

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 PETITION FOR REHEARING

Mary Cummins
Appellant In Pro Per
645 W. 9th St. #110-140
Los Angeles, CA 90015-1640
(310) 877-4770 Direct
(310) 494-9395 Fax
mmmaryinla@aol.com

Amanda Lollar, Bat World Sanctuary
Randy Turner - Attorney for Appellees
Bailey & Galyen
1300 Summit Avenue #650
Fort Worth, Texas 76102
(817) 288-1101 Direct
(817) 545-3677 Fax
rturner@galyen.com

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References to the record will be as follows: “CR__* @ __#” for the Clerk’s Record, “RR__@__” for the Reporter’s Record, * will be the volume, # will be the page number. “Pla Exh __” for the Plaintiffs’ trial exhibits. “Def Exh __” for the Defendant’s trial exhibits, “RB__” for Appellees Reply Brief. “B” for Appellant’s initial brief. “P” for paragraph.

Appellant Mary Cummins will be referred to as “Cummins.” Appellees Amanda Lollar and Bat World Sanctuary will be referred to individually as “Lollar” and “BWS” respectively, and collectively as “Appellees.”

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APPELLANT’S PETITION FOR REHEARING

Appellant Mary Cummins (“Cummins”) appeals from a judgment of the 352nd District Court of Texas in a defamation and breach of contract case.

The Appeals Court released their opinion on this case April 9, 2015 affirming the District Court’s order on the claim of defamation and reversing on the claim of breach of contract, attorney fees and liquidated damages.

ARGUMENT

This case presents important issues regarding defamation, fair and privileged reports to authorities, actual malice, freedom of speech, compensatory damages, exemplary damages, perjury and the rights of indigent out of state pro se parties.

Appellant makes this petition for rehearing because the opinion misstates the record and misinterprets the relevant statutes and case law. Appellant never defamed Appellees. Every word stated by Appellant is the truth and came from fair and privileged reports to authorities.

1. Opinion Misstates the Record

A. (Opinion, pg 24, P 3) Cummins did not point “to numerous books and articles that Lollar had written in the years prior to (sic) Cummins’s internship.” Cummins pointed to some books Appellee wrote and also

“Published media pieces discuss Lollar as a bat rehabilitator as do her public website” (Appellant’s OB p 10). Appellee was the subject of articles written by Bat Conservation International the largest and most respected bat conservation group in the world, Texas Parks and Wildlife Department, book “Radical Views,” Conservation International, Scholastic News Magazine and Best Friends UK also wrote about Appellee in media pieces. Appellee submitted as evidence the “Standards for Global Federation of animal Sanctuaries” which includes her bat protocol. Appellee herself states in her book “Amanda is considered by many to be the world’s leading expert on captive care and captive propagation of insectivorous bats,” “Amanda was a finalist for the 2010 Indianapolis Prize, the most coveted wildlife conservation award in the world, a 2009 Animal Planet Hero of the Year finalist and a 2005 recipient of the Doris Day Kindred Spirit Award.”

B. (Opinion pg 48, p 3) Appellant did not testify “that she told the IRS that Lollar was using BWS as her own personal piggy bank and was paying personal expenses out of the nonprofit.” Appellant did not report Appellee to the IRS. The IRS did cause Appellee to restate their 990’s after someone

else reported them. Appellant witnessed Appellee use BWS credit card to purchase personal items for herself at WalMart.

There are many other instances where the opinion misstates the record.

2. Rehearing should be granted to reconsider the opinion's interpretation of the relevant statutes

Issue 1 - Appellee is a Limited Public Figure

Appellee Lollar is a limited public figure in relation to bats, the care of bats and her bat sanctuary. Appellee stated herself that she is a “world renown bat expert.” Her curriculum vitae states Lollar authored the National “North American Migratory Bat Act” and the “Fish & Wildlife Service protocol for wildlife rehabilitators in response to White Nose Syndrome.” Appellee has thrust herself into the very public conversation of bats, care of bats and her bat sanctuary. Appellee also stated in her resume she was featured on television shows “20/20, Animal Planet, Nickelodean, The Disney Chanel, the David Letterman Show and the CBS Morning Show.” Lollar was also featured in many books and magazines some of which are listed above in item B.

(Ap RB pg 1, p 1) Appellees stated they are a limited public figure stating Bat World “is an internationally renowned non-profit organization,”

and “It has been featured in numerous publications, including Scholastic News, Texas Parks and Wildlife and Bat Conservation International.”

Issue 2 - Statements Made by Appellant Were of Public Concern

Bats, the care of bats, rabies, White Nose Syndrome, bat sanctuaries are all issues of public concern. Appellant wrote about these issues of public concern. Appellee thrust herself into these issues of public concern. Appellant submitted into evidence a newspaper article (Def Exh 22) about a 1999 incident where a toddler was bitten by a rabid bat directly next door to Appellee’s sanctuary. The bat most likely came from the sanctuary. Rabies is fatal and of public concern. Appellee and her sanctuary are mentioned in the article.

Issue 3 - Appellant is legally media

(Def Ex 1, Curriculum Vitae of Appellant) Appellant’s resume shows that Appellant has authored many articles for such media publications as the International Wildlife Rehabilitation Council, Los Angeles Times, Cat Fancy Magazine, California Dept of Fish & Game “Scrawl of the Wild” and had a cable show entitled “Wildlife Rescue.”

One of the items which Appellee stated was “defamation” was a blog with over 500 articles written by Appellant about wildlife and animals

entitled “Mary Cummins Animal Advocates Wildlife Rehabilitation” located at <http://animaladvocateswildliferehabilitation.blogspot.com> That blog had advertisements and produced revenue (PI Ex 17, pg 131). Defendant was receiving revenue from writing articles.

In today’s Internet age Bloggers are considered media “As the Supreme Court has accurately warned, a First Amendment distinction between the institutional press and other speakers is unworkable,” 9th Circuit Judge Andrew Hurwitz for unanimous three-judge panel (*Obsidian Finance Group LLC and Kevin Padrick vs Crystal Cox*, 12-35238).

Issue 4 - Appellee Did Not Prove the Statements were Defamation

Because Appellee is a limited public figure in relation to bats, bat care, bat sanctuaries and thrust herself into the very public concern about bat rabies, White Nose Syndrome, Appellee had to produce real evidence that the statements were defamatory. Appellees failed to do this at trial.

Appellee merely stated that the 45 items were defamatory without providing any evidence at all. Appellant did not even write all the items. Most were written by Appellee herself, government agencies, neighbors, Appellee’s attorney, members of the public and other unknown people.

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Issue 5 - Everything Posted by Appellant Came From Fair and Privileged Reports to Authorities

(PI Ex 19, Reports to authorities) Appellees stated in trial that Appellant's reports to authorities were not defamation. They were fair and privileged reports (Rpt Rec Vol 5 pg 64 line 20) "Finally, Your Honor, 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."

Reports to authorities are fair and privileged so people will report others for crimes without fear of being sued for defamation which is exactly what happened in this case.

In fact in 1999 when a rabid bat from Appellees' sanctuary bit a toddler and the mother complained, Appellees sent a letter from attorney Donald Feare to the city threatening legal action and bad publicity if they didn't ignore the complaint (PI Exh 17, pg 29). Appellees have a long history of using legal action to quiet people and even cities.

If this Opinion stands someone could report someone else for rape, assault, theft and be sued for defamation to quiet them and try to discredit their report. People would stop reporting people for crimes. In fact the

judgment has already been used many times to keep others from making reports to authorities.

Issue 6 - Appellant Did Not Make Any Statement With Malice

(Opinion pg 48, last paragraph) Appellant “posted online an accusation that Lollar might be collecting welfare illegally.” Appellant received a copy of a police report and quoted directly from the police report. Appellant never stated Appellee “was collecting welfare illegally.” Cindy Myers a friend of Appellee Lollar emailed Appellant within two hours after the post that it was most likely a check on someone’s welfare and not a welfare check. The moment Appellant received this information, Appellant corrected the statement. This proves that Appellant would have deleted any item which she thought or knew was false. Appellant still states that everything which was and is posted is the absolute truth. Every time Appellant posted any statement it was always backed up by documentation linked in the blogs, websites. This is all part of Exhibit 17 which includes all the documents linked in the page.

Issue 7 - Trial Court Erred in Granting Judgment to Appellee

Because Appellant did not defame Appellee and did not defame with malice the Court erred in granting judgment.

Issue 8 - Appellee was not Entitled to the Amount of Damages Awarded

Appellant argued in her motion for new trial and appeal that Appellee was not entitled to compensatory and exemplary damages and definitely not a monetary award of \$6,000,000. Right before Judge Brigham stated the award he stated (Rpt Rec Vol 5 pg line 17) “That there will be no more evidence and no more summation.” Then he ruled and stated “We will stand in recess” and left the room. Appellant was not allowed to challenge the monetary award at trial. Appellant did challenge it in post trial motion for new trial.

Compensatory Damages: In trial Appellees did not show any evidence of any financial or other damages. They admitted they had no proof of any financial damages and no proof of any causation by Appellant. Appellee provided no bills for or evidence of any medical, psychological treatment. There were no compensatory damages as nothing was lost.

Exemplary Damages: All throughout the trial Appellant stated she had a negative net worth, owned no car, real estate, investments or any assets of any value (Rpt Rc Vol 5 pg 62) “He (Appellees’ attorney Turner) knows that I don’t own a home. I have no assets. I barely have any money. I had to give him my bank statements so he could see that I barely have any

money.” In fact Appellees have been making fun of Appellant in their over 400 blogs, websites, Facebook pages devoted solely to attacking, defaming Appellant.

(Rpt Rec Vol 4 pg 128 p 4) “In fact, I would like to testify that I have a negative net worth. I don’t own a home. I -- I have no assets. I couldn’t even afford to fix my car, so I had to donate it. Mr. Turner knows this through discovery.”

Exemplary damages are only awarded when compensatory damages do not cover all that was lost. In this case no money was lost. Exemplary damages are based on an individual’s net worth. With a net worth of zero, there can be no exemplary damages. Exemplary damages are only awarded if there is gross negligence or malice. There was no negligence or malice as everything which was posted was the truth.

Issue 9 - Appellee Never Attempted to Mitigate the “Defamation”

All of Appellant’s blogs have a disclaimer which states,

“Public documents, legal documents, information about public figures. This information and data is in the public interest. Everything is the truth to the best of my knowledge or personal opinion and belief. If you see a mistake, please contact me with proof so I can edit or delete it. I generally post links to back up all of the statements I make so you can review the documents and come to your own conclusion. Everything else in the blog is my personal opinion and belief.”

Appellees never sent a cease and desist or any request to edit or delete anything in the blogs or website before they filed this complaint. If they had sent Appellant proof of an error, Appellant would have corrected it instantly as I did with the “welfare check.” (Opinion pg 71, p 4) “When Cummins asked at trial if Lollar had ever asked her to remove anything that Cummins had published, Lollar stated, ‘I have never sent any communication to you whatsoever after you left our internship.’” Appellee failed to mitigate the damages.

Issue 10 - Opinion is Contrary to the Defamation Mitigation Act

(Civil Practice and Remedies Code Sec 73.051) The opinion as it stands would gut the Texas Defamation Mitigation Act. Appellees never tried to mitigate any damages. Had they sent proof of defamation, it would have been edited or deleted as the one statement about the “welfare check” was instantly edited.

Issue 11 - Opinion is Contrary to the Citizen Participation Act

(Civil Practice and Remedies Code Chapter 27) “The purpose” “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 all and, at the same time protect the

rights of a person to file meritorious lawsuits for demonstrable injury.” The opinion as it stands would gut the Texas Citizen Participation Act. This act passed after Appellant was sued. Appellees sued Appellant to try to discredit Appellant’s reports to authorities and to stop her from speaking about the animal cruelty Appellant witnessed at BWS. This Act covers issues of public concern such as health or safety, environment, community, government, public figure.

As proof that Appellees are trying to prevent Appellant from speaking about issues of public concern Appellees sent a copy of the old, void order to Google April 13, 2015 demanding they take down a new blog which had a copy of the Opinion and Appeal documents (Exhibit 3).

Issue 12 - Parts of Appellee’s Brief Contains Perjury, Fraud and Should be Stricken

Appellees stated they were investigated by authorities and were cleared of all wrong doing. This is false. After viewing the episiotomy video Appellee Lollar was found by USDA veterinarian Dr Laurie Gage to have caused bats “pain, suffering and death,” and she “violated the Animal Welfare Act” (Exhibit 1). Appellees no longer have a USDA permit.

“I have reviewed the U-Tube 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. Apologizing in the video to the bat does not solve the problem. 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."

Appellees' veterinarians are not bat experts. They both stated Appellee Lollar taught them about bats. No one taught Lollar about bats. One vet did not even realize freezing bats to death was inhumane and illegal.

Appellees were investigated by the Texas Health Department and violations were found in regard to improper rabies protocols. They were investigated by Texas Parks and Wildlife (Exhibit 2) which stated Appellee was incorrect in stating White Nose Syndrome was in Texas, Lollar's protocol for WNS is not approved, Lollar is not allowed to treat bats with WNS, Lollar is not allowed to have an assurance colony, Lollar is not allowed to allow bats to breed in her facility, Lollar's captive colony bats did not have permits, Lollar cannot exhibit bats as she doesn't have an exhibit permit, to name but a few complaints.

Appellee Lollar stated in court she had completed the 9th grade and had a GED. Later Lollar admitted she did not go past the 8th grade. It was later discovered she never received a GED as Lollar could never produce it in discovery. Texas GED Certificate Search did not find a GED for Lollar. One can only take the GED at the age of 18 yet Lollar stated she received it at 15. Appellees have committed fraud upon the court with their false statements. These false items should be stricken from the record.

CONCLUSION

The Opinion as it stands is a great travesty of justice. There was no defamation. The \$6,000,000 judgment would cause permanent life long damage to Appellant. Appellant can't have a bank account or get a job with this judgment. Appellant can't go bankrupt because the judgment states malice and it is above the limit for all chapters of bankruptcy in California. Appellant's life would be over because she did the right and legal thing by reporting Appellees to authorities who agreed with Appellant's findings.

The Opinion as it stands would gut the Defamation Mitigation Act and the Citizen Participation Act which passed after Appellant was sued. It also guts the protection of privileged and fair reports to authorities. People

would not report others if they could be sued for defamation and have their lives ruined. It would even gut the first amendment Freedom of Speech.

In this case Appellant pro se did not even know which statements Appellees thought were defamatory until after the trial in the form of the court order. Appellant never had a chance to argue the case in the trial court.

There is no evidence that Appellant defamed Appellees with malice or otherwise. There is no evidence or any wrongdoing on the part of Appellant which would support the award of compensatory or exemplary damages.

Accordingly, this Court should reverse the trial courts order on the defamation claim.



Mary Cummins
Appellant In Pro Per
645 W. 9th St. #110-140
Los Angeles, CA 90015-1640
(310) 877-4770
(310) 494-9395 Fax
mmmaryinla@aol.com

CERTIFICATE OF COMPLIANCE AND WORD COUNT

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 2,859 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

CERTIFICATE OF SERVICE

On April 23, 2015, 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:

Randy Turner
Bailey & Galyen
1300 Summit Avenue #650
Fort Worth, Texas 76102
(817) 288-1101
(817)545-3677 Fax
RTurner@Galyen.com



Mary Cummins
Appellant In Pro Per

Morris, Connie R (APHIS)

From: Gage, Laurie J (APHIS)
Sent: Thursday, May 05, 2011 4:13 PM
To: Jones, Daniel R (APHIS)
Cc: Morris, Connie R (APHIS); Gibbens, Robert (APHIS)
Subject: Re: Complaint against Bat World Sanctuary, Amanda Lollar

Hi All

I wanted to include another line about suffering in my previous analysis of this procedure.

I have reviewed the U-Tube 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. Ms. Lollar should have sought veterinary assistance for the bat with 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. Apologizing in the video to the bat does not solve the problem. 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.

Laurie J. Gage, D.V.M., Dipl. ACZM
USDA APHIS Large Cat Specialist

Laura Russell

From: Wendy Connally
Sent: Monday, July 09, 2012 1:54 PM
To: 'sanctuary@batworld.org'
Cc: Megan Russell
Subject: Bat World Sanctuary + BRIT WNS Symposium

Hi Amanda,

Your invitation for the Bat World – BRIT WNS Symposium reached me this morning. **Thanks for your interest in protecting our wonderful bats in Texas and sharing information about White Nose Syndrome.** I think it's great when concerned folks rally together for a good cause; however, I have a few concerns about the information supporting your event. I know that the Bat World Sanctuary has been on the forefront of bat rehabilitation in Texas for some time now; however, there are just a few issues in your announcement I'd like to address.

As you may know, US Fish and Wildlife Service (USFWS) and Bat Conservation International have been the primary nodes coordinating WNS information, survey and response protocols, and research on this fast moving, little understood disease. The USFWS website (<http://www.fws.gov/whitenosesyndrome/>) and conference calls every two weeks with biologists working on these issues provide the most contemporary information on the spread and impact of the fungus (*Geomyces destructans*, Gd) and the disease (White Nose Syndrome). This is the fifth year they've hosted leading national and international scientists and researchers, conservation practitioners and regulators at the WNS Symposium to receive the latest updates on Gd and WNS transmission, spread, conditions and responses – what's new, what's working, what's not. This focused group participates in workshops, information presentations, and action based discussions – these working groups are the leaders in understanding and responding to this disease. There is a lot to know about the relationship between the Gd fungus and the WNS expression (visible effects, stress, and mortality).

WNS has not been detected in Oklahoma. The *fungus* that causes WNS was detected in western Oklahoma a few years back; however, despite many comprehensive additional surveys, it has not been detected again, nor has the disease WNS been detected anywhere in the state.

TPWD has funded surveys in the Panhandle in suitable areas closest to that fungal detection and BCI has done other work to survey for the disease. The fungus and its expression as WNS have not been detected in Texas. There is a **lot** of research going on right now to understand the conditions, sites, and bat species in which the fungus expresses as WNS – while we don't have it in Texas, we certainly want to be adequately prepared for detection and response. We will continue to monitor potential areas and are working on our statewide surveillance and response protocols this year with a working group – I'm working on the list of stakeholders and I can certainly include you in that list if you are interested in learning more.

There are currently no USFWS approved protocols for the treatment and release of WNS positive (WNS+) bats.

Bottom line is that we (Texas) would not want to accept WNS+ bats from outside of the state. And, per the Bat World Wildlife Rehabilitation Permit Provision 12, y'all are not authorized to transport from/to other states without coordinating written permission with TPWD. For interstate transfer to be a more regular occurrence, a special provision would have to be made on the permit explicitly; however, because we do not have WNS in Texas, TPWD would not permit WNS+ bats coming across state lines into Texas to any TPWD permitted rehab facility, nor would we authorize acceptance of any bat from WNS+ states. We could not be certain that WNS+ bats would not pass the fungus or disease to *uninfected releasable bats in the facility*, and then the spores of the fungus could spread upon release of the healthy bats. Another concern would be that if a rehabbed infected bat appears to recover and was released, it could potentially spread the fungal spores and/or breed with indigenous bats (same species, of course) and have possible impacts to their fitness to fend off the disease.

In the event that WNS is detected in Texas, we would currently follow the established USFWS protocols for detection and response. When we get our state specific protocols in place, TPWD will review all bat rehabilitator's permits and

may include some level of quarantine holding and transfer to a permitted scientific research facility, but would not include treatment or release until we know more about the disease. In order for any permitted bat rehabber to provide quarantine facilities, the permit would need to be amended to accommodate these activities, along with a *strong scientifically supported reason for doing so*. Any quarantine practices in any facility must be sufficient to protect uninfected, indigenous bats in the same facility against infection and prevent the release of the fungal spores to the outside world where they could infect wild bats.

I'm a bit concerned with this statement: **"The cost of the symposium will be used to fund a new state of the art sanctuary facility for the successful rescue, breeding, maintenance and eventual release of bats affected by WNS."** At this time, TPWD would not provide a permit for any facility to rescue, breed, maintain or (especially) release bats *which test positive for the fungus or WNS until peer reviewed published research has shown that the treatment could be effective*. Additionally, the Bat World Wildlife Rehabilitation Permit Provision 15a prohibits breeding of any of the animals held under the authority of the permit. While I understand that you provide habitat for a wild maternity colony (*thank you!*), no captive, rehabbing, or nonreleasable bats can be bred at your rehabilitation facility under your permit. All rehab animals at any facility should be separated by sex to prevent breeding. Any future breeding, which would be directly related to an identified need to recover a bat species, would need to occur under other TPWD permit programs and conditions.

Please review the terms of your permit to address this statement: **"... live, rescued bats will be an integral part of the instruction throughout the day, but participants will not be handling them for the purposes of this symposium."** The Bat World Wildlife Rehabilitation Permit allows (Provision 10) *limited* permanent retention of non releasable wildlife, on a *case by case basis*, for educational purposes IF approved by TPWD (see Texas Administrative Code §69.44. General Provisions. e. 1: *The department may permit the retention of non releasable wildlife for approved educational, fostering, or socialization purposes, or for transfer to zoological, scientific, or educational permit holders. Requests must be made in writing to the department*). Using live bats during the symposium is fine if they are not bats currently under rehabilitative care and if they've been approved by TPWD to retain as non releasable for education. I noticed on some of your past annual reports that you indicated several bats in some years that were transferred to "captive colony;" however, I'm unaware of any case by case approvals in our files which would authorize you to hold any non releasable bats for educational purposes and y'all do not have an educational display permit for that purpose. It's possible in our recent turn over that maybe we are missing some authorization paperwork or we just need to update our files that you have a captive colony, appropriate facilities for non releasable bats, and/or numbers and species of those now captive bats? You could coordinate that update with Megan Russell if we're out of date on that information – we have had a lot of change in that program in the last several years, certainly as long as you've been operating the Sanctuary.

Please feel free to visit with Megan Russell (megan.russell@tpwd.state.tx.us) in our Nongame Permits shop or me if you need more information on any of the aspects above.

Your workshop is a great opportunity to reach quite a few people about bat conservation and this devastating disease. We appreciate your efforts!

All the best,

Wendy Connally, Program Lead
Texas Parks & Wildlife Department
*Rare Species, Nongame Permits, and
Texas Conservation Action Plan*
direct 512.389.4975
cell 512.461.6237
wendy.connally@tpwd.state.tx.us

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Your support through the Horned Lizard License Plates contributes to wildlife and habitat conservation throughout Texas
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BCC

