STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0124

Janita Louise Irwin,
individually and as Parent and Natural Guardian
for Ja'Vahn R. Jones, her minor son,
Appellant,

vs.

Carter G. Woodson Institute for Student Excellence,
d/b/a WISE Charter School, et al.,
Respondents.

Filed September 10, 2012
Affirmed; motion denied
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-11-7632

May C. Yang, Law Office of Mitchell R. Hadler, Minneapolis, Minnesota (for appellant)

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Considered and decided by Chutich, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges the district court's summary-judgment dismissal of her claims against respondents, arguing that the district court erred by concluding that her

claims are barred by common-law official immunity, vicarious official immunity, statutory discretionary immunity, and statutory recreational-use immunity. We affirm.

FACTS

Appellant Janita Irwin, the parent and natural guardian of minor Ja'Vahn Jones, sued respondents Carter G. Woodson Institute for Student Excellence (WISE) charter school; Betty Jo Webb, in her capacity as chair of WISE's board of directors; and Greg Stumon, assistant to the WISE board of directors. Irwin alleged that in April 2005 Stumon collided with Jones while playing in a negligent manner and that consequently Jones fractured his femur. Respondents alleged that Irwin's claims were barred by statutory and common-law immunities and moved for summary judgment.

To support their summary-judgment motion, respondents alleged that Irwin attended a meeting of WISE's Parent Community Council (PCC), which was held after school hours. Children were not invited to attend the meeting and were sent outside to play in the parking lot, where they were accompanied by some WISE staff members, including Stumon. Jones was present and playing hula hoop by himself. While Stumon was playing with a group of children, he collided with Jones. Respondents argued that they were protected from Irwin's negligence claims by common-law official immunity; vicarious official immunity; statutory discretionary immunity under Minn. Stat. § 466.03, subd. 6 (2010); and statutory recreational-use immunity under Minn. Stat. § 466.03, subd. 6e (2010); and that they therefore were entitled to summary judgment.

After Irwin submitted written materials in opposition to summary judgment, respondents submitted a reply memorandum and an affidavit of LaTanya Washington,

executive director of WISE. Washington asserted that WISE "adopted the Direct Instruction and Balanced Literacy Approach and an active supervision policy," which "encourages teachers and other staff to be directly involved with students." She also asserted that WISE trained its staff on the policy at the beginning of and during the school year and that Stumon was employed by the school on the date of the incident.

The district court granted summary judgment to respondents, concluding that they were entitled to statutory recreational-use immunity, Stumon was entitled to common-law official immunity, Webb was entitled to statutory discretionary immunity, and WISE and WISE's board of directors[1] were entitled to vicarious official immunity. The court subsequently denied Irwin's request for permission to file a motion for reconsideration.

Irwin appeals from the summary-judgment order.

D E C I S I O N

As an initial matter, we address the parties' requests that we not consider or, alternatively, strike certain matters in the record.

Irwin's Request

In her brief, Irwin argues that respondents committed fraud and violated various discovery rules and therefore Irwin asks that this court not consider or, alternatively, strike Washington's affidavit. We decline to do so.

As an initial matter, we note that Irwin did not make her request in a separate motion before this court as required by Minn. R. Civ. App. P. 127.

[1] In her complaint and amended complaint, Irwin did not name WISE's board of directors as a defendant.

We decline to address Irwin's fraud argument because this court generally will not address arguments that were not presented to and decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Irwin alleges that respondents introduced the Direct Instruction and Balanced Literacy Approach and active supervision policy in an attempt to defraud and mislead the district court. But Irwin did not submit her fraud argument to the district court. Irwin only sent the district court a letter, dated December 19, 2011, in which she argued that Washington's reply affidavit was late and not disclosed through discovery and requested permission to move for reconsideration under Minn. R. Gen. Prac. 115.11.

We also reject Irwin's argument that we should not consider Washington's affidavit because respondents violated Minn. R. Civ. P. 26.05, Minn. R. Civ. P. 11.02, and Minn. Stat. § 549.211 (2010). Irwin argues that she was prejudiced because respondents did not disclose the policy described in Washington's affidavit in their discovery responses. But Irwin cannot show prejudice because the period for discovery did not end until nearly two weeks after respondents filed Washington's reply affidavit, and Irwin took no action to discover more information about the active-supervision policy. Moreover, Irwin did not move for a hearing continuance under Minn. R. Civ. P. 56.06.

We therefore decline Irwin's request to not consider or, alternatively, strike Washington's affidavit.

Respondents' Motion

Respondents move this court to strike documents included in Irwin's appendix that are related to her request for permission to move the district court for reconsideration of its order granting summary judgment to respondents. Respondents also request that this court strike all references to the documents in Irwin's brief. Because we have declined to consider Irwin's request to not consider or to strike Washington's reply affidavit, we deny as moot respondents' motion to strike. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying motion to strike as moot when court did not rely on materials).

Irwin's Appeal from Summary Judgment

The district court must grant summary judgment when, based on the entire record, there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Appellate courts review the evidence "in a light most favorable to the nonmoving party." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). We review the district court's decision de novo "to determine whether genuine issues of material fact exist, and whether the district court correctly applied the law." *Savela v. City of Duluth*, 806 N.W.2d 793, 796 (Minn. 2011). "Immunity is a legal question reviewed de novo." *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004).

Preliminarily, we note that Irwin makes various arguments against the immunity of WISE; the WISE board of directors; and Webb, who is being sued in her official capacity as chair of the board. But rather than referring to WISE, the WISE board of

directors, and Webb separately, we refer to them collectively as WISE because Webb acts only through the board and in that capacity only on behalf of WISE. *See* Minn. Stat. §§ 124D.10, subd. 4(a), (d) (requiring charter schools to organize as a nonprofit corporation under chapter 317A and requiring a board of directors), 317A.011, subd. 4 (defining a board of directors as "the group of persons vested with the general management of the internal affairs of a corporation") (2010); *see also Abrahamson v. St. Louis Cnty. Sch. Dist.*, ___ N.W.2d ___, ___, No. A10-2162, 2012 WL 3236801, at *3 (Minn. Aug. 10, 2012) (referring to school district and members of school board as "District" because school board members were named in the complaint in their official capacities and only acted "through the board and only on behalf of the District in that capacity").

Common-Law Official Immunity

Irwin challenges the district court's determination that Stumon was protected by common-law official immunity. Common-law "[o]fficial immunity . . . protects public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties." *Elwood v. Rice Cnty.*, 423 N.W.2d 671, 678 (Minn. 1988). We consider employees of charter schools to be public officials because "[a] charter school is a public school and is part of the state's system of public education." Minn. Stat. § 124D.10, subd. 7 (2010). "[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."

Anderson, 678 N.W.2d at 655 (quotation omitted). But common-law official immunity does not protect public officials when they are executing a ministerial function. *Id*.

To analyze claims of common-law official immunity, courts must first "identify the specific conduct at issue in the case" and second determine whether the public official's actions were discretionary or ministerial. *Id.* at 656–57 (determining whether a teacher's actions were discretionary or ministerial after identifying the specific conduct challenged). Here, Irwin does not challenge the district court's identification of Stumon's specific conduct at issue as "Stumon's decision to participate in the children's recreational activities rather than merely supervise them." But Irwin does challenge the district court's determination that Stumon's decision to participate in the children's recreational activities was discretionary.

"A duty is discretionary if it involves more individual professional judgment that necessarily reflects the professional goal and factors of a situation." *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 506 (Minn. 2006) (quotation omitted). In *S.W. v. Spring Lake Park Sch. Dist. No. 16*, this court determined that the reactions of a school secretary, teacher, and custodian to the presence of an intruder in the building were discretionary because no security policy existed at the time of the incident and all three individuals were specifically exempted from school guidelines. 592 N.W.2d 870, 876 (Minn. App. 1999), *aff'd*, 606 N.W.2d 61 (Minn. 2000).

But "[i]t must be kept in mind that the mere existence of some degree of judgment or discretion will not necessarily confer common law official immunity; rather, the focus is on the nature of the act at issue." *Schroeder*, 708 N.W.2d at 505 (quotation omitted).

"[A] duty is ministerial if it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts, that is, the duty must dictate the scope of the employee's conduct." *Id.* at 506 (citation and quotations omitted). In *Larson*, the supreme court held that common-law official immunity would not apply to a physical education teacher's decision how to spot and how to teach a gymnastic exercise. *Larson v. Indep. Sch. Dist. No. 314*, 289 N.W.2d 112, 120 (Minn. 1979). But the supreme court subsequently limited *Larson* by noting that it mistakenly applied statutory immunity standards in the analysis and by "declin[ing] to extrapolate from that analysis . . . that the court really meant that teaching decisions are too routine in general to qualify for official immunity." *Anderson*, 678 N.W.2d at 661.

The district court noted that "Stumon and other WISE supervising staff were afforded discretion to choose what activities the children could engage in, where the activities would occur, and whether they would directly engage in the activities with the children." Irwin argues that the district court improperly granted summary judgment to respondents because the record evidence shows that Stumon's actions were ministerial, not discretionary. Irwin argues that Minn. R. 3512.5200, subp. 2(B), and clearly established common law in *Gylten v. Swalboski*, 246 F.3d 1139, 1143 (8th Cir. 2001) and *S.W.*, 592 N.W.2d at 874, made Stumon's supervisory role ministerial. But the cases and the rule are inapplicable here because none of them involves a school employee participating in recreational activities and colliding with a student, and none of them explicitly prohibits or proscribes Stumon's conduct in the particular situation presented here.

Irwin also cites *Fear v. Indep. Sch. Dist. 911*, 634 N.W.2d 204 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001), as support for her argument that Stumon's decision to play with the children was ministerial, not discretionary. In *Fear*, school district employees who supervised recess were sued when a child fell off a snow pile during recess and was injured. 634 N.W.2d at 208–09. The court of appeals concluded that the school employees were not protected by common-law official immunity because the employees provided no evidence to the court "to show that they actually made any decisions regarding recess and children playing on the snow piles." *Id.* at 216. But, unlike in *Fear*, the challenged conduct in this case is Stumon playing with the children, and respondents presented evidence in Washington's affidavit that the staff supervising the children made decisions about what to do with the children and "could choose recreational activity(ies) for the evening." Washington stated in her affidavit that WISE had "an active supervision policy" and that "[s]taff is trained on the goals of the policy (direct interaction with students) and on general matters prior to each school year and throughout the school year during professional development days." Washington also stated that she asked for members of the staff to supervise the children on the day of the PCC meeting, that Stumon was employed by WISE on the day of the incident, that no policy prohibited staff from playing with the children, and that in fact "staff was encouraged to directly interact and play with the students and children because to do so fosters the good development and academic success of students." Washington also stated that the staff supervising the children "had the discretion to determine what they wanted to do with the children in attendance" and "could choose the recreational activity(ies) for

the evening." In sum, Stumon had the discretion whether and how to participate in recreational activities with the children.

We conclude that Irwin has merely created a "metaphysical doubt" that does not constitute a genuine issue of material fact.[2] *See Valspar Refinish, Inc.*, 764 N.W.2d at 364 (noting that nonmoving party in summary judgment proceeding must create more than a "metaphysical doubt as to a factual issue" (quotation omitted)). We further conclude that the district court was correct when it determined that Stumon's decision to play with the children was discretionary.

Consequently, Stumon is protected by common-law official immunity unless he is "guilty of a willful or malicious wrong." *Anderson*, 678 N.W.2d at 655 (quotation omitted). Irwin argues that she identified sufficient evidence in her expert's affidavit to show that Stumon was acting maliciously.[3] The supreme court has

> established a high standard for a finding of a willful or malicious wrong in the context of common law official immunity, by requiring the defendant to have reason to know that the challenged conduct is prohibited . . . . The exception anticipates liability only when an official intentionally

[2] Irwin takes issue with a sentence at the beginning of the district court's analysis, which reads, "Stumon asserts that his decision to participate in, rather than merely supervise, the children's recreational activities on the date of the Incident is a discretionary action entitling him to common law official immunity." Irwin argues that the record "is void of any testimony, statement, or assertions from Stumon." But it appears that the court was merely reciting the arguments of the respondents at the beginning of its common-law official immunity analysis. In the meat of its common-law official immunity analysis, the court relied on the "uncontroverted evidence in Washington's affidavit."

[3] Although Irwin did not raise this issue in her opening brief, Irwin did so in her reply brief in response to respondents' argument that there was no assertion of a malicious act by Stumon. *See* Minn. R. Civ. App. P. 128.02, subd. 4 (noting that an appellant's reply brief "must be confined to new matter raised in the brief of the respondent").

> commits an act that he or she then has reason to believe is prohibited.

Id. at 662 (quotation omitted). Irwin's expert does not make any allegations in his affidavit that Stumon had reason to know that participating in recreational activities with the children was prohibited. Instead, Irwin's expert only asserts that Stumon acted negligently. Therefore, Irwin's argument is without merit.

We conclude that the district court did not err by determining that Stumon is entitled to common-law official immunity.

Vicarious Official Immunity

Irwin challenges the district court's determination that WISE was entitled to vicarious official immunity. "In general, when a public official is found to be immune from suit on a particular issue, his government employer will enjoy vicarious official immunity from a suit arising from the employee's conduct." *Schroeder*, 708 N.W.2d at 508. "Vicarious official immunity is usually applied where officials' performance would be hindered as a result of the officials second-guessing themselves when making decisions, in anticipation that their government employer would also sustain liability as a result of their actions." *Id.* (quotation omitted). Appellate courts apply "vicarious official immunity when failure to grant it would focus stifling attention on an official's performance to the serious detriment of that performance." *Id.* (quotations omitted). "Ultimately, the extension of vicarious official immunity is a policy question for the court." *Id.*

Irwin argues that this court should not grant vicarious official immunity because doing so "would sanction [Stumon's] act of flouting [his] legal duty to keep students safe" and that "'stifling attention' must be asserted on supervising administrators to further advance safety objectives." We disagree.

As noted in Washington's affidavit, "WISE was formed to address a specific need in North Minneapolis and the African-American community," where the majority of students came from low-income, single-parent homes and were highly transitory. WISE's mission was "to ensure the academic and social development of students with the foregoing demographic background in mind." Consequently, as Washington stated, "WISE adopted the Direct Instruction and Balanced Literary Approach and an active supervision policy," which encouraged direct interaction with students to "build[] strong relationships" and therefore "increase attendance, participation, morale, character, [and] development." The failure to grant immunity here could hinder WISE's mission to increase student outcomes by encouraging the staff to directly interact with the students. *See id.* (noting that county should be vicariously immune from suit because to hold otherwise would disincentivize the county to use its knowledge and experience to create policies in the future); *Anderson*, 678 N.W.2d at 664–65 (similar reasoning).

We conclude therefore that vicarious official immunity protects WISE and that the district court did not err.

Statutory Discretionary Immunity

Irwin challenges the district court's decision that WISE was entitled to statutory discretionary immunity.

Although a municipality is generally liable for its torts and the torts of its officers, employees, and agents under Minn. Stat. § 466.02 (2010), a municipality is immunized from liability for claims enumerated in Minn. Stat. § 466.03 (2010). The definition of "municipality" includes a "school district, however organized." Minn. Stat. § 466.01, subd. 1 (2010). "A charter school is a district for the purposes of tort liability under chapter 466." Minn. Stat. § 124D.10, subd. 8(k) (2010). The immunity in section 466.03 only protects the municipality and not its employees. *See* Minn. Stat. § 466.03, subd. 1 (noting that "every *municipality* shall be immune from liability" (emphasis added)); *cf.* Minn. Stat. § 3.736, subd. 3 (2010) (specifying that "the legislature declares that *the state and its employees* are not liable for the following losses" (emphasis added)). Under section 466.03, a municipality enjoys statutory discretionary immunity from "[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." Minn. Stat. § 466.03, subd. 6. "The purpose of statutory immunity is to preserve the separation of powers by insulating policy judgments of the other branches of government from review by the courts in tort actions." *Anderson*, 678 N.W.2d at 655 n.4. "Consistent with that purpose, the reach of statutory immunity has been limited to decisions that involve balancing of policy objectives, such as social, political and economic considerations, at the planning or policy level." *Id.*

The district court identified Irwin's claims as "center[ing] on negligent training and/or supervision." "Hiring, supervising, training, and retaining municipal employees are policy-level activities that are protected by statutory [discretionary] immunity." *Fear*, 634 N.W.2d at 212; *see Watson by Hanson v. Metro. Transit Comm'n*, 553 N.W.2d 406,

413 (Minn. 1996) (concluding that the transit commission's "policy with regard to the training of its drivers also requires the balancing of financial, economic and social considerations").

On appeal, Irwin argues that respondents presented insufficient evidence that WISE made policy-level decisions "in arriving at the decision to have this purported 'active supervision policy' implemented." She also argues that no corroborative evidence supports the allegations in Washington's affidavit that staff were trained on the active-supervision policy or shows what weighing of social, economic, or political considerations had taken place when WISE adopted the active-supervision policy. But Irwin did not raise these concerns in the district court. This court generally will not address arguments that were not presented to and decided by the district court. *Thiele*, 425 N.W.2d at 582. We therefore decline to address Irwin's arguments.

We conclude that the district court did not err by determining that WISE is protected by statutory discretionary immunity.

Statutory Recreational-Use Immunity

Irwin also challenges the district court's determination that statutory recreational-use immunity applied to respondents. Section 466.03 grants municipalities statutory recreational-use immunity, Minn. Stat. § 466.03, subd. 6e; *see Prokop v. Indep. Sch. Dist. No. 625*, 754 N.W.2d 709, 712 (Minn. App. 2008) (stating the same). Under recreational-use immunity, a municipality is exempt from liability for

> [a]ny claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a

> park, as an open area for recreational purposes, or for the provision of recreational services, . . . if the claim arises from a loss incurred by a user of park and recreation property or services. Nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person.

Minn. Stat. § 466.03, subd. 6e.[4]

The district court determined that respondents had "demonstrated their entitlement to statutory recreational immunity." The court addressed Irwin's argument that WISE did not lease or own the parking lot where the injury occurred and reasoned that the lease referred to the

> "Premises" as inclusive of the land, building, and improvements on the Property. Although the Lease further purports to define the "Premises" as the building itself, it is clear that WISE was given use of the parking lot, if not exclusive use. Moreover, the Lease requires WISE to reimburse St. Anne for one-half of the cost to remove snow from the parking lot, and requires WISE to perform certain "Leasehold Improvements," one of which directly encompasses the parking lot itself. The Lease gives rights and obligations to WISE with regard to the parking lot, and there is no indication that WISE would have any such right to or use of the parking lot independent of the Lease. Moreover, there is no indication that St. Anne objected to WISE's use of the parking lot. Consequently, the only reasonable inference is that WISE leased the parking lot in addition to the school building.

[4] The legislature amended this provision in 2011, adding the language "except as provided in subdivision 23" and adding subdivision 23, which limits the liability for causes of action arising out of the use of school property. 2011 Minn. Laws. ch. 57, §§ 1−2, at 215. But by its own limitation, section 466.03, subdivision 23, only applies to causes of action arising on or after May 24, 2011. 2011 Minn. Laws ch. 57, § 2, at 215; *see* Minn. Stat. § 645.01, subd. 2 (2010) ("'Final enactment' or 'enacted finally' for a bill passed by the legislature and signed by the governor means the date and time of day the governor signed the bill."). Because the incident giving rise to Irwin's claims occurred in 2005, this provision does not apply.

(Citations omitted.)

Irwin argues that the lease clearly and unambiguously shows that WISE neither owned nor leased the parking lot. "[A] lease is a form of contract." *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999). "The construction and effect of a contract is . . . a question of law unless the contract is ambiguous." *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). "A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation." *Id.* (quotation omitted). We conclude that the lease is not ambiguous and agree with the district court that WISE leased the parking lot where the accident occurred.

Irwin also argues that the parking lot was a common area that is separate from the leased premises. But Irwin did not make this argument in the district court. This court generally will not address arguments that were not presented to and decided by the district court. *Thiele*, 425 N.W.2d at 582. We therefore decline to address Irwin's argument and conclude that WISE was entitled to statutory recreational-use immunity.

Affirmed; motion denied.