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

REPLY BRIEF FOR APPELLANTS

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Counsel for plaintiffs/appellants

Robert J. Mongeluzzi
Larry Bendesky
Robert W. Zimmerman
Saltz, Mongeluzzi, Barrett & Bendesky, P.C.
1650 Market Street, 52nd Floor
Philadelphia, PA 19103
(215) 496–8282

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I. INTRODUCTION

Considering that they prevailed in the district court, the Brief for Defendants/Appellees Christopher Walkowiak and Palmerton Area School District devotes an inordinate amount of emphasis and space (35 out of 58 pages) to seeking the reversal of the district court's holding that plaintiffs have successfully 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.

If anything, defendants' approach on appeal only serves to underscore the weakness of the grounds on which the district court actually relied in entering summary judgment in their favor. In any event, as demonstrated herein, the evidence in the summary judgment record, when viewed as it must be in the light most favorable to plaintiffs, more than adequately supports the district court's holding that a reasonable jury could find a federal constitutional violation by coach Walkowiak under the state–created danger doctrine. Judge Caputo's summary judgment opinion is replete with cites to the factual record in support of the district court's ruling in this regard.

On the issue of qualified immunity, the Brief for Defendants/Appellees relies heavily on this Court's decision in *Spady* v. *Bethlehem Area Sch. Dist.*, 800 F.3d 633 (3d Cir. 2015). That decision — involving a student's death from dry drowning after the student swallowed a small amount of water in swim class — is entirely distinguishable from this case, both because the cause of injury was extraordinarily rare (in contrast to football concussions) and because the swim teacher, unlike in this case, did not observe that the student was helpless to protect from injury but then nevertheless directed the student to continue swimming, which thereafter inflicted a second injury of far greater severity giving rise to the suit. But don't merely take our word for *Spady*'s inapplicability. When the district court granted summary judgment in favor of coach Walkowiak in June 2016 based on qualified immunity, Judge Caputo's 25–page opinion did not cite to or rely on *Spady* even once, even though this Court's ruling in *Spady* had issued more than nine months earlier.

Revealingly, the Brief for Defendants/Appellees refuses to grapple seriously with this Court's recent decision in *L.R.* v. *School Dist. of Phila.*, 836 F.3d 235 (3d Cir. 2016), which the Brief for Appellants demonstrated compels the reversal of the district court's entry of summary judgment

based on qualified immunity in favor of coach Walkowiak. Defendants' argument that plaintiffs have waived any ability to rely on *L.R.* (an argument that is itself waived because it is contained entirely in a footnote) is unsustainable, given that this Court's ruling in *L.R.* did not issue until after the district court ruled in this case, and in *L.R.* itself this Court employed its own description of the clearly established right at issue, rejecting the opposing parties' competing formulations of that right.

Lastly, on the issue of plaintiffs' municipal liability claim against defendant Palmerton Area School District, the Brief for Defendants/ Appellees merely echoes the grounds for summary judgment on which the district court relied. As demonstrated in the opening Brief for Appellants, when the evidence before the district court is viewed in the light most favorable to plaintiffs, that evidence would allow a reasonable jury to find Palmerton Area School District liable under a deliberate indifference theory given the school district's failure to have in place a concussion–related policy as of November 2011. In addition, as the Brief for Appellants demonstrated, a reasonable jury could find the school district liable under a both a failure to train theory and a "single–incident" theory of liability because the risk of harm to athletes was "so patently obvious." Finally, the

Brief for Appellants established that the absence of adequate concussion–related policies was the "moving force" behind the permanent, devastating brain damage injuries that Sheldon Mann sustained. For all of these reasons, the district court's entry of summary judgment in favor of Palmerton Area School District should also be reversed.

II. ARGUMENT IN REPLY

A. Viewing The Evidence In The Light Most Favorable To Plaintiffs, The District Court Did Not Err In Holding That A Reasonable Jury Could Find That Coach Walkowiak Violated Sheldon Mann's Federal Due Process Right To Bodily Integrity

In 35 pages of text — 23 pages devoted to summarizing the conflicting evidence (a summary that relegates the evidence supporting plaintiffs' claims to the very end) and 12 pages of associated legal argument — the Brief for Defendants/Appellees devotes the vast majority of its focus to attempting to overturn the district court's holding that a reasonable jury could find, viewing the evidence in the light most favorable to plaintiffs, that coach Walkowiak violated Sheldon Mann's federal due process right to bodily integrity.

Defendants' brief challenges two specific aspects of the district court's ruling: (1) that a reasonable jury could find that coach Walkowiak's degree of culpability shocked the conscience; and (2) that a reasonable jury could find that coach Walkowiak affirmatively exercised his authority in a manner that created the danger or rendered Sheldon Mann more vulnerable to the danger than had coach Walkowiak refrained from acting. For the reasons explained below, the district court's ruling in both of these respects was proper, as Judge Caputo's own thorough citations to the summary judgment record in his opinion confirm.

1. The district court properly ruled that the evidence permitted a jury to find that coach Walkowiak's degree of culpability shocked the conscience

As detailed in plaintiffs' opening Brief for Appellants, 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 as a "scout" team defender 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.

The district court, at pages 9 through 11 of its summary judgment opinion (App.12a–14a), thoroughly discussed the evidence in the summary judgment record that would enable a reasonable jury to conclude that coach Walkowiak acted with a degree of culpability that shocked the

conscience. In a lengthy paragraph beginning at the bottom of page 9 of his summary judgment opinion and extending almost through the end of page 10 (App.12a–13a), Judge Caputo describes the evidence contained in the summary judgment record — citing directly to the factual record before him seven separate times — before concluding:

> 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.

App.13a. Indeed, even the unnecessarily lengthy factual recitation contained in the Brief for Defendants/Appellees finally gets around to mentioning in cursory fashion the evidence supporting the district court's conclusion that a reasonable jury could conclude that coach Walkowiak's conduct shocked the conscience at pages 26 through 28, at the very end of that brief's Statement of Facts.

It is repugnant for the Brief for Defendants/Appellees to suggest that coach Walkowiak could knowingly and intentionally order a seriously injured student athlete back onto the practice gridiron where the student is helpless to avoid being the victim of a far more serious, permanent, and injurious head injury and yet not thereby have engaged in conduct that

shocks the conscience. The defendants' position on this issue is predicated on denying and overlooking the evidence of record, on which the district court relied, that satisfies the "shocks the conscience" test when viewed in the light most favorable to plaintiffs, as it must be. The district court's ruling in this regard is fully supported by the record, and therefore no basis exists for this Court to overturn the district court's ruling on the issue to afford coach Walkowiak an alternate basis for affirmance.

2. The district court also properly ruled that the evidence permitted a jury to find that coach Walkowiak affirmatively exercised his authority in a manner that created the danger or rendered Sheldon Mann more vulnerable to the danger than had coach Walkowiak refrained from acting

Defendants next challenge the district court's ruling 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.

The evidence in the summary judgment record, viewed in the light most favorable to plaintiffs, establishes that Sheldon Mann stopped practicing following the first major hit that he sustained. App.1478a–82a. Thereafter, he was stumbling, wobbly, dizzy, and dazed, exhibiting the signs of disorientation that are the classic symptoms of a concussion–related injury. App.1480a–82a. After observing Sheldon Mann in that helpless state, the evidence of record establishes that coach Walkowiak ordered Sheldon to resume practicing, at great personal risk to Sheldon, which risk sadly was realized when Sheldon thereafter sustained a second major hit resulting in the permanent, debilitating injuries that give rise to this suit. App.1478a, 1480a–81a.

As Judge Caputo's summary judgment opinion correctly concludes on this subject, "[b]ased 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." App.15a–16a.

Once again, the district court's ruling in this regard is fully supported by the record, and therefore no basis exists for this Court to overturn the

district court's conclusion to afford coach Walkowiak an alternate basis for affirmance.

B. 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. This Court's recent ruling in *L.R.* v. *School Dist. of Phila.*, 836 F.3d 235 (3d Cir. 2016), dictates reversal on this issue, while coach Walkowiak's reliance on *Spady* v. *Bethlehem Area Sch. Dist.*, 800 F.3d 633 (3d Cir. 2015), is misplaced

As plaintiffs explained in their opening Brief for Appellants, this Court's recent ruling in *L.R.* v. *School Dist. of Phila.*, 836 F.3d 235 (3d Cir. 2016), which issued after the district court granted summary judgment in favor of defendants in this case, necessitates reversal of the district court's holding that coach Walkowiak was entitled to qualified immunity. In *L.R.*, this Court recognized that as of November 2011 — when Sheldon Mann sustained his life–altering, permanent injuries — public school student's federal constitutional right in a school setting "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" was clearly established. *L.R.*, 836 F.3d at 249.

This Court's own specific description of the right at issue in *L.R.* precisely encompasses the very same clearly established 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, 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

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." 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.*

Although this Court recognized the right at stake in *L.R.* to be clearly established as of January 2013, 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. As a result, the right that this Court recognized as

clearly established in *L.R.* thus necessarily was clearly established as of November 2011.

Defendants, in their appellate brief, ask this Court to overlook the obvious parallels between *L.R.* and this case, and defendants simply ignore that the specific right that this Court held to be clearly established in *L.R.* applies verbatim to describe the very right that plaintiffs claim coach Walkowiak violated. Defendants' misplaced attack on plaintiffs' reliance on *L.R.* begins in of all places a footnote (*see* Brief for Appellees at 43 n.15), where defendants assert that plaintiffs have waived any ability to rely on *L.R.*'s formulation of the right at stake in that case as the right that coach Walkowiak violated.

Defendants' waiver argument lacks merit for two reasons. To begin with, this Court has repeatedly held that "arguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived." *John Wyeth & Bro. Ltd.* v. *CIGNA Intern.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) (Alito, J.). Because defendants' waiver argument appears only in a footnote, it is thus itself waived.

Second, and even more importantly, in *L.R.* itself — a decision that this Court did not announce until *after* the district court issued its summary

judgment ruling in favor of defendants in this case — this Court on its own decided how best to phrase the constitutional right that this Court ruled was clearly established in that case. Thus, in *L.R.*, this Court rejected each of the opposing parties' differing formulations of the clearly established right at issue, even after requesting supplemental post–argument letters from the parties setting forth each side's proposed formulation of the constitutional right at issue.

Given that the plaintiff in *L.R.* did not waive the ability to benefit from the right that this Court itself formulated in that case as clearly established despite having failed to formulate the right in question in that very same language either before the district court or in this Court, then surely the plaintiffs in this case, in which the district court's summary judgment ruling issued before this Court decided *L.R.*, cannot be held to have waived the ability to take advantage of that very same clearly established right, which applies equally to the facts of this case as it did to the facts of *L.R.*

While denying the controlling nature of this Court's recent ruling in *L.R.*, the Brief for Defendants/Appellees asserts that this Court's decision from September 2015 in *Spady* v. *Bethlehem Area Sch. Dist.*, 800 F.3d 633 (3d

Cir. 2015), should dictate affirmance. The first sign that *Spady* has no applicability here comes from the fact that the district court, in its 25–page summary judgment opinion issued some nine months after this Court ruled in *Spady*, did not once cite to or rely on *Spady* in any respect whatsoever. If *Spady* compelled the district court's qualified immunity ruling in favor of coach Walkowiak, surely Judge Caputo would have cited to *Spady* and relied on it.

The facts and circumstances at issue in *Spady* explain why even Judge Caputo found it inapplicable to this case. In *Spady*, a non–swimmer high school student in a swimming class briefly slipped underwater, causing him to inhale some water. Several hours later, the student's inhalation of water caused the student's lungs to cease working, manifesting itself in a seizure and culminating in the student's death in a hospital later that day.

The condition from which the student suffered, known alternately as "dry drowning" or "secondary drowning," is an extraordinarily rare condition, in contrast to football concussions, which occur with distressing frequency. Moreover, unlike in this case, the swim teacher in *Spady* did not observe that the student was helpless to protect himself from injury but then nevertheless directed the student to continue swimming. In this case,

by contrast, it was such a secondary injury that permanently and severely harmed Sheldon Mann, whereas in *Spady* the student in question died as the result of the water he inhaled the first and only time that he slipped underwater.

The Brief for Defendants/Appellees also overlooks that this Court's opinion in *Spady*, combined with this Court's more recent ruling in *L.R.*, actually strengthens the reasons for holding in this case that coach Walkowiak violated Sheldon Mann's clearly established rights.

In *Spady*, this Court suggested that the less frequently the injury giving rise to the suit occurs, the more difficult it is to hold that the right in question is clearly established. *L.R.* involved a stranger's abducting a child from a kindergarten classroom for purposes of sexually abusing the child. Surely the vast majority of non–parents who are seeking to remove a kindergarten student from school consist of other family members, caregivers, neighbors, and friends of the parent, none of whom would be seeking to harm the child. By contrast, the national epidemic of serious concussion–related injuries in football manifest themselves far more frequently than a stranger's attempt to abduct a young child from a public school classroom in order to abuse the child.

Thus, insofar as *Spady* suggests that how frequently the scenario giving rise to suit occurs should influence whether to recognize a right as clearly established, the facts of this case provide an even more persuasive context for recognizing as clearly established the identical right recognized in *L.R.* than did the facts and circumstances of *L.R.* itself.*

Lastly, defendants' reliance on U.S. Supreme Court precedent addressing in generalized language how best to define the right at issue in a case in order to determine whether that right constituted clearly established law at the time in question fails to provide any basis for affirmance. That same U.S. Supreme Court precedent existed when this Court issued its ruling in *L.R.*, and it was in the aftermath of that precedent that this Court held in *L.R.* that a public school student such as Sheldon Mann has the federal constitutional right "not to be removed from a safe environment and placed into one in which it is clear that harm is likely to

* This Court's opinion in *Spady* criticizes the district court's ruling in *Sciotto* v. *Marple Newtown Sch. Dist.*, 81 F. Supp. 2d 559 (E.D. Pa. 1999), one of several relevant federal district court rulings cited in the opening Brief for Appellants. But *Spady*'s criticism of *Sciotto* clearly constitutes dicta, as the wrestling injury that an alumni wrestler inflicted on a student in *Sciotto* was far removed from the dry drowning death at issue in *Spady*. Because *Spady*'s criticism of *Sciotto* is dicta, it is not binding on any subsequent panel. *See In re Friedman's Inc.*, 738 F.3d 547, 552 (3d Cir. 2013) ("This language was dicta, and consequently not binding upon future courts.").

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.

Defendants' appellate brief does not have the audacity to accuse this Court of having disregarded applicable U.S. Supreme Court qualified immunity precedents in *L.R.*, and the losing party in *L.R.* did not even seek U.S. Supreme Court review to advance any such contention. Because this Court's recent ruling in *L.R.* necessarily comported with the applicable U.S. Supreme Court qualified immunity precedents on which the Brief for Defendants/Appellees relies, this Court need not fret about running afoul of that precedent merely by applying and adhering to this Court's recent earlier precedent in *L.R.* in this case. Indeed, under the well–established principle that this Court's earlier published opinions bind subsequent panels, this Court has no alternative (unless convened en banc) but to apply the unquestionably applicable holding of *L.R.* to this case.

For these reasons, the district court's entry of summary judgment in favor of coach Walkowiak on the issue of qualified immunity should be reversed, and this case should be remanded for trial.

C. 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 Plaintiffs' Favor On That Claim

1. 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

On the issue of Palmerton Area School District's liability, at least, the Brief for Defendants/Appellees merely seeks affirmance for the very same reasons on which the district court relied in granting summary judgment in favor of that school district on plaintiffs' municipal liability claim.

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 unique 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.

As plaintiffs explained in their opening brief on appeal, the expert report from Scott Bruce that plaintiffs placed before 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.

Although in a footnote the Brief for Defendants/Appellees asserts the truism that expert testimony alone cannot salvage a municipal liability claim (*see* Brief for Appellees at 50 n.18), in this case the expert opinion of Dr. Bruce is well–grounded in the facts of record.

Furthermore, 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 — a fact that the Brief for Defendants/Appellees does not deny — 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. Moreover, for the 2012 football season, Palmerton Area School District finally adopted actual concussion protocols based on the policies already in use in surrounding counties (App.1528a, 1539a–40a), further undermining Palmerton's contention that its non–existent concussion policy was adequate in 2011.

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, thus presented a factual issue for the jury. Moreover, 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.

Plaintiff's opening Brief for Appellants contained a thorough review of three indistinguishable precedential rulings in which this Court held that summary judgment should not have been granted to dispose of the plaintiffs' municipal liability claims under 42 U.S.C. §1983: *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); and *Berg* v. *County of Allegheny*, 219 F.3d 261 (3d Cir. 2000) (per curiam).

The Brief for Defendants/Appellees fails entirely to cite, discuss, or distinguish this Court's rulings in *Thomas* and *A.M. ex rel. J.M.K.* And the

only citations to *Berg* contained in the Brief for Defendants/Appellees consist of generalized legal principles recited in that decision, rather than the facts and circumstances of this Court's ruling in *Berg* and the decision's resulting applicability to the facts and circumstances of this case. Defendants' failure to engage with these precedents, and their controlling impact on this case, leaves unanswered plaintiffs' argument in their Brief for Appellants that those precedents compel the reversal of the district court's entry of summary judgment in favor of Palmerton Area School District on plaintiffs' municipal liability claim.

To summarize, 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 failure caused Sheldon Mann to suffer devastating, permanent injuries, 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.

III. CONCLUSION

For all the foregoing reasons, and those set forth in the opening Brief for Appellant, 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: February 3, 2017

/s/ Howard J. Bashman

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Robert J. Mongeluzzi
Larry Bendesky
Robert W. Zimmerman
Saltz, Mongeluzzi, Barrett & Bendesky, P.C.
1650 Market Street, 52nd Floor
Philadelphia, PA 19103
(215) 496–8282

Counsel for plaintiffs/appellants

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 4,721 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: February 3, 2017

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

Counsel hereby certifies that the electronic copy of this Reply 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: February 3, 2017

/s/ Howard J. Bashman
Howard J. Bashman

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: February 3, 2017

/s/ Howard J. Bashman
Howard J. Bashman