

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

**RICHARD BANKS, JUDY BANKS, :
ROGER McCARREN, and :
LARRY MEYER, :**

**Plaintiffs, : (CONSOLIDATED)
: CIVIL ACTION NO. 3:08-1110**

**v. : (CAPUTO, D.J.)
: (MANNION, M.J.)**

**KAREN GALLAGHER, ANTHONY :
MARIANO, WILLIAM STADNITSKI, :
and DICKSON CITY BOROUGH, :**

Defendants. :

**EDWARD J. KRAFT, JR., :
Plaintiff, : (CONSOLIDATED)
: CIVIL ACTION NO. 3:08-1110**

**v. : (CAPUTO, D.J.)
: (MANNION, M.J.)**

**KAREN GALLAGHER, ANTHONY :
MARIANO, and DICKSON CITY :
BOROUGH, :**

Defendants. :

REPORT AND RECOMMENDATION¹

Pending before the court are two separate partial motions for summary

¹ For the convenience of the reader of this document in electronic format, hyperlinks to the court's record and to authority cited herein have been inserted. No endorsement of any provider of electronic resources is intended by the court's practice of using hyperlinks.

judgment. The first motion is on behalf of defendant Dickson City Borough (“Borough”), (Doc. No. [74](#)), and the second motion is on behalf of defendant William Stadnitski, (Doc. No. [77](#)). For the reasons set forth below, the court will recommend that the defendants’ motions be **GRANTED**.

I. PROCEDURAL BACKGROUND²

On August 17, 2009, the Borough filed a motion for partial summary judgment to the claims made against it by plaintiffs Richard Banks, Judy Banks, Roger McCarren and Larry Meyer. As such, the Borough seeks summary judgment on Counts III, IV(B),³ and VI of the complaint. This motion is fully briefed. (Doc. No.’s [79](#), [109](#), 112, 117, 124, 125,& [126](#)).

On August 17, 2009, defendant Stadnitski, who was sued in his individual capacity also filed a motion for partial summary judgment to the claims made against him by plaintiffs Richard Banks, Judy Banks, Roger

² Because the facts and procedural history have been recounted in greater detail in earlier reports and recommendations and a memorandum, it will not be repeated here. (Doc. No.’s [91](#), 135 & 137).

³ The court notes that in plaintiffs’ complaint, it appears that plaintiffs’ inadvertently listed two Count IV’s. For the sake of clarity, the court will refer to the first Count IV in the complaint as Count IV(A), and the second Count IV listed in the complaint as Count IV(B).

McCarren and Larry Meyer. As such, defendant Stadnitski seeks summary judgment on Counts IV(A), IV(B) and VI of the complaint. This motion is fully briefed. (Doc. No.'s [79](#), [109](#), [112](#), 117, 124, 125 & [126](#)).

II. STANDARD OF REVIEW

Summary judgment is appropriate if the “pleadings, the discovery [including, depositions, answers to interrogatories, and admissions on file] and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” [Fed. R. Civ. P. 56\(c\)](#); see also [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322-23 (1986); [Turner v. Schering-Plough Corp.](#), 901 F.2d 335, 340 (3d Cir. 1990). A factual dispute is genuine if a reasonable jury could find for the non-moving party, and is material if it will affect the outcome of the trial under governing substantive law. [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248 (1986); [Aetna Cas. & Sur. Co. v. Ericksen](#), 903 F. Supp. 836, 838 (M.D. Pa. 1995). At the summary judgment stage, “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; see also [Marino v. Indus. Crating Co.](#), 358

[F.3d 241, 247 \(3d Cir. 2004\)](#) (a court may not weigh the evidence or make credibility determinations). Rather, the court must consider all evidence and inferences drawn therefrom in the light most favorable to the non-moving party. [Andreoli v. Gates, 482 F.3d 641, 647 \(3d Cir. 2007\)](#).

To prevail on summary judgment, the moving party must affirmatively identify those portions of the record which demonstrate the absence of a genuine issue of material fact. [Celotex, 477 U.S. at 323-24](#). The moving party can discharge the burden by showing that “on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party.” [In re Bressman, 327 F.3d 229, 238 \(3d Cir. 2003\)](#); see also [Celotex, 477 U.S. at 325](#). If the moving party meets this initial burden, the non-moving party “must do more than simply show that there is some metaphysical doubt as to material facts,” but must show sufficient evidence to support a jury verdict in its favor. [Boyle v. County of Allegheny, 139 F.3d 386, 393 \(3d Cir. 1998\)](#) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). However, if the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to [the non-movant’s] case, and on which [the non-movant] will bear the burden of proof at trial,” Rule 56 mandates the entry of

summary judgment because such a failure “necessarily renders all other facts immaterial.” [Celotex Corp., 477 U.S. at 322-23](#); [Jakimas v. Hoffman-La Roche, Inc., 485 F.3d 770, 777 \(3d Cir. 2007\)](#).⁴

III. LEGAL ANALYSIS

Defendants have raised various arguments as to why they are entitled to summary judgment. The court will consider these arguments below.

A. Count III

Count III of the complaint alleges that the defendant Borough failed to adequately and properly train and supervise defendants Mariano and Gallagher who proceeded to violate plaintiffs’ constitutional rights. In consequence of those alleged rights violations, plaintiffs assert a Section 1983 claim against the municipality.

In the seminal case of [Monell v. Dept. of Soc. Serv., 436 U.S. 658 \(1978\)](#), the United States Supreme Court confirmed that “Congress did intend

⁴ If the nonmoving party has the burden of proof at trial, the party moving for summary judgment is not required to “support its motion with affidavits or other similar material *negating* the opponent’s claim,” [Celotex, 477 U.S. at 323](#), in order to discharge this “initial responsibility.” In this situation, the movant “‘show[s]’--that is, point[s] out to the district court--that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325.

municipalities and other local government units to be included among those persons to whom §1983 applies,” but emphasized that, “a municipality cannot be held liable under §1983 on a respondeat superior theory.” [Id. at 690-91](#) (emphasis in original). To establish §1983 liability on such a governing body, the plaintiff must identify either a “policy, statement, ordinance regulation or decision officially adopted and promulgated by that body’s officers,” or “constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decision making channels.” [Id. at 690-691](#). A policy is shown when “a ‘decisionmaker possessing final authority to establish municipal policy with respect to the action’ issues an official proclamation, policy, or edict.” [Beck v. City of Pitt., 89 F.3d 966, 971 \(3d Cir. 1996\)](#)(quoting [Andrews v. City of Phila., 895 F.2d 1469, 1480 \(3d Cir. 1990\)](#)). A custom is defined as “such practices of state officials so permanent and well-settled as to constitute law,” which can be established by showing the policy maker’s knowledge and acquiescence to the custom. [Id.](#) Alternatively, a custom or policy may be established from a failure to train, supervise, or otherwise act, where that failure reflects a deliberate indifference of officials to the rights of persons that come into contact with these municipal employees. [City of Canton v. Harris,](#)

[489 U.S. 378, 387-88 \(1989\)](#); [Reitz v. County of Bucks, 125 F.3d 139, 145 \(3d Cir. 1997\)](#).

Moreover, a failure to train constitutes deliberate indifference when the failure has caused a pattern of violations. [Berg v. County of Allegheny, 219 F.3d 261, 276 \(3d Cir. 2000\)](#). In addition,

“Although it is possible to maintain a claim of failure to train without demonstrating such a pattern . . . the burden on the plaintiff in such a case is high: ‘In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens’ rights could justify a finding that policymakers’ decision not to train the officer reflected “deliberate indifference” to the obvious consequence of the policymakers’ choice.’”

[Berg v. County of Allegheny, 219 F.3d 261, 276 \(3d Cir. Pa. 2000\)](#)(citing *Board of County Comm’rs of Bryan County v. Brown*, 520 U.S. 397, 404 (1997)). In addition, a plaintiff must demonstrate a sufficiently close causal connection between the deliberately indifferent training and the deprivation of the plaintiff’s federally protected right. [Canton, 489 U.S. at 391-92](#).

In this action, the court has not yet found, as a matter of law, that plaintiffs’ constitutional rights were violated. Assuming *arguendo* that plaintiffs’

Fourth Amendment rights were violated, the court will turn to the issue of deliberate indifference.⁵

Because plaintiffs have not shown or alleged a pattern of constitutional violations, the plaintiffs must carry the heavy burden of showing that the failure to train made the alleged violations of plaintiffs' federal rights a "highly predictable" consequence of a failure to equip the defendant officers with specific tools to handle *recurring* situations. As explained in this court's prior Report and Recommendation, that was adopted by the district court, the situation that defendants Gallagher and Mariano were confronted with at the Old Country Buffet involved a *novel* set of circumstances. The court explicitly stated that:

"it appears to the Court that the circumstances that confronted the officers upon their arrival at the Old Country Buffet were novel. It is the Court's view that it is *not* common for a large group of persons to carry weapons, including hand guns, into a restaurant open to the general public."

⁵ As explained in the previous Report and Recommendation by the undersigned, this court has recommended (1) denying summary judgment on plaintiff Meyer and plaintiff McCarren's Fourth Amendment claims against defendant Mariano because questions of fact remained, (2) denying summary judgment on plaintiff McCarren's Fourth Amendment claim against defendant Gallagher because questions of fact remained, (3) granting summary judgment in favor of defendant Gallagher on plaintiff Meyer's Fourth Amendment claim on Count I, and (4) granting summary judgment in favor of defendants Gallagher and Mariano on the First Amendment claims.

(Doc. No. [91](#) at 32)(emphasis added). To further demonstrate how novel this situation was, the Borough cites to the deposition testimony of defendant Stadnitski, who stated that in his thirty-seven years of service to the police department, he has never once seen the issue that the defendant officers encountered at the Old Country Buffet. In addition, the Borough argues that plaintiffs have failed to provide an expert report challenging the appropriateness of the training or suggesting that an officer needed to be trained on an issue that is *rarely*, if ever, encountered in typical policing. Plaintiffs have failed to come forward with any evidence that demonstrates it is likely for a police officer to encounter a situation like the one described above. As such, the record is uncontroverted on this issue. Moreover, plaintiffs have conceded that the defendants received their required training. Plaintiffs have failed to identify what additional training, if any, defendants could or should have been given besides the training they received.⁶

⁶ The court notes that plaintiffs' *sole* argument is that "[w]hile it [is] agreed that the Defendants Mariano and Gallagher attended the[ir] required training under Act 120, their knowledge of the Fourth Amendment was abysmal." (Doc. No. [109](#) at 3). After giving multiple examples to demonstrate the alleged lack of Fourth Amendment knowledge on the part of defendants, plaintiffs assert "there is a genuine issue of material fact as to whether or not both Gallagher or Mariano received the proper training which precludes the entry of summary judgment." *Id.* at 5. The court need not address this argument because, as explained above, the court does not find that the

Because this court finds that the situation here was *novel* and that defendants received their required training, the court cannot also find that the defendant Borough exhibited deliberate indifference, namely that a violation of the plaintiffs' federal rights was a "highly predictable" consequence of a failure to equip police officers with specific tools to handle a *recurring* situation. See [Carter v. City of Philadelphia, 181 F.3d 339, 357 \(3d Cir. 1999\)](#)(citing [Walker v. City of New York, 974 F.2d 293, 297-98 \(2d Cir. 1992\)](#)(to establish liability based on deliberately indifferent failure to train, a plaintiff must show to a moral certainty that her employees will confront a

defendant Borough's alleged failure to train amounted to a deliberate indifference to the rights of plaintiffs. However, even if the court did address plaintiffs' argument and found that defendant Mariano and Gallagher's training was inadequate, the court would still recommend that summary judgment in favor of defendants is appropriate. Liability for failure to train cannot be predicated solely upon a showing that a municipality's employees could have been better trained or that additional training was available which would have reduced the overall risk of constitutional injury. [Canty v. City of Phila., 99 F. Supp. 2d 576, 581 \(E.D. Pa. 2000\)](#)(citing [Colburn v. Upper Darby Twp., 946 F.2d 1017, 1029-30 \(3d Cir. 1991\)](#)). In addition, a §1983 plaintiff pressing a claim of this kind must identify a failure to provide specific training that has a causal nexus with his or her injury and must demonstrate that the failure to provide that specific training can reasonably be said to reflect a deliberate indifference to whether constitutional deprivations of the kind alleged occur. [Colburn., 946 F.2d at 1030](#). Here, plaintiffs have not alleged any specific deficiencies in the training program whatsoever, rather they have inferred the training must have been inadequate. Thus, the court need not reach the issue of causation.

given situation, and thus, a policymaker does *not* exhibit deliberate indifference by failing to train employees for *rare* or *unforeseen events*(emphasis added)). See also *Kelly v. Borough of Carlisle & Rogers*, No. 07-1573, 2009 U.S. Dist. LEXIS 37618, at *28 (M.D. Pa. May 4, 2009)(as a practical matter, a municipality cannot be expected to train every officer on every element of every statute or law that exists in Pennsylvania because such an undertaking would be ineffective at best, futile at worst, and most importantly, is beyond what is required by law). Consequently, the court recommends granting summary judgment in favor of the defendant Borough on Count III of the complaint.

B. Count IV(A)

In Count IV(A), plaintiffs allege that, prior to the incident at the Old Country Buffet, defendant Stadnitski, the Chief of Police, failed to adequately and properly supervise and train its police officers, and that following the incident at the Old Country Buffet, defendant Stadnitski “acquiesced in, adopted and ratified the improper and illegal activities of the individual defendants, defendants Mariano and Gallagher.” (Doc. No. [26](#) at ¶34). As such, the court construes plaintiffs’ allegations as seeking to hold defendant Stadnitski, who is sued in his individual capacity, liable under a theory of

supervisory liability.

The Third Circuit has explained that, in order to establish a claim for supervisory liability under §1983:

“The plaintiff must (1) identify the specific supervisory practice or procedure that the supervisor failed to employ, and show that (2) the existing custom and practice without the identified, absent custom or procedure created an unreasonable risk of the ultimate injury, (3) the supervisor was aware that this unreasonable risk existed, (4) the supervisor was indifferent to the risk; and (5) the underling’s violation resulted from the supervisor’s failure to employ that supervisory practice or procedure. We emphasized that ‘it is not enough for a plaintiff to argue that the constitutionally cognizable injury would not have occurred if the superior had done more than he or she did.’” *Sample*, 885 F.2d at 1118. Rather, the plaintiff must identify specific acts or omissions of the supervisor that evidence deliberate indifference and persuade the court that there is a “relationship between the ‘identified deficiency’ and the ‘ultimate injury.’” *Id.*”

[Brown v. Muhlenberg Twp.](#), 269 F.3d 205, 216 (3d Cir. 2001). See also [Sample v. Diecks](#), 885 F.2d 1099, 1118 (3d Cir. 1989).

Defendant Stadnitski argues that he is entitled to summary judgment on this claim because plaintiffs have failed to produce any evidence, either factual or expert, that defendant Stadnitski failed to employ any procedure or practice that would have prevented the “injuries” complained of by plaintiffs. (Doc. No. [79](#) at 3). As explained above, it is undisputed that the defendant officers went through the state required courses for Act 120 certification in

order to become a police officer. In addition, defendant Stadnitski testified that he saw that his police officers went through all of the state mandated training required of them as police officers prior to this event and that he trusted in the judgment of the Assistant District Attorney who had advised the police officers during the incident.

By way of response, the sole argument advanced by plaintiffs in their briefs is that the defendant's motion for summary judgment should be denied because "the attitude of the Chief of Police, notably approving of the way in which this incident was handled [by defendants Gallagher and Mariano], and testifying under oath that he would do the same thing, pretty much regardless of what the law was" creates an issue of material fact. In support of this argument, plaintiffs rely on [Grandstaff v. Berger, 767 F.2d 161 \(5th Cir. 1985\)](#). However, the court finds plaintiffs' reliance on *Grandstaff* is misplaced. First, *Grandstaff* is factually distinguishable because it involved the reckless use of deadly force by police officers that tragically resulted in the death of an innocent third party. See [id.](#) Second, the reasoning within *Grandstaff* that plaintiffs cite to was used by the court in analyzing municipal liability, and plaintiffs have brought this action against defendant Stadnitski in his individual capacity. See [Grandstaff, 767 F.2d at 168](#). Third, it appears that plaintiffs cite

to this case for the proposition that even though there was no specific custom or policy in place at the time of the incident, that does not mean the court cannot find that the actions of defendants after the fact demonstrated there was such a policy or custom in place. Even if the court were to accept this argument, plaintiffs appear to ask the court to find a policy, that they do not identify, that the Chief of Police enforced which creates a question of fact. As explained above, in order to prevail on a supervisory liability claim, plaintiffs would have to identify a policy that the defendant *failed to enforce*, and not that his actions reenforced some custom or policy. As such, the court cannot agree with plaintiffs argument, that the way defendant Stadnitski acted *after* the incident at the Old Country Buffet, including his opinion that he would have taken the same actions as the defendant officers who had relied on the advice of an Assistant District Attorney, in a novel set of circumstances, gives rise to a question of fact with respect to supervisory liability.

As such, the court is compelled to agree with defendant Stadnitski. Because plaintiffs have failed to identify any “specific supervisory practice or procedure that the supervisor failed to employ,” the court recommends granting summary judgment in favor of defendant Stadnitski on Count IV(A)

of the complaint.⁷

C. Counts IV(B) and VI

The defendant Borough and defendant Stadnitski have also moved for summary judgment on Counts IV(B) and VI of the complaint. Count IV(B) of the complaint alleges that defendants deprived plaintiffs of their rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, including but not limited to their right to free speech, their right to keep and bear arms, their right to be free from unreasonable searches and seizures and their right to not be deprived of their property without due process of law. Count VI alleges the defendants denied plaintiffs their rights under Article I, §8 of the Constitution of the Commonwealth of Pennsylvania, including their right to be secure in their person from unreasonable searches and seizures, and to be secure against arrest without probable cause. With respect to each of these Counts in the complaint, defendants have advanced various legal arguments as to why they are entitled to summary judgment on these claims. However, plaintiffs Richard Banks, Judy Banks, Roger McCarren and Larry Meyer have failed to respond or advance any arguments

⁷ Consequently, the court need not address the issue of whether defendant Stadnitski is entitled to qualified immunity.

in opposition to defendants' motions for summary judgment on Counts IV(B) and VI of the complaint. Consequently, the court finds that the failure of plaintiffs to address these claims in their briefs in opposition constitutes an abandonment of these claims. See [Ankele v. Hambrick, 286 F. Supp. 2d 485, 496 \(E.D. Pa. 2003\)](#) (finding summary judgment appropriate on fourteenth amendment malicious prosecution claim because plaintiff made no response to defendant's argument, and thus waived his opportunity to contest that claim), *aff'd*, [136 Fed. Appx. 551 \(3d Cir. 2005\)](#). As such, the court recommends that the defendant Borough and defendant Stadnitski's motions for summary judgment be granted on Counts IV(B) and VI of the complaint.

IV. RECOMMENDATION

For the reasons elaborated above, **IT IS RECOMMENDED** that:

- (1) defendant Dickson City Borough's motion for partial summary judgment, (Doc. No. [74](#)), be **GRANTED**; and
- (2) defendant William Stadnitski's motion for partial summary judgment, (Doc. No. [77](#)), be **GRANTED**.

s/ Malachy E. Mannion
MALACHY E. MANNION
United States Magistrate Judge

Date: March 19, 2010

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