Motion for Rehearing Overruled; Reversed and Rendered; Opinion of June 7, 2001, Withdrawn and Substitute Opinion filed August 16, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00602-CV

WAYNE DOLCEFINO, KTRK TELEVISION, INC., STEVE BIVENS, AND LARRY HOMAN, Appellants

V.

CYNTHIA EVERETT RANDOLPH AND LLOYD E. KELLEY, Appellees

On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 97-45492

O P I N I O N O N M O T I O N F O R R E H E A R I N G

We overrule appellees' motion for rehearing. We withdraw the opinion issued in this case on June 7, 2001, and we issue the following opinion in its place.

This case involves allegations of defamation, wiretapping, and related claims asserted by appellees Randolph and Kelley against appellants Wayne Dolcefino, KTRK Television, Inc., Steve Bivens (collectively "KTRK Defendants") and Larry Homan. In this interlocutory appeal, the KTRK Defendants and Homan both challenge the denial of their respective motions for summary judgment. Appellees have filed three motions asserting

that this court has no jurisdiction over this appeal. Appellees have also moved for sanctions. Because we have appellate jurisdiction to review the trial court's order denying summary judgment, we deny appellees' three jurisdictional motions. We also deny appellees' motion for sanctions.[1] For the reasons stated below, we reverse the trial court's order and render judgment that appellants' motions for summary judgment should be granted.

Background and Procedural History

Elected as the City of Houston Controller in 1996, Kelley took office in January, 1997.[2] While Kelley was in office, the City awarded the accounting firm of Mir, Fox & Rodriguez ("MFR") a contract to resolve Y2K matters. On Kelley's recommendation, MFR subcontracted the Y2K work to Steven C. Plumb, who served as Kelley's campaign treasurer in the 1996 election. In subcontracting the Y2K work to Plumb, MFR neither kept any portion of the payments the City made to Plumb nor retained any supervisory control over Plumb's work for the City.

Wayne Dolcefino, an investigative reporter for KTRK Television, Inc. ("KTRK"), learned of the Plumb subcontract from Larry Homan, an employee in the City Controller's office. Homan met with Dolcefino and stated, among other things, that he was concerned about the possibility that Kelley's campaign might be receiving some of the money that Plumb was paid under the subcontract. Dolcefino then 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,

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[1] Randolph and Kelley have filed a Motion for Sanctions, alleging that appellants have blatantly misrepresented and mischaracterized the facts and the law in this case. This Motion for Sanctions has no merit. We deny this motion.

[2] Our first opinion contains many details relating to the factual background of this case, and we do not repeat the factual background of this case here, except to the extent relevant to this appeal. *See Dolcefino v. Randolph*, 19 S.W.3d 906, 913-16 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

the film crew captured Kelley attending to personal matters during 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 work hours. A third surveillance tape showed Kelley and Cynthia Randolph, a member of his executive staff, spending a workday afternoon at *SplashTown*, a local water park. Accompanying Kelley and Randolph on the *SplashTown* outing were Kelley's two children and another child.

Dolcefino also spoke with Jerry Miller of the Controller's office about these issues. Kelley had appointed Miller as an informal contact person. Kelley alleges that Dolcefino defamed him during a conversation with Miller by accusing Kelley of the crime of altering government records and having his employees alter government records.

In addition, Dolcefino had two KTRK employees—Steve Bivens and Jaime Zamora—follow Kelley and another city employee to a Continuing Legal Education seminar in a Hotel in San Antonio on July 10-11, 1997 ("CLE"). Bivens and Zamora shot video using both camcorders and a hidden "pager cam." On July 10, 1997, Bivens recorded Kelley and several other city employees talking in a courtyard at the hotel during the morning break at the CLE.[3]

Portions of the videotapes were aired on KTRK newscasts along with commentary by Dolcefino raising questions about the propriety of Kelley's actions. As a result of these newscasts, Randolph and Kelley filed suit against Dolcefino, KTRK, and other defendants alleging defamation and related claims. On the first interlocutory appeal, this court rendered judgment that the defendants' first motion for summary judgment be granted. *See Dolcefino v. Randolph*, 19 S.W.3d 906 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) ("First Appeal"). In a second appeal, this court affirmed the trial court's sanctions against Randolph and Kelley for filing frivolous claims against KTRK's attorneys. *See Randolph*

[3] The parties dispute whether there is any evidence that an intelligible audio recording was made along with the video recording; however, we do not reach this issue because we hold that the wiretapping claim is barred by the statute of limitations.

v. Walker, 29 S.W.3d 271 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

After the KTRK Defendants filed the First Appeal, Randolph and Kelley amended their petition several times, adding Bivens and Homan as defendants and adding the following new claims: (1) defamation claims against the KTRK Defendants based on statements made by Dolcefino to Jerry Miller ("Miller Claims"); (2) a claim for common-law invasion of privacy; (3) the alleged violation of Chapter 123 of the Texas Civil Practice & Remedies Code based on the CLE incident ("Wiretapping Claim"); and (4) defamation and related tort claims against Homan.

The trial court granted the motions for summary judgment filed by ABC, Inc., CC Texas Holding Co., Inc., David Gwizdowski, Henry Florsheim, Jaime Zamora, and Noe Cadena.[4] The trial court, however, denied motions for summary judgment filed by appellants under both TEX. R. CIV. P. 166a (b) & (i). The KTRK Defendants and Homan have appealed under TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6) (Vernon 1997).

Issues Presented

The KTRK Defendants present twenty-three issues for our review. In these issues, the KTRK Defendants argue that the trial court erred in denying their Second Motion for Summary Judgment ("KTRK Motion") for the following reasons: (1) some of the claims asserted by Randolph and Kelley were part of the First Appeal and have already been dismissed by the judgment in the First Appeal; (2) Randolph and Kelley have no evidence of the essential elements of the claims for common-law invasion of privacy, intentional infliction of emotional distress, civil conspiracy, and the Miller Claims ; and (3) the KTRK Defendants conclusively proved that the Wiretapping Claim is barred by the statute of limitations. Homan presents four issues for review, arguing that his motion for summary judgment should have been granted because Randolph and Kelley have no evidence of the

[4] The propriety of the trial court's granting of these motions is not before this court.

essential elements of the defamation claim against Homan and because any other claims against Homan are derivative of the defamation claim and should likewise be dismissed.

Standards of Review

We review the denial of a motion for summary judgment by the same standards as the granting of a summary judgment. *Dolcefino*, 19 S.W.3d at 916. 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. *Id.* 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. *Id.*

In reviewing a no-evidence motion for summary judgment, we ascertain whether the non-movant produced any evidence of probative force to raise a genuine issue of fact as to the essential elements attacked in the no-evidence motion. *Id*. We take as true all evidence favorable to the non-movant, and we make all reasonable inferences therefrom in the non-movant's favor. *Id.* A no-evidence motion for summary judgment must be granted if the party opposing the motion does not respond with competent summary-judgment evidence that raises a genuine issue of material fact. *Id*. at 917.

Does This Court Have Appellate Jurisdiction?

Before addressing the merits, we must determine whether we have jurisdiction over this interlocutory appeal. Appellants claim that TEX. CIV. PRAC. & REM. CODE §51.014(a)(6) gives this court jurisdiction to review every aspect of the trial court's denial of their respective motions for summary judgment. Appellees have filed two motions to strike and one motion to dismiss this appeal. These motions assert that this court lacks appellate jurisdiction for the following reasons: (1) Homan has not shown any basis for this court's jurisdiction over his appeal, so Homan's appeal should be dismissed and he should be sanctioned for filing a frivolous appeal under TEX. R. APP. P. 45; (2) under § 51.014(a)(6), a party may appeal only those claims as to which the party has a First

Amendment defense; (3) the trial court granted appellees' special exceptions and motion for summary judgment as to First Amendment defenses so that there can be no appeal under § 51.014(a)(6); (4) the KTRK Defendants may not appeal because the trial court never ruled on the KTRK Motion as to the Miller Claims; and (5) § 51.014(a)(6) allows only one appeal per case.

These arguments have no merit. Under § 51.014(a)(6), this court has jurisdiction over the entire order denying appellants' motions for summary judgment. § 51.014(a)(6); *American Broadcasting Companies, Inc. v. Gill*, 6 S.W.3d 19, 26 (Tex. App.—San Antonio 1999, pet. denied), *disapproved of on other grounds by Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000); *Galveston Newspapers, Inc. v. Norris*, 981 S.W.2d 797, 798-99 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Delta Air Lines, Inc. v. Norris*, 949 S.W.2d 422, 428-29 (Tex. App.—Waco 1997, writ denied).

Homan states in his brief that this court has jurisdiction under § 51.014(a)(6). This statute allows an interlocutory appeal from an order that "denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter 73." § 51.014(a)(6). The unambiguous language of this statute allows Homan to appeal, even if he is not a member of the electronic or print media, if both of the following are true: (1) Homan is appealing the denial of a motion for summary judgment based in whole or in part upon a claim or defense arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution; and (2) Homan is defending a claim based on a communication by Homan that appeared in or was published by the electronic or print media. *Associated Press v. Cook*, 17 S.W.3d 447, 450-51 (Tex. App.—Houston [1st Dist.] 2000, no pet.); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Insurance Co. of North America*, 955 S.W.2d 120, 125-26 (Tex. App.—Houston [14th

Dist.] 1997), *aff'd sub nom. Keck, Mahin & Cate v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692 (Tex. 2000). Homan satisfies both of these requirements, and therefore, this court has jurisdiction over Homan's appeal.

Nonetheless, Randolph and Kelley argue that this court lacks jurisdiction because Homan has not shown that any of his communications appeared in or were published by the electronic or print media. This argument is at odds with appellees' live petition at the time Homan's motion was denied. This petition asserted a defamation claim against Homan and contained the following allegations: (1) "Dolcefino alleged . . . that Defendant Homan was the source for his news broadcast of July 1997 referencing Plaintiff"; and (2) "Defendant Larry Homan participated in the editing and creation of the stories that were defamatory and aired by Defendant Channel 13 and Defendant Dolcefino which caused Plaintiffs harm." Section 51.014(a)(6) does not require that Homan personally appear in or be quoted in the news broadcast. Appellees' defamation claim against Homan is based on alleged communications by Homan that allegedly appeared in or were published by the electronic media. This court has jurisdiction over Homan's appeal under § 51.014(a)(6). *Associated Press*, 17 S.W.3d at 450-51; *National Union Fire Ins. Co. of Pittsburgh, Pa.*, 955 S.W.2d at 125-26.

Randolph and Kelley also argue that appellants may appeal only those claims as to which appellants assert a First Amendment defense. This argument fails under the unambiguous language of § 51.014(a)(6). This statute allows appellants to appeal the entire order denying their motions for summary judgment, including arguments, claims, and defenses that do not involve the First Amendment. § 51.014(a)(6); *American Broadcasting Companies, Inc.*, 6 S.W.3d at 26; *Galveston Newspapers, Inc.*, 981 S.W.2d at 798-99; *Delta Air Lines, Inc.*, 949 S.W.2d at 428-29.

Randolph and Kelley argue that no appeal lies under § 51.014(a)(6) because the trial court granted their special exceptions and motion for summary judgment as to the KTRK Defendants' First Amendment defenses. The court granted appellees' special

exceptions and required the KTRK Defendants to replead some First Amendment defenses as to the invasion-of-privacy claim. The KTRK Defendants repleaded these defenses, so that the special-exceptions order did not permanently strike any First Amendment defense. The trial court granted an interlocutory summary judgment in favor of Randolph and Kelley, ruling that the First Amendment does not bar recovery of all actual and exemplary damages regarding the Wiretapping Claim. This order did not dismiss all of the KTRK Defendants' First Amendment defenses.[5] Thus, the trial court's special-exceptions order and its order granting part of appellees' motion for summary judgment do not defeat our jurisdiction.

Randolph and Kelley also assert that we lack jurisdiction because the trial court refused to rule on the KTRK Motion as to the Miller Claims. The factual premise of this argument is wrong. The trial court did deny the KTRK Motion as to the Miller Claims.[6] In the order appealed from in this case, the trial court did not rule on any of the claims that were part of the First Appeal; however, Randolph and Kelley added the Miller Claims to their petition after the First Appeal was perfected.

Finally, Randolph and Kelley argue that we lack jurisdiction because § 51.014(a)(6) allows only one interlocutory appeal in each case and because the KTRK Defendants have already appealed once. As with several of the other arguments, this one contradicts the unambiguous language of the statute.

In short, all of appellees' arguments against the jurisdiction of this court fail. Under § 51.014(a)(6), this court has jurisdiction over the entire order denying appellants' motions for summary judgment. Therefore, we deny the motions to strike, the motion to dismiss for

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[5] For example, appellants relied in their motions for summary judgment on the requirement that Kelley show actual malice in his defamation claim because he is a public figure. This actual malice requirement is imposed by the First Amendment. *Carr v. Brasher*, 776 S.W.2d 567, 570-71 (Tex. 1989). Appellants have also asserted other First Amendment defenses.

[6] Except for the Miller Claims, all of the other defamation claims of Randolph and Kelley against the KTRK Defendants were disposed of in the First Appeal and were not addressed by the trial court in ruling on the KTRK Motion.

lack of jurisdiction, and the request for sanctions under TEX. R. APP. P. 45 filed by Randolph and Kelley.

Should the Trial Court Have Granted Homan's Motion for Summary Judgment?

Homan presents four issues for review, arguing that his motion for summary judgment should have been granted because there was no evidence of the essential elements of the defamation claim against him and because any other claims against him are derivative of the defamation claim and should likewise be dismissed. We sustain Homan's four issues and hold that the trial court should have granted Homan's motion for summary judgment.

As we stated earlier, the suit against Homan was brought as a result of his conversations with Dolcefino concerning work being performed by Steve Plumb—Kelley's former campaign treasurer. On Kelley's recommendation, the MFR contract with the City of Houston was subcontracted out to Steve Plumb. Under the terms of the subcontract, MFR did not receive any percentage of the money paid by the City of Houston for the work, and MFR retained no control over Plumb's work.

In July and August of 1997, Homan was working as an auditor for the City of Houston. Homan had concerns about the propriety of the Plumb subcontract and about whether the taxpayers of the City of Houston were getting what they paid for under the subcontract. As of July, 1997, Plumb had already been paid $26,000 under his contract with MFR, but Homan had not seen any work product from Plumb. In July and August of 1997, Homan spoke with Dolcefino about his concerns regarding the Plumb subcontract. Homan's affidavit, which was attached to his motion for summary judgment, proved the following, among other things: (1) Homan never accused Kelley of funneling money through the Subcontract to finance his political campaign; (2) Homan never accused Kelley of a misapplication of public funds; (3) Homan merely relayed to Dolcefino his concern that the money from the Plumb subcontract possibly was being diverted to Kelley's campaign.

In appellees' petition, Kelley[7] directly alleged[8] only the following defamatory statements by Homan:

> Defendant Homan only gave Defendant Dolcefino a copy of the Mir, Fox and Rodriguez letter and a copy of the engagment letter with Mr. Plumb. Defendant Homan stated it was an unusual arrangement because he had not seen any of Mr. Plumb's work product. Defendant Dolcefino then questioned Defendant Homan as to where the money might possibly or hypothetically be going. Defendants then constructed a purely hypothetical guess that the money might be going from Mr. Plumb back to Mr. Kelley's pockets or campaign account. Defendant Homan described his concerns about [sic] that the money may be going back to Mr. Kelley or his campaign as rumor or "coffee pot" talk or "water fountain talk." Defendant Homan made it very clear to Defendant Dolcefino that the idea of money being funneled back to Mr. Kelley or his campaign was purely a guess. In addition, Defendant Homan came up with the hypothetical after Defendant Dolcefino repeatedly questioned him as to possibilities. Defendant Homan described his concern that the money might be going back to Mr. Kelley as an opinion without any factual support. Defendant Dolcefino then went to the police department and the district attorney and made specific allegations that Mr. Plumb was in fact funneling money back to Mr. Kelley's campaign.

On appeal, Kelley defends only the above-quoted defamation allegations as to Homan. Kelley admitted at his deposition that only Homan and Dolcefino were present when Homan allegedly defamed Kelley. Kelley also stated at his deposition that the only evidence that he has of this alleged defamation is the deposition testimony of Dolcefino and Homan and Dolcefino's answers to interogatories. All of this evidence indicates that Homan only told Dolcefino that he was concerned that there was a possibility that Kelley was funneling money back to himself or his campaign through Plumb. Kelley did not plead or prove that Homan said this actually was happening. Therefore, we must decide whether Kelley raised a genuine issue of material fact as to the essential elements of his

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[7] Both in response to Homan's motion for summary judgment and on appeal, Randolph has not alleged that she is asserting any claims against Homan. On this basis alone, Homan's motion should have been granted as to Randolph.

[8] Kelley also generally alleges that Homan participated in editing and creating stories that were defamatory and aired by Defendants KTRK and Dolcefino. Homan's affidavit, however, proved that he did not participate in the drafting or editing of these news broadcasts, and Kelley did not present any summary-judgment evidence to the contrary.

claim that Homan defamed him by telling Dolcefino that Homan was concerned about the possibility that Kelley was funneling money back to himself or his campaign through Plumb.[9]

The First Amendment requires Kelley, as a public figure, to prove that Homan acted with actual malice when he told Dolcefino about these concerns. *See Turner v. KTRK Television, Inc*., 38 S.W.3d 103, 120 (Tex. 2000). To establish actual malice, Kelley must prove that Homan made the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 120. In this context, "reckless disregard" means that Homan "entertained serious doubts as to the truth of his publication." *Id*. Although actual malice focuses on the defendant's state of mind, a plaintiff can prove it through objective evidence about the publication's circumstances. *Id.* For the sake of argument, we presume that Homan's statements are actionable because they conveyed a provably false factual connotation that Kelley was funneling money back into his campaign through the Plumb subcontract.[10] *See id.* at 116. If this were so, Kelley would have to prove that, at the time Homan made these statements to Dolcefino, Homan either knew or strongly suspected that his statements conveyed a provably false factual connotation that Kelley was funneling money back into his campaign through the Plumb subcontract. *Id*. at 120. We hold that Kelley's defamation claim against Homan fails as a matter of law because, as we explain below, no summary-judgment evidence raised a genuine issue of material fact regarding the essential element of actual malice. *Carr v. Brasher*, 776 S.W.2d 567, 570-71 (Tex. 1989) (even if statements were defamatory, summary judgment was proper because plaintiff did not raise a fact issue as to actual malice); *accord Turner v. KTRK Television, Inc*., 38 S.W.3d 103, 119-25 (Tex. 2000) (no

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[9] On appeal, Kelley argues that a report made by a Public Integrity Review Group ("PIRG") created a fact issue as to what Homan said to Dolcefino. Kelley waived this argument by not presenting it to the trial court as a ground in opposition to Homan's motion for summary judgment. *Stiles v. Resolution Trust Corp*., 867 S.W.2d 24, 26 (Tex. 1993) (summary judgment ruling cannot be affirmed on grounds not expressly set out in the motion or response).

[10] We base our holding on actual malice and do not decide whether Homan negated any other elements of defamation as a matter of law.

evidence of actual malice as to Dolcefino and KTRK as a matter of law).

Homan moved for summary judgment as to actual malice under both TEX. R. CIV. P. 166a (b) & (i). Homan attached to his motion for summary judgment an affidavit in which he testified, among other things, as follows: (1) that Homan contacted Dolcefino in good faith, based only on his interest in protecting Houston taxpayers; (2) that Homan believed all statements of fact that he made to Dolcefino regarding the Plumb subcontract were true; (3) that Homan did not have or entertain any doubt, serious or otherwise, about the truth of the statements of fact that he made to Dolcefino regarding the Plumb subcontract. Homan negated actual malice as a matter of law, and Kelley had the burden of presenting evidence raising a genuine issue of fact as to the issue of actual malice. *Huckabee v. Time Warner Entertainment Co., L.P.*, 19 S.W.3d 413, 423-24 (Tex. 2000); *Casso v. Brand*, 776 S.W.2d 551, 558-59 (Tex. 1989) (holding affidavit sufficiently negated actual malice by establishing that defendant did not believe allegations were false and did not act with reckless disregard as to their truth or falsity).

In his response, Kelley attached the following summary-judgment evidence: (1) Dolcefino's answers to interogatories; (2) excerpts from the transcript of Dolcefino's deposition; and (3) an affidavit of Kelley. The interogatory answers and deposition excerpts established that Homan told Kelley that he was concerned that there was a possibility Kelley was funneling money back to himself or his campaign through Plumb. This evidence was not material to the essential element of actual malice. In his affidavit, Kelley testified that he never received a contribution from Plumb, that Plumb nevered funneled money to Kelley's campaign account, that Plumb performed work for the money that he was paid, and that Homan's statements to Dolcefino were false, caused Kelley's reputation to suffer, and embarrassed Kelley. Again, this evidence was not material to the actual malice issue. In his response to Homan's motion for summary judgment, Kelley also incorporated by reference the evidence from his responses to the KTRK Motion. This evidence, however, relates primarily to Kelley's claims against the KTRK Defendants and was not material to the actual malice issue as to Homan.

Furthermore, in the petition, Kelley alleged that Homan made it very clear to Dolcefino that the idea that Kelley was funneling money back to his campaign was purely a guess and that it was a hypothetical that Homan came up with after Dolcefino discussed the possible explanations for the Plumb subcontract. Kelley also alleged that Homan described his concern that money might be going back to Kelley as an opinion without any factual support.

In response to Homan's motion for summary judgment, Kelley asserted only one reason why there was a fact issue as to actual malice—that Homan purposefully avoided the truth by deliberately not checking the campaign reports to see if Plumb had made any contributions to Kelley's campaign. Kelley claims that, if Homan had checked Kelley's public campaign reports, he would have learned that Plumb had not made any contributions to his campaign and that none of the money paid to Plumb was given to Kelley's campaign. This argument is not convincing. The fact that Plumb made no campaign contributions does not prove that Kelley did not funnel money back to his campaign.[11] To make a determination in this regard would require an extensive investigation of the kind that might be undertaken by prosecutors, investigators, or journalists. It is unlikely that any source could have easily proved or disproved whether Kelley was funneling money back to his campaign account. Further, Homan made clear to Dolcefino that he had no proof that Kelley was engaging in this conduct and that he was only concerned that this was a possibility. On this record, there is no purposeful-avoidance-of-the-truth theory for actual malice as a matter of law. *Huckabee,* 19 S.W.3d at 427-28.

On appeal, Kelley also argues that Homan was a disgruntled employee of the Controller's Office, that Homan was in fear of being fired, that Kelley was running for re-election in 1997, that Homan was working for Kelley's political opponent in the election,

[11] We are not indicating that Kelley engaged in this kind of misconduct, only that, if he had done so, it is unlikely that he would document this misconduct in his campaign reports.

and that Homan's only interest was in generating negative publicity for Kelley in his re-election campaign. Kelley did not assert these as grounds in opposition to summary judgment in the trial court, and no summary-judgment evidence supports these assertions.[12] Therefore, these arguments do not show a fact issue as to actual malice.

On appeal, Kelley also asserts for the first time that there was a fact issue regarding actual malice based on summary-judgment evidence that Homan visited the offices of KTRK once to confirm that Randolph was the woman accomanying Kelley and his sons to *Splashtown* on a videotape to be used in one of KTRK's broadcasts. While the summary-judgment evidence did show this, it did not indicate that Homan did anything during this visit other than confirm that Randolph, Kelley, and Kelley's sons were on the videotape. These identifications themselves were accurate, and Kelley does not assert that they were defamatory. Homan's confirmation of the identity of these individuals did not raise a genuine issue of fact as to whether Homan had serious doubt as to the truth of the statements that he made to Dolcefino regarding the Plumb subcontract.

Private citizens like Homan do not generally have the time and resources necessary to conduct an investigation of the Plumb subcontract. Further, it would be difficult, if not impossible, for Homan to conduct an investigation himself because he was an employee of the Controller's Office. Homan told Dolcefino—an investigative reporter—about the Plumb subcontract and about some of Homan's concerns, including the possibility that some of the money paid to Plumb might be funneled back to Kelley's campaign. This evidence alone did not raise a genuine issue of material fact as to actual malice.

After reviewing the summary-judgment evidence and applying the appropriate standard of review, we hold that there was no genuine issue of material fact as to whether Homan either knew or strongly suspected that his statements conveyed a provably false factual connotation that Kelley was funneling money back into his campaign through the

[12] While the summary-judgment evidence does not indicate that Homan was a disgruntled employee or that he was in fear of being fired, it does prove that Homan was still employed by the Controller's Office as of the date that he signed his affidavit—February 10, 2000.

Plumb subcontract. Because there was no fact issue as to actual malice, we conclude that Homan was entitled to judgment as a matter of law that Kelley take nothing on his defamation claim. *Huckabee*, 19 S.W.3d at 424-30; *WFAA-TV, Inc. v. McLemore,* 978 S.W.2d 568, 573-74 (Tex. 1998); *Carr,* 776 S.W.2d at 570-71; *accord Turner,* 38 S.W.3d at 119-25. Therefore, we sustain Homan's four issues and hold that the trial court should have granted Homan's motion for summary judgment.[13]

Is Kelley's Wiretapping Claim Barred by Statute of Limitations?

Kelley asserted a Wiretapping Claim against the KTRK Defendants based on their alleged violation of TEX. CIV. PRAC. & REM. CODE § 123.001, *et seq*.[14] Kelley alleged that the KTRK Defendants violated this statute by using a "pager cam" to record Kelley's conversation with Bradford, Stephens, and Jordan during the CLE in San Antonio. The KTRK Defendants moved for summary judgment on the Wiretapping Claim on a number of grounds. We reach only the statute-of-limitations ground, and we hold that the KTRK Defendants were entitled to judgment as a matter of law because they conclusively proved that Kelley's Wiretapping Claim is barred by the two-year statute of limitations under TEX. CIV. PRAC. & REM. CODE § 16.003 (Vernon 1997).

In their motion, the KTRK Defendants conclusively proved that the alleged wiretapping violation occurred on July 10, 1997 and that Kelley did not bring suit on this claim until the Ninth Amended Petition, which was filed more than two years later—on August 30, 1999. Kelley first argues that he actually pleaded this claim earlier—in the Eighth Amended Petition filed in April of 1999. This argument fails because the Eighth Amended Petition made no reference to the San Antonio CLE during which the wiretapping

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[13] On appeal, Kelley only defends his defamation claim against Homan; however, to the extent Kelley's petition alleges invasion of privacy and intentional infliction of emotional distress against Homan based on this conduct, these claims also fail as a matter of law. *See Dolcefino*, 19 S.W.3d at 932; *KTRK Television v. Felder*, 950 S.W.2d 100, 108 (Tex. App.—Houston [14th Dist.] 1997, no writ).

[14] Randolph has not alleged that any conversation of hers was recorded, and she has not asserted any wiretapping claims.

allegedly occurred. In fact, Steve Bivens and Jaime Zamora—the two men who allegedly traveled to San Antonio to videotape Kelley and record his conversations—were not made defendants until the Ninth Amended Petition. Kelley argues that the following paragraph in the Eighth Amended Petition (from the part of the petition stating facts relating to the KTRK news broadcasts) was sufficient to allege wiretapping:

> Defendants stated, "We have showed you the Controller spending time at home "normally" reserved for the office." Defendants accused Mr. Kelley of being late and holding up a City Council meeting because he was at home working on his sprinkler system. These statements are false and defamatory and imply that Plaintiff Kelley abused his time. Defendants violated Plaintiffs' privacy by following Plaintiffs at all hours of the day and by conducting surveillance of Plaintiffs and eavesdropping on Plaintiff's private conversations. The actions of Defendants intruded upon the privacy and seclusion of Plaintiffs in violation of their rights to privacy as secured by the Constitution and laws enacted to secure these rights thereof and in violation of Plaintiffs rights to privacy under the common law.

Kelley argues that the Eighth Amended Petition must be liberally construed in his favor because defendants did not specially except to it. Kelley asserts that, if we liberally construe the above language in his favor, it sufficiently pleaded a wiretapping violation under Chapter 123 of the Texas Civil Practice and Remedies Code. The KTRK Defendants argue that, no matter how liberally the court construes the language of this petition, it cannot create a claim that is not there. They argue that this petition simply did not plead a Chapter 123 violation based on the pager-cam recording in San Antonio on July 10, 1997.

The KTRK Defendants are correct. In liberally construing Kelley's Eighth Amended Petition, we should find that the petition pleaded any claims that may reasonably be inferred from the specific language used in the petition, even if the petition fails to state all of the elements of that claim. *SmithKline Beecham Corp. v. Doe,* 903 S.W.2d 347, 354-55 (Tex. 1995); *Boyles v. Kerr,* 855 S.W.2d 593, 600-601 (Tex. 1993). Nonetheless, Kelley's petition must give the KTRK Defendants fair notice of the claims being asserted, and, if we cannot reasonably infer that Kelley's Eighth Amended Petition asserted a wiretapping claim based on the CLE, then the petition did not contain this claim, even

under our liberal construction. *SmithKline Beecham Corp.*, 903 S.W.2d at 354-55; *Boyles*, 855 S.W.2d at 600-601.

The Eighth Amended Petition did not refer to the interception of Kelley's communications through the use of electronic or other mechanical devices. It did not mention Bradford, Stephens, or Jordan. The Eighth Amended Petition contained a general allegation that KTRK and Dolcefino invaded the privacy of Randolph and Kelley by conducting surveillance of them and by eavesdropping on their private conversations. In the context of the allegations in the Eighth Amended Petition, it cannot reasonably be inferred that this petition pleaded facts relating to the occurrence at the San Antonio CLE. The Eighth Amended Petition referred to alleged invasions of privacy and surveillance of both Randolph and Kelley. However, Randolph was not involved in the San Antonio CLE, and only Kelley has asserted the Wiretapping Claim. The Eighth Amended Petition did not cite Chapter 123 or any other wiretapping statute. The Eighth Amended Petition did not seek the $1,000 statutory penalty allowed under Chapter 123, as did the Ninth Amended Petition. When Kelley added the Wiretapping Claim in the Ninth Amended Petition, he carried forward the above-quoted paragraph, substantially unchanged, in the part of the petition containing allegations regarding the news broadcasts; he alleged the Wiretapping Claim by adding seven new paragraphs relating to the San Antonio CLE in a different part of the petition. It cannot be reasonably inferred from the language in Kelley's Eighth Amended Petition that Kelley asserted a Wiretapping Claim based on the CLE. Therefore, this petition did not assert the Wiretapping Claim. *See SmithKline Beecham Corp.*, 903 S.W.2d at 354-55; *Boyles*, 855 S.W.2d at 600-601.

Kelley also argues that the Wiretapping Claim added by the Ninth Amended Petition should relate back to the filing of the Eighth Amended Petition under TEX. CIV. PRAC. & REM. CODE ANN § 16.068 because the July 10, 1997 wiretapping allegation was not a new, distinct or different transaction or occurrence. This argument fails. The Wiretapping Claim was based on a new and different transaction or occurrence—the alleged electronic interception by Bivens and Zamora of Kelley's private conversation in San Antonio

without his consent. *Harris v. Galveston County*, 799 S.W.2d 766, 769 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (holding that allegations of negligent care during a patient's hospital stay shortly after an operation were a different transaction or occurrence from allegations of negligence during that same operation).

In the Eighth Amended Petition, Randolph and Kelley alleged that KTRK and Dolcefino made various false statements about them, broadcast a videotape of them going to *Splashtown* together, followed them at all hours of the day, eavesdropped on their private conversations, and intruded upon their seclusion. There was no allegation that any of appellees' claims involved conversations of Kelley with Bradford, Stephens, and Jordan or that the claims related to the CLE in San Anotonio. The Eighth Amended Petition contained a general allegation that KTRK and Dolcefino eavesdropped on Randolph and Kelley. In the context of the allegations in the Eighth Amended Petition, it cannot reasonably be inferred that this petition pleaded facts relating to the occurrence at the San Antonio CLE. This occurrence allegedly involved the electronic interception of Kelley's private conversations with others without their consent; and it did not involve Randolph. Before the Ninth Amended Petition added them as new defendants, Kelley had not asserted any claims against Bivens and Zamora—the men who traveled to the San Antonio CLE and allegedly recorded Kelley's conversation with Bradford, Stephens, and Jordan. In his Wiretapping Claim, Kelley alleged, among other things, that Bivens used a pager cam to record Kelley's conversation with Bradford—the Chief of Police of the City of Houston—"about a highly classified on-going criminal investigation being conducted jointly between the Controller's Office and the Police Department." This was a different transaction or occurrence from the allegations contained in the Eighth Amended Petition. Therefore, the filing of the Wiretapping Claim in the Ninth Amended Petition (and subsequent petitions) did not relate back to the filing of earlier petitions under § 16.068. *Harris*, 799 S.W.2d at 769.

Kelley also argues that the discovery rule precluded summary judgment because the KTRK Defendants did not produce the pager-cam tape until August, 1999. The KTRK

Defendants attached summary-judgment evidence to their motion, proving that, on July 11, 1997, Kelley discovered that Dolcefino had a recording of Kelley's conversation with Bradford on July 10, 1997 at the CLE. Kelley did not controvert this summary-judgment evidence. Kelley has never denied that, on July 11, 1997, he discovered that his conversation with Bradford had been secretly recorded by KTRK employees on the previous day. Rather, Kelley argues that the discovery rule precluded summary judgment because no copies of that tape were produced until August of 1999. Regardless of the quality of the audio recording[15], the summary-judgment evidence conclusively proved that, as of July 11, 1997, Kelley knew that an audio recording of some kind had been made by KTRK employees. Because Kelley knew of his alleged wrongfully-caused injury, the statute of limitations began to run on his Wiretapping Claim no later than July 11, 1997, regardless of when Kelley obtained possession of all of the evidence relating to his claims. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 749 (Tex. 1999) (under discovery rule, limitations begins to run on the date when plaintiff knew or should have known of the wrongfully-caused injury, regardless of date on which plaintiff discovers all of the facts relating to plaintiff's claims).

Because Kelley's Wiretapping Claim was based on a new and different transaction or occurrence, the filing of the Wiretapping Claim in the Ninth Amended Petition (and subsequent petitions) did not relate back under § 16.068. Even under the discovery rule, Kelley's Wiretapping Claim accrued no later than July 11, 1997; however, Kelley did not assert this claim until August 30, 1999. Therefore, we sustain the KTRK Defendants' fourteenth issue because Kelley's Wiretapping Claim is barred as a matter of law by the two-year statute of limitations.

[15] The KTRK Defendants assert that there was no evidence that they ever made any intelligible audio recording using the pager cam at the CLE and that therefore the Wiretapping Claim fails; however, we do not reach this issue.

Should the Trial Court Have Granted the KTRK Defendants' No-Evidence Motion for Summary Judgment as to the Other Claims Asserted By Randolph and Kelley?

The KTRK Defendants asserted a no-evidence motion for summary judgment against the following claims, among others: the Miller Claims, common-law invasion of privacy, intentional infliction of emotional distress, and civil conspiracy. We hold that all of these claims fail as a matter of law for the following reasons: (1) Randolph and Kelley did not assert that there was a fact issue regarding these claims in their response to the KTRK Motion; and (2) Randolph and Kelley did not respond to the KTRK Motion with summary-judgment evidence raising a genuine issue of fact as to the essential elements of these claims.

In response to a no-evidence motion for summary judgment, nonmovants need not marshal their proof; however, they must point out the evidence that they assert raises a fact issue as to the elements challenged in the no-evidence motion. *See Stiles v. Resolution Trust Corp*., 867 S.W.2d 24, 26 (Tex. 1993) (summary judgment ruling cannot be affirmed on grounds not expressly set out in the motion or response); *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp*., 29 S.W.3d 282, 285 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (response to no-evidence motion must expressly set forth grounds for not granting summary judgment); TEX. R. CIV. P. 166a(i) cmt. ("To defeat a motion made under paragraph (i), the respondent is not required to marhshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. The existing rules continue to govern the general requirements of summary judgment practice."). The response filed by Randolph and Kelley asserted that there were fact issues relating to the wiretapping and negligence[16] claims; however, the response did not assert that there was a fact issue as to the Miller Claims and the claims for common-law invasion of privacy, intentional infliction of emotional distress, and civil conspiracy. The KTRK Defendants challenged the essential elements of all of these claims in their no-evidence motion. The

[16] The trial court granted summary judgment as to the negligence claims, and they are not before us.

response, however, did not point out or contain any summary-judgment evidence that raised a genuine issue of material fact as to these claims.[17] Consequently, we sustain the KTRK Defendants' first, tenth, thirteenth, fifteenth, twenty-second, and twenty-third issues, and we hold that the trial court should have granted the KTRK Motion as to the Miller Claims and the claims for common-law invasion of privacy, intentional infliction of emotional distress, and civil conspiracy.[18] *Coastal Conduit & Ditching, Inc.*, 29 S.W.3d at 285; *Swate v. Schiffers*, 975 S.W.2d 70, 74-75 (Tex. App.—San Antonio 1998, pet. denied); TEX. R. CIV. P. 166a(c)& (i) cmt.

Conclusion

Under TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6), this court has jurisdiction over the trial court's entire order denying the motions for summary judgment of the KTRK Defendants and Homan. Kelley's defamation claim against Homan fails as a matter of law because no summary-judgment evidence raised a genuine issue of material fact regarding the essential element of actual malice. Kelley did not allege his Wiretapping Claim—based on a new and different occurrence—until his Ninth Amended Petition, which was filed more than two years after the latest date on which limitations could have started to run. Therefore, Kelley's Wiretapping Claim is barred by statute of limitations. The KTRK Motion should also have been granted as to the Miller Claims and the alleged claims for common-law invasion of privacy, intentional infliction of emotional distress, and civil

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[17] Further, to the extent that the invasion of privacy, intentional infliction, and conspiracy claims are predicated on allegedly defamatory conduct, these claims also fail as a matter of law because the defamation claims fail as a matter of law. *Dolcefino*, 19 S.W.3d at 932; *KTRK Television v. Felder*, 950 S.W.2d 100, 108 (Tex. App.—Houston [14th Dist.] 1997, no writ).

[18] In the alternative, the uncontroverted summary-judgment evidence proved that Miller did not repeat any of Dolcefino's alleged statements to anyone and that his opinion and perception of Kelley and Randolph did not change in any way based on anything that Dolcefino has ever said to him, including these statements. Even if damages are presumed, this evidence overcame the presumption and proved that Randolph and Kelley suffered no damages as a matter of law as a result of the Miller Claims. *Swate v. Schiffers*, 975 S.W.2d 70, 74-75 (Tex. App.—San Antonio 1998, pet. denied) (even as to libel *per se* cases where damages are presumed, summary judgment should still be granted if there is no genuine issue of fact as to whether the alleged defamatory statements have caused plaintiff any damage). Because the uncontroverted summary-judgment evidence proved that Randolph and Kelley suffered no damages as a result of the Miller Claims, the trial court should have granted the KTRK Motion as to these alleged claims. *Id*.

conspiracy because Randolph and Kelley did not respond to the KTRK Motion with summary-judgment evidence raising a genuine issue of fact as to the essential elements of these claims. In the alternative, the trial court should have granted the KTRK Motion as to the Miller Claims because the uncontroverted summary-judgment evidence proved that Randolph and Kelley suffered no damages as a result of the Miller Claims. Therefore, the trial court should have granted appellants' motions for summary judgment as to the remaining claims of Randolph and Kelley that were on file at the time the trial court ruled on these motions.

We sustain Homan's four issues and the first, tenth, thirteenth, fourteenth, fifteenth, twenty-second, and twenty-third issues of the KTRK Defendants. Without reaching the other issues presented by appellants, we reverse the order of the trial court denying appellants' motions for summary judgment, and we hold that these motions should be granted. We also render judgment dismissing with prejudice all claims that were not disposed of by our judgment in the First Appeal and that were asserted by appellees in their Tenth Amended Petition.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Yates, Fowler, and Lee.[19]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[19] Senior Justice Norman R. Lee sitting by assignment.