IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony and Joni Cortese, as husband and wife and as parents and natural guardians of James Cortese, a minor, Appellants	:	
v.	:	No. 53 C.D. 2008
	:	Submitted: October 14, 2008
West Jefferson Hills School District, Adam Lotis, Matthews Bus Company, Inc., William Cherpak, T.J. Srsic, George Wilson, John Mitruski, John Yogan, Keith Pancoast, Frank Brettschneider, Robert Ando, Thomas Berrich, Patricia Smith, Randall Sydeski, Andy Palaggo and John Lozosky	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** December 9, 2008

Anthony and Joni Cortese, as husband and wife, and James Cortese, a minor, (collectively "Appellants") appeal from the January 9, 2007 order of the Court of Common Pleas of Allegheny County (trial court) granting Appellees'

motion for summary judgment[1] and dismissing all claims, except as to Appellee Adam Lotis.[2] We affirm primarily on the basis of the trial court's attached opinion, but deem it necessary to discuss briefly the applicability of governmental immunity under Sections 8541 and 8542 of the Judicial Code[3] in light of the trial court's failure to do so.

In July 2002, high school student James Cortese was the victim of a hazing incident while on a school bus returning from a football camp held at Edinboro University.[4] On October 8, 2004, Appellants instituted an action in Allegheny County against student Adam Lotis, the bus company,[5] the school

[1] When reviewing the granting of a motion for summary judgment, a trial court must "view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Flood v. Silfies*, 933 A.2d 1072, 1074 (Pa. Cmwlth. 2007). Our review of the trial court's action in this regard is plenary.

[2] On September 12, 2007, the trial court entered a judgment against Lotis in the amount of $3000 and ordered him to dismiss all claims against Appellants with prejudice within the next seven days or suffer additional sanctions. On October 4, 2007, Appellants and Lotis filed a joint praecipe to discontinue all claims between all Appellants and Lotis. Settlement of the case as to Lotis, the remaining party, rendered the prior January 9, 2007 order granting summary judgment final under Pa. R.A.P. 341. Therefore, Appellants' October 12, 2007 appeal, erroneously filed in the Superior Court but subsequently transferred to our court, was timely. *K.H. v. J.R.*, 573 Pa. 481, 826 A.2d 863 (2003).

[3] 42 Pa.C.S. §§ 8541-8542.

[4] Fellow student Adam Lotis tackled Cortese in the aisle and placed his exposed genitals on Cortese's face. Other students on the bus paid Lotis about $10 for performing this act.

[5] In a November 24, 2004 order, the trial court granted the bus company's preliminary objections and dismissed Appellants' complaint against it. In their October 12, 2007 Notice of Appeal, however, Appellants appealed only from the January 9, 2007 order granting the summary judgment motion and from the February 7, 2007 order denying their request for reconsideration, the latter of which is not a reviewable order. In addition, Appellants neither addressed in their appellate brief any of the issues that the bus company raised in their preliminary objections nor served the company with the Notice of Appeal. Therefore, Appellants waived their opportunity to challenge the order granting the company's preliminary objections and any right to raise issues regarding the company on appeal. Accordingly, we strike that portion of Appellants' brief wherein they make arguments concerning the bus company.

district and numerous district employees. The complaint included Counts of negligence (Lotis, the bus company, Coach Cherpak), intentional infliction of emotional distress (Coach Cherpak), civil conspiracy (school district) and violation of Title IX of the Education Act Amendments of 1972, 20 U.S.C. §§ 1681-1688, (district).[6] The gravamen of the complaint were the allegations that, although most of the football coaching staff, the acting principal and teachers became aware of the hazing incident soon after it happened, no one took any action during the regular football season either to investigate it or to discipline Lotis. Much of the complaint focuses on Coach Cherpak, who was present at the camp but did not ride the bus with the players.

As noted above, the bus company's preliminary objections were granted in 2004. Following numerous depositions, the remaining Appellees filed a motion for summary judgment in October 2006. In January 2007, the trial court granted this motion, identifying Appellants' best evidence in support of each Count and explaining why the evidence was insufficient to make out a *prima facie* case for the respective causes of action. The trial court did not, however, address governmental immunity, which Appellees pled in their New Matter.

Section 8541 of the Judicial Code provides that "[e]xcept as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa. C.S. § 8541. A school district

[6] Title IX prohibits sexual discrimination in any educational program or activity receiving federal financial assistance. In *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), the United States Supreme Court held that a private right of action against a school board could lie for student-on-student sexual harassment if the board acted with deliberate indifference to acts of such harassment which were sufficiently severe, pervasive and objectionably offensive.

is a local agency for purposes of governmental immunity. *See Petula v. Mellody*, 631 A.2d 762 (Pa. Cmwlth. 1993). Pursuant to Section 8542(a) of the Judicial Code, a party who seeks to impose liability upon a local agency must establish that: (1) a common law or statutory cause of action exists against the local agency for a negligent act of the agency or its employee acting within the scope of his employment; and (2) the negligent act falls within one of the exceptions to governmental immunity specifically enumerated in Section 8542(b) of the Judicial Code. 42 Pa. C.S. § 8542(a) and (b).

The only negligence counts now before us are those against Coach Cherpak.[7] In those Counts, Appellants alleged that Cherpak failed to provide adequate supervision on the bus, failed to properly instruct the team about hazing, failed to enforce the school's hazing policy and failed to notify the school and law enforcement authorities about the incident.

As an initial matter, we note that Appellants have not alleged that any of the immunity exceptions applied. Appellants argue, however, that if as Appellees contend, the football camp was not school-sanctioned, then they cannot raise the defense of immunity to Appellants' claims of negligence. If, to the contrary, the camp was school-sanctioned, then Appellants argue that Appellees' conduct constituted willful misconduct which would not be subject to immunity. Without elaboration, Appellees characterize as disingenuous Appellants' argument that the district and its employees would somehow lose local agency status and immunity if the camp was deemed *not* to be school-sanctioned.

[7] As Appellees note, Appellants raise for the first time in their appellate brief an argument concerning the school district's alleged negligence. They did not, however, plead any negligence Counts against the district. Accordingly, we also strike that portion of Appellants' brief.

As a local agency, the district is immune from liability under Section 8541. As a local agency employee, Cherpak would be similarly immune as long as he was acting within the scope of his office or duties. In that regard, Section 8545 of the Judicial Code provides as follows:

> An employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employing local agency and subject to the limitations imposed by this subchapter.

42 Pa. C.S. § 8545. An employee is defined as "[a]ny person who is acting or who has acted on behalf of a government unit whether on a permanent or temporary basis, whether compensated or not . . . including [any] other person designated to act for the government unit." Section 8501 of the Judicial Code, 42 Pa. C.S. § 8501.

Here, Appellants pled that Coach Cherpak advised prospective football players at a school meeting that, if they wanted to play high school football, then he expected them all to attend the camp. They also alleged that Cherpak and other members of the football coaching staff attended and participated in camp activities. Appellants did not allege that Cherpak was acting outside the scope of his duties as a football coach while at the camp. In fact, it is obvious that he was acting in that capacity while at the camp. Indeed, it was Cherpak's status as head football coach that was the basis of Appellants' allegations that he failed to act appropriately with regard to the hazing incident. Therefore, it is clear that Cherpak was acting on behalf of the district and within the scope of his official duties as head football coach.

Nor is there any merit in Appellants' attempt, on appeal, to transform negligence claims into ones sounding in willful misconduct. In Counts V and VI, which Appellants labeled as "negligence," they alleged that Cherpak failed to provide adequate supervision, failed to properly instruct the team about hazing, failed to enforce the school's hazing policy and failed to notify the school and law enforcement authorities about the incident. These allegations do not contain any "willful" components.

In addition, this court has rejected litigants' attempts to re-write their complaints on appeal in order to circumvent a party's immunity. In *Kearney v. City of Philadelphia*, 616 A.2d 72 (Pa. Cmwlth. 1992), this court addressed a plaintiff's attempt, on appeal, to recharacterize the claims in her complaint that the city had acted intentionally, recklessly and wantonly into negligence claims. This court rejected the plaintiff's attempts, commenting that the recharacterization conflicted with the express wording of the complaint and stating that the litigant "may not take liberty to amend her complaint upon appeal in order to enhance her appellate position." *Id*. at 74. We similarly reject Appellants' attempt in the present case to transform their negligence Counts into ones alleging willful misconduct.

The remaining Counts solely against Coach Cherpak are the ones for intentional infliction of emotional distress. We note that such claims do not fall within the exceptions to immunity. Section 8550 of the Judicial Code, 42 Pa. C.S. § 8550; *Weaver v. Franklin County*, 918 A.2d 194 (Pa. Cmwlth.), *appeal denied*, 593 Pa. 751, 931 A.2d 660 (2007). Therefore, if Cherpak's conduct had risen to the requisite high level in order to establish that tort, he could have been held liable. As the trial court concluded, his conduct, though questionable, did not rise to that level. We rely upon the trial court's well-reasoned analysis in this regard.

As for James Cortese's Title IX claim against the district alleging discrimination based on sex, we also adopt the trial court's rationale. As the trial court noted, there was nothing in the voluminous deposition testimony that indicated that Cortese was the victim of student-on-student harassment *based on his gender*. In addition, we note that Appellants alleged that there is no evidence that the district played any role in the harassment itself or had any knowledge of it until after the fact. Moreover, the harassment was not pervasive; rather Lotis hazed Cortese one time, on the bus. While we certainly do not condone the incident or wish to minimize it, we agree with the trial court that the threshold for establishing a Title IX claim is high, and was not met here, even in the light most favorable to Appellants.

With respect to the two conspiracy Counts against the district, like the tort of intentional infliction of emotional distress, civil conspiracy does not fall within an immunity exception. *Weaver*. In addition, we agree with the trial court's determination that Appellants failed to state of claim for civil conspiracy, and rely on the trial court's reasoning in support of that determination.

For the foregoing reasons, and based upon the well-reasoned analysis of the Honorable W. Terrence O'Brien in the attached December 21, 2007 opinion, we affirm.

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BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony and Joni Cortese, as husband and wife and as parents and natural guardians of James Cortese, a minor, Appellants	:	
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O R D E R

AND NOW, this 9th day of December, 2008, the order of Court of Common Pleas of Allegheny County, No. GD 2004-012962, filed January 7, 2007, is hereby AFFIRMED.

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BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

ANTHONY CORTESE, ET AL	:	
	:	
Plaintiffs	:	
v.	:	
	:	
	:	GD 04 - 012962
WEST JEFFERSON HILLS SCHOOL DISTRICT, ET AL	:	
	:	
	:	
Defendants	:	

OPINION

O'BRIEN, J.

Plaintiffs have appealed the granting of summary judgment to all defendants except for Matthews Bus Company, Inc. and Adam Lotis. In ruling on a motion for summary judgment, the court must

> determine whether the record documents a question of material fact concerning an element of the claim or defense at issue. If no such question appears, the court must then determine whether the moving party is entitled to judgment on the basis of substantive law. Conversely, if a question of material fact is apparent, the court must defer the question for consideration of a jury and deny the motion for summary judgment.

Cassell v. Lancaster Mennonite Conference, 834 A.2d 1185, 1188 (Pa. Super. 2003).

FACTUAL SUMMARY

The following factual summary comes from plaintiffs' Reply Brief to defendants' Brief in Support of Motion for Summary Judgment.

Plaintiff, James Cortese was a student at West Jefferson Hills School District and was interested in becoming a member of the football team at Thomas Jefferson, a high school within the Defendant's school district. At a meeting held at the school, he and other potential members of the football team were informed that there was to be a camp held at Edinboro University called the Camp of Champions. It was not mandatory that any student attend the camp, but it was highly encouraged that all potential football players attend the camp. At this meeting the "Athlete's Handbook" was also distributed. This booklet included a section that stated that any hazing of a fellow student would result in the dismissal from the team.

James Cortese and his parents decided to have James attend the camp. Attendance at this camp required the students to stay overnight at Edinboro University. Several members of the coaching staff including Defendant William Cherpak (head football coach) attended the camp and also stayed overnight at Edinboro University. The football players were transported to the camp on a school bus owned and operated by Matthews Bus Company and its employees. This is the same bus company that the school district utilizes to transport the students during the school year. There was no adult supervision on the bus going to or from the camp. The funds to pay for the Camp were collected by Defendant Cherpak who was

paid by the camp to coach. It is believed that the bus was "donated" by the bus company to transport the students to the football camp.

While on the bus trip back from the camp on July 11, 2002, Co-Defendant Adam Lotis, another student at Thomas Jefferson High School and also a prospective football player, tackled James Cortese in the aisle of the school bus and placed his exposed genitals on the face of James Cortese. Adam Lotis was paid approximately $10.00 by other prospective players for performing this act.

Adam Lotis in his deposition admits to having his penis exposed, but claims that James pushed him away. Defendant Cherpak was present when both James Cortese and Adam Lotis spoke to Defendant Smith, the acting principal...

Several members, if not all of the coaching staff of the high school football team, the principal, and other teachers at the school district became aware of the incident shortly after it occurred. No action or investigation was taken against Adam Lotis when the coaching staff and other district employees became aware of the incident, despite a requirement in the "Athlete's Handbook" to dismiss him from the team. Adam Lotis was allowed to remain a member of the team and no investigation was conducted during the entire regular season.

Defendant Berrich, the head basketball coach of the school, took plaintiff James Cortese, [to] a dimly lit area of the gym of the school before school was scheduled to start that year. He asked James Cortese if

certain players were involved (prospective basketball players). When Berrich was told that these specific players were not involved, Berrich told James Cortese not to tell anyone or else Defendant Cherpak (head football coach) could get in trouble. Even after James Cortese told Defendant Berrich who was involved, Berrich took no further action. Coach Berrich had a disciplinary letter placed in his file that included language that he inappropriately intimidated James.

Plaintiffs Anthony and Joni Cortese did not become aware of the incident on the school bus until October 30, 2002. They were informed about the incident when several teachers from the defendant school district were discussing the incident in the stands of a football game for two other high schools. Mr. and Mrs. Cortese were sitting in close proximity and had been involved in conversation with these teachers. By this point in time, the season was over and the playoffs had begun. The topic was part of a discussion about what had recently been reported in the news that a similar incident had taken place at Central Catholic High School and that team terminated the season and forfeited the playoff game.

One teacher, Deborah Markwith, stated that a similar incident had taken place at Thomas Jefferson. Mrs. Markwith, a middle school teacher in the same district, heard about the incident in August but decided she had no duty to report the incident. It was when Mrs. Cortese heard that something had happened on the bus trip home from the camp that she suspected her son was the victim of some type of hazing incident. When

Mr. and Mrs. Cortese got home, they asked James if something had happened to him, he eventually told them about the incident. They promised James that they would not call the school or take any action until the season was over.

On or about October 31, 2002, Defendant Smith, the acting principal of Thomas Jefferson High School, was allegedly informed by an anonymous phone call where she was told about the incident on the school bus trip. She does admit to hearing some rumors but took no action to investigate. The school conducted an investigation the next day where Adam Lotis admitted his actions. This investigation also resulted in allegations that other members of the football team had been exposing themselves to girls in the hallways, other hazing incidents had taken place[,] as well as [that] Defendant Cherpak had also engaged in other outrageous acts by providing alcohol to students. Defendant Cherpak claims he asked a few members of the team what had happened, but they were all asleep. Cherpak chose to "believe" that no one witnessed this act on the bus even though Lotis testified that 8-10 players paid him to assault James Cortese.

Adam Lotis was suspended from the team for one game and then was allowed to stand on the sidelines the next playoff game due to the decision of the coaches. He also attended the banquet and received his varsity letter. Defendant Cherpak disputes this and claims that Adam Lotis never returned to the team, but may have been at the banquet.

After the suspension of Adam Lotis there were several other incidents where members of the football team harassed Plaintiff Joni Cortese as well as James Cortese. One of these incidents involved a football player driving erratically in front of Mrs. Cortese including his jamming on his brakes.

When this incident was brought to the attention of Defendant Smith, she allegedly conducted an investigation into this incident by asking the individual involved what had transpired. She was told that the brakes on the car were causing a problem. Defendant Cherpak was also informed about this incident and laughed.

All Defendants other than Berrich claim they had no knowledge about this hazing incident until October 31, 2002. The depositions of Defendants Srsic, Yogan, Pancoast, Brettschneider and Ando (all football coaches) have been secured and they all deny having any knowledge of the hazing event until after they were told some time in November by Coach Cherpak. Defendant Wilson claims to have heard rumors about the incident, but took no action to investigate. Defendant Smith also heard students talking about the incident but chose not to investigate.

Thomas Sharkey, a former head basketball coach for 23 years and a teacher in the district for 36 years testified that he heard about the hazing incident in question the first game of the season while he was in the press box to run the clock, which he has done for about 30 years. Mr. Sharkey testified that he discussed the incident with both Defendant Smith (the

principal) and Defendant Sydeski (assistant principal). Sydeski denies he even heard rumors about the incident prior to November 2002.

Defendant Berrich also testified he took no further action because it was a football issue and he assumed that the football staff (Defendants) knew about the incident.

The principal of the high school, Bart Rocco, was on sabbatical when the incident and investigation took place. He returned to the school in January, 2003, the semester after the season had concluded. He was in possession of the notes from the acting principal, Defendant Patrice Smith, and provided them to the counsel for the school, yet claims to have never read them. He made a decision not to investigate this incident as "I figured, what I don't know, wouldn't hurt me["] He also claims that his attorney advised him not to get involved...

Plaintiffs' Reply Brief, pp. 2-6, deposition citations omitted.

DISCUSSION

I

As of the time I granted summary judgment, there were four categories of defendants listed in the caption: 1) the school district, 2) the student who allegedly assaulted James Cortese on the bus, 3) the company that owned the bus and 4) thirteen individual employee "school defendants," consisting of coaches, principals and teachers. Twelve of the moving defendants argued that the only individual school defendant who is the subject of any count in the Amended Complaint is Coach Cherpak. These defendants therefore requested that I dismiss them with prejudice for this reason alone. Pa. R. Civ. P. 1020 requires that each cause of action in a complaint be stated in a

separate count containing a demand for relief and that each count be "preceded by a heading naming the parties to the cause of action therein set forth." The only individual school defendant named in the heading to any count is Cherpak, who is the subject of Counts V and VI of plaintiffs' Amended Complaint, which allege negligence. The allegations of negligence in each of those counts refer specifically to Cherpak only. Although Counts X and XI allege that the individual school defendants conspired "to violate the rights and safety of plaintiff James Cortese," the only defendant named in the heading to said counts is the school district. Further, the wherefore clauses ending Counts X and XI use the singular form "defendant." The only reasonable interpretation of the Amended Complaint is that Counts X and XI set forth causes of action against the school district only, based on the conduct of the individual school defendants. Moreover, plaintiffs have waived this issue by not addressing it in their reply brief. I therefore conclude that despite the fact that numerous school district employees are named in the caption of the Amended Complaint, the only individual school defendant who is the subject of any count in the Amended Complaint is Cherpak. All moving defendants also argue plaintiffs have failed to establish a prima facie case against them as to any count. These arguments will now be addressed.

II

Counts I through IV of the Amended Complaint are not against the moving defendants. As stated above, counts V and VI allege negligence on the part of Cherpak. Plaintiffs' entire argument as to Counts V and VI is as follows:

> Defendant Cherpak knew that the bus would be transporting the football players to and from the Camp of Champions. He met with the team prior to them boarding the bus and then drove himself to the camp without insuring there would be an adult on the bus to supervise.

> Defendant Cherpak was in fact paid by the Camp of Champions and had the responsibility to make sure the bus would be safe for the students. The negligent act of not insuring there was at least one adult on the bus resulted in the hazing of Plaintiff by one of his fellow teammates.

Plaintiffs' Reply Brief, p. 15.

As a matter of law, having only one adult (the driver) on a bus transporting high school students does not constitute negligence, given the fact that children of all school ages throughout this region go to school every day on a bus with no other supervision. Moreover, this issue is also waived because plaintiffs do not develop this theory or cite any caselaw to support it.

III

Counts VII and VIII allege intentional infliction of emotional distress against Cherpak. Plaintiffs correctly summarize part of the caselaw in this area as follows:

> To state a claim for Intentional Infliction of Emotional Distress, the plaintiff must show four elements: (1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) the conduct must cause emotional distress; and (4) the distress must be severe. *Chuy v. Philadelphia Eagles Football Club,* 595 F.2d 1265, 1273-1274 (3rd Cir 1979). For conduct to be deemed extreme and outrageous Plaintiff must show that the conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Buczek v.First National Bank*

of Mifflintown, 366 Pa. Super. 551, 531 A.2d 1122, 1125 (Pa. Super Ct. 1987).

Plaintiffs' Reply Brief, p. 13.

Caselaw has also held that

> under this standard, "[i]t has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort."

Daughen v. Fox, 539 A.2d 858, 861 (Pa. Super. 1988). For example, it has been held that even "highly provocative racial slurs and other discriminatory incidents do not amount to actionable outrageous conduct." *EEOC v. Chestnut Hill Hospital,* 874 F. Supp. 92, 96 (E.D. Pa. 1995).

Plaintiffs argue that the following facts demonstrate that Cherpak's conduct meets the above standard:

> In this case Defendant William Cherpak was the head football coach at Thomas Jefferson High School. As his deposition, William Cherpak claims to have not known about the incident involving Plaintiff until November 1, 2002; but despite this testimony, it is alleged that he was aware of the incident on the school bus shortly after the incident occurred. It is without

question that a teacher in the middle school, Deborah Markwith, the basketball coach, Thomas Berrich and Thomas Sharkey knew about the incident and acting pincipal Patricia Smith and assistant football coach George Wilson heard rumors about the incident before any investigation took place.

Thomas Berrich testified that he thought all the football coaches knew about the incident when he took James into the gym prior to the football season beginning, yet Defendant Cherpak and the other coaches claim they did not know until the 2nd game of the playoffs. Coach Wilson also told Defendant Patricia Smith that they all knew when she asked him if the other coaches knew about the incident.

It is propounded that Defendant William Cherpak was not honest in some of his answers that he provided in his deposition. It must be up to the fact finder to determine if William Cherpak was honest when he claims to not have any knowledge of the hazing incident. Despite the alleged knowledge, Defendant Cherpak and the other coaches or school officials took no action against Defendant Lotis. Defendant Cherpak was aware or should have been aware of the stated policy of the school that any hazing incident would result in the offending play[er] being permanently removed from the team yet chose to allow him to

remain part of the team.

When the incident was brought to Defendant Cherpak's attention on or about November 1, 2002 by the acting principal, Defendant Smith, he decided to suspend Defendant Lotis for only one game, despite the written policy to dismiss the player from the team. Defendant Cherpak falsely denied that Adam Lotis ever returned to the team in his deposition. This failure to adhere to the stated anti hazing policy further insulted the Plaintiffs and sent a message to the remaining players that hazing would in fact be tolerated by Defendant William Cherpak and the football team. Subsequent hazing / harassment incidents took place as a result of Defendant Cherpak's failure to take any action or disciplinary measures against Defendant Lotis, thus reaffirming the fact that hazing would be tolerated.

Plaintiffs' Reply Brief, 13-14.

As a matter of law, neither Cherpak's alleged failure to appropriately discipline Lotis nor his alleged lying in depositions even approaches the kind of conduct required for the tort of intentional infliction of emotional distress. [1] Compare the following cases, in which the conduct alleged was held sufficient to state a cause of action for intentional infliction of emotional distress: *Denton v. Silver Stream Nursing and Rehabilitation Center,* 739 A.2d 571 (Pa. Super. 1999) (employer condoned employee's death threats made to whistleblower); *Taylor v. Albert Einstein Medical Center,* 723 A.2d 1027 (Pa.

[1] This claim also fails because plaintiffs have pointed to no medical testimony or expert reports. *Cassell, supra,* fn. 3.

Super. 1999) (physician, who had limited experience performing invasive procedure, performed procedure which contributed to child's death, despite assurances to parents that highly experienced physician would do so); *Hackney v. Woodring*, 622 A.2d 286 (Pa. Super. 1993) (day care center employer sexually harassed, intimidated, threatened to kill and fired eighteen year old female employee); *Hoffman v. Memorial Osteopathic Hospital*, 492 A.2d 1382 (Pa. Super. 1985) (physician knowingly allowed partially clad, paralyzed patient to lie uncovered on cold emergency room floor for one and a half hours); and *Bartanus v. Lis*, 480 A.2d 1178 (Pa. Super. 1984) (family members, in effort to alienate minor son from father, threatened father with bodily harm, engaged in letter-writing campaign to son disparaging father, including calling father "whoremaster" and "con artist," and threatened to commit suicide unless son left father's residence).

IV

Count IX of the Amended Complaint alleges a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1618 et seq. The moving defendants make the following argument as part of their attack on plaintiffs' Title IX claim:

> In *Doe v. Southeastern Greene Sch.Dist.*, 2006 U.S. Dist. LEXIS 12790, the Third Circuit Court (sic) adopted the Title VII elements set forth in *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001) for a plaintiff to prove that same-sex harassment amounts to discrimination on the basis of sex:
>
> > Thus, there are at least three ways by which a plaintiff alleging same-sex sexual harassment might demonstrate that the harassment amounted to discrimination because of sex - the harasser was motivated by sexual desire, the

harasser was expressing a general hostility to the presence of one sex in the workplace, or the harasser was acting to punish the victim's non-compliance with gender stereotypes...

There is absolutely no record evidence of School District liability under the standards set forth under Title IX. Accordingly, Defendant School District's motion for summary [judgment] should be granted and Plaintiff 's complaint dismissed for the reasons that follow...

[I]n this case, there is absolutely no evidence in the substantial deposition testimony or the voluminous documents produced that the minor plaintiff was discriminated against on the basis of his sex or because he failed to meet his harasser's stereotyped gender expectations. In fact, there is no evidence whatsoever as to what gender expectations Defendants' (sic) maintained. There are no allegations that James was more effeminate than the other football players. There are no allegations that the [bus] incident was sexually provocative in nature. In proving any evidentiary theory, a plaintiff must prove that the conduct at issue was "not merely tinged with offensive sexual connotations" but actually amounted to discrimination based upon the plaintiff 's sex. The record is void of any averments, testimony or documents that establish the alleged sexual discrimination was based upon Minor Plaintiff 's sex.

Brief of the moving defendants, pp. 11, 18.

Plaintiffs' entire response to this specific prong of defendants' attack on their Title IX claim is as follows:

> Defendants also attempt to claim that Plaintiff 's that (sic) their conduct does not amount to discrimination based upon [James'] sex. In this case, Adam Lotis clearly attempted to harass [James] in an obscene and sexual manner.

Plaintiffs' Reply Brief, p. 12. Plaintiffs have failed in their reply brief[2] to articulate how they have satisfied the *Bibby* criteria, *supra*, as applied by Judge Conti in *Greene, supra*, which was a same sex Title IX, student-on-student sexual harassment case. Plaintiffs cannot make out a prima facie case under Title IX because they have not even attempted to show that James was harassed because of his sex or to punish any noncompliance with a gender stereotype.

V

As stated previously, Counts X and XI, directed against the school district, allege that various employee school defendants conspired "to violate the rights and safety of Plaintiff James Cortese." Our Supreme Court has summarized the law of civil conspiracy as follows:

> "[I]t must be shown that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means." Proof of malice, i.e., an intent to injure, is an essential part of a conspiracy cause of action; this unlawful intent must also be without justification. Furthermore, a conspiracy is not actionable until "some overt act is done in

[2] On January 24, 2007, plaintiffs filed a motion and brief seeking reconsideration of my order granting summary judgment. As neither the motion nor the brief explained why any new arguments contained therein could not have been made in plaintiffs' original brief in opposition to the motion for summary judgment, I did not consider any such new arguments.

pursuance of the common purpose or design or design ...and actual legal damage results[.]"

Rutherford v. Presbyterian-University Hospital, 512 A.2d 500 (Pa. Super. 1995) (citations omitted.)

The moving defendants argue, *inter alia,* that

> To establish that two or more persons acted in concert or entered into an agreement, mere allegations that they did so are insufficient. *Petula v. Mellody,* 138 Pa. Cmwlth. 411, 588 A.2d 107 (1991). As the Pennsylvania Commonwealth court noted in *Petula,* bald assertions of conspiracy are insufficient absent factual allegations of an agreement...In the case at bar, the record evidence does not establish that the individual School District Defendants acted in concert to not enforce the "Initiation/Hazing" policy or to violate the rights and safety of plaintiffs. Accordingly, Plaintiffs' claims for conspiracy should be dismissed.

Defendants' Brief in support of Motion for Summary Judgment, p. 25.

In meeting this argument, plaintiffs argue the following:

- "Several defendants have provided false testimony."
- "The acting principal has decided not to investigate the wrongdoing of the football coaches and other employees."
- All or most school defendants "knew of the hazing incident on the school bus, but failed to take any action."
- Coach Berrich tried to pressure James not to pursue this matter.

- The permanent principal failed to take any action.

Plaintiffs' Reply Brief, pp. 16-19.

Regardless of whether such alleged conduct can be characterized as wrongful and whatever the defendants' motivation, concerted action simply has not been shown.

BY THE COURT

O'Brien

12/21/07 J.