

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 07-60534-CIV-DIMITROULEAS
MAGISTRATE JUDGE: ROBIN ROSENBAUM

HOWARD K. STERN,

Plaintiff,

vs.

JOHN O'QUINN, et al.

Defendant.

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE ABSENCE OF
ACTUAL MALICE AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Defendants, John O'Quinn ("O'Quinn") and John M. O'Quinn and Associates, PLLC d/b/a The O'Quinn Law Firm ("O'Quinn law firm"), (collectively, "Defendants"), by and through their undersigned counsel and pursuant to Rule 56, Federal Rules of Civil Procedure, respectfully request that this Honorable Court enter an Order Granting Defendants' Motion for Summary Judgment on the Absence of Actual Malice.

In Defendants' Motion to Dismiss, Defendants argued that, because Stern is a limited public figure¹, he must show that O'Quinn made the aforementioned statements with "actual malice." As is the case with a defamation claim, a claim for false light is also subject to dismissal on summary judgment if the plaintiff fails to show that the defendant made the statements with

¹ Stern has conceded that he is required to prove that O'Quinn acted with actual malice. This Court determined that Defendants' arguments in this respect are more appropriate for disposition on summary judgment. See Exhibit "B" ("In his Response, the Plaintiff does not argue that he is not required to prove actual malice, rather he argues that the determination of actual malice is a factual one that is inappropriate on a motion to dismiss. The Court agrees[.] ... The Defendants' arguments in this respect are more appropriate for disposition on a motion for summary judgment.").

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actual malice.² Because Stern can prove no set of facts showing that O'Quinn acted with "actual malice" in making the allegedly defamatory statements, Defendants respectfully request that this Honorable Court enter an Order Granting Defendants' Motion for Summary Judgment.

I. STATEMENT OF MATERIAL FACTS

1. This is a slander and false light invasion of privacy action filed by Howard K. Stern ("Plaintiff" or "Stern") against Defendants.

2. Stern is an attorney licensed to practice law in the State of California. Stern was the personal attorney and companion of Vickie Lynn Marshall, better known as Anna Nicole Smith ("Ms. Smith").

3. Subsequent to Ms. Smith's February 8, 2007 death, STERN filed a petition seeking custody of Ms. Smith's body.

4. O'Quinn is an attorney licensed to practice law in the State of Texas. The O'Quinn law firm is a Texas limited liability company organized as a law firm. At all times material hereto, O'Quinn represented the interests of Ms. Smith's biological mother, Virgie Arthur ("Arthur").

² See Cape Publ'n, Inc. v. Bridges, 387 So. 2d 436, 440, n.6 (Fla. 4th DCA 1980)(stating that actual malice would be required to prove a false light claim). See also Rapp v. Jews for Jesus, Inc., 944 So. 2d 460, 467 (Fla. 4th DCA 2006):

The false light theory of invasion of privacy was incorporated in section 652E of the Restatement (Second) of Torts, which defines the cause of action as follows: [o]ne who gives publicity to a matter concerning another that places the other before the public in a false light ..., if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

(Emphasis Added.)

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5. Defendants, on behalf of Arthur, opposed Stern's Petition for Custody of Ms. Smith's body.

6. The genesis of this action concerns a series of interviews with national news media organizations concerning the judicial proceedings of said custody battle. Plaintiff has alleged that, on at least eight (8) occasions during the course of O'Quinn's representation of Arthur, O'Quinn, as a representative of the O'Quinn law firm, appeared in nationally televised interviews and uttered slanderous statements about Stern.

7. The allegedly slanderous statements made by O'Quinn are as follows³:

A. February 19, 2007 interview on Rita Crosby Specials Unit:

O'QUINN: Why would anyone ask to see the will like Stern did, unless the person was dead who wrote the will or the person who wrote the will was about to die?

COSBY: What are you suggesting?

O'QUINN: I suggest you draw your own conclusions. He asked to read the will 4 days before Anna Nicole died in his presence. Why did he need to read that will unless he knew she was going to die?

* * *

O'QUINN: . . . What must have been going through Mr. Stern's mind that he wanted to read that 4 days before Anna Nicole died? Draw your own conclusions. Use your own common sense.

B. February 21, 2007 interview on On the Record with Greta Van Susteren:

O'QUINN: [Virgie Arthur] believes Howard K. Stern murdered her daughter.

³See Plaintiff's First Amended Complaint, attached hereto as Exhibit "A". See also Order Denying Defendants' Motion to Dismiss, dated August 8, 2008, attached hereto as Exhibit "B".

VAN SUSTEREN: Murdered?

O'QUINN: Yes.

VAN SUSTEREN: Strong word.

O'QUINN: That's what she said. She said that in court, He killed her.

VAN SUSTEREN: What's the basis for that, for the - for being there, sort of complicit that Anna Nicloe took drugs or providing her drugs? I mean, what's her theory?

O'QUINN: He handled all the drugs. We've talked to the maid who kept the place. She gave us a list of the drugs. That's where I got the list. And he wanted to keep total control over her by keeping her doped up. He had total control over her. It was all a technique, a Machiavellian, sinister technique.

* * *

O'QUINN: She sat in the courtroom, like we all have. She has her own judgment about what she's heard. Everybody has a judgment by now about what they've heard.

VAN SUSTEREN: And you agree with that judgment, murder?

O'QUINN: You better believe it. Why does a man ask for a will four days before a person dies?

* * *

VAN SUSTEREN: There's a lot of suspicion about their presence in the Bahamas. I agree. That's still not murder, though.

O'QUINN: And motive. He had opportunity. He was alone with her for three days. He had motive. And there's evidence that he handled her drugs.

C. March 1, 2007 on the Nancy Grace Show:

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O'QUINN: I've been told by sources that should know the truth that there were seven life insurance policies on Anna Nicole's life, and the beneficiary was her son, who died under suspicious circumstances, and the alternative beneficiary is Stern.

* * *

O'QUINN: I'm told they were paid up and in full force, and the primary beneficiary was her son, who died under very suspicious circumstances.

* * *

O'QUINN: . . . This is all about money.

D. March 15, 2007 second interview on *On the Record with Greta Van Susteren*:

O'QUINN: . . . Stern's motives, Stern's agenda is to keep control of the money.

* * *

O'QUINN: Stern was a user. He used Anna Nicole. He wasn't there for any other reason. Remember, Anna Nicole took a massive amount of drugs while she was pregnant with Anna - with Dannielynn And Stern is the one that got the drugs. He got - they had so many drugs, they got them from more than one doctor. And he took them around in a duffel bag - he being Stern - and fed them to Anna Nicole while she was pregnant . . .

* * *

O'QUINN: . . . [Arthur] now has a granddaughter who's still in the hands of a man who all arrows (ph) are pointing to as having killed her daughter and her grandson, and she's worried sick about what's going to happen to her granddaughter.

VAN SUSTEREN: . . . You know, there's been nothing to suggest - not - there's been no even

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allegations that he's killed the grandson or the daughter. But I heard what you said. All right . . .

O'QUINN: There are allegations

VAN SUSTEREN: All right. Well, OK. Well they're your allegations.

E. March 20, 2007 second interview on the Nancy Grace Show:

GRACE: John, what do you think of the biological dad of Anna Nicole Smith coming out and making allegations about homicide?

O'QUINN: . . . Most people I talk to on the inside think say they think that there is probably is - Stern probably had something to do with it Greed sometimes just takes people over.

* * *

O'QUINN: Stern is trying to control all evidence, because he knows he faces prosecution for many crimes.

F. March 26, 2007 third interview on the Nancy Grace Show:

O'QUINN: Oh, but we're supposed to believe this was all accidental. . . . So Stern can walk away from a murder. This was not accidental. That duffel bag is not an accident. It was brought there on purpose. Extra drugs beyond what the hospital was giving was not an accident. It was done on purpose. And let somebody lay blue in bed and not try to get any medical attention for them is not an accident.

G. March 27, 2007 fourth interview on the Nancy Grace Show:

O'QUINN: . . . Howard Stern was there when both of them got deadly sick and died.

* * *

O'QUINN: . . . The fact that he concluded, Perper concluded that it was a drug overdose, I don't

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quarrel with that, and I don't quarrel with his talents to figure that out. But he basically based his story on what happened based on what Howard Stern told him. That's like asking the murder to tell us how this person died. You don't necessarily get the truth.

GRACE: Well, again, before we call Stern a murderer. . .

O'QUINN: OK, OK, He's acting like he's the one. . .

H. March 27, 2007 third interview on *On the Record with Greta Van Susteren*:

VAN SUSTEREN: . . . What kind of information could [Arthur] add to this?

O'QUINN: The information she could add is that her daughter was perfectly - she was a fine girl until she got in with Stern. . . Stern sought to manipulate Anna Nicole because really what he wanted was her money.

VAN SUSTEREN: How would that be relevant to Daniel's death?

O'QUINN: Motive. Daniel was - had already figured things out. He was trying to get an investigator to - hire an investigator to investigate Stern and he went to his mother to get the money and Stern learned of that and he decided he needed rid of Daniel.

II. MEMORANDUM OF LAW

A. Summary Judgment Standard

A party is entitled to summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled judgment as a matter of law." Fed. R. Civ. P. 56 (c). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). There is no genuine issue of material fact unless there is sufficient evidence favoring the non-movant for a jury to return a verdict for that party.

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Anderson, 477 U.S. at 249-250.

“Under Florida’s law regarding summary judgments, when a motion for summary judgment is brought by a defendant against a [general or limited] public-figure plaintiff . . . in a defamation action in which the actual malice test applies, summary judgments are to be more liberally granted.” Dockery v. Florida Democratic Party, 799 So. 2d 291, 294 (Fla. 2d DCA 2001). See also Cronley v. Pensacola News-Journal, Inc., 561 So. 2d 402, 405 (Fla. 1st DCA 1990); Menendez v. Key West Newspaper Corp., 293 So. 2d 751, 752 (Fla. 3d DCA 1974).

B. Actual Malice Standard

The right to free speech is a part of the foundation of our society and is incorporated in the federal constitution. U.S. CONST. amend. I; Friedgood v. Peters Publishing Co., 521 So. 2d 236, 239 (Fla. 4th DCA 1988). These constitutional concerns demanded that the traditional law of defamation be reshaped to avoid intrusion upon free speech rights. See Friedgood at 239-40. One result has been the development of a policy that permits a greater latitude in speech the more public the person or event that is the subject of the speech. Id. “Under that policy[,] a public figure...would have to prove not only that he was defamed[,] but that the publisher of the defamation acted with actual malice towards him.” Id. In essence, the state’s interest in protecting the defamed subject’s reputation is lessened, and as such, public figure plaintiffs must allege and prove a higher level of mens rea (actual malice) on behalf of defendant publishers in order to balance the attendant First Amendment concerns bound up with defamation and free speech. See Mile Marker, Inc., 811 So. 2d 841, 845 (Fla. 4th DCA 2002).

In order to prove that the defendant acted with “‘actual malice,’ a plaintiff must establish by

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clear and convincing evidence that the speaker made the statement ‘with knowledge that it was false or with reckless disregard of whether it was false or not,’ at the time the statements were made. Dunn v. Air Line Pilots Ass’n, 193 F.3d 1185, 1192 (11th Cir. 1999) (quoting test adopted from New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)); Mile Marker, Inc. v. Petersen Publishing, L.L.C., 811 So. 2d 841, 846-47 (Fla. 4th DCA 2002)(“...[O]n summary judgment [a public figure] must present *record evidence* sufficient to satisfy the court that a genuine issue of material fact exists which would allow a jury to find by clear and convincing evidence that the existence of actual malice on the part of the defendant...”)(Emphasis in original opinion.). ““No matter how gross the untruth, the New York Times rule deprives a defamed public official⁴ of any hope for legal redress without proof that the lie was a knowing one, or uttered in reckless disregard of the truth.” Nodar, 462 So. 2d at 807 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)). In this case, Stern cannot, and will not, meet his burden on proving that O’Quinn acted with actual malice when making the statements which serve as the basis of this claim. Not only will Stern be unable to offer any evidence which would prove that O’Quinn made any statements which knowledge that the statements were false, but Stern will also be unable to offer any evidence which would prove that O’Quinn made these statements with reckless disregard of the truth. As such, Defendants’ Motion for Summary Judgment should be granted.

C. Analysis

⁴ Under New York Times and its progeny, the “actual malice” analysis is the same for public officials, general public figures, and limited public figures. See e.g. Della-Donna v. Gore Newspapers Co., 489 So. 2d 72, 74 (Fla. 4th DCA 1986)(“In order to determine whether the ‘actual malice’ standard of proof must be applied to [the defendant’s] conduct, the status of the plaintiff as public official, ‘general’ public figure, ‘limited’ public figure, or private figure must be established.”).

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1. Plaintiff Cannot, And Will Not, Offer Any Evidence Which Would Prove That O'Quinn Made These Statements With Knowledge of The Statements' Falsity Because O'Quinn Made Each Of The Statements Believing Them To Be True..

The term "actual malice" is used in New York Times not to refer in its ordinary sense to feelings of ill will about the person who is the subject of the statement, but rather "to signify the likelihood that the speaker knew the statement was false." Brown v. State, Com'n on Ethics, 969 So. 2d 553, 557 (Fla. 1st DCA 2007). A party who publishes a false statement with knowledge that the statement is false is undoubtedly guilty of acting with actual malice. See e.g. Hoch v. Rissman, Weisberg, Barrett, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) ("...the...defendants themselves acknowledged that the statement was disparaging and false.... This...is a sufficient showing on the issue of actual malice.").

In the instant case, O'Quinn never made any statements with knowledge that the statements were false. Contrarily, O'Quinn still believes the statements made during the interviews which form this basis of Stern's claim are true. To give these statements context, we must remember that at the time that O'Quinn made these statements, there was substantial on-going debate about Ms. Smith's and Daniel Smith's deaths. In fact, to this date, there is continued debate. The inquest into Daniel Smith's death commenced only a couple of months prior to O'Quinn's statements to the media. The criminal investigation into Ms. Smith's death had been recently re-opened. It was the position of the seemingly majority of the media, community, and family and friends of Ms. Smith, that Stern had something to do with Ms. Smith and her son's mysterious drug overdoses.⁵

⁵ See no less than 50 newspaper articles attached hereto as Composite Exhibit "C".

At the time of the February 21, 2007 interview on *On the Record with Greta Van Susteren*⁶, Arthur believed (and still believes) that Stern was responsible for her daughter's drug overdose and resulting death. Similarly, at the time of the March 20, 2007 second interview on the *Nancy Grace Show*⁷, many people believed⁸ (and still believe) that Stern had something to do with Ms. Smith's drug overdose. As indicated during the March 27, 2007 third interview on *On the Record with Greta Van Susteren*⁹, Daniel was trying to hire an investigator to investigate Stern and his dealings with Ms. Smith. Finally, as indicated during the March 27, 2007 fourth interview on the *Nancy Grace Show*,¹⁰ Stern was in the picture when both Daniel and Ms. Smith got deadly sick and died. Even the media took note of this.¹¹ In fact, Stern traveled with Ms. Smith to the Bahamas and was with her in the Bahamas during the coupled of days, and on the day, that she died.

It was not until March 26, 2007, the date that Chief Medical Examiner Joshua Perper released

⁶ See Paragraph 7.B. for the statements made during this interview that Stern alleges were defamatory.

⁷ See Paragraph 7.E. for the statements made during this interview that Stern alleges were defamatory.

⁸ See generally Composite Exhibit "C" ["If it strikes you odd that a perfectly healthy (doped up, yes, but otherwise healthy) thirty-nine year old woman and a perfectly healthy nineteen year old boy both died inexplicably within months of each other, well, you're not the only one. Lots of people are speculating that lawyer turned husband turned evil mastermind Howard K. Stern had a hand in both Anna Nicole's and son Daniel's untimely deaths.](*Yeehaw.com*, February 9, 2007); ("I think Daniel is dead and my sister is dead, and he [Stern] was there both times. I'm going to say yes, I blame him.")(The *New York Post*, February 10, 2007).

⁹ See Paragraph 7.H. for the statements made during this interview that Stern alleges were defamatory.

¹⁰ See Paragraph 7.G. for the statements made during this interview that Stern alleges were defamatory.

¹¹ See Composite Exhibit "C". ("Alan, it stinks of a drug overdose. There's one person in common with the death of her son, Danny, last September, and Anna Nicole herself, that's Howard K. Stern in the room both times. There was testimony yesterday, or rather people have come forward and said, they saw Howard K. Stern disposing of methadone pills in the toilet, flushing evidence down the toilet. So he is at least, according to these witnesses, guilty of obstructing or destroying crucial evidence, if not being the drug supplier. I believe that, when all is said and done, this will be a methadone overdose, the same drug that killed her son.")(Geraldo Rivera, *Hannity and Colmes*, February 8, 2007).

the official autopsy report, that a cause of death for Ms. Smith was even identified. Even so, the cause of Ms. Smith's death was reported as "drug intoxication," which was the very same cause of death of Ms. Smith's son, and which was the very same cause of death that the media and general public expected.¹² This "drug intoxication" cause of death did nothing less than refuel the belief that Stern, who was widely perceived¹³ as the person who was *supplying*¹⁴ the drugs to Ms. Smith, caused Ms. Smith's death.¹⁵ In fact, a video filmed (and released to the media) by Stern himself shows Ms. Smith high on drugs while she was eight months pregnant.¹⁶ Stern cannot, and will not, offer any

¹² Id. ("I believe that, when all is said and done, this will be a methadone overdose, the same drug that killed her son.")(Geraldo Rivera, *Hannity and Colmes*, February 8, 2007). See also Composite Exhibit C ("I think that the first theory that people may be looking at here is, was it a drug overdose of some kind. CBS, too, obviously reporting already that illegal narcotics were found in the room.")(The *Early Show*, February 9, 2007).

¹³ Id.

¹⁴ Id. (Hatten: [W]hen she was in the hospital detoxing, what happened? He was giving her extra pills. We heard testimony about that under oath today. That's the kind of man that Howard K. Stern is. Two for Two. Ok? The two people around him are dead in less than five months.

Hatten: I was trying. I was trying to get her help. When I was around her she was not doing it. However, every time I would go to leave, Howard would show up: "Oh, hey, mama, take it. Take this. Take that."

Hannity: And you saw that? You saw Howard give her drugs?

Hatten: Yes, I saw that. Yes, on numerous cases over the years over and over. And every time I'd get her somewhat clean, he'd come over and shovel more to my friend. He was basically a big, fat pusher.)(*Hannity and Colmes*, February 22, 2007).

¹⁵ Id. ("Unidentified female: ...Yesterday, Larry Birkhead testified under oath that Howard Stern sneaked drugs into the hospital to a pregnant Anna Nicole while she was undergoing detox treatment. Couldn't this alone be grounds for criminal charges against Howard?

...

Don Clark, Working with Virgie Arthur's Legal Team: Well, you know, I heard exactly what she said, and yes, there's a possibility that there could be criminal charges here. There are a lot of issues there that also could lead themselves to criminal charges.)(*The Nancy Grace Show*, February 22, 2007).

¹⁶ Id. ("...In the brief film, a pregnant Anna Nicole Smith talks to a doll in carriage while Howard asks her if she's on a 'mushroom trip.' With her face painted like a clown, Howard zooms in at Anna's dazed expression and says, 'this footage is worth money.')("New Anna Nicole Footage Portrays Howard K. Stern as Enabler," *Bodog Beat*, February 20, 2007). ("Anna Nicole Smith appeared in a bizarre video filmed by lawyer and lover Howard K. Stern six months before she died. The film, which emerged on Monday, shows the eight-months pregnant model, in

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conclusive record evidence which would prove that O'Quinn made these statements knowing them to be false.¹⁷ Were Stern able to offer said evidence, he would have undoubtedly done so during the countless interviews that he has given to the media, during the court proceedings in the battle over the custody of Ms. Smith's body, during the drawn out paternity proceedings, and most importantly, during the discovery period of this defamation lawsuit and the countless other defamation lawsuits that Stern has waged regarding the Anna Nicole Smith media frenzy. The overwhelming evidence demonstrates that O'Quinn believed, and had every reason to believe, that his statements were in fact true. Even today, over half a year after the resolution of the custody and paternity battles, O'Quinn and his client, as well as countless others in the community and media, *still* believe that Stern provided Ms. Smith with all, if not most, of the drugs which caused her early demise. Because Stern cannot meet his burden of offering any evidence which would even suggest that O'Quinn knew his statements to be false at the time that they were made, this Court should grant Defendants' Motion for Summary Judgment.

what appears to be a drugged state, with clown make-up on her face, talking to a doll in a pram as though it is a real baby. Stern asks repeatedly: 'Is this a mushroom trip?'...As Anna Nicole becomes less lucid he says: 'This footage is worth money.')(“Stern stuff, those trippy mushrooms,” *Cape Argus (South Africa)*, February 22, 2007).

¹⁷ Since Stern has alleged that he was not "criminally involved" in the deaths (drug overdoses) of Ms. Smith and her son, and takes issue with the implied "accusations of murder," See First Amended Complaint at 15, 18, 24, Defendants request that this Court take Judicial Notice of: Florida's murder statutes, including felony-murder (Fla. Stat. § 782.04); Florida statutes making it a felony to deliver, or possess with intent to deliver, controlled substances such as Chloral Hydrate and Methadone (Fla. Stat. §§ 893.13(2)(b), 893.13(4), 893.13(1)(a)); Florida statutes making it a felony for anyone to bring Methadone or Chloral Hydrate into Florida unless done so in accordance with Chapter 893 of the Florida Statutes or unless the person bringing these controlled substances is licensed by an appropriate federal agency (Fla. Stat. §§ 893.13(5)(a), 893.13(5)(b)); Florida statutes making the obtaining of controlled substances through fraudulent or false prescriptions a felony (Fla. Stat. § 893.13(7)(c)); Florida statutes making it a felony for anyone to be in actual or constructive possession of a controlled substance unless such substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order (Fla. Stat. § 893.13(6)(a)); and Florida statutes making it a felony for anyone to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge (Fla. Stat. §§ 893.13(6)(a), 893.13(7)(c)).

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2. Plaintiff Cannot, And Will Not, Offer Any Evidence To Prove That O'Quinn Made These Statements With Reckless Disregard of Whether The Statements Were False Because O'Quinn Relied Upon Information From Reliable Sources.

A plaintiff who cannot prove actual malice with clear and convincing evidence that the defendant publisher knowingly made false statements can, alternatively, prove actual malice with clear and convincing evidence that the defendant publisher made the statements with reckless disregard for the statements' truth. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667 (1989). "...[A]lthough the concept of 'reckless disregard' cannot be fully encompassed in one infallible definition[]'...we have made clear that the defendant must have made the false publication with a 'high degree of awareness of...probable falsity...or must have entertained serious doubts as to the truth of his publication.'" Id (Internal citations omitted). A party who makes a statement based upon information that he has obtained from a reliable source cannot be found to have acted recklessly. As such, "[r]eliance upon a reliable source insulates a defendant from a finding of actual malice as a matter of law." Dockery, 799 So. 2d at 296 (citing Holter v. WLCY T.V., Inc., 366 So. 2d 445, 452-53 (Fla. 2d DCA 1978)); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

At the time the statements forming the basis of these claims were made, O'Quinn did not act with reckless disregard of whether the statements were false. Instead, O'Quinn relied in good faith on information relayed to him by reliable sources. One such reliable source was FBI veteran Don Clark, O'Quinn's long time in-house Investigative Strategist and Consultant. Mr. Clark served for 25 years with the Federal Bureau of Investigations, including serving as a Special Agent of the FBI

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in Miami, New York, Washington D.C., Los Angeles, Newark, San Antonio, and Houston.¹⁸ Additionally, Mr. Clark's assignments as an investigative agent and manager in the FBI included foreign counterintelligence, counter-terrorism, violent crimes, organized crime, drugs, and other investigative programs.¹⁹ Not only does Mr. Clark's noble experience with the FBI make him a reliable source, but Mr. Clark's solid history with O'Quinn and the O'Quinn law firm, having never provided information to O'Quinn or the O'Quinn law firm later found to have been inaccurate, bolsters Mr. Clark's status as that of a reliable source.²⁰ O'Quinn had, and still has, no reason to doubt the accuracy of the information relayed to him by Mr. Clark.

The overwhelming majority of the information that O'Quinn relied upon in making the statements that are quoted in the Complaint came directly from Don Clark and O'Quinn's law firm staff whom had been providing O'Quinn with summaries of facts and articles on a daily basis.²¹ For instance, the statements made by O'Quinn during the February 21, 2007 interview on *On the Record with Greta Van Susteren*²² were relayed to O'Quinn by Mr. Clark. Specifically, Mr. Clark spoke with Ms. Smith's Nannies/Maids who confirmed that Stern controlled and handled a large supply of drugs that he in turn supplied to Ms. Smith.

Not only did O'Quinn rely upon information provided to him by Mr. Clark, but O'Quinn also relied upon information provided to him by the Broward County Medical Examiner. The Broward

¹⁸ See Affidavit of Don Clark attached hereto as Exhibit "D".

¹⁹ Id.

²⁰ Id. See also Affidavit of John O'Quinn attached hereto as Exhibit "E".

²¹ See Exhibit "E".

²² See Paragraph 7.B. for the statements made during this interview that Stern alleges were defamatory.

County Medical Examiner is an official authorized by the government to investigate and ascertain causes of death. As a physician, the medical examiner must abide by a code of ethics which includes a duty to report causes of death truthfully. Because the medical examiner is an uninterested person, he would have no reason to report false information. It follows, then, that the Broward County Medical Examiner is a reliable source. The statements made by O'Quinn during the March 26, 2007 third interview on the *Nancy Grace Show*²³ regarding Ms. Smith being found "blue in bed" were based upon the medical examiner's "Scene Investigation" report.²⁴ Additionally, the statements made by O'Quinn during the March 27, 2007 fourth interview on the *Nancy Grace Show*,²⁵ regarding Ms. Smith's cause of death were based upon the Broward County Medical Examiner's report.²⁶

Another set of reliable sources relied upon by O'Quinn was the various witnesses whom testified during the February 2007 courtroom proceedings in Florida. Each witness took an oath to testify truthfully. As such, the witnesses' testimony should be presumed reliable. During the February 2007 courtroom proceedings in Florida, Larry Birkhead informed the court that Ms. Smith was obtaining prescription drugs from different medical doctors, none of whom knew about the other doctors or the other prescription drugs.²⁷ Larry Birkhead also informed the court that Stern

²³ See Paragraph 7.F. for the statements made during this interview that Stern alleges were defamatory.

²⁴ A true and accurate copy of said Report is attached hereto as Exhibit "F"

²⁵ See Paragraph 7.G. for the statements made during this interview that Stern alleges were defamatory.

²⁶ See Exhibit F.

²⁷ See Transcript of February 22, 2007 proceedings at 17, attached hereto as Exhibit G. ("...I hid some of the medicines that I didn't feel was necessary for her, some things she was getting prescribed by ...Dr. A, Dr. B and Dr. C all together. ... at times I took her medicine and I was told by Mr. Stern to give it back to her...). See also Composite Exhibit C ("...Smith used at least seven different aliases, and doctors prescribed her medication under the names of Susie Wong, and Michelle Chase. ...He and Smith's mother blamed Smith's behavior on drugs, and on the witness stand, both said that Stern controlled Smith with narcotics.")(*The Miami Herald*, February 22, 2007).

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facilitated and encouraged Ms. Smith's taking of these various prescription drugs.²⁸ In fact, the testimony revealed that Stern was the person responsible for obtaining the prescription medications from the different doctors in order to give them to Ms. Smith.²⁹ The testimony also revealed that Stern kept drugs in a duffle bag and provided these drugs to Ms. Smith even while she was at the hospital attempting to detox.³⁰ Even the judge himself intimated that Stern may have been the "enabler" in supplying these drugs to Ms. Smith.³¹ Unsurprisingly, Stern never did deny that he provided drugs to Ms. Smith, further illustrating that the statements made by Mr. Birkhead under oath on this point were reliable and true. Accordingly, the statements made by O'Quinn during the February 21, 2007 interview on *On the Record with Greta Van Susteren*³², the March 15, 2007 second interview on *On the Record with Greta Van Susteren*³³, and the March 26, 2007 third interview on the *Nancy Grace Show*³⁴ regarding Stern's handling of the drugs, Stern's providing drugs beyond what the hospital would provide, and drugs being kept in the duffel bag were based upon reliable statements made under oath during the February 2007 courtroom proceedings.

²⁸ Id.

²⁹ Id. at 20 ("But Anna Nicole didn't have a driver's license. She didn't drive herself to the pharmacy and pick things up. She didn't call the doctors. Mr. Stern called the doctors and asked for the prescriptions."). See also generally Exhibit "C".

³⁰ Id. at 45-47 ("There were drugs in a duffle bag. ...Mr. Stern was in the [hospital] room and they were waiting to see who came in and they opened the bottle [of drugs].")

³¹ Id. at 11 ("...Then we have Stern. Is he a bad guy or is he a fellow who has some form of love for her?...[W]hatever relationship he had with her, he would be called, maybe, an enabler...").

³² See Paragraph 7.B. for the statements made during this interview that Stern alleges were defamatory.

³³ See Paragraph 7.D. for the statements made during this interview that Stern alleges were defamatory.

³⁴ See Paragraph 7.F. for the statements made during this interview that Stern alleges were defamatory.

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O'Quinn also relied upon the most reliable source there is—O'Quinn's *own* observations.³⁵ Specifically, with respect to Ms. Smith's Last Will and Testament, O'Quinn, himself, observed a fax cover sheet produced during the trial on the custody issue. The fax cover sheet clearly indicated that Ms. Smith's Will had been faxed *four days* prior to her death. Although Stern attempted to skirt around this inconvenient truth, even the media took notice, questioning exactly why Ms. Smith's Will would be sent not even a week before she actually died.³⁶ Thus, the statements made by O'Quinn during the February 19, 2007 interview on *Rita Crosby Specials Unit*³⁷ and during the February 21, 2007 interview on *On the Record with Greta Van Susteren*³⁸ questioning the motive of Stern in requesting Ms. Smith's Will only a few days prior to her unexpected death were based upon O'Quinn's own observations.

Additionally, journalists and producers of the *On the Record with Greta Van Susteren* show informed O'Quinn that Ms. Smith had seven life insurance policies.³⁹ O'Quinn had no reason to doubt that Ms. Smith had several life insurance policies as indicated by the producers of the *On the Record with Greta Van Susteren* show. In fact, it made sense considering the large amount of money that someone would inherit were Ms. Smith to die. O'Quinn's belief that these producers would

³⁵ See Exhibit "E".

³⁶ See Composite Exhibit C ("The cover sheet shows the fax was sent on 02/03/2007 at 02:18. The fax contained the existing will of Anna Nicole. It lists a phone number with the initials RAR—we believe that to be Ron A. Rale, Howard Stern's lawyer...Rale's only connection to Smith was Howard K. Stern.") ("Was Anna Nicole About to Change Her Will?," *TMZ Exclusive*, February 20, 2007); ("A copy of Anna Nicole Smith's will was mysteriously faxed to the home she shared with Howard K. Stern - just days before she died.") (*The Mirror*, February 22, 2007).

³⁷ See Paragraph 7.A. for the statements made during this interview that Stern alleges were defamatory.

³⁸ See Paragraph 7.B. for the statements made during this interview that Stern alleges were defamatory.

³⁹ See Exhibit "E".

know the truth regarding same was evidenced by O'Quinn's the statements made by O'Quinn during the March 1, 2007 interview on the *Nancy Grace Show*: "I've **been told by sources that should know the truth** that there were seven life insurance policies on Anna Nicole's life." (Emphasis Added). Because O'Quinn relied upon information from reliable sources, O'Quinn cannot be found to have made the statements with reckless disregard of whether the statements were false. As such, this Court should grant Defendants' Motion for Summary Judgment.

D. CONCLUSION

"Actual malice is not presumed[,] 'but is a matter of proof by the plaintiff.'" Dacey v. Florida Bar, Inc., 827 F. 2d 1292, 1295 (5th Cir. 1970)(applying Florida law)(citing New York Times, at 284). Mere allegations that the statements were made with malice or with no reason to believe the statements were true are insufficient. Shaw v. R.J. Reynolds Tobacco Co., 818 F. Supp.1539 (M.D. Fla. 1993), aff'd., 15 F. 3d 1097 (11th Cir. 1994). In this case, Stern cannot meet his burden of demonstrating actual malice through clear and convincing evidence. First, Stern cannot produce any record evidence which would prove O'Quinn made statements knowing that the statements were false. Furthermore, Stern cannot produce any record evidence that O'Quinn made these statements with reckless disregard for their truth. All that Stern has given this court are blanket allegations that he had no "criminal involvement in the death[s] of Ms. Smith's son, Daniel[, or] ..Ms. Smith."⁴⁰ Interestingly, even Stern's blanket statements fail to go to the heart of the matter: whether O'Quinn acted with actual malice. Because Stern cannot meet his burden of demonstrating actual malice through clear and convincing evidence, Defendants respectfully request that this Honorable Court enter an Order Granting Defendants' Motion for Summary Judgment.

_____ WE HEREBY CERTIFY that on October 3rd, 2008, this document was e-filed using the CMECF system and that a true and correct copy was served via e-mail to: **L. LIN WOOD, ESQ.**, (llwood@pogolaw.com) Powell Goldstein LLP, *Co-counsel for Plaintiff*, One Atlantic Center, 14th

⁴⁰ See Exhibit "A" at 15.

