

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 BASED UPON THE LIBEL-PROOF PLAINTIFF  
DOCTRINE AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

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, because the statements sued upon are nonactionable, based upon the Libel-Proof Plaintiff Doctrine and, in support thereof, 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.

2. 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.

3. The genesis of this action is a series of appearances on national talk shows interviews, with national news media organizations, concerning the judicial proceedings involving O'Quinn's client Virgie Arthur ("Arthur").

4. Plaintiff's claim specifically concerns eight statements that were made by O'Quinn between February 19, 2007 and March 27, 2007.<sup>1</sup>

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<sup>1</sup> The Defendants have included the transcripts containing O'Quinn's statements as Composite Exhibit 1 with the exception of the 2/19/07 transcript.

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**MEMORANDUM OF LAW**

When, as in this case, there is no genuine issue of material fact, the moving party is entitled to summary judgment as a matter of law. See Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is proper in an action for defamation. Moreover, under Florida's law regarding summary judgments, "when a motion for summary judgment is brought by a defendant against a 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); *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). A complete failure of proof concerning an essential element of the plaintiff's case renders all other facts immaterial. *Celotex*, 477 U.S. at 324. The movant for summary judgment can demonstrate that the plaintiff's evidence is insufficient to establish his case, or an essential element thereof, by either affirmatively demonstrating the plaintiff's lack of evidence or by reviewing for the court the record to show such lack of evidence. *Celotex*, 477 U.S. at 325; *Hammer v. Slater*, 20 F.3d 1137, 1141 (11<sup>th</sup> Cir. 1994). The mere verification of a party's own conclusory allegations is not sufficient to oppose a motion for summary judgment. See Fed. R. Civ. P. 56(e); *Walker v. Darby*, 911 F.2d 1573, 1577 (11<sup>th</sup> Cir. 1990).

Under Florida law, the elements of defamation are as follows: Defendant (1) made a statement, (2) that was false, (3) to a third party, i.e., Defendant "published the statement," and (4) Plaintiff suffered damages as a result. *Shaw v. RJ Reynolds Tobacco Co.*, 818 F. Supp. 1539 (M.D. Fla. 1993), *affirmed*, 15 F.3d 1097 (1994). Furthermore, regarding damages, a statement is only legally slanderous if, when considered alone without innuendo, it tends to injure Plaintiff's trade or profession. *Meldeau Intern., Inc. v. Goodyear Tire & Co.*, 750 F. Supp. 1574 (S.D. Fla. 1990), or cause mental suffering and injury to Plaintiff's reputation.

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*Miami Herald Pub. Co. v. Brown*, 66 So.2d 679 (Fla. 1953). Where no damages result from allegedly slanderous statements, the question of falsity becomes moot and summary judgment must be granted. *Carlson v. WPLG/TV-10, Post-Newsweek Stations of Florida*, 956 F.Supp. 994 (S.D. Fla. 1996). The record establishes that Stern has not and can not prove that his profession was injured as a result of O'Quinn's statements. In order to overcome this motion for summary judgment, Stern, must either point to evidence in the record or present additional factual evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency. See *Celotex*, 477 U.S. at 324; *Hammer*, 20 F.3d at 1141. The existence of a scintilla of evidence in support of Stern's position is insufficient; the test is "where there is [evidence] upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Anderson*, 477 U.S. at 251.

Libel actions exist because the government has a recognized interest in protecting the reputations of its citizens. See *Gertz v. Welch*, 418 U.S. 323, 341 (1974). A defamation is a statement that tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Harm to reputation is the linchpin of American libel law. *Id.* In *Gertz*, the Supreme Court faced the task of balancing the competing interests of the first amendment and the individual's right to redress for defamation. 418 U.S. at 346. If the purpose of defamation law is to guard against harm to a person's good name, a person without a good name has nothing for the law of defamation to protect. Courts developed the "libel-proof plaintiff doctrine" within this framework of delicately balanced considerations. According to this defense, certain plaintiffs, (like Howard K. Stern), have reputations so diminished at the time of publication of the allegedly defamatory material that no falsehood could make it worse. Because libel-proof plaintiffs by definition suffer minimal (if any) injury to reputation, awarding damages to them would not serve the traditional purpose of libel law.

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Limiting libel damages to actual injury to reputation has roots in the common law; accordingly, courts have long admitted evidence of a plaintiff's tarnished reputation as bearing on the question of defamatory harm. See, e.g., *Craney v. Donovan*, 92 Conn. 236, 242-243, 102 A. 640, 643 (1917).

The first enunciation of the libel-proof plaintiff doctrine was in *Cardillo v. Doubleday*, 518 F.2d 638 (2d Cir. 1975), where a prison inmate challenged as libelous portions of a book describing the inmate's participation in a variety of crimes which the inmate denied having committed. *Id.* at 639-640. The United States Court of Appeals for the Second Circuit affirmed the district court's grant of summary judgment, finding that the inmate was, as a matter of law, libel proof for the purposes of the case. *Id.* In *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298 (2d Cir. 1986), cert. denied, 479 U.S. 1062 (1977), the court emphatically confirmed that a plaintiff may be rendered libel-proof by evidence apart from criminal convictions. The case also emphasized that a court may rely on prior publications regarding the plaintiff, including newspaper articles, in determining whether an individual is libel-proof. 800 F.2d at 303. In *Guccione*, the publisher of Penthouse magazine, sued Hustler Magazine over an article alleging that Guccione was married and also had a "live-in girl-friend, Kathy Keeton." *Id.* at 299. In a boisterous trial, Guccione argued that because he had not been convicted of the crime of adultery, he could not be held libel-proof regarding that issue. *Id.* at 303. The court disagreed, ruling that plaintiffs may be rendered libel-proof by evidence apart from criminal convictions. *Id.* The court specifically found that a number of previously published articles established that Mr. Guccione had engaged in a "long duration of adulterous conduct "which he had made no attempt to conceal from the general public." *Id.* at 302. The court concluded that these articles, which were "extremely probative" of Mr. Guccione's "notoriety for adultery," combined with his testimony established that he was living with Keeton which still married. *Id.*

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at 304. The court, therefore held that any damage to Mr. Guccione's reputation for monogamy "occurred a decade before Hustler published" its 1983 article, and any subsequent report regarding his adultery "could not further injure his reputation on the subject." *Id.* In what constitutes perhaps the best description of the libel-proof plaintiff doctrine, the court explained that "in those instances where an allegedly libelous statement cannot realistically cause impairment of reputation because the person's reputation is already so low or because the true portions of a statement have such damaging effects, even nominal damages are not to be awarded." *Id.*

In *Wynberg v. National Enquirer*, 564 F.Supp. 924 (C.D. Cal. 1982), the plaintiff had a brief but celebrated "close personal relationship," with Elizabeth Taylor. The relationship generated 86 news articles (far fewer than in this case). The gist of the article that was published by the National Enquirer, and the basis for the plaintiff's defamation action was that the plaintiff had used his relationship with Elizabeth Taylor for financial gain. The National Enquirer filed a motion for summary judgment in which it argued that Wynberg's past conduct established his bad reputation which, for purposes of the case, rendered him libel-proof as a matter of law. *Id.* at 927. The *Wynberg* court found the plaintiff libel-proof relying, in part, on "numerous articles" published prior to the *National Enquirer* piece that described the plaintiff's reputation for "taking advantage of women generally," and his "specific reputation for taking financial advantage of Elizabeth Taylor." *Id.* at 928-929.

Florida also recognizes the libel-proof plaintiff doctrine. In *Schaefer v. Warner Books*, 70 F.3d 1285 (11<sup>th</sup> Cir. 1995)<sup>2</sup>, the Eleventh Circuit affirmed this

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<sup>2</sup>The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. The Eleventh Circuit provides by rule that unpublished opinions are not considered binding precedent. They, however, may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition or motion. Eleventh Circuit Rules, Rule 36-2. The Defendants have included the unpublished opinion and the briefs that were filed in that case and are attached hereto as Exhibit 2.

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Court's decision granting summary judgment in favor of Warner Books' Motion For Summary Judgment on the ground that the plaintiff was libel-proof as a matter of law. Similarly in *Fortson v. Colangelo*, 434 F. Supp.2d 1369 (S.D. Fla. 2006), another defamation case, this Court granted the defendant's motion for summary judgment given the plaintiff's well-publicized history of overly aggressive play coupled with the tone and timing of allegedly defamatory remarks, *albeit* without using the terminology "libel proof." 434 F. Supp.2d at 1380.

It should be noted that it is not the mere repetition of the same or similar defamatory statements which supports the libel-proof plaintiff defense. Rather it arises after the publicity of the claims is so widespread that further repetition can do no further harm to the person allegedly defamed. *See Schiavone Construction Co. v. Time, Inc.*, 646 F. Supp. 1511 (D. N.J. 1986) (Challenged statements, as a matter of law, did not harm the plaintiff's reputation, based on the libel-proof plaintiff doctrine). Such is the situation in this case. As in the *Schiavone* decision, the widespread national coverage of Anna Nicole's death, the death of her son and the subsequent burial dispute constitutes sufficient evidence that Stern suffered no injury as a matter of law, pursuant to the libel-proof plaintiff doctrine. In short, the challenged statements could not have caused damage to Stern's already sullied reputation.

As previously stated, herein, the Plaintiff challenges eight statements made by O'Quinn between February 19, 2007 and March 27, 2007. However, in light of the thousands of articles, blog postings, television news and tabloid broadcasts, tying the Plaintiff to the deaths of Anna Nicole Smith and/or Daniel Smith, O'Quinn's statements could not have further injured the Plaintiff's already tarnished reputation. The Defendants have additionally filed in the Appendix to this Response over one hundred twenty five (125) additional articles including a list that summarizes the articles. These articles, however, are just

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the tip of the iceberg. **ADD (See, Composite Ex. 3)** The Project For Excellence In Journalism News Coverage Index, which monitors the news reported by major newspaper, television, radio and online outlets reported that in the two days immediately following Smith's death, nearly a quarter of the news from all sectors (24%) was devoted to this story, and fully half of cable news was focused on Smith. The February 7, 2007 edition of the New York Times, in fact, included a thought-provoking article entitled "Why Did We Watch? The Answer Isn't Pretty."<sup>3</sup> Here are but a sampling of the various headlines that were published BEFORE O'Quinn's uttered his challenged statements:<sup>4</sup>

**"Cops Have More Questions For Howard K. Stern"**

Nov. 21, 2006, www.TMZ.com

"Contrary to published reports, the investigation into the death of Anna Nicole's son is far from over. Law enforcement sources tell TMZ that the Attorney General of the Bahamas ordered police to re-interview Howard K. Stern regarding the painkiller methadone, and how it ended up in the late Daniel Wayne Smith's system."

**"Report: Anna Nicole Smith's Lover Gave Son Drug, Tried to Cover it up"**

Jan. 17, 2007, www.foxnews.com

**"Howard K. Stern helped kill Anna Nicole Smith's son"**

Jan. 17, 2007, www.imnotobsessed.com

**"Anna Nicole Smith's Lover Howard K. Stern Accused of Causing the Death of her son Daniel Smith"**

January 18, 2007, Hollywood.com

**"Witnesses Saw Howard K. Stern with Daniel Smith's Pills"**

Feb. 8, 2007, Hollywood.com

**"Suspicion mounts in deaths of Smith and son Daniel"**

Feb. 9, 2007, www.monstersandcritics.com/people/news/article

**"Anna Nicole Murdered?"**

Feb. 9, 2007, www.yeeeah.com/blog

This article is included in Composite Exhibit 3.

<sup>4</sup> All of the referenced articles and/or postings are included, in their entirety, and are attached hereto as Composite Exhibit 3.

**"Anna Nicole Killed by Methadone, Slimfast & Howard K. Stern"**

Feb. 11, 2007, [www.bastardly.com](http://www.bastardly.com)

**"In Defense of Howard K. Stern."**

Feb. 11, 2007, [insidedateline.msnbc.msn.com](http://insidedateline.msnbc.msn.com)

**"Perez Hilton Libels Howard K. Stern"**

Feb. 12, 2007, [christopherestep.blogspot.com](http://christopherestep.blogspot.com)

The self-described 'Queen of all Media' has probably gone too far in his criticism of Howard K. Stern when in a recent post he refers to him as a murderer:

**"Magistrate: New Questions for Anna Nicole's man"**

Feb. 13, 2007, [www.cnn.com](http://www.cnn.com)

In light of Anna Nicole Smith's death, Bahamian authorities are now more interested in questioning her attorney and partner in connection with the death of Smith's son Daniel, the county's chief magistrate said Monday.

**"Do you Believe Howard K. Stern?"**

Feb. 14, 2007, [www.usmagazine.com](http://www.usmagazine.com)

Additionally, the subject of Howard K. Stern's possible involvement in Anna Nicole Smith's death and the fact that Stern claimed to be the father of Anna Nicole Smith's baby, yet continued to refuse to take a DNA test to prove his paternity, was discussed in countless news and tabloid shows, that were aired before O'Quinn ever uttered the first challenged statement. Stern was portrayed as a villain; a murderer; a drug enabler; drug pusher; and in the most despicable terms that one could ever imagine used to describe a human being. There was, in essence, a chorus of voices all singing the same song: Stern procured and supplied drugs to Smith before, during and following her pregnancy. Stern openly admitted to sleeping with his client, Anna Nicole Smith, by claiming to be the father of Anna Nicole Smith's baby. The transcript of the February 11, 2007 edition of "CNN Larry King Live,"<sup>5</sup> reveals the following:

**"More on Anna Nicole Smith's Death"**

<sup>5</sup>The transcript of this broadcast is included in Composite Exhibit 3 to this Motion For Summary Judgment.

**LARRY KING:** Tonight, what killed Anna Nicole?

**DEBRA OPRI**<sup>6</sup> I have heard point blank that Howard K. Stern said, through his attorney, you're never getting the baby, we're never doing the test.

**KING:** What are they afraid of?

**OPRI:** They're afraid of Larry Birkhead being the biological father and taking custody. Mark my words, Larry Birkhead will continue this fight. Larry Birkhead will not rest until that child is away from Howard K. Stern. . . .my client, indicates with full authority that he had an exclusive relationship with Anna Nicole. . .

**KING:** Are you impressed that Howard K. Stern. . .here's a guy willing to raise a baby, it may not even be his.

**OPRI** No, it doesn't impress me because as far as I'm concerned. . .That baby, to Howard K. Stern, represents a pot of gold. To me, Anna Nicole Smith, to Howard K. Stern, represented a pot of gold, whatever obsession, whatever fascination he may have had for her, it was bad. It was poison. She's dead. Daniel is dead. We do not want Larry Birkhead's child to fall prey to the same problems and issues.

They went to the Bahamas for a reason. And those reasons are quickly dissipating. Anna's dead. Daniel's dead. I don't know how long Howard K. Stern will be there. He's facing an inquest. There are questions concerning Anna's death and what happened, what caused her death. All of these things are a cloud surrounding Howard K. Stern and Larry [Birkhead] is going to sit patiently and pursue this course of litigation.

Larry King subsequently showed a videotape in which Dr. Joshua Perper, the Broward County Medical Examiner, discussed the fact that foul play had not been ruled out as a cause of Anna Nicole Smith's death:

**KING:** And finally, have you ruled out foul play?

**PERPER:** Well, as I said, we were able to rule out foul play as a result of physical violence.

**KING:** Right, but by poisoning?

<sup>6</sup> Debra Opri was Larry Birkhead's attorney in the Broward County proceedings.

**PERPER:** . . .we did not rule out yet foul play in terms of chemical violence.

**KING:** Right.

**PERPER:** . . .because we don't have the tests, and we lack the proper review of the record and the investigation, which might reveal something in this regard.

Additionally, there were countless articles, and blog postings published during the period of time that O'Quinn gave his first statement (February 19, 2007) and his last statement (March 27, 2007), tying Howard K. Stern to the deaths of Anna Nicole Smith and/or Daniel Smith. The articles and the testimony from the Broward County

**"Howard K.-The Heat is On"**

Feb. 20, 2007, [www.tmz.com](http://www.tmz.com)

The police in the Bahamas are in a tricky situation with two investigations-allegations that **Howard K. Stern may have contributed to Daniel's death by fueling him with methadone**, and an allegation that the owners of Anna Nicole's house broke-in after her death.

.....  
...police are now faced with an embarrassing situation. **"Victim" Howard K. Stern is looking increasingly like a man who stoked Anna's addiction to drugs in the later months of her pregnancy-recording it on tape and gleefully saying the video would become a cash cow.**

**"New Anna Nicole Footage Portrays Howard K. Stern as Enabler"**

Feb. 20, 2007, [beat.bodoglife.com](http://beat.bodoglife.com)

**"Anna Nicole murder accusations"**

Feb. 21, 2007, [www.monstersandcritics.com](http://www.monstersandcritics.com)

Anna Nicole Smith was murdered by her lover Howard K. Stern, lawyers claimed yesterday. The accusation was made during a Florida court hearing to determine where the former Playboy Playmate will be buried.

**"Macabre Twists in Anna Nicole Trial: Murder, Methadone, Unmarked Graves and Corpse Viewing"**

Feb, 22, 2007, [www.hollywoodtoday.net](http://www.hollywoodtoday.net)

Circus? What circus? There was testimony Wednesday on unmarked graves, **accusations implying a double murder, post-mortem profiteering, methadone use during pregnancy, conspiracies galore and tears. . . .**

**"Anna Nicole Smith Aide Blasts Howard K. Stern"**

Feb. 23, 2007, [www.hollywoodgrind.com](http://www.hollywoodgrind.com)

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"Howard K. Stern in center of Police Probe."

Feb. 26, 2007, [National Enquirer](#)

"The Mysteries She Left Behind: After Anna Nicole Smith's Sudden Death, Questions Continue to Swirl."

Feb. 26, 2007, [People Magazine](#).

"Anna Nicole's Assistant reveals: "I saw Howard K. Stern inject her with drugs!"

February 27, 2007, [www.nationalenquirer.com/celebrity](http://www.nationalenquirer.com/celebrity)

"Personal Assistant of Anna Nicole Smith reveals shocking details."

Feb. 28, 2007, [www.actressarchives.com](http://www.actressarchives.com)

"The assistant to Anna Nicole Smith calls Howard K. Stern 'an enabler' and that he obtained multiple prescriptions under her legal name-Vickie Lynn Marshall-and even used other aliases to get the woman more drugs. Collins even claims that the staff knew that if there was an overdose they weren't allowed to call 911 and were instructed just to drive Anna Nicole Smith to the closest hospital and that 'Her medications were to be hidden.'"

"Prosecutors consulted in Smith case."

March 14, 2007, [www.miamiherald.com](http://www.miamiherald.com)

"Anna Nicole's Father Blames Stern For Daughter's Death"

March 21, 2007, [www.hollywood.com](http://www.hollywood.com)

"Howard K. Stern's Reputation Still In Crisis- - - Was He Involved in The Death Of Anna Nicole Smith's Son, Daniel?"

March 26, 2007, [www.mikepaulblog.com](http://www.mikepaulblog.com)

Review of the Sworn Affidavit of Texas Attorney Russell Hardin also reveals Stern's tarnished reputation. (See, Exhibit 5). Attorney Hardin was trial counsel in the case involving the Estate of J. Howard Marshall II, (Anna Nicole Smith's husband), in Probate Court in Harris County, Texas. The Sworn Affidavit provides:

"Because punitive damages were an issue in the case, the judge ordered Pierce Marshall [con of J. Howard Marshall II, to disclose his financial statement, subject to a confidentiality agreement, which the judge made an order of the Court. Despite that order, Mr. Stern surreptitiously took from counsels' table Pierce Marshall's financial statement. Mr. Stern made a photocopy of the financial statement and sent the document to be filed in bankruptcy court in California. The bankruptcy court posted the financial statement on the internet. When the probate court discovered what had happened the court contacted the bankruptcy judge, who explained that he did not know the statement was subject to a confidentiality agreement. The bankruptcy judge immediately removed the statement from the website. In open court and on the record the probate judge

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reprimanded Mr. Stern for his action. Mr. Stern admitted that he obtained the statement from opposing counsel's table but claimed that he did not know it was confidential. The probate judge made clear that he did not believe that Stern was ignorant of the confidentiality order. The court ordered Stern to stay behind the bar in the audience, for the remainder of the trial.

Stern's bad reputation became a focus of the Broward County proceedings.<sup>7</sup> The transcript of those proceedings demonstrated that Stern kept all of Smith's family away from Anna Nicole, and that her son Daniel was not a drug user.

**Feb. 21, 2007**

**BARTH:** And when you went to have this memorial service at Daniel's grave site, why did you participate in that event?

**VIRGIE ARTHUR:** It was his birthday.

**BARTH:** Why did you go on his birthday?

**ARTHUR:** Because I was not allowed to go to the funeral.  
\*\*\*\*\*  
I was not allowed to go on his birthday. Howard kept Vickie and Daniel----not any of family, not just me, any of the family.

**BARTH:** But you said Daniel was a good boy and you said he wasn't on drugs; is that correct?

**ARTHUR:** Yes, he wasn't.

**BARTH:** So how is that my client [STERN] kept you from having a relationship with your adult, 20 year old grandson?

**ARTHUR:** Because my daughter was on drugs and she told him that he could not have anything to do with any of the family, not just me, because Howard told her.

(T. 138) (*Emphasis added*).

Although Stern claims that "his reputation has been permanently damaged" as a result of O'Quinn's statements" (§237, First Amended Complaint), that he "has suffered a permanent impairment to his ability to obtain or maintain gainful employment, including employment as an attorney (§240, Complaint), a review of the record before this Court clearly reveals that Stern

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<sup>7</sup> The transcripts of the Broward County proceedings dated 2/21/07 and 2/22/07 are attached hereto as Composite Exhibit 4.

wasn't gainfully employed as an attorney BEFORE O'Quinn uttered his statements. The transcript of the Broward County proceedings demonstrates that Howard K. Stern had but one client- - -Anna Nicole Smith. For the years 2002 up until the time of the Broward County proceedings-Smith's income each year was, at most, \$12,500. In most years, he had no income. Anna Nicole Smith gave him money to live; paid his rent, bought his food and bought his clothing. Stern, in fact, claimed that he had to borrow money from his retired parents to attend the Broward County proceedings.

O'QUINN: You have lived in Anna's house?

STERN: That's correct.

O'QUINN: Do you still live in Anna's house?

STERN: Yes, with our baby.

\*\*\*\*\*

O'QUINN: What is your source of income?

STERN: Right now, I am borrowing money from my parents to be here to fight for Anna

\*\*\*\*\*

COURT: When was the last time you earned your own income?

STERN: I had a law practice?

O'QUINN: What year?

STERN: Until 2002.

\*\*\*\*\*

COURT: What happened in 2003?

STERN: That's when the Anna-well, it was in 2002, that is when the Anna Nicole Show started and I split up with my law partner.

\*\*\*\*\*

COURT: In 2003, did you have any income reported on your tax return?

STERN: Yes. Well, there was—from the Anna Nicole Show, there was income.

COURT: How much?

STERN: It was pretty small. It was like \$12,500.

COURT: Were you paid as a consultant?

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**STERN:** I was actually on that show. It was a reality show.<sup>8</sup>  
\*\*\*\*\*  
I think it was 2002 or 2003.

**COURT:** And what other income did you have that year?

**STERN:** I was with Anna----I was with Anna. My income was with her.

**COURT:** You had no separate and independent income?

**STERN:** No. All she did----

**COURT:** No. Just stay with my questions. What happened in 2004? What was your income?

**STERN:** Same thing, it was through Anna.

**COURT:** Was that show still on the air?

**STERN:** I think that was in 2004.

**COURT:** So you made another 12,000?

**STERN:** If that----

**COURT:** Twelve thousand or less?

**STERN:** Yes.

**COURT:** Where were you living in 2004, California?

**STERN:** Yes. I have an apartment in California that Anna paid the rent on, and I stayed at her house most nights.

**COURT:** How about in 2005, what was your income?

**STERN:** Same thing. All the way to today.

**COURT:** The show was off the air?

**STERN:** No.

**COURT:** It kept going?

**STERN:** I think it was off the air in 2005.

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<sup>8</sup> The Defendants respectfully ask this Court to take judicial notice of the videotaped episodes of the Anna Nicole Show which the Defendants will file under separate cover. Even a cursory view of the Show demonstrates the manner in which Stern portrayed himself to the public, namely as a buffoon, errand boy and a lackey. It demonstrates the depths Stern was willing to go for Smith and is far more damaging than anything surrounding Anna Nicole Smith's death including O'Quinn's statements.

COURT: So your income may be \$12,000 or less in 2005?

STERN: Yes.

COURT: And 2006?

STERN: Same thing.

COURT: There was no income at that point, because there is no show?

STERN: Right.

COURT: Who paid the rent?

STERN: I told you, Anna paid my rent.

COURT: Where was your home?

STERN: Everything that I did for her legally, I did not charge her.

COURT: Let me ask the questions. In 2006, where were you living?

STERN: I lived in Anna's house. Well, in 2006, well, I was with Anna in the Bahamas, here, and I had an apartment in L.A.

COURT: How much rent did you pay?

STERN: It's 950 a month.

COURT: Who paid that?

STERN: I said Anna did.

COURT: When you went to a restaurant, who paid the check?

STERN: Anna paid for most things.  
\*\*\*\*\*

COURT: She would give you cash?

STERN: Yes.  
\*\*\*\*\*

COURT: Are your parents retired?

STERN: Yes.

COURT: And they would send you money?

STERN: If I need money, they would send me money.  
\*\*\*\*\*

COURT: When is the last time they sent you money?

STERN: Well, for this?

COURT: Anything.

**STERN:** . . .The last time was the first time in years. Other than a birthday present, **it was to bring Anna back to the Bahamas to be with her son.**

**COURT:** **They sent you a check?**

**STERN:** **Yes.**

**COURT:** How much was it?

**STERN:** It was----well, do I have to say what I am paying people here?

**COURT:** **No. I want to know the total amount.**

**STERN:** **First of all, it was not a check, it was wired.**

**COURT:** **They wired money?**

**STERN:** **Yes. And I would prefer not to disclose, but it's a substantial amount. . .**

(T. 153-159) (*Emphasis added*).

**O'QUINN:** **Let me see if I have got this straight. For the entire year of 2006, you have had no job that paid you any income?**

**STERN:** **I was with Anna.**

**O'QUINN:** **Is it true you had no job that paid you any income?**

**STERN:** **That's true.**

(T. 163) (*Emphasis added*).

**O'QUINN:** **So in 2006, all the money you had to support yourself, you received from Anna Nicole?**

**STERN:** **Yes.**

**O'QUINN:** **Not from any other business, any other person, any other source?**

**STERN:** **She was my whole life, that is true, correct.**

(T. 164) (*Emphasis added*).

One of the many articles dealing with the fact that Howard K. Stern was entirely financially dependent upon Anna Nicole Smith aptly stated as follows:

**"Howard K. Stern: Anna Nicole Smith Paid My Rent"**

Feb. 21, 2007, stupidcelebrities.net

**"Howard K. Stern was entirely financially dependent upon Anna Nicole Smith, he revealed Wednesday during the ongoing hearing to decide who**

will get custody of her remains. Ah yes. . .a complete loser, just as I suspected."

The transcript of the Broward County proceedings additionally demonstrates that Howard K. Stern brought drugs into Anna Nicole Smith's hospital room. The trial judge, himself, suggested that Howard K. Stern was an enabler with regard to Anna Nicole's continued drug use.

**Feb. 21, 2007 Transcript**

**BIRKHEAD:** She [Anna Nicole Smith] was taking medications before and during the pregnancy.

(T. 265) (*Emphasis added*).

**BIRKHEAD:** ...we had a couple clashes in the hospital room because she and Mr. Stern brought a duffle bag and when they were not administering through the drips, they were taken out of the bag and taken on top of drugs and thwarted the efforts of the hospital to get her off the medication.

(T. 265) (*Emphasis added*).

**Feb. 22, 2007 Transcript**

**COURT:** Now, stay with me. Then we have Stern. Is he a bad guy or is he a fellow who has some form of a love for her? [Anna Nicole Smith]. We don't know. It's a fact that will come out way beyond this hearing. But whatever relationship he had with her, **he would be called, maybe, an enabler** because he lived-your objection is so noted. He [Stern] lived in the home and he may have known if he said to her, stop taking these drugs, and I'm going to have you bring forth additional argument and facts concerning this. But he may have said, if he put his foot down, and he loved her maybe in some form or another, she might have taken flight from Stern.

(T. 11) (*Emphasis added*).

**Cross-Examination of Larry Birkhead**

**MILSTEIN:** ...in the time, Mr. Birkhead, in the time that you spent with Anna Nicole, what efforts did you make personally to assist her in minimizing or rehabilitating herself from any use of substances?

\*\*\*\*\*  
**BIRKHEAD:** Like I said, at times I took her medicine and I was told by Mr. Stern to give it back to her because she needed it to live.

\*\*\*\*\*  
Sometimes I didn't even know if she was going to live and they kept bringing more and more drugs in the house and the

pharmacist. And at one point, the time I knew it was really bad is when one of the individuals in that house came home and they said, they had my picture up in the pharmacy as a VIP customer and they thought it was a funny thing to say. And I said-

(T. 17-18) (*Emphasis added*).

**BIRKHEAD:** I think I did all I could. And when I was pushed away-

**COURT:** Who pushed you away?

**BIRKHEAD:** I got into an argument with Anna Nicole that was something that could have been brushed over. . .And Mr. Stern got in the middle of it with us and he said, like I said yesterday, he told me to come get my stuff, he threw the plasma television out on the front porch and clothes and he won't give me back some of my belongings in the house.

(T. 19).

**BIRKHEAD:** 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.**

**COURT:** **But she could have replaced Mr. Stern with another individual; am I right?**

**BIRKHEAD:** **If he would have told her no on the drugs, she probably would.** And I said no and that's why I'm here today.

(T. 20) (*Emphasis added*).

**BARTH:** Now, you came into that hospital, you testified yesterday, and my client [STERN] was sitting there, and you said at some point during this two-week period, and I'm not sure when, you saw a duffle bag full of drugs; is that correct?  
\*\*\*\*\*

**BIRKHEAD:** **There were drugs in a duffle bag.**

(T. 45) (*Emphasis added*).

**BIRKHEAD:** At one point during the stay in the hospital, she asked me to go get some personal belongings out of the closet in the hospital. And when I went into the closet, she asked me to bring the bag out and she kept pushing the button for the drugs to come out and she was getting frustrated and she kept telling me to press the nurse to tell her to get more. I said, they said you can't have anymore. She said, I need more. When she told me to get her bag for something, totally related (*sic*) to the drugs, like a toothbrush or something like that, when I brought the bag back to her, she pulled the bottle out. **Mr. Stern was in the room** and they were waiting to see who came in and they opened the bottle.

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**BARTH:** . . .Did Anna open the bottle or did Mr. Stern open the bottle? They didn't open the bottle.

**BIRKHEAD:** It happened multiple times, so I guess he did and she did both, and I witnessed both.

\*\*\*\*\* I told them not to and I repeatedly told her not to. . . (T. 47) (Emphasis added).

Anna Nicole Smith's personal assistant called Stern "an enabler" who "obtained multiple prescriptions under her legal name, and used aliases to get her more drugs."<sup>9</sup> Despite the fact that Stern has alleged that he was not "criminally involved in the deaths of Ms. Smith and her son, Daniel, and in spite of the fact that Stern takes issue with what he calls the "implied accusations of murder"<sup>10</sup> the fact remains that Stern could, in fact, be charged under several Florida criminal statutes. Stern could, in fact, face felony murder charges as a result of his "enabler" role. Sections 893.13(2)(b), 893.13(4) and 893.13(1)(a), Florida Stats., makes it a felony to deliver, or possess with intent to deliver, controlled substances such as Chloral Hydrate and Methadone. Sections 893.13(5)(a) and 893.13(5)(b), Fla. Stats., make it a felony for anyone to bring Methadone or Chloral Hydrate into Florida unless the person does 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. Section 893.13(7)(c), Fla. Stat., additionally makes obtaining controlled substances through fraudulent or false prescriptions a felony. Section 893.13(6)(a), Fla. Stat., makes it a felony for anyone to be in actual or constructive possession

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<sup>9</sup> "Personal Assistant of Anna Nicole Smith reveals shocking details."  
Feb. 28, 2007, [www.actressarchives.com](http://www.actressarchives.com)

"The assistant to Anna Nicole Smith calls Howard K. Stern 'an enabler' and that he obtained multiple prescriptions under her legal name—Vickie Lynn Marshall—and even used other aliases to get the woman more drugs. Collins even claims that the staff knew that if there was an overdose they weren't allowed to call 911 and were instructed just to drive Anna Nicole Smith to the closest hospital and that 'Her medications were to be hidden."

<sup>10</sup> See, First Amended Complaint, §§15,18,24.

of a controlled substance unless the substance was lawfully obtained from a practitioner or pursuant to a valid prescription; Sections 893.13(6)(a), and 893.13(7)(c), Fla. Stats., make it a felony for anyone to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge. Stern could also be charged with Attempted Felony Murder pursuant to §782.051, or even Second degree Murder pursuant to §782.04, Fla. Stat. In short, Stern has not and can not establish that O'Quinn's statements were false or defamatory where Florida law provides that Stern could, thus, be charged with Murder. The Defendants would additionally note that in addition to failing to establish his defamation claim, Stern also can't establish a claim for false light invasion of privacy.<sup>11</sup>

**CONCLUSION**

The Defendants, John M. O'Quinn and John M. O'Quinn and Associates, PLLC d/b/a The O'Quinn Law Firm, respectfully submit that summary judgment in their favor is appropriate, as a matter of law, since the Stern, is libel-proof. Did Stern murder Anna Nicole Smith? That answer may never be known. The record, however, provides ample testimony under oath and otherwise that Stern procured drugs both before, during and after Smiths' pregnancy; Stern had sexual relations with Smith, his one and only client; Stern acted as a total jackass on the "Anna Nicole Smith Show"; Stern claimed that he was the father of Smith's baby yet refused to take a paternity test and Stern lived off of Smith. Clearly, any injury to Stern's already besmirched reputation would have been *de minimis*, and summary judgment should be granted in favor of the Defendants.

WE HEREBY CERTIFY that on October 3, 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](mailto:llwood@pogolaw.com)) Powell Goldstein LLP, *Co-counsel for Plaintiff*, One Atlantic Center, 14<sup>th</sup> Floor, 1201 W. Peachtree Street, N.W., Atlanta, GA 30309; and **M. KRISTA BARTH, ESQ.**

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<sup>11</sup>The Defendants have addressed the false light invasion of privacy claim in greater detail in one of the other Motions For Summary Judgment that they are filing simultaneously with this Motion for Summary Judgment.

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