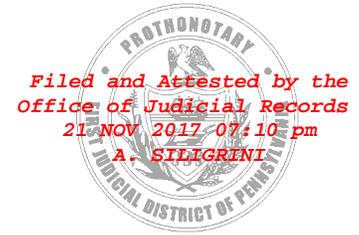


**SWARTZ CAMPBELL LLC**  
**BY:** Jeffrey B. McCarron, Esquire  
 Kathleen M. Carson, Esquire  
 Erik S.. Unger, Esquire  
 Identification Nos. 49467, 47981, 323903  
 Two Liberty Place  
 50 S. 16<sup>th</sup> Street, 28<sup>th</sup> Floor  
 Philadelphia, PA 19102  
 Phone: (215) 564-5190  
 Fax: (215) 299-4301  
[jmccarron@swartzcampbell.com](mailto:jmccarron@swartzcampbell.com)  
[kcarson@swartzcampbell.com](mailto:kcarson@swartzcampbell.com)  
[eunger@swartzcampbell.com](mailto:eunger@swartzcampbell.com)



*Attorneys for Defendants,  
 Bebe H. Kivitz, Esquire, Jacobs Kivitz &  
 Drake, LLC, Dolores M. Troiani, Esquire  
 and Troiani & Gibney, LLP*

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BRUCE L. CASTOR, JR., ESQUIRE,	:	COURT OF COMMON PLEAS
Plaintiff,	:	PHILADELPHIA COUNTY
	:	
v.	:	OCTOBER TERM, 2017
	:	NO. 000755
	:	
ANDREA CONSTAND % BEBE H. KIVITZ,	:	
ESQUIRE, BEBE H. KIVITZ, ESQUIRE,	:	
JACOBS KIVITZ & DRAKE, LLC,	:	
DOLORES M. TROIANI, ESQUIRE AND	:	
TROIANI & GIBNEY, LLP,	:	
Defendants.	:	
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**BRIEF OF DEFENDANTS, BEBE H. KIVITZ, ESQUIRE, JACOBS, KIVITZ & DRAKE, LLC, DOLORES M. TROIANI, ESQUIRE AND TROIANI & GIBNEY, LLP, IN SUPPORT OF THEIR PRELIMINARY OBJECTIONS TO PLAINTIFFS’ COMPLAINT**

**I. Introduction**

Bruce L. Castor, Jr. (“Castor”) is pursuing recovery for a lawsuit he has not won. This action for abuse of process and civil conspiracy arises from the prosecution of an existing lawsuit by defendant, Andrea Constand (“Constand”). Constand sued Castor for defamation and false light invasion of privacy. Castor’s lawsuit is based on his contention Constand’s lawsuit is frivolous and ill-motivated because it was procured, initiated and continued without probable cause for an improper purpose and influenced voters causing him to lose the election. Constand’s lawsuit has not terminated and Castor has not received an adjudication in his favor.

Castor cannot pursue Constand and her lawyers for costing him the election while he faces liability to Constand.

Castor's description that his claim is for abuse of process is inconsistent with his description of the basis for his claim. Castor contends Constand's lawsuit is an abuse of process because it was procured, commenced and continued without probable cause and for an improper purpose and Constand and her lawyers engaged in a conspiracy to abuse process by filing that lawsuit. Redress for a frivolous and ill-motivated lawsuit is allowed if the elements for a claim for wrongful use of civil proceedings are satisfied as provided by 42 Pa.C.S.A. §8351 *et seq.* A claim for wrongful use of civil proceedings requires proof a proceeding was procured, initiated or continued in a grossly negligent manner or without probable cause and primarily for a purpose other than the adjudication of the claim presented and "terminated in favor of the party against whom the proceedings are brought." 42 Pa.C.S.A. § 8351(a). Castor's claims are based on proceedings. The claims are not based on perversion of process after initiation of proceedings, and the proceedings have not terminated. A lawsuit which depends on termination of a pending lawsuit cannot proceed.

Castor's conspiracy claim against Constand's lawyers is based on their activity as lawyers and depends on a valid substantive tort. Without a valid abuse of process claim, there is no substantive tort to serve as the object of the conspiracy. A lawyer is not a conspirator with a client. Castor sued Bebe Kivitz ("Kivitz") and Dolores Troiani ("Troiani") because, together, they were "involved in procuring, initiating and continuing the underlying action" for which they represented Constand. Castor did not allege there existed an agreement among defendants, they acted illegally or by unlawful means, or defendants' sole purpose was to harm Castor.

Castor's request for attorney's fees violates the American Rule. In the absence of express statutory authority, an agreement by the parties or some other established exception, attorney's fees are not recoverable.

Paragraphs 8, 12, 13, 40-62, 63-65 and exhibits A-F of the complaint are scandalous and impertinent. The paragraphs and exhibits describe in graphic detail the sexual assault suffered by Ms. Constand, the criminal investigation that ensued and discuss Constand's settlement of her civil suit against Cosby. The averments and exhibits, describe events which occurred prior to the commencement of Constand's lawsuit against Castor. The allegations have no conceivable relevance because Castor's claims involve whether there was a perversion of legal process *after it has been issued*. Events which occurred prior to Constand's lawsuit are immaterial to Castor's claimed abuse of process. Castor's averments about how he set the stage for Constand to obtain a big payment by not prosecuting Cosby is not a defense to the defamation and false light claims. Scandalous and impertinent matter is not allowed in complaints and should be stricken.

## **II. Matter Before the Court**

The matter before the Court is the preliminary objections of defendants, Bebe H. Kivitz, Esquire, Jacobs Kivitz & Drake, LLC, Dolores M. Troiani, Esquire, and Troiani & Gibney, LLP, to plaintiffs' complaint, pursuant to Pennsylvania Rules of Civil Procedure 1028(a)(2) and (4) for legal insufficiency and the inclusion of scandalous or impertinent matter.

## **III. Questions Presented**

A. Whether plaintiff's complaint states a claim for abuse of process?

Suggested Answer: No.

B. Whether plaintiff's complaint states a claim for civil conspiracy?

Suggested Answer: No.

C. Whether plaintiff's request for attorney's fees incurred in the prosecution of this action should be stricken?

Suggested Answer: Yes.

D. Whether scandalous and impertinent allegations relating to the violent sexual assault suffered by Ms. Constand contained in paragraphs 8, 40-62, and exhibits A-F should be stricken from the complaint?

Suggested Answer: Yes.

E. Whether impertinent allegations relating to the settlement of the civil lawsuit against Mr. Cosby contained in paragraphs 12, 13, 63, 64, and 65 should be stricken from the complaint.

Suggested Answer: Yes.

#### **IV. Facts**

This case involves claims for abuse of process and civil conspiracy asserted by Bruce Castor ("Castor") against Andrea Constand and her lawyers and their law firms. *See generally*, Complaint.<sup>1</sup> Andrea Constand is the complainant in the Commonwealth's criminal case against Bill Cosby. Castor was the district attorney of Montgomery County when Constand reported she had been sexually assaulted by Cosby. Complaint at ¶¶ 4, 9. Castor declined to prosecute Cosby. Complaint at ¶ 9.

Castor pursued election as the district attorney for Montgomery County. Complaint at ¶¶ 13, 25. During his campaign, Castor made statements to the press about Constand to justify and explain his decision not to prosecute Cosby. Complaint at ¶ 68. Constand commenced a civil

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<sup>1</sup> A copy of the Complaint is attached to these preliminary objections as Exhibit A.

action against Castor in the United States District Court for the Eastern District Pennsylvania at No. 15-cv-05799 for defamation and false light invasion of privacy based on Castor's statements to the press. Complaint at ¶¶ 23, 25, Exhibit H. Castor acknowledges Constand's lawsuit has not terminated and continues against him. Complaint at ¶¶ 31, 79, 98.

Defendants, Kivitz and Troiani, are lawyers who represent Constand in her action against Castor. Kivitz and Troiani were the lawyers "involved in procuring, initiating and continuing the frivolous underlying action." Complaint at ¶¶ 33, 35. Kivitz is affiliated with the law firm Jacobs, Kivitz & Drake, LLC and Troiani is affiliated with the law firm Troiani & Gibney. Complaint at ¶¶ 34, 36. The law firms are included for vicarious liability. Complaint at ¶ 37.

Castor does not identify a legal process as the basis for his abuse of process claim. Instead, Castor relies on a proceeding--*Constand v. Castor*, No. 2:15-05799 (U.S.D.C. E.D. Pa.). See Complaint at ¶¶ 23, 24, 25, 26, 28, 31, 33, 35, 74, 75, 78, 79, 83, 85, 93, 94 and 96. Castor contends he was and continues to be "wrongfully sued" in the *Constand* lawsuit. Complaint at ¶ 31. Castor alleges Constand's lawsuit against him is:

- "a tactically timed, patently frivolous lawsuit" (Complaint at ¶ 23);
- a "manufactured lawsuit" (Complaint at ¶ 24);
- a "legally flawed lawsuit" (Complaint at ¶ 25);
- "a sham lawsuit" (Complaint at ¶ 26);
- a "malicious, knowingly false lawsuit" (Complaint at ¶ 26);
- a "bogus lawsuit" (Complaint at ¶ 28);
- a "knowingly frivolous" lawsuit (Complaint at ¶¶ 31, 33, 35, 94)
- a "frivolous lawsuit" (Complaint at ¶¶ 74, 75)
- an "outlandish" lawsuit (Complaint at ¶ 79);

- a baseless lawsuit (Complaint at ¶ 79); and
- a malicious action (Complaint at ¶ 83).

According to Castor, defendants procured, initiated and continued the *Constand* lawsuit against Castor in a grossly negligent, reckless and malicious manner, without probable cause and for an improper purpose. Complaint at ¶¶ 27, 30, 33, 35, 69, 74, 75, 83, 93, 94. The alleged improper purpose was to fix the district attorney election, destroy Castor’s political prospects and reputation and further the defendants’ own goals. Complaint at ¶ 95.

Castor does not allege or identify a definite act or threat not authorized by process, or aimed at an objective not legitimate in the use of a process. Castor does not maintain that the lawsuit by Constand against him was initiated legitimately and then perverted. Castor does not allege facts to establish that defendants seek anything other than the *Constand* lawsuit’s authorized conclusion—a determination of the merits of the claims asserted in that action. Castor does not and cannot allege the *Constand* lawsuit has terminated in his favor. Ms. Constand’s action against Castor is still being actively litigated. Complaint at ¶ 31. According to Castor, defendants’ alleged abuse of legal process is not complete and “still continues.” Complaint at ¶¶ 79, 98.

Castor’s civil conspiracy claim is based on an alleged conspiracy to abuse process. *See generally*, Complaint. Castor contends Constand conspired with her attorneys to harm Castor and his reputation by filing and continuing the *Constand* lawsuit. Complaint at ¶¶ 87-88. The conduct by defendants Kivitz and Troiani and their law firms which forms the basis of Castor’s claim is conduct in the representation of their client for the *Constand* lawsuit. *See* Complaint at ¶¶ 33, 35 (alleging Troiani and Kivitz involved in procuring, initiating and continuing the frivolous underlying action). Castor does not allege facts to establish the existence of an

agreement between defendants made for the sole purpose of injuring Castor. Complaint at ¶¶ 86-91. Castor does not explain how the filing of the *Constand* lawsuit was illegal or was accomplished by unlawful means. *Id.*

Castor, by way of relief for his abuse of process and conspiracy claims, seeks compensatory damages, attorneys' fees, costs and punitive damages. *See* Complaint at pp. 29, 30.

## **V. Argument**

### **A. Preliminary Objection Standard**

#### **1. Demurrer**

The lawyer defendants challenge the legal sufficiency of the claims asserted by plaintiff in his complaint pursuant to Pa.R.C.P. 1028(a)(4). A preliminary objection in the nature of a demurrer is properly sustained where the complaint has failed to set forth sufficient facts to establish the elements for a cause of action. *Lerner v. Lerner*, 954 A.2d 1229, 1235 (2008); *Cunningham v. Prudential Prop. & Cas. Ins. Co.*, 340 Pa. Super. 130, 489 A.2d 875 (1985). The question presented on demurrer is whether, based on the facts alleged, the law provides that no recovery is possible. *Werner v. Plater-Zyberk*, 799 A.2d 776, 783 (2002).

A court is “precluded from considering any conclusions of law or inferences which are not supported by the factual allegations contained in the complaint.” *Hart v. O'Malley*, 436 Pa. Super. 151, 647 A.2d 542, 553 (1994), *aff'd*, 544 Pa. 315, 676 A.2d 222 (1996). A plaintiff, therefore, cannot maintain a cause of action by merely stating “conclusions of law, . . . argumentative allegations, and expressions of opinion.” *Neill v. Eberly*, 153 Pa. Commw. 181; 620 A.2d 673, 675 (Pa. Commw. 1983); *see also Surgical Laser Technologies, Inc. v. Commonwealth, Dept. of Revenue*, 156 Pa. Cmwlth. 48, 56, 626 A.2d 664, 667 (1993) (“The

court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.”) Furthermore, the court “must not supply a fact missing in the complaint” in order to cure a defect in the pleading. *Hart*, 647 A.2d at 553. A demurrer should be sustained where the plaintiff has failed to state a claim on which relief may be granted. *Eckell v. Wilson*, 597 A.2d 696, 698 (Pa. Super. 1991).

## **2. Scandalous and Impertinent Matter**

Pursuant to *Pennsylvania Rule of Civil Procedure* 1028(a)(2), this Court may strike matter that is “scandalous or impertinent.” Scandalous and impertinent has been defined as “immaterial and inappropriate to the proof of the cause of action.” *Rollinson v. Clarke-DeMarco*, 83 Pa. D. & C.4th 467, 475 (Mercer Cnty. 2007) (quoting *White v. George*, 66 Pa. D. & C.4th 129, 142 (Mercer Cnty. 2004)). Scandalous and impertinent matter should be struck if there is prejudice. *Id.*

### **B. Castor Fails to State a Claim for Abuse of Process**

#### **1. Elements of Abuse of Process**

Castor asserted a claim for abuse of process in Count II of his complaint. Abuse of process is a common law cause of action. Under Pennsylvania law,

[t]he tort of "abuse of process" is defined as the use of legal process against another primarily to accomplish a purpose for which it is not designed. To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff. This tort differs from that of wrongful use of civil proceedings in that, in the former, the existence of probable cause to employ the particular process for its intended use is immaterial. *The gravamen of abuse of process is the perversion of the particular legal process for a purpose of benefit to the defendant, which is not an authorized goal of the procedure.* In support of this claim, the [plaintiff] must show some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process ...; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.

*Shiner v. Moriarty*, 706 A.2d 1228, 1236 (Pa. Super. 1998), *appeal denied*, 556 Pa. 711, 729 A.2d 1130 (1998). “An attorney is liable for abuse of process when the acts complained of are his own personal acts or the acts of others wholly instigated and carried on by him.” *Hart v. O’Malley*, 436 Pa. Super. 151, 173, 647 A.2d 542 (1994) (citing *Adelman v. Rosenbaum*, 133 Pa. Super. 386, 391, 3 A.2d 15, 18 (1938)). “An attorney cannot be liable for doing nothing more than carrying out the process to its authorized conclusion” even if done with bad intentions. *Id.* (citing *Shaffer v. Stewart*, 326 Pa. Super. 135, 139, 473 A.2d 1017, 1019 (1984)).

Abuse of process is not an alternative to wrongful use of civil proceedings. The torts are distinct causes of action.

An action for wrongful use of civil proceedings differs from an action for abuse of process. The gist of an action for abuse of process is the improper use of process after it has been issued, that is, a perversion of it. Malicious use of civil process has to do with the wrongful initiation of such process. *Wrongful use of civil proceedings is a tort which arises when a person institutes civil proceedings with a malicious motive and lacking probable cause.*

*Sabella v. Milides*, 2010 PA Super 48, 992 A.2d 180, 187-88 (2010) (emphasis added). Liability for abuse of process will not be imposed for the wrongful initiation of civil proceedings:

*The gravamen of the misconduct for which the liability stated ... is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed ... .*

*Rosen v. American Bank of Rolla*, 426 Pa. Super. 376, 627 A.2d 190, 192 (1993) (emphasis added).

Where a plaintiff alleges a civil proceeding was instituted for an improper purpose, the claim is for wrongful use of civil proceedings, but it is not abuse of process. *Hart v. O'Malley*, 436 Pa. Super. 151, 647 A.2d 542, 551 n.2 (1994) ("A preliminary injunction is a process in civil litigation. The [appellants] allege that the preliminary injunction was instituted for an improper purpose. However, this claim, if proven, only establishes a cause of action for wrongful use of civil proceedings, not a claim for abuse of process."); *Rosen v. Tesoro Petroleum Corp.*, 399 Pa. Super. 226, 582 A.2d 27, 32-33 (1990) ("abuse of civil process is concerned with a perversion of a process after it is issued" and, as a consequence, . . . "appellants have failed to state a claim for abuse of process, as the allegations in their complaint amount to no more than a charge for the initiation of litigation for a wrongful purpose, and do not charge [the] appellees with any 'perversion' of properly issued process"); *Shaffer v. Stewart*, 326 Pa. Super. 135, 473 A.2d 1017, 1019, 1021 (1984) (explaining that "[w]hen the caveat [to the probate of a will] was filed and prevented the immediate probate of the decedent's will, a civil proceeding had been instituted within the meaning and intent of the Pennsylvania statute," and, as a result, no cause of action for abuse of process could exist where "the averments of the amended complaint are that the caveat was filed maliciously and without probable cause in the hope of effecting a settlement on behalf of persons having no legally recognizable claim . . . ."); *Greenberg v. McGraw*, 2017 PA Super 136, 161 A.3d 976, 990-91 (2017) (abuse of process cannot be based on the wrongful initiation of proceedings); *Bell v. Sullivan*, 2017 U.S. Dist. LEXIS 190150 at \*19-20 (E.D. Pa. November 16, 2017) (abuse of process claim pertaining to wrongful initiation of civil process fails to state a claim for abuse of process).

Although Castor titles the claim in Count II of his complaint as "abuse of process," the language of Castor's complaint entirely tracks the language of the Dragonetti Act, 42 Pa.C.S.A.

§ 8351, which provides redress for the tort of wrongful use of civil proceedings, the essence of which is the institution of a civil action for an improper purpose and without probable cause or with gross negligence. *Rosen v. American Bank of Rolla*, 426 Pa. Super. 376, 627 A.2d 190, 193 (1993); *Hart v. O'Malley*, 436 Pa. Super. 151, 647 A.2d 542, 546 (1994), *aff'd*, 544 Pa. 315, 676 A.2d 222 (1996). Section 8351 provides:

(a) A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:

(1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and

(2) the proceedings have terminated in favor of the person against whom they are brought.

42 Pa. C.S.A. § 8351(a). A cause of action for wrongful use of civil proceedings requires a plaintiff to allege and prove three elements: (1) the underlying proceeding was terminated in favor of the plaintiff, (2) the defendant caused these proceedings to be instituted without probable cause or with gross negligence, and (3) the proceedings were instituted primarily for an improper purpose. *Al Hamilton Contracting Co. v. Cowder*, 434 Pa. Super. 491, 644 A.2d 188, 191 (1994); *Meiksin v. Howard Hanna Co.*, 404 Pa. Super. 417, 590 A.2d 1303, 1304 (1991). *Schaffer v. Stewart*, 473 A.2d 1017, 1021 (1983). A cause of action for wrongful use of civil proceedings does not accrue until the proceeding on which the claim is based is “terminated in favor of” the plaintiff and all appeal periods expired. *Buchleitner v. Perer*, 794 A.2d 366 (Pa. Super. 2002); *Ludmer v. Nernberg*, 520 Pa. 218, 553 A.2d 924 (1989).

Castor does not identify legal process to serve as the basis for his abuse of process claim. Castor’s complaint is based entirely on the procurement, initiation and continuation of the

*Constand* lawsuit. Complaint at ¶¶ 27, 30, 33, 35, 69, 74, 75, 83, 93, 94. The *Constand* lawsuit is a proceeding. The *Constand* lawsuit is not process. Castor asserted he was “wrongfully sued” in the *Constand* lawsuit. Complaint at ¶ 31. The wrongful procurement, initiation or continuation of a lawsuit alleged in paragraphs 27, 33, 35, 69, 74, 75, 83, 84, 93, 94 of Castor’s complaint do not relate to the elements for abuse of process. *Hart v. O’Malley*, 647 A.2d at 551 n.2; *Rosen v. Tesoro Petroleum Corp.*, 3582 A.2d at 32-33; *Shaffer v. Stewart*, 473 A.2d at 1019, 1021; *Greenberg v. McGraw*, 161 A.3d at 990-91; *Bell v. Sullivan*, 2017 U.S. Dist. LEXIS 190150 at \*19-20.

Castor did not allege or identify perversion of process or a definite act or threat by defendants not authorized by a particular process. Defendants are not alleged to have received any personal benefit as a result of the *Constand* action that is not authorized. Pursuit of the *Constand* lawsuit is not actionable as an abuse of process. Alleged “false, scandalous statements” or “fabricated” or “scurrilous” accusations made in pleadings and court filings in the *Constand* lawsuit cannot form the basis for defendants’ liability to Castor. “It is a well-established principle of Pennsylvania law that the filing of a complaint and other pleadings is protected by an absolute privilege.” *Werner v. Plater-Zyberk*, 2001 WL 1112973, 51 Pa. D. & C.4th 192 (2001), *reversed on other grounds*, 2002 PA Super 42, 799 A.2d 776 (2002), *citing*, *Smith v. Griffiths*, 327 Pa. Super. 418, 425, 476 A.2d 22, 24 (1984). The privilege is impenetrable. Pursuant to the judicial privilege, a person is entitled to absolute immunity for “communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought.” *Post v. Mendel*, 510 Pa. 213, 507 A.2d 351, 355 (1986).

The pendency of the *Constand* lawsuit precludes Castor from stating a claim for wrongful

use of civil proceedings. Castor cannot the element requiring “termination in favor of.” See 42 Pa. C.S.A. § 8351(a)(2). While Castor seeks to avoid the “termination in favor of” requirement by asserting abuse of process as his claim, Castor’s complaint, based on the commencement and continuation of the *Constand* lawsuit, does not allege an abuse of process claim. Bypassing the “termination in favor of” element would mean that Castor can litigate the validity of the *Constand* lawsuit ahead of the adjudication of the *Constand* lawsuit. An abuse of process claim is not a permissible means for Castor to collaterally attack the *Constand* lawsuit.

Castor’s abuse of process claim also fails for the same reason he cannot state a claim for wrongful use of civil proceedings. The alleged abusive process must complete for a claim to be ripe for adjudication. *York Grp., Inc. v. Pontone*, No. 10-1078, 2013 U.S. Dist. LEXIS 196281, at \*32-33 (W.D. Pa. May 22, 2013); *Access Fin. Lending Corp. v. Keystone State Mortg. Corp.*, Civil Action No. 96-191, 1996 U.S. Dist. LEXIS 14073 at \* 5 (W.D. Pa. Sep. 4, 1996) (Assertion, by way of a counterclaim, that the underlying litigation as a whole constitutes an abuse of process fails to state a claim which is ripe for adjudication. By definition, a lawsuit in its entirety cannot constitute an abuse of process when it has not yet been concluded.); *Giordano v. Claudio*, 714 F. Supp. 2d 508, 533-534 (E.D. Pa. 2010) (finding “since the Amended Counterclaim refers only to [plaintiff’s] initiation of the lawsuit and not to any discrete portions of the lawsuit (such as a subpoena or a discovery request), we cannot adjudicate [defendants’] abuse of process claim until the completion of [plaintiff’s] lawsuit”); *Citizens Bank of Pa. v. Exec. Car Buying Servs., Inc.*, No. 10-478, 2010 U.S. Dist. LEXIS 119436, 2010 WL 4687922, at \*5 (D.N.J. Nov. 10, 2010) (applying Pennsylvania law and finding even if defendants had adequately plead an abuse of process claim, such a claim would be dismissed as premature because it was based on the filing of the lawsuit, which was pending). To state a claim for abuse

of process, the alleged abusive process must be “completed so that the factfinder can determine the primary reason for its use. Hence, that process, whether it allegedly encompasses the entire litigation, or a portion thereof, must have been completed.” *Access Fin.*, 1996 U.S. Dist. LEXIS 14073, 1996 WL 544425, at \*6 n.3. The *Constand* litigation continues and has not been completed. Complaint at ¶¶ 31, 79. Castor’s claim is not ripe for adjudication.

Count II of Castor’s complaint should be dismissed for failure to state a claim for abuse of process.

**C. Castor Fails to State a Claim for Civil Conspiracy**

**1. The Failure to State a Claim for Abuse of Process is Fatal to Castor’s Conspiracy Claim**

Castor asserted a claim for civil conspiracy in count one of the complaint. A conspiracy claim requires a substantive tort the defendants conspired to commit. *Rose v. Wissinger*, 439 A.2d 1193, 1199 (Pa. Super. 1982). The substantive tort defendants allegedly conspired to commit was abuse of process. There was no object of the conspiracy because Castor failed to state a claim for abuse of process.

**2. Civil Conspiracy Claims Against Lawyers Are Not Actionable**

Conspiracy claims against lawyers are not permitted. It is well-settled that a lawyer are not conspirators with their clients. *See, e.g., Heffernan v. Hunter*, 189 F.3d 405, 413 (3d Cir. 1999) (There is a “ban on conspiracies in the attorney-client context.”); *Worldwide Marine Trading v. Marine Transport Service*, 527 F. Supp. 581, 586 (E.D. PA. 1981); *Rutherford v. Presbyterian-University Hospital*, 417 Pa. Super. 316, 612 A.2d 500, 508 (1992); *Nix v. Temple University*, 408 Pa. Super. 369, 596 A.2d 1132, 1137 n.3 (1991); *Aetna Electroplating Co., Inc. v. Jenkins*, 335 Pa. Super. 283, 484 A.2d 134, 137 (1984) (allegations insufficient to substantiate claim for concerted tortious activity involving attorney and client where attorney acted in

accordance with the instructions of his client); *Commonwealth v. Portnoy*, 129 Pa. Commw. 469 566 A.2d 336, 340-41, n.10 (1989), *aff'd*, 612 A.2d 1349 (Pa. 1992) (no cause of action for concerted tortious conduct is stated by alleging that the attorney acted at the direction and with authorization of the client especially in the absence of any indication that the attorney personally profited from the alleged improper conduct of the client); *Harvey v. Pincus*, 549 F. Supp. 332 (E.D. Pa. 1982) (attorney not liable for tortious conduct of the client in the absence of any inducement or encouragement); *Bowdoin v. Oriol*, 2000 U.S. Dist. LEXIS 888 (E.D. PA. 2000) (no cause of action for conspiracy exists against an attorney arising out of the attorney's participation as a professional and attorneys are not subject to conspiracy liability for advising or serving their clients). A conspiracy requires two or more actors. The intra-corporate conspiracy doctrine immunizes an attorney from allegations of conspiring with his or her client because the lawyer is not distinct from the lawyer's client. *Heffernan v. Hunter*, 189 F.3d at 413. In *Heffernan v. Hunter*, the Court found there is a "ban on conspiracies in the attorney-client context," and that no conspiracy can exist where an attorney's advice or advocacy is for the benefit of his client, rather than for the attorney's sole personal benefit. *Id.* at 413. The *Heffernan* court found, based on compelling need for a client to seek independent and zealous counsel, no conspiracy can exist based on an attorney's advice or advocacy of his client and can only exist upon proof of self-interested activity due to a stake by the lawyer in the transaction which is other than a mere professional interest. *Id.* at 414. A lawyer cannot be liable for conspiracy if his involvement was to advance the interests of the lawyer's client. *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198; 412 A.2d 466, 472; *Smith v. Griffiths*, 327 Pa. Super. 418, 476 A.2d 22, 27 (1984). There is no active participation in a conspiracy when a lawyer provides advice and assistance at the behest of his client, does not hold any stake in his client's

activities greater than a professional interest and, therefore, does not personally profit from the alleged improper conduct of the client. *Aetna Electroplating Co., Inc.*, 484 A.2d at 137 (Pa. Super. 1984); *Commonwealth*, 566 A.2d at 340-41, n.10; *see also Morin v. Trupin*, 747 F.Supp. 1051 (S.D.N.Y. 1990) (no RICO claim where relationship between defendants was no different than the typical professional relationship between client and attorney). No conspiracy can exist where an attorney's advice or advocacy is for the benefit of his client rather than for the attorney's sole personal benefit. *Heffernan*, 189 F.3d at 415.

To overcome an attorney's exemption from conspiracy claims for providing advice and counsel to their clients, the conduct of the lawyer must consist of self-interested activity beyond the scope of the practice of law and the lawyer must have a stake in the alleged wrongful activity greater than a professional interest. *Worldwide Marine Trading*, at 583-584. Sole personal benefit requires more than mixed motives such as enhancing an attorney's reputation through aggressive representation. *Heffernan*, at 411-13 (*citing, Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321, 328 (9<sup>th</sup> Cir. 1982)).

Castor's conspiracy claim is based on conduct by Kivitz and Troiani as lawyers in the representation of their client. They are alleged to be the attorneys involved in procuring, initiating and continuing the allegedly frivolous *Constand* lawsuit against Castor. Complaint at ¶¶ 33, 35. The performance by Kivitz and Troiani as lawyers during the representation of their common client was not for their sole personal benefit and did not grant them a personal stake beyond attorney's fees. Castor's conspiracy claim against Kivitz, Troiani and their law firms is barred by the intra-corporate conspiracy doctrine. Castor, as a matter of law, cannot state a claim against Kivitz, Troiani or their law firms for conspiracy. Count one of the complaint should be dismissed against Kivitz, Troiani and their law firms.

## 2. Castor Fails to Allege Facts to Establish the Elements of Civil Conspiracy

Whether Castor states a claim for conspiracy also depends on Castor having alleged sufficient facts to establish the elements of a conspiracy claim. To state a cause of action for civil conspiracy, plaintiff must allege facts to establish (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose, (2) an overt act done in pursuance of the common purpose, and (3) actual legal damages. *Phillips v. Selig*, 2008 Pa. Super. 244, 959 A.2d. 420, 437 (2008). A civil conspiracy claim depends on an agreement to commit an underlying substantive tort and may proceed only if there is a cause of action for an underlying act. *Nix v. Temple Univ.*, 408 Pa. Super. 369, 596 A.2d 1132, 1137 (Pa. Super. Ct. 1991). “Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means of establishing vicarious liability for the underlying tort.” *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 407 (3d Cir. 2000) (citing *Halberstam v. Welch*, 705 F.2d 472, 479, 227 U.S. App. D.C. 167 (D.C. Cir. 1983)). “To make a case for civil conspiracy . . . Pennsylvania law requires plaintiff to first prove, by ‘full, clear, and satisfactory evidence,’ an underlying criminal act or intentional tort.” *Jeter v. Brown & Williamson Tobacco Corp.*, 294 F. Supp. 2d 681, 688 (W.D. Pa. 2003) (*internal cites deleted*). There is no liability for an agreement which does not have tortious conduct as the objective of the conspiracy.

Parallel conduct or bald assertions are insufficient to properly plead civil conspiracy. *Petula v. Melody*, 138 Pa. Commw. 411, 419, 588 A.2d 103, 107 (1991). Rather, plaintiff must set forth facts supporting the existence of a conspiracy, such as meetings, conferences, telephone calls or written statements. *Id.* at 419, 588 A.2d at 107. Proof of agreement and malicious intent

are essential to stating a claim for conspiracy, and the fact that two or more people are acting to do something at the same time is not by itself an actionable conspiracy. *Kist v. Fatula*, No. 3:2006-67, 2007 U.S. Dist. LEXIS 60615, at \*26 (W.D. Pa. Aug. 17, 2007).

Malice requires that the conspirators act with the sole purpose of injuring the plaintiff. *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466 (1979); *Sarpolis v. Tereshko*, 625 Fed. App'x 594, 601 (3d Cir. 2016); *WM High Yield Fund v. O'Hanlon*, 2005 U.S. Dist. LEXIS 33569 at \*48, 2005 WL 1017811 (E.D. Pa. Apr. 29, 2005); *Becker v. Chicago Title Ins. Co.*, 2004 U.S. Dist. LEXIS 1988, 2004 WL 228672, at \*13 (E.D. Pa. Feb. 4, 2004). In *Thompson Coal*, the Pennsylvania Supreme Court determined that where the facts presented indicated that one of the alleged conspirators was acting to advance the legitimate business interests of his client and his own interests, the conspiracy claim failed. *Thompson Coal Co.*, 488 Pa. 198, 412 A.2d 466. Thus, to succeed on a conspiracy claim, a plaintiff must demonstrate the sole purpose and objective of any conspiracy among the defendants must have been a malicious intent to injure plaintiff. *WM High Yield Fund*, 2005 U.S. Dist. LEXIS 33569 at \*48. “[W]here the facts show that a person acted to advance his own business interests, and not solely to injure the party injured, those facts negate any alleged intent to injure.” *Becker v. Chi. Title Ins. Co.*, 2004 U.S. Dist. LEXIS 1988, 2004 WL 228672, at \*13 (E.D. Pa. Feb. 4, 2004). In the case of an attorney acting for a client, the attorney is not subject to liability unless he or she acts solely to injure the plaintiff rather than in the capacity of legal counsel seeking to advance the interests of the client. See *Denenberg v. Am. Family Corp. of Columbus, Ga.*, 566 F. Supp. 1242, 1253 (E.D. Pa. 1983); *Deitrick v. Costa*, 2014 U.S. Dist. LEXIS 183444 \* (M.D. Pa. Oct. 2, 2014).

Castor’s complaint fails to allege facts to establish the elements for a civil conspiracy claim. The complaint does not allege facts to establish an agreement. There are no facts alleged from which an agreement can be inferred such as meetings, conferences, telephone calls or

written statements. There is no allegation that defendants made an agreement with each other to engage in concerted conduct to commit an unlawful act or a lawful act by unlawful means. The filing and pursuit of Constand's action against Castor was permitted by law.

Castor also does not allege facts to establish the requisite malice--that the sole purpose of defendants' conduct was to injure Castor. Kivitz's and Troiani's actions were in their capacity as attorneys to Constand, their client, seeking to advance Constand's legitimate interest in obtaining redress for allegedly defamatory statements made by Castor about Constand rather than for the sole purpose of injuring Castor. Because Castor fails to allege facts to establish the required elements of a conspiracy claim, Count I of the complaint should be dismissed.

**D. Castor Cannot Recover Attorneys' Fees Incurred In the Prosecution of this Action**

Castor, in the *ad damnum* clause of each count of his complaint, seeks recovery of attorney's fees incurred in the prosecution of this action. Whether a plaintiff can recover attorneys' fees for the prosecution of an action depends on whether recovery for such fees and costs is authorized under Pennsylvania law. Pennsylvania follows the general, American rule that there can be no recovery of attorneys' fees from an adverse party, absent an express statutory authorization, a clear agreement by the parties or some other established exception. *Chatham Communications, Inc. v. General Press Corp.*, 463 Pa. 292, 300-01, 344 A.2d 837, 842 (1975)(quoting *Corace v. Balint*, 418 Pa. 262, 271, 210 A.2d 882, 886-87 (1965)); *In re Kling*, 433 Pa. 118, 121, 249 A.2d 552, 554 (1969); *Shapiro v. Magaziner*, 418 Pa. 278, 280, 210 A.2d 890, 892 (1965). *See generally* 42 Pa.C.S. § 2503(10) (providing that "a litigant is entitled to attorneys' fees as part of the taxable costs, only in circumstances specified by statute heretofore or hereafter enacted"); 42 Pa. C.S.A. 1726(a)(1) (Attorney fees are not a taxable item of costs.) There is no statutory authorization, agreement or other exception to the American Rule which

would permit Castor to recover attorneys' fees for the abuse of process and civil conspiracy claims asserted against defendants in the complaint. Pennsylvania law does not permit the recovery of attorney's fees from an adverse party for those claims. Accordingly, Castor's requests for attorney's fees should be stricken from the complaint.

**E. Certain Allegations of Castor's Complaint Should be Stricken as Scandalous and Impertinent**

**1. Averments relating to the sexual assault suffered by Ms. Constand**

Castor misuses this action to embarrass and humiliate Ms. Constand by unnecessarily providing the lurid details of the sexual assault of Ms. Constand and the criminal investigations concerning the assault. Complaint at ¶¶ 8, 40-62, and exhibits A-F. Paragraphs 8, 40 through 62 and exhibits A through F of Castor's complaint describe in graphic detail the sexual assault suffered by Ms. Constand and the criminal investigation that ensued. The averments and exhibits are immaterial to Castor's civil conspiracy and abuse of process claims. The averments describe events which occurred prior to the commencement of the *Constand* lawsuit against Castor which forms the basis for Castor's abuse of process and conspiracy to abuse process claims. The averments and exhibits have no conceivable relevance to Castor's abuse of process or conspiracy to abuse process claims because those claims involve the perversion of legal process *after it has been issued*. Events which preceded the commencement of the *Constand* lawsuit against Castor have no relevance to whether defendants subsequently perverted that proceeding to accomplish a purpose for which it was not intended. To require defendants to respond to what are plainly irrelevant and immaterial allegations would prejudice them. Apart from the time and expense involved in responding to irrelevant and immaterial allegations, Castor should not be permitted to use this action as a vehicle for to obtain discovery of matters

relevant only to the *Constand* lawsuit against Castor. Paragraphs 8, 40-62, and exhibits A-F of the complaint should be stricken as scandalous and impertinent matter.

## **2. Averments relating to settlement of the civil suit against Mr. Cosby**

Castor also makes numerous references to Constand's settlement of her civil suit against Mr. Cosby that are irrelevant and immaterial to Castor's claims for abuse of process and conspiracy to abuse process. *See* Complaint at ¶¶ 12, 13, 63, 64, and 65. The settlement of Constand's civil suit against Mr. Cosby, like the averments concerning the sexual assault of Constand, has no bearing on whether defendants abused process by bringing a lawsuit against Castor for defamation or invasion of privacy. As discussed above, any abuse of process claim necessarily must be based on events or conduct which occurred after the commencement of Constand's lawsuit against Castor. The settlement of Constand's civil suit against Mr. Cosby, which occurred years before, has absolutely no bearing on Castor's claims in this lawsuit. Castor's averments about how he set the stage for Constand to obtain a big payment by not prosecuting Cosby also is not a defense to the defamation and false light claims. Defendants should not be required to expend time and expense responding to averments which have no conceivable relevance to the claims alleged by Castor. Paragraphs 12, 13, 63, 64, and 65 of the complaint also should be stricken as scandalous and impertinent matter.

## **VI. Conclusion**

Defendants, Bebe H. Kivitz, Esquire, Jacobs Kivitz & Drake, LLC, Dolores M. Troiani, Esquire, and Troiani & Gibney, LLP, request that the Court sustain their preliminary objections and dismiss plaintiffs' complaint with prejudice. Alternatively, defendants request that the Court

strike paragraphs 8, 12, 13, 40-62 and 63-65 of the Complaint and strike plaintiffs' requests for attorneys' fees incurred in the prosecution of this action.

Respectfully submitted,

SWARTZ CAMPBELL LLC

/s/Jeffrey B. McCarron

JEFFREY B. McCARRON

KATHLEEN M. CARSON

ERIK S. UNGER

*Attorneys for Defendants, Bebe H. Kivitz,  
Esquire, Jacobs Kivitz & Drake, LLC,  
Dolores M. Troiani, Esquire, and Troiani &  
Gibney, LLP*

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