STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1279
A13-1280
A13-1281

Tony Ducklow,
Appellant (A13-1279),

Stephanie Waite-Tranberg,
Appellant (A13-1280),

Mary Stefansky,
Appellant (A13-1281),

vs.

KSTP-TV, LLC,
Respondent.

Filed March 3, 2014
Affirmed
Larkin, Judge

Ramsey County District Court
File Nos. 62-CV-12-5343, 62-CV-12-5342, 62-CV-12-5339

Patrick T. Tierney, Caitlin T. Talarico, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul, Minnesota (for appellants)

Joseph J. Roby, Jr., Jessica L. Durbin, Johnson, Killen & Seiler, Duluth, Minnesota (for respondent)

Mark R. Anfinson, Minneapolis, Minnesota (for amicus curiae Minnesota Newspaper Association)

Terrance W. Moore, Hellmuth & Johnson, Edina, Minnesota (for amicus curiae Minnesota Broadcasters Association)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

LARKIN, Judge

In these consolidated appeals from the summary-judgment dismissal of their defamation claims, appellant public school teachers assert that the district court erred by (1) interpreting the Minnesota Free Flow of Information Act (FFIA), Minn. Stat. §§ 595.021-.025 (2012), to provide an absolute privilege protecting from disclosure unaired video that respondent filmed in connection with an allegedly defamatory news segment; and (2) determining that appellants failed to introduce evidence sufficient to create a genuine issue of material fact on the element of actual malice and thus that judgment was appropriate as a matter of law. We affirm.

FACTS

On September 21, 2011, respondent KSTP-TV LLC aired a report about a contract between the St. Paul school district and a company called Playworks for the provision of recess coaches to lead structured activities during school recesses. KSTP's report questioned whether the $175,000 contract was a good use of taxpayer dollars. Reporter Robert McNaney and photojournalist Jared Bergerson prepared the report. Appellants Tony Ducklow, Stephanie Waite-Tranberg, and Mary Stefansky are teachers who appeared in video shown during the KSTP report and assert that they were defamed by it.

In preparing the KSTP report, McNaney and Bergerson visited Battle Creek Elementary School to take footage of a recess coach at work. According to McNaney

and Bergerson, they observed the recess for about 15 or 20 minutes. At his deposition for this case, McNaney testified that, during the time he and Bergerson were at Battle Creek, he observed the teachers standing away from the students and did not recall seeing any teachers engaged with students. Bergerson testified that, during the time they were there, the teachers were always standing in groups and were not actively participating with the kids.

The KSTP report included interviews with a school district representative and a Playworks representative as well as footage of the recess at Battle Creek. In response to questioning about the teachers' role at recess, the district representative answered that "teachers are still out on the play-yard as they always were before, supervising students, spread out overseeing the different games and activities that are happening." The footage from the Battle Creek recess, however, showed teachers standing in groups, accompanied by the following statement from McNaney: "We watched one school with a coach for about 15 minutes. The coach was very active with the kids hustling around the playground. The teachers who are still supposed to be engaged in the activities spent the time talking amongst themselves."

Each of the appellants was a second-grade teacher at Battle Creek on September 21, and the three appear in the KSTP report for two seconds standing in a group. Appellants assert that McNaney's statement quoted above is false in two respects. They first assert, based on the timing of recesses for different grades on that day, that McNaney and Bergerson could not have observed recess for 15-20 minutes. Second, they deny that they talked amongst themselves for 15-20 minutes during recess that day,

relying on their own testimony as well as testimony from other teachers who were present on the playground that day.

Shortly after the KSTP report aired, Ducklow contacted KSTP, asserted that the report was inaccurate, and requested to see the raw video taken at Battle Creek on September 21. A series of e-mail exchanges followed. KSTP ultimately decided to stand by its report and refused to share the video with appellants. KSTP took no steps to preserve the unaired video, and it was written over when capacity was needed for more current stories.

Appellants initiated these three civil actions in May 2012, asserting claims for defamation. The cases were consolidated in the district court, and KSTP brought two motions: one to exclude any reference to the no-longer-available unaired video on the ground that it was privileged under the FFIA and a second for summary judgment. Appellants opposed the motions, asserting that the unaired video was not privileged, that the court should allow an adverse inference based on KSTP's assertion of the privilege and/or spoliation of the unaired video, and that the evidence was sufficient to prove their defamation claims. The district court granted both of KSTP's motions. These appeals follow.

D E C I S I O N

On appeal from the summary-judgment dismissal of claims, this court conducts a de novo review to determine whether (1) there exist any genuine issues of material fact, and (2) the district court erred in its application of the law. *STAR Ctrs, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). The court views the evidence in the

light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But a party may not avoid summary judgment by resting on mere averments or presenting evidence that "merely creates a metaphysical doubt as to a factual issue." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "[T]he court is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented." *Id.* at 70. Summary judgment is "mandatory against a party who fails to establish an essential element of [his or her] claim, if that party has the burden of proof, because this failure renders all other facts immaterial." *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. Oct. 16, 2001).

To prevail on a defamation claim,

> a plaintiff must prove that: (1) the defamatory statement was communicated to someone other than the plaintiff; (2) the statement is false; (3) the statement tends to harm the plaintiff's reputation and to lower the plaintiff in the estimation of the community; and (4) the recipient of the false statement reasonably understands it to refer to a specific individual.

McKee v. Laurion, 825 N.W.2d 725, 729-30 (Minn. 2013) (quotations omitted). Because appellants, as public school teachers, are treated as public figures for purposes of their defamation claims, they are also required to prove, by clear and convincing evidence, that KSTP acted with actual malice in publishing the allegedly defamatory report. *See Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 56 (Minn. App. 1995) (holding that "a public school teacher is a public official" who must prove actual malice to prevail on a

defamation claim), *review denied* (Minn. July 27, 1995). "Actual malice" means that a defendant had actual knowledge of a statement's falsity or acted with reckless disregard for the truth. *Id.* "Reckless disregard means the publisher had to entertain serious doubts about the publication's truth." *Id.* (quotation omitted).

Appellants intended to prove KSTP's actual malice in this case through a combination of the unaired portions of video from the KSTP story and testimony about their participation at recess on the day that the video was filmed. They assert that the district court erred by (1) granting KSTP's motion to exclude any reference to the unaired video and (2) determining that, without the unaired video, appellants had not provided evidence sufficient to create a genuine issue of material fact regarding actual malice.[1]

I.

The district court granted KSTP's motion to exclude references to the unaired video based on its determinations that the video is privileged under the FFIA. Appellants argue that the district court erred by granting KSTP's motion in limine because (A) the unaired video is not privileged under the FFIA or the privilege has been waived and (B) appellants are entitled to an adverse-inference instruction based on KSTP's spoliation of the unaired video and/or assertion of the privilege.

A.

A district court's ruling on a motion in limine should not be reversed unless based on a "clear abuse of discretion" or an "erroneous view of the law." *Bergh & Mission*

[1] Appellants also challenge the district court's denial of their motion to amend their complaints to add claims for punitive damages. Because we affirm the dismissal of appellants' claim, we need not reach their punitive-damages arguments.

Farms, Inc. v. Great Lakes Transmission Co., 565 N.W.2d 23, 26 (Minn. 1997). The determination of the scope of a statutory privilege and its exceptions is subject to de novo review. *See Bol v. Cole*, 561 N.W.2d 143, 146, 149 (Minn. 1997) (holding that both interpretation of statutes and determination of the existence of privileges present questions of law).

The FFIA creates "a substantial privilege not to reveal sources of information or to disclose unpublished information." Minn. Stat. § 595.022 (expressing public policy of FFIA). Two categories of information are subject to the privilege: (1) "the person or means from or through which information was obtained" and (2) "any unpublished information procured by the person in the course of work or any of the person's notes, memoranda, recording tapes, film or other reportorial data whether or not it would tend to identify the person or means through which the information was obtained." Minn. Stat. § 595.023. In more general terms, the FFIA protects from disclosure (1) the identity of media sources and (2) unpublished information gathered by the media. By the plain language of the statute, unpublished materials are protected "whether or not" they would reveal a media source. *Id.*

There are exceptions to the privilege created by the FFIA. For example, in a defamation action, "where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice," the privilege for "the identity of the source of information" can be overcome if (1) "there is probable cause to believe that the source has information clearly relevant to the issue of defamation" and (2) "the information cannot be obtained by any alternative means or

remedy less destructive of first amendment rights." Minn. Stat. § 595.025, subds. 1, 2. By its express terms, this exception does not apply to the privilege for unpublished materials.

Appellants argue that the legislative history of the FFIA creates an ambiguity in the statute and that this court should interpret the exception to the privilege for defamation cases to apply to unpublished materials as well as the identity of sources. We disagree.

In 1996, the Minnesota Supreme Court interpreted an earlier version of the FFIA to protect only unpublished materials likely to reveal the identity of a source. *State v. Turner*, 550 N.W.2d 622, 631 (Minn. 1996). In 1998, the legislature amended the statute to provide that unpublished materials were subject to the privilege "*whether or not*" they would tend to reveal the identity of a source. 1998 Minn. Laws ch. 357, § 1, at 589 (emphasis added). Although the legislature broadened the privilege in 1998, it made no corresponding amendments to the language of the exception in civil defamation cases. *Id.*

The 1998 amendment created an incongruity between the two types of information protected by the privilege. Under the plain language of the amended statute, the privilege for the identity of a source is subject to an exception in civil defamation cases, but the privilege for unpublished materials is not. Even assuming that this incongruity was unintentional, however, this court cannot "add words or meaning to a statute that were intentionally or inadvertently omitted." *Rohmiller v. Hart*, 811 N.W.2d 585, 590 (Minn. 2012). If "a question of statutory construction involves a failure of expression rather than

an ambiguity of expression, courts are not free to substitute amendment for construction and thereby supply the omissions of the legislature." *Id.* (quotation omitted). Accordingly, we conclude that the district court did not err by concluding that no exception to the FFIA applies and thus that the unaired video was absolutely privileged under the FFIA.

Appellants also argue that KSTP waived the privilege by airing portions of the video in the KSTP story. A privilege may be waived through disclosure of privileged materials. *See State v. Gore*, 451 N.W.2d 313, 318 (Minn. 1990) (recognizing "that privileged information loses its privileged character when subsequently disclosed by the holder of the privilege"). But the privilege in this case extended only to those portions of the video that were not aired. Thus, disclosure of the aired portions of the video would not waive the privilege.

Under the plain language of the FFIA, the unaired video is protected by a privilege that was not waived by KSTP. Accordingly, we conclude that the district court did not err by granting KSTP's motion in limine to preclude reference to the unaired video.

B.

A district court's decision whether to give an adverse-inference instruction, whether based on spoliation or the assertion of a privilege, is subject to review for an abuse of discretion. *See Patton v. Newmar Corp.*, 538 N.W.2d 116, 118-19 (Minn. 1995) (spoliation); *Soukup v. Summer*, 269 Minn. 472, 479, 131 N.W.2d 551, 555 (1964) (assertion of privilege).

Appellants first assert that they are entitled to an adverse-inference instruction based on KSTP's failure to preserve the unaired video. "[S]poliation of evidence is the failure to preserve property for another's use as evidence in pending or future litigation." *Miller v. Lankow*, 801 N.W.2d 120, 127 (Minn. 2011) (quotation omitted). An adverse-inference instruction may be an appropriate sanction for spoliation. *Wajda v. Kingsbury*, 652 N.W.2d 856, 862 (Minn. App. 2002), *review denied* (Minn. Nov. 19, 2002). "A [spoliation] sanction is only appropriate if the unavailability of the evidence results in prejudice to the opposing party." *Foss v. Kincade*, 766 N.W.2d 317, 323 (Minn. 2009). Appellants' assertion of prejudice is premised on their assertion that the unaired video would have been admissible. Because we affirm the district court's determination that the unaired video is privileged, we also affirm the district court's denial of a spoliation sanction.

Appellants next assert that they are entitled to an adverse-inference instruction based on KSTP's assertion of a privilege under the FFIA, but they cite no authority that supports this assertion. The cases on which they do rely are inapposite. *See, e.g.*, *Herbert v. Lando*, 441 U.S. 153, 158-75, 99 S. Ct. 1635, 1640-48 (1979) (discussing availability of First Amendment privilege for unpublished materials); *Parker v. Hennepin Cnty. Dist. Court*, 285 N.W.2d 81, 83-84 (Minn. 1979) (discussing availability of adverse-inference instructions when litigant asserts Fifth Amendment privilege against self-incrimination in civil cases). Taking into consideration the public policy underlying the FFIA, we discern no abuse of discretion in the district court's refusal to give an adverse-inference instruction based on KSTP's assertion of the privilege created by that

statute. *See Merrill v. St. Paul City Ry. Co.*, 170 Minn. 332, 337, 212 N.W. 533, 534 (1927) (explaining that an adverse-inference instruction "should be given only when the facts and circumstances demand it"), *overruled on other grounds by American Motorists Ins. Co. v. Vigen*, 213 Minn. 120, 5 N.W.2d 397 (1942).

II.

In determining whether summary judgment is appropriate, we "must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 2513 (1986). "On appeal from summary judgment in public figure defamation cases, the test is whether the evidence in the record could support a reasonable jury finding that the plaintiff has shown actual malice by clear and convincing evidence." *Foley v. WCCO Television, Inc.*, 449 N.W.2d 497, 503 (Minn. App. 1989), *review denied* (Minn. Feb. 9, 1990).

The district court determined that appellants did not have sufficient evidence to create a genuine issue of material fact regarding actual malice. Appellants assert that their witnesses' testimony that events did not occur as McNaney reported them is sufficient to demonstrate actual malice. We disagree.

Actual malice is a subjective standard. *In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 813 (Minn. 2006) (citing *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S. Ct. 2678 (1989)). Although it may be proved through circumstantial evidence, *see Harte-Hanks*, 491 U.S. at 668, 106 S. Ct. at 2686, actual "[m]alice is not to be presumed or inferred from the fact that a false statement has been made, but must be proved by plaintiff with convincing clarity,"

Valento v. Ulrich, 402 N.W.2d 809, 813 (Minn. App. 1987). "A genuine issue of fact as to actual malice exists only if the facts permit the conclusion that the defendant[] in fact entertained serious doubts as to the truth of the publication." *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 488 (Minn. 1985) (quotation omitted).

We agree with the district court that, on the full record presented, even with all inferences drawn in appellants' favor, no reasonable jury could find that appellants have proven actual malice under the heightened clear-and-convincing evidence standard. Even assuming that McNaney and Bergerson were wrong about what occurred on the playground on September 21, no evidence in the record indicates that either McNaney or Bergerson "in fact entertained serious doubts as to the truth of" the statements made in the KSTP report. Because appellants have not offered evidence sufficient to dispute McNaney's and Bergerson's testimony that they believed the KSTP report to be accurate, the district court did not err by granting KSTP's motion for summary judgment. *See, e.g., Madison v. Frazier*, 539 F.3d 646, 658-59 (7th Cir. 2008) (affirming summary-judgment dismissal of defamation claim where allegedly defamatory statement was made based on author's recollection of events and there was no evidence that author "doubted her belief" in the statement); *Valento*, 402 N.W.2d at 813-14 (affirming summary-judgment dismissal of defamation claim despite evidence that statements based on personal observation were false).

Affirmed.