Reversed and Rendered and Opinion filed February 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00026-CV

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WAYNE DOLCEFINO, KTRK TELEVISION, INC., CC TEXAS HOLDING CO., INC., CAPITAL CITIES/ABC, INC., HENRY FLORSHEIM, and DAVID GWIZDOWSKI, Appellants

V.

CYNTHIA EVERETT RANDOLPH AND LLOYD E. KELLEY, Appellees

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 97-45492

O P I N I O N

This is a defamation suit in which appellants, Wayne Dolcefino, KTRK Television, Inc., CC Texas Holding Co., Inc., Capital Cities/ABC, Inc., Henry Florsheim, and David Gwizdowski, all media defendants in the court below, challenge the denial of their motion for summary

judgment.[1] In twenty-four points of error, they contend the trial court erred in refusing to render summary judgment that Cynthia Everett Randolph and Lloyd E. Kelley, appellees and plaintiffs in the court below, take nothing on their defamation claims. We reverse the trial court's judgment and render judgment in favor of appellants.

I. FACTUAL BACKGROUND

Elected as the City of Houston Controller in 1996, Lloyd Kelley took office in January 1997. While Kelley was in office, the City awarded the accounting firm of Mir, Fox & Rodriguez ("MFR") a contract to resolve "Y2K" matters, i.e., issues associated with computer problems expected to arise at the beginning of the year 2000. On Kelley's recommendation, MFR subcontracted the Y2K work to Steven C. Plumb, who had served as Kelley's campaign treasurer in his bid to be elected City Controller. In subcontracting the Y2K work to Plumb, MFR neither kept any portion of the payments the City made to Plumb under the subcontract nor retained any supervisory control over Plumb's work for the City. Wayne Dolcefino, an investigative reporter for KTRK television, Channel 13, learned of the Plumb subcontract from Larry Homan, an employee in the City Controller's office.[2] Once alerted to this information, Dolcefino began investigating the Plumb subcontract as well as Kelley's work habits as City Controller. In the course of the investigation, Dolcefino's television news team chronicled how the City Controller spent his work days. While making surveillance videotapes of Kelley at various public places, the film crew captured Kelley attending to personal matters during

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[1] Appellants bring this interlocutory appeal pursuant to Texas Civil Practice and Remedies Code § 51.014(a)(6), which allows for an accelerated appeal from the denial of a media defendant's motion for summary judgment when the cause of action arises under the free speech or free press clause of the First Amendment to the United States Constitution. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(6) (Vernon Supp. 2000).

[2] According to Kelley, Homan was a "disgruntled employee" who was working on the election campaign of Kelley's opponent, Sylvia Garcia, during Kelley's upcoming bid for re-election. The only proof supporting this characterization is Kelley's affidavit, which states that Homan was actively working on Sylvia Garcia's campaign.

business hours. One surveillance videotape showed Kelley at his home on a summer day installing a sprinkler system in his front yard. A second tape showed Kelley on a shopping trip to a local bookstore during regular work hours, accompanied by two City employees. A third surveillance tape showed Kelley spending a workday afternoon at *Splashtown*, a local water park, with Cynthia Randolph, a member of his executive staff. Accompanying Kelley and Randolph on the *Splashtown* outing were Kelley's two children and another child.

In furtherance of his investigation, Dolcefino sought and obtained hundreds of pages of public documents from the City through requests he made under the Texas Public Information Act, including records from the Controller's Office and the City Finance and Administration Department. Among these documents were the City payroll records on Randolph, which showed that she worked the day of her *Splashtown* outing with Kelley. These payroll records were later changed by the filing of an "exception" to reflect Randolph's afternoon at the water park as vacation time. The change, made in accordance with the City's policies and procedures, was entered four days after KTRK-Channel 13 requested the records, and more than two weeks after the *Splashtown* outing. In television broadcasts aired on KTRK-Channel 13, Dolcefino reported the *Splashtown* trip, noting both the original omission of any entry in Randolph's payroll records showing the time she took off to accompany Kelley to the water park and the fact that these records were later changed to reflect the time off as vacation time.

A. Statements to the Public Integrity Review Group

As Dolcefino investigated the Plumb subcontract, he spoke to Officers B.A. Fletcher and S.R. Jett of the Houston Police Department, who were on a task force known as the Public Integrity Review Group or "PIRG." Dolcefino told the officers that there may not have been any work product from Plumb relating to the Y2K subcontract and that the money Plumb received as compensation for his services may have been directed to Kelley's campaign fund. Dolcefino asked the officers to do nothing until after July 16, 1997, the date Plumb's report

from his Y2K work was due to be submitted to the City. Nevertheless, the PIRG began an investigation of the matter. Appellants learned of the PIRG's investigation on July 15, 1997, the day before the Plumb report was to issue.

B. The July 16th Broadcast

On the day Plumb was to submit his report to the City (July 16, 1997), appellants[3] broadcast a story on the subcontract, reporting that KTRK-Channel 13 had "learned" that the PIRG was asking questions about Kelley. In the broadcast, appellants noted that Plumb had started benefitting from government contracts just a few months after Kelley became the City Controller and that Plumb had prepared only a three-page report detailing his Y2K work, despite being paid $26,000 for his services. Dolcefino reported that Kelley had helped steer money to Plumb, and that MFR had performed no Y2K services under its contract with the City, but instead had passed the Y2K work and all the money to Plumb. During the broadcast, appellants showed excerpts of a taped interview with Gaspar Mir, a principal of MFR, during which Mir stated that MFR had no idea what the City was getting for its money in connection with the Plumb subcontract.

C. The July 21st Broadcast

Appellants followed up on the July 16th broadcast with another television report on the Plumb subcontract. The story aired on July 21, 1997, the same day Kelley held a press conference. In the broadcast report, appellants showed videotaped footage of Kelley at the press conference explaining that Plumb had not been involved in the financial aspects of Kelley's campaign and that there was no wrongdoing in connection with the subcontract. Dolcefino reported that Kelley could not recall if he suggested Plumb for the subcontract. He

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[3] While most of the broadcasts were special reports narrated by Dolcefino, other reporters also participated. At all times, Dolcefino acted as an employee of KTRK-Channel 13. Consequently, except when a specific remark or act is attributable to Dolcefino, we refer to it as the statement or act of the appellants.

also reported that Kelley could not identify Plumb's qualifications. In addition, Dolcefino reiterated the assertion from the July 16th broadcast that Plumb had received $26,000 and had produced only a three-page report. At the end of the July 21st broadcast, Dolcefino noted that Kelley claimed the police had cleared him of wrongdoing, but Dolcefino remarked that Kelley's statement was inaccurate as the district attorney's office had merely declined to press charges. According to Dolcefino, this action was "[n]ot exactly a clearing of any wrongdoing." Dolcefino also noted that neither the City Attorney nor the City's Finance and Administration Department had responded to Kelley's claims that those groups had conducted an audit and found no wrongdoing.

D. The July 22nd Broadcast

Most of the broadcast report aired on July 22, 1997, repeated the information from the story aired the previous day. The report stated that Kelley denied wrongdoing, could not recall whether he suggested Plumb for the subcontract, and could not identify Plumb's qualifications. The July 22nd broadcast also repeated that the City had paid Plumb $26,000 and that Plumb had produced only a three-page report, that Kelley had asked MFR to hire Plumb, and that MFR had passed the contract money to Plumb without reviewing Plumb's work. Appellants closed the broadcast report by noting that although Kelley had been cleared of criminal charges, "the ethics of the matter are still under investigation."

E. The August 12th Broadcast

The broadcast appellants aired on August 12, 1997, focused on the surveillance and investigation of Kelley's work habits as City Controller. Appellants described Kelley's *Splashtown* outing with Randolph, his workday installation of a sprinkler system at his home, and his workday visit to the local bookstore with other City employees. The report primarily centered on the *Splashtown* outing, describing how Randolph, a member of Kelley's executive staff, had accompanied him to the water park and that, although she had filled out the

appropriate paperwork indicating her vacation time, her paycheck did not reflect the vacation time until over two weeks after the incident. Dolcefino called this record keeping "entirely legal," but noted that the payroll records of every executive with Kelley's office whose records appellants had requested were changed after appellants made the requests. Dolcefino also quoted Randolph as saying that she had never babysat Kelley's children, to which Dolcefino commented: "Apparently, she chose to spend her personal vacation time with the City official who hired her and his children." Dolcefino also stated in the broadcast that he had asked to review Kelley's appointment calendars and schedule books but was told that they were routinely destroyed.

F. Statements to Newspaper Reporters and City Officials

Dolcefino spoke with Tim Fleck, a reporter for *The Houston Press*, sometime prior to July 24, 1997. An article in that weekly newspaper reported Dolcefino as stating that the airing of Channel 13's malfeasance investigation on Kelley was imminent. Kelley accuses Dolcefino of making similar statements to *Houston Chronicle* reporter Julie Mason, then Mayor Bob Lanier, and the Mayor's Chief of Staff, Joe Wykieth.

II. PROCEDURAL BACKGROUND

Randolph filed suit in September 1997. Kelley joined the suit in February 1998. Both asserted defamation claims arising out of the television broadcasts. In addition, Kelley alleged defamation based on statements Dolcefino purportedly made to the PIRG, the newspaper reporters, the Mayor and other City officials. Both Kelley and Randolph sought to hold appellants KTRK Television, Inc., Capital Cities/ABC, Inc., CC Texas Holding Co., Inc., Henry Florsheim, and David Gwizdowski vicariously liable for Dolcefino's actions by asserting claims of negligent supervision and civil conspiracy.[4]

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[4] Capital Cities/ABC, Inc. owns CC Texas Holding Co., Inc., which, in turn, is KTRK's parent corporation. Florsheim is KTRK's president and general manager. Gwizdowski is KTRK's former assistant (continued...)

Appellants filed a traditional motion for summary judgment under Texas Rule of Civil Procedure 166a(b) and, alternatively, a "no evidence" motion for summary judgment under rule 166a(i). As grounds for summary judgment, appellants asserted that (1) the statements made the subject of the defamation claims were true, and thus, not defamatory as a matter of law, or were otherwise not actionable; (2) the statements were not published with actual malice; (3) the statements were protected by certain privileges; (4) certain claims were barred by the statute of limitations; and (5) the claims of negligent supervision and conspiracy had no merit. The trial court denied the appellants' motions for summary judgment.

III. STANDARD OF REVIEW

We review the denial of a motion for summary judgment by the same standards as the granting of a summary judgment. *See HBO v. Harrison*, 983 S.W.2d 31, 35 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Specifically, in reviewing a traditional motion for summary judgment, we take as true all evidence favorable to the non-movant, and we make all reasonable inferences in the non-movant's favor. *See KPMG Peat Marwick v. Harrison County Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). If the movant's motion and summary judgment proof facially establish his right to judgment as a matter of law, the burden shifts to the non-movant to raise a material fact issue sufficient to defeat summary judgment. *See Harrison*, 983 S.W.2d at 35.

We review a "no evidence" summary judgment by ascertaining whether the non-movant produced any evidence of probative force to raise a fact issue on the material questions presented. *See Roth v. FFP Operating Partners*, 994 S.W.2d 190, 195 (Tex. App.—Amarillo 1999, pet. denied). We consider all the evidence in the light most favorable to the party against whom the summary judgment was rendered and disregard all contrary evidence and

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[4] (...continued)
news director.

inferences. *See Merrill Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, 523 U.S. 1119 (1998). The party moving for a "no evidence" summary judgment should specifically state the elements as to which there is no evidence.[5] *See* TEX. R. CIV. P. 166a(i); *Robinson v. Warner-Lambert & Old Corner Drug*, 998 S.W.2d 407, 409 (Tex. App.—Waco 1999, no pet.). A "no evidence" summary judgment is improperly granted if the non-movant presents more than a scintilla of probative evidence to raise a genuine issue of material fact. *See Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.). More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Havner*, 953 S.W.2d at 711 (citation omitted). Summary judgment, however, must be granted under rule 166a(i) if the party opposing the motion fails to bring forth competent summary judgment proof. *See Saenz v. Southern Union*, 999 S.W.2d 490, 492 (Tex. App.—El Paso 1999, pet. denied); *Robinson*, 998 S.W.2d at 412.

IV. DEFAMATION

Appellants contend the statements made in the broadcasts and to the newspaper reporters and City officials were not defamatory as a matter of law, and therefore, the trial court erred in denying their motion for summary judgment.

Defamatory statements read from a script and broadcast constitute libel rather than slander. *See Christy v. Stauffer Publications, Inc.*, 437 S.W.2d 814, 815 (Tex. 1969). Libel is a defamatory statement, expressed in written or other graphic form, which tends to injure a person's reputation, "and thereby expose the person to public hatred, contempt or ridicule,

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[5] Kelley and Randolph argue that appellants were also required to state that the parties had adequate time for discovery and seem to contend that appellants' failure to do so makes their motion conclusory. As authority, Kelley and Randolph rely on a recent law review article. *See* William J. Cornelius & David F. Johnson, *Tricks, Traps and Snares in Appealing a Summary Judgment in Texas*, 50 BAYLOR LAW REV. 813 (1998). Texas law, however, does not require such a statement. *See, e.g., Robinson v. Warner-Lambert & Old Corner Drug*, 998 S.W.2d 407, 412 (Tex. App.—Waco 1999, no pet.).

or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury." TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1997). Whether words are capable of the defamatory meaning the plaintiff attributes to them is a question of law for the court. *See Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 654 (Tex. 1987). In making this determination, we construe the statement as a whole in light of the surrounding circumstances, based upon how a person of ordinary intelligence would perceive the entire statement. *See id*. at 655.

A public official asserting a defamation claim against a media defendant must prove that (1) the defendant published a false statement; (2) which was defamatory to the public official; and (3) the false statement was made with actual malice as to its truth. *See Evans v. Dolcefino*, 986 S.W.2d 69, 76 (Tex. App.—Houston [1st Dist.] 1999, no pet.). A private citizen must prove the same elements, except that she need only show that the false statement was made with negligence as to its truth. *See id.*

A. Truth of Statements

In four points of error, appellants urge that Kelley and Randolph cannot recover on their libel claims because there is no evidence that certain of the statements were false and the evidence conclusively establishes that these statements were true. In their second and third points of error, appellants make these contentions in connection with the July 1997 broadcasts, and in their eighth and ninth points of error, they make the same contentions in connection with the August 1997 broadcast.

A defendant can defeat a libel claim by establishing the "substantial truth" of the statement. *See McIlvain v. Jacobs*, 794 S.W.2d 14, 15 (Tex. 1990). A broadcast is substantially true if the allegedly defamatory statement is not more damaging to the plaintiff's reputation, in the mind of the average listener, than a truthful statement would have been. *See*

id. at 16. In determining if a broadcast report is substantially true, we look to the "gist" of the broadcast. *See id*. When, as here, a case involves media defendants, the defendants need only prove that third party allegations reported in a broadcast were, in fact, made and under investigation; they need not demonstrate the allegations themselves are substantially true. *See Dolcefino v. Turner*, 987 S.W.2d 100, 109 (Tex. App.—Houston [14th Dist.] 1998, pet. granted).

1. The July 16th Broadcast

The gist of the alleged libel in the July 16th broadcast was that (1) Kelley helped his former campaign treasurer, Plumb, obtain a subcontract with the City, (2) Plumb submitted only scant documentation to justify the compensation awarded to him under the subcontract, and (3) MFR, the party with whom the City directly contracted, had little or no involvement in the Plumb subcontract. The gist of the July 16th broadcast is substantially true.

a. Kelley's Role in Obtaining the Plumb Subcontract

It is undisputed that Plumb served as Kelley's campaign treasurer.[6] Gaspar Mir of MFR stated in an interview taped before the July 16th broadcast that Kelley had recommended Plumb for the subcontract. The PIRG report supports Mir's statements; it specifically notes that Mir reported that Kelley had told him to hire Plumb. The subcontract appended to the PIRG report is evidence that MFR, in fact, hired Plumb. The PIRG report also demonstrates that MFR lacked the experience to perform the Y2K services called for by its contract with the City and that MFR would necessarily have to have subcontracted the Y2K work in order to avoid breaching the contract. This evidence establishes the substantial truth of the statements made with regard to Kelly's role in obtaining Plumb's subcontract. In an effort to prove the falsity of this matter, Kelley submitted his affidavit, stating: "Defendants broadcast that 'Just a few

[6] Kelley admits this fact in appellees' brief and also admitted it at his press conference in July 1997.

months after Lloyd Kelley became Houston Controller . . . his former campaign treasurer started benefitting with government contracts . . .' This was false, defamatory, and has injured me in my profession." Such a conclusory statement is no evidence the matter is false. *See Lewelling v. Lewelling*, 796 S.W.2d 164, 167 n.5 (Tex. 1990). In any event, the summary judgment evidence in the record establishes the statement is true. The PIRG report is proof that Plumb received two City contracts after Kelley was elected — the one at issue in this case and another one Plumb received in March 1996.

b. Scant Documentation to Justify Compensation Paid to Plumb

The PIRG report further serves as proof that, as of the date of the July 16th broadcast, Plumb had submitted only a three-page report as his individual work product. Dolcefino's affidavit also proves this fact. It is undisputed that Plumb received $26,000 from the City for his work on the Y2K subcontract. Based on the summary judgment evidence, we find that the second item (scant documentation to justify the compensation awarded under the subcontract) is substantially true.

To support his contention that the second item is false, Kelley points to the evidence that, at a later press conference, he produced additional materials purportedly documenting Plumb's work on the subcontract. As of the date of the July 16th broadcast, however, this documentation had not been produced, nor was it produced in response to appellants' formal requests for documents. Furthermore, although the videotape of the press conference shows a table covered with documents, the record does not contain any such materials and they were never before the trial court. The evidence in the record is Dolcefino's testimony that he viewed the materials that were made available and that none of them were pertinent to his statement in the July 16th broadcast that there was only one three-page report documenting Plumb's work on the subcontract. This evidence and the PIRG report establish the substantial truth of the statement.

c. Lack of Involvement by MFR in the Plumb Subcontract

The substantial truth of the third item (lack of involvement by MFR in the Plumb subcontract) is also established by the PIRG report, which states that Houston police officers interviewed MFR principal Carolyn Fox, who stated that MFR was not given supervisory responsibilities over Plumb or his work product. The PIRG's interview with Gaspar Mir, another principal of MFR, is also detailed in the report. Mir stated that the Y2K subcontract directed Plumb to report directly to the City Controller's office. In addition, Mir stated in the broadcast that he had no idea what Plumb had done for the money he had received. Perhaps most importantly, the Plumb subcontract, which is included in the PIRG report, specifically states that "the City Controller shall have the sole responsibility for approving the scope of [Plumb's] work plan, required fees and hours to be dedicated to each [t]ask." There is no evidence of the falsity of the third item.

d. Report of the PIRG Investigation

Kelley complains in his response to appellants' motion for summary judgment that appellants reported in the July 16th broadcast that Channel 13 had "learned" the PIRG investigators were asking questions about the Plumb subcontract. According to Kelley, this statement was false because appellants did not *learn* of the investigation, but instead *instigated* it. Kelley points to the PIRG report as support for his contention, noting that the report lists Dolcefino as the complainant.

We disagree that the statement was false. Dolcefino stated in his affidavit that he asked the PIRG not to investigate until after the July 16th deadline for Plumb's report. On July 15th, Gaspar Mir told Dolcefino the PIRG was asking questions regarding the Plumb subcontract. The following day, appellants reported that Channel 13 had learned of the PIRG investigation. This statement was an accurate representation because, until that point, appellants only knew that Dolcefino had spoken with the PIRG regarding the Plumb subcontract; they did not know

the PIRG had taken any action to investigate until Mir informed Dolcefino of that fact. Furthermore, this statement is not pertinent to the gist of the broadcast, but is a matter of secondary importance. Any variance with respect to matters of secondary importance may be disregarded and the substantial truth of the statements determined as a matter of law. *See McIlvain*, 794 S.W.2d at 16. We find the distinction Kelley makes with respect to appellants' reporting of the PIRG investigation to be immaterial and thus not actionable in any event.

2. The July 21st and 22nd Broadcasts

The gist of the July 21st broadcast was that (1) Kelley held a press conference to address the Plumb matter and denied any wrongdoing in connection with it, and (2) Kelley "possibly" was deceptive in connection with the contract because (i) MFR was awarded the contract, (ii) Plumb's name was not on it, (iii) Kelley had recommended Plumb, (iv) MFR subcontracted the work to Plumb but never reviewed it, and (v) Plumb's work product was scant compared to the amount of compensation awarded him under the subcontract.

The first item is easily disposed of as true because there is no question that Kelley held a press conference and denied wrongdoing. It is clear from the record that the second item is also substantially true. The MFR contract does not contain Plumb's name; Gaspar Mir stated that Kelley had recommended Plumb for the subcontract and that MFR did not, and could not, review Plumb's work. In addition, Mir told the PIRG investigators that MFR was not qualified to carry out its Y2K contract with the City and, therefore, had to subcontract the work. Plumb received $26,000 and provided only a three-page report as his individual work product. From these facts, one could reasonably infer that Kelley possibly deceived the City. We find the statements made in July 21st broadcast to be substantially true. In any case, use of the phrase "possible deception" places this statement in the realm of opinion, which is not actionable as defamation. *See Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989); *Falk & Mayfield L.L.P. v. Molzan*, 974 S.W.2d 821, 824 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

Kelley argues that Plumb provided more than the three-page report under the subcontract and, therefore, the statement is false. At the press conference, Kelley stated that Plumb was on a committee that produced more substantial work product. Whatever the committee may have produced, it was not Plumb's individual work product, and it was not produced in response to appellants' formal requests for documents.[7] The additional documentation Kelley claims to have produced was not provided until later and, as previously noted, is not in the record.

Kelley disputes Dolcefino's statement that Kelley could not identify Plumb's qualifications. Kelley points out that, at the press conference, he stated he *could* identify Plumb's qualifications but that he did not have to do so. In other words, Kelley *could*, but *would not*, orally recite Plumb's qualifications. Despite repeated inquires, Kelley did not enunciate Plumb's qualifications during the press conference, but instead referred reporters to Plumb's resume. We find that the statement concerning Kelley's inability to identify Plumb's qualifications is not substantially true. Nonetheless, it is not the gist of the broadcast; rather, it is a matter of secondary importance that was not material to the report. We disregard any variance with respect to items of secondary importance and determine substantial truth as a matter of law. *See McIlvain*, 794 S.W.2d at 16. Therefore, Dolcefino's statement regarding Kelley's inability to identify Plumb's qualifications cannot form the basis of a defamation claim.

The July 22nd broadcast primarily contained information previously aired. The only new information was that City officials were still looking into the ethics of the Plumb subcontract. The gist of the July 22nd broadcast was Kelley's denial of wrongdoing and the details of Plumb receiving the subcontract, apparently at Kelley's request. For the reasons noted above, the gist

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[7] Dolcefino testified in his deposition that the three-page report was the only report delivered during the operative period and that it was the only report produced pursuant to the appellants' Open Records Act request.

of this broadcast was substantially true.

The new information aired on July 22nd is also substantially true. The PIRG report indicates that Officers Jett and Gillespie met with a representative of the City's Finance and Administration Department on July 23, 1997, about Plumb's time reports. Officer Jett and the department representative then met with City Attorney Gene Locke to discuss over $4,600 in unsupported time billed. The PIRG report states that the Finance and Administration Department compared preliminary audits of Plumb's billing records on July 23, 1997. Consequently, when appellants stated on July 22nd that "officials were still looking into the ethics of the matter," the statement was true. Appellants made a similar remark concerning the ongoing nature of the investigation the previous day, noting that the district attorney's decision not to press criminal charges was "[n]ot exactly a clearing of any wrongdoing." This statement is also substantially true. According to the PIRG report, investigators discovered thirty-three hours for which Plumb billed but provided no support, an amount equal to $4,620. The district attorney's office, having determined the matter was a contractual dispute and therefore a civil rather than a criminal matter, did not file charges. Nonetheless, as Dolcefino accurately reported, no City agency had determined that Kelley was free from wrongdoing; and given the lack of support for Plumb's billing, one could reasonably infer that Plumb may have acted improperly in charging the City for his services.

3. The August 12th Broadcast

The gist of the August 12th broadcast was that (1) appellants performed surveillance on Kelley which revealed Kelley was not in his office during regular business hours and instead appeared to be tending to personal matters; (2) appellants were unable to review Kelley's calendars and schedule books because these items were routinely destroyed; (3) appellants were able to obtain payroll records for Randolph (a member of Kelley's executive staff), who was videotaped spending a workday afternoon at *Splashtown* with Kelley and his children, and Randolph's vacation time for this outing was not reflected on the payroll records; (4) time

records for Randolph and other City employees, whose records appellants asked to review, were changed after appellants asked for the records; and (5) appellants insinuated Randolph and Kelley were involved in a personal relationship.

a. Defamation as to Randolph

Because Randolph is not a public figure, we conduct a separate review to determine whether the August 12th broadcast was defamatory as to her. As a private citizen asserting a defamation claim, Randolph need only prove the allegedly false statement was made with negligence as to its truth. *See Evans v. Dolcefino*, 986 S.W.2d 69, 76 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

The first, second, and fourth items made the subject of the August 12th broadcast are not germane to Randolph. Turning to the third item (the *Splashtown* outing), we note that Randolph and Kelley do not dispute that they went to *Splashtown* together on July 3, 1997. The surveillance videotape clearly captures them together, clad in swim wear, at the water park. The summary judgment proof established that the City paid Randolph for working eight hours that day and deducted four vacation hours on July 18th on an "exception pay timesheet." In other words, Randolph received a paycheck that did not reflect time off for her afternoon at *Splashtown*, and only in the next pay period were those vacation hours deducted. Based on this proof, we find the third item is substantially true. Randolph's summary judgment proof that her leave request and time sheet were filled out in accordance with City policy and procedure do not negate the truth of what appellants reported. Her claim that Dolcefino knew that it was the City Finance and Administration Department, rather than the City Controller's office, that changes payroll is not germane to the gist of the broadcast, and is, therefore, a matter of secondary importance. Disregarding any variance in matters of secondary importance,[8] we find these statements in the August 12th broadcast to be substantially true.

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[8] *See McIlvain*, 794 S.W.2d at 16.

The insinuation of a personal relationship between Kelley and Randolph in item five arises from the following broadcast statements:

> And while Cynthia Randolph doesn't tell us what she was doing at *Splashtown* that day, she says, 'I have never babysat Lloyd Kelley's children.' Apparently, she chose to spend her personal vacation time with the City official who hired her and his children.

While these statements may imply a personal relationship between Randolph and Kelly, the underlying facts are true. Randolph admits that she made the statement about never having babysat Kelley's children. Although she argues that appellants quoted her statement out of context, this fact is not germane to whether the statement is true. In addition, Randolph's payroll records indicate that her afternoon at *Splashtown* was, in fact, vacation time, and she does not dispute that she was there with Kelley and his children, as shown on the surveillance tape. Given the truth of the underlying facts, a mere implication of a personal relationship between Kelley and Randolph cannot be the basis for a defamation claim. *See generally Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995) ("Truth is a complete defense to defamation.").

Randolph's summary judgment proof included an affidavit from a private citizen who stated the broadcast gave the impression that Randolph and Kelley were involved in an extramarital affair. Because the underlying facts reported are true, this affidavit is no proof that the statements made were false; rather, it merely establishes a possible inference that could be drawn from the broadcast.

b. Defamation as to Kelley

All portions of the August 12th broadcast relating to Randolph also relate to Kelley. Having established that those portions are true or substantially true, we need not determine whether they were made with actual malice. We now turn to the items in the August 12th broadcast relating only to Kelley.

Turning to the first item (tending to personal matters during work days), appellants' videotape of the August 12th broadcast shows Kelley (1) clad in very casual attire, in the front yard of his residence installing a sprinkler system; (2) at his home on another workday, again dressed in informal attire, getting into a car with two other City employees and driving to a local bookstore; and (3) on the *Splashtown* outing. Kelley does not point to any proof to refute the truth of these matters.

As for the second item (destruction of calendars and schedule books), the only summary judgment proof that Kelley's appointment calendars and schedule books were routinely destroyed was Dolcefino's statement to that effect in the August 12th broadcast and Dolcefino's affidavit that he believed all statements in that broadcast were true. This proof does not establish that the statements are true. Nevertheless, appellants asserted in the broadcast that, like every elected official, "Kelley . . . is not required to keep an official record of his time or a particular schedule." The statement regarding the destruction of calendars and schedule books was not so egregious as to subject him to "public hatred, contempt, or ridicule, or financial injury," nor does it impeach his "honesty integrity, virtue or reputation,"[9] especially in light of the caveat enunciated in the broadcast. Consequently, we find the second item is not defamatory as a matter of law.

In addition, we note that even though appellants did not offer competent summary judgment proof regarding the truth of the statement concerning the routine destruction of calendars and schedule books, we may consider whether appellants were entitled to summary judgment under the "no evidence" standard applicable to Texas Rule of Civil Procedure 166a(i). Kelley offered no evidence to refute the truth of the statement. His failure to do so merits the granting of appellants' motion under rule 166a(i) as to defamation regarding that portion of the

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[9] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1997).

broadcast.[10] *See Saenz v. Southern Union Gas Co.*, 999 S.W.2d 490, 492 (Tex. App.—El Paso 1999, pet. denied) (holding that motion for summary judgment must be granted if party opposing motion fails to bring forth competent summary judgment proof); *Robinson v. Warner-Lambert & Old Corner Drug*, 998 S.W.2d 407, 409 (Tex. App.—Waco 1999, no pet.) (same).

The fourth item (change of other City employees' time records) can be addressed in similar fashion. Appellants offer as proof a tape of the August 12th broadcast in which Dolcefino states, "the payroll records of every Controller's office exec we wanted to talk to was changed after we asked for records; vacation hours were always added. In a letter they told us this was all done in accordance with City policy." Further proof is Dolcefino's affidavit that he believed all statements in the August 12th broadcast were true. While appellants' proof on this matter does not warrant the granting of their traditional motion for summary judgment, like the statement regarding routine record destruction, we find that this statement could not subject Kelley to hatred, ridicule, contempt or financial injury, especially given the caveat enunciated in the broadcast that the changes to payroll records were made in accordance with City policy. Therefore, this statement is not defamatory as a matter of law. In addition, because Kelley offered no evidence to refute the truth of this statement, he could not avoid summary judgment under rule 166a(i).

4. Statements to the Newspaper Reporters

Kelley also accuses appellants of defamation in connection with statements Dolcefino allegedly made to newspaper reporters Tim Fleck and Julie Mason. Dolcefino allegedly

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[10] Kelley complains that appellants are not entitled to a "no evidence" summary judgment, as their motion was conclusory and "never discussed adequate time for discovery." First of all, there is no requirement that the motion state there has been adequate time for discovery. *See* TEX. R. CIV. P. 166a(i). More importantly, appellants specified the claims and elements that could not be supported by the evidence and, therefore, their motion was not conclusory.

commented to each of these reporters that he was doing a series on "malfeasance."[11] Kelley argues this statement is defamatory *per se* because malfeasance is an *illegal* deed, and accusing another of an illegal deed is defamatory. *See Stearns v. McManis*, 543 S.W.2d 659, 661–62 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ dism'd). Appellants first attack the admissibility of these statements, arguing the trial court should have sustained their hearsay objections.[12] Appellants next argue the statements, assuming they were made, were true and therefore not defamatory.

In addressing the validity of appellants' hearsay objections, we begin by noting that hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. *See* TEX. R. EVID. 801 (d). The statements allegedly uttered by the newspaper reporters about what Dolcefino allegedly told them were made out of court and repeated by Kelley. Kelley offered the reporters' statements to establish that Dolcefino told Mason and Fleck that he was doing a story on Kelley's malfeasance. Because Kelley is seeking to establish a defamation claim based on what Dolcefino allegedly said to these newspaper reporters, for purposes of the hearsay analysis, the crucial inquiry is whether Dolcefino made the remarks, not whether Dolcefino was actually doing a story on malfeasance or whether Kelley committed malfeasance. Kelley clearly offered the statements by the newspaper reporters to establish the truth of the matters asserted, i.e., to prove Dolcefino said these

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[11] Kelley's affidavit states Mason wrote an editorial in the *Houston Chronicle* regarding the Plumb subcontract. Additionally, the affidavit states that when Kelley asked her where she got the idea Plumb was funneling subcontract money to Kelley's campaign, she responded that "[Kelley] needed to talk to Dolcefino and that apparently he was not finished with the Plumb story and that he told her he would be doing a series of stories on malfeasance in the Controller's Office." Kelley also states "Tim Fleck of the *Houston Press* quoted Mr. Dolcefino as saying he was doing a story on malfeasance regarding me and my office." Kelley offers no other evidence of the statements.

[12] Appellants timely objected that the statements by the newspaper reporters were hearsay. The trial court refused to rule on the objections, and appellants objected to the refusal to rule. Thus, appellants properly preserved their hearsay objections. *See* TEX. R. APP. P. 33.1(a)(1).

things to Mason and Fleck. As such, the statements are hearsay.[13] In fact, the statements contain hearsay within hearsay. *See* TEX. R. EVID. 805. A trial court may not consider hearsay evidence in ruling on a motion for summary judgment. *See Ho v. University of Texas at Arlington*, 984 S.W.2d 672, 680 (Tex. App.—Amarillo 1998, pet. denied); *Fidelity & Cas. Co. of New York v. Burts Bros., Inc.*, 744 S.W.2d 219, 224 (Tex. App.—Houston [1st Dist.] 1987, no writ). Thus, it was error for the trial court to base its denial of appellants' motion for summary judgment on these hearsay statements.

Our hearsay finding notwithstanding, we find that even if the statements Dolcefino allegedly made to the newspaper reporters were admissible, the statements still could not form the basis of a defamation claim because, if made,[14] they were true and thus not defamatory. In making this determination as to the truth of the statements, we look at the meaning of "malfeasance" and consider the context in which the statements were made. "Malfeasance" is defined as "wrongdoing or misconduct by a public official." BLACK'S LAW DICTIONARY 968 (7th ed. 1999). Dolcefino allegedly told the reporters that he was doing a series of stories on malfeasance. Because Dolcefino, in fact, did a series of broadcasts, the subject of which was the wrongdoing or misconduct of a public official (City Controller) in the performance of his duties, any such statements were true. Therefore, even if the statements Dolcefino purportedly made to Mason and Fleck were not hearsay, they could not form the basis of a defamation claim.

5. Statements to City Officials

Kelley contends appellants defamed him in making several statements to City officials.

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[13] For the same reasons, the statements by Mason and Fleck are also hearsay.

[14] Although Dolcefino denies speaking to Mason before he began the television broadcasts, and also denies making the statement about malfeasance to Fleck, in conducting our review, we take as true all evidence favorable to the non-movant (Kelley) and, therefore, we assume the statements were made. *See KPMG Peat Marwick v. Harrison County Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

To establish his claims, Kelley relies on the PIRG report, which states:

> Dolcefino stated that he received information that Mr. Kelley required a contractor, Mir, Fox, & Rodriguez to issued [sic] a $75,000 subcontract to Mr. Plumb for computer consulting work on the System 2000 Project. *Mr. Dolcefino stated he believed Mr. Plumb was then funneling those funds back into Mr. Kelley's campaign account.* Mr.Dolcefino also stated he had been unable to identify a work product by Mr. Plumb, despite a report being due on July 15, 1997.

The first and last sentences are substantially true, as previously noted in discussions of the broadcasts. The second sentence, italicized above, is also true — Dolcefino's affidavit states that he had been told the money being paid to Plumb may have been directed to Kelley's campaign account. Dolcefino stated in his pretrial deposition that people in the City Controller's office raised the issue of money going back into Kelley's campaign. Dolcefino notes in his affidavit that at the time he spoke with the PIRG, he did not have any information indicating this information was false nor did he have reason to doubt its veracity. Thus, from the evidence in the record we conclude it is true, or at least substantially true, that Dolcefino believed money may have been directed back to Kelley's campaign. Accordingly, we find that these statements to the PIRG are not defamatory as a matter of law.

Kelley contends the statement regarding the funneling of funds back into Kelley's campaign account is false because only Larry Homan (Dolcefino's contact in the City Controller's office), not "people," made the statement. We find this distinction to be a matter of secondary importance. As such, we can disregard it and determine the substantial truth of the statement as a matter of law. *See McIlvain*, 794 S.W.2d at 16.

Kelley also complains that the PIRG report contains a defamatory statement by Dolcefino that Plumb's subcontract created a conflict of interest. The PIRG report, however, does not contain this statement, and Kelley has failed to set forth a record reference to support his argument. Facts stated and arguments made in the brief must be supported by record

references or the complaints are waived. *See* TEX. R. APP. P. 38.1(f), 38.1(h); *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 280 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

Similarly, Kelley asserts that Dolcefino made allegations regarding the Plumb subcontract to former Mayor Lanier's Chief of Staff, Joe Wykeith. Again, the record contains no evidence of such a statement. While Kelley mentions this matter in his statement of facts, he does not revisit it in his argument. Having failed to support his argument with record references, Kelley has waived this complaint. *See Melendez*, 998 S.W.2d at 280 (citing *Tacon Mech. Contractors v. Grant Sheet Metal, Inc.*, 889 S.W.2d 666, 671 (Tex. App.—Houston [14th Dist.] 1994, writ denied)).

Next, Kelley contends appellants defamed him to former Mayor Lanier. In his affidavit Kelley states:

> Mayor Lanier told me that Wayne Dolcefino had been following me and that he was going to do a story on me that I had given a contract to my campaign manager "Blum" and was funneling money back to my campaign account . . . . The Mayor also stated that Wayne Dolcefino claimed to have film of Hispanic workers from my office doing yard work or mowing the grass at my house during work hours.

Kelley offers these statements to establish the truth of the matter asserted, i.e., that Dolcefino uttered these allegedly defamatory statements to former Mayor Lanier. As such, these statements are clearly hearsay. *See* TEX. R. EVID. 801(d). Notably, Kelly's affidavit does not establish that *he* heard the statements allegedly uttered by Dolcefino, but rather that Mayor Lanier, an out-of-court declarant, told Kelley that he (Mayor Lanier) had heard them. The truth of whether Dolcefino, in fact, made these allegedly defamatory statements would depend on the credibility of the out-of-court declarant (Mayor Lanier). Consequently, Kelley's affidavit testimony purporting to establish what Dolcefino said to Mayor Lanier is inadmissible

hearsay.[15] Therefore, it was error for the trial court to rely on these hearsay statements in denying appellants' motion for summary judgment. *See Ho*, 984 S.W.2d at 680; *Burts Bros.*, 744 S.W.2d at 224. More importantly, given the hearsay nature of the statements Dolcefino is alleged to have made to Mayor Lanier, there is no competent summary judgment evidence of an essential element of a cause of action for defamation – that Docefino *published* the statements Kelley attributes to him.

Kelley also contends in his affidavit that appellants defamed him to other City officials. According to Kelley's affidavit testimony, Dolcefino called City Attorney Gene Locke and told him people in the City Controller's office were altering government records. For the reasons set forth above regarding the hearsay nature of the statements Dolcefino allegedly made to the newspaper reporters (Fleck and Mason) and Mayor Lanier, this statement is hearsay. *See* TEX. R. EVID. 801(d). Therefore, it is inadmissible and could not be the basis for the trial court's denial of appellants' motion for summary judgment. *See Ho*, 984 S.W.2d at 680; *Burts Bros.*, 744 S.W.2d at 224.

We sustain points of error two, three, eight and nine.

B. Actual Malice

Throughout appellees' brief, Kelley focuses on what he asserts is proof of appellants' actual malice. One cannot establish actual malice, however, when the speaker makes a true or substantially true statement. *See New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that actual malice requires the defamatory statement be made with knowledge of the

[15] The first statement (relating to Dolcefino following Kelley and doing a story on the Plumb subcontract and funneling money back to Kelley's campaign), even if it were admissible, is not defamatory because it is true. The July 16th broadcast concerned the possibility that Plumb had funneled money to Kelley's campaign, and the August 12th broadcast established that appellants had been following Kelley. More importantly, Kelley did not come forward with any poof that the statements were false. Therefore, these statements could not be the basis for the trial court's denial of appellants' motion for summary judgment on Kelley's defamation claims.

statement's falsity or reckless disregard of its truth or falsity). Having determined that all the statements at issue were true or substantially true, we need not consider whether appellants acted with actual malice.

V. OTHER CLAIMS

In points of error 19, 20 and 23, appellants challenge the trial court's refusal to grant summary judgment on Randolph and Kelley's causes of action for negligent supervision and conspiracy by the appellants to defame them. Causes of action for negligent supervision and conspiracy depend entirely on the validity of appellees' defamation claims. *See KTRK Television v. Felder*, 950 S.W.2d 100, 108 (Tex. App.—Houston [14th Dist.] 1997, no writ) (holding that claims grounded entirely on defamation claim are precluded when defamation claim has no merit because the statements are substantially true). Because we hold that appellants did not defame Kelley or Randolph, we find their claims based on negligent supervision and conspiracy are without merit. We sustain points of error 19, 20, and 23.

Inasmuch as our holding is dispositive of all other issues appellants have raised, we need not address the remaining points of error.

VI. CONCLUSION

Having determined that appellants proved the truth of the allegedly defamatory statements, we find they negated an essential element of appellees' cause of action for defamation and therefore are entitled to summary judgment. Absent a claim for defamation, the appellees' claims for negligent supervision and conspiracy also fail. Accordingly, we reverse the trial court's denial of appellants' motion for summary judgment and render judgment for appellants that appellees take nothing.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed February 10, 2000.

Panel consists of Justices Yates, Fowler and Frost.

Publish—TEX. R. APP. P. 47.3(b).