

No. 07-16-00337-CV

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IN THE SEVENTH DISTRICT COURT OF APPEALS

MARY CUMMINS,  
Appellant,  
v.  
AMANDA LOLLAR,  
Appellee

---

On appeal from the County Court at Law Number Three of Tarrant County, Texas,  
Hon. Mike Hrabal Presiding  
Trial Court Cause No. 2015-2259-3

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APPELLEE'S BRIEF

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ORAL ARGUMENT NOT REQUESTED  
Accelerated Interlocutory Appeal Tex. R. App. P. 28.1  
TOTAL WORD COUNT: 8203

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TO THE HONORABLE COURT OF APPEALS:

Comes now Amanda Lollar, Appellee in the above-entitled and numbered case, requesting that this Honorable Court overrule each of Appellant's issues on appeal, and in so doing, affirm the trial court's judgment denying Appellant's Motion to Dismiss in all regards.

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

Appellant Mary Cummins will be referred to as "Appellant." Appellee Amanda Lollar will be referred to as "Appellee."

## **ADDITIONAL PARTIES, COUNSEL, AND JUDGES PRESIDING**

1. Judge Presiding in the County Court at Law Number Three  
in Cause No. 2015-2259-3  
The Honorable Mike Hrabal,  
100 W. Weatherford Street, Room 290A  
Fort Worth, Texas 76196-0240  
817-884-1095

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## STATEMENT OF THE CASE

This is a case brought by Appellee Amanda Lollar seeking compensatory and exemplary damages as a result of defamatory material published by Appellant Mary Cummins after Appellant repeatedly published the identical defamatory materials and statements which previously resulted in a \$6 million judgment against her. [CR 1 @ 104-109] In the previous case, after a four day bench trial, Appellee and Bat World Sanctuary were awarded compensatory and exemplary damages as a result of Cummins' defamation. *Id.*

In this case, Appellant sought dismissal of Appellee's suit under Chapter 27 of the Texas Civil Practice and Remedies Code, known as the "Texas Citizens Participation Act," (TCPA). After a hearing, the trial court denied Appellant's motion. [CR 9 @ 2938] Appellant then filed this appeal.

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellee requests oral argument only in the event that Appellant's request for oral argument is granted.

## RESPONSIVE ISSUES PRESENTED

### I. Responsive Issue One

*(Responsive to Appellant's Issues One and Three)*

The trial court properly denied Appellant's Motion to Dismiss brought under Chapter 27 of the Texas Civil Practice and Remedies Code.

- A. Appellant has not and cannot establish that Appellee's suit is "based on, relates to, or is in response to Appellant's exercise of the right of free speech, the right to petition; or the right of association, as set forth in the TCPA.
- B. Appellee's pleadings and other evidence combined with the judgment, findings of fact, and conclusions of law from the 352<sup>nd</sup> District Court of Tarrant County in the previous case as well as the Second Court of Appeals' opinion in *Mary Cummins v. Bat World Sanctuary and Amanda Lollar*, No. 02-12-00285-CV (Tex. App.–Fort Worth, April 9, 2015, pet. denied) provide ample clear and specific evidence which establishes a prima facie case for each essential element of Appellee's defamation claim against Appellant.

### II. Responsive Issue Two

*(Responsive to Appellant's Issues Two, Five, and Six)*

Appellant's Issues regarding limitations, jurisdiction, and Appellee's alleged non-compliance with the Defamation Mitigation Act are not properly before this Court in this interlocutory appeal.

Alternatively, the trial court properly denied Appellant's Motion to Dismiss because it had jurisdiction over this case which was brought within the one year statute of limitations and properly ruled that Appellee complied with the Defamation Mitigation Act. TEX. CIV. PRAC. & REM. CODE §73.051.

### III. Responsive Issue Three

*(Responsive to Appellant's Issue Four)*

Appellant's Issue regarding alleged misdeeds by Appellee and Appellee's Attorney are not properly before this Court in this interlocutory appeal.

Alternatively, the trial court properly denied Appellant's meritless Motion to Dismiss based on her unfounded accusations against Appellee and Appellee's Attorney.

## STATEMENT OF THE FACTS

The parties to this appeal have a long history, the background of which may be helpful to this Court's understanding and disposition of this appeal.

Accordingly, the following is provided:

### I. The Parties

Appellee Amanda Lollar is the founder and president of Bat World Sanctuary, the world's largest rescue/rehabilitation/teaching sanctuary dedicated exclusively to bats. [CR 1 @92-96] Bat World is the only sanctuary in the world that is "GFAS verified" by the prestigious Global Federation of Animal Sanctuaries and "ASA accredited" by the American Sanctuary Association. *Id.* Appellee is the author of 7 books, including the definitive medical reference book on insectivorous bats that is used worldwide by veterinarians and wildlife centers. *Id.* She has been twice nominated for the prestigious Indianapolis Prize, the world's top award for animal conservation. *Id.*

Appellant Mary Cummins has described her occupation as "causing havoc on the web." *Id.* Although she maintains websites and blogs claiming to have an animal rescue organization, a real estate business, and a property appraisal business, she has stated in sworn answers to interrogatories in a federal lawsuit she

filed against Appellee and Bat World that she is "unemployed and does not own a business or company." *Id.*

## II. The Parties' Background

For several years Bat World had an internship program that trains interns in the rescue, care and rehabilitation of bats. *Id.* Veterinarians, USDA wildlife specialists, and other animal rehabilitators from around the world have attended Bat World's internship. *Id.* In 2010, Appellant applied for an internship at Bat World. *Id.* Unfortunately, at that time Bat World did not do background checks on applicants and was unaware of all the blogs and websites about her and the numerous lawsuits she had been involved in, both as a plaintiff and as a defendant. *Id.* Appellant was accepted as an intern and began a two-week internship. However, she became disgruntled and left the internship early. *Id.*

## III. The Defamation

Almost immediately after leaving the internship, Appellant began posting copyrighted photos and proprietary information on the internet in violation of her internship contract. *Id.* She also posted false statements about Appellee and Bat World. When Appellant refused to remove the false statements and proprietary material from the internet Appellee and Bat World filed suit against her in the 352<sup>nd</sup> District Court of Tarrant County, Texas. *Id.* Appellant was outraged that

she had been sued and retaliated by inventing monstrous lies about Appellant and posting them all over the internet, falsely accusing her of being cruel to animals, practicing veterinary medicine without a license, getting sanctioned by animal regulatory agencies, illegally breeding bats, committing fraud and forgery, murdering her baby, and hundreds of other horrific lies. *Id.*

Appellant also posted an edited video of Appellee performing an emergency episiotomy on a bat. Appellant edited the video so that it contained the following false captions:

"This bat was about to give birth. Amanda Lollar of Bat World Sanctuary decided to do an episiotomy. She did not give the bat pain relief. She is not a veterinarian. GRAPHIC ANIMAL CRUELTY!!!"

"Amanda cuts the bats vagina with scissors three times. Bat convulses near the end then passes out from schock (*sic.*)"

"She can't tell the difference between a foot and baby's head. Amanda pulls too much and bat's vagina, uterus prolapse."

"Mom bat passes out from schock (*sic*) She later dies."

"Baby is pink yet dead. It had just died."

"Amanda tries to glue the incisions closed. She accidentally glued her vagina shut. Mom later died. Report Amanda Lollar for animal cruelty and neglect." *Id.*

As a result of Appellant's relentless defamation campaign, fund raising for

Bat World nearly dried up, forcing Bat World to the brink of bankruptcy after being in existence for almost 20 years. *Id.*

#### IV. The Trial

A four-day bench trial was held in the 352<sup>nd</sup> District Court in June, 2012 before visiting Judge Bill Brigham. Highly trained veterinarians, wildlife rehabilitators, and other experts from around the United States testified that Appellee's knowledge, care, and treatment of bats are virtually the gold standard among rehabilitators. *Id.* Witness after witness testified about her love and compassionate treatment of bats. *Id.* After listening to all of the witnesses and viewing videos and scientific literature, the trial court not only found that Appellant's statements about Appellee were defamatory but also that her lies were "egregious as well as malicious as well as intentional." [CR 1 @ 100] The court likewise found that the captions Appellant had added to her posting of the episiotomy video were defamatory. The trial judge stated on the record that Appellee "is to bats what Jane Goodall is to primates." *Id.* He ordered Appellant to pay \$3.0 million to Appellee in actual damages and \$3.0 million in punitive damages for the defamation. He also ordered Appellant to permanently remove the defamation from the internet. CR 1 @ 107]

#### V. The Appeal

Appellant appealed the trial court's judgment to the Second Court of Appeals. On April 9, 2015 in a 76-page opinion, the court affirmed the \$6.0

million defamation judgment against Appellant. *See Cummins v. Bat World Sanctuary*, No. 02-12-00285-CV, (Tex. App.–Fort Worth Apr. 9, 2015, pet. denied.) The court of appeals held Appellant "engaged in a persistent calculated attack on Lollar with the intention to ruin both Lollar's life's work and her standing in the animal rehabilitation community." *Id.* at pp. 72, 73. The court further held that "clear and convincing evidence supports the trial court's finding that Cummins made statements on these matters with actual malice." *Id.* at p. 75. The court rejected Appellant's claim that some of the statements were taken from reports to government agencies and therefore could not form the basis of a defamation claim. *Id.* "Cummins was not making a report to a government agency when she posted the statements on her website." *Id.*

The court of appeals also affirmed the injunction ordering Appellant to remove the defamation from the internet but held that, to the extent the injunction could be construed as prohibiting future speech by Appellant, it was an unconstitutional prior restraint. *Id.* at 66. "To the extent that the trial court's order required Cummins to remove the statements that the court ruled were defamatory, the order is constitutional. But the order is unconstitutional to the extent that it permanently enjoins Cummins from making similar statements in the future." *Id.*

## VI. The Defamation Continued

Almost immediately after the judgment was signed by the trial court in 2012, Appellant began posting a flurry of new defamatory statements about Appellee. Incredibly, she even began reposting the same statements and the same video with the same captions that had been adjudicated by the trial court and, later, by the court of appeals as defamatory. [CR 1 @ 93] Even more incredibly, Appellant posted on the internet that the court of appeals' opinion " ... states I'm free to post about Amanda Lollar and Bar World Sanctuary; I will be reposting all of the videos and photos; I am legally allowed to post the (defamatory video) as per the court opinion; I am free to talk about Amanda Lollar committing animal cruelty, neglect, animal abuse, killing and murdering mother bats and their babies." [CR 1 @ 187]. Apparently Appellant absurdly misinterpreted the appellate court's ruling concerning potential prior restraint of speech as a green light to commit the same defamation in the future with impunity.

## VII. Defamatory Statements

Exhibit E Attached to Appellee's Response to Appellant's Motion to Dismiss contains 2,116 defamatory statements that Appellant has made about Appellee. Each of these statements is false. [CR 1 @ 187-197] Exhibits 1 through 29 are copies of the pages on the internet that contain these statements along with the URL addresses where the pages appear. Many of these statement are either

verbatim or substantially the same as the following statements which were adjudicated to be defamatory in the first lawsuit:

"Vet recommended blood and stool tests. Lollar declined. She just wants empirical therapy. If that doesn't work, she wants to euth the dog."

"The current method she suggests is also inhumane. The bats die of suffocation."

"She doesn't even administer the gas legally, humanely, or safely."

"He (Appellee's attorney) should not be working for free for someone who commits animal cruelty."

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

"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."

"Just confirmed that Amanda Lollar of Bat World Sanctuary is illegally obtaining human and animal rabies vaccinations ....Again, breaking the law. I'm amazed she admitted to having the vaccine and buying it when she is doing it illegally."

"Amanda Lollar of Bat World Sanctuary admits in writing that she and Bat World Sanctuary are being forced to leave Mineral Wells because of all the complaints to the City and Health Department."

"Lollar is exposing people to rabies by not checking their cards."

"She's been breeding her bats illegally."

"Rabies complaint against Bat World Sanctuary. General sanitation laws, harboring high risk rabies animals, allowing them in downtown."

"People have been reporting her smelly building and rabid bats for over 15 years."

"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."

"Amanda Lollar of Bat World Sanctuary found guilty of illegally breeding bats at her facility. It is a violation of her permit"

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

"The complaints stretching back 18 years were about animal cruelty, animal neglect, violations of the health code, violations of Texas Parks & Wildlife regulations, violations of the Animal Welfare Act, building violations and a report about a rabid bat biting a toddler directly next door to Bat World Sanctuary."

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

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

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

"Update: Health Dept. forced Bat World Sanctuary to leave town. They gutted her building, cleaned it and removed her property."

"Amanda Lollar commits animal cruelty at Bat World Sanctuary."

[CR 1 @ 187-287].

## VIII. Defamatory Video Captions

In addition to reposting the same video captions that had already been adjudicated to be defamatory, Appellant posted new defamatory captions with the video. *Id.* These new captions included defamatory statements that had been made by a USDA "Big Cat Specialist" who had viewed Appellant's original false captions on YouTube. *Id.* Appellant posted the episiotomy video on YouTube along with the following captions that she acknowledged at the previous trial she knew were defamatory:

The bat "experienced pain and suffering,"

"I have reviewed the U-Tube [sic] footage and looked at the complaint about the bat that was mishandled by Ms. Amanda Lollar of the Bat World Sanctuary,"

"This is indeed a violation of the AWA (Animal Welfare Act),"

"Ms. Lollar should have sought veterinary assistance for the bat with the dystocia,"

"It would be one thing if she were only assisting a birth, but the moment Ms. Lollar realized this was a dystocia requiring an episiotomy, she should have taken the bat to her attending vet or a local veterinarian,"

"This mother bat clearly experienced pain and suffering at Ms. Lollar's hand, so much so that it appeared to lose consciousness during the procedure,"

"No anesthesia was given to the bat and no pain management was offered,"

"I believe the mother bat could have survived if it had been properly anesthetized and the pup delivered using proper surgical techniques,"

"It is possible the pup could also have survived if this case had been properly managed by a veterinarian."

[CR 1 @ 187-287]

All of these statements in the captions were false. [CR 1 @ 298-300]

Appellee filed this suit against Appellant to recover damages caused by her reposting false statements and a video with false captions that have already been adjudicated to be defamatory by the 352<sup>nd</sup> District Court and the Second Court of Appeals, as well as to recover damages caused by Appellant's posting of new defamatory statements and new defamatory video captions.

## ARGUMENT AND AUTHORITIES

### I. Responsive Issue One

*(Responsive to Appellant's Issues One and Three)*

- A. Appellant has not and cannot establish that Appellee's suit is "based on, relates to, or is in response to Appellant's exercise of the right of free speech, the right to petition; or the right of association, as set forth in the TCPA.
- B. Appellee's pleadings and other evidence combined with the judgment, findings of fact, and conclusions of law from the 352<sup>nd</sup> District Court of Tarrant County in the previous case as well as the Second Court of Appeals' opinion in *Mary Cummins v. Bat World Sanctuary and Amanda Lollar*, No. 02-12-00285-CV (Tex. App.—Fort Worth, April 9, 2015, pet. denied) provide ample clear and specific evidence which establishes a prima facie case for each essential element of Appellee's defamation claim against Appellant.

The purpose of the TCPA is to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate, freely, and otherwise participate in government to the maximum extent permitted by law, and at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." *Better Business Bureau v. BH DFW, Inc.*, 402 S.W.3d 299, 305 (Tex. App.—Dallas 2013, pet. denied); TEX. CIV. PRAC. & REM. CODE § 27.002.

The TCPA requires that a trial court dismiss a legal action if the movant "shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of the right to free speech; the right to petition, or the right of association." TEX. CIV. PRAC. & REM. CODE §27.005(b). A

matter public concern is defined by the TCPA as an issue related to: (A) health or safety; (B) environmental, economic, or community well-being, (C) the government; (D) public official or public figure; or (E) a good, product, or service in the marketplace. *Id.* at § 27.001(7) (A)-(E).

This court reviews the applicability of the TCPA to a particular case *de novo*. See *Avila v. Larrea*, 394 S.W.3d 646, 652-53 (Tex. App.–Dallas 2012, pet. denied); *Rebak Creative Services, Inc., v. Witt*, 404 S.W.3d 716, 725 (Tex. App.–Houston [14<sup>th</sup> Dist.] 2013, pet. denied).

Appellant here appears to argue that the trial court erred in denying her motion to dismiss because Appellee is a public figure, or that her defamatory comments about Appellee are matters of public concern as defined by the TCPA. But Appellee made this same argument to the 352<sup>nd</sup> District Court and to the Second Court of Appeals in the previous case. Both of these courts held that Appellee was not a public figure, that she was not a limited purpose public figure, and that Appellant’s defamatory statements, videos and other postings did not address a matter of public concern. See *Cummins v. Bat World Sanctuary*, No. 2-12-00285-CV, at 24-25; citing *Hutchinson v. Proxmire*, 443 U.S.111, 135, 99 S. Ct. 2675, 2688 (1979) (stating that before defamatory statements were made about the plaintiff, he had published writing that reached only a “relatively small

category of professionals” that plaintiff had not “thrust himself or his views into public controversy . . .”).

In fact the only “controversy” here is the one which Appellant attempted to incite by her relentless internet assault on Appellee. But the law does not permit Appellant to create a controversy by her endless barrage of attacks and then point this Court to those same attacks as support for her assertion that Appellee is the subject of a public controversy. *See Klentzman v. Brady*, 312 S.W.3d 886, 898 (Tex. App–Houston [1<sup>st</sup> Dist.] 2009, no pet.) (defamation defendant cannot create own defense by making claimant a public figure by repeated “discussion”).

At the conclusion of the hearing on Appellant’s Motion to Dismiss, the trial court stated:

“Well, based on the evidence before me under Chapter 27.006 of the Civil Practice and Remedies Code, it appears that there are—sufficient evidence in the affidavits provided by the plaintiff stating the facts on which the liability is based. So I will deny the motion to dismiss under the Anti-Slapp Statute.

I also believe that the collateral estoppel argument (by Appellee) is sound and that these appear to be repetitions of statements which were previously declared both by the trial court and the Court of Appeals, as well as through the denial of a petition for review by the Supreme Court to have been found that they are defamatory. . .”

[RR 2 @ 22]

The basis of Appellee’s current suit against Appellant is the same as the previous case. Appellant simply reposted the same defamatory material about

Appellee based on the same purported public controversy that was at issue in the previous case. Thus, the issue of whether Appellant is a public figure or a limited purpose public figure based on the same “controversy” has been decided adverse to Appellant and she is collaterally estopped from attempting to relitigate this fact issue that was resolved in the prior suit between these parties. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984) (holding that any defenses sought to be asserted in second action are barred where facts essential to first action were fully and fairly litigated and parties were adversaries in first action).

Accordingly, the trial court did not err in denying Appellant’s motion to dismiss as Appellee is not a public figure and Appellant’s statements are not about a matter of public concern.

Appellee has likewise met her burden of establishing by clear and convincing evidence a prima facie case for each element of her defamation claim against Appellant. *See Newspaper Holdings Inc., v Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 82 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2013, pet. denied) (observing that the term “prima facie” represents only the minimum quantity of evidence necessary to support a rational inference that the allegations of fact are true); *accord Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227

(Tex. 2004). The “clear and convincing” evidentiary requirement of the TCPA does not impose a higher standard of proof than is required of a plaintiff at trial. *See In re Lipsky*, 460 S.W.3d 579, 590-91 (Tex. 2015).

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

- (1) published a statement,
- (2) that was defamatory concerning the plaintiff,
- (3) while acting with either actual malice, if the plaintiff is a public figure, or negligence, if the plaintiff is a private individual, regarding the truth of the statement. *In re Lipsky*, 411 S.W.3d 530, 546 (Tex. App.–Fort Worth 2013), *aff’d*, 460 S.W.3d 579 (Tex. 2015); *WFAA–TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989) (citing *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, – (1964)).

A statement is defamatory “if it tends to injure a person's reputation and thereby expose the person to public hatred, contempt, ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation.” *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 580 (Tex. App.–Austin 2007, pet. denied) (op. on reh'g) (citing TEX. CIV. PRAC. & REM. CODE §73.001).

“Literally or substantially true” facts which are “published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way” are actionable as defamation. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000); *Klentzman*, 312 S.W.3d at 115. Thus, a defendant who “gets the details right but fails to put them in the proper context and thereby gets the ‘gist’ wrong” may be held liable for defamation. *Klentzman*, 312 S.W.3d at 115, (*quoting Turner*, 38 S.W.3d at 115). Whether a publication is false depends on “a reasonable person's perception of the entirety of a publication and not merely on individual statements.” *Turner*, 38 S.W.3d at 115.

Also, a defendant may be liable for defamation if a reasonable person would recognize that an act creates an unreasonable risk that defamatory matter will be communicated to a third party. *See George v. Deardorff*, 360 S.W.3d 683, 690 (Tex. App.—Fort Worth 2012, no pet.). To support a malice finding, the actor must have either acted with specific intent to cause a substantial injury, or acted with conscious indifference to the rights of others despite his actual, subjective awareness of the risk involved. *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 619 (Tex. App.—Waco 2000, pet. denied). Here, Appellee is not a public figure, as explained above. Thus, she is not required to prove actual malice.

In most defamation claims, the plaintiff must prove actual injury caused by the defamatory statement. *Exxon Mobil Corp. v. Hines*, 252 S.W.3d 496, 501 (Tex. App.–Houston [14<sup>th</sup> Dist.] 2008, pet. denied); *Tex. Disposal Sys. Landfill, Inc.*, 219 S.W.3d at 580. Some statements, however, are defamatory *per se*, meaning that the law presumes the plaintiff’s injury. *See Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984) (op. on reh'g) (explaining that a false statement charging someone with the commission of a crime is defamatory *per se*); *Tex. Disposal Sys. Landfill, Inc.*, 219 S.W.3d at 580–81; *see also Morrill v. Cisek*, 226 S.W.3d 545, 549 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2006, no pet.) A statement constitutes defamation *per se* if it “injures a person in his office, profession, or occupation.” *Hancock v. Variyam*, 400 S.W.3d 59, 63-64 (Tex. 2013); *Tex. Disposal Sys. Landfill, Inc.*, 219 S.W.3d at 581. A defendant is liable to a plaintiff for defamation *per se* even in the absence of any evidence of harm. *Downing v. Burns*, 348 S.W.3d 415, 425 (Tex. App.–Houston [14<sup>th</sup> Dist.] 2011, no pet.).

Moreover, the vast majority of the thousands of statements and postings by Appellant are defamatory *per se*. For instance, Appellant’s assertions that Appellee has committed animal cruelty, donor fraud, and that Appellee practiced medicine without a license are defamatory *per se* because they accuse Appellee of

a crime. *See Leyendecker & Assocs.*, 683 S.W.2d at 374. Viewed in the light most favorable to Appellee, the pleadings on file in this case, together with the affidavits attached to Appellee's response, as well as the attachments to those affidavits provide ample clear and convincing evidence that Appellant repeatedly posted volumes of defamatory statements about Appellee which she knew to be false.

Moreover, Appellant is collaterally estopped from attempting to relitigate the truth or falsity of the statements that have previously been adjudicated as defamatory. *See Resolution Trust Corp.*, 837 S.W.2d at 628.

This Court should overrule Appellant's Issues One and Three and affirm the trial court's denial of Appellant's Motion to Dismiss.

## **II. Responsive Issue Two**

*(Responsive to Appellant's Issues Two, Five, and Six)*

Appellant's Issues regarding limitations, jurisdiction, and Appellee's alleged non-compliance with the Defamation Mitigation Act are not properly before this Court in this interlocutory appeal.

Alternatively, the trial court properly denied Appellant's Motion to Dismiss because it had jurisdiction over this case which was brought within the one statute of limitations and properly ruled that Appellee complied with the Defamation Mitigation Act. TEX. CIV. PRAC. & REM. CODE §73.051

In Texas, the limitations period for libel and slander claims is one year. TEX. CIV. PRAC. & REM. CODE §16.002. Texas applies the "single publication" rule in libel cases, which means the statute of limitations begins to run, on the last day of

mass distribution to the public. *Williamson v. New Times, Inc.*, 980 S.W.2d 706, 710 (Tex. App.–Fort Worth 1998, no pet.). The rationale behind the single publication rule is that on the final date of distribution, "the publisher, editors and authors have done all they can to relinquish all right of control, title and interest in the printed matter." *Holloway v. Butler*, 662 S.W.2d 688, 690 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1983, writ ref'd n.r.e.). When applied to online publications, the single publication rule provides that limitations begin to run from the date an article is first posted and made available to the public on the internet. *Van Buskirk v. The New York Times*, 325 F.3d 87, 89 (2<sup>nd</sup> Cir. 2003).

Appellee filed this suit against Appellant on April 15, 2015. [CR 1 @ 14-20] Attached to Appellee's response to Appellant's Motion to Dismiss is Exhibit 1. Set out in that exhibit are literally thousands of defamatory statements posted by Appellant within the one year limitations period preceding the date suit was filed. This Court should overrule Appellant's Issue Five.

Appellant's assertion in this interlocutory appeal that the trial court erred in failing to dismiss this case based on lack of personal jurisdiction is likewise without merit. The Texas long-arm statute authorizes the exercise of jurisdiction in this case because Appellant came to Texas, entered into a contract in Texas, to be performed in Texas with Appellant, a Texas resident. TEX. CIV. PRAC. & REM.

CODE. §17.042; *Stauffacher v. Lone Star Mud, Inc.*, 54 S.W.3d 810, 815 (Tex. App.–Texarkana 2001, no pet.). Appellant then created a video while in Texas and has used that video as at least one basis of her continuing defamatory assaults on Appellee. Thus, under the facts and circumstances of this case, the trial court properly denied Appellant’s motion to dismiss based on a lack of personal jurisdiction. This Court should overrule Appellant’s Issue Six.

Appellant asserts in her Issue Two that the trial court erred in failing to dismiss this case because Appellee did not comply with the Defamation Mitigation Act. TEX. CIV. PRAC. & REM. CODE §73.051. The act requires defamation plaintiffs to request a correction, clarification, or retraction from the publisher of a defamatory statement within the limitations period for the defamation claim. TEX. CIV. PRAC. & REM. CODE §§73.051, .054-.055. Under this provision, a defamation plaintiff may only recover exemplary damages if she serves the request for a correction, clarification, or retraction within 90 days of receiving knowledge of the publication. *Id.* §73.055(c); *see also Neely v. Wilson*, 418 S.W.3d 52, 63 (Tex. 2013).

However, the remedy available to a defamation defendant for a plaintiff’s timely failure to request a retraction is limited to a potential restriction on the availability of exemplary damages at trial. TEX. CIV. PRAC. & REM. CODE

§73.055(c); *see also Neely*, 418 S.W.3d at 63 (“Under this provision, a defamation plaintiff may only recover exemplary damages if she serves the request for a correction, clarification, or retraction within 90 days of receiving knowledge of the publication”).

Here, Appellee served upon Appellant a request for retraction on July 15, 2015. [RR 2 @ 22]. However, Appellant’s incessant defamatory internet postings have continued unabated throughout the pendency of this case. Thus, the timing of Appellee’s request for retraction has no effect on Appellee’s ability to seek exemplary damages from Appellant in this case.

More importantly, the issue of Appellee’s compliance with the requirements of the Defamation Mitigation Act is not properly before this Court in this interlocutory appeal. Appellant’s statutory remedy for Appellee’s purported failure to comply with the Defamation Mitigation Act was to seek abatement. TEX. CIV. PRAC. & REM. CODE §73.062(a). She did not do so. She was not entitled to seek dismissal in the trial court and she is likewise not entitled to seek dismissal in this Court. Accordingly, this Court should overrule Appellant’s Issue Two.

**III. Responsive Issue Three**  
*(Responsive to Appellant’s Issue Four)*

Appellant’s Issue regarding alleged misdeeds by Appellee and Appellee’s Attorney are not properly before this Court in this interlocutory appeal.

Alternatively, the trial court properly denied Appellant's meritless Motion to Dismiss based on her unfounded accusations against Appellee and Appellee's attorney.

Appellant's unfounded attacks on Appellee and Appellee's Attorney are not appropriate for this Court's consideration in this interlocutory appeal.

Furthermore, the rules of appellate procedure require that an appellant's brief "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). As a pro se litigant, Appellant is required to follow the same rules and laws as litigants represented by a licensed attorney. *See Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184-85 (Tex. 1978). To preserve a complaint for appellate review, a party generally must present the complaint to the trial court by timely request, motion, or objection, stating the specific grounds, and obtain a ruling. *Shaw v. Cnty. of Dallas*, 251 S.W.3d 165, 174 (Tex. App.–Dallas 2008, pet. denied) (*citing* TEX. R. APP. P. 33.1(a)). "If the matter is not presented to the trial court, the trial court has no opportunity to rule on the issue or to correct its ruling if it is made in error." *In re R.J.P.*, 391 S.W.3d 677, 678 (Tex. App.–Dallas 2013, no pet.) (*quoting In re Marriage of Lendman*, 170 S.W.3d 894, 898 (Tex. App.–Texarkana 2005, no pet.)). In addition, to preserve error for appellate review, "a party's argument on appeal

must comport with its argument in the trial court." *Knapp v. Wilson N. Jones Mem'l Hosp.*, 281 S.W.3d 163, 170 (Tex. App.–Dallas 2009, no pet.).

Here, Appellant's specific baseless attacks and assertions regarding Appellee and Appellee's Attorney were not presented to the trial court and thus not preserved for appellate review. In any event they are not subject to interlocutory appeal. This Court should overrule Appellant's Issue Four.

## CONCLUSION

The trial court properly determined that Appellant was not entitled to dismissal of this case under the TCPA. It likewise held that Appellant's remaining complaints did not form a basis for the relief she requested. Accordingly, this Court should affirm the trial court's denial of Appellant's Motion to Dismiss.

## PRAYER

Appellee requests that this Court affirm the trial court's denial of Appellant's Motion to Dismiss. Appellee further prays that she be awarded costs of court, attorney's fees, and expenses, and such other and further relief to which she is entitled in law and in equity.

Respectfully submitted

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was delivered, pursuant to the Texas Rules of Civil Procedure to all parties shown below on this the 9th day of December, 2016.

Mary Cummins  
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Randall E. Turner  
RANDALL E. TURNER

## **CERTIFICATE OF COMPLIANCE and WORD COUNT**

I certify that the foregoing document was created in Microsoft Word [year] and has 8203 words according to Microsoft Word. I further certify that this document has been formatted in accordance with Texas Rule of Appellate Procedure 9.4(b)-(e). The brief is filed in text-searchable PDF format and the appendix is combined in one computer file with the brief. The brief complies with the requirements of the Court:

1. The brief is submitted by electronic filing as required by this Court.
2. The electronically filed document is labeled with the following information:
  - A. Case Name: Amanda Lollar v. Mary Cummins
  - B. Appellate Cause No: 07-13-00337-CV
  - C. Type of Brief: Appellee's Brief
  - D. Party for whom the brief is being submitted: Amanda Lollar
  - E. Word Processing Software and Version Used to Prepare the Brief:  
Microsoft Office 2013: Submitted in Text Searchable PDF Format
3. The documents in the appendix conform to the requirements of Texas Rules of Appellate Procedure 9.2, 9.3, 38.1(k).

*Randall E. Turner*  
RANDALL E. TURNER