

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 07-60534-CIV-DIMITROULEAS
MAGISTRATE JUDGE: Rosenbaum

HOWARD K. STERN,

Plaintiff,

vs.

JOHN O'QUINN, et al.

Defendant.

_____/

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND
INCORPORATED MEMORANDUM OF LAW ON THE ISSUE THAT
EXPRESSIONS OF OPINION ARE NOT ACTIONABLE,
ESPECIALLY WHEN MADE IN THE CONTEXT OF TABLOID MEDIA**

Defendants, John O'Quinn and John M. O'Quinn and Associates, PLLC d/b/a The O'Quinn Law Firm (collectively, "Defendants" or "O'Quinn"), by and through their undersigned counsel and pursuant to Fed. R. Civ. P. 56, hereby moves this Court for the entry of summary judgment in their favor on the issue that expressions of opinion are not actionable, especially when made in the context of tabloid media, and as grounds state as follows:

STATEMENT OF MATERIAL FACTS

1. This is a slander and false light invasion of privacy action against O'QUINN, an attorney licensed to practice law in the State of Texas and the O'QUINN law firm, a Texas limited liability company organized as a law firm. O'QUINN, gained *pro hac vice* admission in Florida solely to represent the interests of his Texas client, Virgie Arthur in Broward County Court Case No. 07-00824(61) and the subsequent appeal. The genesis of the action is a series of comments or statements made during high-profile news talk shows or limited on-camera interviews concerning the judicial proceedings involving O'QUINN's client VIRGIE ARTHUR ("ARTHUR").

2. Plaintiff Howard K. Stern ("Plaintiff") has conceded that he is a limited public figure for the purpose of the claims he has brought against O'Quinn in this matter¹, and this

¹ In response to Defendants' Motion to Dismiss, where O'Quinn argued that Stern was a limited public figure subject to the actual malice standard, Plaintiff did not contest his status as a

Court has confirmed that Stern is a limited public figure. See Order Denying Defendants' Motion to Dismiss, dated August 8, 2008 (attached hereto as Exhibit "A", Doc. 156) ("As a limited public figure, Stern must show that O'Quinn made his statements with 'actual malice,' which means 'with knowledge that it was false or with reckless disregard of whether it was false or not.'") (quoting *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 936 F. Supp. 917, 922 (M.D. Fla. 1996)).

3. There are eight statements made by O'Quinn which form the basis of the Plaintiff's claim against the Defendants. All of these statements were made in response to provocative questioning which itself suggested the very answer the questions were seeking. As to the **first statement**, the Complaint alleges that, on February 19, 2007, O'Quinn engaged in the following exchange when questioned by Rita Cosby in front of the Broward County Courthouse:

COSBY: I wanna ask you real quick - you know, today there's word about a will- Anna Nicole's will being faxed around days before she died. What do you make of that? A lot of people are shaking their heads . . .

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. Real fascinating, isn't it? Why did he need to read that will unless he knew she was going to die?

COSBY: Yesterday in court he said he didn't even remember being there when the will was signed, yet that was basically his own client and now we're hearing that at least Ron Rale was faxing the will to somebody?

O'QUINN: Right. Ron Rale is his friend, remember? Stern's friend. Ex-law partners. Fax his will of Anna Nicole Smith 4 days before she died, Stern who was in total control of her life. What must have been going through Mr. Stern's mind that he wanted to read that will 4 days

limited public figure, thereby waiving any argument that he is not. See *Sammons v. Sonic-North Cadillac, Inc.*, 2007 WL 2298032, *2 n.2 (M.D. Fla. 2007) (recognizing that plaintiff's failure to raise a legal argument on a theory in response to defendant's motion to dismiss for failure to state a claim operates as a waiver of that argument).

before Anna Nicole died? Draw your own conclusions. Use your own common sense.

4. With respect to the **second statement** which forms the basis of Plaintiff's claims, on February 21, 2007, O'Quinn engaged in the following exchange during his appearance on On the Record with Greta Van Susteren:

VAN SUSTEREN: All right. You represented Virgie, the grandmother of the baby
...

O'QUINN: True.

VAN SUSTEREN: ... and the mother of Anna Nicole. How is she doing tonight?

O'QUINN: It's been a hard time for her, a lot of painful memories, a lot of emotional times. You saw the emotions. Even the judge says you're going to have to start passing Kleenex here in a minute. I'm getting very emotional myself.

VAN SUSTEREN: It certainly seems like she doesn't have much fondness for Howard K. Stern.

O'QUINN: No. She believes [he] murdered her daughter.

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 Nicole took drugs or providing her with 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 sinister technique.

VAN SUSTEREN: Now, wait a second, John. You and I are both lawyers. ... We can all have our sort of suspicions, but in terms of evidence of murder, that's a different level.

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: He didn't according to . . . Krista Barth, the fax machine - she's made a representation to the court. You're talking about the fact that there was a will that sent and it was dated before Anna Nicole died by five days. But, apparently, it's a fax machine data mistake, per Howard K. Stern's lawyer.

O'QUINN: You said apparently. You've already made judgment on it.

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.

5. With respect to the **third statement** which forms the basis of Plaintiff's claims, on March 1, 2007, O'Quinn engaged in the following exchange when prompted by provocative questioning by Nancy Grace on the Nancy Grace Show:

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.

GRACE: Mr. O'Quinn, it gets curiouser and curiouser, does it not?

* * *

O'QUINN: Oh, yes, it does. This is all about money.

6. With respect to the **fourth statement** which forms the basis of Plaintiff's claims, on March 15, 2007, O'Quinn engaged in the following exchange during his second appearance on On The Record with Greta Van Susteren:

VAN SUSTEREN: . . . Howard K. Stern, you say, is not fit, that he's sneak, won't do the test. Look, I have lots of objections to him not allowing the baby to be swabbed so that paternity can be established. .

. . . I mean, he's not unfit in that he's going to harm the child. Do you agree?

O'QUINN: . . . I do not agree with that. . . .
Remember, he was trying to strike a bargain with Larry Birman (SIC) that he would yield and let Birkman have custody if Birkman would make sure that Stern got to run the estate of Anna Nicole. Stern's motives, Stern's agenda is to keep control of the money

VAN SUSTEREN: . . . But both of them had long-term relationships with Anna Nicole in various forms. . . . So, it's not like these runaway dads are attempting to be runaway dads.

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 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.

7. With respect to the **fifth statement** which forms the basis of Plaintiff's claims, on March 20, 2007, O'Quinn engaged in the following exchange in response to provocative questions by Nancy Grace during his second appearance 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.

8. With respect to the **sixth statement** which forms the basis of Plaintiff's claims, on March 26, 2007, O'Quinn engaged in the following exchange during his third appearance on the Nancy Grace Show:

GRACE: . . . The thought of brining in a duffel bag full of drugs while Smith was pregnant.

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.

9. With respect to the **seventh statement** which forms the basis of Plaintiff's claims, on March 27, 2007, O'Quinn engaged in the following commentary during his fourth appearance on the Nancy Grace Show:

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

GRACE: You know, what's another thing that's disturbing, John O'Quinn - and I'm not doubting Joshua Perper. . . . My concern is about the investigation that goes along with that analysis, Mr. O'Quinn. Two people dying of accidental drug overdoses, including some of the same drugs?

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

9. With respect to the **eighth statement** which forms the basis of Plaintiff's claims, on March 27, 2007, O'Quinn engaged in the following dialogue during his third appearance on One 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.

MEMORANDUM OF LAW

Summary judgment is appropriate where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317(1986); *Gas Kwick, Inc. v. United Pacific Ins. Co.*, 58 F.3d 1536 (11th Cir. 1995); *William Penn Life Ins. Co. of New York v. Sands*, 912 F.2d 1359 (11th Cir. 1990). The existence of some factual disputes will not defeat an otherwise properly supported motion for summary judgment. "The requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Once a party properly makes a summary judgment motion by demonstrating the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories and admissions on file, and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324.

To prevail in a libel action, a plaintiff, especially one who has conceded that he is a public figure, must prove that the published defamatory statements were (1) statements of fact; (2) false, and (3) made with actual malice. *Rasmussen v. Collier Co. Pub. Co.*, 946 So. 2d 567 (Fla. 2d DCA 2006); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).² Here, it is impossible for the Plaintiff to argue that any of the statements made by O'Quinn were statements of fact. Rather, they were simply expressions of opinion.

²The present motion addresses only the first element, and is dispositive of the entire case.

To determine whether a statement is actionable or whether it is a pure expression of opinion, the court must “construe the statement in its totality, examining not merely a particular phrase or sentence, but all of the words used in a publication.” *Morse v. Ripken*, 707 So. 2d 921, 922 (Fla. 4th DCA 1998). Whether a statement is one of fact or of opinion is a question of law. *Hay v. Indep. Newspapers, Inc.*, 450 So. 2d 293, 295 (Fla. 2d DCA 1984). The *Hay* court stated:

There is a distinction between pure expressions of opinion and mixed expressions of opinion. Pure opinion is based upon facts that the communicator sets forth in a publication, or that are otherwise known or available to the reader or the listener as a member of the public. Mixed opinion is based upon facts regarding a person or his conduct that are neither stated in the publication nor assumed to exist by a party exposed to the communication. Rather, the communicator implies that a concealed or undisclosed set of defamatory facts would confirm his opinion. Pure opinion is protected under the First Amendment, but mixed opinion is not.

In determining whether an alleged libelous statement is pure opinion, the court must construe the statement in its totality, examining not merely a particular phrase or sentence, but all of the words used in the publication. The court must consider the context in which the statement was published and accord weight to cautionary terms used by the person publishing the statement. All of the circumstances surrounding the publication must be considered, including the medium by which it was disseminated and the audience to which it was published.

Hay, 450 So. 2d at 295. The determination of whether the complained of words are actionable expressions of fact or non-actionable expressions of pure opinion and/or rhetorical hyperbole, is a question of law. *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 936 F.Supp. 917(M.D. Fla. 1996). The Supreme Court has unconditionally protected rhetorical hyperbole through its holding that “statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual” are not actionable. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

In this instance, an examination of each and every one of the statements that is at issue - - in context - - will readily reflect that O’QUINN simply “weighed in” along with literally dozens of other commentators, journalists and others with regard to the ongoing “media frenzy” - - as described by STERN, himself, in his Complaint - - surrounding the death of Anna Nicole Smith. O’QUINN was repeatedly asked to comment upon his client’s own views of the situation; the “facts” which had already been brought to light through the

media or through the statements of various police organizations, or the offices of the medical examiner, and other circumstances which caused a legitimate concern as to both the cause of Ms. Smith's death, the death of her son, Daniel, and the custody of Ms. Smith's baby, who also happens to be the granddaughter of O'QUINN's client. In fact, there is not a single instance of any particular "fact" that is related by O'QUINN. To the contrary, and at best, O'QUINN provided his own client's view of the facts and speculation that had run rampant through the national and international press, while simultaneously expressing the concerns that both he and his client harbored over the prospect that an individual who was associated with suggestions of foul play might ultimately determine where Anna Nicole Smith's body was to be buried, and who was simultaneously seeking custody of VIRGIE ARTHUR's granddaughter. At best, Defendants would submit that O'QUINN's statements could only be interpreted as constituting O'QUINN's own opinion - - and the opinion of his client - - as to their concerns over reasonable conclusions that might be derived from the information that was being developed and disclosed throughout the national media at an extraordinary pace. At the same time, however, it is equally clear that O'QUINN was serving as the voice of his client, as her adversary and her advocate. Viewed in context, therefore, as the Court must do, Defendants submit that no reasonable viewer of these various talk shows could have viewed O'QUINN's comments as constituting statements of fact, as opposed to an expression by O'QUINN of his own opinions or belief with regard to the suspicious circumstances surrounding the death of Anna Nicole Smith and her son, Daniel.

When words are taken completely out of the context, and without consideration of the medium in which those words are uttered, including the complete audio and visual components of the subject television broadcasts, it is not possible to achieve an accurate and effective method for gauging the impact of those televised statements or the visual images which are alleged to have conveyed defamatory facts. Thus, in order to answer any question as to the meaning which was reasonably conveyed to viewers of these various television broadcasts, and to assess whether they could reasonably have been understood in a defamatory sense, the Court must consider the context in which these statements were made, including the totality of the information that was conveyed through these same broadcasts and other information which had been thoroughly examined throughout the course of the so-called "media frenzy" surrounding O'QUINN's comments. *See Confer.*

Corporate Training v. National Broadcasting Co., 868 F.Supp. 501, 507 (E.D.N.Y. 1994)(suggesting that a television reporter can alter the tone and meaning of an otherwise innocuous broadcast to audio and visual editing techniques).³

This Court itself has found, in the Order Denying Defendant's Motion to Dismiss, that since the Plaintiff has not attached the entire transcripts of the statements to its complaint, the Court was unable to review the statements in context. *See* Exhibit "A" at page 12, note 2. The Court further opined that the issue of the accuracy of the statements or their context are issues for summary judgment, which the Court will consider at a later stage in the proceedings. *Id.* Here, on a motion for summary judgment, in examining the entire context of O'Quinn's statements, no genuine issue of material fact remains that these statements are not actionable, as they are mere expressions of opinion based on facts which were already known by the public.

February 19, 2007 statement

STERN's first challenge is to statements made by O'QUINN on February 19, 2007. Although STERN characterizes it as an interview, the MSNBC website provided by STERN in his initial complaint, demonstrates that there was no "interview." The comments were made as O'QUINN walked into the Broward County courthouse with his Texas client, VIRGIE ARTHUR. These comments were made purely in the form of an opinion, based on certain facts about Anna Nicole's will, which were known at that time. [See O'Quinn's

³On December 3, 2007, a Florida Circuit Court entered an opinion in *United Auto Ins. Company v. Phillip Freidin, et. al.*, Case No. 06-25595 CA 08, granting Defendant's Motion For Judgment on the Pleadings based, in part, on Defendant's contention that the alleged statements attributed to Defendants were not defamatory as a matter of law. In *Owaki v. City of Miami*, 491 F. Supp.2d 1140 (S.D. Fla. 2007) this Court, while recognizing the limited precedential effect of non published circuit opinions, specifically found the language of the non-published circuit court opinion in *United Auto Ins. Company v. Phillip Freidin, et. al.*, Case No. 06-25595 CA 08, instructive. "At best, the statements attributed to the attorney defendants reflect their opinion, *i.e.* that their client had a viable bad faith lawsuit against United Auto. That opinion is not actionable. Citations omitted. . . . Defendants' statements can only be interpreted as an indication that, the Defendants attorneys as counsel for Judge Levine's estate, believed that United was guilty of bad faith because it failed to make a settlement offer. The lawyers were clearly adversaries, and advocates for their clients. Viewed in context, therefore, as the Court must do, the Court has determined that no reasonable reader could view those comments as statements of fact, as opposed to the attorneys' expressions of their own opinion or belief in a potential claim against United, arising out of the manner in which the settlement negotiations were handled in the underlying claim."

Affidavit, attached hereto as Exhibit "B"]. The Affidavit reveals that, at the time that O'QUINN made the statement with respect to the will, the public was already aware of the existence of the will, which named Anna Nicole's son as her heir, and STERN as the executor of her estate. The fact that there was a challenge by STERN and his representatives as to the date on which the will was faxed to STERN did not mean that the challenge was in any way credible. Thus, O'QUINN was within his right to express an opinion as to what one may conclude based on the fact that Anna Nicole's will indicated that it was faxed to Plaintiff a few days prior to Anna Nicole's death.

February 21, 2007 statement

The second allegedly defamatory statement was uttered by O'QUINN during the February 21, 2007 broadcast of FOX News "On the Record With Greta Van Susteren." It is interesting to note that the transcript containing the allegedly defamatory statement, states that it is a "partial transcript," that "has been edited for clarity."⁴ Furthermore, the following statement is noted on the cover of the transcript: "**This is not a legal transcript for purposes of litigation.**"⁵ To determine whether a statement is actionable, it is necessary to consider the circumstances of its publication and the entire language used. *Morse v. Ripken*, 707 So. 2d 921, 922 (Fla. 4th DCA 1998). In assessing whether statements are actionable, they must be considered in light of the surrounding circumstances. *Smith v. Cuban American National Foundation*, 731 So.2d 702 (Fla. 3d DCA 1999). A statement is not defamatory unless the gist or sting of the statement is defamatory. *Rubin v. U.S. News & World Report, Inc.*, 271 F.3d 1305 (11th Cir. 2001). The gist of any statement within a publication or broadcast is found only by reference to the entire context.

In *Fortson v. Colangelo*, 434 F.Supp.2d 1369 (S.D.Fla. 2006), this Court held that in determining whether an allegedly defamatory statement is an actionable statement of fact, it is essential that the court consider all of the circumstances surrounding the statement, including the medium, by which it is published. Although Stern claims that "O'QUINN uttered false and defamatory statements conveying that Stern murdered Ms.

⁴ See, "Virgie Arthur's Lawyer on Days' Drama," attached hereto as Exhibit "C".

⁵ *Id.*

Smith,”⁶ a review of the transcript does not support STERN’s claim. The transcript reflects that O’QUINN, when asked by Van Susteren, provided the basis for his client’s negative opinion of STERN. O’QUINN responded, that it was ARTHUR’s opinion that STERN murdered Anna Nicole.⁷ Subsequently, VAN SUSTEREN inquired whether O’QUINN agreed with his client’s theory in the case. O’QUINN was clearly entitled to state his client’s opinion of STERN. As ARTHUR’s attorney, O’QUINN was also entitled to express the fact that he agreed with his client’s position with respect to STERN. Moreover, even the caption/title of the broadcast indicates that its subject matter involves O’QUINN’s assessment of his client’s, ARTHUR’s, case. Any audience member watching this broadcast or reading the transcript would know that a lawyer, as an advocate for his client’s position, will make certain statements which must be considered with a grain of salt.

March 1, 2007 statement

STERN next claims that O’QUINN uttered false and defamatory statements on the March 1, 2007 broadcast of The Nancy Grace Show. STERN claims the statements conveyed that Stern was criminally involved in Daniel and Anna Nicole Smiths’ deaths, in order to benefit from life insurance proceeds. The transcript, however, demonstrates that everyone agreed that Daniel died under suspicious circumstances and that it was actually Carlos Diaz, an “Extra” correspondent, who spoke about the enormous sums of money being expended and that everyone was interested in making money from Anna Nicole’s death.⁸ The transcript establishes that a caller to the show asked where O’QUINN’s client was getting the money to pay for litigating the case. Another caller to the show, thereafter, inquired whether there was any life insurance. *Id.* Although STERN claims that O’QUINN described the existence of insurance policies despite the fact that there was no credible or reliable evidence to support the existence of said policies,⁹ STERN’s claim is easily refuted by the transcript of the broadcast which STERN, himself, provided this Court. *See,*

⁶ *See*, First Amended Complaint, p. 21.

⁷ *See*, First Amended Complaint, p. 21.

⁸ *See*, “Nancy Grace: Anna Nicole’s Bahamian Funeral Plans Released,” attached hereto as Exhibit “D”.

⁹ *See*, First Amended Complaint, p. 29.

“Stunning Developments in Anna Nicole Case, attached hereto as Exhibit “E”. O’QUINN never stated actionable facts about the life insurance policy. In fact, the transcript demonstrates that O’QUINN had no independent knowledge that the insurance policies even existed. Any information that O’QUINN had concerning insurance came from what he heard from other people. See Exhibit “B”. In his Affidavit, O’QUINN stated that reporters and producers for the Greta Van Susteren’s “On the Record” show advised him about the existence of the life insurance policies. See Exhibit “B”. When O’QUINN made his statements, there was widespread speculation as to the cause of death. At the time these statements were made, therefore, the viewers would have easily understood that this could have provided a motivation for Anna Nicole’s death.

March 14, 2007 statement

STERN next claims that O’QUINN gave a slanderous “interview” to Greta Van Susteren. A review of the transcript reveals that the entire focus of the March 14, 2007 broadcast on this talk show was a meeting between the Seminole Police and the Broward County Homicide prosecutors to discuss Anna Nicole’s death and the fact that murder charges were a distinct possibility. *Id.* Consideration of the context in which the complained of statements were made completely undermines STERN’s claims. The time, place, circumstances and the situation that existed when O’QUINN uttered the statements demonstrate that O’QUINN’s statements were related to the fact that his client was deeply concerned for her granddaughter’s safety since her granddaughter remained in the care of an individual who was the subject of continued speculation and allegations. Van Susteren’s introduction to her show is illustrative of the fact that she was making a lurid and provocative headline:

“Tonight, manslaughter or worse? Is Anna Nicole’s death a murder? Just hours ago, a stunning report. Seminole police have been meeting with homicide prosecutors.”

See, Exhibit “E”. This is a classic example of the provocative captions and introductions provided by these nightly talk shows in order to create sensationalism and attract viewers.

STERN argues that O’QUINN’s statement that there have been allegations that STERN may have had involvement in the deaths of Anna Nicole and Daniel Smith is false because “STERN had no involvement in Daniel Smith’s death” and “no involvement in Ms.

Smith's death." See, p. 31, First Amended Complaint. However, at the time of the statement, there were allegations linking STERN to Anna Nicole and Daniel Smiths' deaths. STERN had not been ruled out as a suspect in Daniel Smith's death, since the inquest into Daniel Smith's death had commenced only a few short days prior to O'QUINN's statement and the criminal investigation into Anna Nicole Smith's death had only recently re-opened. The portion of the transcript that STERN chooses not to refer to, covers the portion of the exchange that occurred directly before STERN's abbreviated rendition of the interview. The complete transcript is attached hereto as Exhibit "C" and reveals that O'QUINN was acting in the best interests of his client, VIRGIE ARTHUR, in stating that his client, the child's grandmother, was the person best suited to have custody of the child:

VAN SUSTEREN: ...you wanted to speak in greater depth about this whole issue about whether or not your client, Virgie Arthur, the grandmother of this child, should have custody of this child. .

O'QUINN: . . .In the law, there's two phrases that control custody. One phrase is, Do what's in the best interests of the child. The other phrase is, Who is fit to be a parent? And in this case, what's in the best interests of Dannielynn is that her grandmother [can] mother her and provide maternal support, love and affection.

* * *

VAN SUSTEREN: All right. Would you agree that a parent, instead of a grandparent, might be—is—in the law would have priority over a grandparent in terms of best interests, assuming that the parent is not a drug addict or a ne'er-do-well of some sort?

O'QUINN: Not in this case, because as a parent—either of those men are nothing but sperm donors. They're like one-night stands. They had maybe sex one time, not sex to create a child, not have any interest to have a child, just sex. And here's this fellow, Stern, who is sneaky and whatever. He won't even have a blood test to prove that he is or is not the parent. That is not a fit person that is not willing to come forward as an honest man and say, I will take the blood test. I will let the court know for sure what my status is regarding this child.

Again, O'QUINN's statements are purely of opinion and therefore, are not actionable. Moreover, any viewer watching the broadcast would recognize that O'QUINN's statements were expressed in his capacity as an attorney for ARTHUR.

March 20, 2007 statement to Nancy Grace

STERN, again, selectively edits out pages and pages of the transcript of O'QUINN's appearance on March 20, 2007, on the Nancy Gracy Show. A review of the complete transcript of the Show gleans O'QUINN's statements in the proper context.¹⁰ A review of the transcript reveals that O'QUINN responded directly to the continued speculation that STERN was involved in the deaths of Anna Nicole and Daniel Smith:

TOM O`NEIL, "IN TOUCH WEEKLY": I`m confused here, Nancy. What we`ve got is -- and we`re breaking it in tomorrow`s issue -- is we have Jack Harding, who is a private investigator, who was the guy who Daniel went to see right before his death, and you know, with accusations that Howard was acting like a Svengali and feeding drugs to his mom. Jack Harding now has officially said that he suspects foul play as a result of his own investigation here. And not only that, he says there`s an ex-CIA investigator as part of this team, who also suspects foul play. And they worry that Dannielynn is next or could be next.

The allegation here, without saying it`s Howard Stern, is that this is all for money, which is what Virgie Arthur has said from the very beginning, of course. She said, My daughter and my grandson were killed for money. And they believe -- what he told us was that there could be residual drugs in Dannielynn`s system, that if she died of drugs next, that it wouldn`t be too suspicious.

GRACE: And Tom, **that`s on top of what the biological dad is saying. He is very concerned that -- as I recall, his quote saying, One person`s taking the drugs away from her, I guess he was talking about Birkhead, and somebody else is, quote, "shoving drugs down her throat."** Take a listen to this.

HOWARD K. STERN: Anna Nicole was on prescription medication at different times. When you say drugs, I don`t want to give the impression she was using anything illegal.

UNIDENTIFIED MALE: Was she abusing these drugs? Was she taking too many of them?

STERN: Look, I`m not a doctor.

UNIDENTIFIED MALE: Prior to the last five months?

STERN: She did.

¹⁰ See Transcript titled "Bahamian Judge Reportedly Orders DNA Test for Anna Nicole's Baby, Stern appeals," attached hereto as Exhibit "F".

UNIDENTIFIED MALE: And are you aware that methadone is a narcotic?

STERN: Sir, I know it`s a prescription medicine. It may or may not be a narcotic. Anna, in a lot of ways, always thought she was going to die young, and she said that she thought she was going to be like Marilyn Monroe. So she thought she was going to die when -- I forget if the age is 36 or 37. So we discussed it prior to that. And then Anna also thought she was going to die when she was giving birth to Dannielynn. So Anna did talk about death. She talked about death really from the time that I met her.

(END VIDEO CLIP)

GRACE: Not only that, even ordered a dress to be worn in her own casket.

STERN additionally chose to edit the so-called interview on this sensationalist media talk show so as to exclude the statements made by STERN`s own attorney, James Neavitt, during the interview:

GRACE: Mr. Neavitt, no offense, I know that you are a veteran trial lawyer. I know you`ve been around the block, as have I, in many, many courtrooms. But what you just said doesn`t even make sense. You said if a judge issued an order for a DNA test, Stern, your client, would comply. You`ve already got a California judge ordering it and a Bahamian judge ordering it.

NEAVITT: Right. First of all, you don`t have a California court ordering my client to submit Dannielynn for testing. It was against Anna. In the Bahamas...

GRACE: But now your client has -- now your client has the baby.

NEAVITT: My client has the baby, and the Bahama courts are dealing with it. I can`t tell you what they`re saying. I can`t...

(CROSSTALK)

GRACE: I didn`t ask you to tell me what the court said in the Bahamas. Jean Casarez has already told me that. What I`m asking you is, all along, your client has represented -- and I know you`re stuck with the client you got, OK? There`s nothing you can do about that. But your client has represented from day one, if a judge ordered DNA from Dannielynn, who`s set to inherit \$475 million -- this is covergirl Anna Nicole Smith`s only descendent -- that he would comply. He has the baby. A California court has ordered DNA. Now a Bahama court has ordered it. What`s the problem?

NEAVITT: First of all, I can't say that a Bahama court ordered it. When the Bahama court orders it, he will comply.

* * *

GRACE: Back to you, Mr. Neavitt. This is Howard K. Stern's long-time attorney. Mr. Neavitt, why won't your client consent to the DNA test? This is crazy! First we couldn't bury the woman, now we can't figure out who the father is of her only descendent.

NEAVITT: Nancy, the issue is not whether my client is going to take the test. . . . He will take the test when he's ordered to do so. You're asking me to violate a gag order and confirm or deny that that's the order. You have people telling you this is what they heard. Who did they hear it from? Everybody that's in that courtroom is under a gag order. If they heard it from somebody in the courtroom, they're violating a court order. I'm not going to do that.

GRACE: If there wasn't a judge's order today, Mr. Neavitt, why is your client appealing that directive to an appeals court? What is he appealing?

NEAVITT: The only way an appeal will be known is if it came through somebody that was violating the gag order. I'm not going to do that.

GRACE: OK. You know what? In addition to being a veteran trial lawyer, Mr. Neavitt is apparently an expert dancer because he just danced right out of that question. But hey, we know what you're doing, Neavitt.

NEAVITT: I have to. You know I have to. You know I have to.

Once again, STERN complains about statements that STERN has completely taken out of context. A review of the complete transcript reveals that O'QUINN, looking out for the best interests of his client was solely interested in conveying his feelings that he wanted his client, the child's grandmother, to have involvement in raising the child "with whoever the father is," which is also a matter of opinion and, thus, not actionable. Moreover, his comments were made in the context of comments and opinions of other guests on the broadcast. It was stated that Daniel's investigator suspected foul play in Anna Nicole's death and that Larry Birkhead, the father of Anna Nicole's baby, observed that Stern was "shoving drugs down her throat." In light of all these comments and observations, O'QUINN's statements about STERN's involvement in Anna Nicole's death were expressions of opinion based on facts which had already been presented to the audience.

March 26, 2007 statement to Nancy Grace

STERN next challenges the statements made by O'QUINN during the March 26, 2007 Nancy Grace Show. Once again, STERN has mutilated the transcript of the broadcast and the challenged statements are completely out of context. A review of the complete transcript, titled "Accidental Drug Overdose Declared Cause of Anna Nicole's Death" is attached hereto as Exhibit "G" and reveals that O'QUINN was merely responding to everything previously stated about the mystery needle used by a mystery person to inject Anna Nicole with drugs. Again, Nancy Grace's introduction is yet another classic example of the provocative nature of the show to come:

NANCY GRACE, HOST: Tonight, breaking news. The tightly guarded cause of death in the sudden collapse of covergirl Anna Nicole Smith secret no more. Cause of death a deadly mixture of drugs coursing through her body and a toxic level of old-school sleeping med, chloral hydrate, plus complications using hypodermic injections. But questions still remain. What was in the mystery needle? And who injected her? And tonight, 12 hours to formal inquest there in the Bahamas in the death of Anna Nicole's young son, Daniel Smith, his death eerily similar to his own mother's.

* * *

Good evening. . . If you were listening to Dr. Joshua Perper today live, you would learn that a deadly mixture of drugs were coursing through the covergirl's body, along with old-school sleeping tonic chloral hydrate, then complications from hypodermic use in the buttocks. What does it all mean? For right now, it means accident, a deadly mixture of drugs in the covergirl's system.

O'QUINN additionally was responding to a video clip that was presented in which Larry Birkhead described the manner in which STERN brought Anna Nicole her drugs:

(BEGIN VIDEO CLIP)

LARRY BIRKHEAD: We had a couple clashes in the hospital room because she and Mr. Stern brought in a duffle bag, and when there wasn't enough administered through the drips that she was on, they were taken out of the bag and taken on top of the drugs that they were giving at the hospital and thwarting the efforts by the hospital to get her off the medications.

Again, O'Quinn's statements regarding Stern's involvement were based on information which had already been disseminated. He merely expressed his opinion based on the facts which had been revealed by other people. It was Larry Birkhead who revealed the details surrounding the duffel bag in which Plaintiff apparently carried the drugs to administer to

Anna Nicole. In light of Birkhead's revelation, and Nancy Grace's request that O'QUINN respond to these statements, O'QUINN commented on the previously made statements. He certainly did not advance any facts which were not otherwise known to the audience.

March 27, 2007 statement to Nancy Grace

STERN next alleges that O'QUINN "uttered false and defamatory statements conveying that STERN murdered Ms. Smith." The complete transcript of the broadcast, titled "Inquest Opens in Bahamas in Death of Anna Nicole Smith's Son Daniel," attached hereto as Exhibit "H", however, reveals that O'QUINN never made any factual statements and never opined that STERN murdered Smith. It reveals that O'QUINN, merely agreed with the other guests on the show that STERN's actions in the case were unusual. The transcript reflects that the March 27, 2007 broadcast centered around Daniel's mysterious death and Daniel's visits to a private investigator. Nancy Grace specifically questioned whether Anna Nicole's death was accidental where nine different drugs were found in her body. It was at that point that Nancy Grace asked O'QUINN for his analysis and O'QUINN agreed with the opinion espoused by Nancy Grace that it was disturbing that both Anna Nicole and Daniel Smith died of accidental drug overdoses, involving some of the same drugs. O'QUINN also agreed with the opinions given by the other guests on the show that STERN's actions in the case were unusual. Therefore, O'QUINN's statements were expressions of his own opinion based on facts which had already been available to the public.

CONCLUSION

A review of the statements which form the basis of Plaintiff's claims against O'QUINN in the context in which they were made demonstrates the absence of any genuine issue as to any material fact on the issue of whether these statements were mere expressions of O'QUINN's opinions. These so-called interviews in which O'QUINN participated were nothing more than sensationalist programs which included as guests, not just O'QUINN, but others, including pop psychologists, mere speculators as to the death of Anna Nicole, as well as various viewers who were watching these tabloid shows from their homes and calling in to contribute their opinions.¹¹ These exchanges did not take place on nightly news shows.

¹¹Curiously, Plaintiff has not sued any of these other individuals for libel but, instead, has filed a lawsuit against a highly-respected lawyer with deep pockets who merely advanced and advocated his client's position.

Rather, looking at the entire context of these television programs, it is clear that, on a daily basis, the tabloid media was feeding the public frenzy by harvesting the sensationalist interest in this tragedy in order to boost their ratings. *See* Articles regarding coverage of Anna Nicole Smith, attached hereto as Exhibit "I". These articles include such statements as "Anna Nicole Smith died under suspicious circumstances, and the media onslaught began", "I understand our fascination with famous people whose lives turn into train wrecks. Ratings go through the roof and circulation spikes", "The death of Anna Nicole Smith, which set off a classic media feeding frenzy, may be an instance where press coverage exceeded public demand." *Id.* The media's goal in providing overly excessive coverage of Anna Nicole and Howard K. Stern was to spark an interest among its audience and to encourage provocative comments in order to increase the ratings of these tabloid media talk shows.

In the context of this daily speculation and media obsession with Anna Nicole Smith, O'QUINN was invited on these tabloid programs to comment on various facts as they were presented to him in a provocative manner; those facts and questions changed on a daily basis. He was invariably introduced as ARTHUR's attorney. ARTHUR was Anna Nicole's mother and the grandmother Anna Nicole's child, who was advocating for the best interests of her granddaughter. ARTHUR clearly did not want her granddaughter to remain in the hands of a man who was under a cloud of suspicion relating to Anna Nicole's death, and believed that she should have custody of Anna Nicole's child. As her attorney, it was only natural for O'QUINN to advocate and advance his client's position. Surely, the audience of the broadcasts on which O'QUINN appeared could not have believed that he was merely relating an objective cold version of the facts of this case. Rather, any reasonable member of the audience would know that, as ARTHUR's attorney, O'QUINN was doing more than simply commenting on the facts as he learned them. As ARTHUR's attorney, he was advancing the position and reasonable beliefs of his client based on materials and facts already known to the public.

It is important that the Court review these transcripts in their entirety and use its common sense to glean the true nature of these shows. These talk shows are television equivalent to supermarket tabloid journalism. This is precisely the reasons why provocative headlines and sensational headlines are used. O'QUINN was in the midst of this frenzy as

an advocate for a wounded mother who was advancing her position just as STERN was advocating for his position. It is simply inconceivable that anyone would take these comments as true and objective statements of fact, rather than what they really were: tabloid media's lurid and provocative attempts to better their ratings through the use of individuals who intimately and closely knew Anna Nicole during life and at death.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on November 30, 2007, 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 Floor, 1201 W. Peachtree Street, N.W., Atlanta, GA 30309; and **M. KRISTA BARTH, ESQ.** (krista@emsattorneys.com), Eric M. Sauerberg, P.A., *Co-counsel for Plaintiff*, Suite 102, 200 Village Square, Palm Beach Gardens, FL 33410 **NEIL McCABE, ESQ.**, (neilm@oqlaw.com) The O'Quinn Law Firm, 440 Louisiana, Suite 2300, Houston, TX 77002 who are listed as recipients as counsel under said system.

STEPHENS LYNN KLEIN LA CAVA
HOFFMAN & PUYA, P.A.

Counsel for Defendants

9130 S. Dadeland Blvd., PHII
Two Datran Center
Miami, FL 33156

Tele: 305/670-3700

Fax : 305/670-8592

E-Mail: kleinr@stephenslynn.com

By: ___/s/_____

ROBERT M. KLEIN

Florida Bar No. 230022

YELENA SHNEYDERMAN

Florida Bar No. 0015718