No. 19-7050

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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| DUSTIN LANCE, | ) |
| | ) |
| Plaintiffs/Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| CHRIS MORRIS, in his official capacity, et al., | ) |
| | ) |
| Defendants/Appellees. | ) |

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On Appeal from the United States District Court
for the Eastern District of Oklahoma
The Honorable Ronald White, United States District Judge
D.C. No. 17-cv-00378-RAW

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**APPELLEES/DEFENDANTS MORRIS, HARPER, AND D. MORGAN'S REPLY TO RESPONSE OF APPELLANT TO PETITION FOR REHEARING *EN BANC***

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HARPER AND DAKOTA MORGAN

**March 17, 2021**

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**APPELLEES/DEFENDANTS MORRIS, HARPER, AND D. MORGAN'S REPLY TO RESPONSE OF APPELLANT TO PETITION FOR REHEARING *EN BANC***

Pursuant to the Clerk's Order of March 10, 2021, the Appellees/Defendants (collectively referred to herein as the "Appellees") Chris Morris, in his Official Capacity, Daniel Harper, in his Individual Capacity ("Harper"), and Dakota Morgan, in his Individual Capacity ("D. Morgan") submit their Reply to the "Response of Appellant to Petition for Rehearing *En Banc*" ("Response"). For the reasons set forth in their Corrected Petition for Rehearing *En Banc*, and as further discussed herein, the Appellees believe *en banc* consideration is necessary because this proceeding involves questions of exceptional importance.

**ARGUMENT AND AUTHORITY**

Regarding the failure to train claim and contrary to Appellant's contention, the panel's decision was not well-supported by the record. Indeed, the panel reached the conclusion that "Lance presented evidence that the employees had obtained no training on when to call a nurse or a doctor when one was not on site." (Opinion, p. 23). However, in reaching this conclusion, the panel focused solely on the testimony of a couple of officers on a completely different subject – the alleged lack of training on when a medical condition involved an emergency. (*Id.*). In focusing on this meager bit of testimony about a wholly different issue, the panel created a disconnect between the alleged lack of training and municipal causation. It was undisputed that Harper, D. Morgan, E. Morgan, and Smead all knew and understood the procedure of reporting an inmate's medical needs as outlined by Pittsburg County Criminal Justice Center's ("PCCJC") policy, and that they recognized ***if*** Lance had, in fact, made a jailer aware of his medical condition

***prior*** to Monday, December 19, 2016, but was not granted access to medical care, such conduct would have violated PCCJC's policy.[1]

Appellee E. Morgan testified that if an inmate had come to him with the same medical condition as Plaintiff, he would have started the process of calling the nurse and trying to get ahold of the of a transport officer.[2] Similarly, D. Morgan, Harper, and Sparks all testified that, if they were confronted with an inmate with a persistent erection, they would contact either the sergeant or the nurse.[3] Appellee Smead testified that when faced with inmate with an erection that would not go away, his first step would have been to contact the nurse, and if she wasn't available to contact the jail administrator and take steps to get him medical attention.[4] More importantly, D. Morgan and Harper further testified that ***if they did not know or had questions about whether an inmate was experiencing a medical emergency***, the proper step would be to inform the sergeant or the nurse, and that jailers were never allowed to independently determine whether an inmate health issue is serious.[5] Likewise, Smead testified that if he, ***as a sergeant, was confronted with a situation that he was not certain whether it constituted a medical emergency***, he would contact the nurse or the jail administrator if she were not available,

[1] Appx. Vol. II, 591-596; Appx. Vol. III, 612, 620, 630-632, 771; Supp. App. 100, 109-110, 128-131, 133-137, 140-143, 147, 149, 153-156, 160-161, 163, 176-177, 197-199, 207-209, 211-212.
[2] Suppl. App. 149-151
[3] Appx. Vol. III, 631-632, 639-640; Suppl. App. 211-212
[4] Appx. Vol. II, 587, 596
[5] Appx Vol. III, 644; Suppl. App. 165-167, 197-199

and that jailers were not allowed to make an independent determination whether an inmate was having a serious medical event.[6]

Thus, the panel's conclusion is simply without an evidentiary foundation. The officers knew to contact the nurse or sergeant for inmate medical emergencies, knew to contact the nurse or sergeant if there was a question about whether there was a medical emergency, and all testified that they would have contacted the nurse or sergeant if confronted with an inmate with a persistent erection.[7] Consequently, the panel's analysis regarding the issue of municipal causation is fatally flawed. Moreover, contrary to Appellant's contention, this factual issue does raise an issue of exceptional importance, as it directly led the panel to create new law adopting the three-part municipal deliberate indifference test set forth in *Walker v. City of New York*, 974 F.2d 293, 297–98 (2d Cir. 1992) which, as applied here, improperly collapses municipal liability into *respondeat superior* liability and improperly imposes municipal liability based on mere negligence.

As set forth in Appellees' Petition, municipal causation for denial of medical care claims simply cannot logically be established based upon the theory that the municipality failed to train staff to recognize inmate medical needs. This is because, to show an underlying constitutional violation for such claims, a plaintiff must prove that a staff

[6] Appx. Vol. II, 588, 592-595; Suppl. App. 134-135

[7] The Nurse was ordinarily readily available by telephone and would take phone calls from jail staff in the evenings and on the weekends regarding inmate medical problems. She testified that, if she were not available on a particular occasion, they would call the jail administrator to make the decision which would ordinarily result in the inmate being sent to the emergency room. Suppl. App. 105. There is no evidence of any prior problems with the Nurse failing to respond promptly to such phone calls. Suppl. App. 198.

member subjectively knew he had a serious medical need and declined to take any action to obtain medical care for him. *See Rife v. Okla. Dep't of Pub. Safety*, 854 F.3d 637, 647 (10th Cir. 2017). However, if any staff member had direct knowledge that a plaintiff was suffering from a serious medical need, then any failure to obtain medical care obviously cannot have been caused by any lack of training to recognize inmate medical needs. Likewise, if the jury infers such subjective knowledge on the basis that a plaintiff's medical need was obvious, then the plaintiff cannot demonstrate the alleged failure to obtain medical care on his behalf was caused by any lack of such training as no training is required to recognize an obvious medical need.

Appellant takes issue with the Appellees' argument in this regard, stating: "An officer who knows that a detainee is at risk of serious harm may nonetheless lack the training to handle that risk appropriately. Training makes the officer's obligation clear." (Response, p. 12). However, Appellant's argument is not consistent with either the panel's findings, or the factual record. As discussed above, the panel's determination on the lack of training issue was based solely on testimony that jail staff had not been trained to recognize medical emergencies. The panel did not cite to any evidence – nor was there any such evidence – that the individual Appellee officers had not been trained on how to handle a situation when they recognized that an inmate was suffering a medical emergency. Instead, the record irrefutably demonstrates that they all knew to contact either the nurse or sergeant in the event of inmate medical emergency or if they did not know whether an inmate was having a medical emergency. Likewise, the sergeants also

knew to contact the nurse if they did not know whether the inmate was having a medical emergency. The panel's disregard of this evidence in light of its focus on the alleged lack of staff training to recognize inmate medical emergencies creates a fatal flaw in its causation analysis. Since Appellant did not, and could not, prove municipal causation, the panel did not need to reach the issue of deliberate indifference.

Appellant further argues that it does not matter at the summary judgment stage whether the claims against the municipality are inconsistent with the claims against the individual Appellees. Rather, Appellant contends that that is an issue for the jury to decide. (Response, pp 12-13). But, Appellant is engaged in knocking down a straw-man argument that the Appellees do not make in their Petition.

There are limited circumstances where inadequacy in training can be a basis for § 1983 liability. *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). "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*, 563 U.S. 51, 61 (2011). Inadequacy in training may serve as the basis for municipal liability "only where the failure to train amounts to deliberate indifference . . ." to inmate rights. *City of Canton*, 489 U.S. at 388. "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable for such a failure under § 1983." *Id.* at 389. Yet here, the panel, disregarding the tenuous nature of municipal liability for failure to train claims, instead adopted a three-part test for determining municipal deliberate indifference from the Second Circuit case *Walker v. City of New York*, 974 F.2d 293, 297–98 (2d Cir. 1992)

(Panel Opinion, p. 25) and applied it in such a manner as to improperly collapse municipal liability into *respondeat superior* liability and to render municipal liability based on mere negligence.

To be deliberately indifferent, a municipality must have "actual or constructive notice that its action or [inaction] is substantially certain to result in a constitutional violation." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998). Notice is typically proven by "the existence of a pattern of tortious conduct." *Id.* "Deliberate indifference 'may be found absent a pattern of unconstitutional behavior' only in 'a narrow range of circumstances' where 'a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction."' *Waller v. City & Cty. of Denver*, 932 F.3d 1277, 1284 (10th Cir. 2019) (quoting *Barney*, 143 F.3d at 1307-08).

Appellant argues that the Appellees "contend that the panel erred in holding that a factfinder could reasonably infer municipal deliberate indifference absence a pattern of unconstitutional behavior." (Response, p. 13). However, that is a mischaracterization and oversimplification of the Appellees' argument. Appellees do not argue that deliberate indifference can never be found absent a prior pattern of constitutional violations. However, the relevant case law teaches that deliberate indifference may be found absent a pattern of similar constitutional violations only in "a narrow range of circumstances." Appellees argue that the panel erred in ignoring the lack of any "pattern of unconstitutional behavior" in this particular case and instead applying the Second Circuit's *Walker* standard.

While the *Walker* analysis is readily suited to analyze municipal liability for excessive force and similar claims, it is a poor fit for analyzing municipal liability for medical deliberate indifference claims. Using the *Walker* standard, instead of notice via patterns of unconstitutional behavior, in considering jail staff's training to assess any and all medical conditions' (instead of what was at issue here, priapism), is untenable—it would effectively result in findings of deliberate indifference for all cases where plaintiffs allege failure to train as it relates to jail staff in their gatekeeper role. This is because a plaintiff can almost always demonstrate that lay jail staff were not trained to assess a particular medical condition. Indeed, because lay persons are not expected to be able to accurately assess inmate medical conditions, the objective component of the deliberate indifference test requires that the inmate's medical condition be diagnosed by a physician as mandating treatment, or so obvious that even a lay person would easily recognize the medical necessity for a doctor's attention. *Oxendine v. R.G. Kaplan, M.D.*, 241 F.3d 1272, 1276 (10th Cir. 2001). Further, since it was undisputed that priapism was NOT a frequent medical condition faced by inmates at PCCJC,[8] it was clearly improper for the panel to stray from the typical pattern-of-unconstitutional-behavior requirement in proving deliberate indifference. *Cf. Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1319-20 (10th Cir. 2002) (since OCD was a frequently occurring disorder and jail staff received no training on OCD reasonable factfinders could find constitutional violations were a "plainly obvious consequence").

[8]Supp. App. 97, 112, 137-138, 212.

Appellant likens the *Walker* standard to the Tenth Circuit's "plainly obvious" standard and argues that:

> The panel's deliberate indifference holding was closely tied to the specific facts of this case: the facility only had a medical professional on site from 8-5 during the workweek and, even though medical emergencies will "obviously occur sometimes on evenings and weekends," the sergeants testified they were not trained to handle such emergencies in the nurse's absence. Op. 25-27.

(Response, p. 15). However, as discussed above, the panel's decision in that regard is not "closely tied" to the facts of this case. The panel's determination was based solely on testimony that jail staff had not been trained to recognize medical emergencies. Contrary to Plaintiff's assertion, there was no evidence that "the sergeants testified they were not trained to handle such emergencies in the nurse's absence." Rather, as discussed above, Sergeant Smead testified that when faced with inmate with an erection that would not go away, his first step would have been to contact the nurse, and if she wasn't available to contact the jail administrator and take steps to get him medical attention.[9] More importantly, Smead testified that if he, ***as a sergeant, was confronted with a situation that he was not certain whether it constituted a medical emergency***, he would contact the nurse or the jail administrator if she were not available.[10] Moreover, given that medical deliberate indifference claims require subjective knowledge of a substantial risk of harm to the inmate, such violations cannot be a highly predictable or plainly obvious consequence of a municipality's failure to train jail staff to recognize inmate medical

[9] Appx. Vol. II, 587, 596
[10] Appx. Vol. II, 588, 592-595; Suppl. App. 134-135

emergencies. The panel's application of the *Walker* analysis to this case improperly collapses municipal liability into *respondeat superior* liability and renders municipal liability based on mere negligence.

Appellant also takes issue with the Appellees' argument that he cannot demonstrate municipal deliberate indifference because neither the Supreme Court nor the Tenth Circuit has held it was clearly established that Plaintiff's complaint of pain associated with a persistent erection was a sufficiently serious medical need requiring medical treatment. "The violated right in a deliberate-indifference case thus must be clearly established because a municipality cannot *deliberately* shirk a constitutional duty unless that duty is clear." *Arrington-Bey v. City of Bedford Heights Ohio,* 858 F.3d 988, 995 (6th Cir. 2017). In response, Appellant argues that "the Tenth Circuit has repeatedly rejected the proposition that a violation of clearly established law is required for municipal liability." (Response, p. 16). However, none of the cases which Appellant cites for this proposition addressed the specific issue which the Appellees raise – whether a violation of ***clearly established law*** by a municipal employee is required to hold a municipality liable under 42 U.S.C. § 1983 ***under a failure-to-train theory of liability***. Indeed, it does not appear that Tenth Circuit has addressed that specific issue at all, which is yet another reason to grant *en banc* review.[11]

[11]This Court recently clarified that an underlying constitutional violation by a municipal employee is required to impose municipal liability under a failure-to-train theory, but it did not consider whether the violation had to be clearly established. *See Crowson v. Washington Cty. Utah*, 983 F.3d 1166, 1185-93 (10th Cir. 2020).

Thus, for all the reasons addressed in the Appellees' Corrected Petition and further discussed above, the Court should exercise its judicial discretion and grant *en banc* review of the panel's decision reversing the grant of summary judgment to the Appellees.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I, Michael L. Carr, certify that this brief complies with Fed. R. App. P. 32(a)(7)(B), in that it is proportionally spaced and contains 2,571 words. I relied upon my word processor, Microsoft Word, to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Michael L. Carr
Michael L. Carr

## CERTIFICATE OF DIGITAL SUBMISSION

I certify that all required privacy redactions have been made and, with the exception of those redactions, the digital submission is an exact copy of the written document filed with the Clerk, and the digital submissions have been scanned for viruses with TREND MICRO Security Agent, Version 16.513.00, updated March 17, 2021 and, according to the program, is free of viruses.

s/ Michael L. Carr
Michael L. Carr

## CERTIFICATE OF SERVICE

Pursuant to Fed. R. Appx. P. 25(d)(2), I hereby certify that on March 17, 2021, the foregoing Brief was filed electronically the CM/ECF system with the Court and that the requisite number of true and correct copies of the version submitted electronically of the foregoing Brief is being forwarded by First Class Mail to the Court within five days of the Court issuing Notice that the electronic brief has been accepted:

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Further, pursuant to Fed. R. Appx. P. 25(d)(1), I hereby certify that on March 17, 2021, which caused the following parties or counsel in this matter to be served by electronic means as more fully reflected on the Notice of Electronic Filing:

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