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Clerk
Second Court of Appeals of Texas
Suite 9000
401 West Belknap
Fort Worth, Texas 76196

Re: *Cummins v. Lollar and Bat World Sanctuary,* 02-12-00285-CV

To the Court of Appeals for the Second District of Texas:

I write on behalf of Public Citizen as amicus curiae to express the following concerns about the libel judgment that is under appeal. Public Citizen is a public interest organization based in Washington, D.C, with over 300,000 supporters nationwide, 14,000 of them in Texas; Public Citizen also has an office in Austin, Texas. Since its founding in 1971, Public Citizen has encouraged public participation in civic affairs, and has brought and defended numerous cases involving the First Amendment rights of citizens who participate in civic affairs public debates. *See* http://www.citizen .org /litigation/briefs/internet.htm. Public Citizen has an interest in the development of libel law in this state, and in the application of fair procedures for resolving such libel suits, both because Public Citizen itself issues reports and makes statements in letters to state and federal agencies, and often criticizes specific people or companies by name in those publications, and also because its members and supporters, and the citizens whose public participation it encourages, often face the threat of libel litigation from those with whom they disagree.

Facts and Statement of the Case

In this case, plaintiff-appellee Amanda Lollar, who was described by the trial judge in his oral findings as having a "world-wide reputation in the proper care of bats similar to that of Jan Goodall in the [care] of primates," June 14 Tr. at 66, obtained a judgment in excess of six million dollars in actual and punitive damages, as well as attorney fees, against defendant-appellant blogger Mary Cummins, who posted some very strong criticisms of Lollar on the Internet. In addition to the monetary verdict, the trial judge issued an injunction requiring Cummins to remove forty-seven specific statements from the Internet and to refrain from repeating those statements.

It is certainly understandable that some of the statements at issue in this case might have caused Lollar economic and reputational injury; Public Citizen takes no position on whether any particular statement could, on a proper record and with proper findings, form a basis for a defamation judgment. But in support of the judgment here, the trial court made no findings about whether

specific statements were false or whether specific statements were uttered with actual malice. The trial court also failed to address whether each of the specific forty-seven statements was a statement of actual or implied fact, and hence potentially the subject of a proper defamation judgment, or whether the statement was one of opinion that is, therefore, not actionable. Nor did the trial court specifically address whether Lollar is, as Cummins argued below, a limited purpose public figure.

Each of the Statements on Which the Judgment and Injunction Was Based Should Be Tested Against Each of the State and Constitutional Elements of a Libel Claim.

In her appeal, Cummins has raised a number of legal issues, but the heart of her appeal, Br. at 28-53, is the contention that not a single one of the statements on which the defamation judgment in this case is based was (1) shown to be a statement of actionable fact, (2) proved to be false, and (3) proved to have been uttered with actual malice—that is, with knowledge that the statement was false or made with reckless disregard of the probability that the statement was false. Remarkably, in her responsive brief, Lollar never addresses the distinction between fact and opinion, or argues that specific statements were about facts capable of being proved false. She does give examples of statements that she believes were shown to have been false. Br. at 16. Lollar says that certain statements were published with "malice," *id.* at 20, but in attempting to be specific, she identifies only three pages in the record as supporting the contention that Cummins made statements "knowing they were false." *Id.* at 21. Lollar never argues that anything Cummins said was published with reckless disregard of probably falsity, only that Cummins published "without knowing whether those statements were true." *Id.* "Negligence, lack of investigation, or failure to act as a reasonably prudent person are insufficient to show actual malice." *Duffy v. Leading Edge Products*, 44 F.3d 308, 313 (5th Cir. 1995). Moreover, Lollar does not show that even a single one of the statements meets all three elements identified at the beginning of this paragraph. For that reason alone, the judgment should be reversed.

Indeed, in Public Citizen's experience, plaintiffs often bring defamation claims over every criticism that a defendant has advanced, hoping that the court or jury will be swayed to award more significant relief than might be deserved if only the legally and factually strongest of the defamation claims could be established. The Texas Legislature recently confirmed the state's policy of protecting speech on issues of public concern against abusive litigation by enacting an anti-SLAPP statute. Texas courts should not encourage blunderbuss defamation claims by failing to make precise findings about each of the alleged defamatory statements.[1]

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[1]Lollar objects to Cummins' confining her analysis to the forty-seven statements whose repetition was specifically enjoined, contending that the judgment is based on other allegedly false statements as well. Br. 17. Because the trial court made no findings about any other statements, not to speak of findings that meet First Amendment muster, and because Lollar's appellate brief neither identifies the other statements on which the judgment is said to have been based, nor points to any place in the record showing that the elements of a defamation claim were proved for each of those

The Judgment and Injunction Should Be Reversed for Failure to Both Prove and Find Constitutionally Required Actual Malice.

Moreover, even if Lollar were able to prove each element of its case by a preponderance of the evidence, the First Amendment requires that actual malice be proved by the standard of clear and convincing evidence. *Trout Point Lodge v. Handshoe*, — F.3d —, 2013 WL 4766530 (5th Cir. Sept. 5, 2013); *Leading Edge Products*, 44 F.3d at 313. The trial judge made no findings of "actual malice"—at most, his oral explanation for his decision referred to Cummins' defamation as "malicious, as well as intentional," June 14 Tr. at 65-66, which might well have been common law malice or ill will rather than actual malice, which requires knowledge of falsity or reckless disregard of probable falsity. *Leading Edge Products*, 44 F.3d at 313 ("Actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true."). Moreover, the judge never indicated that his finding of "malice" was based on the clear and convincing evidence standard.

Meeting the actual malice standard cannot be avoided in this appeal, for two reasons. First, although the judge did not expressly address the issue of limited purpose public figure, he referred to Lollar as having "the world-wide reputation in the proper care of bats similar to that [of] Jane Goodall in the [care] of primates." June 13 Tr. That clause alone implies that Lollar was a limited purpose public figure. In addition, the extensive evidence, introduced by Lollar herself, of plaintiff being quoted in publications, having her articles about bats printed in publications, and being a finalist for major national awards, and seeking donations to support her charitable work, June 11 Tr. 52-59, 72, all provide significant support for treating her as a limited purpose public figure. *E.g.*, *Chevalier v. Animal Rehabilitation Ctr.*, 839 F. Supp. 1224 (N.D. Tex. 1993) (zoologist who voluntarily appeared on TV and gave interviews about his work). Moreover, even if Lollar were not a public figure, the award of punitive damages cannot be sustained without proof of actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350 (1974); *Hancock v. Variyam*, 400 S.W.3d 59, 66 (Tex. 2013).

Review of the trial transcript reveals that, whether wisely or not, defendant Cummins passionately believed what she has said about Lollar. June 11 Tr. 69-73; June 13 Tr. 50-105. This is not a case of statements made despite knowing that the statements are false. If anything, it would have to be a case of reckless disregard, but in most respects at least, Lollar's appellate brief taxes Cummins with contentions that are inadequate to show actual malice, such as failure to investigate sufficiently, *Leading Edge Products*, 44 F.3d at 313; *Doubleday & Co. v. Rogers,* 674 S.W.2d 751, 756 (Tex. 1984), or desire to injure Lollar. *Freedom Newspapers v. Cantu*, 168 S.W.3d 847, 858 (Tex.2005) ("Jurors cannot impose liability on the basis of a defendant's 'hatred, spite, ill will, or desire to injure.'").

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statements, the judgment cannot be sustained based on the additional statements.

The Court Should Review the Judgment and Injunction Independently on the Entire Record to Ensure That Constitutional Standards Have Been Met.

Although the appellee argues that the court should apply the ordinary highly deferential standards of review to the trial judge's very conclusory determinations on such issues as falsity and malice, Br. 8-10, those deferential standards do not apply to the constitutionally required elements of a defamation claim. Rather, under such cases as *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510-511 (1984) and *Doubleday & Co.*, 674 S.W.2d at 755, the Court is required to conduct an independent review of the record (although without de novo review of any explicit credibility findings) to ensure that the First Amendment's requirements have been met.

Moreover, although Texas law does not always require precise findings that each element of a claim for relief has been met, given the very large verdict, the Court should demand more precision in the decision below than the trial judge accorded Cummins. Indeed, because Cummins has appealed from an injunction barring her from repeating each of forty-seven different statements, the injunction against each such statement depends on the Court's concluding that each of the elements of a libel claim, whether required by Texas law or by the First Amendment, has been met with respect to each of the statements whose injunction is under appeal. This Court cannot properly perform its appellate function without precise findings in support of injunctive relief pertaining to each statement.

Conclusion

For these reasons, the Court should either reverse the decision below for failure of proof, or vacate the judgment below and remand for further proceedings.

Respectfully yours,

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cc: Randall Turner, Esquire
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