**Affirmed and Opinion Filed January 4, 2018**

**In The**
# Court of Appeals
# Fifth District of Texas at Dallas

**No. 05-16-01250-CV**

**MICHAEL HACKBARTH, Appellant**
**V.**
**UNIVERSITY OF TEXAS AT DALLAS, Appellee**

**On Appeal from the 134th Judicial District Court**
**Dallas County, Texas**
**Trial Court Cause No. DC-15-06745**

## MEMORANDUM OPINION

Before Justices Francis, Evans, and Boatright
Opinion by Justice Francis

Michael Hackbarth appeals the trial court's order granting the University of Texas at Dallas's motion for summary judgment and dismissing his retaliation claim under the Texas Whistleblower Act. In two issues, he contends there are genuine issues of material fact as to whether he (1) made a good-faith report of a violation of law and (2) would have been discharged but for the report. For reasons set out below, we affirm the trial court's order.

Appellant was hired as a UTD police officer in January 2012 after retiring as a senior corporal from the Dallas Police Department with twenty-eight years of service. Appellant had extensive training and was considered a "master peace officer," which he said is the highest level officer recognized by the Texas Commission on Law Enforcement. Once hired by UTD, he completed the UT System's ten-week academy.

In September 2012, UTD student N.B. reported that her boyfriend, Pritesh Rana, also a student, had physically and sexually assaulted her multiple times over the previous seven months, both on and off campus. N.B. was accompanied by some of her sorority sisters, who believed the violence was affecting her behavior. Sgt. Karl Zuber, supervised by Lt. Kenneth MacKenzie, investigated the case and interviewed N.B., her sorority sisters, and Rana. Rana admitted he had bruised N.B. and grabbed her by the throat during an argument. But Rana told police he and N.B. had consensual sex. He described one instance where she told him to stop, and he did, but afterwards she called him a "rapist." N.B. refused to give a written statement and did not want to press charges.

Given these circumstances, as well as the lack of physical evidence because the reports were not near in time to the alleged offenses, MacKenzie closed the case by allowing N.B. to sign a statement of nonprosecution. N.B. was given information on the UTD counseling center and women's center and "victim information." Rana was instructed to have no further contact with N.B. In addition, the Department issued a BOLO to alert officers to the escalating violence between the couple and that both had refused to prosecute. The BOLO contained the students' names, their photographs, and the make and model of their vehicles. It stated the couple normally met in school parking lots and advised officers to "take appropriate action" if they made contact and an offense had occurred. The BOLO was emailed to all officers and posted on a bulletin board.

On February 3, 2013, appellant was dispatched to a disturbance call at the UTD library, where a man was reportedly holding a female against her will. Appellant's shift supervisor, Sgt. Mark Brushwiller, also responded. On arrival, they found N.B. and Rana seated in the lobby. Appellant said both were "calm," but Brushwiller said N.B. was "upset" and "maybe crying."

Brushwiller recognized the couple from a disturbance the previous week in which the two were arguing and N.B. was crying. In that incident, both students denied any physical contact.

Appellant interviewed Rana, and Brushwiller interviewed N.B. N.B. said she and Rana were having an argument on the fourth floor of the library. When she tried to leave, Rana came from behind and wrapped his arms around her torso to keep her from leaving. N.B. yelled, and Rana released her. She denied any assault. Rana admitted to "wrongful contact," saying he held on to N.B. and would not let her go. Appellant determined no offense occurred, and Brushwiller relied on appellant's "experience and guidance" in determining the outcome. Brushwiller warned Rana that this was the "second time" he had responded to a disturbance involving them and advised Rana "of the consequences of his aggressive actions." Rana was allowed to leave. Both officers then spoke to N.B. briefly and gave her a UTD statement of nonprosecution, which she signed. The officers did not talk to the librarian or any witnesses nor did they check to see if any video of the incident was available. Neither was aware of the previously issued BOLO regarding the couple.

MacKenzie reviewed appellant's report and immediately recognized the parties as the subjects of the BOLO. MacKenzie had another officer pull the library's security video, which showed Rana restrain N.B. and put her in a headlock. After discussing the case with a Collin County prosecutor, MacKenzie decided, given the prior history, to proceed with an arrest of Rana on a Class C assault charge even though N.B. was an uncooperative witness. At some point, he told appellant he was going to have Rana arrested, and appellant disagreed that any offense occurred. Appellant voiced concern that an arrest would "ruin the kid's life."

MacKenzie directed Cpl. Robert Montgomery to draft an arrest warrant for Rana, which is the genesis of this dispute. Montgomery reviewed the dispatch audio recording of the 911 call and other documents associated with the case. When drafting the probable cause affidavit,

Montgomery included a sentence that read, "While the library staff was on the phone with the UTD Dispatcher she heard the female scream." MacKenzie believed the usage of the pronoun "she" in the sentence was unclear, and he revised it to read, "While the caller was on the phone, the UTD Dispatcher heard a female scream." Montgomery said he twice told MacKenzie the statement was incorrect because the librarian, not the dispatcher, heard the scream. Nevertheless, MacKenzie said he had "more experience" and instructed Montgomery to prepare the affidavit to reflect the dispatcher heard the scream. Montgomery prepared the affidavit as instructed by MacKenzie.

After the arrest warrant issued, appellant and Montgomery went to Police Chief Larry Zacharias and told him about the problem with the warrant. Appellant testified Zacharias immediately took a "defensive posture," saying they were "dumping" on his lieutenant. Appellant believed the chief's reaction "had to do" with another complaint initiated against MacKenzie only two weeks earlier, and he told Zacharias, "I thought you might think that, but this is just a coincidence." According to appellant, Montgomery told the chief he twice told MacKenzie the statement was wrong, but MacKenzie insisted it stay in. Appellant told Zacharias he believed MacKenzie intentionally included the false statement about who heard the scream to "bolster the credibility" of the warrant. Appellant also mentioned he believed the warrant presented a "*Brady*" issue.[1] At the conclusion of the meeting, Zacharias said he would look into it.

After speaking with MacKenzie and reviewing the drafts of the affidavits prepared by Montgomery as well as the revisions made by MacKenzie, Zacharias believed "pronoun

[1] *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the United States Supreme Court concluded that the suppression by the prosecution of evidence favorable to the defendant violates due process if the evidence is material either to guilt or punishment, without regard to the good or bad faith of the prosecution. *Brady*, 373 U.S. at 87; *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). This duty to disclose applies even if there has been no request by the defendant and encompasses both impeachment and exculpatory evidence. *Id*. It also requires disclosure of favorable evidence known only to the police. *Id*.

confusion" caused the error. He directed MacKenzie to contact the judge who signed the warrant and tell her about the incorrect statement. MacKenzie reported back to Zacharias that he contacted the judge, who said if probable cause still existed absent the sentence, the police did not need to obtain another warrant and that it could be cleared up with testimony at trial. Zacharias met with appellant and Montgomery and told them what the judge said.

Dissatisfied with Zacharias's response, appellant contacted the Collin County District Attorney's Office and the Texas Rangers with his complaint about the warrant. Neither had the resources to investigate the complaint. Then, in May 2013, appellant made a complaint to the University of Texas System's Office of Director of Police (ODOP) in Austin, alleging MacKenzie intentionally falsified a statement in a warrant affidavit that resulted in an innocent person being arrested and suspended from UTD. Appellant alleged the false arrest was then "covered up by withholding necessary and immediate 'Brady' disclosure, which resulted in Rana accepting a plea agreement he would otherwise not have taken." Rana pleaded no contest to Class C assault in municipal court. He was also suspended from UTD.

The case was assigned to Ruben Puente, ODOP assistant director. Puente was assisted in the investigation by Inspector Larry Bloom and two sergeants from the UT-Austin and UT-Arlington police departments. Puente decided to "put everybody at UTDPD under the microscope" and notified Zacharias of the investigation. Investigators obtained statements from appellant and MacKenzie and interviewed several witnesses, including appellant, Montgomery, Zacharias, MacKenzie, the municipal judge who signed the warrant, the two Collin County prosecutors who met with appellant, and the Texas Ranger who appellant contacted.

At the conclusion of the month-long investigation, ODOP issued a seventy-five-page report, determining appellant's allegations of false arrest, tampering with a government record, unlawful restraint, and official oppression were all unfounded. Among other things, ODOP

found appellant and Brushwiller's investigation into the library incident was "flawed" and "should have been handled in a significantly different, more deliberate and thoughtful manner." As for the statement in the warrant affidavit, ODOP noted a "significant distinction between untruthfulness and error in fact both in terms of culpability and intent" and then found "no evidence that a falsehood was purposely propagated" as part of the warrant investigation. Further, ODOP found MacKenzie's "inadequate supervisory oversight" and Montgomery's reluctance to use the chain of command contributed to the "misunderstanding as to what occurred and why." Finally, ODOP determined no attempted cover-up by Zachiarias occurred and the Department was not overzealous in its pursuit of the Rana warrant; rather, ODOP found the Department's actions "should have been more swift and assured."

The report did, however, outline a number of "performance failures" related to the handling of the N.B.-Rana incidents. As a result, ODOP, on its own, commenced a new investigation. Among other things, this second investigation looked into appellant's and Brushwiller's investigation of the library incident as well as an allegation that appellant improperly took police records home.

At the conclusion of this second investigation, ODOP sustained an allegation that appellant and Brushwiller mishandled a domestic violence call in violation of UTDPD General Order 11.2.6. In particular, ODOP found the officers' investigation was inadequate and "completely devoid of any customary and professional police investigatory procedures." In particular, ODOP noted the officers' failure to conduct in-depth interviews of N.B. and Rana; failure to verify the couple's account of the incident by identifying and interviewing the numerous available witnesses who could confirm or deny the account; failure to ascertain if items of evidentiary value existed; appellant's "over-reliance" on his "alleged police experience;" Brushwiller's "over-reliance" on appellant's "alleged police experience;"

appellant's loss of objectivity and concern for N.B., a victim; and appellant's neglect in ensuring conformance to UT Dallas PD policies and procedures. The report noted that although Brushwiller was the on-scene supervisor, appellant "dominated" all decisions and Brushwiller "relinquished any decision making authority."

ODOP also sustained a finding that appellant violated the ODOP Code of Conduct Policy by taking home copies of UTD police reports. Appellant admitted to making copies of police documents related to the library incident and information related to N.B. and Rana and taking them home for "review and storage." Puente ordered appellant to surrender the documents, which appellant did.

ODOP did not sustain an allegation that appellant interfered with the prosecution of Rana. This allegation stemmed from information learned during the administrative investigation that someone sent Rana anonymous text messages providing the contact information for a defense attorney and telling him he had "an excellent case." ODOP determined one of appellant's former colleagues sent the texts, not appellant, although appellant admitted he knew about the texts and did not inform UTD police leadership. Finally, ODOP investigated and sustained an allegation that MacKenzie failed to arrest Rana in September 2012 despite probable cause to warrant an arrest.

The ODOP reports did not make any recommendations on discipline. After receiving the reports, Zacharias terminated both appellant and Brushwiller and verbally reprimanded MacKenzie.[2]

With respect to appellant, Zacharias gave him an opportunity to respond in writing to the ODOP report. After receiving that response, Zacharias notified appellant he was terminating

[2] Zacharias "partially disagreed" with ODOP's conclusion about MacKenzie "because there was no video or other tangible evidence to support an arrest" in September 2012.

him and set out his reasons in a July 18, 2014 memorandum. Zacharias was particularly concerned that, even after the ODOP investigation, appellant continued to maintain that he did nothing wrong as it related to the failure to investigate the library incident. Zacharias said appellant's "insistent belief that he committed no error whatsoever caused me to lose confidence in [appellant's] ability to adequately respond to incidents in which the safety of our student may be at risk." Zacharias was also concerned appellant had changed his basis for taking home copies of sensitive police reports and documents—from telling ODOP it was for "review and storage to now saying he was advised by a separate unnamed law enforcement agency to keep the records." Zacharias did not believe appellant's explanation was credible. Zacharias said he lost confidence in appellant's ability to do his job because he was "more concerned about protecting the reputation of the perpetrator, Rana, than protecting the safety of the victim, N.B."

Appellant appealed his termination. An appeal hearing was held before a panel of three police officers from other UT System police departments—Tyler, Houston, and Austin. After hearing the evidence, the board unanimously sustained appellant's termination. Appellant then appealed the decision to Dr. Calvin D. Jamison, UTD vice president of administration. Dr. Jamison concurred with the recommendation of the hearing board and upheld appellant's termination.

Appellant filed this whistleblower lawsuit, claiming he was terminated in retaliation for making good faith reports to the Collin County District Attorney's Office, the Texas Rangers, and ODOP that the UTD Police Department violated the law in connection with the filing of the Rana case by using a false affidavit. UTD filed a combined plea to the jurisdiction and motion for no-evidence and traditional summary judgment, contending appellant could not show (1) he reported a violation of law in good faith and (2) but-for causation, both of which he argues are jurisdictional elements. Attached to the motion were excerpts from the termination appeal

hearing and depositions, the ODOP investigation reports, an expert report by Judge John Creuzot, and various affidavits and other documents. Appellant responded with evidence. The trial court granted UTD's motion for summary judgment and dismissed appellant's claim, but denied the plea to the jurisdiction. This appeal followed.

We review a trial court's grant of summary judgment de novo. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015). In a traditional summary judgment motion, a movant must state specific grounds, and a defendant who conclusively negates at least one essential element of the plaintiff's cause of action or conclusively establishes all the elements of an affirmative defense is entitled to summary judgment. *Id.* (citing TEX. R. CIV. P. 166a(c)). In a no-evidence summary judgment motion, the movant contends that no evidence supports one or more essential elements of a claim for which the nonmovant would bear the burden of proof at trial. TEX. R. CIV. P. 166a(i). The trial court must grant the motion unless the nonmovant raises a genuine issue of material fact on each challenged element. *KCM Fin.*, 457 S.W.3d at 79.

In two issues, appellant argues the trial court erred by granting UTD's summary judgment motion on his whistleblower claim because there are fact issues on (1) whether he made a good faith report on a violation of law and (2) but-for causation. We need not decide whether appellant made a good faith report because we conclude the trial court correctly determined appellant failed to present more than a scintilla of evidence that he was terminated because he made such a report.

A necessary element of a whistleblower claim is causation—that the employee was terminated because he reported a violation of the law in good faith to an appropriate law enforcement agency, although the employee's report need not be the sole reason for the adverse employment action. *See City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 67 (Tex. 2000); *Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 633–34 (Tex. 1995). To show causation, the

employee must demonstrate that after he made such a report, the employee suffered discriminatory conduct by his employer that would not have occurred when it did if the employee had not reported the illegal conduct. *Zimlich*, 29 S.W.3d 62, 67 (Tex. 2000).

Circumstantial evidence can be sufficient to establish a causal link between the adverse employment action and the reporting of illegal conduct. *Id*. Such evidence includes (1) knowledge of the report of illegal conduct, (2) expression of a negative attitude, (3) failure to adhere to established company policies regarding employment decisions, (4) discriminatory treatment in comparison to similarly situated employees, and (5) evidence that the stated reason for the adverse employment action was false. *Id*. A plaintiff need not present evidence involving all five categories to prove causation. *Tex. Dep't of Criminal Justice v. McElyea*, 239 S.W.3d 842, 856 (Tex. App.—Austin 2007, pet. denied). But evidence the decision-maker knew of an employee's whistleblowing report to law enforcement *and* exhibited a negative attitude toward the fact of the employee's report is not enough, on its own, to show a causal connection between the two events. *Zimlich*, 29 S.W.3d at 69.

Turning to these factors, we consider the evidence in the light most favorable to the nonmovant as we must on summary judgment. It is undisputed that UTD knew that appellant reported the false affidavit to appropriate law enforcement officials. The director of ODOP notified Zacharias of the complaint and also told Zacharias appellant reported the "false affidavit" to both the DA and Texas Rangers. UTD does not assert otherwise. Thus, the record shows UTD had knowledge of the report.

As evidence of a "negative attitude," appellant directs us to statements made by both Zacharias and Puente. As for Zacharias, appellant relies solely on his testimony that when he and Montgomery first approached Zacharias about the false statement in the affidavit, Zacharias became "defensive" and thought they were "dumping" on his lieutenant. But even appellant

believed the chief's reaction had to do with the fact that this was the second complaint in as many weeks against his lieutenant. As appellant explained, "This had to do about another complaint that initiated just about two weeks prior to this that another officer had filed against the Lieutenant, and I think that was a lot to come down at one time to a friend of the Chief's [who] was the Lieutenant." So, even appellant did not attribute the "negative attitude" to the report itself.

As for Puente, the principal ODOP investigator, appellant argues he evinced a negative attitude by testifying at the termination appeal hearing that appellant's allegations were "very egregious and very inflammatory." But when determining whether an agency expressed a negative attitude toward a whistleblower report, we focus on the words and conduct of the final decision-makers who ultimately approved of appellant's termination. *See Office of the Atty. Gen. of Tex. v. Rodriguez*, No. 08-14-00054-CV, 2017 WL 4586128, at *13 (Tex. App.—El Paso Oct. 16, 2017, pet. filed). Puente made no recommendation as to appellant's discipline and no evidence shows he was otherwise involved in the decision. Consequently, we conclude his statement is not relevant to our analysis.

Regardless, after considering the statement in the context of Puente's remaining answer, we cannot agree with appellant. At the appeal hearing, Puente was asked about ODOP's "mission" when it began investigating appellant's complaint. Puente responded the "first order of business" was to scrutinize the allegations of corruption against Zacharias and two lieutenants and the intentional falsification of the warrant. Puente went on to say: "We had to address those immediately because that was the outreach and we considered them very egregious and very inflammatory. And certainly if we had anything that resembled that going on through the authority of the Office of Director of Police, we need to clarify that right out of the — off the bat.

We had to make sure that what is it that we have and address those issues." Puente's comment addressed the nature of the allegations and was not a negative statement about the report itself.

Even if we considered the statements by Zacharias and Puente as expressions of a negative attitude, they would not be enough, on their own, to show a causal connection between the two events. *See Zimlich*, 29 S.W.3d at 69. Thus, we look to see if there is more than a scintilla of evidence regarding any of the remaining factors.

The third factor considers whether UTD failed to adhere to established company policies regarding appellant's termination. Appellant asserts the normal procedure within UTD is to investigate officer misconduct internally, and not with the ODOP. Appellant's argument, however, misses the mark. UTD did not initiate the complaint with ODOP—he did. And after ODOP investigated appellant's complaints, it decided on its own to undertake a second investigation into appellant's handling of the library incident.

Appellant also asserts UTD has a policy of "progressive discipline" and complains he should have been subject to a suspension like two other officers in unrelated incidents. One of the officers was suspended for five days for two separate incidents: (1) failing to fully investigate an incident where a bottle labeled diluted muriatic acid was in a dorm room, but the bottle did not contain muriatic acid, and (2) obtaining an affidavit of nonprosecution from a potential victim when a student failed to pay for a sandwich at the commissary. A second officer received a two-week suspension for unlawfully detaining someone who failed to provide identification during a traffic stop.

But the evidence does not show UTD had such a "policy." Zacharias was asked at the appeal hearing whether there was a policy, either in writing or in practice, to employ progressive discipline. Zacharias responded that "[i]t's pretty much a practice" but it is done in conjunction with the human resources staff "as to the entire dynamics of the situation." He agreed

progressive discipline was "available" to him but said it was not required. At best, this evidence establishes UTD had a preference perhaps for doing things a certain way, but does not establish an actual policy deviation. *See Rodriguez*, 2017 WL 4586128, at *15.

Moreover, as Zacharias said, he and human resources look to the "entire dynamics" of a particular situation, and here, appellant insisted, even after ODOP's investigation, that Rana was falsely arrested and had not committed any offense. Appellant continued in his belief that not only had he not done anything wrong, but that he would not act differently in the future. Consequently, Zacharias said he lost confidence in appellant. On the other hand, there is no evidence the two officers suspended for other violations (1) were investigated by ODOP or (2) continued to maintain they acted appropriately despite findings to the contrary.

Appellant also relies on the discipline of these two officers as evidence of the fourth factor: discriminatory treatment of the whistleblower as compared to other employees. Appellant contends the difference between the "short suspensions" those officers received and his termination is "huge." Also, he asserts those officers' conduct was "more egregious" than anything he did with the library incident, particularly since his "was a proper investigation of an incident."

In determining whether an agency engaged in retaliatory conduct, the plaintiff may present evidence the agency treated a similarly-situated employee differently than it did the plaintiff. *Rodriguez*, 2017 WL 4586128, at *16. As *Rodriguez* has explained, Texas courts have held, in a variety of contexts, that "[e]mployees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct." *Id.* (quoting *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005) (employment discrimination case)); *see also Parker v. Valerus Compression Servs., LP*, 365 S.W.3d 61, 69 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (retaliatory discharge for filing worker's

compensation claim); *Willis v. Nucor Corp.*, 282 S.W.3d 536, 553–54 (Tex. App.—Waco 2008, no pet.) (same). To establish that employees are "comparable in all material respects," a plaintiff also must show "that there were no differentiating or mitigating circumstances as would distinguish the employer's treatment of them. *See McNeel v. Citation Oil & Gas Corp.*, 526 S.W.3d 750, 758 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (analyzing disparate treatment in sex discrimination claim under the TCHRA).

Contrary to appellant's assertion otherwise, neither officer was similarly situated to appellant. ODOP never determined either of these two officers conducted investigations that were "inadequate, and completely devoid of any customary police investigatory procedures." To the extent he compares his situation to that of MacKenzie's, we again disagree that he and MacKenzie are similarly situated. MacKenzie was the lieutenant overseeing the Criminal Investigations Division and he decided what charges to bring. He was disciplined for failing to arrest Rana in September 2012. But when MacKenzie made his decision in September 2012, he had no tangible evidence. In contrast, appellant was the actual investigating officer in the library incident, who ODOP found failed to adequately investigate the incident, including failing to obtain the video evidence showing the struggle between Rana and N.B. in the library.

We agree with UTD that the person in the position most similar to appellant was Brushwiller. As shift supervisor, he answered the call with appellant and his performance, like appellant's, was criticized by ODOP. Brushwiller made no whistle-blowing accusations, and he was treated similarly by ODOP, Zacharias, the appeal panel, and Jamison. We conclude appellant has not raised more than a scintilla of evidence on factors three and four.

Finally, appellant argues UTD's stated reasons for discharge are false. Here, he primarily argues that before he filed his complaint with ODOP, no one at UTD had alleged he failed to

properly investigate the library incident and that he received a "meets expectations" performance review after the incident.

We fail to see how UTD's failure to discipline appellant before he made his complaint to ODOP raises a fact issue on whether UTD's stated reason for terminating him was false. Appellant initiated the ODOP investigation. Once ODOP investigated appellant's complaint, it decided on its own to launch a separate investigation into appellant's handling of the library incident. ODOP issued a report critical of appellant and his handling of the library incident investigation. When appellant was given a chance to respond, it is undisputed that he continued to insist he had done nothing wrong. With respect to the performance review, the evidence showed the evaluation was issued while the ODOP investigations were going on, and Zacharias waited to take any action until those complaints were fully investigated.

Zacharias testified his decision to terminate appellant was based on the investigation done by ODOP, its findings, the secondary complaint regarding appellant taking records home, appellant's responses, appellant's failure to accept responsibility for his actions, and his continued failure to demonstrate that he was "willing to police this campus in a manner consistent with our goals, which is keeping the campus safe." Appellant has not presented evidence sufficient to raise a fact issue on Zacharias's reasons for terminating him.

We conclude appellant has failed to present more than a scintilla of evidence to show he would not have been terminated but-for his whistle-blowing. Accordingly, we overrule the second issue. Having done so, we need not address the first issue. *See* TEX. R. APP. P. 47.1.

Appellee has brought a cross-appeal asking this Court to review and reverse the trial court's denial of its plea to the jurisdiction. The plea to the jurisdiction raises no independent grounds or arguments and was presented as part of the document that sought summary judgment. Although the trial court granted the summary judgment motion but denied the plea to the

jurisdiction, it dismissed appellant's claims with prejudice, which is the same relief appellee would be afforded on the granting of its plea. Consequently, we believe the trial court considered the jurisdictional complaint within the context of the summary judgment. Accordingly, we need not separately address the denial of the plea. *See id*.

We affirm the trial court's order granting summary judgment.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

MICHAEL HACKBARTH, Appellant

No. 05-16-01250-CV V.

UNIVERSITY OF TEXAS AT DALLAS, Appellee

On Appeal from the 134th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-15-06745.
Opinion delivered by Justice Francis;
Justices Evans and Boatright participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee UNIVERSITY OF TEXAS AT DALLAS recover its costs of this appeal from appellant MICHAEL HACKBARTH.

Judgment entered January 4, 2018.