

No. 02-12-00285-CV

IN THE SECOND DISTRICT COURT OF APPEALS

MARY CUMMINS,
Appellant,
v.
AMANDA LOLLAR AND BAT WORLD SANCTUARY,
Appellees

On appeal from the 352nd Judicial District Court of Tarrant County, Texas,
Hon. William Brigham Presiding
Trial Court Cause No. 352-248169-10

APPELLEES' BRIEF

RANDALL E. TURNER
State Bar No. 20328310
DANIEL P. SULLIVAN
State Bar No. 24054465
Bailey & Galyen
1300 Summit Ave., Ste. 650
Fort Worth, Texas 76102
817-359-7065
817-764-6336 Fax

Attorney for Appellees
Amanda Lollar and
Bat World Sanctuary

ORAL ARGUMENT REQUESTED

TOTAL WORD COUNT: 8,945

IN THE SECOND DISTRICT COURT OF APPEALS

MARY CUMMINS,
Appellant,
v.
AMANDA LOLLAR AND BAT WORLD SANCTUARY,
Appellees

On appeal from the 352nd Judicial District Court of Tarrant County, Texas,
Hon. William Brigham Presiding
Trial Court Cause No. 352-248169-10

APPELLEES' BRIEF

TO THE HONORABLE COURT OF APPEALS:

Come now Amanda Lollar and Bat World, Appellees in the above-entitled and numbered case, requesting that this Honorable Court overrule each of Appellant's issues on appeal, and in so doing, affirm the judgment of the trial court in all regards.

References to the record will be as follows: "CR __ @ __" for the Clerk's Record, "RR __ @ __" for the Reporter's Record.

Appellant Mary Cummins will be referred to as "Cummins." Appellees Amanda Lollar and Bat World Sanctuary will be referred to individually as "Lollar" and "Bat World" and collectively as "Appellees."

ADDITIONAL PARTIES, COUNSEL, AND JUDGES PRESIDING

1. Judge Presiding in the 352nd Judicial District Court in
Cause No. 352-248169-10.
The Honorable Bonnie Sudderth,
Tim Curry Justice Center - 8th Floor
401 W. Belknap
Fort Worth, Texas 76196
817-884-2730
2. Judge Presiding in the 352nd Judicial District Court in
Cause No. 352-248169-10.
The Honorable William Brigham, Retired Judge and Justice,
sitting by assignment
Tim Curry Justice Center - 8th Floor
401 W. Belknap,
Fort Worth, Texas 76196
817-884-2730
3. Counsel for Appellees
Randall E. Turner
Bailey & Galyen
1300 Summit Ave., Ste. 650
Fort Worth, Texas 76102
817-359-7065
817-764-6336 Fax

TABLE OF CONTENTS

ADDITIONAL PARTIES, COUNSEL, AND JUDGES PRESIDING	ii
TABLE OF CONTENTS.....	iii
INDEX OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	viii
STATEMENT REQUESTING ORAL ARGUMENT.....	ix
RESPONSIVE ISSUES PRESENTED	x
STATEMENT OF FACTS	1
FINDINGS OF FACT AND CONCLUSIONS OF LAW	6
SUMMARY OF THE ARGUMENT	7
STANDARDS OF REVIEW	8
ARGUMENT AND AUTHORITIES.....	10
I. Responsive Issue One.....	11
II. Responsive Issue Two	22
III. Responsive Issue Three	25
IV. Responsive Issue Four	30
CONCLUSION	33
PRAYER.....	33
CERTIFICATE OF SERVICE	34
CERTIFICATE OF COMPLIANCE and WORD COUNT	35

INDEX OF AUTHORITIES

Cases

<i>Arthur Andersen v. Perry Equip. Corp.</i> , 945 S.W.2d 812 (Tex. 1997).....	30
<i>BMC Software Belgium, N.V. v. Marchand</i> , 83 S.W.3d 789 (Tex. 2002).....	10
<i>Brown v. Comm'n for Lawyer Discipline</i> , 980 S.W.2d 675 (Tex. App.—San Antonio 1998, no writ)	32
<i>Burleson State Bank v. Plunkett</i> , 27 S.W.3d 605 (Tex. App.—Waco 2000, pet. denied).....	13
<i>Cain v. Bain</i> , 709 S.W.2d 175 (Tex. 1986).....	9
<i>Carr v. Brasher</i> , 776 S.W.2d 567 (Tex. 1989).....	12
<i>Catalina v. Blasdel</i> , 881 S.W.2d 295 (Tex. 1994).....	8
<i>City of Keller v. Wilson</i> , 168 S.W.3d 802 (Tex. 2005).....	8, 9, 10
<i>Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.</i> , 219 S.W.3d 563 (Tex. App.—Austin 2007, pets. denied).....	12
<i>Downing v. Burns</i> , 348 S.W.3d 415 (Tex. App.—Houston [14 th Dist.] 2011, no pet.).....	16
<i>Exxon Mobil Corp. v. Hines</i> , 252 S.W.3d 496 (Tex. App.—Houston [14 th Dist.] 2008, pet. denied)	15
<i>George v. Deardorff</i> , 360 S.W.3d 683 (Tex. App.—Fort Worth 2012, no pet.).....	13
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323, 94 S. Ct. 2997 (1974).....	18

<i>Green Int’l, Inc. v. Solis</i> , 951 S.W.2d 384 (Tex. 1997).....	31, 32
<i>Hancock v. Variyam</i> , 2013 WL 2150468 (Tex. May 17, 2013)	15, 25
<i>Hearst Corp. v. Skeen</i> , 159 S.W.3d 633 (Tex. 2005).....	18
<i>Hruska v. First State Bank of Deanville</i> , 747 S.W.2d 783 (Tex. 1988).....	32
<i>In re Lipsky</i> , 2013 WL 1715459 (Tex.App.—Fort Worth 2013, no pet. h.)	12, 18
<i>In re Moers</i> , 104 S.W.3d 609 (Tex. App.—Houston [1 st Dist.] 2003, no pet.)	10
<i>International Security Life Ins. Co. v. Finck</i> , 496 S.W.2d 544 (Tex. 1973).....	32
<i>Klentzman v. Brady</i> , 312 S.W.3d 886 (Tex. App.—Houston [1 st District] 2009, no pet.).....	12, 18, 20
<i>Leyendecker & Assocs., Inc. v. Wechter</i> , 683 S.W.2d 369 (Tex. 1984).....	15, 25
<i>McGalliard v. Kuhlmann</i> , 722 S.W.2d 694 (Tex. 1986).....	9
<i>Middleton v. Kawasaki Steel Corp.</i> , 687 S.W.2d 42 (Tex. App.—Houston [14 th Dist.] 1985).....	8
<i>Miranda v. Byles</i> , 390 S.W.3d 543 (Tex. App.—Houston [1 st Dist.] 2012, pet. filed).....	8, 9, 23
<i>Morrill v. Cisek</i> , 226 S.W.3d 545 (Tex. App.—Houston [1 st Dist.] 2006, no pet.).....	15
<i>New York Times v. Sullivan</i> , 376 U.S. 254, 84 S. Ct. 710 (1964).....	12

<i>Peshak v. Greer</i> , 13 S.W.3d 421 (Tex. App.–Corpus Christi 2000, no pet.)	25
<i>Plas–Tex, Inc. v. U.S. Steel Corp.</i> , 772 S.W.2d 442 (Tex. 1989).....	9
<i>Rosenblatt v. Baer</i> , 383 U.S. 75, 88, 86 S. Ct. 669 (1966).....	19
<i>Saenz v. Fidelity & Guar. Ins. Underwriters</i> , 925 S.W.2d 607 (Tex. 1996).....	25
<i>See AMX Enterprises, L.L.P. v. Master Realty Corp</i> , 283 S.W.3d 506 (Tex. App.–Fort Worth 2009, no pet.).....	32
<i>Tagle v. Galvan</i> , 155 S.W.3d 510 (Tex. App.–San Antonio 2004, no pet.).....	29
<i>Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.</i> , 219 S.W.3d 563 (Tex. App.—Austin 2007, pet. dism'd).....	15, 28
<i>Thomas v. Oldham</i> , 895 S.W.2d 352 (Tex. 1995).....	30
<i>Tony Gullo Motors I, L.P. v. Chapa</i> , 212 S.W.3d 299 (Tex. 2006).....	31
<i>Trotter v. Jack Anderson Enters. Inc.</i> , 818 F.2d 431 (5 th Cir. 1987).....	19
<i>Turner v. KTRK Television, Inc.</i> , 38 S.W.3d 103 (Tex. 2000).....	12, 13
<i>Valero Mktg. & Supply Co. v. Kalama Int'l</i> , 51 S.W.3d 345 (Tex. App.–Houston [1 st Dist.] 2001, no pet.)	22, 23
<i>WFAA–TV, Inc. v. McLemore</i> , 978 S.W.2d 568 (Tex. 1998).....	12, 18, 19
<i>Woods v. Woods</i> , 193 S.W.3d 720 (Tex. App.–Beaumont 2006, pet. denied).....	9, 23

Rules

TEX. DISCIPLINARY R. PROF. CONDUCT 1.04	31
TEX. R. APP. P. 33.1.....	29

Other Authorities

TEX. CIV. PRAC. & REM. CODE § 38.001	31, 32
TEX. CIV. PRAC. & REM. CODE § 41.003	25
TEX. CIV. PRAC. & REM. CODE § 41.011	28
TEX. CIV. PRAC. & REM. CODE § 73.001	12

STATEMENT OF THE CASE

Appellees Amanda Lollar and Bat World Sanctuary filed this suit seeking compensatory and exemplary damages resulting from defamatory material published by Appellant Mary Cummins. [2nd Supp CR @ 15, 21] Appellees also sought damages arising out of Cummins' breach of an internship contract, as well as attorney's fees and injunctive relief. [2nd Supp CR @ 19, 20] After a bench trial, the court awarded Appellees compensatory and exemplary damages as a result of Cummins' defamation, and damages for Cummins' breach of contract. [2nd Supp CR @ 172] The trial court also awarded Appellees attorney's fees and injunctive relief. [2nd Supp CR @ 172-76]

Cummins then filed this appeal. [2nd Supp CR @ 179]

STATEMENT REQUESTING ORAL ARGUMENT

Appellees believe that oral argument would be beneficial to this Court's full understanding of the legal and factual issues presented in this case.

RESPONSIVE ISSUES PRESENTED

I. Responsive Issue One

(Responsive to Cummins' Issues One, Two, Three, and Four)

Ample evidence supports the trial court's judgment that Cummins maliciously defamed Lollar and Bat World.

II. Responsive Issue Two

(Responsive to Cummins' Issues Six, Seven, and Ten)

Ample evidence supports the trial court's judgment that Cummins breached her internship contract with Bat World and that Bat World and Lollar were damaged as a result of that breach.

III. Responsive Issue Three

(Responsive to Cummins' Issue Five)

Ample evidence supports the trial court's awards of compensatory and punitive damages resulting from Cummins' defamation of Lollar and Bat World.

IV. Responsive Issue Four

(Responsive to Cummins' Issues Eight and Nine)

The trial court properly awarded Appellees reasonable attorney's fees.

STATEMENT OF FACTS

Bat World Sanctuary (“Bat World”) is an internationally renowned non-profit organization dedicated to the rescue and rehabilitation of bats. [RR 2 @ 30-31, 34-35, 44, 47] Bat World also offers educational programs and materials for schools and hosts continuing education internships and workshops for animal care and rehabilitation professionals. [RR 2 @ 30-31, 34-35, 38] It has been featured in numerous publications, including *Scholastic News*, *Texas Parks and Wildlife*, and *Bat Conservation International*. [RR 2 @ 54-58, 145]

Amanda Lollar is the founder and president of Bat World. [RR 2 @ 27, 31-32] Although she is not a licensed veterinarian, Lollar has consulted with numerous animal care providers to learn about the care and rehabilitation of bats, and has conducted her own extensive research. [RR 2 @ 27-30, 43-44, 145; RR 3 @ 90-92] Lollar has published several books, including *The Captive Care and Medical Reference for the Rehabilitation of Insectivorous Bats*, and *Bat in My Pocket*. [RR 2 @ 48-52] Lollar has been recognized and honored for her contributions and efforts to protect insectivorous bats and fruit bats, and is regarded as an expert in bat care. [RR 2 @ 72-73, RR 3 @ 95-96, 206-07].

Lollar began an internship program in 2000 to promote and teach the proper care and rehabilitation of insectivorous bats. [RR 2 @ 30-31] More than 400 wildlife rehabilitators, biologists, conservation scientists, veterinarians, zoologists,

researchers, and teachers from around the world have attended. [RR 2 @ 30, 43]

Program participants are required to read and sign the Bat World Internship Contract, which includes the following provisions:

[Bat World] agrees to train and educate Trainee in the care, treatment, and medical management of insectivorous bats. In consideration for this training and education Trainee agrees to the following terms and conditions:

It is understood that the data, techniques, results, and anecdotal information provided to Trainee during their internship at Bat World is proprietary and is copyrighted as intellectual property by Bat World. Trainee agrees not to distribute, share, publish, or sell this information without obtaining prior written permission from [Bat World]. [2nd Supp. CR @ 24, Appellees' Appendix Tab 3]

In 2010, Cummins was accepted into Bat World's two-week internship program. [RR 2 @ 73, 74, 77, RR 6 @ P Exh. 17; 2nd Supp CR @ 24] Cummins came to Bat World, signed the internship contract, and began learning how to care for and feed baby bats, and how to treat injured and sick bats. [RR 2 @ 76, 79, 86, 173] During her internship, Cummins videotaped and photographed various procedures, sometimes with Lollar's permission and sometimes without. [RR 2 @ 77, 85-93, 98] No one gave Cummins permission to publish or otherwise share that information. In fact, all interns are specifically prohibited from sharing photographs and videos they take at Bat World absent express written permission. [RR 2 @ 89; 2nd Supp CR @ 24]

Cummins' internship started off well, but rapidly declined when she repeatedly failed to follow directions. [RR 2 @ 79] She became disgruntled and left the program without completing it. [RR 2 @ 73, 74, 83-84] She then began posting on the internet videos and photographs that she had taken at Bat World. [RR 2 @ 84-88] She added defamatory comments about Appellees to those postings. [RR 4 @ 185-87] She posted a particular video with commentary on YouTube accusing Lollar of animal cruelty.¹ [RR 2 @ 98-104, 265;S RR 3 @ 13, 16]

Cummins sent defamatory statements and complaints about Appellees to numerous agencies and law enforcement authorities, including the United States Department of Agriculture, the Texas Department of Parks and Wildlife, and the City of Mineral Wells. [RR 2 @ 96-97, 106-112; RR 3 @ 16-21] She then posted the contents of these complaints on the internet. [RR 2 @ 104] Cummins emailed the district attorney in Mineral Wells alleging that she had witnessed severe animal cruelty at Bat World, that Lollar possessed a controlled substance without a license, and that Lollar illegally gave rabies vaccinations to interns at Bat World. [RR 2@ 109, 114]

¹ Cummins claimed that Lollar did not give a bat pain medication before a necessary episiotomy. Cummins also alleged that Lollar pulled out the bat's uterus, and glued the bat's vagina shut, and that the bat passed out from pain and later died. [RR 2 @ 103, 116] All of these statements were false. [RR 2 @ 100, 103, 104; RR 3 @ 226, 228-230]

Cummins admitted sending emails to many animal rights organizations and wildlife conservation groups accusing Lollar of “illegally performing surgery, performing surgery without . . . anesthesia, performing improper surgery [and an] episiotomy without anesthesia, and yanking molars out of a bat without anesthesia.” [RR 3 @ 21]

On her personal blog, Cummins posted that she had, “Just confirmed that Amanda Lollar of Bat World Sanctuary is illegally obtaining human and animal rabies vaccination again breaking the law.” [RR 4 @ 226] Cummins alleged on Facebook that Lollar had committed animal cruelty, that Bat World was a public health threat, that Lollar fraudulently used donors’ funds for her own personal use, and that she illegally possessed a controlled medical substance, Isoflurane. [RR 3 @ 24-25, 28-30, 32] Cummins also claimed that Lollar had tried to extort money from her and had made death threats against her. [RR 3 @ 31] She then used internet search engine optimization to manipulate search results so that users who sought information about Appellees would be directed to Cummins’ defamatory statements instead. [RR 3 @ 141-42]

Lollar and Bat World filed suit against Cummins for breach of contract, and for defamation under Section 73.001 of the Texas Civil Practice and Remedies Code. [2nd Supp CR @ 15, 20] Appellees requested exemplary damages and attorney’s fees under Sections 41.003 and 38.001 of the Texas Civil Practice and

Remedies Code, respectively. [2nd Supp CR @ 19-20] Appellees also asked for a permanent injunction ordering Cummins to remove the videos, photographs, and false statements from the internet. [2nd Supp CR @ 21]

At trial, Appellees introduced extensive evidence to establish that Cummins had made and published statements accusing Lollar of animal cruelty and other crimes, and that such statements had damaged Lollar's reputation and caused financial damages to Bat World. [RR 2 @ 83, 85, RR 6 @ Plaintiffs' Exhibit 17, 36] After a three-day bench trial, the court ruled in favor of Appellees and ordered Cummins to pay \$3,000,000 in actual damages, \$3,000,000 in exemplary damages, \$10,000 for breach of contract, and \$176,700 in attorney's fees. [2nd Supp CR @ 172] The trial court also entered an injunction ordering Cummins to remove 47 specific items she had posted on her personal websites and other sources. [2nd Supp CR @ 172-77]

Even after Bat World and Lollar filed this suit, Cummins continued to publish defamatory statements about Lollar on the internet, including the accusation that Lollar was illegally injecting the rabies vaccine into interns at the sanctuary. [RR 4 @ 206-07]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trial court issued the following findings of fact and conclusions of law:

Findings of Fact:

1. Defendant committed defamation expressed in written or other graphic form that tended to injure Amanda Lollar's reputation and thereby exposed her to public hatred, contempt or ridicule, or financial injury; or to impeach Amanda Lollar's honesty, integrity, virtue or reputation, and thereby exposed her to public hatred, ridicule, or financial injury.
2. Defendant's defamation of Amanda Lollar caused Amanda Lollar to sustain actual damages in the amount of three million dollars (\$3,000,000.00).
3. Defendant acted with malice in committing defamation against Amanda Lollar.
4. Defendant should pay exemplary damages to Amanda Lollar in the amount of three million dollars (\$3,000,000.00).
5. Defendant and Bat World Sanctuary entered into a contract on June 20, 2010.
6. Defendant breached the contract.
7. Defendant should pay Bat World Sanctuary the sum of ten thousand dollars (\$10,000.00) for the breach of contract.
8. Reasonable and necessary attorney's fees for Bat World's attorney, Randall E. Turner, is one hundred seventy six thousand seven hundred dollars (\$176,700.00).

Conclusions of law.

1. Statements published by Defendant about Amanda Lollar were defamatory.

2. Bat World Sanctuary is entitled to recover reasonable and necessary attorney's fees from Defendant.

3. Amanda Lollar is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions. [2nd Supp CR @ 196-197]

Cummins thereafter filed a motion for new trial but did not request additional or amended findings of fact and conclusions of law. [2nd Supp CR @ 181]

SUMMARY OF THE ARGUMENT

This case involves two theories of law: breach of contract and defamation.

Cummins posted videos and photos on the internet that she took at Bat World Sanctuary during her internship. She also posted a portion of one of Lollar's published manuals even though doing so violated the internship contract that Cummins signed, which prohibited publication of data or images obtained during her internship.

Cummins also posted a myriad of false and damaging statements about Lollar and Bat World on the internet. She claimed that Lollar was committing animal cruelty, illegally possessing and administering controlled substances, "illegally" performing surgery on a wild animal, and many, many more wild accusations. Cummins also accused Lollar of extortion and misappropriation of donor contributions.

Some of these statements appeared with a photo or video that Cummins posted in violation of the internship contract. Others appeared without an accompanying image. The publication of these statements, as well as videos and photos from Bat World that Cummins manipulated and displayed in a manner so as to portray Appellees as having committed animal cruelty, form the basis of Appellees' defamation claims.

STANDARDS OF REVIEW

Sufficiency of the Evidence

This Court reviews the sufficiency of the evidence supporting a trial court's challenged findings of fact by applying the same standards used in reviewing the legal or factual sufficiency of the evidence supporting jury findings. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994); *Miranda v. Byles*, 390 S.W.3d 543, 553 (Tex. App.–Houston [1st Dist.] 2012, pet. filed). The trial court's factual findings are reviewable for legal and factual sufficiency of the evidence supporting them. *See Middleton v. Kawasaki Steel Corp.*, 687 S.W.2d 42, 44 (Tex. App.–Houston [14th Dist.] 1985), writ ref'd n.r.e., 699 S.W.2d 199 (Tex. 1985).

The test for legal sufficiency is “whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.” *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). In making this determination, this Court credits favorable evidence if a reasonable fact finder could, and

disregards contrary evidence unless a reasonable fact finder could not. *Id.* If the evidence falls within the zone of reasonable disagreement, this Court may not substitute its judgment for that of the fact finder. *Id.* at 822. The fact finder is the sole judge of the credibility of the witnesses and the weight to give their testimony. *Id.* at 819.

In reviewing a factual sufficiency challenge, this Court considers and weighs all of the evidence supporting and contradicting the challenged finding and sets aside the finding only if the evidence is so weak as to make the finding clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *see also Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989).

In a bench trial, the court, as the fact finder, determines the credibility of the witnesses and the weight to be given their testimony. *Miranda*, 390 S.W.3d at 553; *Woods v. Woods*, 193 S.W.3d 720, 726 (Tex. App.–Beaumont 2006, pet. denied); *see also City of Keller*, 168 S.W.3d at 819. In resolving factual disputes, the trial court may believe one witness and disbelieve others, and it may resolve any inconsistencies in a witness's testimony. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986).

In making credibility determinations, the fact finder “cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted.”

City of Keller, 168 S.W.3d at 820. The fact finder thus is not “free to believe testimony that is conclusively negated by undisputed facts.” *Id.* However, if the fact finder could reasonably believe the testimony of one witness or disbelieve the testimony of another witness, the appellate court “cannot impose [its] own opinions to the contrary.” *Id.* at 819.

An appellant may not challenge a trial court's conclusions of law for factual sufficiency. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). But, in an appeal from a bench trial, this Court reviews a trial court's conclusions of law as legal questions, de novo, and upholds them if the judgment can be sustained on any legal theory supported by the evidence. *Id.*; *In re Moers*, 104 S.W.3d 609, 611 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

ARGUMENT AND AUTHORITIES

Introduction

In June 2010, Cummins began an internship at Bat World Sanctuary but became disgruntled and left prematurely. [RR 2 @ 73-74, 79, 83] She then set out to defame Lollar, ruin her livelihood, and destroy Bat World. To accomplish this goal, Cummins relentlessly posted lies on the internet, wrote countless letters and filed numerous complaints with federal agencies. [RR 2 @ 94-115] Cummins' false statements included accusations that Lollar fraudulently misused donor

contributions, illegally possessed and used Isoflurane² without a veterinary license, and made death threats against Cummins and tried to extort her. [RR 3 @ 24-25, 28-30, 32] Perhaps most significantly, Cummins knowingly and falsely accused Lollar – the founder and owner of a wildlife facility funded almost exclusively through grants and donor contributions – of animal cruelty. [RR 2 @ 98-104, 116, 257]

I. Responsive Issue One

(Responsive to Cummins' Issues One, Two, Three, and Four)

Ample evidence supports the trial court's judgment that Cummins maliciously defamed Lollar and Bat World.

Cummins' first four issues generally complain that the trial court erred in finding that she defamed Lollar. [Cummins' brief @ 9, 13, 16, 27] She argues that Appellees failed to carry the burden of proof commensurate with the heightened standard applicable to limited-purpose public figures. [Cummins' brief @ 8] Cummins also asserts that Appellees failed to prove that she made or published the statements in question, that such statements were false, and that the statements were made maliciously. [Cummins' brief @ 6-8]

To maintain a defamation cause of action, a plaintiff must prove that the defendant:

(1) published a statement,

² Isoflurane is an anesthetic that wildlife rehabilitators may purchase through a licensed veterinarian. [RR2@109]

(2) that was defamatory concerning the plaintiff,

(3) while acting with either actual malice, if the plaintiff is a public figure, or negligence, if the plaintiff is a private individual, regarding the truth of the statement. *In re Lipsky*, 2013 WL 1715459 (Tex.App.—Fort Worth 2013, no pet. h.); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989) (citing *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710 (1964)). A statement is defamatory “if it tends to injure a person's reputation and thereby expose the person to public hatred, contempt, ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation.” *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 580 (Tex. App.—Austin 2007, pets. denied) (op. on reh'g) (citing TEX. CIV. PRAC. & REM. CODE § 73.001).

“Literally or substantially true” facts which are “published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way” are actionable as defamation. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000); *Klantzman v. Brady*, 312 S.W.3d 886, 899 (Tex. App.—Houston [1st District] 2009, no pet.). Thus, a defendant who “gets the details right but fails to put them in the proper context and thereby gets the ‘gist’ wrong” may be held liable for defamation. *Klantzman*, 312 S.W.3d at 899 (quoting *Turner*, 38 S.W.3d at 115).

Whether a publication is false depends on “a reasonable person's perception of the entirety of a publication and not merely on individual statements.” *Turner*, 38 S.W.3d at 115.

Also, a defendant may be liable for defamation if a reasonable person would recognize that an act creates an unreasonable risk that defamatory matter will be communicated to a third party. *See George v. Deardorff*, 360 S.W.3d 683, 690 (Tex. App.–Fort Worth 2012, no pet.). To support a malice finding, the actor must have either acted with specific intent to cause a substantial injury, or acted with conscious indifference to the rights of others despite his actual, subjective awareness of the risk involved. *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 619 (Tex. App.–Waco 2000, pet. denied).

Cummins conceded at trial that she published many of the defamatory statements at issue. [RR 2 @ 257, 264-68] In particular, she admitted stating on her Facebook page that Lollar had committed animal cruelty and illegally possessed a controlled medical substance, Isoflurane. [RR 3 @ 25, 28-30, 32] Cummins admitted that she did not know whether Lollar was illegally possessing Isoflurane, but "it sounded . . . like it was illegal" so she made the accusation without checking to see if it was truthful or not. [RR 3 @ 30] Cummins also testified that she had posted that:

- Bat World was a public health threat, [RR 3 @ 28]

- Lollar had fraudulently used Bat World donor funds for her own personal use, and [RR 3 @ 28]
- Lollar had tried to extort her and had made death threats against her. [RR 3 @ 31-32]

Cummins knew when she posted the extortion and fraud accusations that she was accusing Lollar of committing a crime. [RR 3 @ 32-33]

In addition to Cummins' admissions, Appellees established through expert witness testimony that Cummins authored the defamatory statements that appeared in her blogs and was responsible for having those statements reposted in media sites. [RR 3 @ 129-132, 165] After qualifying as an expert, Eric Shupps, an information technologist, testified that there was "no question" that Cummins was the author of the defamatory materials. [RR 3 @ 116-117, 144-47] Shupps also traced the origin of six defamatory articles that appeared on two news websites, Indybay and Raise the Fist. [RR 3 @ 120-21, 139, 144-47, 161-165; RR 6 @ Appellees' exhibit 18, Indybay # 1-5, Raise the Fist # 1] Using a sophisticated computer program designed to analyze and discover the authorship of documents, Shupps determined that Cummins wrote the articles. [RR 3 @ 140-141, 161] In fact, based on his expertise, Shupps was convinced that Cummins had written the articles before he even began the computer statistical analysis. [Id.]

But Shupps also found an electronic “fingerprint” on one of the news articles he examined: a PDF image file posted in conjunction with the article’s content. [RR 3 @ 135] Shupps said that Cummins failed to “clean” the properties on the file and that, “The author field of that document . . . plainly says Mary Cummins.”³ [RR 3 @ 135] The evidence is legally and factually sufficient to establish that Cummins made the defamatory statements.

In most defamation claims, the plaintiff must prove actual injury caused by the defamatory statement. *Exxon Mobil Corp. v. Hines*, 252 S.W.3d 496, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 580 (Tex. App.—Austin 2007, pet. dism’d). Some statements, however, are defamatory per se, meaning that the law presumes the plaintiff’s injury. *See Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984) (op. on reh’g) (explaining that a false statement charging someone with the commission of a crime is defamatory per se); *Tex. Disposal Sys. Landfill, Inc.*, 219 S.W.3d at 580–81; *see also Morrill v. Cisek*, 226 S.W.3d 545, 549 (Tex. App.—Houston [1st Dist.] 2006, no pet.) A statement constitutes defamation per se if it “injures a person in his office, profession, or occupation.” *Hancock v. Variyam*, 2013 WL 2150468 *5 (Tex. May 17, 2013);

³ Shupps also said that once the PDF file posted, its authorship properties could not have been changed or altered to make it appear that Cummins had posted the picture when she had not. [RR 3 @ 135, 159-60]

Tex. Disposal Sys. Landfill, Inc., 219 S.W.3d at 581. A defendant is liable to a plaintiff for defamation per se even in the absence of any evidence of harm. *Downing v. Burns*, 348 S.W.3d 415, 425 (Tex. App.–Houston [14th Dist.] 2011, no pet.).

As the record in this case shows, Cummins repeatedly published untrue statements that Lollar – a person whose life and livelihood are dedicated to the care of bats – had committed inhumane and cruel acts against the very animals that she fights daily to protect. [RR 2 @ 109-116, 264, 268; RR 6 @ Appellees’ exhibit 17] Cummins stated that Lollar had committed numerous crimes, including illegally possessing animal and human rabies vaccinations, fraud, and extortion, which are defamatory per se. [RR 2 @ 264-268] She also accused Lollar of illegally breeding bats at her facility in violation of her wildlife rehabilitator permit. [RR 3 @ 31-32] The record shows that Cummins made these statements, she made them about Lollar, and these statements were false. [RR 2 @ 107-117, 130; RR 3 @ 13, 24-36, 93-96; RR 4 @ 148-49; RR 5 @ 22] Thus, in the absence of any proof to the contrary, it is presumed that Cummins’ statements damaged Appellees.⁴

⁴ Moreover, as discussed below in Appellees’ Responsive Issue Three, beginning at page 26, there is ample evidence to show that Cummins’ actions actually damaged Appellees.

In her brief, Cummins lists 47 statements and postings that the trial court ordered her to remove from the internet. [Cummins' brief @ 27, 56] Cummins now argues that Appellees failed to prove that every one of the items was defamatory and thus, the trial court's judgment was not supported by sufficient evidence. These statements fall into the following categories:

- Statements accusing Lollar of animal cruelty and treating animals inhumanely,
- Statements accusing Lollar of the commission of a crime,
- Statements accusing Lollar of illegally breeding animals at Bat World in violation of her wildlife rehabilitation permit,
- Statements claiming that the health department made Lollar leave town, gutted her building, and removed her belongings, and
- Statements that Lollar is exposing others to rabies and exposing the public to health hazards.⁵

Here, Cummins appears to believe that the listed items are the only basis for the trial's court's holding. This is incorrect. The 47 items listed in the judgment were subject to the injunction, but they were by no means a complete list of every defamatory statement made by Cummins that supported the judgment. Cummins further argues that a heightened burden of proof applies in this case and that Appellees failed to carry that burden. Specifically, Cummins alleges that Lollar's role at Bat World and her expertise in the care and rehabilitation of bats makes her

⁵ In addition, two of the statements accuse Lollar of posting an objectionable photo of Cummins.

a limited-purpose public figure. [Cummins’ brief @ 8] She further contends that because bats can carry rabies, the entire issue of bats and their care is matter of public concern and is thus the basis of a “public controversy.” [Cummins’ brief @ 1]

A defamation plaintiff’s status dictates the degree of fault he or she must prove to support a finding of liability by the defendant. *McLemore*, 978 S.W.2d at 571. A private plaintiff need only prove that the defendant should have known that the published statement was false. *McLemore*, 978 S.W.2d at 571; *In re Lipsky*, 2013 WL 1715459 at *8; *Klentzman*, 312 S.W.3d at 898. In contrast, a public figure plaintiff must establish that the defendant either knew a statement was false or made the statement with reckless disregard about whether it was false. *McLemore*, 978 S.W.2d at 573-74; *see also Hearst Corp. v. Skeen*, 159 S.W.3d 633, 637–38 (Tex. 2005).

A limited-purpose public figure is only a public figure “for a limited range of issues surrounding a particular public controversy.” *McLemore*, 978 S.W.2d at 571 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 94 S. Ct. 2997, 3012 (1974)). For a plaintiff to be deemed a limited-purpose public figure, the controversy at issue must be (1) public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to

feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy. *McLemore*, 978 S.W.2d at 571, *see also Trotter v. Jack Anderson Enters. Inc.*, 818 F.2d 431, 433 (5th Cir. 1987). A plaintiff's status as a limited-purpose public figure is a question of constitutional law for the court. *Rosenblatt v. Baer*, 383 U.S. 75, 88, 86 S. Ct. 669, 677 (1966).

Cummins posits several theories arguing that Lollar is a limited-purpose public figure, or that a “public controversy” exists in this case. Each of these is without merit.

Here, Lollar's role as a wildlife rehabilitator who has written and spoken extensively about the benefits and importance of bats and their care, and as an advocate for these creatures, does not automatically elevate her status to that of a limited-purpose public figure. Although Cummins points to a 1999 newspaper article regarding an isolated bat biting that purportedly occurred in Mineral Wells, this single, 10-year-old incident does not support her assertion that Lollar was a limited-purpose public figure in 2010 when Cummins began her relentless barrage of defamatory attacks. [Cummins' brief @ 14] Likewise, Cummins cannot rely on the widespread internet assault that she initiated against Appellees to now claim that Lollar is a limited-purpose public figure at the center of a controversy. *See*

Klantzman, 312 S.W.3d at 905. (Plaintiff did not become limited-purpose public figure based solely on defendant’s repeated “discussions” of him.).⁶

Nor is there any evidence of a “public controversy.” Cummins’ assertion that Appellees are the subject of a public controversy simply because they are “mentioned by name” in various books and articles is likewise unpersuasive – especially since many of the publications in question are Lollar’s. [Cummins’ brief @ 10; RR 2 @ 51-60] Writing a manual on the proper care of bats is not “media exposure” about a “public controversy.” Accordingly, this Court should determine as a matter of law that Lollar was not a limited-purpose public figure in this case.

Even if this Court determines that Appellees are limited-purpose public figures, this finding does not affect the judgment. Here, the trial court specifically found that Cummins “acted with malice in committing defamation against Amanda Lollar,” and the record is replete with evidence that she did so. [2nd Supp. CR @ 193; RR 2 @ 115-16, 264-66; RR 3 @ 30, 115-16, 129, 142-43, 264-67]

⁶ *c.f.*, *Hutchinson v. Proxmire*, 443 U.S. 111, 135, 99 S. Ct. 2675, 2688 (1979) (noting that the subject of plaintiff’s writings became matter of controversy only as consequence of defendant’s action and proclaiming that, “[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.”). Rather, a defamation defendant must show that the plaintiff “relinquished...his interest in the protection of his own name” by “engag[ing] the attention of the public in an attempt to influence the resolution” of “an[] issue of public concern.” *Id.* at 168, 99 S. Ct. at 2707-08.

In this case, Cummins not only wrote and published the defamatory material – she also used “Google robots” to ensure that the defamatory statements were reposted by other sources to disseminate the information as widely as possible. [RR 2 @ 115-17; RR 3 @ 126-130, 155-56] Cummins further used her computer skills to manipulate Google search results so that internet users looking for the actual Bat World website were instead directed to the defamatory articles about Lollar and the sanctuary. [RR 3 @ 126-127]

Cummins admitted that she posted allegations that Lollar broke the law and practiced medicine without a license without knowing whether those statements were true, and in some instances knowing they were false. [RR 4 @ 206-07, 2nd Supp CR @ 186] Over and over, Cummins acted with specific intent to cause substantial injuries to Lollar, whether those injuries were the withdrawal of permits that were necessary for the operation of Bat World, the undercutting of donor funds and grant monies, or simply causing abject, public humiliation to Lollar. The sheer depth, breadth, and volume of the defamatory campaign that Cummins mounted and maintained in this case is difficult to comprehend.

Legally and factually sufficient evidence supports the trial court’s judgment that Cummins acted with actual malice in defaming Appellees, neither of whom are limited-purpose public figures. This Court should overrule Cummins’ issues One, Two, Three, and Four.

II. Responsive Issue Two

(Responsive to Cummins' Issues Six and Seven)

Ample evidence supports the trial court's judgment that Cummins breached her contract with Bat World and that Bat World and Lollar were damaged as a result of that breach.

The essential elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach. *Valero Mktg. & Supply Co. v. Kalama Int'l*, 51 S.W.3d 345, 351 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

There is ample evidence that Cummins entered into a contract with Bat World that prohibited her from disclosing certain information that she had access to as an intern.⁷ [RR 2 @ 231] Lollar testified that she presented Cummins with the contract upon her arrival at the sanctuary and that Cummins signed the contract in Lollar's presence. [RR 2 @ 76] The signed copy of the contract was admitted at trial as Plaintiffs' Exhibit 16. [RR 6 @ Plaintiffs' exhibit 16; Appellees' Appendix, Tab 3]

Linda James, a handwriting expert, stated that she examined Cummins' signature on the contract, compared that signature to Cummins' signature on

⁷ Specifically, Cummins' contract provided "It is understood that the data, techniques, results, and anecdotal information provided to trainee during their internship at BWS is proprietary and is copyrighted as intellectual property by BWS. Trainee agrees not [to] distribute, share, publish, or sell this information without obtaining prior written permission from BWS."

several other items and that, in her expert opinion, Cummins' signature on the contract was genuine. [RR 2 @ 229-231, RR 3 @ 169-170, 178, 186]

Cummins testified at trial that she did not sign the contract. [RR 2 @ 229-231] But, she conceded that her deposition testimony was different. She explained that "I thought I had signed it for a while." [RR 2 @ 232] Cummins also suggested that Lollar might have tried to trick her into signing the contract when she was asleep. [RR 4 @ 81, 122-23]

In its role as fact finder, the trial court could have chosen to believe Lollar and James, and disbelieve Cummins. *Miranda*, 390 S.W.3d at 553; *Woods*, 193 S.W.3d at 726. There was ample evidence to support the trial court's finding that a valid contract existed between the parties. *Valero Mktg. & Supply Co.*, 51 S.W.3d at 351.

Cummins further states that she did not breach the contract, or, alternatively, that Appellees failed to perform under the contract. [Cummins' brief @ 67-70] Lollar testified Cummins violated the internship contract by publishing images and information she obtained during her internship at Bat World. [RR 2 @77] Lollar explained that "we don't want photographs to be taken out of context. . . . We want all the pictures that are published about our sanctuary to be positive, to represent bats in a positive light." [RR 2 @ 77] Some of the information that Cummins published was proprietary. [RR 2 @ 77-78] Cummins acknowledged

that she posted videos and pictures of those procedures. [RR 2 @ 242-45, 247-49; RR 3 @ 14, 16]

Cummins asserts that Bat World failed to perform under the contract because she did not “learn anything she didn’t already know.” [Cummins’ brief @ 67] But Cummins was trained in the preparation of insectivorous food diets, observed surgical procedures on bats, received instructions on how to recognize neurological distress in a baby bat, and should have learned about bat hydration and wing repair. [RR 3 @ 173] Cummins would have learned more but “there were numerous things [Cummins] was supposed to do, and [she] unfortunately didn’t do a vast majority of those.” [RR 2 @ 173]

Lollar testified that she is a paid consultant in bat care and she would have charged at least \$10,000 to show the photographs and videos in question. [RR 2 @ 78-79] Thus, the \$10,000 damages award is supported by evidence of the actual damages Lollar and Bat World suffered in this case as a result of Cummins’ breach of the contract. [RR 2 @ 78-79]

Thus, the evidence was legally and factually sufficient to support the trial court’s judgment that a valid contract existed, Cummins breached the internship

contract, and Appellees suffered \$10,000 in damages as a result of that breach. This Court should overrule Cummins' Issues Six,⁸ Seven and Ten.

III. Responsive Issue Three

(Responsive to Cummins' Issue Five)

Ample evidence supports the trial court's awards of compensatory and punitive damages resulting from Cummins' defamation of Lollar and Bat World.

Cummins argues that the evidence is legally and factually insufficient to support the amount of the trial court's compensatory (\$3,000,000) and exemplary (\$3,000,000) damages awards.

Actual or compensatory damages repay a plaintiff for the injury she incurred. *Hancock*, 2013 WL 2150468 at *4. These damages include general or non-economic damages for loss of reputation or mental anguish, and special damages. *Id.* Awards of presumed actual damages are subject to appellate review for evidentiary support. *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996); *accord*, *Hancock*, 2013 WL 2150468 at *4.

To justify exemplary damages in a defamation case, a plaintiff must prove by clear and convincing evidence that the defendant's statements were made

⁸ Cummins mistakenly assumes that Lollar and Bat World were required to prove that Cummins' breach of the internship contract directly resulted in an overall reduction in Bat World's revenue. [Cummins' brief @ 60-62] But,

maliciously. TEX. CIV. PRAC. & REM. CODE § 41.003(a); *Leyendecker & Assocs., Inc.*, 683 S.W.2d at 375; *Peshak v. Greer*, 13 S.W.3d 421, 426 (Tex. App.–Corpus Christi 2000, no pet.).

Both Lollar and Hyatt testified that Appellees suffered financially as a direct result of Cummins’ actions. Because Bat World is funded largely by member donations, grants, and educational resources sold to schools, Lollar’s reputation is vital. [RR 2 @ 45, 56, 57] Lollar testified that it had been “ruined” by Cummins’ defamatory campaign. [RR 2 @ 117] Revenue from donations to the sanctuary and grant money that had remained stable even through the recent recession plummeted after Cummins’ defamatory statements appeared on the internet: from \$144,000 and \$132,000 in 2009 and 2010, respectively, to \$72,289 in 2011. [RR 2 @ 118-19; RR 6 @ Plaintiffs’ exhibit 36] Profits from the sale of Lollar’s books have dropped tremendously as a direct result of Cummins’ defamation. [RR 2 @ 163-164]

Dottie Hyatt also testified that Cummins’ defamatory statements had caused a sharp reduction in the number of invitations that Bat World received for educational presentations, which is one of its primary means of support. [RR 2 @ 45, RR 5 @ 12, 18-21] Hyatt said that school districts that had participated in Bat World’s lecture series and presentations for years cancelled after Cummins’

Lollar and Bat World’s evidentiary burden on the breach of contract claim was satisfied by Lollar’s testimony

defamatory postings began. [RR 5 @ 19-20] While Hyatt was able to explain the situation and eventually restore Bat World's working relationship with one of the larger school districts, she had not been as fortunate with others. [RR 5 @ 20-21]

Bat World suffered another financial blow when the Kenneth A. Scott Charitable Trust, which had offered to fully fund Bat World's future internship programs, ceased all communications with Appellees after Cummins contacted them. [RR 2 @ 110] Another long-time donor told Lollar that she was withdrawing her financial support of the sanctuary as a direct result of Cummins' defamation. [RR 2 @ 207-08, 210] Lollar has spent her personal money and borrowed from her father to keep Bat World open, but at the time of trial, it was still unclear whether Bat World would survive. [RR 2 @ 121-22]

Lollar has experienced emotional hardship as well. The uncertainty surrounding Bat World has been emotionally "devastating" for Lollar and she is humiliated by Cummins' accusations. [RR 2 @ 122] She no longer shops or eats out in Mineral Wells because she feels shame and fears facing anyone who has seen Cummins' website postings. [RR 2 @ 130, 191] Lollar testified that she had worked for 20 years to change the public's perception of and treatment of bats, and that Cummins' defamatory statements and accusations of animal cruelty had ruined all of her efforts. [RR 2 @ 122]

regarding the monetary value of Cummins' breach of the internship contract.

Hyatt, who has known Lollar for many years, testified that Cummins' defamatory statements had been "devastating" to Lollar. [RR 5 @ 22]

Accusing someone involved with animals with animal cruelty is akin to accusing somebody like a minister of child molestation. And even if [Lollar] is victorious in this lawsuit, that stigma will never ever go away. . . . [Lollar] has built the largest rehabilitation teaching sanctuary in the entire world that's dedicated to bats. She's world renowned and highly respected, and that was taken from her." [RR 5 @ 22-23]

Sufficient evidence supports the trial court's finding that Cummins' relentless defamatory campaign caused Appellees' actual damages. *See, Tex. Disposal Sys. Landfill, Inc.*, 219 S.W.3d at 580. In addition to economic damages, Lollar suffered severe mental anguish, humiliation, and loss of reputation that she may never regain. The bat sanctuary that Lollar has dedicated the last 20 years of her life to may not survive because of Cummins' relentless barrage of defamatory postings. The compensatory damage award in this case is neither unfair nor unreasonable, and should be affirmed by this Court.

The evidence is likewise sufficient to support the award of exemplary damages. In determining the appropriate amount of punitive damages, the fact finder must consider the nature of the wrong, the character of the conduct involved, the degree of culpability, and the extent to which the conduct offends the public sense of justice. TEX. CIV. PRAC. & REM. CODE § 41.011(a).

As discussed above in Appellees’ Responsive Issue 1, at pages 22-23, the record in this case is replete with evidence supporting the trial court’s finding that Cummins acted with malice. The record also includes ample evidence to support the amount of the award. Here, the nature of the wrong was a far-reaching defamatory internet campaign designed to undermine Lollar’s credibility with her primary supporters: animal rights groups and organizations. As to the character of Cummins’ conduct, the trial court determined that it was “egregious” and “intentional.” [RR 5 @ 65] Appellees established that Cummins was singlehandedly responsible for launching this defamatory campaign to ruin Lollar’s reputation and shut down Bat World. She repeatedly reposted her statements and worked relentlessly to spread the statements as widely as possible, to inflict as much damage as possible. Indeed, her defamatory internet campaign continues to this day. Because Cummins holds herself out to be a champion of animal rights – and apparently has a large internet following that believes she actually is – her attack on the bat sanctuary is especially outrageous. This Court should uphold the trial court’s award of exemplary damages.

Moreover, to the extent that Cummins is now arguing that the trial’s award failed to apportion liability between certain specific defamatory and non-defamatory materials, her failure to timely object at trial precludes her right to so complain in this Court. TEX. R. APP. P. 33.1(a)(1).

In a bench trial, a party must specifically ask for additional findings of fact and conclusions of law that detail the trial court's apportionment of findings between the permissible and impermissible bases for liability. *Tagle v. Galvan*, 155 S.W.3d 510, 516 (Tex. App.–San Antonio 2004, no pet.). Otherwise, any complaint about the sufficiency of the evidence to support the determination is based on the determination as a whole. *Thomas v. Oldham*, 895 S.W.2d 352, 360 (Tex. 1995). Cummins' failure to request additional specific findings waives any error, and any sufficiency analysis is limited to the determination as a whole. *Id.*

Because ample evidence supported the trial court's award of compensatory and exemplary damages, this Court should overrule Cummins' Issue Five.

IV. Responsive Issue Four

(Responsive to Cummins' Issues Eight and Nine)

The trial court properly awarded Appellees reasonable attorney's fees.

Cummins complains that the trial court erred in awarding \$176,700 attorney's fees to Lollar and Bat World. In so complaining, Cummins asserts that the amount of attorney's fees was unreasonable, the trial court erred in failing to segregate the fees between the defamation and breach of contract claims, and there was no evidence to support the claim for attorney's fees because Appellees' attorney was working pro bono.

To determine the reasonableness of an attorney's fee, the fact finder should consider, among other factors, the time and labor required, the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer, the fee customarily charged in the locality for similar legal services, and the experience, reputation, and ability of the lawyer performing the services. *Arthur Andersen v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (citing TEX. DISCIPLINARY R. PROF. CONDUCT 1.04, reprinted in TEX. GOV'T CODE, tit. 2, subtit. G app. (State Bar Rules, art. X, § 9)).

Here, Randy Turner, Appellees' trial counsel, testified without objection that he had spent 589 hours working on this case and that his usual hourly rate was \$300. [RR 3 @ 242-243] Turner has practiced law for 32 years, is board certified in civil trial law and personal injury trial law, and is the past president of the Tarrant County Trial Lawyers Association. [RR 3 @ 241-242] Since accepting Appellees' case approximately two years before trial, Turner had spent more time on it than any other active case in his practice. *Id.* Turner's trial testimony supplies ample support for the trial court's award of attorney fees. *See Arthur Anderson*, 945 S.W.2d at 818. This Court should overrule Cummins' complaint regarding the reasonableness of Appellees' attorney's fees.

Cummins additionally asserts that the trial court erred in awarding attorney's fees to Plaintiffs because they failed to segregate those fees between the

defamation claims and the breach of contract claims. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006)

To recover attorney's fees under the Texas Civil Practice and Remedies Code, a party must prevail on a cause of action for which attorney's fees are recoverable and recover damages thereon. TEX. CIV. PRAC. & REM. CODE § 38.001; *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997). Attorney's fees are recoverable for breach of contract claims. TEX. CIV. PRAC. & REM. CODE § 38.001(8); *International Security Life Ins. Co. v. Finck*, 496 S.W.2d 544, 546–47 (Tex. 1973). A party is generally required to segregate attorney's fees in a case containing multiple causes of action. However, if no one objects at trial to the fact that the attorney's fees are not segregated as to specific claims, then the objection is waived. *Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 785 (Tex. 1988). In a bench trial, the segregation issue must be raised at trial. *Id.* Because Cummins failed to do so, she waived her argument regarding segregation of attorney's fees. *Solis*, 951 S.W.2d at 389.

Cummins likewise complains that the trial court erred in awarding Appellees attorney's fees because their attorney was providing legal services on a pro bono basis. However, the fact that an attorney volunteers his services does not preclude an award of attorney's fees under Section 38.001 of the Texas Civil Practice and Remedies Code. *See AMX Enterprises, L.L.P. v. Master Realty Corp*, 283 S.W.3d

506, 520-521 (Tex. App.–Fort Worth 2009, no pet.); *Brown v. Comm'n for Lawyer Discipline*, 980 S.W.2d 675, 683-84 (Tex. App.–San Antonio 1998, no writ) (holding state bar represented by private lawyers on a pro bono basis may recover reasonable attorney's fees).

Appellees' reasonable attorney's fees were supported by ample evidence and Cummins failed to preserve any complaint regarding segregation of those fees. Accordingly, this Court should overrule Cummins' Issues Eight and Nine.

CONCLUSION

Abundant evidence supports the trial court's judgment that Cummins maliciously defamed Appellees and that Appellees were entitled to compensatory and punitive damages as a result of the damages caused by that defamation. The record also supports the trial court's award of breach of contract damages as well as its award of attorney's fees. Accordingly, this Court should overrule each of Cummins' issues on appeal and affirm the trial court's judgment in every regard.

PRAYER

Appellees request that this Court overrule each and every one of Cummins' issue on appeal and affirm the judgment of the trial court in every regard. Appellees further request any such relief to which they are entitled in law and equity.

RANDALL E. TURNER
BAILEY & GALYEN
1300 Summit Avenue, Suite 650
Fort Worth, Texas 76102
Telephone: 817.471.1241
Fax: 817.764.6336

By: /s/ Randall E. Turner
RANDALL E. TURNER
SBN: 20328310
DANIEL P. SULLIVAN
SBN: 24054465
ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of foregoing document has been mailed to Mary Cummins, by certified mail, return receipt requested, on this the 7th day of June, 2013.

CMrrr: 7013 0600 0002 3267 9552
Mary Cummins
645 W. 9th Street. #110-140
Los Angeles, CA 90015-1640

/s/ Randall E. Turner

CERTIFICATE OF COMPLIANCE and WORD COUNT

I certify that the foregoing document was created in Microsoft Word 2011 and has 8,945 words according to Microsoft Word. I further certify that this document has been formatted in accordance with Texas Rule of Appellate Procedure 9.4(b)-(e). The brief is filed in text-searchable PDF format and the appendix is combined in one computer file with the brief. The brief complies with the requirements of the Court:

1. The brief is submitted by electronic filing as required by this Court.
2. The electronically filed document is labeled with the following information:
 - A. Case Name:
 - B. Appellate Cause No:
 - C. Type of Brief: Appellees' Brief
 - D. Party for whom the brief is being submitted: Amanda Lollar and Bat World Sanctuary
 - E. Word Processing Software and Version Used to Prepare the Brief:
Microsoft Office 2011: Submitted in Text Searchable PDF Format
3. The documents in the appendix conform to the requirements of Texas Rules of Appellate Procedure 9.2, 9.3, 38.1(k) and Local Rule 3.

s/ Randall E. Turner

No. 02-12-00285-CV

IN THE SECOND DISTRICT COURT OF APPEALS

MARY CUMMINS,

Appellant,

v.

AMANDA LOLLAR AND BAT WORLD SANCTUARY,

Appellees

On appeal from the 352nd Judicial District Court of Tarrant County, Texas,

Hon. William Brigham Presiding

Trial Court Cause No. 352-248169-10

APPELLEES' APPENDIX

APPENDIX TABLE OF CONTENTS

1. Judgment, filed August 27, 2012	TAB 1
2. Findings of Fact and Conclusions of Law, filed October 8, 2012.....	TAB 2
3. Bat World Internship Contract.....	TAB 3

No. 02-12-00285-CV

IN THE SECOND DISTRICT COURT OF APPEALS

MARY CUMMINS,

Appellant,

v.

AMANDA LOLLAR AND BAT WORLD SANCTUARY,

Appellees

On appeal from the 352nd Judicial District Court of Tarrant County, Texas,

Hon. William Brigham Presiding

Trial Court Cause No. 352-248169-10

APPELLEES' APPENDIX

APPENDIX TABLE OF CONTENTS

1. Judgment, filed August 27, 2012	TAB 1
2. Findings of Fact and Conclusions of Law, filed October 8, 2012.....	TAB 2
3. Bat World Internship Contract.....	TAB 3

CAUSE NO. 352-248169-10

BAT WORLD SANCTUARY and AMANDA LOLLAR Plaintiffs,	§	IN THE DISTRICT COURT
	§	
	§	
	§	
v.	§	OF TARRANT COUNTY, TEXAS
	§	
MARY CUMMINS, Defendant	§	352 ND JUDICIAL DISTRICT

JUDGMENT

ON the 11th day of June this cause came on to be heard. Amanda Lollar, Plaintiff whose last three digits of her Texas driver's license number are 000, appeared in person and by her attorney and announced ready for trial. Bat World Sanctuary, Plaintiff, appeared by and through its attorney and announced ready for trial. Mary Cummins, Defendant whose last three digits of her California driver's license number are 781 appeared *pro se* and announced ready for trial. No jury having been demanded, all questions of fact were submitted to the Court.

After hearing the evidence and arguments of counsel and the defendant the Court finds that the plaintiffs, Amanda Lollar and Bat World Sanctuary, are entitled to recover from the defendant, Mary Cummins.

IT IS THEREFORE ORDERED that Amanda Lollar recover from Mary Cummins actual damages in the amount of THREE MILLION DOLLARS (\$3,000,000.00).

IT IS FURTHER ORDERED that Amanda Lollar recover from Mary Cummins exemplary damages in the amount of THREE MILLION DOLLARS (\$3,000,000.00).

IT IS FURTHER ORDERED that Bat World Sanctuary recover from Mary Cummins actual damages in the amount of TEN THOUSAND DOLLARS (\$10,000.00).

IT IS FURTHER ORDERED that Bat World Sanctuary recover from Mary Cummins attorney's fees in the amount of ONE HUNDRED SEVENTY SIX THOUSAND SEVEN HUNDRED DOLLARS (\$176,700.00).

IT IS ORDERED that Mary Cummins be permanently enjoined and she is ORDERED to immediately and permanently remove from the internet the following statements which currently appear at <http://www.animaladvocates.us/batWorldLawsuit/>:

1. They breed animals in the facility.

2. Pretty ironic for this group to certify Bat World Sanctuary when the health department told her to leave town and they had to gut the building and remove her belongings.
3. Vet recommended blood and stool tests. Lollar declined. She just wants empirical therapy. If that doesn't work, she wants to euth the dog. She refused treatment. When I was at Bat World June 19, 2010 to June 28, 2010 I saw her use her fingers to pull out one of the dog's teeth, i.e. oral surgery on dogs.
4. The current method she suggests is also inhumane. The bats die of suffocation. She also forgets to mention that the drugs she suggests must be used under the direction of a veterinarian. She doesn't even administer the gas legally, humanely, or safely.
5. He should not be working for free for someone who commits animal cruelty.
6. I doubt he'll be speaking about this embarrassing little case where he is actually representing someone who commits animal cruelty and neglect.
7. She took the money that came from the dissolution of Bonnie Bradshaw's group and bought a new silver Honda Eclipse. That money was supposed to go for animals. This is what Lollar does with money that is given to Bat World.
8. Lollar never even washed her hands before surgery, you can see dirty finger nails in the photos, no surgical garments, no mask, hat, nothing. Night and day.
9. Just confirmed that Amanda Lollar of Bat World Sanctuary is illegally obtaining human and animal rabies vaccinations. ...Again, breaking the law. I'm amazed she admitted to having the vaccine and buying it when she is doing it illegally.
10. She does not state that it died from neglect of care. She also chose to euth it instead of treating it as her vet suggested. She'd previously turned down care which her vet suggested.
11. When I was at Bat World she told me the place where she buys her rabies vaccine thinks she's a doctor.
12. Earlier in the year the vet noted the dog had major dental issues yet she didn't have the vet treat them. You know how painful it would be to have a mouth full of rotten teeth? That's animal neglect.
13. BREAKING NEWS!!! Amanda Lollar of Bat World Sanctuary admits in writing that she and Bat World Sanctuary are being forced to leave Mineral Wells because of all the complaints to the City and Health Department.
14. The dogs rear claws are super long. There is no way she could stand. ... She has to drag herself on cement.
15. She tells people to use Isoflurane illegally, inhumanely and unsafely in her book.

16. He didn't care that she admitted to illegally having the human rabies vaccination, admitted to using drugs not according to the label or that she "proudly" admitted to performing surgery.
17. In the video Lollar takes tweezers and just pulls out the molars of a conscious bat that is fighting and biting her while it bleeds. Lollar is proud of this and posted this video in her book and online. Bat experts know that bats must be unconscious and intubated to remove molars. Can you imagine the pain that bat felt?
18. Pulling molars out of conscious bats is not "cutting-edge" though cutting open conscious bats might fall into that "category." Operating on bats using the drop anesthesia technique or amputating wings instead of pinning them is also not cutting edge but cave man veterinary practice.
19. Lollar is exposing people to rabies by not checking their cards.
20. Her recent story about the episiotomy at the depo was that, that was not the bat's vagina and uterus being pulled out. It was the "placenta separating." It clearly was not.
21. She'd already yanked out the placenta which is what helped cause the prolapse, besides cutting way too much and pulling too hard. She really needs to get her vision checked. Someone with very bad vision is the last person who should be slicing into microbats.
22. Yeah, I look like crap in the videos but at least there are no videos of me hacking an animal to death.
23. She's been breeding her bats illegally. She's committing fraud asking for money for a project she cannot and will not do.
24. She said she would use the bag for the trip then return it to Walmart for a refund. She admitted to me with an evil laugh that she does this frequently.
25. Rabies complaint against Bat World Sanctuary. General sanitation laws, harboring high risk rabies animals, allowing them in downtown.
26. Amanda Lollar and her buildings have been written up so many times for building violations, safety issues, rabies, histoplasmosis, no address, unsightly building, build up of guano 6-8 feet... People have been reporting her smelly building and rabid bats for over 15 years.
27. She's basically experimenting on bats. The bats are dying because she doesn't take them to the vet. That's okay because she can just go get more bats.
28. Amanda Lollar of Bat World Sanctuary found guilty of illegally breeding bats at her facility. It is a violation of her permit.

29. Amanda Lollar of Bat World Sanctuary is now sending threats of extortion from Mineral Wells, Texas. Because she's sending it over the computer it's a Federal crime.
30. She has violated the following regulations listed on her permit. "15 a. Permit holder is prohibited from a. Propagating, selling or bartering animals or animal remains received or held under authority of this permit." She is allowing the bats to breed.
31. The complaints going back 18 years were about alleged animal cruelty, animal neglect, violations of the health code and building and safety regulations.
32. The complaints stretching back 18 years were about animal cruelty, animal neglect, violations of the health code, violations of Texas Parks & Wildlife regulations, violations of the Animal Welfare Act, building violations and a report about a rabid bat biting a toddler directly next door to Bat World Sanctuary.
33. Here is the disgusting photo of my face which they photoshopped semen onto. They then added the caption "Yep, screw you too, Mmmmary!" They named the file "mmmm." This is how disgusting and childish these people are.

IT IS FURTHER ORDERED that Mary Cummins be permanently enjoined and she is ordered to immediately and permanently remove from the following URL's in their entirety:

1. http://www.animaladvocates.us/batWorldLawsuit/Amanda_Lollar_Bat_World_Sanctuary_Breeding_Bats.pdf
2. http://www.animaladvocates.us/batWorldLawsuit/amanda_lollar_1994_manual_original.pdf
3. <http://www.animaladvocates.us/batWorldLawsuit/mmmmm.jpg>

IT IS FURTHER ORDERED that Mary Cummins be permanently enjoined and she is ORDERED to immediately and permanently remove from the internet the following statements which currently appear at http://www.animaladvocates.us/mary_cummins_sues_amanda_lollar_bat_world_sanctuary

1. She's the one who handles rabid bats with her bare hands.

IT IS FURTHER ORDERED that Mary Cummins be permanently enjoined and she is ORDERED to immediately and permanently remove from the internet the following statements which currently appear at <https://www.facebook.com/marycummins>:

1. Update: Health Dept. forced Bat World Sanctuary to leave town. In January they gutted the building, cleaned it and removed her property.

2. Amanda who runs bat sanctuary just uses her bare hands. The rabid bats even bite her.

IT IS FURTHER ORDERED that Mary Cummins be permanently enjoined and she is ORDERED to immediately and permanently remove from the internet the following statements which currently appear at <https://www.facebook.com/AnimalAdvocatesUSA>:

1. Update: Health Dept. forced Bat World Sanctuary to leave town. In January they gutted the building, cleaned it and removed her property.

IT IS FURTHER ORDERED that Mary Cummins be permanently enjoined and she is ORDERED to immediately and permanently remove from the internet the following statements which currently appear at <https://plus.google.com/107575973456452472889>:

1. Bat World Sanctuary admits in writing they are being forced to leave the City because of all the complaints to the City and Health Dept.

IT IS FURTHER ORDERED that Mary Cummins be permanently enjoined and she is ORDERED to immediately and permanently remove from the internet the following statements which currently appear at <http://twitter.com/MMMARYinLA>:

1. Bat World Sanctuary admits in writing that they are being forced to leave the City because of all the complaints to the City and Health Dept.
2. Update: Health Dept. forced Bat World Sanctuary to leave town. They gutted her building, cleaned it and removed her property.
3. Amanda Lollar commits animal cruelty at Bat World Sanctuary <http://goo.gl/fb/tfv4x>

IT IS FURTHER ORDERED that Mary Cummins be permanently enjoined and she is ORDERED to immediately and permanently remove from the internet the following statements which currently appear at <http://www.myspace.com/mmmaryinla>:

1. Health Dept. forced Bat World Sanctuary to leave town. They gutted her building, cleaned it and removed her property.
2. Bat World Sanctuary admits in writing they are being forced to leave the City because of all the complaints to the City and Health Dept.

IT IS FURTHER ORDERED that Mary Cummins be permanently enjoined and prohibited from posting on the internet or publishing to any person any video recording of any episiotomy that was recorded or made at Bat World Sanctuary.

IT IS FURTHER ORDERED that the total amount of the judgment here rendered will bear interest at the rate of five percent (5%) per year from the date of this judgment until paid.

All costs of court spent or incurred in this cause are adjudged against Mary Cummins, defendant.

All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary.

All other relief not expressly granted in this judgment is denied.

SIGNED this 27 day of August, 2012.

William Brigham
JUDGE PRESIDING

CAUSE NO. 352-248169-10

BAT WORLD SANCTUARY and
AMANDA LOLLAR
Plaintiffs,

v.

MARY CUMMINS,
Defendant

§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

TARRANT COUNTY, TEXAS

352ND JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-numbered and captioned cause was tried before this Court without a jury on June 11, 2012. Plaintiff, Amanda Lollar appeared in person and by attorney of record. Plaintiff, Bat World Sanctuary, appeared in person by counsel. Defendant, Mary Cummins, appeared in person.

After considering the pleadings, the evidence, and the arguments, the Court, in response to Defendant's request, makes its findings of fact and conclusions of law as follows:

Findings of Fact

1. Defendant committed defamation expressed in written or other graphic form that tended to injure Amanda Lollar's reputation and thereby exposed her to public hatred, contempt or ridicule, or financial injury; or to impeach Amanda Lollar's honesty, integrity, virtue or reputation, and thereby exposed her public hatred, ridicule, or financial injury.
2. Defendant's defamation of Amanda Lollar caused Amanda Lollar to sustain actual damages in the amount of three million dollars (\$3,000,000.00).
3. Defendant acted with malice in committing defamation against Amanda Lollar.
4. Defendant should pay exemplary damages to Amanda Lollar in the amount of three million dollars (\$3,000,000.00).
5. Defendant and Bat World Sanctuary entered into a contract on June 20, 2010.
6. Defendant breached the contract.

MAILED COPY TO ALL ATTORNEYS
AND PRO SE PARTIES OF RECORD
10-8-12 LAA

Court's Minutes 237 LAA
Transaction #

TAB 2

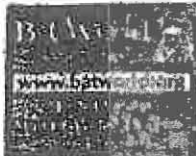
7. Defendant should pay Bat World Sanctuary the sum of ten thousand dollars (\$10,000.00) for the breach of contract.
8. Reasonable and necessary attorney's fees for Bat World's attorney, Randall E. Turner, is one hundred seventy six thousand seven hundred dollars (\$176,700.00).

Conclusions of Law

1. Statements published by Defendant about Amanda Lollar were defamatory.
2. Bat World Sanctuary is entitled to recover reasonable and necessary attorney's fees from Defendant.
3. Amanda Lollar is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions.

SIGNED this 8 day of October, 2012.


JUDGE PRESIDING



Bat World Sanctuary Internship Contract

This agreement is entered into between Mary C. Conner, hereinafter called "Trainee" and Bat World Sanctuary (BWS). BWS agrees to train and educate Trainee in the care, treatment, and medical management of insectivorous bats. In consideration for this training and education Trainee agrees to the following terms and conditions:

~~Trainee understands that the skills, knowledge, and information provided to Trainee by BWS are proprietary and confidential. BWS reserves the right to remove or restrict access to this information without notice and without penalty to Trainee.~~

If Trainee successfully completes the BWS training program to the satisfaction of BWS, he or she shall be issued a Certificate of Completion of the BWS training program. BWS shall have sole discretion to decide whether or not Trainee has sufficiently demonstrated the skills, knowledge, temperament, and compassion for bats to receive a Certificate of Completion. The Certificate of Completion shall entitle Trainee to publish, advertise, and communicate to third persons the fact that he or she has been trained by BWS and is certified by BWS. In the event that Trainee receives a Certificate of Completion of the BWS training program, Trainee agrees to thereafter diligently and precisely follow all of Bat World guidelines and procedures when caring for, treating, or housing bats. These guidelines and procedures appear in *Standards and Medical Management for Captive Insectivorous Bats*, a book published by BWS and provided to Trainee. This book may be revised from time to time by BWS and Trainee agrees that it will be Trainee's responsibility to make sure that he or she has the most recently revised copy.

Trainee understands that, in attempting to establish and maintain an assurance colony or other captive collection of insectivorous bats, failure to follow the procedures, protocols, and diets recommended by BWS will have a substantial negative impact on the success of such a project. Trainee agrees that a representative of BWS may make periodic, unannounced inspections of any facility or place where Trainee is caring for, treating, or housing bats for the purpose of insuring Trainee's compliance with the guidelines and procedures of BWS. Trainee agrees to fully cooperate with the BWS representative at these inspections, and to furnish the representative with all requested information and documents concerning the care, treatment, and housing of bats. BWS may, from time to time, by email, telephone, or letter, request information or documents from Trainee concerning Trainee's care, treatment and housing of bats. Trainee agrees to timely comply with such requests by promptly furnishing all requested information and documents.

In the event that Trainee at any time fails to follow, to the satisfaction of BWS, each and every BWS guideline and procedure when caring for, treating, or housing bats, then Trainee's Certificate of Completion of Bat World's training program shall be automatically revoked without notice or hearing and Trainee may no longer publish, advertise, or communicate to any person the fact that he or she was trained by BWS or was certified by BWS. BWS shall have sole discretion to determine whether or not the Certificate of Completion should be revoked. In the event that Trainee is notified in writing that Trainee's Certificate of Completion has been revoked by BWS and Trainee thereafter publishes, advertises or communicates to any person the fact that Trainee was trained by BWS or was certified by BWS, then Trainee agrees to pay BWS liquidated damages in the amount of \$10,000, and all attorney's fees incurred by BWS in enforcing this contract.

If any portion of this contract is found to be void or unenforceable it shall not affect the remainder of the contract which shall remain in full force and effect. This contract contains the entire agreement of the parties with respect to the subject matter of this contract, and supersedes all prior negotiations, agreements and understandings with respect thereto. This contract may only be amended by a written document duly executed by all parties. Venue for any lawsuit to enforce this contract or for any lawsuit alleging breach of this contract shall be in Tarrant County, Texas.

SIGNED this 20th day of June, 2010



TRAINEE



BAT WORLD REPRESENTATIVE

