

BAT WORLD SANCTUARY and
AMANDA LOLLAR,

Plaintiffs,

vs.

MARY CUMMINS,

Defendant Pro se

§ IN THE DISTRICT COURT

TARRANT COUNTY, TEXAS

352nd JUDICIAL DISTRICT

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Pursuant to Rule 166a of the Texas Rules of Civil Procedure, Defendant moves for summary judgment against Plaintiffs and, in support thereof, shows the following:

INTRODUCTION

Plaintiffs filed their second amended petition against Defendant October 4, 2011. Plaintiffs allege that Defendant entered into a written contract with Plaintiffs. Plaintiffs allege Defendant breached said contract by posting on the Internet photos and videos taken at Bat World Sanctuary without permission. Plaintiffs also allege that Defendant made false reports to authorities and posted false and defamatory statements online about Plaintiffs.

Plaintiffs allege claims for breach of contract, attorney's fees, defamation, exemplary damages and permanent injunction. As set forth in more detail below Plaintiffs' breach of contract claim is barred because Defendant never signed a contract with Plaintiffs. Even if Defendant had signed said contract, contract was not valid. Even if Defendant had signed said contract and it were valid, Defendant's action would not have been a breach of contract. Even if Defendant had breached said contract Plaintiffs have not been damaged. Plaintiffs' claims for attorney's fees are barred as there was no valid contract and attorney stated in court he was working "pro bono." Plaintiffs' defamation

1 and libel *per se* claims are barred because Plaintiffs have not proven that Defendant
2 made all of the statements in question and Defendant never posted false statements of
3 fact about Plaintiffs. Truth is a defense. Plaintiffs' complaint for exemplary damages are
4 barred as there was no malice. Plaintiffs' request for permanent injunction against
5 Defendant is barred because Defendant's posted videotapes and photographs do not
6 violate a contract because the contract was void, Plaintiffs did not perform according to
7 the contract, Defendant did not breach the contract, Plaintiffs were not damaged by any
8 breach and Defendant did not post defamatory, false statements of fact on the Internet
9 about Plaintiffs. As such, Defendant is entitled to summary judgement on each of
10 Plaintiffs' claims asserted in the above-styled action.

11 GROUNDS FOR SUMMARY JUDGMENT

12 Defendant believes that there is no genuine issue of material fact and that they are
13 entitled to judgment against Plaintiffs as a matter of law based upon the following
14 grounds:

- 15 1. Plaintiffs' Claim of Breach of Contract is barred because there was no valid
16 contract, Plaintiffs did not perform according to the terms of the contract,
17 Defendant did not breach any contract and Plaintiffs were not damaged as a result
18 of any alleged breach.
- 19 2. Pursuant to section 38.001 of Texas Civil Practice & Remedies Code Plaintiffs
20 claim to recover reasonable and necessary attorney's fees are barred because
21 there was no valid contract, Plaintiffs did not perform according to the terms of the
22 contract, Defendant did not breach any contract, Plaintiffs were not damaged as a
23 result of any alleged breach and Plaintiffs never paid any attorney's fees.
- 24 3. Pursuant to section 73.005 of Texas Civil Practice & Remedies Code Plaintiffs'
25 defamation, libel, libel *per se* claims are barred because truth is a defense,

1 Plaintiffs have not proven that statements were false, Plaintiffs have not proven
2 that Defendant made all of the statements in question, Plaintiffs have not shown
3 proof of damages and Plaintiffs were not damaged.

4 4. Pursuant to Texas Civil Practice & Remedies Code section 41.003 Plaintiffs
5 request for exemplary damages is barred because Defendant did not commit
6 defamation, libel or libel *per se* and there was no malice involved.

7 5. Plaintiffs' request for permanent injunction against Defendant is barred because
8 Defendant's posted videotapes and photographs do not violate a contract because
9 the contract was void, Plaintiffs did not perform according to the contract,
10 Defendant did not breach the contract, Plaintiffs have shown no damages,
11 Plaintiffs were not damaged by any breach and Defendant did not post defamatory,
12 false statements of fact on the Internet about Plaintiffs.

13 SUMMARY JUDGMENT EVIDENCE

14 In support of this Motion, Defendant relies upon the following evidentiary materials:

- 15 1. Plaintiffs' Second Amended Petition attached as Exhibit 1.
- 16 2. Affidavit of Witness Kay Singleton attached as Exhibit 2.
- 17 3. Document "Intern Rules" attached as Exhibit 3.
- 18 4. Email from Plaintiffs to Defendant attached as Exhibit 4.
- 19 5. Email from Defendant to Plaintiffs attached as Exhibit 5.
- 20 6. Hand writing expert report attached as Exhibit 6.
- 21 7. Curriculum vitae of Defendant Mary Cummins attached as Exhibit 7.
- 22 8. Alleged contract attached as Exhibit 8.
- 23 9. Batworld.org website page attached as Exhibit 9.
- 24 10. Chapter nine of Plaintiffs' book attached as Exhibit 10.
- 25 11. Videos posted by Plaintiffs on public YouTube attached as Exhibit 11.

- 1 12. Photos posted by Plaintiffs on public website batworld.org attached as Exhibit 12.
- 2 13. Photos posted by Plaintiffs on public website Facebook attached as Exhibit 13.
- 3 14. November 8, 2011 deposition of Plaintiff Lollar transcript attached as Exhibit 14.
- 4 15. Receipt for human rabies vaccination by Plaintiffs attached as Exhibit 15.
- 5 16. Internet post by intern Sarah Kennedy attached as Exhibit 16.
- 6 17. Proof videos were posted before Defendant left Bat World Sanctuary attached as
7 Exhibit 17.
- 8 18. Proof photos were posted before Defendant left Bat World Sanctuary attached as
9 Exhibit 18.
- 10 19. Copyright statement from Plaintiffs' website attached as Exhibit 19.
- 11 20. May 4, 2011 temporary injunction hearing transcript attached as Exhibit 20.
- 12 21. Affidavit of Defendant Mary Cummins attached as Exhibit 21.

13 UNDISPUTED FACTS

- 14 1. Defendant Mary Cummins is an experienced wildlife rehabilitator permitted by the
15 California Department of Fish & Game to care for native wildlife including bats (Exhibit
16 7).
- 17 2. Defendant attended an internship at Bat World Sanctuary in Mineral Wells, Texas in
18 June 2010. The purpose of the internship was to learn more about the care, treatment
19 and medical management of insectivorous bats.
- 20 3. Defendant took and posted on the Internet photos and videos while at Bat World
21 Sanctuary.
- 22 4. Defendant had written, oral and perceived permission to take and post these photos
23 and videos.
- 24 5. Defendant posted almost all of these photos and videos to the Internet **before**
25 Defendant left Bat World Sanctuary (Exhibit 17).

1 6. After leaving Bat World Sanctuary Defendant made truthful reports against Plaintiffs
2 for animal cruelty, animal neglect, violations of the Texas Health Code, violations of the
3 Animal Welfare Act, violations of regulations of the Texas Department of Parks and
4 Wildlife and to other government agencies.

5 7. Plaintiffs were investigated by the United States Department of Agriculture, Texas
6 Health Department and the Texas Department of Parks and Wildlife.

7 8. Plaintiffs filed their first complaint against Defendant September 15, 2010.

8 ARGUMENTS AND AUTHORITIES

9 Summary Judgment Standard.

10 A movant should be granted summary judgment if it demonstrates that there is no
11 genuine issue of material fact and that it is entitled to judgment as a matter of law with
12 respect to the issues set forth in the motion. Texas Rules Civil Procedure 166a(c); *Nixon*
13 *v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Texas 1985). Once the movant
14 produces evidence entitling it to summary judgment, the burden shifts to the non-
15 movant to established material fact question. *Lecton v. Dyll*, 65 S.W. 3d 696, 701 (Tex.
16 App.-Dallas 2001, pet. denied). As set forth in more detail below, there are no genuine
17 issues of material fact with respect to Plaintiffs' claims, and Defendant is entitled to
18 summary judgment as a matter of law.

19 **A. Plaintiffs' Claim of Breach of Contract is barred because there was no valid**
20 **contract, Plaintiffs did not perform according to the terms of the contract,**
21 **Defendant did not breach contract and Plaintiffs were not damaged as a result of**
22 **any alleged breach.**

23 The essential elements of a breach of contract cause of action that must be proven
24 are, (1) There is a valid contract; (2) The Plaintiffs performed or tendered performance
25 according to the terms of the contract; (3) The Defendant breached the contract; and

1 (4) The Plaintiffs sustained damages as a result of the breach. Valero Marketing &
2 Supply v. Kalama International, 51 S.W.3d 345, 351 (Tex.App.- Houston [1st Dist.] 2001,
3 no pet.).

4 A valid contract is formed by an offer, an acceptance, a meeting of the minds, each
5 party's consent to the terms, and, in the case of a written contract, execution and
6 delivery of the contract with the intent that it be mutual and binding. Baroid Equipment,
7 Inc. v. Odeco Drilling, Inc., 184 S.W.3d 1, 17 (Tex.App.-Houston [1st Dist.] 2005, pet.
8 denied).

9 Defendant did not breach said contract because it was not a valid contract.
10 Defendant never signed the contract in question as evidenced by affidavit of Defendant
11 (Exhibit 21) and hand writing expert report (Exhibit 6).

12 Even if Defendant had signed the contract Defendant would not have breached said
13 contract because contract is not valid. Defendant's name is misspelled by Plaintiffs as
14 "Cummings" when Defendant's last name is "Cummins" (Exhibit 8).

15 Even if Defendant had signed the contract Defendant would not have breached said
16 contract because contract is not valid. Plaintiffs did not perform as per the contract.
17 Plaintiffs did not "train and educate Trainee in the care, treatment and medical
18 management of insectivorous bats" (Exhibit 8) as evidenced by Defendants affidavit
19 (Exhibit 2) and witness Kay Singleton's affidavit (Exhibit 2).

20 Even if contract were valid and had Plaintiffs performed Defendant would not have
21 breached or violated contract. The contract states "It is understood that the data,
22 techniques, results, and anecdotal information provided to Trainee during their
23 internship at BWS (Bat World Sanctuary) is proprietary and is copyrighted as intellectual
24 property by BWS. Trainee agrees not (sic) distribute, share, publish, or sell this
25 information without obtaining prior written permission from BWS." Defendant was not

1 provided anything that Defendant didn't already know **during the internship** at Bat
2 World Sanctuary. Defendant had read Plaintiffs' co-authored book in 2005 besides other
3 books and had already been rehabbing bats for years. Defendant didn't learn anything
4 new that wasn't already in Plaintiffs' book as evidenced by Defendants affidavit (Exhibit
5 21).

6 Plaintiffs' book is a "how to" book. Therefore nothing in the book is "proprietary" or a
7 "trade secret." The Economic Espionage Act's definition of trade secret or proprietary
8 data follows from Section 1838, paragraph (3):

9 "[T]he term 'trade secret' means all forms and types of financial, business, scientific,
10 technical, economic, or engineering information, including patterns, plans, compilations,
11 program devices, formulas, designs, prototypes, methods, techniques, processes,
12 procedures, programs, or codes, whether tangible or intangible, and whether or how
13 stored, compiled, or memorialized physically, electronically, graphically,
14 photographically, or in writing if—

15 **"(A) the owner therefore has taken reasonable measures to keep such**
16 **information secret,** and "(B) the information derives independent economic value,
17 actual or potential, from not being generally known to, and not being readily
18 ascertainable through proper means by, the public[.]"

19 Because Plaintiffs' book is a "how to" book which is publicly available Plaintiffs have
20 not taken reasonable measures to keep such information "secret." The techniques are
21 ascertainable through proper means by the public. Plaintiffs' even offer chapters of the
22 book for free on their public website (Exhibits 9, 10). Plaintiffs and others have posted
23 similar photos, videos, techniques on the public Internet at such sites as YouTube, their
24 own public website batworld.org and Facebook (Exhibits 11, 12, 13). Defendant did not
25 post or share anything that wasn't already made public by Plaintiffs therefore Defendant

1 did not share or post anything that can be legally considered "proprietary." Plaintiffs do
2 not derive independent economic value from the information not being generally known
3 or readily available to the public.

4 The techniques in the book are not only not proprietary but they are also not
5 copyrighted. Copyright is a Federal issue, not a state or District Court issue. The fair use
6 act of copyright states "Copyright protects the particular way authors have expressed
7 themselves. It does not extend to any ideas, systems, or factual information conveyed in
8 a work." Copyright does not cover "techniques."

9 It further states "Section 107 contains a list of the various purposes for which the
10 reproduction of a particular work may be considered fair, such as criticism, comment,
11 news reporting, teaching, scholarship, and research." Defendant is a non-profit educator
12 who merely commented and criticized some techniques in the book. Defendant only
13 copy/pasted a few paragraphs from the book at most. Defendant did not copy/paste
14 large portions of the book. Defendant did not violate Plaintiffs' copyright.

15 Plaintiffs' website batworld.org has a copyright statement (Exhibit 18). The statement
16 is as follows, "we will happily provide most of our information free of charge to like-
17 minded individuals and groups." Plaintiffs allow others to use their material.

18 Even if contract were valid Defendant would not have breached the contract by
19 Defendant's actions. The contract states "Trainee agrees not (sic) distribute, share,
20 publish, or sell this information without obtaining prior written permission from (Bat
21 World Sanctuary) BWS." Defendant had prior written, oral and implied permission to
22 take and post the photos and videos as evidence by "Intern Rules" (Exhibit 3), Emails
23 with BWS (Exhibits 4, 5), Affidavit of Kay Singleton (Exhibit 2) and Affidavit of Defendant
24 Mary Cummins (Exhibit 21).

1 Plaintiffs would have to show that Plaintiffs sustained damages as a result of the
2 breach. Plaintiffs have failed to show any damages as there have been no damages.

3 **B. Pursuant to section 38.001 of Texas Civil Practice & Remedies Code**
4 **Plaintiffs claim to recover reasonable and necessary attorney's fees are barred**
5 **because there was no valid contract, Plaintiffs did not perform according to the**
6 **terms of the contract, Defendant did not breach any contract, Plaintiffs were not**
7 **damaged as a result of any alleged breach and no attorney's fees were**
8 **paid.**

9 Section 38.001 "Recovery of Attorney's fees" states "a person may recover
10 reasonable attorney's fees from an individual or corporation, in addition to the amount of
11 a valid claim and costs, if the claim is for: (1) rendered services; (2) performed labor;
12 (3) furnished material; (4) freight or express overcharges; (5) lost or damaged freight
13 or express; (6) killed or injured stock; (7) a sworn account; or (8) an oral or written
14 contract." There was no valid contract, Plaintiffs did not perform according to the terms
15 of the contract, Defendant did not breach any contract and Plaintiffs were not damaged
16 as a result of any alleged breach.

17 Attorney Randy Turner is providing services "pro bono." Turner stated in the May
18 4, 2011 temporary injunction hearing that "Q. Okay. Now, although you've asked for
19 attorney's fees, I'm handling this case pro bono, is that correct? You're not paying me
20 anything? A. That's correct." page 38, line 20 (Exhibit 20) Plaintiffs have not paid any
21 attorney's fees. Therefore there are no attorney's fees to "recover."

22 **C. Pursuant to section 73.005 of Texas Civil Practice & Remedies Code**
23 **Plaintiffs' libel, libel per se and defamation claims are barred because truth is a**
24 **defense, Plaintiffs have not proven that statements were false, Plaintiffs have not**
25

1 **proven that Defendant made all statements in question, Plaintiffs have not proven**
2 **damages and Plaintiffs have not been damaged.**

3 Pursuant to Texas Civil Practice & Remedies Code Section 73.001, "a libel is a
4 defamation expressed in written or other graphic form that tends to blacken the memory
5 of the dead or that tends to injure a living person's reputation and thereby expose the
6 person to public hatred, contempt or ridicule, or financial injury or to impeach any
7 person's honesty, integrity, virtue, or reputation or to publish the natural defects of
8 anyone and thereby expose the person to public hatred, ridicule, or financial injury." Acts
9 1985, 69th Leg., ch. 959, Section 1, eff. Sept. 1, 1985.

10 To prove a cause of action for defamation, Plaintiffs must prove that (1) the
11 defendant published a statement of fact, (2) the statement was defamatory, (3) the
12 statement was false, (4) the defendant acted negligently in publishing the false and
13 defamatory statement, and (5) the Plaintiffs suffered damages as a result. See *Brown v.*
14 *Swett & Crawford of Tex., Inc.*, 178 S.W.3d 373, 382 (Tex. App.-Houston [1 Dist.] 2005,
15 no pet.) (citing *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998)); see also
16 *Tex. Civ. Prac. & Rem. Code Ann. § 73.001* (Vernon 2005).

17 Plaintiffs claim Defendant also committed libel *per se*. *Tex. Civ. Prac. & Rem. Code*
18 *Ann. § 73.001* (Vernon 2005). Libel *per se* means that the written or printed words are
19 so obviously hurtful to the person aggrieved that they require no proof of their injurious
20 character to make them actionable. *Knox v. Taylor*, 992 S.W.2d 40, 50 (Tex.App.-
21 Houston [14th Dist.] 1999, no pet.). Defamation is actionable *per se* if it injures a person
22 in his office, business, profession, or occupation. Id. A false statement that charges a
23 person with the commission of a crime is also libelous *per se*. *Leyendecker & Assocs.,*
24 *Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984).

1 Plaintiffs claim Defendant committed libel *per se* by falsely posting that Plaintiffs
2 committed a crime. Defendant posted that Plaintiff Lollar “gives” rabies vaccinations to
3 humans. In Plaintiffs’ November 8, 2011 deposition Plaintiff Amanda Lollar admitted to
4 purchasing, possessing and giving rabies vaccinations to humans, page 29, line 17,
5 (Exhibit 14) “Q. Do you have a human rabies vaccine booster at Bat World Sanctuary?
6 A. Yes, we do” and line 21, “Q. Where did you get it from? A. From a drug company that
7 we have an account.” It is illegal for anyone other than a veterinarian, doctor or nurse to
8 purchase or possess the human rabies vaccination. Purchasing, receiving, possessing
9 the human rabies vaccination is a crime.

10 Defendant never stated that Plaintiff Lollar “injected” the vaccine into a human, only
11 that Plaintiff “gave” the vaccine to a human. In this case Plaintiff gave the vaccine to
12 Intern Sarah Kennedy or more specifically supposedly a doctor as per Plaintiff, page 31,
13 line 20 (Exhibit 14). In discovery Plaintiffs gave Defendant a copy of a receipt for the
14 human rabies vaccination (Exhibit 15) which proves they purchased and possessed it.
15 Plaintiffs are not a veterinarian, doctor or a nurse. August 20, 2011 Intern Sarah
16 Kennedy posted that “I also received shots including a cautionary booster on my last
17 day with the bats” (Exhibit 16). Defendant did not commit libel *per se* because what
18 Defendant posted was the truth as evidenced by Plaintiffs’ own statements under oath
19 and supporting documents.

20 Pursuant to Texas Civil Practice & Remedies Code section 73.005 truth is a defense
21 in a defamation; “the truth of the statement in the publication on which an action for libel
22 is based is a defense to the action.” Everything posted by Defendant about Plaintiff is
23 the truth. Plaintiffs have not submitted evidence to show that statements made by
24 Defendant were false. Plaintiffs have not submitted evidence to show that Defendant
25

1 made all statements in question. Defendant cannot be held responsible for actions by
2 third parties.

3 To prevail in a defamation, libel, libel *per se* claim Plaintiffs must prove that (1) the
4 defendant published a statement of fact, (2) the statement was defamatory, (3) the
5 statement was false, (4) the defendant acted negligently in publishing the false and
6 defamatory statement, and (5) the Plaintiffs suffered damages as a result. Plaintiffs
7 have not proven that Defendant made all of the statements in question, that the
8 statements were defamatory/false, Defendant acted negligently and/or with malice or
9 that Plaintiffs suffered damages as a result. The claims of defamation and libel *per se*
10 must be dismissed.

11 **D. Pursuant to Texas Civil Practice & Remedies Code section 41.003 Plaintiffs**
12 **request for exemplary damages is barred because Defendant did not commit**
13 **defamation, libel or libel *per se* and there was no malice involved.** In order to
14 recover exemplary damages under section 41.003 Plaintiffs would have to prove that
15 Defendant's statements were defamation, libel and/or libel *per se* and were made with
16 fraud, malice or gross negligence. Truth is a defense in a defamation claim. Plaintiffs
17 have also not proven that Defendant made all of the statements in question.

18 **E. Plaintiffs' request for permanent injunction against Defendant is barred**
19 **because Defendant's posted videotapes and photographs do not violate a**
20 **contract because the contract was void, Plaintiffs did not perform according to**
21 **the contract, Defendant did not breach the contract, Plaintiffs were not damaged**
22 **by any breach, Plaintiffs have not proven that Defendant made all statements in**
23 **question and Defendant did not post defamatory, false statements of fact on the**
24 **Internet about Plaintiffs.**

1 CONCLUSION

2 As set forth above, Plaintiffs' Claim of Breach of Contract is barred because there
3 was no valid contract, Plaintiffs did not perform according to the terms of the contract,
4 Defendant's actions did not breach any contract and Plaintiffs were not damaged as a
5 result of any alleged breach.

6 Plaintiffs' claim to recover reasonable and necessary attorney's fees is barred
7 because there was no valid contract, Plaintiffs did not perform according to the terms of
8 the contract, Defendant did not breach any contract, Plaintiffs were not damaged as a
9 result of any alleged breach and Plaintiffs never paid any attorney's fees.

10 Plaintiffs' claims for defamation, libel, libel *per se* are barred because truth is a
11 defense, Plaintiffs have not proven that Defendant made all of the statements in
12 question and Plaintiffs were not damaged.

13 Plaintiffs' request for exemplary damages is barred because Defendant did not
14 commit defamation, libel or libel *per se* and there was no malice involved.

15 Plaintiffs' request for permanent injunction against Defendant is barred because
16 Defendant's posted videotapes and photographs do not violate a contract because the
17 contract was void, Plaintiffs did not perform according to the contract, Defendant did not
18 breach the contract, Plaintiffs were not damaged by any breach, Plaintiffs have not
19 proven that Defendant made the statements in question, Plaintiffs have not proven that
20 statements made were false and Defendant did not post defamatory, false statements of
21 fact on the Internet about Plaintiffs.

22 For these reasons, all of Plaintiffs' claims fail as a matter of law. Based upon the
23 foregoing, Defendant is entitled to summary judgment on each of Plaintiffs' claims.

24 PRAYER

25 For these reasons, Defendant respectfully requests that the Court

- 1 1. Grant this Motion for Summary Judgment in its entirety;
2 2. Dismiss each of Plaintiffs' claims with prejudice; and
3 3. Grant Defendant such other and further relief to which Defendant may be justly
4 entitled at law or in equity.

5
6 Respectfully submitted,

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8 Mary Cummins, Defendant Pro se
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11 Phone 310-877-4770
12 Email: mmmaryinla@aol.com

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By:



Mary Cummins, Defendant Pro Se

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CERTIFICATE OF SERVICE

I, Mary Cummins, hereby certify that a TRUE COPY of the above **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT** was served on the Plaintiffs' Attorney of record by FAX and by FIRST CLASS MAIL at

Randy Turner
Bailey & Galyen
1901 W. Airport Freeway
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this 27th Day of January, 2012



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