trainer of any injuries that occur during practices or games. (Doc. 57, DSF, ¶ 8; *see also* Doc. 57-1, Def. Ex. A, at 9.) Additionally, the Handbook contains a separate section dedicated to the proper handling of injured players. (Doc. 57-1, Def. Ex. A, at 20.) The procedures outlined in this section prohibit injured athletes from returning to practice or competition without first being cleared by the athletic trainer. (*Id.* at 20-21.) The

Handbook does not include any policies or guidelines that specifically address concussions or other head injuries. The School District also adopted OAA Orthopaedic Specialists' concussion policies, though deposition testimony shows that it is unclear if these policies were written out at the time of Sheldon's incident. It is undisputed that one year after Sheldon's incident, however, the School District had a written concussion policy in place.

Plaintiffs assert due process claims against the School District and Coach Walkowiak for violating Sheldon's constitutional rights and causing his traumatic brain injuries. Specifically, Plaintiffs claim that Sheldon's rights were violated as a result of Coach Walkowiak's exercise of authority in telling Sheldon to continue participating in football practice after sustaining a hit and exhibiting signs of a concussion. Plaintiffs also claim that Sheldon's rights were violated as a result of the School District's practice of failing to medically clear student athletes, failing to enforce and enact proper concussion policies, and failing to train the coaches on a safety protocol for head injuries. The parties engaged in discovery and on February 1, 2016, Defendants filed a motion for summary judgment, arguing that there is insufficient evidence in the record to establish a state-created danger claim against Coach Walkowiak and a municipal liability claim against the School District. (Doc. 56.) Defendants also argue that even if there were sufficient evidence to establish a state-created danger claim, Coach Walkowiak is entitled to qualified immunity. This motion has been fully briefed and is now ripe for disposition.

II. Discussion

A. Legal Standard

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Wright v. Corning*, 679 F.3d 101, 103 (3d Cir. 2012) (quoting

Orsatti v. N.J. State Police, 71 F.3d 480, 482 (3d Cir. 1995)). A fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. *See Edelman v. Comm'r of Soc. Sec.*, 83 F.3d 68, 70 (3d Cir. 1996). Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *Anderson*, 477 U.S. at 247-48. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Id*. at 248. Where there is a material fact in dispute, the moving party has the initial burden of proving that: (1) there is no genuine issue of material fact; and (2) the moving party is entitled to judgment as a matter of law. *See Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 251 (3d Cir. 2010). The moving party may present its own evidence or, where the non-moving party has the burden of proof, simply point out to the court that "the nonmoving party has failed to make a sufficient showing on an essential element of her case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When considering whether there are genuine issues of material fact, the court is required to "examine the evidence of record in the light most favorable to the party opposing summary judgment, and resolve all reasonable inferences in that party's favor." *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007). Once the moving party has satisfied its initial burden, the burden shifts to the non-moving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. *Anderson*, 477 U.S. at 256-57. The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

To prevail on a motion for summary judgment, the non-moving party must show

"specific facts such that a reasonable jury could find in that party's favor, thereby establishing a genuine issue of fact for trial." *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 270 (3d Cir. 2007) (citing Fed. R. Civ. P. 56(e)). Although the non-moving party's evidence may be either direct or circumstantial, and "need not be as great as a preponderance, the evidence must be more than a scintilla." *Id*. (quoting *Hugh v. Butler Cnty. Family YMCA*, 418 F.3d 265, 267 (3d Cir. 2005)). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

B. State-Created Danger

Plaintiffs assert a claim for due process violations pursuant to 42 U.S.C. § 1983 ("Section 1983") under the Fourteenth Amendment against the School District and Coach Walkowiak. In order to state a claim under Section 1983, a plaintiff must show that the defendant, acting under color of state law, deprived him or her of a right secured by the Constitution or the laws of the United States. *Paratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). Although the general rule is that the state has no affirmative obligation to protect its citizens from the violent acts of private individuals, courts have recognized two (2) exceptions to this rule. *Morse v. Lower Merion Sch. District*, 132 F.3d 902, 907 (3d Cir. 1997) (citations omitted). The first is known as the "special relationship" exception, which allows a plaintiff to recover "when the state enters into a special relationship with a particular citizen . . . [and] fails, under sufficiently culpable circumstances, to protect the health and safety of the citizen to whom it owes an affirmative duty." *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1369 (3d Cir. 1992). The second is the "state-created danger" theory of liability, which Plaintiffs invoke here.

The state-created danger theory has its origins in the United States Supreme Court's

decision in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), wherein the Court stated that "while the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201. The Third Circuit Court of Appeals adopted the "state-created danger" theory in *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996), concluding that when the harm incurred is a direct result of state action, liability may attach under Section 1983. In *Kneipp*, the Third Circuit adopted a four (4) part test, which was later modified in *Bright v. Westmoreland County*, 443 F.3d 276 (3d Cir. 2006). This test holds a state actor liable if: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted with a degree of culpability that shocks the conscience; (3) there existed some relationship between the state and the plaintiff such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all. *Bright*, 443 F.3d at 281. Notwithstanding having adopted this state-created danger test, the Third Circuit has acknowledged the difficulty in establishing such a claim against school officials, and explicitly noted an "aware[ness] of only one such instance in which a state-created danger case against school officials survived summary judgment." *Sanford v. Stiles*, 456 F.3d 298, 312 (3d Cir. 2006). With this in mind, I turn now to Plaintiffs' claim to see if sufficient evidence has been adduced to survive summary judgment.

1. Foreseeable and Fairly Direct Harm

The first element of a state-created danger claim requires Plaintiffs to establish that the harm alleged was "foreseeable and fairly direct." *Phillips v. Cty. of Allegheny*, 515 F.3d

224, 235 (3d Cir. 2008). More specifically, this "require[s] a plaintiff to allege an awareness on the part of the state actors that rises to [the] level of actual knowledge or an awareness of risk that is sufficiently concrete to put the actors on notice of the harm." *Id.* at 238.

At the motion to dismiss stage, I held that Plaintiffs adequately pled this element with the following allegations:

> 67. At all times pertinent hereto, Defendants knew, or should have known, that traumatic brain injuries, including but not limited to concussions, was a common hazard associated with football activities.
>
> 68. At all times pertinent hereto, Defendants knew, or should have known, that traumatic brain injuries, including but not limited to concussions, can occur from violent hits during football games and practices.

(Doc. 27, Am. Compl. ¶¶ 67-68; *see also* Doc. 33, at 7-8.) Now at the summary judgment stage, I find that Plaintiffs have presented evidence sufficient for a reasonable juror to conclude that these allegations are true. First, Coach Walkowiak testified that he was aware of the hazards and symptoms of concussions prior to Sheldon's injury when the 2011 football season began:

> Q. What is a concussion?
> A. A concussion is a brain injury to a player or person that promotes various symptoms–signs and symptoms.
> Q. Did you know that before you began the 2011 season?
> A. We were definitely aware of concussions before the season.
> Q. Were you aware of the symptoms of a concussion before the season?
> A. Yes.

(Doc. 73-3, Pl. Ex. E, Christopher Walkowiak Dep. Tr., at 10:21-11:6.) He testified that he took a "very good course" on concussion management protocol and training at DeSales University to help with his job as head football coach, which instructed on, *inter alia*, the signs and symptoms of concussions and when to send an injured player out of the game. (*Id.* at 10:1-13:13.) He also testified about his responsibility as a coach to be "vigilant" to see if players are exhibiting signs of a concussion and his responsibility to err on the side of caution and take them out of play if they are. (*Id.* at 14:16-25.) He further testified on the ability of hits sustained by players to result in concussions. (*Id.* at 15:23-17:19.)

Additionally, Plaintiffs have presented evidence from which a reasonable juror could conclude that Coach Walkowiak was aware of Sheldon's first hit and the injury that resulted therefrom. For example, Ryan McGrath, the junior high football coach at the time, testified as follows:

> Q. Generally what do you recall?
> A. I just know he got hit hard like a play or two later again.
> Q. You say again. ***Did–Coach Walkowiak told you that both of the hits were hard***?
> Q. ***Yes***.

(Doc. 73-3, Pl. Ex. C, Ryan McGrath Dep. Tr., at 54:14-19 (emphasis added).) There is also evidence of an e-mail from Coach Walkowiak to Carol Boyce, the Superintendent of the School District at the time, where he references a "first play" where Sheldon was hit, which Coach Walkowiak characterized as a "stinger":

> 1) The ***first play*** where Sheldon complained of a shoulder injury was not a substantial hit that would merit a big hit or substantial hit tag . . . Sheldon was asked if he was alright, because he was moving his shoulder like if he had discomfort after the play when the team was in the huddle . . .
>
> 2) At the meeting, I said, ***in my opinion, it would have been something like a stinger***. Because he was able to move the shoulder, just seemed to have some discomfort.

(Doc. 73-3, Pl. Ex. D, 1/18/12 E-mail from Walkowiak to Boyce, at 597-98 (emphases added).) Coach Walkowiak also testified that he understood at the time of the incident that a stinger can be a symptom of a concussion:

> Q. And a stinger can be a symptom of a concussion?
> A. A stinger would be, yes, a symptom of it, depending where you were hit.
> Q. And you understood that in 2011, right?
> A. Yes.

(Doc. 73-3, Pl. Ex. E, Chris Walkowiak Dep. Tr., at 170:7-12.) Collectively, these pieces of evidence are sufficient for a reasonable juror to conclude that Coach Walkowiak (1) knew that traumatic brain injuries, including concussions, were a common hazard to look out for in football; (2) admitted to others in 2011 that Sheldon suffered ***two*** hard hits; (3) admitted to others that the first hard hit appeared to be "something like a stinger"; (4) knew that a

stinger could be a symptom of a concussion; and (5) was aware of his responsibility to "err on the side of caution" and take injured players out of play. There is also evidence that after his awareness of this first "stinger" hit, he instructed Sheldon to continue playing in practice. (*See, e.g.*, Doc. 73-3, Pl. Ex. K, Alexander Miller Dep. Tr., at 40:13-17.) In light of this evidence, Plaintiffs have presented sufficient evidence from which a reasonable juror could conclude that Sheldon's injury was a "foreseeable and fairly direct" harm.

2. Degree of Culpability that Shocks the Conscience

The second element of Plaintiffs' state-created danger claim requires that Defendants acted with a degree of culpability that "shocks the conscience." *Sanford*, 456 F.3d at 304 (citation omitted). The "time in which the government actors had to respond to an incident is of particular significance." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 240 (3d Cir. 2008). In other words, there is an inverse relationship between the level of culpability required to shock the conscience and the time that the state actors had to deliberate, such that the "level of culpability required to shock the conscience increases as the time state actors have to deliberate decreases." *Sanford*, 456 F.3d at 309. For example, in a "hyperpressurized" environment, an intent to cause harm is usually required. *Id.* However, in cases where deliberation is possible and officials have the time to make "unhurried judgments," deliberate indifference is sufficient. *Id.* Moreover, in cases "involving something less urgent than a 'split-second' decision but more urgent than an 'unhurried judgment,'" the relevant inquiry is whether the state actor "consciously disregarded a great risk of harm," with the possibility that "actual knowledge of the risk may not be necessary where the risk is 'obvious.'" *Id.* Here, there is no indication that this was a "hyperpressurized" situation in which an intent to harm is required. Therefore, Plaintiffs need only adduce sufficient evidence to establish deliberate indifference. *Id.*

At the motion to dismiss stage, I held that Plaintiffs adequately alleged the second element of their claim with allegations that (1) Defendants "observ[ed] Sheldon getting hit on the field and subsequently exhibiting symptoms of a head injury"; (2) Defendants then

"instruct[ed] him to continue to practice"; and (3) Defendants "were or should have been aware of the risk of continuing to play football with a head injury." (Doc. 33, at 10.) Plaintiffs have presented sufficient evidence to support these allegations to survive summary judgment. First, as noted above, Plaintiffs presented evidence that Coach Walkowiak observed Sheldon get hit on the field and exhibit symptoms of a head injury through deposition testimony from both Ryan McGrath and Coach Walkowiak as well as an e-mail from Coach Walkowiak to Carol Boyce. (Doc. 73-3, Pl. Ex. C, Ryan McGrath Dep. Tr., at 54:14-19; Doc. 73-3, Pl. Ex. D, 1/18/12 Email from Walkowiak to Boyce, at 597-98; Doc. 73-3, Pl. Ex. E, Chris Walkowiak Dep. Tr., at 170:7-12.) Second, Plaintiffs presented evidence through the testimony of other players that after Sheldon's first hit, Coach Walkowiak instructed Sheldon to continue practicing. (*See, e.g.*, Doc. 73-3, Pl. Ex. K, Alexander Miller Dep. Tr., at 40:13-17.) Finally, as noted above in my analysis on the first element, Plaintiffs presented evidence showing that Defendants were aware or should have been aware of the risk of continuing to play football with a head injury through Coach Walkowiak's deposition testimony. (*See, e.g.*, Doc. 73-3, Pl. Ex. E, Christopher Walkowiak Dep. Tr., at 10:21-11:6.) Moreover, Defendants' athletic director, Andrew Remsing, testified that "it would be unacceptable for a coach to allow a player to continue practicing if that player exhibited signs of a concussion." (Doc. 73-3, Pl. Ex. I, Andrew Remsing Dep. Tr., at 34:3-7.) Defendants' athletic trainer, David Smith, provided similar testimony. (Doc. 73-3, Pl. Ex. J, David Smith Dep. Tr., at 26:5-14.) Collectively, these pieces of evidence are sufficient for a reasonable juror to conclude that Coach Walkowiak had an awareness of risk that was sufficiently concrete to put him on notice of the harm that could result from placing Sheldon back into practice after exhibiting signs of a concussion.

Although Defendants dispute that Coach Walkowiak characterized Sheldon's first hit as a "big hit" and that he was aware that Sheldon was experiencing symptoms of a concussion prior to the "second" hit, Plaintiffs have presented sufficient evidence to create a genuine issue as to whether Coach Walkowiak was aware of this first "big hit" and that

Sheldon was experiencing symptoms of a concussion. It is for a jury, not this Court, to assess the credibility of this evidence and resolve this factual dispute.

The facts presented here are similar to those presented in *Alt v. Shirey*, No. 11-468, 2012 WL 726579 (W.D. Pa. Feb. 7, 2012), *Report & Recommendation adopted*, 2012 WL 726593 (W.D. Pa. Mar. 1, 2012), which involved a high school football player who experienced a traumatic brain injury as a result of numerous collisions and being placed back into play on numerous occasions. In *Alt*, the court found that the "shock the conscience" element of the plaintiff's state-created danger claim could be satisfied if it could be proved that the plaintiff "sustained substantial hits to the head . . . in the open view of trainers and coaches," that "Defendants were then alerted to the fact that Plaintiff and other team members could sustain serious head injuries during the course of play," and that the plaintiff subsequently sustained a serious head injury. *Id.* at *12. If proved, the court held that these facts would show that the defendants were "deliberately indifferent, thereby establishing a level of culpability that was conscience-shocking." *Id.* Because Plaintiffs have presented sufficient evidence demonstrating very similar facts here–that Sheldon sustained substantial hits during practice in the open view of Coach Walkowiak, that Defendants were aware of the fact that the football team members could sustain serious head injuries during the course of play, and that Sheldon subsequently sustained a serious head injury–I find that a reasonable juror could conclude that this "shock the conscience" element has been satisfied.

3. Foreseeable Victim

To establish the third element of Plaintiffs' claim, they must prove that "a relationship between the state and [Sheldon] existed such that [Sheldon] was a foreseeable victim of the defendant's acts." *Sanford v. Stiles*, 456 F.3d 298, 304 (3d Cir. 2006). Defendants did not challenge this element at the motion to dismiss stage. (Doc. 33, at 10.) However, now at the summary judgment stage, although Defendants concede that a special relationship existed between Sheldon and the District in the educational context, they dispute that Sheldon was a "foreseeable victim" since Defendants acted properly and with due care.

(Doc. 60, at 10.) However, Plaintiffs have presented sufficient evidence from which a reasonable juror could disbelieve Defendants' assertion that they acted "properly and with due care." Accordingly, a reasonable juror could find that this element has been satisfied.

4. Affirmative Authority

The last element of Plaintiffs' claim requires showing that Defendants affirmatively used their authority in a way that created a danger to Sheldon or that rendered him more vulnerable to danger than had the state not acted at all. *Bright*, 443 F.3d at 281. Defendants argue that Plaintiffs failed to adduce sufficient evidence to establish affirmative conduct. In denying Defendants' motion to dismiss, I held that Plaintiffs' allegations that (1) following Sheldon's first hit, "the coaches told Sheldon to continue to play in the practice," (2) Coach Walkowiak "personally observed Sheldon's disoriented position yet acted in deliberate indifference to his health, safety and welfare by placing him back into practice," and (3) these "decisions by the coaching staff increased the severity of [Sheldon's] signs and symptoms, and/or exposed him to future injuries," were sufficient to establish the final element of Plaintiffs' claim. (Doc. 33, at 11.) Because Plaintiffs have presented sufficient evidence from which a reasonable juror could conclude that these allegations are true, summary judgment on this element will be denied.

Plaintiffs presented the deposition testimony of several players who testified that Coach Walkowiak told Sheldon to continue practicing even after being made aware of his first hit. Although some players testified that they only recalled one (1) hit to Sheldon as opposed to two (2), (*see, e.g.*, Doc. 58-4, Def. Ex. R, Tanner Gutekunst Dep. Tr., at 36:19-22), this testimony creates a factual dispute for the jury to resolve–it is up to the jury to decide which witnesses are credible, not the Court. Plaintiffs presented sufficient evidence from which a reasonable juror could conclude that Sheldon experienced two (2) hard hits, and that after the first hit, Coach Walkowiak instructed him to return to practice. This is sufficient to establish an affirmative act. *See, e.g.*, *Alt*, 2012 WL 726579, at *11 (holding that an "affirmative" act was properly alleged where the plaintiff alleged that the defendants ordered the plaintiff back onto the field after sustaining an obvious head injury). Based on

the evidence in the record, a reasonable juror could believe that Coach Walkowiak ordered Sheldon back onto the field after his first hit, which would constitute an affirmative act, and that this act rendered Sheldon more vulnerable to injury than had the state not acted at all. Accordingly, Plaintiffs have adduced sufficient evidence to establish a prima facie case of their state-created danger claim.

B. Qualified Immunity

Defendants argue that even if Plaintiffs can establish their state-created danger claim, Coach Walkowiak is entitled to qualified immunity. State actors sued in their individual capacity under Section 1983 are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When a qualified immunity defense is asserted, a court must determine (1) whether the facts alleged by the plaintiff make out a violation of a constitutional right, and (2) whether that right was clearly established at the time of the injury. *Yarris v. Cty. of Del.*, 465 F.3d 129, 140-41 (3d Cir. 2006) (citation omitted). Courts may exercise their discretion in deciding which inquiry to address first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Because I find the issue of clearly established law to be dispositive, I confine my analysis to that issue.

A government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right. *Hinterberger v. Iroquois Sch. Dist.*, 548 F. App'x 50, 52 (3d Cir. 2013) (citing *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011)). In determining whether a right has been clearly established, the court must define the right with the appropriate level of specificity. *Sharp v. Johnson*, 669 F.3d 144, 159 (3d Cir. 2012). The Supreme Court has emphasized that "we do not require a case directly on point before concluding that the law is clearly established, but existing precedent must have placed the statutory or constitutional question beyond debate." *Stanton v. Sims*, 134 S.Ct. 3, 5 (2013) (citation and internal quotation marks omitted).

The viability of a state-created danger claim is well-settled. *Hinterberger*, 548 F. App'x

at 52. However, no published opinion of the Third Circuit has found that a state-created danger arises when coaches fail to take certain precautions in athletic practice or in any analogous situation. *Id.* at 53. In *Hinterberger v. Iroquois School District*, a cheerleader suffered a severe closed head injury after attempting the "twist down cradle," a new stunt introduced by her coach at practice in a room without adequate matting. In analyzing whether the coach was entitled to qualified immunity, the Third Circuit explained that although district court opinions "may be relevant to the determination of when a right was clearly established for qualified immunity analysis," they "do not establish the law of the circuit, and are not even binding on other district courts within the district." *Id.* Noting that the district court below relied on district court opinions to find that a right was clearly established, the Third Circuit reversed, and concluded that those cases alone did not place the defendant coach on notice that her actions amounted to a constitutional violation. *Id.* at 53-54. The Third Circuit emphasized that cases from other courts of appeals also did not support the plaintiff's claim that her alleged constitutional right was clearly established, and cited to various cases that disagreed as to the applicability of the state-created danger doctrine in the context of schools. *Id.* at 54 (citing cases). *See, e.g.*, *Priester v. Lowndes Cty.*, 354 F.3d 414, 422 (5th Cir. 2004) (noting that the Fifth Circuit had not adopted a theory of state-created danger and otherwise found no liability for injury sustained to student during football practice). Fully recognizing the tragic nature of the plaintiff's injury and "the fact that more might have been done to prevent it," the Third Circuit concluded that the alleged constitutional right was not clearly established at the time of her accident. *Hinterberger*, 548 F. App'x at 54 (citation and internal quotation marks omitted). The critical portion of the Third Circuit's analysis in reversing the district court and concluding that the defendant coach was entitled to qualified immunity from suit is directly applicable here:

> [Plaintiff] does not cite, and we have not found, any precedential circuit court decisions finding a state-created danger in the context of a school athletic practice.
>
> We thus conclude that [Plaintiff's] alleged right was not clearly established at the time of her accident.

Id. The Third Circuit further noted that "cases decided in this Circuit after Hinterberger's accident have not been models of clarity as to whether a state-created danger claim can be successfully maintained in the context of school sports." *Id.* at 54 n.2 (citing cases).

The analysis in *Hinterberger* is instructive. Here, Plaintiffs allege that the relevant constitutional right is "the student's right to freedom from school officials' deliberate indifference to, or affirmative acts that increase the danger of, serious injury from unjustified invasions of bodily integrity perpetrated by third parties in the school setting." (Doc. 73. at 36.) In support of this constitutional right, Plaintiffs rely on an opinion from the Eastern District of Pennsylvania, *Sciotto v. Marple Newtown Sch. Dist.*, 81 F. Supp. 2d 559, 568 (E.D. Pa. 1999). However, as explained by the Third Circuit in *Hinterberger*, which was decided in 2013, over a decade after *Sciotto* was decided, this right was not clearly established. *Hinterberger*, 548 F. App'x at 53-54. In fact, the Third Circuit cited *Sciottio* in their opinion, yet still found that the right was not clearly established. *Id.* Because Sheldon's alleged right was not clearly established at the time of his injury, Coach Walkowiak is entitled to qualified immunity. Judgment will be entered in favor of Coach Walkowiak on this claim.

C. Municipal Liability

Municipal employers, such as school districts, cannot be held vicariously liable for the constitutional violations committed by their employees. *Monell v. N.Y. City Dep't of Soc. Servs.*, 463 U.S. 658, 694 (1978). Rather, for liability to attach, Plaintiffs must show that the violation of their rights was caused by a policy, custom, or practice of the municipality. *Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996). Plaintiffs must be specific in identifying "exactly what the custom or policy was." *McTernan v. City of New York*, 564 F.3d 636, 658 (3d Cir. 2009). A municipality may be held liable for a substantive due process violation even when none of its individual employees are ultimately found liable. *Sanford*, 456 F.3d at 314. Here, Plaintiffs assert that the School District is liable based both on municipal policies and customs that caused Sheldon's injuries.

A municipal "policy" is made "when a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." *Beck*, 89 F.3d at 971. A policy may also be established by "a municipality's failure to train its employees." *Moeck v. Pleasant Valley Sch. Dist.*, 983 F. Supp. 2d 516, 524 (M.D. Pa. 2013) (citing *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989)). To assert liability under this "failure to train" theory, Plaintiffs must show "that the failure amounts to 'deliberate indifference' to the rights of persons with whom those employees will come into contact" and that the "deficiency in training must have actually caused the constitutional violation." *Thomas v. Cumberland Cty.*, 749 f.3d 217, 222 (3d Cir. 2014). This deliberate indifference standard is "a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* at 223. Under normal circumstances, "a pattern of similar constitutional violations by untrained employees is necessary to demonstrate deliberate indifference for purposes of failure to train." *Id.* However, under extraordinary circumstances, a single incident can implicate municipal liability where "the need for training can be said to be so obvious, that failure to do so could properly be characterized as deliberate indifference to constitutional rights even without a pattern of constitutional violations." *Id.*

A municipal "custom" exists when, though not authorized by law, "such practices of state officials [are] so permanent and well-settled as to virtually constitute law." *Beck*, 89 F.3d at 971 (citation and internal quotation marks omitted). In other words, a custom is less official than a policy, and may consist of "a course of conduct so permanent and widespread that it has the force of law." *Alt*, 2012 WL 726579, at *16 (citations omitted). To hold a municipality liable for its custom or practice, Plaintiffs must demonstrate that (1) the decision-maker had notice that a constitutional violation could occur; (2) the decision-maker acted with deliberate indifference to this risk; and (3) there is a causal connection between the custom or policy and the violation of the constitutional right. *Berg*, 219 F.3d at 276.

At the motion to dismiss stage, I held that Plaintiffs adequately alleged a policy or custom pursuant to which Defendants could be held liable based on (1) a policy or custom

of failing to medically clear student athletes; (2) a policy or custom of failing to enforce and/or enact proper and adequate policies for head injuries; and (3) a failure to train the coaches on proper procedures and a safety protocol relating to head injuries. (Doc. 33, at 15.) However, to survive a motion for summary judgment, Plaintiffs must go beyond the liberal pleading standards and show, through some record evidence, that these policies or customs existed and caused Sheldon's injury.

Here, there is no record evidence to support any formal policy pursuant to which the School District may be held liable. Specifically, there is no evidence that "any final policy-making official issued any type of official proclamation, policy, or edict whereby the School District formally endorsed" a refusal to medically clear student athletes or to deliberately ignore head injuries. *Dorley v. South Fayette Twp. Sch. Dist.*, 129 F. Supp. 3d 220, 240-41 (W.D. Pa. 2015). Nor do Plaintiffs identify who made the policy that they claim caused the violation of Sheldon's rights or submit any evidence to support an allegation that the School District's final policy-makers acquiesced in Coach Walkowiak's actions. *Id.*

Rather, the record evidence shows that at the time of Sheldon's incident, Defendants had a comprehensive policy for evaluating and medically clearing student athletes following an injury. Defendants point to their 2011-12 Athletic Handbook and the District-adopted OAA Concussion Policies, both of which were made known to the coaches at the time of Sheldon's incident. (*See, e.g.*, Doc. 73-3, Pl. Ex. E, Chris Walkowiak Dep. Tr., at 23:16-25:20.) The 2011-12 Athletic Handbook provides that it is Defendants' policy to "exclude any contestant who . . . has suffered illness or injury until that contestant is pronounced physically fit by the school physician." (Doc. 57-1, Def. Ex. A, at 4.) It also provides that it is Defendants' policy for the head athletic coach to complete or have the athletic trainer complete accident report forms, submit them to the school nurse, and to inform the athletic trainer of any injuries which occur during practices or games. (*Id.* at 9.) The coaches "***must*** follow the recommendation of the Athletic Trainer in all matters regarding the athlete's participation in practices and games." (*Id.* (emphasis added).)

The Handbook also contains a policy dedicated to the proper handling of injured

players, which includes procedures (1) requiring that an injured athlete never be moved until the extent of the of the injury is known and (2) prohibiting student-athletes from returning to practice or competition without being cleared by the athletic trainer first:

> - **Never move an injured athlete** until the extent of the injury is known. Keep the athlete still, comfortable, and reassured. Call the Athletic Trainer immediately, if he is unavailable, contact the Athletic Director. . . .
> - When the Athletic Trainer is available he/she will make the initial assessment of the injury and recommend further action.
> - Call the parents and inform them of the suspected extent of the injury and the recommendations of the Athletic Trainer.
> - If it is determined that the athlete needs treatment, he/she may go to the physician of his/her choice.
> - ***The coach and trainer must complete an Injury Report Form as soon as possible*** to file with the office.
> . . .
> - ***Student-athletes may not return to practice or competition without being cleared by the Athletic Trainer. Without this clearance, the athlete may not participate***. While coaches can discuss injury and playing status with the trainer and physician(s), he/she shall not override a firm recommendation by the trainer and/or physician that a student not participate. ***Nor shall coaches seek to persuade players to play against trainer's/physician's orders***.

(*Id.* at 20-21 (last three emphases added).)

Plaintiffs argue that the Handbook was inadequate because it did not specifically address concussions or head injuries, thereby causing Sheldon's injury. However, this argument is misguided. First, this policy of medically clearing athletes is comprehensive enough to apply to student athletes who suffered concussions or head injuries. There is no explanation as to why a policy would need to specifically address concussions or head injuries or what that policy would need to entail, *i.e.*, what types of concussion-specific policies would be needed that were not already captured by the policy relating to other injuries. Second, even if this failure to specifically address concussions deems Defendants' policy inadequate, the fact that a policy is ultimately proved inadequate does not demonstrate deliberate indifference or that the School District was operating according to any official policy designed to ignore concussions and force injured players to continue playing. For example, in *Chambers v. School District of Philadelphia Board of Education*,

587 F.3d 176 (3d Cir. 2009), the plaintiff relied on deposition testimony from the school district's Director of Special Education Services, who had testified about his "great concern" over certain services not being provided to the disabled plaintiff and that he "made numerous calls over numerous time periods and . . . was very upset that this had not been provided." *Id.* at 193-94 n.23 (3d Cir. 2009) (affirming summary judgment for the defendant school district because the plaintiffs' reliance on deposition testimony regarding the inadequacies of educational services failed to establish deliberate indifference for municipal liability claim). The Third Circuit explained that the plaintiffs' "reliance on this testimony to support their contention that the School District was deliberately indifferent . . . is misplaced" because "the fact that the School District's attempts ultimately proved inadequate on several fronts does not demonstrate that the School District was operating according to any official policy designed to derail the implementation of that plan or otherwise deny [the plaintiff] educational benefits to which she was statutorily entitled." *Id.* at 194 n.23. Accordingly, the Third Circuit held that the municipality could not be held liable and affirmed the district order granting summary judgment in favor of the school district.

Plaintiffs rely on *Alt v. Shirey*, No. 11-468, 2012 WL 726579 (W.D. Pa. Feb. 7, 2012), *Report & Recommendation adopted*, 2012 WL 726593 (W.D. Pa. Mar. 1, 2012), where the court found that the plaintiff stated a claim for municipal liability based on the defendant's failure to have procedures in place to recognize traumatic head injuries and provide proper education on head injuries. However, the court in *Alt* did not find a plausible claim for municipal liability based on a mere failure to have a written concussion policy in place, as Plaintiffs allege here. Rather, in *Alt*, the court found a plausible claim for municipal liability based on a "custom or practice of ***ignoring*** the consequences of head injuries," after the plaintiff was repeatedly injured at numerous games in open view of coaches and trainers, and "ordering players back onto the field after sustaining blows to the head." 2012 WL 726579, at *16. This custom was established with allegations of a pattern whereby the

defendants repeatedly ignored injuries sustained by the plaintiff at numerous games:

> Plaintiff avers that [Defendants'] failure to recognize and educate their student athletes concerning the causes, symptoms and dangers of traumatic head injuries was a common custom or practice that led to the violation of Plaintiff's constitutional rights. The factual allegations indicate that ***Plaintiff's injuries at all three games occurred in open view of coaches*** and trainers, ***and that at no time did the District address Plaintiff's injuries or the dangers of head injuries in general***. Consequently, Plaintiff's factual allegations support his theory of municipal liability that ***the District had a custom or practice of ignoring the consequences of head injuries by ordering players back onto the field after sustaining blows to the head***.

Id. (emphases added).

However, unlike in *Alt*, Plaintiffs have submitted no evidence of other injuries or any players repeatedly getting injured "in open view of coaches and trainers," yet being ordered "back onto the field after sustaining blows to the head." Unlike in *Alt*, there is no evidence of a pattern whereby Defendants repeatedly ignored head injuries. Plaintiffs cannot point to any evidence of any "practices . . . so permanent and well settled as to virtually constitute law." *Berg*, 219 F.3d at 275 (citation and internal quotation marks omitted); *see also Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 252 (3d Cir. 1999) (rejecting a Section 1983 claim against a municipality where the plaintiff "provided no evidence that [the school district's] policy is to ignore the responsibilities imposed by IDEA. Rather the evidence presented was that [the school district] failed to fulfill its responsibilities."). This case is more like *Chambers*, where the Third Circuit explained that "[w]hile it is certainly true that the School District in this case too frequently failed to fulfill commitments it had made with respect to [the plaintiff's] education, the record does not support a finding that the School District's policy is to ***ignore*** the responsibilities imposed by the IDEA." 587 F.3d at 194 (emphasis added). Similarly, here, while it is certainly true that the School District failed to fulfill its commitment to appropriately attend to Sheldon after he was injured during practice, "the record does not support a finding that the School District's policy is to ***ignore***" its responsibilities regarding injured student athletes. *Chambers*, 587 F.3d at 194. There was not a pattern of injuries that the School District continually ignored, like there was in *Alt*. To the contrary, the evidence shows that shortly after Sheldon's injuries in November 2011,

Defendants began discussing how to address concussions and what protocols should be put in place. (*See, e.g.*, Doc. 73-4, Pl. Ex. W (January 2012 e-mails discussing an upcoming meeting about Sheldon's incident, the injury procedures in place, and suggestions for protocol and program improvement); *see also* Doc. 73-4, Pl. Ex. X (January 2012 e-mails discussing written policies dealing with concussions from other schools).)

Plaintiffs' reliance on a failure to train theory to establish municipal liability is equally unavailing. Specifically, Plaintiffs argue that the School District should be held liable based on their failure to train coaches on safety protocol and indicators of a concussion or other head injury. Although the Supreme Court has recognized that in limited circumstances, a municipality may be held liable under a failure to train theory, the Court also explained that a municipality's "culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 131 S.Ct. 1350, 1359 (2011) (citation and internal quotation marks omitted). Recognizing the difficulty in satisfying such a burden, the Supreme Court has cautioned that any "less stringent standard of fault" under a failure-to-train theory "would result in a de facto *respondeat superior* liability on municipalities." *Id.*

In the context of a failure to train theory, the Third Circuit has consistently held that "a ***pattern of similar constitutional violations*** by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Hinterberger*, 898 F. Supp. 2d at 808 (emphasis added); *Berg*, 219 F.3d at 276 ("Failure to adequately screen or train municipal employees can ordinarily be considered deliberate indifference only where the failure has caused a pattern of violations."); *see also Connick*, 131 S.Ct. at 1360 ("Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights."). Here, a review of the record yields no evidence of a pattern of similar constitutional violations suffered by members of the football team, or any other student-athletes getting injured other than Sheldon that would put the School District on notice of any purported failure to train. *See Hinterberger*, 898 F. Supp. 2d at 808 (finding no municipal liability for this same reason). Plaintiffs point to no evidence in the

record to show that there was a history of the School District ***ignoring*** the risk of concussions or a pattern of sending injured players back into practice. There is no evidence of any complaints prior to the date of Sheldon's injury concerning unsafe practices regarding head injuries or instructing injured players to continue playing. *See, e.g.*, *id.* at 806 (holding that the school district's liability could not be established based on an allegedly deliberately indifferent custom or policy by the School Board because the President of the School Board denied any knowledge of complaints, prior to the date of the plaintiff's injury, concerning unsafe practices by the high school cheerleading squad or the coach in particular).

Nor does the record support the type of "single-incident" liability "hypothesized" by the Supreme Court in *City of Canton, Ohio v. Harris*, 109 S.Ct. 1197 (1989) ("*Canton*"). *Connick v. Thompson*, 563 U.S. 51 (2011). In *Connick v. Thompson*, the Supreme Court explained that the Court's decision in *Canton* "left open the possibility that, in a narrow range of circumstances, a pattern of similar violations might not be necessary to show deliberate indifference." *Connick*, 563 U.S. at 63. The Court posed the hypothetical example of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force. *Id.* Given the known frequency with which police attempt to arrest fleeing felons and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights, the Court theorized that a city's decision not to train the officers about constitutional limits on the use of deadly force could reflect the city's deliberate indifference to the "highly predictable consequence," namely, violations of constitutional rights. *Id.*

Here, however, the facts, even when construed most favorably to Plaintiffs, do not place this case within the narrow range of situations where "single-incident liability" could reasonably be found. In *Hinterberger*, the court found that cheerleading coaches were not akin to the hypothetical untrained police officer who, armed with a deadly weapon, must foreseeably make split-second decisions regarding the limits of acceptable force and who presumably lack the means to obtain the necessary training on his own. 898 F. Supp. 2d at 809. Because the foreseeability of constitutional harm to the cheerleading squad

members was not so patently obvious as that described in *Canton*, the court found "no basis upon which the record could support a finding of 'single-incident' liability." *Id.* Similarly, here, the foreseeability of constitutional harm to the football team members was not so patently obvious, particularly given the absence of the need to make split-second decisions like in the hypothetical posed in *Canton*, and given the policies and procedures already in place and outlined in the Athletic Handbook requiring that injured players be cleared by a medical professional before returning to play. Accordingly, Plaintiffs have failed to adduce sufficient evidence for their municipal liability claim.

However, even assuming Plaintiffs have established a policy or custom, they must also demonstrate that the School District, through its deliberate conduct, was the "moving force" behind the injury alleged. *Berg*, 219 F.3d at 276. Where the policy does not facially violate the Constitution, this causation element can only be established by demonstrating that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences. *Id. "*A showing of simple or even heightened negligence will not suffice.'" *Id.* Here, Plaintiffs have failed to establish this required causal link.

In *Hinterberger v. Iroquois School District*, 898 F. Supp. 2d 772, 805 (W.D. Pa. 2012), *rev'd on other grounds*, 548 F. App'x 50 (3d Cir. 2013), a cheerleader was injured after attempting a new stunt called the "twist down cradle." While attempting the stunt, the plaintiff flew over and outside the perimeter of her base and her spotters, striking her left hip, left shoulder, and head on the room floor, suffering a severe closed head injury. *Id.* at 779. At the time that the plaintiff struck the floor, there was no matting in place. *Id.* In raising a claim against the School District, the plaintiff challenged the specific policy decision of the High School Athletic Director's refusal to allocate funds for better matting in the room or alternatively, to provide greater access to the high school gym. *Id.* at 805. In rejecting the municipality claim, the court explained that the alleged policy decision could not be said to be the "moving force" behind the plaintiff's injury. Rather, the cause of the plaintiff's injury was the athletic director's affirmative conduct in introducing the squad to the new stunt in an unsuitable environment. "Although the [athletic director's] refusal to supply higher qualify

matting may have been a factor that ultimately contributed to Plaintiff's injury, it was not the 'moving force' behind Plaintiff's injury because ultimately, it was [the coach], not [the athletic director], who made the determination to proceed with the introduction of the stunt under dangerous conditions." *Id.* at 805.

Similarly, here, the School District's failure to implement a policy that specifically addressed concussions and head injuries, and the School District's purported failure to train their employees in addressing concussions and head injuries, cannot be said to be the "moving force" behind Sheldon's injury. Although the lack of an adequate policy may have "ultimately contributed" to Sheldon's injury, it was not the "moving force" behind Plaintiff's injury because ultimately, it was Coach Walkowiak, not the School District or Athletic Director, who made the determination to send Sheldon back into practice after his first hit. *Id.* Plaintiffs have also failed to establish causation because even if the School District did have a concussion policy or protocol in place, it likely would not have had any effect on the situation because Plaintiffs have pointed to no evidence that Coach Walkowiak actually believed that Sheldon was suffering from concussive symptoms. Accordingly, Plaintiffs have failed to adduce sufficient evidence for their municipal liability claim. Judgment will be entered in favor of the School District.

III. Conclusion

Unfortunately, the tragic story of Sheldon's injury is not an anomaly. In 2008, Ryne Dougherty, a high-school linebacker, sustained a concussion during football practice. Michael S. Schmidt, *School Set to Discuss Concussion Guidelines*, N.Y. Times, Oct. 22, 2008, at B17. After a normal CT scan and sitting out for the required period, he returned to the field, only to collapse and suffer a brain hemorrhage, resulting in his death. Examples of other young football players who have suffered serious injury after sustaining a concussion include Zackery Lystedt, a middle-school student who, in 2006, suffered permanent brain damage after sustaining a concussion and an additional hit in the same game, and Zachary Frith, a high-school freshman who, in 2005, also suffered permanent brain damage after sustaining a concussion during a football game and then staying in the

game. I do not take these stories lightly. However, as a matter of law, I cannot side-step the well-established doctrines of qualified immunity and municipal liability. Although it can be said that the School District and Coach Walkowiak could have acted differently and done more to prevent Sheldon's head injuries, I cannot say that their conduct rises to the level of constitutional violations that make them liable in a court of law.

Accordingly, for the above stated reasons, Defendants' Motion for Summary Judgment will be granted. An appropriate order follows.

June 2, 2016
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that all counsel listed immediately below on this Certificate of Service are Filing Users of the Third Circuit's CM/ECF system, and this document is being served electronically on them by the Notice of Docket Activity:

Robin B. Snyder
Thomas A. Specht

Dated: November 14, 2016

/s/ Howard J. Bashman
Howard J. Bashman