

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

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

HOWARD K. STERN,

Plaintiff,

vs.

JOHN M. O'QUINN and
JOHN M. O'QUINN & ASSOCIATES, PLLC.
d/b/a/ THE O'QUINN LAW FIRM

Defendant

_____ /

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM¹

Defendants JOHN O'QUINN, and JOHN M. O'QUINN & Associates, PLLC., d/b/a THE QUINN LAW FIRM, by and through undersigned counsel, file this Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and, in support, thereof, state as follows:

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 interviews, with national news media organizations, concerning the judicial proceedings involving O'QUINN's client VIRGIE ARTHUR ("ARTHUR").

MEMORANDUM OF LAW

Fed. R. Civ. P. 12(b)(6) provides that this Court must dismiss a complaint if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. *Bell Atlantic Corp. v. Twombly*, -U.S.-, 127 S.Ct. 1955,1965 (2007). In order to survive a motion to dismiss in a defamation action, a plaintiff must establish that the words about which he complains are reasonably capable of sustaining a defamatory meaning and that the words are not mere comments within the ambit of the First Amendment. Under Florida law, the test to be applied in

¹ Defendants JOHN M. O'QUINN and JOHN M. O'QUINN & ASSOCIATES, PLLC, (hereafter collectively referred to as "O'QUINN") are simultaneously filing a Motion To Dismiss based upon lack of personal jurisdiction; improper venue/and or alternatively to transfer cause of action based on *forum non conveniens*.

determining whether an allegedly defamatory statement constitutes an actionable statement of fact requires that the court examine the statement in its totality and the context in which it was uttered or published.² In determining whether an allegedly defamatory statement is an actionable statement of fact, the court must consider all of the circumstances surrounding the statement, including the medium, by which the statement is disseminated and the audience to which it is published. *Fortson v. Colangelo*, 434 F. Supp.2d 1369 (S.D. Fla. 2006).¹

AS TO ALL OF O'QUINN'S STATEMENTS

Florida's litigation privilege bars Stern's defamation claim

Where the facts giving application to Florida's litigation privilege are apparent on the face of the complaint, as in this case, the litigation privilege may be raised by motion to dismiss. *Horsley v. Rivera*, 292 F.3d 695 (11th Cir. 2002). Defamatory statements made in the course of judicial proceedings are absolutely privileged, and no cause of action for damages will lie, regardless of how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry. *Fridovich v. Fridovich*, 598 So.2d 65 (Fla. 1992). In *Levin, Middlebrooks, Marbie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So.2d 606, 607-608 (Fla. 1994), the Florida Supreme Court explained the scope and rationale of the litigation privilege inquiry:

[A]bsolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior. . .so long as the act has some relation to the proceeding. The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

Florida's litigation privilege is applicable to nearly all conduct that occurs during a proceeding, so long as it has some relation to that proceeding. *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380 (Fla. 2007). The determination of whether to apply the litigation privilege focuses on the purpose and the timing of the misconduct, *i.e.*, whether the conduct was in furtherance of the party's defense or prosecution of the lawsuit. "[P]articipants must be free to use their best judgment in prosecuting or defending a lawsuit." *Id.* at 384. There is little doubt that all of the challenged statements were made in the course of judicial proceedings and were related to the litigation in question and that O'QUINN has absolute immunity. STERN, in fact,

² If a case is in federal court based on diversity, the forum state's law governs substantive claims and federal law governs the specificity with which to allege the substantive claims. See, *James Ventures, L.P. v. Timco Aviation Services, Inc.*, 2007 WL 141156 (S.D.Fla. Jan. 17, 2007).

acknowledges that the challenged statements were made in the course of judicial proceedings and were related to the litigation in his First Amended Complaint.

"Defendants represented Virgie Arthur ("Arthur"), the biological mother of Ms. Smith, before, during and after court proceedings held in Broward County, Florida in February 2007 in relation to questions of legal custody regarding Ms. Smith's body and parental custody over Ms. Smith's infant daughter, Dannielynn Hope Marshall Stern (now Dannielynn Hope Marshall Birkhead)." (¶9).

"Defendants also represented Arthur in Florida and elsewhere in her relations with the media, including questions surrounding the custody battle over Ms. Smith's body, the deaths of Ms. Smith and Daniel Smith, and litigation in the Bahamas concerning the paternity and custody of Ms. Smith's daughter." (¶10).

"At all times relevant to Stern's claims, O'Quinn was: (a) acting as an authorized agent of the Law Firm in representing Arthur, a client of his Law Firm; (b) acting within the scope of his employment; and (c) making statements related to Defendants' representation of Arthur." (¶12).

"Arthur was represented in the Florida custody hearings over Ms. Smith's body by Defendants." (¶47).

"Shortly after being hired by Arthur, O'Quinn traveled to Florida to assist with the litigation regarding custody of Ms. Smith's body and to handle the media for Arthur." Defendant O'Quinn's strategy was to injure Plaintiff (¶48).

"Defendants represented Arthur in the hearings held from February 16 through February 22, 2007, in Broward County Circuit Court regarding custody of the body of Ms. Smith." (¶51).

"While still in Florida, O'Quinn interviewed and hired appellate counsel for Arthur to appeal Judge Seidlin's ruling." (¶52).

"O'Quinn was present with Arthur in Florida during her unsuccessful February 28, 2007 appeal of Judge Seidlin's ruling to the 4th District Court of Appeals in West Palm Beach, Florida." (¶53).

"As part of his representation of Arthur in hearings regarding the custody of Ms. Smith's body and as Arthur's media spokesperson, O'Quinn began making medial appearances on nationally-broadcast television shows and in the print media representing himself to be the attorney for Arthur." (¶54).

"As part of their representation of Arthur, Defendants handle media requests and represent Arthur's interests in the media." (¶55).

"O'Quinn was acting as an employee of the Law Firm, within the scope of his representation of Arthur on behalf of the Law Firm, while he was present in Florida for court hearings regarding the custody of Ms. Smith's body." (¶58).

"O'Quinn was acting as an employee of the Law Firm when he made media appearances on behalf of Arthur." (¶59).

"The Law Firm authorized the public statements made by O'Quinn while he was present in Florida for court hearings regarding the custody of Ms. Smith's body." (¶60).

"O'Quinn's strategy was to injure Stern's reputation in the public arena so that Defendants and Arthur could gain a competitive advantage in the court proceedings and media frenzy surrounding Ms. Smith's death, paternity and custody of Ms. Smith's daughter, and/or control

of the estate of Ms. Smith.” (¶61).

“Arthur was represented in the custody hearings by Defendants.” (¶67).

“As part of his representation of Arthur in hearings regarding the custody of Dannielynn and as Arthur’s media spokesperson, O’Quinn began making media appearances on Nationally-broadcast television shows and in the print media representing himself to be the attorney for Arthur.” (¶68).

“O’Quinn intentionally slandered Stern in a calculated effort to gain a competitive advantage for Defendants and Arthur, in any dispute Arthur may have with Stern over the custody of Ms. Smith’s body, parental custody of Dannielynn and/or control of the estate of Ms. Smith.” (¶69).

“O’Quinn’s public statements regarding Stern regarding Stern were part of O’Quinn and the Law Firm’s joint venture to injure Stern’s reputation in the public arena so Defendants and Arthur could gain a competitive advantage in the court proceedings and media frenzy surrounding Ms. Smith’s death, paternity of and custody of Ms. Smith’s daughter, and/or control of the estate of Ms. Smith.”(¶219).

“Defendants intentionally published the false and defamatory statements about Stern in a calculated effort to spear the reputation of Stern to benefit Virgie Arthur in ongoing court proceedings and in the eyes of the public.” (¶223).

O’QUINN must, therefore, be afforded absolute immunity with regard to the challenged statements pursuant to Florida’s litigation privilege.

O’QUINN’s statements were non-defamatory, as a matter of law, where the statements consisted of pure opinion and/or rhetorical hyperbole not verifiable facts.

The determination of whether complained of words are actionable expressions of fact or non-actionable expressions of pure opinion and/or rhetorical hyperbole, is a determination that may be determined by this Court in a preliminary motion. *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. On December 3, 2007, the Circuit Court entered an opinion in *United Auto Ins. Company v. Phillip Freidin, et. al.*, Case No. 06-25595 CA 08,³ 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. The Court's language is particularly instructive in the case at hand.⁴

STERN cannot possibly state a defamation cause of action referring to O'QUINN's words, alone, where those words were uttered during a television broadcast involving a stream of audio and visual components interacting with each other. O'QUINN's allegedly defamatory words, standing alone, cannot readily be viewed in isolation, without also considering the accompanying visual images, the tone of voice of the announcer, reporter, or television host, along with the combined audio and video editing effects.

³ 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 instructive.

⁴ "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."

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

In this case, there is even more reason to find that O'QUINN's statements can not possibly form a basis for a defamation cause of action. O'QUINN's statements can not be viewed in isolation where STERN failed to provide or even refer to complete, unedited transcripts of the television broadcasts containing the challenged statements.

Publication without actual malice

Because STERN is a limited public figure, his defamation suit is subject to First Amendment limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). As a limited public figure, STERN must be able to prove that O'QUINN made his statements with "actual malice." A defendant acts with "actual malice" if he makes the challenged statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 936 F.Supp. 917 (M.D. Fla. 1996). Colodny co-authored a book that advanced a novel theory about the Watergate incident. According to Colodny, the book exposed John Dean as having repeatedly lied and/or perjured himself during and after his tenure as counsel to President Richard Nixon. The case involved a letter written by John Dean's lawyer, John Garrick, to the Tampa Tribune which was published in its "Commentary" section. Garrick stated, therein, that he and his law firm were "confident that full disclosure of all the tape recordings made by Colodny will expose Colodny's book, 'Silent Coup' as a fraud." 936 F.Supp. at 921. Following the publication of Garrick's statement, Colodny sued Garrick for defamation. The Court held that the author who wrote and promoted the book regarding the Watergate break-in and ensuing scandal, was a "limited public figure"(as is STERN), for purposes of the author's defamation action against individual's attorney. The Court noted that the author wrote the book voluntarily and for profit, promoted the book and responded to public scrutiny and comment

through the media. The Court found that Colodny, like STERN, had "ready access to the media" as he was involved in an actual public controversy" and participated sufficiently in that controversy "to gain him general fame or notoriety in the community." The Court held as a matter of law, that no reasonable jury could find that Garrick acted with actual malice when writing the "fraud" statement. 936 F.Supp. at 926.

As a limited public figure, STERN stands in the same shoes as the author in the *Colodny* case. STERN also had ready access to the media, and had regularly appeared on television to promote his position in the ongoing litigation involving O'QUINN's client, VIRGIE ARTHUR. In fact, on many of the same shows which are the subject of STERN's Complaint, the point was repeatedly made that STERN had been actively involved in soliciting payments from the media from particular interviews. Thus, STERN not only participated in the controversy surrounding the deaths of Anna Nicole Smith and Daniel Smith, he was alleged to have actively profited in this macabre melodrama, to the point where he had gained an extraordinary level of fame - - and notoriety - - in the American community, if not around the world. Thus, as in *Colodny*, STERN's actions are certainly subject to first amendment limitations. STERN can prove no set of facts to establish actual malice with clear and convincing evidence. *Dockery v. Fla. Democratic Party*, 799 So.2d 291 (Fla. 2d DCA 2001)(Public figure asserting defamation claim must prove actual malice with clear and convincing evidence); *Wynberg v. National Enquirer, Inc.*, 564 F.Supp.924(C.D. Cal.1982)("Due to his 'close personal relationship' with a celebrity for over 14 months and the substantial publicity they received, plaintiff was a 'public figure' relative to the issue of their relationship and therefore could not recover on his defamation claim" where plaintiff failed to show that publisher acted with actual malice in writing and publishing the allegedly defamatory article).

STERN can prove no set of facts in support of his First Amended Complaint that O'QUINN deliberately or recklessly uttered the challenged statements, believing his statements to be false. Mere allegations that 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). At the time that O'QUINN made the statements there was substantial on-going debate about Anna Nicole and Daniel Smith's deaths. In fact, to this date, there is continued debate. The inquest into Daniel Smith's death only commenced on November 19, 2007, only days ago, in the Bahamas and the criminal investigation into Anna Nicole Smith's death has recently been re-opened. Thus, it is impossible for STERN to set forth facts to establish that O'QUINN's pure expressions of opinion on this subject were published with actual malice where to date, there is continued speculation and no conclusive suspect(s) and/or no conclusive cause of death.

STERN's False Light Invasion of Privacy claim is precluded

The Florida Supreme Court has never endorsed the validity of a cause of action for invasion of privacy on the false light theory. *Gannett Co., Inc. v. Anderson*, 947 So.2d 1 (Fla. 1st DCA 2006). On September 26, 2007, the Florida Supreme Court granted review in *Jews for Jesus, Inc. v. Rapp*, 963 So.2d 702 (Fla. 2007) to consider the certified question whether Florida recognizes the tort of false light invasion of privacy. Thus, STERN's false light invasion of privacy claim is currently precluded under Florida law.

Even if this Court decides to consider STERN's false light invasion claim, STERN is still not entitled to relief under any set of facts that could be proven consistent with the allegations in his First Amended Complaint and dismissal is still mandated where STERN is unable to establish that O'QUINN provided false information which placed STERN in a false light either knowingly or in reckless disregard to the falsity of the material.

There is no joint and several liability

Clearly, STERN's joint and several liability claim can't stand where his claims for slander and false light invasion fail. *Ovadia v. Bloom*, 756 So.2d 137 (Fla. 3d DCA 2000); *Hoch v. Rissman, Weisberg, Barrett*, 742 So.2d 451 (Fla. 5th DCA 1999).

Punitive damages Are precluded

STERN can prove no set of facts in support of his punitive damages claim, since he can prove no set of facts that O'QUINN acted with actual malice. *Gertz v. Robert Welch*, 418 U.S. 323, 349 (1974)(Punitive damages may not be awarded in a defamation action unless the plaintiff can show that the defendant acted with actual malice). As such, STERN's claim for punitive damages fails.

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 STERN⁵ 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. Most assuredly, Florida's litigation privilege provides immunity for defamatory statements uttered as litigants are walking into a courthouse. STERN's claim regarding O'QUINN's February 19, 2007 comment must, therefore, be dismissed since it is clear that STERN is not entitled to relief under any set of facts that could be proven consistent with his allegations.

⁵ See, Tab A to Stern's Complaint.

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, which STERN provided in the Appendix to his Complaint states that it is a "partial transcript," that "has been edited for clarity."⁶ Thus, it is impossible to discern the context of O'QUINN's comments. Furthermore, the following statement is noted on the cover of the transcript: "**This is not a legal transcript for purposes of litigation.**"⁷ Accordingly, this Court should not consider the transcript of the February 21, 2007 broadcast in rendering a decision. There is no absolute rule for determining what words are, and what words are not, actionable, thus, it is necessary to consider the circumstances of its publication and the entire language used. 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. If the gist is substantially true, then minor inaccuracies are insufficient to prove actual malice. *Id.*

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. Where there is only a partial edited transcript, it is absolutely impossible to discern the context in which O'QUINN's statements were made. Thus, STERN is not entitled to relief under any set of fact that could be proven consistent with his allegations concerning the challenged statement.

Furthermore, even if this Court chooses to consider the partial edited transcript, a review of the transcript referenced in STERN's First Amended Complaint, establishes that STERN is still not entitled to relief under any set of facts that could be proven consistent with STERN's allegations. The transcript clearly establishes that O'QUINN's comments to Van Susteren were made in the course of the judicial proceedings involving O'QUINN's client, VIRGIE ARTHUR, and were directly related to the litigation in question. Florida's litigation privilege must, therefore, be applied as a bar to STERN's cause of action.

Although STERN claims that "STERN uttered false and defamatory statements conveying that Stern

⁶ See, Tab A to Stern's Complaint.

⁷ *Id.*

murdered Ms. Smith,"⁸ 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.⁹ 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 opinion of STERN. O'QUINN is, therefore, entitled to absolute immunity under Florida's litigation privilege. Additionally, it should be noted that STERN fails to provide any proof that O'QUINN provided false and defamatory information about STERN. O'QUINN's comments were, in fact, neither false nor defamatory.

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.¹⁰ 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,¹¹ STERN's claim is easily refuted by the transcript of the broadcast which STERN, himself, provided this Court.¹² 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. Similarly, STERN is not entitled to relief under any set of facts that could be proven consistent with his claim that O'QUINN's false and defamatory statements conveyed that STERN was criminally involved in Daniel and Anna Nicole Smith's deaths. There is nothing false or

⁸ See, First Amended Complaint, p. 21.

⁹ See, First Amended Complaint, p. 21.

¹⁰ See, Tab B to Stern's Complaint.

¹¹ See, First Amended Complaint, p. 29.

¹² See, Tab B to Stern's Complaint.

defamatory about O'QUINN's statements. Daniel and Anna Nicole did, in fact, die under suspicious circumstances. When O'QUINN made his statements, there was wide-spread speculation as to their cause of death. The speculation continues today. The inquest into Daniel Smith's death has only recently begun and the investigation into Anna Nicole Smith's death was only recently re-opened.

A review of the transcript also establishes that O'QUINN's comments were made in the course of the judicial proceedings and were related to the litigation in question. During the interview, O'QUINN was, in fact, specifically asked about his representation and his relationship with his client.¹³ Florida's litigation privilege should, therefore, be applied as a bar to STERN's cause of action.

March 14, 2007 statement

STERN next claims that O'QUINN gave a slanderous interview to Greta Van Susteren "on his own behalf" on March 15, 2007.¹⁴ STERN clearly uses the above terminology in an attempt to avoid application of Florida's litigation privilege. A review of the transcript, supplied by STERN,¹⁵ reveals that O'QUINN did not appear "on his own behalf." O'QUINN, at all times, was speaking on behalf of his client, VIRGIE ARTHUR. O'QUINN'S statements were at all times, directly related to his representation of ARTHUR in the on-going litigation. During the entire interview, O'QUINN spoke about his client's actions to obtain custody of her granddaughter Dannielynn, given the circumstances in the case. Thus, Florida's litigation privilege provides O'QUINN with absolute immunity.

Additionally, it must be noted that the transcript of the March 14, 2007 interview, provided by STERN, contains a notation indicating that it is a "partial" transcript that was "edited for clarity." Thus, as stated previously, there is no way of discerning whether the challenged statements have been taken out of context. The transcript further provides: "**This is not a legal transcript for purposes of litigation.**"¹⁶ This Court should, therefore, not consider the March 14, 2007 transcript. Nevertheless, even if this Court chooses to consider the transcript, STERN is still not entitled to relief under any set of facts that could be proven consistent with the allegations contained in his complaint.

A review of the transcript reveals that the entire focus of the March 14, 2007 interview was the meeting between the Seminole Police and the Broward County Homicide prosecutors to discuss Anna Nicole's

¹³ See, Tab B to Complaint.

¹⁴ As was stated in the previously filed Motion to Dismiss, although STERN states that O'QUINN's interview with Van Susteren took place on March 15, 2007, a review of the transcript that STERN, himself, provided in Tab C to his Complaint, reveals that the interview actually occurred on March 14, 2007.

¹⁵ See, Tab C to Complaint.

¹⁶ See, Tab C to Stern's Complaint.

death and the fact that murder charges were a distinct possibility.¹⁷ 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 there was on going speculation and allegations:

"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."¹⁸

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."¹⁹ There, however, is nothing false or defamatory about O'QUINN's statement. There were allegations, and there still are allegations linking STERN to Anna Nicole and Daniel Smith's deaths. To date, STERN has not been ruled out as a suspect in Daniel Smith's death, since the inquest into Daniel Smith's death commenced only a few short days ago and the criminal investigation into Anna Nicole Smith's death was only recently re-opened. Thus, to date, no one has been ruled out as a suspect in their deaths including STERN. The portion of the transcript that STERN chooses not to refer to, covers the portion of the interview that occurred directly before STERN's abbreviated rendition of the interview. The complete transcript can be found in Tab C to Stern's Complaint. The transcript 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?

¹⁷ *Id.*

¹⁸ See, Tab C to Stern's Complaint.

¹⁹ See, p. 31, First Amended Complaint

O'QUINN: Not in this case, because as a parent—either of those men are nothing but sperm donors. They're like on-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, STERN fails to provide any proof that O'QUINN provided false and defamatory information about STERN. O'QUINN's comments were not false or defamatory and are, therefore, not actionable. Thus, STERN is not entitled to relief under any set of facts that could be proven consistent with the allegations contained in his complaint.

March 20, 2007 statement to Nancy Grace

STERN, again, selectively edits out pages and pages of the transcript of the March 20, 2007 interview. O'QUINN would ask this Court to review the web site provided by STERN in order to access the complete transcript so as to consider O'QUINN's statements in the proper context. A review of the website, provided by STERN, 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.

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 interview 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."

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. Review of the complete transcript which can be found on the web site provided by STERN 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:

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.

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, found at Tab D of Stern's Complaint, of the broadcast, 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. Although STERN contends that O'QUINN's statement that STERN was present when both

Daniel and Anna Nicole Smith got sick and died is a false and defamatory statement, the statement is neither. The truth is that STERN was present when both Anna Nicole and Daniel got sick and died. 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. The complete transcript demonstrates that O'QUINN never made defamatory statements and never made false statements. As such, STERN is not entitled to relief under any set of facts that could be proven consistent with the allegations contained in his complaint.

March 27, 2007 statement to Greta Van Susteren

STERN next challenges statements made by O'QUINN on the March 27, 2007 FOX Broadcast "On the Record With Greta Van Susteren." STERN fails to give either the title of the interview, or the location where the interview is posted, as he has with all of the other interviews referred to in his First Amended Complaint. What makes this especially curious is the fact that O'QUINN pointed out in his previously filed Motion to Dismiss that the document submitted by STERN in Tab E to his Complaint, which was purported to be the transcript of the March 27, 2007 broadcast, was dissimilar to the transcript that appears on the FOX website for that same date. O'QUINN further pointed out that the transcript of the March 27, 2007 broadcast which appears on the FOX website (which was provided in Stern's Complaint) doesn't even include an interview with O'QUINN. Thus, O'QUINN argued in his previously filed Motion to Dismiss that the document provided by STERN shouldn't be considered by this Court. Now, in his First Amended Complaint, STERN doesn't bother with the formality of attaching the transcript or referring to the website containing the March 27, 2007 broadcast. Clearly, there is absolutely no way to verify or to respond to the alleged false and defamatory statements where there is no way of verifying where the statements referred to by STERN are even located. Furthermore, as previously stated, none of the transcripts of the FOX News broadcasts should be considered by this Court since all of the transcripts specifically state that they have been edited for clarity and are not legal for purposes of litigation.

CONCLUSION

Although the threshold of sufficiency for a complaint to survive a motion to dismiss is low, dismissal is nevertheless appropriate where, as in the case at hand, the plaintiff cannot identify each of the material elements necessary to sustain a recovery under some viable legal theory. *Roe v. Aware Women Center For*

