

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A25-0454**

Maxwell Harvey,  
Respondent,

vs.

Aubrey Dudley, et al.,  
Defendants,

Josh Barlage, et al.,  
Appellants,

Referee Brad Davick,  
Appellant.

**Filed December 15, 2025  
Affirmed in part, reversed in part, and remanded  
Ross, Judge**

Hennepin County District Court  
File No. 27-CV-23-10923

Christopher J. Kuhlman, Kuhlman Law, PLLC, Minneapolis, Minnesota; and

J. Ashwin Madia, Zane Umsted, Madia Law LLC, Minneapolis, Minnesota (for  
respondent)

John P. Edison, Molly M. Fischl, Squires, Waldspurger & Mace, P.A., Minneapolis,  
Minnesota (for appellants Josh Barlage, et al.)

Theodore J. Waldeck, Daniel C. Leitermann, Waldeck & Woodrow, P.A., Minneapolis,  
Minnesota (for appellant Brad Davick)

Considered and decided by Bond, Presiding Judge; Ross, Judge; and Larkin, Judge.

## **NONPRECEDENTIAL OPINION**

**ROSS, Judge**

A high-school athletic trainer cleared an athlete to complete his wrestling match after the referee stopped the contest concerned that the athlete may have been injured when his head struck the mat. The athlete sued his coach, the school district, the referee, the trainer, and the trainer's employer, alleging, among other things, that he was injured by the negligent decision to return him to competition. The district court denied all five defendants' motions for summary judgment on that negligence claim. The coach, school district, and referee appeal, relying on direct or vicarious official immunity. We affirm in part, because the referee has not advocated on appeal that he is entitled to official immunity on the theory that he unsuccessfully relied on in the district court (that immunity extends to him as a contractor-agent providing services for the school district), and on appeal he relies on a theory neither considered nor decided by the district court (that he was employed by the school district). But we reverse in part, because the coach is entitled to official immunity for his discretionary decision to return the athlete to compete after the evaluating trainer cleared the athlete to do so, and the school district is entitled to vicarious official immunity for the coach's decision.

## **FACTS**

Maxwell Harvey wrestled on the 2019 Apple Valley High School varsity team. Harvey was wrestling an opponent during a December wrestling tournament. The high school's head coach, Josh Barlage, watched the match from the team bench, and spectators watched from the bleachers. Harvey's opponent performed a takedown that caused

Harvey's head to forcefully strike the mat and led the match referee, Brad Davick, to signal an injury timeout. Coach Barlage and the school's certified athletic trainer, Aubrey Dudley, approached within seconds, and Referee Davick told them that Harvey took a blow to the head. Whether Harvey momentarily lost consciousness, and whether the coach, referee, or trainer heard anyone declare that he did, are factually disputed.

Dudley evaluated Harvey for symptoms of a concussion, later stating that she observed none and that Harvey reported none when she inquired. She tested Harvey's grip strength and eye responsiveness and asked him if he felt alright to continue. Harvey said that he did, and Dudley told Barlage that it was her opinion that Harvey could return to compete. Barlage saw nothing alarming in Harvey's demeanor and was satisfied that he could continue wrestling. Dudley, Barlage, and Davick permitted Harvey to rejoin the match, and he did.

After the match but later during the tournament, Harvey told Dudley that he was experiencing concussion symptoms. Dudley pulled Harvey from competing further. She evaluated him again, this time diagnosing him as having suffered a concussion.

Harvey sued Barlage, Barlage's employer the Independent School District 196 (ISD 196), Davick, Dudley, Dudley's employer Twin Cities Orthopedics P.A., and two other entities not relevant here, asserting that his continued wrestling after his head hit the mat seriously injured him. Among other claims, Harvey alleged negligence on the theory that the decision to return him to competition after Davick stopped the match for evaluation breached the duty of care established by Minnesota law and the Minnesota State High School League's (MSHSL) safety protocols. Barlage and Davick moved for summary

judgment on official-immunity grounds, and ISD 196 sought summary judgment based on vicarious official immunity derived from Barlage's immunity. Dudley and Twin Cities Orthopedics moved for summary judgment based in part on the contention that Harvey failed to establish that Dudley breached the medical standard of care applicable to her. The district court denied all the defendants' summary-judgment motions. It held that Davick is not a public official entitled to official immunity, that fact disputes preclude deciding Barlage's official-immunity claim, and that ISD 196 therefore is not entitled to vicarious official immunity.

Barlage, ISD 196, and Davick appeal from the district court's decision denying them official immunity.

### **DECISION**

Barlage and ISD 196 (the school-district appellants) and Davick appeal from the district court's summary-judgment decision. Summary judgment is warranted when no genuine issue of material fact precludes judgment as a matter of law. Minn. R. Civ. P. 56.01. We review *de novo* whether any genuine issues of material fact exist and whether the district court erroneously applied the law. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). Davick argues that he is entitled to official immunity. The school-district appellants similarly argue that Barlage is entitled to official immunity and that ISD 196 therefore enjoys vicarious immunity. We address these arguments in turn.

## I

Davick argues that the district court erroneously determined that he is not entitled to official immunity. Under the doctrine of common-law official immunity, “a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong.” *Elwood v. County of Rice*, 423 N.W.2d 671, 677 (Minn. 1988) (quotation omitted). Davick’s argument that he is a public official entitled to immunity for his allegedly discretionary role in returning Harvey to competition falters as a matter of procedure. This is because we do not review issues on appeal that were not presented to or considered by the district court or consider novel theories raised for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). For the following reason, Davick’s argument falls under the appellate-review limits announced in *Thiele*.

Harvey points out accurately that Davick asks us to review the district court’s official-immunity decision under a theory Davick never presented to the district court. Davick argues on appeal that he qualifies as a public official for the purposes of an official-immunity analysis because he was the school district’s employee at the time of Harvey’s allegedly injurious 2019 wrestling match. But he asked the district court to grant him summary judgment under his legal theory that the district court should treat him as an official because he served as a referee in his role as an independent contractor for the high school. His summary-judgment memorandum characterized him as “an agent of Apple Valley High School,” not as a school-district employee. His reply memorandum echoed this argument, responding to Harvey’s argument that official immunity should not extend

to Davick as a contractor under *Kariniemi v. City of Rockford*, 882 N.W.2d 593 (Minn. 2016). He specifically asserted that the district court must “determin[e] whether a non-government employee is considered a public official for the purposes of immunity” and argued that *Kariniemi* supports treating him as an official. The district court tracked the argument as Davick presented it, analyzing it as if Davick was an independent contractor under *Kariniemi*. Davick never argued, and the district court never considered, his position as framed on appeal, which is that he is entitled to official immunity as an employee of the school district. And although we may in some circumstances consider newly presented issues in the interest of justice, Minn. R. Civ. App. P. 103.04, Davick offers no reason why justice is best served by overlooking his shift in strategy. Without prejudice, we therefore do not address the merits of Davick’s new theory, and we also do not address the theory he raised in the district court but abandoned on appeal.

## II

We turn to Barlage’s challenge to the district court’s summary-judgment decision that he is not entitled to official immunity. Again, official immunity applies to actions a public official makes in the exercise of judgment or discretion. *Elwood*, 423 N.W.2d at 677. Whether the doctrine applies is a question of law we review *de novo*. *Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004). We first identify the conduct at issue and second decide whether that conduct was discretionary rather than ministerial. *Vassallo by Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014). Even if the conduct was discretionary, an official is not protected by official immunity if he engaged in the discretionary conduct maliciously. *Schroeder v. St. Louis County*, 708 N.W.2d 497, 505

(Minn. 2006). Our *de novo* review leads us to conclude that Barlage is entitled to official immunity.

### **Conduct at Issue**

Barlage argues that the district court erred by defining the conduct at issue as his “decision to allow Harvey to return to the match after he may have been knocked unconscious.” We must define the “precise governmental conduct at issue,” *Mumm v. Mornson*, 708 N.W.2d 475, 490 (Minn. 2006), which, in a negligence action like this one, is the conduct the plaintiff alleges was negligent, *Watson by Hanson v. Metro. Transit Comm’n*, 553 N.W.2d 406, 411 (Minn. 1996). Harvey’s complaint accuses Barlage of negligence because he “chose to return him to the match.” We hold that the conduct at issue is Barlage’s decision to return Harvey to the match under the circumstances known to Barlage at the time of his decision.

### **Ministerial or Discretionary**

We next consider whether Barlage’s decision as to whether to return Harvey to competition under the circumstances constituted a discretionary act versus a ministerial act. Discretionary conduct involves “individual professional judgment that necessarily reflects the professional goal and factors of a situation.” *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998). By contrast, ministerial duties are “absolute, certain, and imperative, [and] involv[e] merely execution of a specific duty arising from fixed and designated facts.” *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 664 (Minn. 1999) (quotation omitted). The law can establish a duty as merely ministerial, and so can an organization’s internal policies. *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678

N.W.2d 651, 658–59 (Minn. 2004). We therefore look at the controlling law and policies involved in Barlage’s decision.

Minnesota law requires a coach to remove a concussed athlete from play. Minn. Stat. § 121A.38, subd. 2 (2024). Specifically, “[a] coach . . . shall remove a youth athlete from participating in any youth athletic activity when the youth athlete” either “exhibits signs, symptoms, or behaviors consistent with a concussion” or the athlete “is suspected of sustaining a concussion.” *Id.*, subd. 2(d). After an athlete is removed from an activity “because of a concussion,” he may not rejoin until he is asymptomatic and receives a medical professional’s written permission to participate. *Id.*, subd. 2(e). A careful reading of these provisions informs us that the statute prohibits returning an athlete to competition without written permission from an evaluating medical professional if that athlete was removed from competition because he was in fact concussed. But it includes no similar return-to-competition restriction when the athlete was removed merely on symptoms or suspicion of a possible concussion. In this case, because the undisputed facts establish that Davick stopped the competition because of the force of Harvey’s contact with the mat rather than a determination that Harvey had suffered a concussion, section 121A.38, subdivision 2(e), did not impose a ministerial duty on Barlage to prohibit Harvey from returning to the match.

We next consider whether applicable policies imposed a duty on Barlage to prohibit Harvey’s return to the match. We first outline the provisions relevant to Barlage’s challenged decision.

Harvey points to the safety protocols of the MSHSL, which adopted the National Federation of State High School Associations' (NFHS) concussion rule:

Any athlete who exhibits signs, symptoms, or behaviors consistent with a concussion (such as the loss of consciousness, headache, dizziness, confusion, or balance problems) shall be immediately removed from the contest and shall not return to play until cleared by an appropriate health care professional.

The MSHSL implemented a set of protocols effectuating this rule. Referees must “know the signs and symptoms of a concussion and immediately remove any athlete” displaying them from competition. But the rule provides that “[o]nly an Appropriate Health Care Professional can decide if an athlete has been concussed.” If the health-care professional diagnoses an athlete with a concussion, her determination “is final and the athlete must be removed from all competition for the remainder of that day.” But where she determines after her evaluation that the athlete “did not sustain a concussion, the head coach may so advise the officials during an appropriate stoppage of play, and the athlete may reenter competition pursuant to the contest rules.”

The MSHSL adopted two additional protocols. The first, an “Acute injury” protocol, instructs that when a “player shows any symptoms or signs of a concussion,” he “should not be allowed to return to play in the current game or practice.” The second is a six-step “Return to play protocol” for easing athletes recovering from concussions back into competition, and completing each step “requires a minimum of 24 hours.” The MSHSL did not amend these rules before the December 2019 wrestling match involved here. The “2019-2020 MSHSL Eligibility Brochure,” which students must sign before competing in MSHSL sports, includes a page entitled, “CONCUSSION MANAGEMENT

RECOMMENDATIONS FOR MSHSL ATHLETES.” This page includes the same “Acute injury” and “Return to play protocol” sections just outlined.

Before the 2019-2020 season, the NFHS amended its wrestling rules regarding concussions. Under Article 4(b)(2) of rule 8-2, on-site health-care professionals may extend an injury timeout to five minutes to evaluate a suspected head or neck injury. Under Article 5, a health-care professional’s decision that a wrestler should not participate “shall not be overruled.” Appendix B to the wrestling rules, which is entitled, “SUGGESTED GUIDELINES FOR MANAGEMENT OF CONCUSSION IN SPORTS,” offers “SUGGESTED CONCUSSION MANAGEMENT” procedures, including that “[n]o athlete should return to play . . . on the same day of a concussion[.]”

The final relevant policy components are in the MSHSL’s 2017 training materials, which discuss the responsibilities of coaches who suspect an athlete of having suffered a concussion. They instruct coaches to “[i]mmediately remove the student from play” and keep him “out of play the day of the injury and until an Appropriate Health Care Professional [AHCP] . . . says they are symptom-free and given the okay to return to activity.” They also provide specific instructions for when an athlete loses consciousness, stating that a “loss of consciousness, for any period of time, usually means a concussion and requires immediate removal from participation for that entire day and further clearance from an AHCP to return to play.” And they state, “If a loss of consciousness occurs during play, the athlete has suffered a concussion” and “must be removed for the remainder of that day and may not return until examined and cleared by an AHCP.” Barlage completed the training sometime before the 2019-2020 wrestling season.

Our careful consideration leads us to conclude that the applicable policies, rules, and training material afford coaches the discretion to return injured athletes suspected of having been concussed to competition if they have first been immediately removed from play and then approved for reentry by a certified health-care professional. The MSHSL protocols, which implement the NFHS rules, allow the head coach to advise the official that the athlete may reenter the competition after the evaluating health-care professional has confirmed that the athlete was not concussed. It follows that a coach's decision to reenter an athlete under the circumstances Barlage faced is a matter of the coach's discretion. Nothing in the administrative guidance, taken in part or as a whole, obligates a coach to prohibit an athlete's return to competition after an official removed the athlete because of a blow to the head and then a certified trainer evaluates and clears the athlete to return. The rule and its implementing protocols allow coaches to use their "individual professional judgment" to decide whether to allow an athlete to return. *Wiederholt*, 581 N.W.2d at 315.

We are not persuaded otherwise by a brochure on which the district court based its determination that a coach has no discretion to return an evaluated athlete to competition. The "CONCUSSION MANAGEMENT RECOMMENDATIONS FOR MSHSL ATHLETES" page of the 2019-2020 MSHSL Eligibility Brochure does not create a ministerial duty because an organization's internal recommendations do not bind its members to specific conduct. *In re Alexandria Accident of Feb. 8, 1994*, 561 N.W.2d 543, 549 (Minn. App. 1997), *rev. denied* (Minn. June 26, 1997). And the "Acute injury" section of that document states only that a player exhibiting concussion symptoms "should" not be

allowed to return that day, and this suggestive language is not the sort of mandatory charge that generally creates a ministerial duty. *See Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 156 (Minn. 2014) (“The use of the word ‘should’ in a rule or a statute is not mandatory.”). Also key to our decision to depart from the district court’s conclusion, the “Return to play protocol” section regards a different circumstance from the one the parties encountered here. The protocol instructs how to carefully ease a player back into competing after he has been diagnosed with a concussion. But at the time Dudley cleared Harvey to return to compete after she evaluated him, Harvey had not yet been diagnosed as having suffered a concussion.

Our conclusion is supported by the unchallenged testimony of a MSHSL representative. That testimony corroborates the fact that coaches are treated as having discretion. The representative testified that coaches may allow an athlete who loses consciousness to continue competing on the same day if a health-care professional has cleared him to return. The representative believed that where this notion might conflict with some of the training material, the material assumes that a medical professional is not present to evaluate the injured athlete. Although a medical professional’s presence does not relieve a coach of his concussion-response responsibilities, medical professionals “have a greater authority” in the continuation-of-play decision. In sum, the MSHSL rules gave Barlage the discretion whether to defer to or override Dudley’s decision that Harvey could continue competing.

We of course offer no opinion as to what a coach should do when faced with an athlete known or suspected to have been concussed. Our question, which is purely legal, is

whether a coach in Barlage's shoes has the discretion to return an evaluated-and-medically-cleared athlete to competition. We hold that when an athlete is first rendered possibly unconscious or actually unconscious and then examined by an appropriate medical professional who evaluates whether the athlete has suffered a concussion and clears him to continue competing, the law and applicable policies in place at the time of the 2019 wrestling match afforded Barlage the discretion as head coach whether to permit Harvey to return to competition.

### **Willful or Malicious**

The only remaining question is whether Barlage's decision was malicious. Official immunity will not protect an official's discretionary conduct if the official engaged in willful or malicious conduct. *Schroeder*, 708 N.W.2d at 505. In the official-immunity context, "willful" and "malicious" both refer to an intentional, wrongful act without legal justification. *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991). A finding of malice requires "specific facts evidencing bad faith," and "[m]ere allegations" are insufficient. *Semler v. Klang*, 743 N.W.2d 273, 279 (Minn. App. 2007) (quotation omitted), *rev. denied* (Minn. Feb. 19, 2008). Harvey argues that Barlage's maliciousness "remains an open question," and, without citation to the record, that Barlage chose to reenter Harvey despite knowing that Minnesota law mandated his removal. We are unpersuaded by the conclusory assertion and have already explained that the law did not mandate Harvey's removal from competition. Because Harvey identifies no evidence supporting his assertion that Barlage used his discretion to return Harvey to competition out of malice, the assertion does not prevent summary judgment.

For these reasons, we hold that Barlage is protected by official immunity from Harvey's negligence claim. We turn to the school district's related argument.

### III

We agree with ISD 196 that it is entitled to vicarious immunity. When a public official is entitled to official immunity, his government employer generally enjoys vicarious immunity except when public policy counsels otherwise. *Schroeder*, 708 N.W.2d at 508. Neither party addresses public policy in its briefing, but we believe that denying ISD 196 immunity would penalize the school district for implementing a protocol providing an additional layer of protection against concussions for student athletes by enabling coaches to review a medical professional's conclusion that an athlete may continue playing. *See Anderson*, 678 N.W.2d at 664–65 (concluding that chilling effect on policy development provided sufficient reason to extend official immunity to school district). Vicarious immunity should be extended where officials would hesitate in the performance of their duties in fear of exposing their government employer to liability in its absence. *Id.* at 663–64. Without dispute, Barlage is an employee of ISD 196. Because Barlage is entitled to official immunity, ISD 196 is entitled to vicarious immunity.

**Affirmed in part, reversed in part, and remanded.**