COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP945 **Cir. Ct. No. 2014CV198**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

BRIANNA KOPP, VICTORIA NEUMAN AND JENNIFER KEMPKA,

PLAINTIFFS-APPELLANTS,

V.

SCHOOL DISTRICT OF CRIVITZ, MICHAEL K. DAMA, INDIVIDUALLY, KAM DAMA, INDIVIDUALLY AND SOPHIA ANNA DAMA,

DEFENDANTS-RESPONDENTS,

EMPLOYERS MUTUAL CASUALTY COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Oconto County: MICHAEL T. JUDGE, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Brianna Kopp, Victoria Neuman, and Jennifer Kempka (collectively, the "Plaintiffs") appeal an order dismissing their claims against the School District of Crivitz and its insurer (together, the "District"), Michael and Kam Dama (together, the "Damas"), and their daughter, Sophia Dama (collectively with the Damas and the District, the "Defendants"). The claims at issue arose out of the Plaintiffs' use of a cell phone in a locker room prior to a high school basketball game to photograph and make a video recording involving Sophia. Based on the Defendants' responses to this incident, the Plaintiffs asserted claims for breach of contract, breach of the duty of good faith and fair dealing, defamation, negligence, civil conspiracy, and intentional infliction of emotional distress, all of which the circuit court dismissed on summary judgment.

¶2 The Plaintiffs first assert the circuit court erred by dismissing Sophia as a party. We conclude the Plaintiffs' appeal on this issue is untimely. Next, we conclude the court properly granted summary judgment to the Defendants on all of the Plaintiffs' claims, as there are no genuine issues of material fact and the Defendants are entitled to judgment as a matter of law. Finally, the Plaintiffs assert their claims should survive based on the spoliation of evidence doctrine, because Kam Dama deleted an allegedly defamatory Facebook post and a police officer ordered the deletion of a cell phone video of the incident. We conclude the circuit court properly exercised its discretion in declining to apply the spoliation doctrine. Consequently, we affirm in all respects.

BACKGROUND[1]

¶3 At all times relevant to this action, the Plaintiffs and Sophia were students in the junior class at Crivitz High School. These students were involved in numerous extra-curricular activities, including playing on the high school's varsity basketball team. Each high school student was required to abide by the terms of the Crivitz High School Student Handbook (the "Handbook"), with activities being governed by the Extra-Curricular Activities Code (the "Code"), a copy of which each of the Plaintiffs signed. Jeffrey Dorschner was the District athletic director. Michael Dama was the varsity basketball team's assistant coach and the District school board president.

¶4 The varsity basketball team was scheduled to play a game on February 18, 2014. The Plaintiffs arrived at school prior to the game. Neuman later admitted to taking Snapchat videos of Kopp and Kempka prior to the game while they were using the bathroom by holding her cell phone above the stall door.[2] Neuman shared the video of Kempka to her Snapchat friends list.[3] The Plaintiffs then watched the junior varsity basketball game until its halftime.

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[1] The facts in this section are either undisputed or are viewed in the light most favorable to the non-moving party (here, the Plaintiffs). We will note significant, but non-material, factual disputes where appropriate. We note only the facts—alleged or undisputed—that are relevant to the disposition of the arguments on appeal.

[2] Snapchat is an image messaging social media application for mobile devices. Elise Moreau, *What Is Snapchat? An Intro to the Popular Ephemeral App*, LIFEWIRE, https://www.lifewire.com/what-is-snapchat-3485908 (last visited Sept. 29, 2017). "Photos and videos [on Snapchat] essentially disappear a few seconds after they've been viewed by their recipients." ***Id.*** Neuman testified that once a Snapchat message was sent, it would be immediately deleted from the user's device.

[3] Additionally, Kopp admitted that she had previously taken a picture of Neuman going to the bathroom in the locker room. Kopp later deleted this photograph at the direction of law enforcement.

¶5 At halftime, the Plaintiffs and Sophia were all present in their locker room preparing for the varsity game. Neuman testified that at some point Sophia had gone into one of the bathroom stalls in the locker room. Neuman admitted to standing on the toilet in the stall next to Sophia and taking a Snapchat picture of Sophia "[a]fter she had flushed and a few seconds had passed by." According to Neuman, Sophia was fully dressed and had her hand on the lock, leaving.[4] Neuman testified she said, "Hey Sophi," and Sophia looked up at her and smiled as Neuman took the picture. Neuman testified she then deleted the picture and showed Sophia the blank Snapchat screen.

¶6 Neuman also admitted to taking a video of Kempka dancing in her underwear and "[shaking] her butt" near Sophia in the locker room that day. That video was not taken using Snapchat, but rather it was saved on Neuman's phone. Kempka and Kopp were both aware at the time that Neuman had taken the video. Neuman testified Kempka's body never touched Sophia's.[5]

¶7 When the Damas returned home that night, Michael confronted Sophia because he felt she had been "disconnected" at times during the game. Sophia then told the Damas what had occurred in the locker room prior to the game. Michael spoke with Crivitz High School Principal Jeffery Baumann that

[4] Sophia disputed that she was fully dressed. Sophia testified that at the time Neuman was looking over the stall, she was naked from the waist down.

[5] Sophia also disputed that there was no contact with Kempka. According to Sophia, Kempka had stopped her while she was on the way to her locker and put "her crotch … on my thigh as she humped my thigh." Later, as Sophia was bending over putting her hair in a ponytail, she claimed Kempka "came over and placed her butt on my head, and I pushed her off and stood up again. And then I looked up, and [Neuman and Kopp] were standing there saying that they didn't get it, with their cell phones in their hands."

evening regarding the Plaintiffs' conduct in the locker room. Michael also informed Dorschner of Sophia's allegations by letter on February 20, 2014.

¶8 On February 20, District officials, including Dorschner and Baumann, removed the Plaintiffs from their classes and confiscated their cell phones. The Plaintiffs were interviewed separately, and each admitted they had been involved in the taking of photographs and a video of Sophia in the locker room two days prior. Concerned about the possibility of nude photographs of students, District superintendent Patrick Mans called the Marinette County Sheriff's Department to assist in the investigation.

¶9 Patrol sergeant Matthew Evancheck received the dispatch and consulted with a detective, who recommended that he confront the Plaintiffs quickly to avoid any possibly illicit photographs going "viral" on the Internet. Evancheck responded to the high school and, together with Mans, Dorschner and Baumann, interviewed the Plaintiffs. The District officials and Evancheck interviewed Kempka alone first. District officials did most of the questioning, but Evancheck inspected Kempka's cell phone and returned it to her.

¶10 Evancheck and the school administrators then interviewed Neuman and Kopp together. Neuman admitted she had taken a photo of Sophia in the locker room bathroom stall. Evancheck requested to view Neuman's cell phone, to which she consented. Evancheck testified he found photos of both Neuman and Kopp sitting on a toilet. He also viewed the cell phone video that depicted, in Evancheck's words, "Sophia bent over and the Kempka girl running around in her bra and panties." According to Evancheck, it "appeared that [Kempka] bumped her butt into Sophia[']s head as Sophia was bent over." Evancheck regarded this

as horseplay and instructed Neuman to delete the video, which she did. Neuman consented to a forensic search of her phone.

¶11 Evancheck acknowledged being "stern" at times with the Plaintiffs and telling at least Kempka and Kopp, each of whom was seventeen at the time, that there could be possible criminal consequences for their conduct.[6] Evancheck ultimately initiated a referral to juvenile services for Neuman, who was sixteen at the time, and to the district attorney for Kempka and Kopp, for, among other things, criminal harassment. Evancheck did not know if any action was ever taken regarding the juvenile services referral, but the district attorney decided not to prosecute.

¶12 Soon after the interviews, Dorschner, Baumann and Mans decided they would sanction the Plaintiffs for a Code violation, consisting of conduct unbecoming of a student athlete. On February 21, 2014, Dorschner sent a letter to each of the Plaintiffs advising them of the decision. Kopp and Kempka were suspended from 25% of the basketball season for a first violation, whereas Neuman was suspended for a greater number of games due to a prior violation. Each of the Plaintiffs was also ineligible for all-conference awards and team awards for the season. As a result of the violation, each of the Plaintiffs was also ineligible, at least for a time, to participate in national honor society, student council, and other clubs, as well as to receive certain athletic awards and to participate in social functions like homecoming court.

[6] Evancheck denied the Plaintiffs' assertions that he had told them they were "rapists and child pornographers" during the interviews.

¶13 The Damas disagreed with the nature of the penalties the Plaintiffs were given. Neither felt a Code violation was sufficient punishment, and Michael would have instead recommended a three-day school suspension to provide a "cooling off" period. It is undisputed that Kam posted on Facebook about the incident, one of which posts she subsequently deleted.[7] Kam also appeared at a school board meeting and stated the Plaintiffs had "been doing this for years. They didn't receive enough punishment."

¶14 Kempka notified Dorschner of her desire to appeal her violation. Following a hearing, at which Kempka had an opportunity to present her argument, the board of appeals voted to uphold the sanctions. Neuman also appealed, but upon being notified of the decision in Kempka's case, decided not to attend the hearing. None of the Plaintiffs sought judicial review of their sanctions.

¶15 The Plaintiffs filed the present action in late 2014. Their eight-count complaint, consisting of more than two-hundred numbered paragraphs, advanced claims against the District for breach of contract, breach of the duty of good faith and fair dealing, negligence, and intentional denial of due process; against the Damas for defamation; and against both the District and the Damas for intentional infliction of emotional distress. Following her deposition, Sophia was added as a party and the complaint was amended to add defamation and intentional infliction of emotional distress claims against her, as well as a conspiracy claim against her and her parents.

[7] Facebook is an online social network that allows individuals to publish posts to the public at large or to a set of other user profiles known as "friends." *See* Nathan Petrashek, Comment, *The Fourth Amendment and the Brave New World of Online Social Networking*, 93 MARQ. L. REV. 1495, 1507 (2010).

¶16 Sophia filed a motion to dismiss the claims against her. The circuit court granted the motion, concluding the Plaintiffs' claims against her were based solely on her deposition testimony, which was absolutely privileged. *See* ***Bergman v. Hupy***, 64 Wis. 2d 747, 750, 221 N.W.2d 898 (1974).

¶17 The parties also filed cross-motions for summary judgment. The circuit court heard oral argument, after which it dismissed all claims against the remaining Defendants. The court dismissed the contract claims against the District because it concluded no contract existed. It also dismissed the Plaintiffs' defamation claims, concluding the allegedly defamatory statements were not statements of fact and there was no evidence supporting the conclusions that the statements were made with the intent to injure or that the statements tended to injure the Plaintiffs' reputation in the community. The court determined the Plaintiffs' negligence claim against the District was barred by governmental immunity, and their conspiracy claim was defective because the evidence showed no concerted action by the Defendants to harm them. With respect to the Plaintiffs' intentional infliction of emotional distress claim, the court concluded neither the District nor the Damas had engaged in extreme or outrageous conduct and there was no evidence supporting a conclusion their conduct was intended or actually caused the Plaintiffs to suffer emotional distress. Finally, as a matter of public policy, the circuit court concluded "Sophia and her parents should not have to fear reprisal litigation for reporting what is indisputably inappropriate and improper behavior by the Plaintiffs." The Plaintiffs now appeal.

DISCUSSION

Sophia Dama's dismissal as a party

¶18 The Plaintiffs argue the circuit court erroneously dismissed Sophia as a party.[8] Sophia argues, among other things, that this court lacks jurisdiction to consider this argument because the Plaintiffs failed to timely appeal the order dismissing her as a party. Determining whether an order is final and whether an appeal has been timely filed from such an order both present questions of law, which we review de novo. ***Sanders v. Estate of Sanders***, 2008 WI 63, ¶21, 310 Wis. 2d 175, 750 N.W.2d 806.

¶19 A final order or judgment may be appealed as a matter of right. *See* WIS. STAT. § 808.03(1) (2015-16).[9] A final judgment or order is "a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties." ***Id.*** Here, Sophia filed a motion seeking to dismiss her as a party. The circuit court heard oral arguments on the motion on January 26, 2016, and it entered an order shortly thereafter—on February 2—that dismissed all the claims against Sophia.[10] Thus, as of February 2, 2016, there remained nothing to litigate as it pertained to Sophia, and the February 2 order was a final order as to the Plaintiffs and Sophia.

[8] Because Sophia was dismissed as a party, that portion of the defamation claim alleging Sophia's parents were vicariously liable for her defamatory statements was also necessarily dismissed.

[9] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[10] A judgment is entered when it is filed in the office of the clerk of court. *See* WIS. STAT. § 806.06(1)(b). The order at issue here was file-stamped February 2, 2016.

¶20 The relevant statutes require a notice of appeal to be filed a maximum of ninety days after the entry of a final judgment or order.[11] *See* WIS. STAT. § 808.04(1); RULE 809.10(1)(e). The Plaintiffs would have been required to file a notice of appeal from the February 2, 2016 order no later than Monday, May 2, 2016. The Plaintiffs filed their notice of appeal on May 3, 2016. We agree with Sophia that the Plaintiffs' tardy notice of appeal deprives this court of jurisdiction to consider their arguments related to Sophia's dismissal.[12] *See* ***Bruns v. Muniz***, 97 Wis. 2d 742, 747, 295 N.W.2d 11 (Ct. App. 1980).

Summary judgment on the Plaintiffs' remaining claims

¶21 We review a grant of summary judgment de novo, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). When reviewing a circuit court's summary judgment ruling,

[11] The ninety-day period applies when the appealing party does not receive notice of the judgment's or order's entry; otherwise, a forty-five-day period applies. *See* WIS. STAT. § 808.04(1).

[12] The Plaintiffs fail to reply to Sophia's argument, and they did not preemptively address it in their brief-in-chief. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108, 279 N.W.2d 493 (Ct. App. 1979) (holding unrefuted arguments are deemed conceded). We note the Plaintiffs did file a motion for reconsideration before the circuit court, but their arguments within that motion appear limited to matters that had already been raised and decided; at a minimum, the Plaintiffs do not argue their reconsideration motion presented any "new" arguments. "No right of appeal exists from an order denying a motion to reconsider which presents the same issues as those determined in the order or judgment sought to be reconsidered." ***Silverton Enters., Inc. v. General Cas. Co. of Wis.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988).

we construe the facts and all reasonable inferences in favor of the non-moving party. ***Strozinsky v. School Dist. of Brown Deer***, 2000 WI 97, ¶32, 237 Wis. 2d 19, 614 N.W.2d 443.

¶22 The Plaintiffs' claims dismissed on summary judgment included: (1) breach of contract, against the District; (2) breach of the duty of good faith and fair dealing, against the District; (3) defamation, against both Kam and Michael Dama; (4) negligence, against the District; (5) civil conspiracy, against the Damas; and (6) intentional infliction of emotional distress, against the District and the Damas.[13] In addition to arguing these claims were improperly dismissed, the Plaintiffs argue their claims should go forward as a sanction for the Defendants' spoliation of evidence. We conclude the circuit court properly dismissed each of the Plaintiffs' claims because, as explained below, there are no genuine issues as to any *material* fact and the Defendants are entitled to judgment in their favor as a matter of law. Furthermore, the court did not err by rejecting the Plaintiffs' spoliation argument.

1. Breach of contract (against the District)

¶23 To prevail on a breach of contract claim, the plaintiff must establish the existence of a contract. ***VanHierden v. Swelstad***, 2010 WI App 16, ¶11, 323 Wis. 2d 267, 779 N.W.2d 441. The Plaintiffs believe the Handbook and Code together constitute an enforceable contract (either express or implied) whereby the

[13] The Plaintiffs also brought various claims against the District for malicious, willful, and intentional denial of procedural due process. They do not challenge the dismissal of these claims on appeal and thus have abandoned them. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

"District promised to provide the Plaintiffs a high school education and the students and District promised to follow the Handbook and Code." The Plaintiffs theorize the District breached the alleged contract "by failing to follow the process for [d]iscipline and the stated disciplines to be given" in those documents. In the Plaintiffs' view, the "only possible violation" was of the Handbook's policy regarding electronic communication devices, and they had a contractual right to receive only the punishments prescribed for such a violation.

¶24 The elements of a contract are offer, acceptance and consideration. ***Rosecky v. Schissel***, 2013 WI 66, ¶57, 349 Wis. 2d 84, 833 N.W.2d 634. Here, the Handbook's and Code's provisions are undisputed, as well as the circumstances under which those documents were issued. "The existence of a valid express contract presents a question of law we review de novo when, as here, the relevant facts are undisputed." ***VanHierden***, 323 Wis. 2d 267, ¶11.

¶25 The problem with the Plaintiffs' theory is that "[t]he majority of courts which have considered whether a student handbook can form the basis for an implied contract between a student and a public secondary or elementary school have found that such claims fail for lack of consideration, among other things." ***Sutherlin v. Independent Sch. Dist. No. 40***, 960 F. Supp. 2d 1254, 1268-69 (N.D. Okla. 2013) (collecting cases). Typically, these cases hold that, given compulsory school attendance requirements, a school district's promise to provide an education is inadequate consideration for the school's "agreement" to bind itself to the provisions of a handbook. *See* ***Brodeur v. Claremont Sch. Dist.***, 626 F. Supp. 2d 195, 217 (D.N.H. 2009). "Consideration" refers to a detriment to the promisee or a benefit to the promisor. ***First Wis. Nat. Bank of Milwaukee v. Oby***, 52 Wis. 2d 1, 6, 188 N.W.2d 454 (1971).

¶26 No Wisconsin case appears yet to have addressed whether a public school handbook and activities code give rise to a contract. However, our supreme court has held "that the performance of a legal duty, or the promise to perform a legal duty, is not sufficient consideration to create a contract." ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, ¶45, 262 Wis. 2d 127, 663 N.W.2d 715. In ***Scott***, our supreme court dismissed a breach of contract claim, holding the alleged contract failed for lack of consideration because the school district had a pre-existing legal duty to do what it had allegedly promised to do—namely, provide guidance counseling services to a high school student. ***Id.***, ¶¶44-45.

¶27 Here, the Plaintiffs' breach of contract claim based on the Handbook and Code similarly fails because the District was required by law to provide educational services. "Public education is a fundamental responsibility of the state," WIS. STAT. § 118.01(1), and every elementary school and high school must provide a free education to pupils residing within the school district, WIS. STAT. § 121.77(1)(a). Generally speaking, school attendance is compulsory for children. WIS. STAT. § 118.15(1)(a). Under these circumstances, the District lacks the necessary consideration to bargain with a student based on the contents of the documents at issue here. In exchange for the students agreeing to abide by the Handbook and Code, the District offered nothing beyond that which it was already required to provide.

¶28 The Appellants assert there is no legal requirement that schools offer the opportunity to participate in extra-curricular activities. While this may be true, such an argument views a public school's role too narrowly, as limited to providing classroom instruction. As part of its educational mission, the District has chosen to adopt certain voluntary extra-curricular programs to enhance its students' learning. The Code states:

> The Crivitz School District believes that a program of activities outside the school curriculum is a valuable enhancement to the regular school program of studies.
>
> Extra-curricular school programs at Crivitz are intended to enrich learning through activities that foster the emotional, intellectual and social needs of students. It is also the intent of these programs to increase a student's understanding of ethical conduct and self[-]discipline.
>
> It is the position of the Crivitz School District that involvement in extra-curricular activities is a privilege with accompanying responsibilities and expectations.

Nothing in the Code suggests the District intended to create a binding contract with the students who elect to participate in its extra-curricular activities. The document does not establish any definitive "right" on the part of the student to participate in such activities, nor does it create a District obligation to offer such extra-curricular activities, much less in a particular manner. Rather, it is apparent the District views its offering extra-curricular activities as an additional method of satisfying its pre-existing legal obligation to provide a public education.

¶29 The Plaintiffs rely on ***Cosio v. Medical College of Wisconsin, Inc.***, 139 Wis. 2d 241, 407 N.W.2d 302 (Ct. App. 1987), in support of their argument that a valid contract existed here. In that case, we held that a bulletin and handbook provided to a doctoral student at the Medical College of Wisconsin "were contractual in nature and spelled out part of the relationship" between the student and the Medical College. ***Id.*** at 245. However, ***Cosio*** is distinguishable in that it involved the provision of post-secondary educational services by a private institution. As such, there was no pre-existing legal obligation to provide educational services. Here, both the Code's specific provisions and the District's pre-existing legal duty are fatal to the Plaintiffs' breach of contract claim.

2. Breach of the duty of good faith and fair dealing (against the District)

¶30 "Every contract implies good faith and fair dealing between the parties to it, and a duty of cooperation on the part of both parties." ***Beidel v. Sideline Software, Inc.***, 2013 WI 56, ¶27, 348 Wis. 2d 360, 842 N.W.2d 240 (quoted source omitted). However, the implied duty exists only once a contract has been formed. *See* ***Hauer v. Union State Bank of Wautoma***, 192 Wis. 2d 576, 596-97, 532 N.W.2d 456 (Ct. App. 1995). As previously explained, neither the Handbook nor the Code gave rise to a contract. Therefore, the circuit court properly dismissed the Plaintiffs' claim against the District for breach of the implied duty of good faith and fair dealing.

3. Defamation (against the Damas)

¶31 Next, the Plaintiffs argue there are disputed issues of material fact regarding their defamation claims against the Damas. An actionable claim for defamation requires proof of three elements: (1) a false statement; (2) communicated by speech, conduct or in writing to a person other than the person defamed; and (3) the communication is unprivileged and tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her. ***Schaul v. Kordell***, 2009 WI App 135, ¶10, 321 Wis. 2d 105, 773 N.W.2d 454.

¶32 The first inquiry in evaluating a defamation claim is whether the communication is reasonably capable of a defamatory meaning from the standpoint of an ordinary observer. ***Laughland v. Beckett***, 2015 WI App 70, ¶21, 365 Wis. 2d 148, 870 N.W.2d 466. Part of this consideration is whether the meaning the plaintiff ascribed to the language is a natural and proper one. ***Id.*** Whether a communication is capable of a defamatory meaning presents a question

of law, which we review de novo. ***Id.*** If we determine the statements at issue are potentially defamatory, we must consider any defenses, including that the statements were substantially true or that they consisted of mere opinions. ***Id.***, ¶22. "If the challenged statements as a whole are not capable of a false and defamatory meaning, or are substantially true, a [defamation] action will fail." ***Torgerson v. Journal/Sentinel, Inc.***, 210 Wis. 2d 524, 534-35, 563 N.W.2d 472 (1997).

a. Michael Dama

¶33 The Plaintiffs' appellate brief focuses on the contents of the letter Michael sent to Dorschner on February 20, 2014. That letter stated as follows:

> Vicki Newman [sic] stood on a toilet in an adjacent stall and put her camera phone over the top of the stall where my daughter was changing, Sophi saw the phone[,] Vicki took it down, Sophi went ahead and changed into her basket ball uniform, when she completed changing she looked up and noticed the phone again over the stall. I believe she did record a video of Sophi changing but we are not sure.
>
> Jen[n]ifer Kempka while in her underwear started grinding on my daughter[']s leg, this is when Sophi went into the bathroom stall to avoid further harassment from Jen. When she was done changing she came out of the bathroom stall and bent over to put her hair in a pony tail and Jen pinned Sophi's head under her but[t] and rubbed her bare but[t] into the back of Sophi's neck. Sophi pushed her off and then [bent] over again to complete he[r] pony tail and Jen shook her but[t] on the top of Sophi's head while Breanna Kopp used her phone to record Jen dancing on the top of [S]ophi's head.
>
> These incidents are very serious to me, hazing and bullying should be taken very seriously.

It is undisputed that Michael did not personally witness what occurred in the locker room and that the letter's contents were based on what Sophia had told him occurred.

¶34 The Plaintiffs assert many details of the letter are simply untrue. For example, the Plaintiffs assert Sophia was fully clothed when Neuman was in the other bathroom stall and that Kempka never touched Sophia. For purposes of our analysis, we assume without deciding that some of the details of the incident communicated in Michael's letter were false in the manners the Plaintiffs have alleged. We nonetheless conclude the circuit court properly dismissed the defamation claim against Michael because, even viewing the material facts in the light most favorable to the Plaintiffs, their claim fails as a matter of law.

¶35 First, the Plaintiffs have failed to demonstrate any way in which the arguably "false" contents of the letter tended to "lower [them] in the estimation of the community or to deter third persons from associating or dealing with [them]." *See* ***Schaul***, 321 Wis. 2d 105, ¶10. The essential conduct complained of—the Plaintiffs' behavior toward Sophia, and their photographing and recording that behavior and her reactions—are undisputed. The minor details of the incidents—including whether Sophia was fully clothed or in the process of changing her clothes, and whether Kempka actually made contact with Sophia while Neuman recorded the video—were not materially any more defamatory than the misconduct to which they had admitted.

¶36 For this reason, we also conclude that even if some of the statements were potentially capable of a defamatory meaning, they are not actionable because the letter as a whole was substantially true. We must consider the context and circumstances under which the statements were made. ***Terry v. Journal Broad.***

Corp., 2013 WI App 130, ¶19, 351 Wis. 2d 479, 840 N.W.2d 255. Here, these circumstances involve a father's efforts to notify the District about his daughter's claimed mistreatment in the locker room two days prior. The District's investigation ultimately confirmed that the letter's core allegations were true and that misconduct had occurred. "It is not 'necessary that the article or statement in question be true in every particular. All that is required is that the statement be substantially true.'" ***Id.*** (quoting ***Lathan v. Journal Co.***, 30 Wis. 2d 146, 158, 140 N.W.2d 417 (1966)). "Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." ***Lathan***, 30 Wis. 2d at 158.

¶37 The Plaintiffs' second amended complaint also alleged that on February 19, 2014, Michael was overheard at a restaurant stating that "he was going to get the Plaintiffs in so much trouble or words to that effect." Even assuming this statement could conceivably be viewed as defamatory by suggesting the Plaintiffs had done something wrong, the statement is also substantially true. The Plaintiffs were ultimately sanctioned with a Code violation for their undisputed misconduct, based in part on Michael's reporting.

b. Kam Dama

¶38 The Plaintiffs allege that numerous of Kam's statements regarding the locker room incident were defamatory. In February 2014, Kam published a Facebook post addressing the incident in which she called the Plaintiffs and their parents "nasty" and stated Sophia had for eleven years "been putting up with these mean and nasty girls." The Plaintiffs also assert Kam defamed them when she said at a school board meeting the Plaintiffs had "been doing this for years" and "[t]hey didn't receive enough punishment."

¶39 Only statements of fact give rise to a claim for defamation. ***Laughland***, 365 Wis. 2d 148, ¶27. Mere opinions are not actionable. ***Id.*** Kam's characterization of the Plaintiffs as being "mean" and "nasty" based on their conduct is a statement of opinion, as is her statement that the Plaintiffs were insufficiently punished. *See* ***Terry***, 351 Wis. 2d 479, ¶23 (holding that under the circumstances, variations of the terms "rob," "ripped off," "cheat," "victim," and "scam" were statements of opinion that were not defamatory). Kam's assertion that her daughter had been "putting up" with the Plaintiffs for years was also an opinion. To the extent there was any statement of "fact" blended with this latter opinion (a proposition of which we are skeptical), there was ample specific testimony by Sophia and others of arguably harassing conduct, unrefuted by any of the Plaintiffs, that supported Kam's statement. Therefore, any factual matters implied by Kam's statement were, based on this record, substantially true.

4. Negligence (against the District)

¶40 The District is a governmental body. Governmental immunity, which is derived from the common law and codified in WIS. STAT. § 893.80(4), provides that government agencies and officials are not liable for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions. *See* ***Pries v. McMillon***, 2010 WI 63, ¶20, 326 Wis. 2d 37, 784 N.W.2d 648. The immunity defense presumes negligence and looks to whether the government action broadly involves the exercise of discretion. ***Scott***, 262 Wis. 2d 127, ¶16.

¶41 Several exceptions limit the scope of governmental immunity. These exceptions represent a judicial balance struck between the need of public officers to perform their functions freely and the right of an aggrieved party to seek redress. ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶24, 253 Wis. 2d 323,

646 N.W.2d 314. The Plaintiffs assert two such exceptions apply here: the "ministerial duty" exception and the exception for "malicious, willful, and intentional" acts. *See* ***id.*** In each instance, we conclude the circuit court properly dismissed the Plaintiffs' negligence claim against the District. *See* ***id.***, ¶17 (application of immunity statute and its exceptions is a question of law).

a. Ministerial duty

¶42 The ministerial duty exception distinguishes between discretionary acts and ministerial acts, immunizing the former but not the latter. ***Id.***, ¶25. "A ministerial duty is one that 'is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.'" ***Id.*** (quoting ***Lister v. Board of Regents***, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976)).

¶43 The Plaintiffs assert the "rules in the Handbook governing the penalty for the first cell phone violation are expressed so clearly and precisely as to eliminate the official's exercise of any discretion." Among other problems, this argument presupposes that the Plaintiffs could only have been punished for violating the Handbook's policy regarding electronic communication devices. Dorschner repeatedly testified school officials viewed what occurred in the locker room as a more serious incident than just a device violation. The record supports the Defendants' assertion that the Plaintiffs' conduct was "akin to aggravated use of a cell phone as an internet-connected video camera in a locker room bathroom," with elements of other misconduct that included harassment and bullying. Nothing the Plaintiffs have presented demonstrates the District was, by law,

required to treat their undisputed misconduct as a mere violation of the District's policies regarding the acceptable use of cell phones.

¶44 Additionally, we agree with the circuit court's assessment that matters of student discipline are inherently discretionary. The court wrote: "Common sense and law affords schools and their employees discretion in disciplining their students. School discipline is a perfect example of discretionary conduct, requiring balancing of multiple factors and making a judgment call." The Plaintiffs have failed to point to anything creating an "absolute, certain and imperative" duty on the part of the District to deal with the Plaintiffs' conduct in a particular manner.

b. Malicious, willful and intentional acts

¶45 This exception to government immunity applies to "ill-intended acts"—i.e., those that are malicious, willful and intentional. ***Bicknese v. Sutula***, 2003 WI 31, ¶19, 260 Wis. 2d 713, 660 N.W.2d 289. All three conditions must be present for an otherwise immune act to fall outside the scope of immunity. ***Id.***

¶46 Here, the Plaintiffs assert a number of circumstances abrogate immunity under the malicious, willful and intentional acts exception. The Plaintiffs point to four events purportedly befitting of the exception: (1) the allegedly harsh "interrogation tactics" the District used during the investigation; (2) the District's decision to punish them for a Code violation rather than a violation of the Handbook's electronic communication device policy; (3) the additional "punishments" they sustained (apparently consisting of their removal, temporary or otherwise, from other extra-curricular activities); and (4) the District's purported "failure to follow the appeals process."

¶47 We disagree that any of the alleged circumstances—some of which take liberties with the record—were "malicious, willful and intentional acts" warranting the abrogation of immunity. The Plaintiffs ignore that their undisputed misconduct warranted the investigation and the sanctions that followed. From this record, there can be no reasonable inference that any tactics used during the investigation were intended to unjustifiably harm the Plaintiffs; rather, any allegedly "harsh" tactics were intended exclusively to determine what had occurred in the locker room on February 18, 2014, and whether any action was warranted in response to that occurrence. Again, the Plaintiffs provide no support for the notion that the District could punish them only for a violation of the electronic communication device policy. Finally, there is no record support for the Plaintiffs' assertion that the District maliciously failed to follow the appeals process. One of the Plaintiffs did not appeal, another abandoned her appeal, and Kempka followed through with her appeal but the sanctions against her were upheld.

5. Civil conspiracy (against the Damas)

¶48 The Plaintiffs' second amended complaint alleged Sophia and the Damas had "confirmed, agreed and mutually undertook to make false claims, libelous statements and defamatory statements" to the District with the intent to injure the Plaintiffs' reputations. As previously discussed, however, none of the Damas' allegedly defamatory statements is actionable. Accordingly, the Plaintiffs' conspiracy claim must also fail.

¶49 In addition, given the Plaintiffs' undisputed misconduct, the notion that the Damas acted in a conspiratorial fashion to injure the Plaintiffs' reputations is untenable. "The gravamen of a civil action for conspiracy is the civil wrong

which has been committed pursuant to the conspiracy and which results in damage to the plaintiff." ***Modern Materials, Inc. v. Advanced Tooling Specialists, Inc.***, 206 Wis. 2d 435, 447-48, 557 N.W.2d 835 (Ct. App. 1996). The "civil wrong" alleged here apparently consisted only of statements of opinion and the Damas' notification to the District of the locker room incident. These are not actionable.

¶50 Moreover, we apply a more stringent test in conspiracy cases than is normally used for judging whether a case may be submitted to the jury on the basis of reasonable inferences. *See* ***Maleki v. Fine-Lando Clinic Chartered, S.C.***, 162 Wis. 2d 73, 84, 469 N.W.2d 629 (1991). "To prove a conspiracy, a plaintiff must show more than a mere suspicion or conjecture that there was a conspiracy or that there was evidence of the elements of a conspiracy." ***Id.*** If circumstantial evidence supports equal inferences of lawful and unlawful action, a claim of conspiracy is not proven, and the matters should not be submitted to a jury. ***Id.*** at 85. Such is the case here.

6. Intentional infliction of emotional distress (against the District and the Damas)

¶51 An intentional infliction of emotional distress claim requires proof of four elements: (1) the defendant intended to cause emotional distress by his or her conduct; (2) that the conduct was extreme and outrageous; (3) that the conduct was a cause-in-fact of the plaintiff's emotional distress; and (4) that the plaintiff suffered an extreme and disabling response to the defendant's conduct. ***Terry***, 351 Wis. 2d 479, ¶42.

¶52 The circuit court properly dismissed the Plaintiffs' intentional infliction of emotional distress claim as a matter of law.[14] To be actionable, "[t]he average member of the community must regard the defendant's conduct in relation to the plaintiff, as being a complete denial of the plaintiff's dignity as a person." ***Alsteen v. Gehl***, 21 Wis. 2d 349, 359-60, 124 N.W.2d 312 (1963). None of the litany of circumstances the Plaintiffs present in their appellate brief meets this standard—particularly in light of the Plaintiffs' admitted locker room misconduct. As an example, even accepting the Plaintiffs' characterization of their interviews as "threatening" and "intimidating," and their assertion that they were not permitted to discuss the circumstances of their punishment with other school staff members, no reasonable member of the community—as a matter of law—would view these events as "extreme and outrageous" conduct warranting judicial remedy.

¶53 Additionally, we conclude the Plaintiffs have failed to demonstrate factual issues regarding causation and damages. The Plaintiffs claim that, as a result of the Defendants' conduct, they avoided some classes, suffered from some depression, and were reluctant to engage with certain individuals and social situations in Crivitz. However, temporary discomfort cannot be the basis of recovery. ***Id.*** at 361. The record is devoid of evidence demonstrating that the Plaintiffs were unable to function in their relationships because of the Defendants' conduct. *See* ***id.*** "The law intervenes only where the distress is so severe that no

[14] For the first time in their reply brief, the Plaintiffs argue Kopp did nothing wrong and was uninvolved in the locker room incident. This assertion is belied by the record and, in any event, was made untimely. *See* ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256 (holding arguments made for the first time in a reply brief will not be considered).

reasonable [person] could be expected to endure it." ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 653, 517 N.W.2d 432 (1994).

¶54 Moreover, the Plaintiffs fail to explain how any consequences they claim to have suffered were a result of the Defendants' conduct rather than their own admitted misdeeds. Under these circumstances, we conclude, as a matter of law, that there is insufficient evidence creating a triable issue of fact regarding causation. *See* ***Alsteen***, 21 Wis. 2d at 360 (holding a defendant may demonstrate a disabling emotional condition would have been present even in the absence of the defendant's intervening conduct).

Alleged evidence spoliation

¶55 The Plaintiffs assert this case is a credibility contest and "hinges" upon what occurred in the locker room on February 18, 2014, as well as the subsequent Facebook postings by Sophia's mother. In the Plaintiffs' view, the Defendants destroyed prior to trial some evidence necessary to the determination of their claims—namely, the locker room cell phone video and Kam's first Facebook post about the incident, both of which were deleted after their creation. The Plaintiffs assert the Defendants should have known there was a potential for litigation arising from the circumstances and that the deleted materials would be relevant to that litigation. Because the Defendants deleted those materials anyway, the Plaintiffs argue their claims should survive summary judgment.

¶56 "Every party or potential litigant is duty-bound to preserve evidence essential to a claim that will likely be litigated." ***American Family Mut. Ins. Co. v. Golke***, 2009 WI 81, ¶21, 319 Wis. 2d 397, 768 N.W.2d 729. Spoliation is the "intentional destruction, mutilation, alteration, or concealment of evidence." ***Id.*** (quoting BLACK'S LAW DICTIONARY 1409 (7th ed. 1999)). In reviewing the

offending party's conduct, the circuit court should consider not only whether the party responsible for the destruction of evidence knew, or should have known, at the time it destroyed the evidence that litigation was a distinct possibility, but also whether the offending party destroyed material which it knew, or should have known, would constitute evidence relevant to pending or potential litigation. ***Insurance Co. of N. Am. v. Cease Elec. Inc.***, 2004 WI App 15, ¶15, 269 Wis. 2d 286, 674 N.W.2d 886, *aff'd*, 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462.

¶57 A circuit court's decision whether to impose sanctions for the destruction or spoliation of evidence, and what sanction to impose, is committed to the court's discretion. ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999). We affirm a circuit court's discretionary ruling if the court examined the relevant facts, applied a proper standard of law, and, utilizing a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Id.*** We will search the record for reasons to sustain the circuit court's exercise of discretion. ***Olivarez v. Unitrin Prop. & Cas. Ins. Co.***, 2006 WI App 189, ¶17, 296 Wis. 2d 337, 723 N.W.2d 131. The circuit court's findings of fact relevant to its spoliation determination will not be overturned unless they are clearly erroneous. WIS. STAT. § 805.17(2).

1. The deleted locker room video

¶58 The Defendants posit that the circuit court appropriately declined to sanction them for the alleged spoliation of the locker room cell phone video because they were blameless in its destruction. The Plaintiffs' brief-in-chief asserts that the District ordered the video to be deleted. In fact, the record clearly and undisputedly shows sergeant Evancheck ordered the video to be deleted, and he did so on his own initiative. Because none of the Defendants deleted, or

directed another person to delete, the video recording, the circuit court could not have rationally sanctioned any of the Defendants for spoliation on that ground. Moreover, as previously discussed, it is undisputed that misconduct occurred in the locker room on February 18, 2014; the "facts" the Plaintiffs believe the deleted video would have shown were therefore immaterial.

2. The deleted Facebook post

¶59 The Plaintiffs also contend sanctions for spoliation were warranted because Kam deleted at least one of her Facebook posts regarding the locker room incident. The Plaintiffs contend it was "highly probable" this initial post defamed the Plaintiffs. At a minimum, the Plaintiffs assert the court should have assumed the deleted post was defamatory and, based on this, their defamation and related claims should have survived.[15] *See* ***Cease Elec.***, 269 Wis. 2d 286, ¶16 ("Spoliation remedies advance truth by assuming that the destroyed evidence would have hurt the party responsible for the destruction of evidence and act as a deterrent by eliminating the benefits of destroying evidence.").

¶60 Nothing in the record suggests a reasonable inference that Kam should have been aware of a "distinct possibility" that litigation would ensue at the time she deleted the post. The Plaintiffs disagree, asserting Kam was aware that they disputed Sophia's version of the locker room incident. Yet, even if Kam was aware that some of the immaterial underlying facts were disputed, this does not

[15] The Plaintiffs' brief-in-chief does not explicitly limit the Plaintiffs' desired relief to their defamation claims, but those (and the related claims, such as the conspiracy claim) are the only claims to which Kam's deleted post appears relevant.

mean the present litigation was likely, or even reasonably foreseeable, to ensue—in particular, that the Plaintiffs would file a defamation claim against her.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.