



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-16-00337-CV

MARY CUMMINS, APPELLANT

V.

AMANDA LOLLAR, APPELLEE

On Appeal from County Court at Law Number Three
Tarrant County, Texas
Trial Court No. 2015-002259-3; Honorable Mike Hrabal, Presiding

May 3, 2018

MEMORANDUM OPINION

Before **CAMPBELL, PIRTLE, and PARKER, JJ.**

This appeal is round two of an Internet defamation suit filed by Appellee, Amanda Lollar, against Appellant, Mary Cummins. Lollar is President of Bat World Sanctuary, Inc., a non-profit corporation located in Mineral Wells, Texas, dedicated to the rehabilitation of bats. Cummins is a California resident who champions herself as an animal advocate and an investigator of animal cruelty.

In the first defamation suit, which was tried without a jury, Lollar obtained a multi-million-dollar judgment in actual and exemplary damages against Cummins. Cummins appealed the judgment to the Second Court of Appeals. In a lengthy opinion, that court affirmed the award of actual and exemplary damages for defamation, affirmed that portion of the trial court's judgment ordering Cummins to remove from the Internet the web pages and defamatory statements specified in the judgment, but reversed that portion of the judgment permanently enjoining Cummins from making similar statements in the future, and reversed the award for damages for breach of contract and attorney's fees. See *Cummins v. Bat World Sanctuary*, No. 02-12-00285-CV, 2015 Tex. App. LEXIS 3472, at *36, *90 (Tex. App.—Fort Worth April 9, 2015, pet. denied).

Soon after the Second Court of Appeals issued its opinion, Cummins resumed posting statements about Lollar and a video with captions added by Cummins of Lollar performing an episiotomy on a pregnant bat. Relying on that part of the Second Court's opinion that reversed the permanent injunction as being an unconstitutional prior restraint;¹ *id.* at *78, Cummins posted, "I am not prohibited from posting anything on the internet. I will be reposting all of the videos and photos." Her understanding of the opinion ignored that portion which provides, "[t]hough Cummins can be held responsible for any defamatory statements she may make about Lollar in the future, the trial court could not issue an order prohibiting her from making them." *Id.* (Emphasis added).

¹ The Second Court held that the trial court's judgment requiring Cummins to remove from the Internet statements that appeared on specific webpages was constitutional; however, the Second Court found the trial court erred in permanently enjoining Cummins from making similar statements in the future as a violation of article 1, section 8 of the Texas Constitution.

Two days after Cummins began reposting statements, on April 15, 2015, Lollar filed her second defamation suit against Cummins. This time, Cummins availed herself of legislative enactments which did not exist at the time of the first suit, filing a motion to dismiss Lollar's suit pursuant to the Texas Citizens Participation Act² and the Texas Defamation Mitigation Act.³ Following a brief hearing at which Cummins represented herself, the trial court entered an order denying her motion without specifying a reason. Cummins then filed this appeal challenging the denial of her motion to dismiss.⁴

Proceeding *pro se* on appeal, Cummins presents six issues challenging the trial court's order. She asserts the trial court erred in denying her motion to dismiss on the following grounds: (1) the Texas Citizens Participation Act (TCPA); (2) the Texas Defamation Mitigation Act (TDMA); (3) a lack of clear and convincing evidence that she allegedly defamed Lollar with malice; (4) Lollar and her attorney, Randy Turner, committed fraud, forgery, and perjury; (5) the one-year statute of limitations for defamation had expired; and (6) the trial court did not have personal or subject matter jurisdiction. Lollar responded by asserting that the TCPA was inapplicable to the facts of this case, or alternatively, by alleging that she had established a *prima facie* case for each element of her cause of action by clear and specific evidence. She further alleged that

² TEX. CIV. PRAC. & REM. CODE ANN. § 27.001-.009 (West 2015). All further references throughout this opinion to "§" or "section" are to the Texas Civil Practice and Remedies Code unless otherwise designated.

³ §§ 73.051-.062 (West 2017).

⁴ This appeal was originally filed in the Second Court of Appeals. Generally, accelerated appeals are not transferred to another appellate court. See Misc. Docket No. 11-9194 (Sept. 26, 2011). However, due to recusals by justices on the Second Court of Appeals, this appeal was transferred to this court by order of the Texas Supreme Court. See Misc. Docket No. 16-9142 (Sept. 15, 2016). Therefore, should a conflict exist between precedent of the Second Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. See TEX. R. APP. P. 41.3.

she had properly complied with the TDMA and that her suit was brought within the one-year statute of limitations. By reply brief, Cummins defends the position she has taken on her issues. We affirm the trial court's denial of Cummins's motion to dismiss.

BACKGROUND

Lollar founded the Bat World Sanctuary (BWS) in 1994 in Mineral Wells, Texas, to protect a bat colony and rescue injured bats. According to Lollar, she and a local veterinarian worked together to treat and rehabilitate injured bats.

In 2000, BWS began offering internships for people to learn about bat rescue and rehabilitation. In June 2010, Cummins accepted a two-week internship at BWS and entered into an internship contract with BWS. Cummins left BWS before completing her internship and returned to California.

Disenchanted with her internship, Cummins sought out information from government agencies about whether BWS had a permit to operate and she reported the "less than optimal" conditions she had witnessed while at BWS to certain local, state, and federal organizations. She complained that Lollar was mistreating her dogs and the bats at BWS. She made online accusations that Lollar failed to treat two dogs for specific ailments. One of the dogs, who was nineteen years old and in poor health, was eventually euthanized, an act Cummins characterized as cruel.

Cummins also posted statements about mistreatment of bats that included extraction of teeth and performing episiotomies without local anesthesia. While an intern at BWS, Cummins made a video of Lollar performing an episiotomy on a bat giving birth. She posted the video with misleading captions on the Internet, on Twitter, and on her

Facebook page. Lollar acknowledged what the video portrayed but took issue with the captions that Cummins added which accused Lollar of various forms of “graphic animal cruelty.”

Cummins posted statements, videos, and photographs accusing Lollar of animal cruelty, practicing veterinary medicine without a license, fraud, violations of laws, rules, regulations, or standards, and illegal possession of a controlled substance. Non-criminal accusations further portrayed Lollar as uneducated and unintelligent. Cummins also posted negative statements on a blog about Lollar’s attorney.

Following Cummins’s postings, Lollar asserted that donations to BWS had decreased and it was near bankruptcy.⁵ She sued Cummins for defamation and BWS sued for breach of the internship contract. Following a bench trial at which Cummins represented herself and at which Lollar and BWS had pro bono representation, BWS was awarded \$10,000 for breach of contract plus attorney’s fees of \$176,700 and Lollar was awarded \$3,000,000 in actual damages for defamation and \$3,000,000 in punitive damages. The trial court’s judgment ordered that Cummins “immediately and permanently remove from the internet the following statements” from several different websites:

- They breed animals in the facility.
- Pretty ironic for this group to certify Bat World Sanctuary when the health department told her to leave town and they had to gut the building and remove her belongings.

⁵ Cummins disputes that donations for BWS slowed.

- Vet recommended blood and stool tests. Lollar declined. She just wants empirical therapy. If that [sic] doesn't work, she wants to euth [sic] 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.
- 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.
- He should not be working for free for someone who commits animal cruelty.
- I doubt he'll 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.
- 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.
- 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.
- She does not state that it died from neglect of care. She also chose to euth [sic] it instead of treating it as her vet suggested. She'd previously turned down care which her vet suggested.
- When I was at Bat World she told me the place where she buys her rabies vaccine thinks she's a doctor.
- 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.
- **BREAKING NEWS!!!** Amanda Lollar of Bat World Sanctuary admits in writing that she and Bat World Sanctuary are being forced to leave

Mineral Wells because of all the complaints to the City and Health Department.

- The dogs rear claws are super long. There is no way she could stand. . . . She has to drag herself on cement.
- She tells people to use Isoflurane illegally, inhumanely and unsafely in her book.
- He didn't care that she admitted to illegally having the human rabies vaccination, admitted to using drugs not according to the label that she "proudly" admitted to performing surgery.
- In the video Lollar takes tweezers and just pulls out the molars of a conscious bat that is fighting and biting her while it bleeds. Lollar is proud of this and posted this video in her book and online. Bat experts know that bats must be unconscious and intubated to remove molars. Can you imagine the pain that bat felt?
- 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.
- Lollar is exposing people to rabies by not checking their cards.
- 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.
- 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.
- Yeah, I look like crap in the videos but at least there are no videos of me hacking an animal to death.
- She's been breeding her bats illegally. She's committing fraud asking for money for a project she cannot and will not do.
- 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.

- Rabies complaint against Bat World Sanctuary. General sanitation laws, harboring high risk rabies animals, allowing them in downtown.
- 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.
- 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.
- Amanda Lollar of Bat World Sanctuary is now sending threats of extortion from Mineral Wells, Texas. Because she's sending it over the computer it's a Federal crime.
- 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.
- 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.
- Here is the disgusting photo of my face which they photoshopped semen onto. They then added the caption "Yep, screw you too, Mmmmary!" They named the file "mmmm." This is how disgusting and childish these people are.
- She's the one who handles rabid bats with her bare hands.
- Update: 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.
- Amanda Lollar commits animal cruelty at Bat World Sanctuary.

The judgment further ordered Cummins to remove three specific websites in their entirety. Finally, Cummins was “prohibited from posting on the internet or publishing to any person any video recording of any episiotomy that was recorded or made at Bat World Sanctuary.”

In its lengthy analysis, the Second Court found the evidence sufficient to show that Cummins’s statements about Lollar were false and sufficient to establish defamation per se with actual malice. *Cummins*, 2015 Tex. App. LEXIS 3472, at *75. The award for actual damages and exemplary damages in favor of Lollar was affirmed but the damages for breach of contract and attorney’s fees in favor of BWS were reversed. *Id.* at *89-90. The court also affirmed the portion of the trial court’s judgment ordering Cummins to remove defamatory statements and websites but reversed that portion of the judgment permanently enjoining Cummins from posting or publishing future defamatory content as being an unconstitutional prior restraint. *Id.* at *90.

We now turn to the second defamation suit, the suit pending in the trial court in this cause of action. In this proceeding, Cummins sought to have Lollar’s defamation suit dismissed under the TCPA and the TDMA. At a hearing on the motion to dismiss, the trial court found that the pleadings and affidavits included with Lollar’s response to the motion presented sufficient evidence to deny Cummins’s motion to dismiss under the

TCPA. The trial court also found that Lollar’s request for retraction under the TDMA was timely filed and admitted an exhibit into evidence which identified hundreds of statements Lollar claimed defamed her. Cummins filed this appeal from the denial of her motion to dismiss.

PRO SE LITIGANTS

As a pro se litigant, Cummins is not exempt from procedural rules. *Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005). As such, she must comply with applicable procedural rules or else she would be given an unfair advantage over litigants represented by counsel. *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184-85 (Tex. 1978). Notwithstanding this precedent, we are instructed to construe the appellate briefing rules liberally so that substantial compliance is sufficient to address the merits of an argument. See TEX. R. APP. P. 38.9.

ISSUE ONE—TEXAS CITIZENS PARTICIPATION ACT

Chapter 27 of the Texas Civil Practice and Remedies Code, known as the Citizens Participation Act, is often characterized as an “anti-SLAPP” (Strategic Lawsuits Against Public Participation) statute. See *KBMT Operating Co. v. Toledo*, 492 S.W.3d 710, 713 n.6 (Tex. 2016); *Serafine v. Blunt (Serafine I)*, 466 S.W.3d 352, 365-67 (Tex. App.—Austin 2015, no pet.). The stated 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 extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.” § 27.002; *ExxonMobil Pipeline Co. v. Coleman*, 515 S.W.3d 895, 898 (Tex. 2017). To effectuate the purpose of the TCPA, the Legislature included an expedited manner for

dismissing claims brought to intimidate or to silence a defendant's exercise of the enumerated First Amendment rights. See *Coleman*, 515 S.W.3d at 898. See also § 27.003.

Under the anti-SLAPP provisions of the TCPA, a defendant moving to dismiss must show by a preponderance of the evidence⁶ that the plaintiff's claim is based on, relates to, or is in response to the defendant's exercise of: (1) the right of free speech, (2) the right to petition, or (3) the right of association. § 27.005(b). If the defendant demonstrates that the plaintiff's suit implicates one of these rights, the burden shifts to the plaintiff to establish by clear and specific evidence⁷ a prima facie case⁸ for each essential element of the claim in question. § 27.005(c). Even when the plaintiff meets its burden, the trial court still must dismiss the lawsuit if the defendant "establishes by a preponderance of the evidence each essential element of a valid defense to the plaintiff's claims." § 27.005(d). In determining whether to dismiss a suit, the trial court shall consider the pleadings as well as the supporting and opposing affidavits. § 27.006.

Under the TCPA, "exercise of the right of free speech means a communication made in connection with a matter of public concern." § 27.001(3). A "communication"

⁶ Preponderance of the evidence means the greater weight and degree of credible evidence presented in evidence that would create a reasonable belief in the truth of the matter. *Murf v. Pass*, 249 S.W.3d 407, 409 n.1 (Tex. 2008); *Herrera v. Stahl*, 441 S.W.3d 739, 741 (Tex. App.—San Antonio 2014, no pet.).

⁷ Proof by clear and specific evidence is more than "mere notice pleading." *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015). A party must "provide enough detail to show the factual basis for its claim." *Id.* at 590-91.

⁸ The legal meaning of a prima facie case is "evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted." *In re Lipsky*, 460 S.W.3d at 590 (citing *Simonds v. Stanolind Oil & Gas Co.*, 134 Tex. 348, 136 S.W.2d 207, 209 (1940)). It is the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *In re Lipsky*, 460 S.W.3d at 590 (citing *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004)).

includes the “making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.” § 27.001(1); *Deaver v. Desai*, 483 S.W.3d 668, 672 (Tex. App.—Houston [14th Dist.] 2015, no pet.). A “matter of public concern” includes an issue related to “health or safety, environmental, economic, or community well-being, the government, a public official or public figure, or a good, product, or service in the marketplace.” *Id.* at § 27.001(7).

ANALYSIS

Whether speech is a matter of public concern is a question of law. *Connick v. Myers*, 461 U.S. 138, 148 n.7, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); *Klantzman v. Brady*, 456 S.W.3d 239, 257 (Tex. App.—Houston [1st Dist.] 2014), *aff'd*, 515 S.W.3d 878 (Tex. 2017). Likewise, public figure status is also a question of law. *Neely v. Wilson*, 418 S.W.3d 52, 70 (Tex. 2013).

In the first appeal, based on the record before it, the Second Court found that, although animal cruelty could be a matter of public concern, statements made by Cummins about the care and treatment of bats by Lollar were not a matter of public concern or controversy. *Cummins*, 2015 Tex. App. LEXIS 3472, at *24-28. The court also found there was no evidence to support Cummins’s claim that Lollar was a limited-purpose public figure. *Id.* at *26, *28. Furthermore, Cummins was not a media defendant. *Id.* at 28.

The “law of the case” doctrine mandates that when a question of law is decided on appeal by a court of last resort, that decision governs the case throughout any subsequent proceedings. *Hudson v. Wakefield*, 711 S.W.3d 628, 630 (Tex. 1986); *Allied Mktg. Group*.

v. Paramount Pictures Corp., 111 S.W.3d 168, 177 (Tex. App.—Eastland 2003, pet. denied) (citing *Hudson*, 711 S.W.2d at 630). The doctrine is ordinarily applicable only where the prior appellate decision was rendered in the same case in which the subsequent appeal is pending; however, it has been applied where the facts in the second trial are substantially the same as in the first trial, or so nearly aligned that they do not materially affect the legal issues involved in the second trial. *Farmers Group Ins., Inc. v. Poteet*, 434 S.W.3d 316, 329 (Tex. App.—Fort Worth 2014, pet. denied). The public policy underlying the doctrine is to prevent useless relitigation of issues already decided between the parties, to ensure consistency, and to promote judicial economy. See *LeBlanc v. State*, 826 S.W.2d 640, 644 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd). Under this doctrine, matters of law disposed of in an earlier proceeding will not be revisited in a subsequent proceeding.

Applying the law of the case doctrine to this case, we are bound by the Second Court's determinations that Cummins's statements did not involve a matter of public concern and that Lollar was not a limited-purpose public figure. Cummins has not shown anything different than what was shown in the first case; therefore, we are bound by the Second Court's question of law determination that the statements made by Cummins were not communications "made in connection with a matter of public concern." As such, because Lollar's suit was not based on, related to, or pertained to a matter of public concern or controversy, the TCPA simply does not apply to this case. Accordingly, the trial court did not err in denying Cummins's motion to dismiss based on that statute.

Even if we were to assume *arguendo* that Cummins could have shown by a preponderance of the evidence that her right to free speech was implicated and that the

TCPA applied, the trial court's denial of the motion to dismiss would still prevail because Lollar established by clear and specific evidence a prima facie case of defamation, and Cummins did not establish by a preponderance of the evidence a valid defense to those claims. Defamation is "the invasion of a person's interest in her reputation and good name." *Hancock v. Variyam*, 400 S.W.3d 59, 63 (Tex. 2013). To establish a defamation claim, a plaintiff must show the defendant: (1) published a false statement of fact to a third party, (2) that defamed the plaintiff, (3) with the requisite degree of fault (actual malice if the plaintiff is a public official or a public figure or with negligence if the plaintiff is a private individual) regarding the truth of the statement, and (4) the statement caused damages, unless the statements were defamatory per se. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015).

Defamation per se refers to statements that are so obviously harmful that general damages may be presumed. *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 162 n.7 (Tex. 2014). A statement that injures a person in her office, profession, or occupation is typically classified as defamatory per se. *Hancock*, 400 S.W.3d at 64.

The statements made by Cummins against Lollar accuse her of crimes such as fraud, practicing veterinary medicine without a license, and illegal possession of a controlled substance. The statements also accuse Lollar of various forms of animal neglect and violations of state and federal rules and regulations. Cummins's Internet posts were damaging to Lollar's reputation and her livelihood.

Applying a de novo standard of review to the trial court's determinations; *Watson v. Hardman*, 497 S.W.3d 601, 605 (Tex. App.—Dallas 2016, no pet.), like the Second Court, we too have before us sufficient evidence that Cummins made the statements in question with actual malice, i.e., with knowledge that they were false or with reckless disregard of whether they were true. See *Cummins*, 2015 Tex. App. LEXIS 3472, at *36-67; *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 420 (Tex. 2000). As a private person, Lollar was only required to establish that Cummins made those statements with negligence. However, again like the Second Court, we find Cummins's statements were so malicious and defamatory that they were defamatory per se—i.e., they were so inclined to cause injury to Lollar that general damages were presumed. *Waste Mgmt. of Tex., Inc.*, 434 S.W.3d at 162 n.7. Accordingly, we find Lollar met her burden of proof under section 27.005(c) to establish by clear and specific evidence a prima facie case for each element of her defamation claim. Issue one is overruled.

ISSUE TWO—TEXAS DEFAMATION MITIGATION ACT

In 2013, the Legislature enacted the Texas Defamation Mitigation Act. TEX. CIV. PRAC. & REM. CODE ANN. §§ 73.051-.062 (West 2017). The purpose of the TDMA is to provide a method for a person who has been defamed by a publication or broadcast to mitigate any perceived damage or injury. § 73.052. Under the TDMA, a person may not maintain a defamation suit unless: (1) the person has made a timely and sufficient request for a correction, clarification, or retraction from the offending party; or (2) the offending party has made a correction, clarification, or retraction. § 73.055(a). A request for a correction, clarification, or retraction must be made during the limitations period for commencement of the defamation claim. *Id.* at (b). Furthermore, a person who does not

request a correction, clarification, or retraction within ninety days after receiving knowledge of a publication may not recover exemplary damages. *Id.* at (c). The TDMA affords a means to quickly mitigate any perceived damage and it promotes early resolution of disputes arising from a defamatory publication. *Hardy v. Commun. Workers of Am. Local 6215*, No. 05-16-00829-CV, 2017 Tex. App. LEXIS 2842, at *17 (Tex. App.—Dallas March 31, 2017, pet. denied) (mem. op).

ANALYSIS

Here, Cummins sought dismissal of Lollar’s suit under the TDMA for failure to comply with its requirements. She contends that Lollar did not timely request a correction, clarification, or retraction under section 73.055(b) and dismissal was the proper remedy because the TDMA is designed to bar “frivolous, meritless defamation lawsuits exactly like this one.”

Immediately after the Second Court issued its opinion reversing the permanent injunction prohibiting Cummins from republishing any of the defamatory statements made the basis of the first defamation suit, she began reposting statements and a video which had just been declared defamatory. By her pleadings, Lollar asserts that Cummins began posting defamatory statements “within one hour” after the Second Court released its opinion. Using the April 9, 2015 release date of the opinion as the date Lollar received knowledge of those postings, she had ninety days to request a correction, clarification, or retraction to be eligible for recovery of exemplary damages. § 73.055(c).

The ninetieth date from April 9, 2015 was July 8, 2015, but Lollar did not request a written retraction until July 15, 2015. Thus, Lollar’s request was not within the ninety-

day deadline specified in section 73.055(c). However, Cummins’s argument that dismissal of Lollar’s suit was required is mistaken. The only consequence for failing to make a request for retraction within ninety days is preclusion of recovery of exemplary damages, not dismissal. See *Warner Bros. Entm’t, Inc. v. Jones*, 538 S.W.3d 781, 812 (Tex. App.—Austin 2017, pet. filed March 7, 2018). Otherwise, Lollar’s request was made within the one-year limitations period for a defamation action. See § 16.002(a) (West 2017).⁹

The TDMA also requires a request for retraction to state “with particularity the statement[s] alleged to be false and defamatory” and, to the extent known, the time and place of publication. § 73.055(d)(3). The request must also allege the “defamatory meaning of the statement[s].” *Id.* at (d)(4). Lollar’s request for retraction included an exhibit describing hundreds of statements she wanted retracted. Cummins claims that Lollar did not comply with her email request for proof that the statements were defamatory. However, Lollar provided her with a document entitled, “Disclosure of Evidence of Falsity” which incorporated the transcript from the first defamation suit in which the statements were found to be defamatory. Based on these facts, we conclude that Lollar satisfied the requirements of the TDMA for maintaining her defamation suit. Issue two is overruled.¹⁰

ISSUE THREE—SUFFICIENCY OF THE EVIDENCE TO SUPPORT DEFAMATION WITH MALICE

⁹ The one-year statute of limitations is fully discussed in Cummins’s fifth issue.

¹⁰ We note that if Cummins believed that Lollar did not comply with the requirements of the Act, she had the option to file a plea in abatement under section 73.062.

By her third issue, Cummins contends that Lollar did not produce clear and convincing evidence that she defamed her with malice. To establish actual malice in a defamation case, a plaintiff must prove that the defendant made the statement “with knowledge that it was false or with reckless disregard of whether it was false or not.” See *Van Der Linden v. Khan*, 535 S.W.3d 179, 202 n.12 (Tex. App.—Fort Worth 2017, pet. filed March 12, 2018). The following is the entirety of Cummins’s issue challenging whether Lollar presented sufficient evidence to establish that Cummins acted with malice:

In order to prove malice one must prove that the party knowingly made a false statement of fact about another party which was not privileged. [Lollar] did not prove the items were defamatory.

Cummins presents a conclusory statement unsupported by argument or legal authority. See TEX. R. APP. P. 38.1(i); *Hornbuckle v. State Farms Ins.*, No. 02-15-00387-CV, 2016 Tex. App. LEXIS 11197, at *8 (Tex. App.—Fort Worth Oct. 13, 2016, no pet.) (mem. op.). An appellate court has no duty to brief issues for an appellant. *Hornbuckle*, 2016 Tex. App. LEXIS, at *7-8. Applying even a liberal construction of Rule 38.1(i) of the Texas Rules of Appellate Procedure, we cannot say that Cummins met the minimal standard of substantial compliance with the rule. Resultantly, she has not preserved her issue on malice for our consideration. Issue three is overruled.

ISSUE FOUR—FORGERY, FRAUD, AND PERJURY

Cummins’s fourth issue asserts the trial court erred in denying her motion to dismiss because Lollar and her attorney, Randy Turner, committed forgery, fraud, and perjury. We disagree.

For the first time on appeal, Cummins argues that Turner and Lollar have unclean hands and she makes numerous accusations against Turner culminating in a suggestion that he be disbarred. Cummins alleges that Turner and Lollar acted in concert to commit forgery, fraud, and perjury in emails, affidavits, and exhibits. Cummins also claims that Lollar perjured herself about the financial status of BWS.

Preservation of error reflects important prudential considerations recognizing that the judicial process benefits greatly when trial courts have the opportunity to first consider and rule on error. *Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014) (citing *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003)). Affording trial courts this opportunity conserves judicial resources and promotes fairness by ensuring that a party does not neglect a complaint at trial and raise it for the first time on appeal. *Burbage*, 447 S.W.3d at 258.

By failing to object to emails, affidavits, and exhibits in the trial court, Cummins has waived any complaint for appellate review. The time for Cummins to have raised issues of forgery, fraud, and perjury was in the trial court at the hearing on her motion to dismiss. She did not present those issues thereby depriving the trial court of the opportunity to evaluate and rule on them. Issue four is overruled.

ISSUE FIVE—STATUTE OF LIMITATIONS

By her fifth issue, Cummins contends the trial court erred in denying her motion to dismiss based on the one-year statute of limitations for defamation. We disagree.

An action for defamation is subject to a one-year statute of limitations from the date of accrual. § 16.002(a) (West 2017). Generally, an action for defamation accrues when

the defamatory statement is published or circulated. *Velocity Databank, Inc. v. Shell Offshore, Inc.*, 456 S.W.3d 605, 609(Tex. App.—Houston [1st Dist.] 2014, pet. denied). A defamation claim arising out of a website would accrue from the day the matter was published or circulated. *Id.*

By her brief in support of her amended motion to dismiss, Cummins argued that any Internet posts made prior to April 15, 2014, exactly one year before Lollar filed her second defamation suit, fell outside of the limitations period. At the hearing on the motion to dismiss, Lollar introduced, and the trial court admitted an exhibit containing hundreds of posts dated between July 2014 and July 2015. On appeal, without citing any relevant authority other than the statute of limitations for defamation,¹¹ Cummins argues that those posts were cut and pasted from earlier posts and, therefore, fell outside the statute of limitations period based on the “first publication standard.”

The Second Court issued its opinion on April 9, 2015. Lollar’s underlying suit was filed on April 15, 2015. Cummins filed her original motion to dismiss on July 21, 2015, and her amended motion to dismiss on February 8, 2016. In her response to Cummins’s original motion, Lollar included her four-page affidavit listing numerous statements posted by Cummins which were found to be defamatory in the first suit. Lollar also filed a response to Cummins’s amended motion that included a request for retraction under the TDMA and an exhibit that listed hundreds of statements published subsequent to July 2014. Those posts, which are the basis of Lollar’s second defamation suit, fall within the

¹¹ Rule 38.1(i) of the Texas Rules of Appellate Procedure requires an appellant to cite appropriate legal authorities in support of his or her argument. Failure to do so results in inadequate briefing and waiver of the argument. *Sanders v. Future Com, Ltd.*, No. 02-15-00077-CV, 2017 Tex. App. LEXIS 4575, at *18-19 (Tex. App.—Fort Worth May 18, 2017, no pet.) (mem. op.).

one-year statute of limitations from the date suit was filed on April 15, 2015. Issue five is overruled.

ISSUE SIX—LACK OF JURISDICTION

Again, without citation to any legal authority,¹² Cummins contends the trial court should have granted her motion to dismiss for lack of both personal and subject matter jurisdiction and because Tarrant County, Texas, was not a proper venue for Lollar’s suit. We disagree.

Whether a court has personal jurisdiction over a nonresident defendant is a question of law we review de novo. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). A court has power to decide a case only if it has “both subject matter jurisdiction over the controversy and personal jurisdiction over the parties.” *TV Azteca v. Ruiz*, 490 S.W.3d 29, 36 (Tex. 2016) (citing *Spir Star AG v. Kimich*, 310 S.W.3d 868, 871 (Tex. 2010)). Subject matter jurisdiction involves a court’s “power to hear a particular type of suit,” while personal jurisdiction “concerns the court’s power to bind a particular person or party.” *TV Azteca*, 490 S.W.3d at 36 (citing *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996)).

A court has personal jurisdiction over a nonresident defendant only if the requirements of both the Due Process Clause of the Fourteenth Amendment and the state’s long-arm statute are satisfied. *Moncrief Oil Int’l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 149 (Tex. 2013). Under the Due Process Clause, a defendant must have sufficient

¹² Again, Cummins failed to comply with Rule 38.1(j) of the Texas Rules of Appellate Procedure by not providing this court with any legal authority to support her argument.

minimum contacts with the forum so that maintaining suit there will not offend “traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Section 17.042 of the Texas Civil Practice and Remedies Code, known as the Texas “long-arm statute,” sets out a nonexclusive list for establishing whether a nonresident does business in Texas for purposes of personal jurisdiction, to wit: (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state; (2) commits a tort in whole or in part in this state; or (3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state. § 17.042 (West 2015). Personal jurisdiction involving Internet cases is resolved using a sliding scale and is determined by the degree of interaction. *Reiff v. Roy*, 115 S.W.3d 700, 705-06 (Tex. App.—Dallas 2003, pet. denied).

Cummins argues that because the Second Court found no evidence that she breached her internship contract, Lollar cannot use a “false” breach-of-contract claim to confer jurisdiction in Texas. Cummins misses the point. Her internship contract entered in Texas was not found to be invalid. Additionally, the photos and videos used in her online posts were taken in Texas and used to defame a Texas resident. By her repeated Internet transmission of photos and videos she took in Texas and by the formation of a valid internship contract entered in Texas, Cummins had sufficient minimum contacts to subject herself to the jurisdiction of a Texas court. *Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005).

Cummins also bases her complaint on a perceived bias between Lollar’s attorney, the attorney’s wife, and their personal friendships with numerous judges and justices in

Tarrant County, Texas, including justices on the Second Court. Her solution is to remove the case to federal court or California. Because Cummins cites no authority for her contention that the trial court lacked subject matter jurisdiction, she has waived any complaint on that basis. See TEX. R. APP. P. 38.1(i). Issue six is overruled.

CONCLUSION

The trial court's *Order Denying Motion to Dismiss* is affirmed.

Patrick A. Pirtle
Justice