

**APPELLANT REQUESTS
ORAL ARGUMENT**

02-12-00285-CV

IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS
Fort Worth, Texas

MARY CUMMINS,
Defendant-Appellant,

v.

AMANDA LOLLAR, BAT WORLD SANCTUARY,
Plaintiffs-Appellees

On Appeal From the 352nd Judicial District Court
Tarrant County, Texas
Trial Court Cause No. 352-248169-10
Honorable William Brigham Presiding

APPELLANT'S BRIEF

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| TABLE OF CONTENTS | Page |
|---|------|
| Identity of Parties and Counsel..... | i |
| Index of Authorities..... | vii |
| Statement of the Case..... | xiv |
| Statement Regarding Oral Argument..... | xv |
| Issues Presented..... | xvi |
| <i>Issues Presented for Defamation</i> | |
| 1. Are Appellees Amanda Lollar, BWS limited-purpose public figures with respect to their voluntary and public participation in animal and bat care? | |
| 2. Are statements about Appellees, public safety, public health, government action statements about matters of public concern? | |
| 3. Did Appellees present “more than a scintilla” of evidence that any of the supposedly defamatory statements meet <i>all four</i> of the following criteria of defamation? | |
| a. is a verifiable statement of fact; | |
| b. is false or not substantially true; | |
| c. is of and concerning Appellee; and | |
| d. is capable of conveying a defamatory meaning about Appellees? | |
| 4. Did the trial court err in granting Appellee’s judgement against Appellant for defamation? | |
| 5. Were Appellees entitled to the amount of compensatory and exemplary damages awarded? | |
| <i>Issues Presented for Breach of Contract</i> | |

| | |
|---|---|
| 6. Did Appellees present “more than a scintilla” of evidence that Appellant’s actions meet <i>all four</i> of the following criteria of breach of contract? | |
| a. The existence of a valid contract; | |
| b. Performance or tendered performance by the plaintiff; | |
| c. Breach of the contract by the defendant; | |
| d. Damages sustained by plaintiffs as a result of the breach. | |
| 7. Did the trial court err in granting Appellee’s judgement against Appellant for breach of contract? | |
| 8. Were Plaintiffs entitled to attorneys’ fees? | |
| 9. Were attorney’s fees reasonable? | |
| 10. Were liquidated damages reasonable, legal? | |
| Statement of the Facts..... | 1 |
| Summary of the Argument..... | 4 |
| Argument..... | 8 |
| I. Standard of Review..... | 8 |
| II. Plaintiffs Bear the Burden of Proving Falsity..... | 8 |
| Issue No. 1 Restated: Are Appellees Amanda Lollar, BWS limited-purpose public figures with respect to their voluntary and public participation in animal and bat care?..... | 8 |
| A. Appellees are a limited-purpose public figure..... | 9 |
| Public Figure Factor 1: Appellees Lollar, BWS were a public controversy before Cummins ever commented about them..... | 9 |
| a. Appellees’ care of bats was and still is the subject of local and statewide discussion..... | 9 |

| | |
|--|-----------|
| b. The impact of the controversy would be widely felt..... | 11 |
| c. The proper inquiry is whether Lollar, BWS were a limited purpose public figure at the time Cummins posted comments in 2010-2012..... | . . 11 |
| Public Figure Factor 2: Lollar, BWS played much “more than a trivial or tangential role” in creating the controversy..... | . 12 |
| Public Figure Factor 3: The supposedly defamatory statements were about the controversy which Lollar voluntarily helped create.. | . 13 |
| Issue No. 2 Restated: Are statements about Appellees, public safety, public health, government action statements about matters of public concern?..... | . . 13 |
| B. Lollar, BWS also bear the burden of proving falsity because the allegedly defamatory statements address matters of public concern..... | . . 14 |
| 1. The allegedly defamatory statements were about matters of public concern..... | . 14 |
| Issue No. 3 Restated: Did Appellees present “more than a scintilla” of evidence that any of the supposedly defamatory statements meet all four of the following criteria of defamation?..... | . . 16 |
| Issue No. 4 Restated: Did the trial court err in granting Appellee’s judgement against Appellant for defamation?..... | . 16 |
| III. The trial court erred in granting judgment to Appellees because there is no evidence Appellant wrote a single defamatory statement about Appellees..... | . . 16 |
| A. Appellees must offer competent evidence as to each of the four independent elements to prove Defamation..... | . 19 |
| 1. Most of the statements cannot be defamatory because they are not verifiable assertions of fact..... | . 19 |

| | |
|--|-----------|
| 2. A statement can defame a person only if it is “of and concerning” him; some of the statements at issue are not about Plaintiffs at all..... | . . 21 |
| 3. Most of the statements relied upon are not capable of defamatory meaning because they are not specific and offensive statements about Plaintiffs..... | . . 23 |
| 4. Appellees have failed to show that any statement if false..... | 23 |
| B. Plaintiffs were not entitled to judgment as to those posts that Plaintiffs failed to mention and statements that Plaintiffs refused to specifically identify..... | . . 25 |
| IV. None of the Specific Statements Identified by Appellees Defame Them..... | . 27 |
| A. Supposedly Defamatory Statements 1 - 47..... | 28 |
| Issue No. 5 Restated: Were Appellants entitled to the amount of compensatory and exemplary damages awarded?..... | . 53 |
| 1. Were Plaintiff’s entitled to \$3,000,000 in compensatory damages?..... | . 57 |
| 2. Were Plaintiff’s entitled to \$3,000,000 in exemplary damages?..... | . 54 |
| Summary of Defamation Claim..... | 56 |
| V. Breach of Contract..... | 59 |
| Issue No. 6 Restated: Did Appellees present “more than a scintilla” of evidence that Appellant’s actions meet all four of the following criteria of breach of contract?..... | . . 57 |
| a. There is a valid contract;..... | 62 |
| b. The Plaintiffs performed or tendered performance according to the terms of the contract;..... | . 63 |
| c. The Defendant breached the contract; and..... | 67 |

| | |
|---|---------|
| d. The Plaintiffs sustained damages as a result of the breach.... | 71 |
| Issue No. 7 Restated: Did the trial court err in granting Appellee’s judgement against Appellant for breach of contract?..... | . 68 |
| Issue No. 8 Restated: Were Plaintiffs entitled to attorneys’ fees?. | 72 |
| Issue No. 9 Restated: Were attorney’s fees reasonable?..... | 72 |
| Issue No. 10 Restated: Were Plaintiffs entitled to liquidated damages?..... | . 69 |
| Were they reasonable, legal?..... | |
| Summary..... | 76 |
| Prayer..... | 76 |
| Certificate of Service | |
| Appendix | |

| Case Law | INDEX OF AUTHORITIES | Page |
|---|----------------------|--------------|
| | | |
| <i>Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys., Inc.</i> , 997 S.W.2d 803, 810 (Tex. App.—Dallas 1999, no pet.). | | 74 |
| <i>Baker</i> , 812 S.W.2d at 55 | | 75 |
| <i>Bridgmon v. Array Sys. Corp.</i> , 325 F.3d 572, 577 (5th Cir.2003) | | 60 |
| <i>Carla Main et al v H. Walker Royall</i> , No. 05-09-01503-CV, 2010 Tex. App. | | 9, 10, 12 |
| <i>Diaz v. NBC Universal, Inc.</i> , No. 08-1190-cv, 337 Fed. Appx. 94 (2d Cir 2009) | | 21 |
| <i>Double Diamond, Inc. v. Van Tyne</i> , 109 S.W.3d 848 (Tex. App., Dallas 2003, no pet.) | | 23 |
| <i>Dudrick v. Dolcefino</i> , No. 14-96-01181-CV, 1998 Tex. App. LEXIS 7682 (Tex. App.Houston [14th Dist.]) | | 12 |
| <i>Freedom Commc,ns, Inc. v. Coronado</i> , 296 S.W.3d 790 (Tex. App., Corpus Christi 2009, no pet.) | | 23 |
| <i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974) | | 19 |
| <i>Harvest House Publishers v. Local Church</i> , 190 S.W.3d 204 (Tex. App., Houston [1st Dist.] 2006, pet. denied) | | 22 |
| <i>Henriquez v. Cemex Mgmt., Inc.</i> , 177 S.W.3d 241 (Tex. App., Houston [1st Dist.] 2005, pet. denied) | | 22 |

| | |
|--|--------------|
| <i>Holloway v. Tex. Elec. Util. Constr., Ltd.</i> , 282 S.W.3d 207 (Tex. App., Tyler 2009, no pet.) | 26 |
| <i>Holt</i> , 835 S.W.2d at 84. | 61 |
| <i>King Ranch, Inc. v. Chapman</i> , 118 S.W.3d 742 (Tex. 2003) | 16 |
| <i>Kirch v. Liberty Media Corp.</i> , 449 F.3d 388 (2d Cir. 2006) | 21 |
| <i>Levinsky,s, Inc. v. Wal-Mart Stores, Inc.</i> , 127 F.3d 122 (1st Cir. 1997) | 22 |
| <i>Masson v. New Yorker Magazine</i> , 501 U.S. 496 (1991) | 24 |
| <i>Mercier v. Sw. Bell Yellow Pages, Inc.</i> , 214 S.W.3d 770, 773 (Tex. App.—Corpus Christi 2007, no pet.) | 60 |
| <i>Merrell Dow Pharms. v. Havner</i> , 953 S.W.2d 706 (Tex. 1997) | 16 |
| <i>Milkovich v. Lorain Journal Co.</i> , 497 U.S. 1 (1990) | 18, 19,20 |
| <i>Moldea v. N.Y. Times Co.</i> , 22 F.2d 310 (D.C. Cir. 1994) | 19 |
| <i>Musser v. Smith Protective Servs., Inc.</i> , 723 S.W.2d 653 (Tex. 1987) | 22 |
| <i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982) | 20 |
| <i>Newspapers, Inc. v. Matthews</i> , 339 S.W.2d 890 (Tex. 1960) | 20, 21 |
| <i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) | 17 |

| | |
|--|--------------|
| <i>Paul Mood and K&M Distributors v. Kronos Product, Inc.</i> , Dallas County; 5th district (05-06-00111-CV, 254 SW3d 8, 11-28-07) | 61 |
| <i>Phillips v. Phillips</i> , 820 S.W.2d 785, 788 (Tex. 1991). | 74 |
| <i>Plotkin v. Joekel</i> , No. 01-06-00624-CV, 2009 Tex. App. LEXIS 7709 (Tex. App., Houston [1st Dist.] Sept. 25, 2009, pet. denied) | 27 |
| <i>Prime Prods., Inc. v. S.S.I. Plastics, Inc.</i> , 97 S.W.3d 631, 636 (Tex. App.—Houston [1st Dist.] 2002) | 60 |
| <i>Sava Gumarska v. Advanced Polymer Sciences, Inc.</i> , 128 S.W.3d 304, 317 n.6 (Tex. App.-Dallas 2004, no pet.) | 60 |
| <i>Scott v. Godwin</i> , 147 S.W.3d 609 (Tex. App., Corpus Christi 2004, no pet.) | 15 |
| <i>Shaw v. Palmer</i> , 197 S.W.3d 854 (Tex. App., Dallas 2006, pet. denied) | 18, 19,20 |
| <i>Stewart Title Guar. Co. v. Aiello</i> , 941 S.W.2d 68, 73 (Tex. 1997) | 73 |
| <i>Szczepanik v. First Southern Trust Co.</i> , 883 S.W.2d 648, 649 (Tex. 1994) | 61 |
| <i>United States v. Nat'l Treasury Employees Union</i> , 513 U.S. 454 (1995) | 15 |
| <i>Valence Operating Co. v. Dorsett</i> , 164 S.W.3d 656, 664 (Tex. 2005). | 74 |
| <i>Vice v. Kasprzak</i> , No. 01-08-00168-CV, 2009 Tex. App. LEXIS 7725 (Tex. App., Houston [1st Dist.]) | 11 |

| | |
|--|------------------|
| <i>Stuart v. Bayless</i> , 964 S.W.2d 920, 921 (Tex. 1998) | 61 |
| <i>Valero Mktg. & Supply Co. v. Kalama Int'l, LLC</i> , 51 S.W.3d 345, 351 (Tex.App.-Houston [1st Dist]2001, no pet.) | 60 |
| <i>West v. Triple B Servs., LLP</i> , 264 S.W.3d 440, 446 (Tex. App.-Houston [14th Dist] 2008, no pet.) | 60 |
| <i>WFAA-TV, Inc. v. McLemore</i> , 978 S.W.2d 568 (Tex. 1998) | 9, 10, 11, 13 |
| <i>Winchek</i> , 232 S.W.3d at 202 | 60 |
| Constitutional Provisions | |
| U.S. CONST., amend I | 20, 21 |
| Statutes and Rules | |
| Tex. Civ. Prac. & Rem. Code Ann. § 38.001 | 72 |
| Tex. Civ. Prac. & Rem. Code § 73.001 | 7 |
| Tex. Civ. Prac. & Rem. Code Ann. § 41.008 | 58 |
| Tex. Civ. Prac. & Rem. Code Ann. § 41.003 | 58 |
| Tex. R. Civ. P. 166a(i) | 16 |

STATEMENT OF THE CASE

This is a defamation and breach of contract case. Plaintiffs/Appellees Amanda Lollar (Lollar) and Bat World Sanctuary (BWS) “Appellees” sued Defendant/Appellant Mary Cummins (Cummins) “Appellant” for libel, claiming unspecified damages, over posts made on the Internet and reports to government agencies. Appellees also sued Appellant for breach of contract, claiming again unspecified damages over posts made on the Internet and reports made to government agencies.

This appeal arises from the trial. Appellant argued that Appellees failed to show any of the elements of defamation or breach of contract. Appellant also argued that Appellees failed to show damages, causation or malice. The Court gave judgment to Plaintiffs for \$6,200,000. This appeal is taken from the final trial court order signed August 27, 2012.

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant believes that oral argument will significantly aid in clarifying the issues involved in this appeal. This case presents important issues regarding the proper legal standards for determining whether a defamation plaintiff is a public figure; and whether or not Internet posts made about Appellees constitute defamation. This appeal also deals with breach of contract, specifically whether or not Appellees proved any or all the elements of breach of contract.

The keystone of this appeal is the First Amendment protection for discussion of issues of public policy. This appeal is also about privileged fair reports made to government agencies. Defendant Cummins made reports about animal cruelty, animal neglect and other violations which she witnessed while an intern at BWS. Appellees brought this defamation suit alleging that 47 statements, files posted online about what Defendant witnessed defamed Plaintiff. Appellant respectfully requests oral argument if it can be done telephonically. Appellant is an indigent out of state pro se Defendant without the financial means to fly to Texas without sufficient notice. If oral argument cannot be done telephonically, Appellant requests four week's notice in order to secure affordable airfare.

ISSUES PRESENTED

Issues from Defamation Claim

1. Are Appellees Amanda Lollar, BWS, limited-purpose public figures with respect to their voluntary and public participation in animal and bat care?
2. Are statements about Appellees, public safety, public health, government action, statements about matters of public concern?
3. Did Appellees present “more than a scintilla” of evidence that any of the supposed defamatory statements meets *all four* of the following criteria?
 - a. is a verifiable statement of fact;
 - b. is false or not substantially true;
 - c. is of and concerning Appellees; and
 - d. is capable of conveying a defamatory meaning about Appellees?
4. Did the trial court err in granting Appellee’s judgement against Appellant for defamation?
5. Were Appellees entitled to the amount of compensatory or exemplary damages awarded?

Issues from Breach of Contract Claim

6. Did Appellees present “more than a scintilla” of evidence that any of Appellant’s actions meet *all four* of the following criteria for breach of contract?
 - a. The existence of a valid contract;
 - b. Performance or tendered performance by the plaintiff;
 - c. Breach of the contract by the defendant; and

- d. Damages sustained by the plaintiffs as a result of the breach.
- 7. Did the trial court err in granting Appellee's judgement against Appellant for breach of contract?
- 8. Were Plaintiffs entitled to attorneys' fees?
- 9. Were attorneys' fees reasonable?
- 10. Were Plaintiffs entitled to liquidated damages? Were they reasonable, legal?

STATEMENTS OF FACTS

Appellant Mary Cummins is a licensed wildlife rehabilitator in Los Angeles, California who rescues ill, injured and orphaned native wildlife for release back to the wild. She cares for coyotes, bobcats, foxes... all the way down to bats. She has written manuals, articles and given classes about wildlife rehabilitation.

Cummins has gone through the Police Academy and Humane Academy to become a Humane Officer. Defendant has been trained to properly investigate and document animal cruelty and neglect. She gives presentations to law school students as part of the Animal Legal Defense Fund about animal cruelty and neglect cases. She is on the Humane Society of the United States' National Disaster Animal Response Team that aides in animal cruelty and neglect cases.

June 19, 2010 Appellant flew to Texas at her own expense to be an intern at BWS for two weeks. Cummins was to receive advanced training in bat care. Instead Cummins merely fed baby bats and cleaned.

While Cummins was there she witnessed animal cruelty, animal neglect, violations of the Health Code, Animal Welfare Act, Texas Parks & Wildlife regulations besides other violations of law.

Cummins left the internship early after ten days and reported Appellees to authorities giving detailed written reports along with photos and videos. Plaintiffs were investigated by authorities and violations were found. After Cummins reported Plaintiffs to authorities, Plaintiffs filed this frivolous and malicious defamation and breach of contract claim against Cummins in retaliation.

Appellee Lollar is a wildlife rehabilitator caring only for bats in Texas. She admitted in sworn testimony that she has not gone past the ninth grade and has never taken a class in animal care instead learning everything through “trial and error.” She admitted that she performs surgery on bats even though she is not a veterinarian. She publicly shows photos and videos of herself performing amputations, episiotomies, dental extractions and giving rabies vaccinations.

Plaintiffs originally sued Cummins for defamation and breach of contract over what Cummins, other named individuals, anonymous individuals and un-manned robots posted on the Internet about Plaintiffs. Plaintiffs also claimed that Cummins’ fair reports to authorities were defamation as well as items written by Lollar herself and items written by government agencies.

Trial in the matter took place June 2012. Trial court Judge William Brigham ruled for the Plaintiffs ordering Cummins to remove items in Plaintiffs' Exhibits 17 and 18, i.e. items on Cummins' website, items written and posted by others on others' websites which Cummins does not control, items written by anonymous individuals, items written by government agencies, items written by Plaintiffs and items posted by unmanned robots. Judge 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 for attorney's fees for an initial grand total of \$6,186,700, C.R. Volume 5, pg 66, lines 17 - 21.

Plaintiffs' attorney Randy Turner wrote the final order and sent it to Judge Brigham's personal residence. The order was signed August 27, 2012 stating that Cummins must remove 47 items. Cummins must remove reports made by government agencies obtained through legal information act requests about Plaintiffs. Cummins was further ordered never to post a video she took with permission of Lollar trying to perform an episiotomy. The final signed order which Plaintiffs' attorney wrote actually only included items in Exhibit 17 and not 18 or 19.

Defendant Cummins filed an appeal of the final trial court order and requested the Judge to write and sign an order on “Facts and Findings.” Instead Plaintiffs’ attorney Turner wrote the “Facts and Findings” and Judge Brigham signed it. Turner wrote every order which Judge Brigham signed without making one edit.

SUMMARY OF THE ARGUMENT

In bringing this lawsuit, Appellees sought to control and punish public discourse and fair reports to government agencies about Appellees. Plaintiffs have a history of using lawyers to punish fair reports to authorities. In 1999 when a rabid bat bit a toddler on the cheek directly next to Lollar’s building and the City complained, Lollar hired another animal rights attorney Donald Feare to threaten to sue the City of Mineral Wells, Texas if they gave the complaint any merit, Plaintiffs’ Exhibit 17, pg 29, paragraph 3¹ “It is my hope that the city will take the intelligent and considered course treating the complaint as groundless. Continued negative publicity and/or a protracted legal battle would ill-serve either party.” The city backed down. Plaintiffs tried to do the same in this case with Defendant.

¹ http://www.animaladvocates.us/batWorldLawsuit/Bat_World_Sanctuary_Threatens_To_Sue_City_Of_Mineral_Wells.pdf

Appellees chose to become publicly involved in the issue of care of bats by offering themselves as an “expert” and by offering an internship to the public for a few years.

Lollar claims to have been defamed by Cummins’ and others’ posts on the Internet. Pre-trial the only statement which Lollar stated was defamatory was “she gives rabies vaccinations.” In deposition Lollar admitted she gave an intern a rabies vaccination. Cummins was not told of any other specific supposedly defamatory statements before trial. Cummins had in fact offered to correct or delete any item which was incorrect C.R. Vol. 3, pg 68, lines 3-6. Appellees never replied and therefore did not try to mitigate the issues.

In the middle of the trial Defendant was handed three large notebooks i.e., Exhibits 17, 18 and 19 which included everything Cummins had supposedly ever written about Lollar, items written by government agencies, items written by Lollar, reports made to government agencies, items written by named other individuals, items written by anonymous individuals and items posted by robots. No specific statements were noted as defamatory pre-trial or during the trial. Appellant only received the

specific allegedly defamatory statements post trial in the form of the signed court order.

In trial Appellees had the burden of providing falsity for two independent reasons. First, Plaintiffs are a limited-purpose public figure for purposes of discussion of bats, bat care and laws pertaining to animals. Published media pieces discuss Lollar as a bat rehabilitator as do her public website. Lollar states in her manual that she is the “world’s leading expert on captive care and captive propagation of insectivorous bats” Plaintiffs’ Exhibit 3, pg 203. She states “BWS is recognized as the world’s leader in bat care standards and cutting-edge rehabilitation treatments used worldwide” back cover of same. The media items were published years before Cummins ever met Lollar. Second, Lollar has challenged statements made by Cummins on issues of public concern, and Plaintiffs in such cases bear the burden of proving falsity.

This brief will show that Appellees have not produced competent evidence that the statements of which she complains meet the legal standard for defamation. The court order identified 47 supposedly defamatory statements and files. Appellees bear the burden of demonstrating that each one meets all four elements of defamation, Tex.

Civ. Prac. & Rem. Code § 73.001 - (1) a statement of fact; (2) of and concerning Plaintiffs; (3) capable of defamatory meaning; and (4) was false. They also must prove that Defendant wrote the statements.

Appellees have not even proved that Cummins made the statements. Some of the 47 items include a non-copyrighted manual written by Lollar herself, complaints made about Lollar by government agencies and complaints made by others about Lollar.

This brief will also show that Appellees have also not produced competent evidence to support a claim for breach of contract. The essential elements of a breach of contract cause of action that must be proven are, (1) There is a valid contract; (2) the Plaintiffs performed or tendered performance according to the terms of the contract; (3) the Defendant breached the contract; and (4) the Plaintiffs sustained damages as a result of the breach. Plaintiffs failed to prove any of the four elements of breach of contract.

Besides not proving the elements of defamation and breach of contract Plaintiffs admitted at trial they had no proof of any damages or proof of any causation. The court's order is also overly broad. It contains prior restraint

which is unconstitutional. The monetary award and legal fees are excessive.

The trial court erred in granting judgment for Plaintiffs. Appellant asks this Court to reverse and render judgment for Appellant.

ARGUMENT

The trial court ruled in favor of Appellees in their claims for defamation and breach of contract. Appellant discusses the issues presented in the order below.

I. Standard of Review.

This court reviews the District Court's order granting judgment against Appellant. A judgment should not be granted when the Plaintiffs have not shown the elements of defamation or breach of contract.

II. Appellees Bear the Burden of Proving Defamation, Falsity.

Although truth is sometimes an affirmative defense that defamation defendants must provide in a defamation case, in this case, Appellees bear the burden of proving defamation, falsity. That is so for two independent reasons: (1) Appellees are a limited-purpose public figure, and (2) the allegedly defamatory statements involve matters of public concern. Despite well established law and an overwhelming and uncontested factual record,

the trial court mistakenly granted judgment on each of these grounds. That decision should be reversed.

Issue No. 1 Restated: Were Appellees entitled to judgment because Appellees were a limited-purpose public figure with respect to their voluntary and public participation in animal and bat care?

A. Appellees are a limited-purpose public figure

There are cases where the issue of public-figure status may be a close call. This case is not one of them. Whether a defamation plaintiff is a limited-purpose public figure is a pure question of law. *See WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998), *see Carla Main et al v H. Walker Royall*, No. 05-09-01503-CV, 2010 Tex. App. Three factors guide the analysis: 1) whether there was a public controversy; 2) whether the plaintiff played “more than a trivial or tangential role” in the controversy; and 3) whether the alleged defamation related to her role in the controversy. All three are satisfied here.

Defendant stated in trial that Plaintiffs are a limited purpose public figure. Plaintiffs’ response was C.R. Volume 5, pg 64, lines 6 - 12,

“Defamation -- A person can’t be elevated to a limited purpose public figure by defamation. That is, you can’t defame somebody and then everybody finds out about it and then everybody knows about the -- the allegations that have been made and then claim that they’re now a public figure because of your defamation.”

Plaintiffs were a limited purpose public figure years before Defendant ever went to BWS.

Public Figure Factor 1: Appellees Lollar, BWS were a public controversy before Cummins ever commented about them

A “controversy” is “public” if “people are discussing it and people other than the immediate participants in the controversy are likely to feel the import of its resolution.” *WFAA*, 978n S.W.2d at 571, *see also Carla Main et al v H. Walker Royall*, No. 05-09-01503-CV, 2010 Tex. App. That requirement is easily satisfied here.

a. Appellees’ care of bats was and still is the subject of local and statewide discussion.

Amanda Lollar and BWS were the subject of local and state-wide debate and discussion years before Defendant interned at BWS. All told, the controversy was covered by at least 20 articles, editorials and books prior to the publication of comments by Defendant. Plaintiffs’ own Exhibits presented at trial prove this.² All of the articles and books mentioned

² Plaintiff's Exhibit 1, “Captive Care and Medical Reference for the Rehabilitation of Insectivorous Bats,” Exhibit 3, “Standards and Medical Management for Captive Insectivorous Bats,” Exhibit 5, “The Bat in My Pocket,” Exhibit 6, “Bats in the Pantry,” Exhibit 7 “BWS Fall/Winter 2011,” Exhibit 8, “Bat Conservation International Summer 1999,” Exhibit 10 “Texas Parks & Wildlife August 2007,” Exhibit 11 “Bat Conservation International Fall 2004,” Exhibit 13 “Bat Conservation International Summer 2000,” Exhibit 14, “Radical Virtues,” and Exhibit 15, “Our Best Friends Autumn 2009.”

Appellees by name. This level of media exposure renders the controversy a very “public” one indeed.

The First Court held that because a controversy about local development plans and financing had “played out in the local media” in approximately nine published articles, that the property owners’ association board president was a limited-purpose public figure. *See Vice v. Kasprzake*, No. 01-08-00168-CV, 2009 Tex. Appe. LEXIS 7725, at *31 (Tex. App.--Houston [1st Dist.] Oct. 1, 2009, no pet.h.) If nine articles show a public controversy, more than 20 certainly suffices.

b. The impact of the controversy would be widely felt.

In determining whether a controversy is public, courts also ask whether the possible resolution of the conflict will impact more than just its immediate participants. *See WFAA*, 978n S.W.2d at 571. The controversy at issue here had and still has potentially far-reaching effects throughout the state. Plaintiffs’ bats have tested positive for rabies. Plaintiff also stated she intends to treat bats with White Nose Syndrome which is also contagious. This is an issue of public safety and concern which affects more than just local participants. These specific bats are migratory bats which can spread disease outside of Texas throughout the world. Thus the

controversy itself affects not only all of the citizens of Texas, but the rest of the United States and the world.

c. The proper inquiry is whether Lollar, BWS were a limited purpose public figure at the time Cummins posted comments in 2010-2012.

In this situation it is clear that the public controversy existed before Cummins' comments were made. The issues addressed in Cummins' comments were being discussed in a public forum prior to Cummins posting them on the Internet. People have been complaining about Appellees to government agencies for over 18 years.

Public Figure Factor 2: Lollar played much “more than a trivial or tangential role” in creating the controversy.

Lollar did not just play a significant role in an ongoing controversy; she had a significant role in creating the controversy. It is undisputed that Lollar founded BWS and published a manual on the care of bats in 1994. Lollar in her book Plaintiffs' Trial Exhibit 3, pg 203 states she is the “world's leading expert on” “bat care” and has “trained interns and biologists.” Lollar created the internship program and invited Cummins to attend. Cummins' comments on the Internet were about what she witnessed during the internship. A person like Lollar who participates in “the events creating the controversy” increases their risk of public exposure. *See Dudrick v.*

Dolcefino, No. 14-96-01181-CV, 1998 Tex. Appe. LEXIS 7682, at 25 n.11 (Tex. App.--Houston [14th Dist.] Dec. 10, 1998, pet.denied) (not designated for publication), see *Carla Main et al v H. Walker Royall*, No. 05-09-01503-CV, 2010 Tex. App.

Public Figure Factor 3: The supposedly defamatory statements were about the controversy which Lollar voluntarily helped create.

The final factor in the limited-purpose public figure inquiry is whether the purported defamatory speech concerned the same controversy in which the Plaintiffs participated. *WFAA*, 978 S.W.2d at 571. Appellees meet this factor; Lollar does not dispute that the alleged defamation relates to her care of bats, activities at BWS, what Cummins witnessed in the internship program, and Appellees' role in that controversy.

In sum, Appellees satisfy all three of the factors required to find that they are a limited-purpose public figure with respect to their involvement in the internship program at BWS and bat care in general. Appellees therefore have the burden of proving falsity. Because Appellees offered no contrary evidence, the trial court erred in granting judgment to Plaintiff.

Issues No. 2 Restated: Were Appellees entitled to judgment for alleged defamation about bat care, events witnessed at a bat internship at BWS made about “matters of public concern”?

B. Appellees also bear the burden of proving falsity because the allegedly defamatory statements address matters of public concern.

Even if Appellees were not a limited-purpose public figure, which they are, they still would bear the burden of proving falsity for the independent reason that the First Amendment shifts the burden of proof in defamation cases where, as here, a defendant publishes allegedly defamatory statements about an issue of public concern. *See BE K Constr. Co. v. NLRB*, 536 U.S. 516, 534 (2002).

1. The allegedly defamatory statements were about matters of public concern.

On every level of analysis, Defendant's criticism of Appellees involves issues of public concern. Defendant's comments criticize Plaintiffs' care of bats which are the most common Rabies Vector Species (RVS) in the US. Texas has more rabid bats than any other state in the nation. Most rabid bats are found in North Texas where BWS is located. Rabies is a fatal disease. Fatal human diseases, public safety are "matters of the highest public interest and concern."

September 1999 a bat which later tested positive for rabies bit a toddler on the cheek directly next door to BWS's building located at 115 N.E. 1st St. in Mineral Wells, Texas, Plaintiffs' Exhibit 22, pg 1 - 2. The mother

complained and City investigated the incident. As per documents Defendant received in a state information act request and posted online Defendant's Exhibit 24, the City came to the decision to order Plaintiffs to "get the bats out of town." Plaintiffs' sanctuary is in the very center of town.

Plaintiff Lollar got wind of this decision and hired attorney Donald Feare. Feare wrote a letter threatening to sue the City if they did not find the complaint "groundless." The City backed down and did nothing. The State Health Department issued a rabies alert and ordered all people in Palo Pinto County to exclude bats from their building. Plaintiffs did not comply with the order.

Defendant commented about Plaintiffs on the Internet in the wake of a public controversy, underscoring the degree to which it is about a matter of public concern. "Speech made in the context of ongoing commentary and debate in the press is of public concern to the public." *Scott v. Godwin*, 147 S.W.3d 609, 618 (Tex. App. -- Corpus Christi 2004, no pet.); *see also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 466 (1995) (holding speech was on matter of public concern partly because it was made "to a public audience").

In the trial court Plaintiffs failed to explain why Defendant's comments were not matters of public concern. Most of the statements Defendant made were about public concern, namely Plaintiffs' care of bats which are a RVS. The trial court erred in granting judgment to Plaintiffs when most of Defendant's statements were "of public concern."

Issue No. 3 Restated: Did Appellees present "more than a scintilla" of evidence that any of the supposedly defamatory statements meet all four of the following criteria of defamation?

Issue No. 4 Restated: Did the trial court err in granting Appellee's judgement against Appellant for defamation?

III. The trial court erred in granting judgment to Appellees because there is no evidence Appellant wrote a single defamatory statement about Appellees.

Cummins demonstrated to the trial court that Plaintiffs should not have been granted judgment on Plaintiffs' libel claims because there is no evidence that any of the 47 statements they identified were (1) a statement of fact; (2) of and concerning Plaintiffs; (3) capable of defamatory meaning; and (4) was false. Plaintiff also must prove that Defendant wrote the statement and there were actual damages, C.R. Volume 6, pg 46 lines 3-25, 47, 48, 49, 50 lines 1-16. Because all six elements must be satisfied with respect to each allegedly defamatory statement, a failure of proof of

any one of them is fatal to Plaintiffs' libel claim with respect to that statement.³

Plaintiffs were required to come forward with "more than a scintilla" of evidence regarding each ground which Appellant claimed. Tex. R. Civ. P. 166a(i); see also *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex.2003). Evidence constitutes "more than a scintilla" if it "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharms. V. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). The evidence introduced by Plaintiffs fails to carry this burden with regard to a single one of the supposed defamatory statements.

Plaintiffs' decision to include so many individual statements in the final order unfortunately means that Appellant must discuss all of them in this brief. To assist the Court, Appellant has compiled all 47 of the statements in a single table and assigned to each statement an identifying number, Tab

1.⁴

³ The first three elements are necessary for any defamation claim. The fourth one, falsity, is Plaintiffs' burden if they are a public figure or if the topic is one of public concern. As shown above, those requirements are satisfied here, so Plaintiffs bear the burden on falsity as well.

⁴ To assist the Court in referring to specific statements addressed in their brief, each of the statements is individually numbered and will be referred to herein by its "item number," e.g. "Item 5."

Appellant recognizes that reviewing Plaintiffs' evidence (or the lack thereof) with respect to 47 separate statements is a formidable task. Nevertheless, Appellant knows that this Court will recognize its "obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v Consumers Unions of U.S., Inc.*, 466 U.S. 485, 499 (1984) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. at 284-86). When the Court makes that examination here, it will find that none of the statements relied upon by Plaintiffs comes close to meeting the rigorous legal standard for defamation. Judgment should have been rendered for Appellant.

Below, Appellant first discusses the law governing the four main elements on which Appellant has moved: (1) a statement of fact; (2) of and concerning Plaintiffs; (3) capable of defamatory meaning; and (4) was false.

Appellant then discusses the statements as to which Plaintiffs failed to produce any evidence (objectionable or otherwise) and show that the trial court erred in granting judgment to Plaintiffs. Appellant then proceeds to review each of the statements that Plaintiffs' claim are defamatory,

organizing them into groups where possible, and demonstrating that Plaintiffs have failed to meet their burden for each and every statement by failing to show that each satisfies all elements of defamation.

A. Appellees must offer competent evidence as to each of the four independent elements to prove defamation.

1. Most of the statements cannot be defamatory because they are not verifiable assertions of fact.

The U.S. Supreme Court holds that a statement cannot be defamatory if it is not a statement of fact that can be verified. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990). If a statement is not “objectively verifiable,” then it is opinion that is wholly protected under the First Amendment and cannot be the subject of a defamation claim. This Court has held that it is “[a]n essential element of defamation ... that the alleged defamatory statement be a statement of fact rather than opinion.” *Shaw v. Palmer*, 197 S.W.3d 854, 857 (Tex. Appl.--Dallas 2006, pet. denied).

Milkovich also establishes that opinions are completely protected if the factual referents are disclosed by the speaker. After *Milkovich*, the only “opinions” that are not protected are statements that look like opinion but imply the existence of *undisclosed* facts. See *Milkovich*, 497 U.S. at 31; *Bentley v Bunton*, 94 S.W.3d 561, 580-81 (Tex. 2002). When a person

discloses the factual basis for her opinion, the opinion cannot be defamatory, because the reader can decide for himself whether he agrees. See *Riley*, 292 F.3d at 291-292 (because the defendant's statement followed a "summary of the evidence upon which is [was] based" it was constitutionally protected opinion); *Partington*, 56 F.3d at 1156 ("The court of appeals that have considered defamation claims after *Milkovich* have consistently held that when a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment."); *Moldea v N.Y. Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994) ("the reader understands that such supported opinions represent the writer's interpretation of the facts presented"). In this case Appellant's statements are linked to supporting files written by others including government agencies.

The U.S. Supreme Court has long acknowledged that an author's expression of opinion on matters of public concern is not actionable as defamation. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("Under the First Amendment there is no such thing as a false idea."); cf. *Milkovich*, 497 U.S. at 20 ("a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection"). The main principle of

America's commitment to free speech is that "expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values." See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (internal quotations omitted).

Plaintiffs should not have been granted judgment on the defamation claim because Plaintiffs could not have produced (and did not produce) any competent evidence that these statements of Cummins' opinion were statements of verifiable fact. Some of the statements were privileged statements taken from reports which Defendants made to government agencies. The one video in question was taken and shared with permission and consent of Plaintiff therefore it is privileged. The other statements are linked to documents written by government agencies which show the factual basis of her opinion. Therefore they are not defamatory.

2. A statement can defame a person only if it is "of and concerning" him; some of the statements at issue are not about Plaintiffs at all.

A statement can only defame a person if it is *about* that person. See *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 893 (Tex. 1960). Thus, the "of and concerning" requirement "stands as a significant limitation on the universe of those who may seek a legal remedy for communications they think to be false and defamatory and to have injured them." *Kirch v. Liberty*

Media Corp., 449 F.3d 388, 399-400 (2d Cir. 2006). Of and concerning is a “threshold, and constitutional, matter.” *Diaz v. NBC Universal, Inc.*, No. 08-1190-cv, 337 Fed. Appx. 94, 96 (2d Cir. 2009).

In *Newspapers, Inc.*, the Texas Supreme Court analyzed the required connection between the allegedly defamatory statement and the defamation plaintiff and held that the connection must be very tight indeed. 339 S.W. 2d 890. In this case Plaintiff Matthews claimed the article defamed him because it said that the “operators of the Texas Body Shop” were operating an illegal insurance fraud ring, and that contained the “implication that he, Matthews, as true owner and operator of the Texas Body Shop, was operating the shop as a front for Rocha and Hisbrook in their illicit activities.” *Id.* at 894. The court rejected this reasoning, finding that the defamatory statement must “point to the plaintiff and *to no one else.*” *Id.* (emphasis added.).

Here, most of the statements identified by Plaintiffs do not point to them at all. Rather, they refer to Plaintiffs’ attorney or others--not to Plaintiffs. Of the 47 statements ten do not mention or refer to Appellees in any way.⁵ They certainly do not point to Appellees “and to no one else.” As such, they

⁵ See Items. 1, 5, 6, 12, 14, 16, 18, 22, 33, 36.

do not satisfy the *Newspapers* “of and concerning” standard. See *id.*; see also *Harvest House Publishers v. Local Church*, 190 S.W. 3d 204, 212-13 (Tex. App.--Houston [1st Dist.] 2006, pet. denied).

In the trial court, Plaintiffs did not offer up any evidence on the “of and concerning” requirement which must be satisfied as to each one of the 47 statements. The comments which Defendant did make about Plaintiffs clearly refer to Appellees.

3. Most of the statements relied upon are not capable of defamatory meaning because they are not specific and offensive statements about Plaintiffs.

Whether a statement is capable of defamatory meaning is an issue of law. See *Musser v. Smith Protective Servs., Inc.*, 723 S.@.2d 653, 654-55 (Tex. 1987). Ordinary statements about legal business dealings are not capable of defamatory meaning. Non-specific statements are not capable of defamatory meaning. See, e.g. *Henriquez v. Cemex Mgmt., Inc.*, 177 S.W.3d 241, 252 (Te. App.--Houston [1st Dist.] 2005, pet. denied); *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 129 (1st Cir. 1997). Here, most of the statements identified by Plaintiffs are not capable of defamatory meaning. The statements that are not about Plaintiffs are not capable of defamatory meaning as to them. See Items 1, 5, 6, 12, 14, 16,

18, 22, 33, 36.; see, e.g., *Double Diamond, Inc. v. Van Tyne*, 109 S.W.3d 848, 854 (Tex. App.--Dallas 2003, no pet.).

4. Plaintiffs have failed to show that any statement is false.

If this Court finds either that Plaintiffs are a limited-purpose public figure or that the allegedly defamatory statements were made by Defendant on matters of public concern, then Plaintiffs also have the burden of proving falsity. Plaintiffs have not met the burden of introducing evidence that each statement was false or not substantially true, either because they have not addressed the truth or falsity, or because their evidence shows the statement to be true, or because their evidence is insufficient. Indeed, Plaintiffs have not met their burden on any statement at all.

As long as a statement is substantially true, it is not defamatory. Minor inaccuracies do not render a statement false for defamation purposes. See, e.g., *Freedom Commc'ns, Inc. v. Coronado*, 296 S.W. 3d 790, 800-801 (Tex. App.--Corpus Christi 2009, no pet.) (courts should overlook minor inaccuracies "so long as 'the substance, the gist, the sting, of the libelous charge' is justified" (quoting *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991))).

B. Plaintiffs were not entitled to judgment as to those posts that Plaintiffs failed to mention and statements that Plaintiffs refused to specifically identify.

Plaintiffs bear the burden of identifying and supporting Plaintiffs' specific claims of defamation. For all of the allegedly defamatory statements Plaintiffs provided no evidence whatsoever of any of the elements of defamation. Plaintiffs did not even specifically identify the allegedly defamatory statements before or during trial. Defendant was not given a copy of the "specific" allegedly defamatory items until *after* the trial concluded. There was no way that Defendant could have possibly defended statements without knowing what they were. Plaintiffs' attorney Randy Turner wrote the final order and mailed it to Judge Brigham's home for him to sign. Defendant did not see the items until after the Judge signed the order. Defendant was not allowed the opportunity to defend herself except here in the Appeals Court.

In trial Plaintiffs introduced into evidence Exhibits 17, 18 and 19. Initially Plaintiffs stated only the items highlighted in yellow were defamatory. Later in trial they stated that was not correct. Moments before the Judge ruled Plaintiffs stated they didn't mean to include Exhibit 19, C.R. Vol 6 pg 64, lines 19-24, "I misspoke earlier. We are not asking that Exhibit -- that that

the statements in Exhibit 19 be ordered to be taken down off the Internet. Those were reports to government agencies.”

These exhibits were three large three-ring binders. Exhibit 17 was supposedly everything Defendant had posted about Plaintiffs. This included items written by others which Defendant merely copy/pasted in quotations. It also included files received as a result of public information act requests which Defendant loaded up to her website and linked to text in the website. 99% of what Defendant posted was actually written by others. This folder was over an inch thick. Defendant was not able to authenticate all the material in trial. All of Exhibits 17, 18 and 19 were never authenticated.

Exhibit 18 was everything other known people, unknown people and robots had posted about Plaintiffs on websites Defendant did not control. The exhibit was never authenticated. It could never be authenticated because the authors were not a party to this case. Plaintiffs never sent subpoenas to get the true identities of the authors. Some were known with their names in the actual items. Plaintiffs instead chose to sue Defendant for what others had written.

Exhibit 19 were the fair and privileged reports which Defendant made to government agencies.

Plaintiffs cite Exhibits 17, 18 and 19 as containing statements about Plaintiffs but fail to specifically identify the statements and fail to provide any evidence of any of the elements of defamation. Accordingly judgment should not have been granted to Plaintiffs as to all of those Exhibits. *See, e.g. Holloway v. Tex. Elec. Util. Contr., Ltd.*, 282 S.@.3d 207, 212 (Tex.App.--Tyler 2009, no pet.)(holding no-evidence summary judgment response was inadequate to raise fact issue when party failed to discuss challenged element anywhere in response); *Plotkin v. Joekel*, No. 01-06-00624-CV, 2009 Tex. App. LEXIS 7709, at *42-44 (Tex. App.--Houston[1st Dis.] Sept. 25, 2009, pet. denied) holding no-evidence summary judgment properly granted where response did not present evidence of each required element of claim.

IV. None of the Specific Statements Identified by Appellees Defame Them

Plaintiffs don't actually claim as defamatory Defendant's descriptions about what Plaintiffs did or facts about them. This is Plaintiffs' defamation claim. Under the law it is not a claim of defamation at all. Defamation plaintiffs can recover when someone publishes a false statement of fact about them that is capable of defamatory meaning. Theories, conclusions, dramatic portrayals, are not actionable. As demonstrated below, none of

the supposedly defamatory statements Plaintiffs cite can support a claim for defamation.

Appellant will now go through each of the 47 supposedly defamatory statements by number according to the court order. Duplicates will refer to previous identical item. Appellant will show that not one item meets all the elements of defamation.

A. Supposedly Defamatory Statements 1 - 47.

1. “They breed animals in the facility.”

Falsity: Plaintiffs introduced no evidence that the statement is not true. Plaintiffs introduced evidence that the statement is true. Plaintiffs admitted into evidence Exhibit 3 which is a manual titled “Standards and Medical Management for Captive Insectivorous Bats.” Appellee states in the book that her bats are breeding, pg 82 paragraph one, “This author has maintained a captive reproductive colony of between 40 and 70 Brazilian free-tailed bats (*T. brasiliensis*) for the past 16 years. This colony has produced third generation offspring (see table 8-1)” pg 83 paragraph one, lines 1-4, “Copulation has been observed both inside and outside of roosting pouches guarded by territorial males in these captive colonies,” pg 84 Table 8-1 titled “Select Data on a Captive Reproductive Colony of

Tadarida brasiliensis” captioned “Select free-tailed bats (*T. brasiliensis*) in BWS’s non-releasable captive colony that have reproduced over the last 16 years,” “Four females in the captive colony are pregnant at the time of this writing.” This book was written in 2010.

Defendant introduced into evidence Exhibit 23 an article co-written by Appellees titled “Observations on the Reproductive Behavior of Captive *Tadarida Brasiliensis Mexicana*.” In the article Appellee describes mating and breeding behavior she has observed in her facility. Therefore the statement is true. They breed animals in the facility.

2. **“Pretty ironic for this group to certify BWS when the health department told her to leave town and they had to gut the building and remove her belongings.”**

Falsity: Plaintiffs introduced no evidence that the statement is not true. Plaintiffs introduced evidence that the statement is true. Plaintiffs admitted into evidence a sub-directory in Defendant’s main website “<http://www.animaladvocates.us/batWorldLawsuit>” as Exhibit 17. This sub-directory contains 178 documents/files which are linked to the text in the index page. The index page also links to other websites. Because Plaintiffs admitted into evidence the URL of the sub-directory, it also includes all files linked to that URL as they are a part of it. In this sub-directory is a

document from the Health Department stating that the City Manager is ordering Plaintiffs to “get the bats out of town.” This is also Defendant’s Exhibit 24, pg 3, paragraph 1. There is an email from Plaintiffs’ neighbor to the City Manager, Defendant’s Exhibit 27, pg 2 stating “Rusher spent Saturday gutting the building” and “Robert also told me that they are working on the inside of the building and trying to clean it up and also get the rest of Amanda Lollar’s belongings out of the building.”

Of and concerning: This statement is actually about the Global Federation of Animal Sanctuaries which supposedly “verified” BWS.

Privileged: The two linked files are government communications received in a state information act request. They are fair reports made by and to the City of Mineral Wells.

Made by Defendant: Defendant did not write the linked files. Defendant merely summarized and linked to them giving the reader the ability to form their own opinion.

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.”

Falsity: Plaintiffs introduced no evidence that the statement is not true. Plaintiffs introduced evidence that this statement is true. This information comes directly from veterinary records Plaintiff produced in discovery. The contents of the veterinary files were linked in the text of Plaintiffs' Exhibit 17, pg 41, paragraph 4. The last part of the statement is what Defendant witnessed at BWS.

Made by Defendant: Defendant did not write the veterinary records. Plaintiffs' veterinarian wrote the records. Defendant merely summarized and linked to them allowing the reader to form their own opinion.

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."

Falsity: Plaintiffs introduced no evidence that the statement is not true. Plaintiffs introduced evidence that the statement is true, Exhibit 3, pg 111. Bat experts have stated in books that Plaintiffs' method is inhumane. The bats can suffocate to death.⁶

Defendant witnessed Plaintiff administer the gas in this improper manner. Plaintiff does not use a nebulizer to administer the gas with the

⁶ *Bats in Captivity*, Volume 1, 2010, "Biological and Medical Aspects," Dr. Deborah Cottrell DVM, edited by Susan M. Barnard, pg 306.

proper ratio of Isoflurane and oxygen. The bat would stop breathing completely or awaken during surgery. Photos of this surgery with the bottle of Isoflurane and cotton ball visible were admitted into evidence, Defendant's Exhibit 36.

5. "He should not be working for free for someone who commits animal cruelty."

Of and concerning: The "He" in this statement is Turner attorney for Plaintiffs. The statement is not about Plaintiffs.

Statement of fact: This is Defendant's personal opinion that an animal rights attorney should not be working for someone whom she believes commits animal cruelty. Defendant believes that Plaintiffs' acts constitute animal cruelty based on the legal definition of "animal cruelty."

Privileged: Defendant reported Plaintiffs for animal cruelty and neglect. The Texas Board of Veterinarians stated that Plaintiff committed "animal cruelty." Defendant merely copy/pasted the statements made in privileged reports.

Falsity: Plaintiffs introduced no evidence that the statement is not true. Plaintiffs introduced evidence that the statement is true, Exhibits 3 and 17.

6. "I doubt he'll be speaking about this embarrassing little case where he is actually representing someone who commits animal cruelty and neglect."

Of and concerning: The “he” in this statement is Turner. Plaintiff is not specifically identified.

Statement of fact: This is the opinion of Defendant. Defendant witnessed Plaintiff commit acts which meet the definition of animal cruelty and neglect.

Privileged: Defendant reported Plaintiffs to government agencies for animal cruelty and neglect. They are fair and privileged reports and statements. Defendant posted her fair reports online along with summaries of the reports.

Falsity: Plaintiffs introduced no evidence that Plaintiffs did not commit animal cruelty.

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.”

Falsity: Plaintiffs introduced no evidence that show this is false. Plaintiffs admitted in sworn deposition testimony that Plaintiff received money from Bradshaw’s group and bought a Honda Eclipse. Plaintiffs’ Exhibit 17 includes a summary of the deposition.

Defamatory Meaning: Stating that someone took money and bought a car is not defamatory.

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.”**

Statement of fact: This is the opinion of Defendant that Plaintiff’s surgical “practices” are “night and day” compared to Defendant’s veterinarian’s surgical practices.

Defamatory Meaning: Stating that someone does not wash their hands before surgery is not defamatory.

Falsity: Plaintiffs introduced no evidence that Plaintiffs washed her hands or wore surgical garments when she performs surgery. Defendant’s Exhibit 36 includes a photo of Lollar not wearing surgical garments while performing surgery. Also C.R. Volume 1, pg 68, line 15, Plaintiff Lollar states, “My hands are dirty in this scene.”

9. **“Just confirmed that Amanda Lollar of BWS 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.”**

Falsity: Plaintiffs introduced no evidence that Plaintiffs obtained human and animal rabies vaccinations legally. Plaintiff introduced evidence that Plaintiff obtained the vaccinations illegally, Plaintiffs’ Exhibit 17, pg 40, last

paragraph. It is against the law for anyone other than a doctor, nurse, veterinarian or pharmacist to obtain and possess rabies vaccinations.

Plaintiff Lollar admitted to Defendant that the company that sells the vaccinations to Plaintiff think she's a doctor. Plaintiff admitted that she obtains and possesses rabies vaccinations in her sworn deposition.

Defendant confirmed this with written communication with the company that sells Plaintiff the vaccinations.

Defamatory Meaning: Defendant merely summarized an email to and from the company that sells the vaccinations and linked to it allowing the reader to form their own opinion.

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."

Falsity: Plaintiffs introduced no evidence that this statement is not true. Plaintiffs introduced evidence that this statement is true. In discovery Plaintiff gave Defendant Plaintiffs' veterinary record. This statement is taken directly from those records which were linked to this statement in Plaintiffs' Exhibit 17. Defendant did not write the veterinary records. Defendant merely summarized the records.

11. "When I was at Bat World she told me the place where she buys her rabies vaccine thinks she's a doctor."

Falsity: Plaintiff introduced no evidence that this is not true. This is what Plaintiff told Defendant. The vaccination company stated that a doctor must have their license at the address where they ship the vaccinations. See item 9.

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.”

Falsity: Plaintiffs introduced no evidence that this statement is not true. Plaintiff introduced evidence that this statement is true. This information was taken from Plaintiffs’ veterinary records. The definition of animal neglect is to not give proper care.

Statement of fact: It is Defendant’s opinion that Plaintiff committed animal neglect. Plaintiffs actions meet the legal definition of animal neglect.

13. “BREAKING NEWS!!! Amanda Lollar of BWS admits in writing that she and BWS are being forced to leave Mineral Wells because of all the complaints to the City and Health Department.”

Falsity: Plaintiffs introduce no evidence that this statement is not true. Plaintiff introduced evidence that this statement is true, Exhibit 17, pg 42, paragraph 4, “Amanda Lollar says she’s being forced out of Mineral Wells,

Texas because of complaints to the Health Dept and City. Here it is.⁷” The underlined words are a hyperlink to the file which proves this. In Plaintiffs’ “First Supplemental Response to Disclosure” Plaintiffs state they are being forced to leave Mineral Wells because of complaints to the City and Health Department, i.e. “Defendant has made it impossible for (sic) Plaintiffs’ to remain in Mineral Wells because of her rampage of complaints to the city and the health dept.”

14. “The dogs rear claws are super long. There is no way she could stand. ... She has to drag herself on cement.”

Of and Concerning: This statement is about Plaintiffs’ dog, not Plaintiffs.

Falsity: Plaintiffs introduced no evidence that this statement is not true. Plaintiff admitted in trial that the dog in question was old and had major problems with her knees and hips. Defendant’s Exhibit 36 includes a photo of the dog with long rear claws. Defendant never saw this dog stand but merely drag itself.

15. “She tells people to use Isoflurane illegally, inhumanely and unsafely in her book.”

⁷ http://www.animaladvocates.us/batWorldLawsuit/bat_world_must_leave_citysm.jpg

Falsity: Plaintiffs introduced no evidence that this statement is not true.

Plaintiff introduced evidence that this statement is true. Plaintiff admitted into evidence Exhibit 3. This manual recommends using Isoflurane illegally, inhumanely and unsafely, pg 111. Plaintiff admits she does not use a nebulizer to properly administer Isoflurane. Plaintiff admitted into evidence Exhibit 17, pg 67, paragraph 2 which discusses this inhumane and illegal method. Also included is text from the label of a box of Isoflurane which Plaintiff gave to the City of Mineral Wells, Exhibit 17, pg 78, paragraph 5,

"It clearly states 'Caution: Federal law restricts this drug to use by or on the order of a licensed veterinarian,'" "I have a book here that states specifically NOT to do this. The box says 'Since levels of anesthesia may be altered easily and rapidly, only vaporizers producing predictable percentage concentrations of isoflurane should be used.'"

Defendant witnessed Plaintiff use Isoflurane illegally.

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."

Of and concerning: The "He" in this statement is Plaintiffs' attorney, not plaintiff.

Falsity: Plaintiff introduced no evidence that this statement is not true.

Plaintiff introduced evidence that this statement is true, see previous items.

Plaintiff did indeed admit to having the human rabies vaccination, using

drugs not according to the label and indeed “proudly” admitted to performing surgery in Plaintiffs’ Exhibits 1 and 3.

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.”

Falsity: Plaintiffs introduced no evidence that this statement is not true.

Plaintiffs introduced evidence that this statement is true. Plaintiff made and posted a video of Plaintiff Lollar using tweezers to pull molars out of a conscious bat that is fighting and biting her while it bleeds. Defendant showed this video in the trial. This video is also online and part of Plaintiffs’ manual Exhibit 3. Exhibit 3, pg 125 shows Plaintiff using tweezers to pull out the teeth of a conscious bat. Plaintiffs’ Exhibit 1, pg 168, paragraph 1, she states bats should be sedated for dental extraction. Plaintiff admitted this in trial C.R. Volume 2 pg 164, lines 20 - 25.

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.”

Of and concerning: Defendant does not specify any specific person but speaks of anyone in general who would commit such acts.

Statement of fact: This is not a statement of fact but personal opinion of Defendant.

19. “Lollar is exposing people to rabies by not checking their cards.”

Falsity: Plaintiffs introduced no evidence that this statement is not true.

Plaintiff admitted she did not check Defendant’s card in trial, C.R. Volume 2, pg 157, lines 20 - 25, pg 158, pg 159,

Q. Earlier you stated that you don’t let anyone volunteer or intern at BWS unless they show their proof of vaccination card; is that true?

A. That’s true.

Q. Did I show you mine?

A. No.

Plaintiff Lollar is indeed exposing people to rabies by not checking their rabies vaccination cards before they enter the bat enclosures or handle bats.

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.”

Falsity: Plaintiffs introduced no evidence that this statement is not true.

Plaintiffs introduced no evidence to show that the specific part of the bat which Defendant was referring to that was being pulled out was not the vagina and/or uterus. The placenta was pulled out completely but Plaintiff

never showed evidence to prove that the other parts of the bat that were being pulled out were not the uterus or vagina.

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.”

Falsity: Plaintiffs introduced no evidence that this statement is not true.

Trial evidence shows this to be true. Defendant's Exhibits include the video of the episiotomy. Plaintiff clearly states “I'm gonna cut a little more. Think we're gonna need more sutures,” “Damnit,” “baby, I don't wanna get you too big but I'm gonna have to. I'm gonna have to put a suture in her,” “I'm sorry,” “I want her to stop struggling a little bit,” “I'm so sorry,” “I'm gonna have to do the other side too,” “I don't know what that was. I know I didn't stab him,” “I am soooooo sorry,” “no, it's a foot,” “I'm so sorry,” “no, it's a head,” “she's gonna prolapse,” “Damnit!,” “the opening is too big.” In Defendant's Exhibit 36 there is a photo of Plaintiff with multiple pairs of overlapping glasses. In sworn deposition testimony Plaintiff admitted that she needs to use glasses.

Defamatory Meaning: It is Defendant's opinion that someone with bad vision should not be cutting 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.”

Of and concerning: Defendant stated that Defendant Cummins looks “like crap.” This statement is about Defendant, not Plaintiffs.

23. “She's been breeding her bats illegally. She's committing fraud asking for money for a project she cannot and will not do.”

Sentence one: “She's been breeding her bats illegally.”

Falsity: See item 1. Plaintiffs’ wildlife rehabilitation permit Defendant’s Exhibit 45, pg 2, item 15 a., clearly states she is not allowed to let her bats breed. In Plaintiffs’ Exhibit 17, pg 97 is a linked email between TPWD wardens which states “Megan is concerned about the allegation that Ms. Lollar is intentionally breeding bats, which is a violation of the permit conditions,” to which the warden responds “There are bats that are reproducing at the facility.” Exhibit 17, pg 85, paragraph 8 is text from another exchange “My concern was if she is intentionally breeding and/or not taking all measures possible to prevent breeding. Thanks.”

Sentence two: “She's committing fraud asking for money for a project she cannot and will not do.”

Falsity: Plaintiffs introduced no evidence that Plaintiff is not committing fraud by asking for donations to build an assurance colony for bats with White Nose Syndrome which she is not permitted to possess.

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.”

Falsity: Plaintiffs introduced no evidence that this statement is not true.

Plaintiff told Defendant that she would buy a \$10 bag from Walmart, use it for a trip then return it for a refund.

25. “Rabies complaint against BWS. General sanitation laws, harboring high risk rabies animals, allowing them in downtown.” (The text that is underlined is a hyperlink to a pdf file)

Falsity: Plaintiffs failed to produce evidence that this is not true.

Plaintiffs produced evidence to show that this is true. This is not merely a statement but a hyperlink to a file received in a public information act request from the City of Mineral Wells. These words merely describe what is in the file. The linked file included all documents about a rabies investigation made by the City about Plaintiffs in regard to a rabid bat biting a toddler on the cheek directly next door to Plaintiffs’ building. Plaintiffs’ Exhibit 17, pg 79, paragraph 2 includes these files, also Defendant’s Exhibit 24, pg 3, paragraph 1. This incident was in the *Mineral Wells Index* newspaper September 12, 1999 which is Defendant’s Exhibit 22, pg 1 - 2 ⁸

⁸ <http://www.animaladvocates.us/batWorldLawsuit/rabidbattoddlera.jpg>

⁹. The bat tested positive for rabies. Toddler had to undergo a series of post exposure shots.

Made by Defendant: This statement is taken from the City's report. Defendant merely repeated what others wrote in the privileged report. Defendant wrote nothing in the report which was made over ten years earlier.

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."

Falsity: Plaintiffs have introduced no evidence that this statement is not true. Plaintiffs introduced evidence that this statement is true, Plaintiffs' Exhibit 17, pgs, 91, 95, 98. This statement was again taken from the results of public information act requests. Those documents were written by others years earlier. This statement is hyperlinked to documents provided to Defendant from the City of Mineral Wells¹⁰. People and government agencies have been reporting Appellees for over 18 years. In trial Plaintiff Lollar admitted that people had been reporting her for many years, C.R. Volume 3, pg 195, lines 17 - 25, pg 196, lines 1- 10;

⁹ <http://www.animaladvocates.us/batWorldLawsuit/rabidbattoddlerb.jpg>

¹⁰ http://www.animaladvocates.us/batWorldLawsuit/bat_world_sanctuary_building_complaints.pdf

Q. Do you remember that you said the people have been complaining about you and BWS?

A. I probably told you about the three people in town who -- one of them is on the city council, one of them is on the historical society, and another one owns the building right next to our wild sanctuary.

Made by Defendant: Defendant merely summarized the complaints and linked to them allowing readers to form their own opinion.

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.”

Falsity: Plaintiffs have introduced no evidence that this statement is not true. Plaintiffs have introduced evidence that this statement is true, C.R.

Volume 2, pg 27, lines 17 -19, “We began to experiment with different medications for different ailments, you know, such as, you know, infections from bite wounds.” This statement was linked to a file¹¹. Plaintiffs’ Exhibit

17, pg 82, paragraph 7 includes exact quotes made by Plaintiff about operating on bats, bats dying, also Defendant’s Exhibit 50, pg 1, paragraph

1. Plaintiff stated,

“Barbara and I have both done c-sections, amputations, etc. I've also neutered a dozen or so free-tails. Most vets won't or don't want to work on bats. If you're lucky enough to have a vet who will supply you with isoflurane and show you the basics, you've got nothing to lose by trying,” “If it dies while under anesthesia at least it had a more merciful death then it

¹¹ http://www.animaladvocates.us/batworldLawsuit/amanda_lollar_performs_surgery_on_bats_illegally.pdf

would have had otherwise. And hopefully you've learned something in the process--something that you may be able to use to save the next bat.”

Plaintiff admitted in sworn deposition that she is not a veterinarian, has never taken a class in animal care. She learned everything through “trial and error.” It is Defendant’s personal opinion that this amounts to “experimenting.”

28. “Amanda Lollar of BWS found guilty of illegally breeding bats at her facility. It is a violation of her permit.”

Falsity: See items 1 and 23.

29. “Amanda Lollar of BWS is now sending threats of extortion from Mineral Wells, Texas. Because she's sending it over the computer it's a Federal crime.”

Falsity: Plaintiffs introduced no evidence that this statement is not true.

Plaintiffs have introduced evidence that it is true, Plaintiffs’ Exhibit 17, pg 84, paragraph 3. A post was made to LAAnimalWatch.blogspot.com from a computer in BWS. The computer information of that post matched emails sent from Plaintiff Lollar to Defendant. The underlying data of the post was visible because that blog has logs. That post stated,

“Mary Cummins you are a sick woman. You're only attacking Ms. Lollar because you are losing the lawsuit. Take these pages down and all the other sites like Indy and maybe they will close <http://victimsofmisscummins.blogspot.com/to> public view and maybe they will stop digging into your sick pathetic excuse for a life.”

This is extortion which came from Lollar's computer in BWS.

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."

Falsity: See items 1 and 23. Plaintiffs introduced no evidence that this statement is not true. Plaintiffs have introduced evidence that it is true.

31. "The complaints going back 18 years were about alleged animal cruelty, animal neglect, violations of the health code and building and safety regulations."

Falsity: Plaintiffs introduced no evidence that this statement is not true. Plaintiffs have introduced evidence that it is true, Plaintiffs' Exhibit 17, entire page, also Defendant's Exhibits 17, 21, 22, 24, 25, 26, 27, 29 (reports filed by government agencies and ten individuals).

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 BWS."

Falsity: See item 31.

33. "Here is the disgusting photo of my face which they photoshopped semen onto. They then added this caption 'Yep, screw you too, Mmmmary!' They named the file 'mmmm.' This is how disgusting and childish these people are."

Of and concerning: This statement is about a friend of Plaintiffs named Dmytryk. Dmytryk posted this photo, captioned it and named the file. This is not about Plaintiff.

34. http://www.animaladvocates.us/batWorldLawsuit/Amanda_Lollar_Bat_World_Sanctuary_Breeding_Bats.pdf
“An email from the warden to Texas Parks & Wildlife stating that bats are breeding in Lollar's facility.”

Falsity: See item 1, 18.

Made by Defendant: Defendant did not write the email linked in the text. Defendant merely described the wardens' email. The reader can form their own opinion.

35. http://www.animaladvocates.us/batWorldLawsuit/amanda_lollar_1994_manual_original.pdf
“Amanda Lollar's 1994 manual which she wrote. She stated that she euthanizes bats by freezing them to death which is illegal and inhumane according to the AVMA and bat experts.”

Falsity: Plaintiffs introduced no evidence that this statement is not true. Plaintiffs did introduce evidence showing that this is true, Plaintiffs' Exhibit 17, pg 34, last paragraph. This statement was linked to a true and correct copy of Plaintiff Amanda Lollar's first edition 1994 non-copyrighted manual¹². The manual clearly states “This manual may be duplicated in part or in whole.” This manual states pg 47,

¹² http://www.animaladvocates.us/batWorldLawsuit/amanda_lollar_1994_manual_original.pdf

“Euthanasia,” “Most bats will enter torpor, a natural deep sleep, when placed in the refrigerator. After several hours, the bat should be in a deep sleep, and can be placed into the freezer. Because many bats can survive freezing temperatures, it will need to remain in the freezer for at least a week before disposal.”

As per the American Veterinary Medication Association Guidelines on Euthanasia¹³ this is inhumane animal cruelty which is illegal, Defendant’s Exhibit 31.

Made by Defendant: Defendant did not write the manual. Plaintiff wrote the manual. Therefore it can never be defamation by Defendant. Defendant merely truthfully summarized what was in the manual.

36. <http://www.animaladvocates.us/batWorldLawsuit/mmmm.jpg>

“A photo that defendants made of me. They took a photo of my face and photoshopped semen on my face.”

See item 33.

37. **“She's the one who handles rabid bats with her bare hands.”**

Falsity: Plaintiffs introduced no evidence that Plaintiff Lollar has never handled rabid bats with her bare hands. Plaintiffs have introduced evidence that Plaintiff Lollar has handled rabid bats with her bare hands, C.R.

Volume 3, pg 176, lines 4 - 13;

¹³ <https://www.avma.org/KB/Policies/Documents/euthanasia.pdf>

Q. Earlier we talked about a video which I posted in which you're holding a bat in your bare hands and it appeared to have neurological symptoms. Do you remember this?

A. Yes.

Q. Earlier you stated that it had neurological symptoms. Do you agree that when I was videotaping you, you were showing me the signs of rabies?

A. Yes.

Plaintiff Lollar gave Defendant permission to take and share video of Lollar holding what Lollar states to be a bat exhibiting the signs of rabies in her bare hand. Lollar explains the symptoms of rabies in the video.

Defendant admitted into evidence many video files but they are not in the court record for some reason. Here is a link to the video [http://](http://www.youtube.com/watch?v=cZL7fioluwM)

www.youtube.com/watch?v=cZL7fioluwM

Defamatory Meaning: It is not illegal to hold a rabid bat with your bare hands.

38. "Update: Health Dept. forced BWS to leave town. In January they gutted the building, cleaned it and removed her property."

See item 2.

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

Falsity: See item 37. Plaintiffs introduced no evidence that Plaintiff Lollar does not use her bare hands to handle bats. Plaintiffs did introduce evidence to show that Plaintiff Lollar uses her bare hands, Plaintiffs' Exhibit

3 “Standards and Medical Management for Captive Insectivorous Bats,” pg 21 Figure 2-3., pg 22 Figure 2-5., pg 32 Figure 3-12,, pg 82 Figure 8-1 A, pg 105 Figure 9-7., pg 125 Figure 11-3, A-D., pg 126 Figure 11-4, 11-5, 11-6, pg 131 Figure 11-9. A, B, pg 134 Figure 11-11 A-D, pg 135 Figure 11-12 A-C, Figure 11-13 A-G, pg 137 Figure 11-15, C, pg 170 Figure 12-25 A-C, pg 175 Figure 12-28, A-E, pg 176 Figure 12-29, A,B, pg 182 Figure 12-34, A-D. Plaintiff admitted to Defendant that rabid bats had bitten her.

In Plaintiffs’ Exhibit 1, pg 183, three photos show Lollar’s fingers after she states she was bitten by bats. Pg 182 Lollar describes various bat bites and how to get bats to release their bite by flicking your wrist. Exhibit 3, pg 141 has the same information. Lollar even states what it feels like to be bitten, pg 141, paragraph 2.

Defamatory Meaning: While it’s none too wise to hold a rabid bat in your bare hand and let it bite you, it’s not illegal.

40. “Update: Health Dept. forced BWS to leave town. In January they gutted the building, cleaned it and removed her property.”

See item 38.

41. “BWS admits in writing they are being forced to leave the City because of all the complaints to the City and Health Dept.”

See item 13.

42. “BWS admits in writing that they are being forced to leave the City because of all the complaints to the City and Health Dept.”

See item 13.

43. “Update: Health Dept. forced BWS to leave town. In January they gutted the building, cleaned it and removed her property.”

See item 38.

44. “Amanda Lollar commits animal cruelty at BWS.”

Falsity: Plaintiffs introduced no evidence that Plaintiff Lollar does not commit animal cruelty at BWS. Plaintiffs introduced evidence that Plaintiff does commit animal cruelty at BWS, Plaintiffs’ Exhibit 3 and 17. This statement was linked to an article in which someone else stated “Amanda Lollar commits animal cruelty at BWS.”

Made by Defendant: Defendant did not write this article or the title of the article. Defendant merely copy/posted the link to Animal Advocates’ Facebook page which automatically posted the title.

45. “Health Dept. forced BWS to leave town. In January they gutted the building, cleaned it and removed her property.”

See item 38.

46. “BWS admits in writing they are being forced to leave the City because of all the complaints to the City and Health Dept.”

See item 42.

47. "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 BWS."

"A video recording of any episiotomy that was recorded or made at BWS."

Falsity: Plaintiffs introduced no evidence that the video is false.

Plaintiffs introduced evidence that the video is the truth, C.R. Volume 1, pg 132, lines 4 - 18. Plaintiff admits that it is a video of Plaintiff performing an episiotomy.

Privileged, Made with Consent: Plaintiffs gave Defendant oral and written permission to take and share the video Defendant's Exhibit 7, item 14 "Take as many pictures as you like of both procedures and bats," and bats "do not mind having their picture taken with a flash." In fact Plaintiff ordered Defendant to take the video believing that Plaintiff would be seen in favorable light. It goes without saying that, if the Plaintiff has, by word or deed, consented to the publication of the supposedly defamatory statement or item, she may not later seek to recover damages for its publication.

Issue 5 Restated: Were Appellees entitled to the amount of compensatory and exemplary damages awarded?

Plaintiffs are not entitled to any judgment for defamation or breach of contract as they never showed all of the elements of defamation. If

Defendant had defamed Plaintiffs or breached a contract, the amount of compensatory and exemplary judgments awarded were not proper.

1. Were Plaintiff's entitled to \$3,000,000 in compensatory damages?

The order includes \$3,000,000 in compensatory damages.

Compensatory damages provide a plaintiff with the monetary amount necessary to "replace what was lost, and nothing more." Plaintiffs failed to produce any evidence of any financial damages. They did not prove that anything was lost. In fact Defendant proved in trial that Plaintiffs are making more money than ever before. \$3,000,000 is therefore excessive.

2. Were Plaintiffs entitled to \$3,000,000 in exemplary damages?

The order includes \$3,000,000 in exemplary damages. Exemplary damages are damages requested and/or awarded in a lawsuit when the defendant's willful acts were malicious, violent, oppressive, fraudulent, wanton, or grossly reckless. Defendant posted truthful items about Plaintiffs in order to protect animals and the public. Plaintiffs failed to produce any evidence of malice, i.e. the Defendant either knew the statements were false or had a reckless disregard for their truth or falsity. The items posted were the truth. Exemplary damages are only awarded only when compensatory damages do not cover all actual damages. There were no

actual damages. Exemplary damages are based on the individual's net worth. As per Defendant's affidavit of indigence, Defendant has a negative net worth.

Texas law provides that an award for exemplary damages is justified only upon proving fraud, malice, or gross negligence by clear and convincing evidence. Tex. Civ. Prac. & Rem. Code Ann. § 41.003. "Because fraud is often difficult to prove, courts justify awarding exemplary damages upon a showing of malice." 326 B.R. at 392 (*citing Roth v. Mims*, 298 B.R. 272, 297 (N.D. Tex. 2003)). The clear and convincing standard has been described as falling between the "preponderance of the evidence" standard used in civil proceedings and the "beyond a reasonable doubt" standard used in criminal proceedings. Tex. Civ. Prac. & Rem. Code Ann. § 41.008. "The amount awarded must be reasonably proportional to actual damages, though no set ratio exists for measuring reasonableness." *In re Amberjack Interests*, 326 B.R. at 393 (*citing Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981)). The Court weighs the following six factors in determining the reasonableness of an award: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties

concerned; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant. \$3,000,000 in exemplary damages is clearly excessive. It would arbitrary deprive defendant of property in violation of due process.

Summary of Defamation Claim

Plaintiffs did not introduce one bit of evidence that would show that Defendant defamed Plaintiffs. In fact the evidence which Plaintiffs introduced clearly shows that Defendant did not defame Plaintiffs. Plaintiffs did not meet their burden in proving all elements of defamation. Plaintiffs did not even prove that Defendant authored all of the statements. The trial court mistakenly granted judgment on the defamation claim.

V. Appellees Bear the Burden of Proving Breach of Contract.

In order to prevail on a breach of contract claim, plaintiff must establish: (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, *See Mercier v. Sw. Bell Yellow Pages, Inc.*, 214 S.W.3d 770, 773 (Tex. App.—Corpus Christi 2007, no pet.).

Issue 6 Restated: Did Appellees present “more than a scintilla” of evidence that Appellant’s actions meet all four of the following criteria of breach of contract?

Generally, the measure of damages for breach of contract is that which restores the injured party to the economic position he would have enjoyed if the contract had been performed. *Sava Gumarska v. Advanced Polymer Sciences, Inc.*, 128 S.W.3d 304, 317 n.6 (Tex. App.-Dallas 2004, no pet.) *see also Valero Mktg. & Supply Co. v. Kalama Int'l, LLC*, 51 S.W.3d 345, 351 (Tex.App.-Houston [1st Dist] 2001, no pet.); *see also Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 577 (5th Cir.2003); *see also Winchek*, 232 S.W.3d at 202; *see also Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.—Houston [1st Dist.] 2002, pet. denied), 01-03-00034-CV; *see also West v. Triple B Servs., LLP*, 264 S.W.3d 440, 446 (Tex. App.-Houston [14th Dist] 2008, no pet.)

Regardless of whether the lost profits are characterized as direct or consequential damages, the amount of the loss must be shown by competent evidence with reasonable certainty, be based on objective facts, figures, or data, and be predicated on one complete calculation, *See Holt*, 835 S.W.2d at 84. The injured party must do more than show that they

suffered some lost profits. *See Szczepanik v. First Southern Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994).

In trial Appellees showed no proof of actual or financial damages. Defendant's Exhibit 37 is Plaintiffs' financials. Page 1 showed that their 2011 income was almost double their 2010 income when Defendant supposedly made the statements. Their 990 tax returns and website state they are making three times as much money today than in 2010.

Consequential damages may not be recovered unless they are foreseeable and traceable to the wrongful act and result from it. *See Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998). Source: 08-0303 *Paul Mood and K&M Distributors v. Kronos Product, Inc.*, from Dallas County; 5th district ([05-06-00111-CV](#), 254 SW3d 8, 11-28-07, pet. denied Jun 2008). As previously stated, when questioned in trial by Appellant, Appellees admitted they have no proof of causation.

Plaintiffs offered no evidence as to each of the four elements of Breach of Contract.

a. There is a valid contract

Plaintiffs' own expert stated in writing in her written report that it was only "probable" that Defendant signed the contract. Expert stated it was not

“strong probable” or “definite identification.” When Defendant questioned the expert in trial about this exhibit C.R. Volume 3, pg 184, lines 10-16, expert agreed that she said it was merely “probable,”

Q. And in your analysis, you stated that it was merely probably that I signed that document, correct?

A. Yes, I said it was a level of probability.

Q. Okay. But it’s not the strongest level which would be identification, or the one beneath that, strong (sic) probability?

A. That is correct.

In trial Plaintiffs’ expert changed her story on the witness stand but did not submit an updated written report. Any lay person can eyeball the signatures and see that they are very different. Plaintiffs’ expert claimed that all the very different signatures were made by the same person. Expert also stated that it normally takes her three to five hours to ascertain a signature, C.R. Volume 3, pg 178, line 7. In this situation it took her 20 to 25 hours, C.R. Volume 3, pg 178, lines 10-11. Obviously, it was not an easy job.

Plaintiffs’ expert did not use authenticated or original signatures in their comparison to the supposed signature on the contract. Defendant provided an original signature in deposition. The expert admitted receiving it but stated she did not use it in her analysis. Defendant only authenticated her driver’s license signature and one other. That signature was made in 2005 with an electronic stylus onto a small scanner at the Department of Motor

Vehicles making it unacceptable for comparison to a signature made with a pen on paper. That signature is very different than the one on the contract.

During the trial it was revealed that Plaintiff's expert never received original signatures of the signatures used to compare to the contract, only copies, C.R. Volume 3, pg 182, lines 17 - 20;

Q. All the other signatures that you were given, they were all copies, correct?

A. They were color copies of three of them, and then three and four were copies.

Copies would not show the true size of the original signatures. Plaintiffs' expert claimed in trial that she changed her opinion after seeing the supposed original signature, C.R. Volume 3, pg 187, lines 13-25, pg 188, line 1;

Q. Again, what changed from your original report when you said it was merely probable?

A. Whenever I looked at the original and I examined it and I put it through all the instruments that I have and I examined it through the stereoscopic microscope, there was nothing on this document that showed any evidence of the signs of forgery, anyone else's habits.

Q. And you couldn't see that in the copy?

A. No. The copy did not tell me five factors, other factors, that were present on the photocopy.

If the expert can change her opinion based on a signature supposedly being original or not, then the expert could also change her opinion about the signatures used for comparison being original or not. The signatures

used for comparison were not originals. For this reason this expert and her testimony do not meet the rigorous standards of Texas Rules of Evidence.

Defendant's expert witness stated in writing that Defendant did not sign the contract. Because of Plaintiffs' motion abuse causing Defendant to repeatedly fly to Texas on short notice Defendant could not afford to bring her experts to trial. Defendant was not allowed to submit her Expert's report at trial.

There were no witnesses to the signing of the document. The court had to take Plaintiff's word that she witnessed Cummins signing the contract.

Plaintiff admitted in court testimony that Plaintiff filled in Defendant's name misspelling it, C.R. Volume 2, pg 76. Defendant's last name is "Cummins," not "Cummings." If Defendant had signed the contract, she would have corrected the name.

Plaintiff Lollar does not remember when or where the document was supposedly signed. Plaintiff changed her story a few times stating it was signed in the bedroom, the office, the hallway, at night, in the day time. Plaintiff cannot remember where or when it was supposedly signed because it was never signed by Defendant.

The copy of the supposed signed document which Defendant received pre-trial did not have a stain on it. The document which Plaintiff produced at trial had a stain, C.R. Volume 2, pg 166, lines 6 - 21;

Q. Isn't there like a coffee stain on there, the bottom right?

A. Oh, a coffee stain. I'm not sure what that is. This is the original contract, and apparently it ended up with something on it at some point in time.

Q. So that happened after you made the copies that you gave to your expert and to me?

A. No, this happened well before that.

Q. Then how come it's not on all the copies?

A. Because I -- I scanned this contract in at one point, and then after that, that's -- after that it ended up with the stain, which is why I ended up enclosing it in the plastic, so nothing else would happen to it

Q. So after I supposedly signed it is when it was stained?

A. Yes, afterwards.

The supposed evidence in this case was not properly preserved. Plaintiff admits it has been altered.

Plaintiff Lollar has a history of lying in sworn affidavits, depositions and court room testimony. Plaintiff also has a history of forging documents. Plaintiffs submitted into evidence Exhibit 17, Volume 6, pg 81, paragraph 4, which shows court documents from a previous malicious and meritless breach of contract lawsuit Plaintiff filed against Talking Talons Youth Leadership in 2008 in New Mexico, "UPDATE - June 9, 2011: Amanda Lollar forges a contract in Talking Talons lawsuit. Sound familiar?" That statement was linked to the court documents including Defendants' reply pg 10 item 6, "Defendant denies entering into a written contract with Plaintiff."

In that case there was also a contract supposedly signed by Defendants which materialized out of thin air years later. Through discovery that contract turned out to be a forgery. Plaintiffs were forced to settle with Defendants.

Taking all of these factors into consideration Plaintiffs provided no evidence of a valid contract signed by Defendant.

b. The Plaintiffs performed or tendered performance according to the terms of the contract

If the contract were signed, there was still no breach of contract.

Plaintiffs provided no evidence that Plaintiffs performed according to the contract. As per the contract Plaintiffs' Exhibit 16, paragraph 1, Plaintiff was supposed to train Defendant;

“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:”

Defendant did not receive training as promised. Defendant merely fed baby bats and cleaned. Defendant had read Plaintiffs' co-authored manual in 2005. Defendant did not learn anything new that she didn't already know before going to BWS. Plaintiffs did not perform according to the contract.

c. The Defendant breached the contract

Even if Defendant had signed the contract and Plaintiffs performed according to the contract, Plaintiffs did not introduce evidence that Defendant breached the contract. There are only two actions by Defendant which would have been considered breach of contract as per the contract, Plaintiffs' Exhibit 16, paragraph 2.

1. "It is understood that the data, techniques, results, and anecdotal information provided to Trainee during their internship at BWS is propriety and is copyrighted as intellectual property by BWS. Trainee agrees not (sic) distribute, share, publish, or sell this information without obtaining prior written permission by BWS."

Appellee stated in court that she wants interns to "spread the knowledge that they learn at BWS," C.R. Volume 2, pg 73, lines 16 - 22,

"She (defendant) seemed to be very -- a very compassionate person at the time. She seemed to be somebody that we thought could take the knowledge and spread it and -- and do some good with it. We encourage everyone who comes to spread the knowledge, what they've learned, so that other people with -- other rehabilitators in their community so more bats can be saved."

Plaintiffs are clearly speaking out of both sides of their mouth on this issue. The point of an internship and manuals is to learn and share information. Nonetheless none of BWS's data, techniques, results or anecdotal information could ever be considered proprietary. BWS sells to the public a how-to manual, Plaintiffs' Exhibits 1 and 3. They freely post

their techniques and data online in their website¹⁴. Therefore, nothing can be considered proprietary;

"Proprietary information, also known as a trade secret, is information a company wishes to keep confidential. Proprietary information can include secret formulas, processes, and methods used in production. It can also include a company's business and marketing plans, salary structure, customer lists, contracts, and details of its computer systems. In some cases, the special knowledge and skills that an employee has learned on the job are considered to be a company's proprietary information.¹⁵"

Plaintiffs post chapters from this book free online. They give classes showing the public these techniques. Nothing is therefore proprietary as they have already shared all of this information with the world.

None of BWS's data, techniques, results or anecdotal information could ever be considered copyrighted;

"Copyright protects the particular way authors have expressed themselves. It does not extend to any ideas, systems, or factual information conveyed in a work."¹⁶

Defendant merely copy/pasted a few sentences of Plaintiffs' book in order to comment. This is legal under the Fair Use of Copyright Act. Defendant was not sued for copyright violation. Copyright is a Federal question of law.

¹⁴ BWS <http://www.BatWorld.org>

¹⁵ <http://definitions.uslegal.com/p/proprietary-information>

¹⁶ <http://www.copyright.gov/fls/fl102.html>

Defendant had written and oral permission to take and post photos and videos, Defendant's Exhibit 7, item 14 "Take as many pictures as you like of both procedures and bats." In email June 24, 25, 2010 Plaintiff acknowledged in writing that she knew and approved of Defendant taking and posting photos and videos on the Internet while at BWS, Defendant's Exhibit 10, 11. Plaintiff even says "Thank you!" Defendant's Exhibit 13, 15 show almost every single photo and video was posted on the Internet while at BWS. Plaintiff only expressed her displeasure after Defendant reported her to authorities July 2, 2010 immediately after returning home, Defendant's Exhibit 16.

Plaintiffs' original complaint stated that Defendant posting photos and videos taken while at BWS was defamatory and shared copyrighted and proprietary data. At trial Plaintiffs stated that Defendant's photos and videos did *not* defame Plaintiffs and did *not* share proprietary or copyrighted data. Defendant went through all of the photos and videos in trial. This was Plaintiffs' response to the items, C.R. Volume 4, pg 182, lines 13 - 18;

Q. What is this a picture of?

A. Appears to be two red bats.

Q. Is this defamatory?

A. No.

Q. Does it share copyrighted or proprietary data?

A. No.

Defendant therefore did not breach this item of the contract.

Plaintiffs' Exhibit 16, paragraph 5.

2. "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 is 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."

Defendant never received a certificate of completion as Defendant did not complete the full two week internship as she left early. No certificate of completion was given or revoked. Defendant has never published, advertised or communicated to any person that Trainee was trained by BWS or is certified by BWS. Defendant has stated the opposite, i.e. she did not receive training. Plaintiffs did not introduce evidence that Defendant breached any provision of the contract.

d. The Plaintiffs sustained damages as a result of the breach.

Plaintiffs failed to introduce evidence to show any actual damages. Defendant introduced evidence to show there were no damages. Plaintiffs' own financials produced in discovery Defendant's Exhibit 37 show a large increase in revenue and not a decrease. Plaintiffs did not introduce evidence to show that Defendant caused any damage and admitted same in trial, C.R. Volume 2, pg 206, lines 3 - 8;

Q. Again, my only question right now is: Do you have any proof that I am the cause of certain of your finances being down? I mean, overall your finances are way up, they are almost double

A. They're -- They're -- I don't have any proof that it was you."

Issue 7 Restated: Did the trial court err in granting Appellees judgment against Appellant for breach of contract?

Plaintiffs failed to produce any evidence of any or all of the four elements of breach of contract. The trial court erred in granting Appellees judgment.

Issue 8 Restated: Were Plaintiffs entitled to attorneys' fees?

Issue 9 Restated: Were attorney's fees reasonable?

Because there was no breach of contract, attorney's fees should not be awarded. To warrant recovery under section 38.001 of the Texas Civil Practice and Remedies Code, attorney's fees must be —reasonable. See Tex. Civ. Prac. & Rem. Code Ann. § 38.001.

In this case attorney Turner included all hours spent on the entire case. This case had two claims i.e., defamation and breach of contract. Most of the time spent on this case was in relation to the defamation claim and not the breach of contract claim. Plaintiffs did not segregate hours spent on the defamation claim from the breach of contract claim. Segregation is required between time expended on a claim that allows recovery of attorney's fees and claims that do not allow recovery of attorney's fees. *See, e.g., Stewart*

Title Guar. Co. v. Aiello, 941 S.W.2d 68, 73 (Tex. 1997). Claims for breach of contract allow recovery of attorney's fees. Claims for defamation do not.

In trial C.R. Volume 2, pg 242, lines 19 - 22, Turner stated "As a matter of fact, I can say that since taking this case in 2010 I have spent more time on this case than any other case in my practice." Page 243, lines 3-4 "the total number of hours that I have spent on this case as of today at 4:30 is -- is 589 hours." Lines 18 - 22, "A reasonable fee in Tarrant County for someone with my experience and my credentials and my qualifications is \$300 an hour. If you multiply that out, a reasonable and necessary attorney's fee in this case is \$176,700." There is no attorney that can keep a straight face and state that \$176,700 is "reasonable" attorneys' fees in this case. Turner also committed motion abuse by filing unnecessary motions in the hopes that Defendant would run out of funds. If he did invest 589 hours, most of them were unnecessary.

The supposed contract clearly states that Defendant must pay "all attorney's fees incurred by BWS in enforcing this contract." BWS incurred no attorney's fees as Turner was pro bono. The contract was not enforced. Therefore no attorney's fees should be awarded.

Issue 10 Restated: Were \$10,000 in liquidated damages just?

A valid liquidated damages clause estimates in advance the just compensation a party will accrue if the other party to the contract fails to perform. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 664 (Tex. 2005). “Whether a contractual provision is an enforceable liquidated damages provision or an unenforceable penalty is a question of law[.]” *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991).

In determining whether a liquidated damages clause is enforceable, courts examine (1) whether the harm caused by the prospective breach of the contract is incapable or difficult of estimation and (2) whether the amount of liquidated damages called for is a reasonable forecast of just compensation. *Id.* If either element is lacking, the liquidated damages clause is unenforceable. *Arthur’s Garage, Inc. v. Racal-Chubb Sec. Sys., Inc.*, 997 S.W.2d 803, 810 (Tex. App.—Dallas 1999, no pet.)

“If the liquidated damages are proven to be disproportionate to the actual damages, the liquidated damages can be declared a penalty and recovery limited to actual damages.” The burden of proving a penalty defense is on the party challenging the liquidated damages clause. *Baker*, 812 S.W.2d at 55.

Generally, the party asserting this defense must prove the amount of the other party's actual damages, if any, to show that the liquidated damages set forth in the agreement were not an approximation of actual loss. *Baker*, 812 S.W.2d at 55. In this case Defendant proved there were no damages. Plaintiffs have no proof of any damages. In trial Plaintiffs tried to argue that the sharing of Defendant's photos and videos would cause them \$10,000 in damage, C.R. Volume 2, pg 79, lines 19-15, pg 80 lines 1-2;

Q. Okay. And is \$10,000 your estimate of the approximate amount that you would charge someone to randomly show these videos and pictures?

A. Yes. Yes.

Q. So, in your mind, the \$10,000 has some bearing to the actual damages that you would suffer if photographs were published randomly without your approval?

A. Yes.

Plaintiffs and others have posted almost identical photos and videos on the Internet. Plaintiff gave Defendant permission to take and share the photos and videos. Plaintiffs stated in trial that the sharing of photos and videos did not defame them or share copyrighted, proprietary data. The \$10,000 liquidated damages clause is therefore unenforceable.

Summary

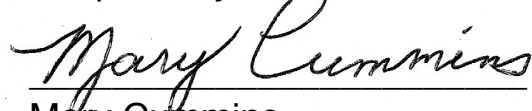
Despite well-established law and an overwhelming and uncontested factual record, the trial court mistakenly granted judgment on the

defamation and breach of contract claims. The amount of attorney's fees was excessive. The award was also excessive. The liquidated damages clause is unenforceable. That decision and judgement should be reversed.

PRAYER

For the foregoing reasons, and pursuant to Texas Rule of Appellate Procedure 43, Appellant Mary Cummins asks this Court to sustain the issues presented, hold that the trial court erred in ruling for Appellees, reverse the district court's order, and render the judgment the trial court should have rendered. Appellant requests all other appropriate relief to which she is entitled including attorney's fees and all related costs.

Respectfully submitted,



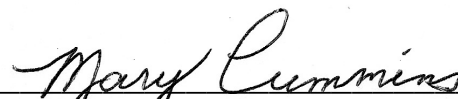
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CERTIFICATE OF SERVICE

On April 4, 2013, in compliance with Texas Rule of Appellate Procedure 9.5, I served a copy of this brief upon all other parties to the trial court's judgment by electronic filing and first-class United States mail, properly posted and deliverable as follows:

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Mary Cummins
Appellant In Pro Per

**APPELLANT'S
APPENDIX**

**APPELLANT'S APPENDIX
TABLE OF CONTENTS**

Table of Statements

1. Table of Allegedly Defamatory Statements (Tab 1)

Relevant Trial Court Orders

2. Signed Final Judgment in favor of Appellees/Plaintiffs (Tab 2)
3. The Contract (Tab 3)

Relevant Statutory and Constitutional Authority

4. Tex. Civ. Prac. & Rem. code 73.001 (Tab 4)
5. U.S. Const. Amend. 1 (Tab 5)

Opinions and Other Judgments Cited in Brief (Tab 6)

7. *Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys., Inc.*, 997 S.W.2d 803, 810 (Tex. App.—Dallas 1999, no pet.)
8. *Carla Main et al v H. Walker Royall*, No. 05-09-01503-CV, 2010 Tex. App.
9. *Dudrick v. Dolcefino*, No. 14-96-01181-CV, 1998 Tex. App. LEXIS 7682 (Tex. App., Houston [14th Dist.] Dec. 10, 1998, pet. denied) (not designated for publication)
10. *Plotkin v. Joekel*, No. 01-06-00624-CV, 2009 Tex. App. LEXIS 7709 (Tex. App., Houston [1st Dist.] Sept. 25, 2009, pet. denied)
11. *Vice v. Kasprzak*, No. 01-08-00168-CV, 2009 Tex. App. LEXIS 7725 (Tex. App., Houston [1st Dist.] Oct. 1, 2009, no pet. h.)

TAB
1

| # | Allegedly Defamatory Statements, Files |
|----|---|
| 1 | They breed animals in the facility. |
| 2 | Pretty ironic for this group to certify BWS 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 BWS 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. |

| # | Allegedly Defamatory Statements, Files |
|----|---|
| 13 | BREAKING NEWS!!! Amanda Lollar of BWS admits in writing that she and BWS 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. |
| 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 BWS. General sanitation laws, harboring high risk rabies animals, allowing them in downtown. |

| # | Allegedly Defamatory Statements, Files |
|----|--|
| 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 BWS found guilty of illegally breeding bats at her facility. It is a violation of her permit. |
| 29 | Amanda Lollar of BWS 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 BWS. |
| 33 | Here is the disgusting photo of my face which they photoshopped semen onto. They then added this caption "Yep, screw you too, Mmmmary!" They named the file "mmmm." This is how disgusting and childish these people are. |
| 34 | PDF: An email from the warden to Texas Parks & Wildlife stating that bats are breeding in Lollar's facility. |
| 35 | PDF: Amanda Lollar's 1994 manual which she wrote. She stated that she euthanizes bats by freezing them to death which is illegal and inhumane according to the AVMA and bat experts. |
| 36 | JPG: A photo that defendants made of me. They took a photo of my face and photoshopped semen on my face. |
| 37 | She's the one who handles rabid bats with her bare hands. |

| # | Allegedly Defamatory Statements, Files |
|----|---|
| 38 | Update: Health Dept. forced BWS to leave town. In January they gutted the building, cleaned it and removed her property. |
| 39 | Amanda who runs bat sanctuary just uses her bare hands. The rabid bats even bite her. |
| 40 | Update: Health Dept. forced BWS to leave town. In January they gutted the building, cleaned it and removed her property. |
| 41 | BWS admits in writing they are being forced to leave the City because of all the complaints to the City and Health Dept. |
| 42 | BWS admits in writing that they are being forced to leave the City because of all the complaints to the City and Health Dept. |
| 43 | Update: Health Dept. forced BWS to leave town. In January they gutted the building, cleaned it and removed her property. |
| 44 | Amanda Lollar commits animal cruelty at BWS (link) |
| 45 | Health Dept. forced BWS to leave town. In January they gutted the building, cleaned it and removed her property. |
| 46 | BWS admits in writing they are being forced to leave the City because of all the complaints to the City and Health Dept. |
| 47 | Video of episiotomy recorded or made at BWS |

TAB
2