

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ANDREA CONSTAND	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO.:
	:	2:15-CV-05799-ER
	:	
BRUCE CASTOR	:	
	:	
Defendant.	:	

ORDER

AND NOW, this _____ day of _____, 2017, upon consideration of the Motion for Summary Judgment of Defendant Bruce Castor, and any response thereto, it is hereby **ORDERED** and **DECREED** that said Motion is **GRANTED**. Judgment is entered in favor of Defendant Bruce Castor.

EDUARDO C. ROBRENO, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ANDREA CONSTAND

Plaintiff,

v.

BRUCE CASTOR

Defendant.

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: CIVIL ACTION NO.:
: 2:15-CV-05799-ER
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:
:

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT BRUCE CASTOR

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant Bruce Castor, by and through the undersigned counsel, hereby moves for summary judgment on all claims asserted by Plaintiff in her Complaint. Mr. Castor incorporates the accompanying Memorandum of Law and Statement of Undisputed Material Facts as though fully set forth herein at length. Mr. Castor respectfully requests this Honorable Court grant his Motion for Summary Judgment and enter judgment in his favor and against the Plaintiff.

Respectfully Submitted,

BY:


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Attorneys for Bruce Castor

Dated: October 27, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ANDREA CONSTAND	:	
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**DEFENDANT BRUCE CASTOR’S STATEMENT OF UNDISPUTED MATERIAL
FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

1. Plaintiff Andrea Constand has sued Defendant Bruce Castor for the following causes of action: Defamation / Defamation *per se* and False Light / Invasion of Privacy. A copy of the Complaint attached as Exhibit “A”.
2. In 2005, Plaintiff accused William Cosby of sexual assault. *Id.* at 13.
3. On February 17, 2005, Defendant Castor, then Montgomery County District Attorney, determined after an investigation that charges would not be filed and issued a Press Release. *See Ex. A at 18-19; see Press Release attached as Exhibit “B”.*
4. In the District Attorney’s Press Release, Castor wrote that the District Attorney found insufficient credible and admissible evidence to sustain charges against Cosby. *See Ex. “B”.*
5. On March 8, 2005, Plaintiff filed a civil suit against Cosby alleging Battery, Assault, Negligent and Intentional Infliction of Emotional Distress, Defamation, and False Light / Invasion of Privacy. *See Constand v. Cosby* Complaint attached as Exhibit “C”.
6. In 2006, Plaintiff settled the civil suit against Cosby for an undisclosed monetary settlement.
7. Defendant Castor left the District Attorney’s office in 2008. *See Ex. A at 7.*

8. The transcript of Cosby's deposition from the civil case brought by Constand was unsealed by this Court on July 6, 2015; around this time, then Montgomery County District Attorney Risa Ferman (Castor's successor) re-opened this case for the first time since 2005, based on the new information. A copy of the Criminal Complaint with Affidavit of Probable Cause is attached as Exhibit "D".
9. On December 30, 2015, charges were filed against Cosby related to the alleged assault; he was charged with three felony counts of aggravated assault. *Id.*
10. In 2015, Castor was running for Montgomery County District Attorney against Kevin Steele.
11. Steele made Castor's 2005 decision not to prosecute Cosby an issue in the campaign and ran a TV commercial about Castor's decision. A copy of the relevant portions of the Deposition of Brian Miles is attached as Exhibit "E".
12. Plaintiff claims the following statements attributed to Castor were defamatory:
 - a. "If the allegations in the civil complaint were contained with the detail in her statement to the police, we might have been able to make a case of it." *See* Ex. A at 27 and 41¹.
 - b. "Inky: Cosby victim told police much different than she told court in her lawsuit. First I saw that in story. Troublesome for the good guys. Not good." *Id.* at 29, 31 and 41.
13. Plaintiff alleges that as a result of the above two statements, she suffered financial and emotional damage.² *See* Ex. A.
14. Defendant raised the affirmative defense of truth in his Answer to the Complaint with Affirmative Defenses.

¹Despite referencing the articles containing the alleged defamatory statements, Plaintiff did not attach the articles to her Complaint. The first statement was published in an Associated Press article dated 9/23/15; the second statement was published on social media along with a link to an article published in the Philadelphia Inquirer on 9/13/15. Both articles are collectively attached hereto as Exhibit "F".

² Plaintiff initially claimed she "suffered in her business" and that she lost income related to the loss of clients in her massage practice; however, this claim has been withdrawn. Plaintiff is no longer pursuing a claim that she lost clients or business income.

15. During the 2005 criminal investigation into Plaintiff's allegations against Cosby, of which Castor was a part, Plaintiff was interviewed by various law enforcement departments on at least four occasions.
16. Plaintiff was initially interviewed by the Durham Regional Police in Toronto, Ontario on January 13, 2005. A copy of the interview report is attached as Exhibit "G".
17. Plaintiff was interviewed by the Cheltenham Township Police on January 19, 2005. A copy of the interview report is attached as Exhibit "H".
18. Plaintiff was interviewed by the Montgomery County Detectives on January 22, 2005. A copy of the interview report is attached as Exhibit "I".
19. Plaintiff was interviewed by the Montgomery County detectives on February 9, 2005. A copy of the report is attached as Exhibit "J".
20. On January 13, 2005, Plaintiff told the Durham Regional Police she had met Cosby 6 months prior to the 2004 assault. *See Ex. G.*
21. On January 22, 2005, Plaintiff told the Montgomery County Detectives she met Cosby in 2001, approximately three years before the alleged assault. *See Ex. I at 6 and 13.*
22. On January 13, 2005, Plaintiff told the Durham Regional Police that she had never been alone with Cosby prior to the alleged assault. *See Ex. G.*
23. On January 22, 2005, Plaintiff told the Montgomery County Detectives that she had been alone with Cosby prior to the alleged assault on other occasions, both at the home of Cosby and in a hotel room. *See Ex. I at 9 and 12.*
24. On January 13, 2005, Plaintiff told the Durham Regional Police that she was assaulted by Cosby in mid-January 2004 after a night out to dinner with a group of people. *See Ex. G.*

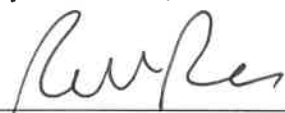
25. On January 19, 2005, Plaintiff told the Cheltenham Police that the assault may have occurred on March 16, 2004 after a dinner party. *See* Ex. H.
26. On January 22, 2005, Plaintiff told the Montgomery County Detectives that the assault occurred sometime between Mid-January and Mid-February when Cosby invited her to his house, but not after a dinner party as twice previously reported. *See* Ex. I at 13.
27. On January 22, 2005, Plaintiff told the Montgomery County Detectives that on the night of the assault Cosby invited her to his home to talk about Plaintiff's move and career change. *See* Ex. I at 13.
28. In the civil complaint filed against Cosby on March 8, 2005, Plaintiff alleged that the assault occurred in January 2004, with no day specified. *See* Ex. C at ¶9.
29. In the civil complaint filed against Cosby on March 8, 2005, Plaintiff alleged that Cosby invited her to his house by telling her that "he wanted to offer her assistance in her pursuit of a different career." *See* Ex. C at ¶9.
30. Plaintiff admits that she reported to the police the assault occurred on the following dates: March 16, 2004; Mid-January 2004; between Mid-January and Mid-February 2004; and January 2004. A copy of the referenced portions of Plaintiff's Deposition Transcript is attached as Exhibit "K" (with Plaintiff's court approved redactions), *see* Ex. K at p. 91.
31. During the January 22, 2005 interview with the Montgomery County Detectives, Plaintiff told the detectives she had not been physically injured, there was no violence attached to the situation, and that she had not suffered physical trauma. *See* Ex. I at p.19.
32. In the civil complaint filed against Cosby on March 8, 2005, Plaintiff alleged that following the assault, she awoke feeling raw in and around her vaginal area. *See* Ex. C at ¶22.

33. Plaintiff later admitted in her deposition taken in this case on January 23, 2017 that when she gave her statement to the Montgomery County Detectives on January 22, 2005, she “may have lessened it” in terms of the physical trauma, and that she downplayed the extent of the physical trauma during the interview with the police and testified “I just think I misrepresented”. *See* Ex. K at p. 54–55, 92-94.
34. Castor issued a press release on February 17, 2005 informing the public that charges would not be filed against Cosby at that time. *See* Ex. B.
35. Plaintiff understood that charges could be filed if new information came to light. *See* Ex. K at p. 82.
36. On March 8, 2005, three weeks after the press release was issued, Plaintiff filed a civil complaint against William Cosby. *See* Ex. C.
37. Plaintiff never requested that the transcript of the deposition given by Cosby in the civil case, or any other information learned during discovery in the civil suit, be sent to the Montgomery County District Attorney’s office. *See* Ex. K at p. 82.
38. Plaintiff settled case with Cosby for a monetary settlement and was satisfied with the resolution. *Id.* at p. 95.
39. Cosby’s deposition from the civil case remained sealed by Court Order until July 6, 2015. *See* Ex. D.
40. The Montgomery County District Attorney’s Office, led by then District Attorney Risa Ferman (now Judge Risa Ferman), re-opened the criminal investigation against Cosby sometime after his deposition from the civil case was unsealed on July 6, 2015. *See* Ex. D at p. 11.
41. Cosby was charged with three felony counts of aggravated assault on December 30, 2015. *See* Ex. D.

42. Cosby's criminal trial began on June 5, 2017 in the Court of Common Pleas of Montgomery County and ended on June 12, 2017.
43. On June 17, 2017, the Court declared a mistrial after the jury could not reach a unanimous decision regarding Cosby's guilt.
44. Legal experts and the media opined that Plaintiff's inconsistencies in her statements to the police resulted in the jury's inability to find Cosby guilty beyond a reasonable doubt. *See* sampling of articles regarding criminal trial and jury deliberations attached as Exhibit "L".³
45. Plaintiff does not personally know any of the people who have made negative comments about her on news stories published on the internet. *See* Ex. K at p. 104, 148.

Respectfully Submitted,

BY:


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Attorneys for Bruce Castor

³ An article published by the New York Times on June 17, 2017 quotes Alan J. Tauber, Esq. as saying "Some jurors were no doubt moved by Ms. Constand's contradictory statements to police during the initial investigation. She denied having been alone with Cosby before the alleged assault; she denied having contacted him afterwards; and stated that the assault occurred in March of 2004. All demonstrably false"; the article quotes Kevin Harden, Esq. as stating "the jury's repeated questions about prior statements and reports to police suggests that some were primarily concerned with Constand's credibility" and Barbara Ashcroft, Esq. is quoted as follows "... jurors are fighting over who to believe and who to trust as they methodically examine and in this case re-examine the testimony.. this has been a classic sexual assault case of 'he says, she says.'"

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CERTIFICATE OF SERVICE

I, Robert Connell Pugh, Esquire, hereby certify that a true and correct copy of Defendant Bruce Castor’s Motion for Summary Judgement and the accompanying Memorandum of Law, was served upon all counsel of record via the Court’s electronic filing and U.S. First Class Mail, postage pre-paid, on the date listed below:

Respectfully Submitted,

BY: 

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JUSTIN A. BAYER, ESQUIRE
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Attorneys for Bruce Castor

Dated: October 27, 2017

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT BRUCE CASTOR’S
MOTION FOR SUMMARY JUDGMENT**

AND NOW comes Defendant Bruce Castor (“Castor”), by and through his counsel, Kane Pugh Knoell Troy & Kramer, and files the within Memorandum of Law in Support of his Motion for Summary Judgment and Statement of Undisputed Facts, averring as follows:

I. Background and Factual History

Plaintiff Andrea Constand has sued Defendant Bruce Castor for defamation / defamation *per se* and false light¹. Plaintiff initiated this case by filing a Complaint on or about October 26, 2015. *See* Ex. A. Mr. Castor incorporates the accompanying Statement of Undisputed Material Facts as though fully set forth herein in its entirety.

¹ This case is before the Court on diversity grounds, therefore Pennsylvania law applies. On October 16, 2017, Plaintiff filed a Notice Pursuant to Federal Rule of Civil Procedure 44.1 Regarding the Application of Canadian Defamation Law. Under Fed. R. C. P. 44.1, it is the responsibility of the party seeking the application of foreign law to “carry both the burden of raising the issue that foreign law may apply in an action, and the burden of adequately proving foreign law to enable the court to apply it in a particular case.” *See Bel-Ray Co., Inc. v. Chemrite Ltd.*, 181 F.3d 435, 444 (3d. Cir. 1999). Prior to October 16, 2017, Plaintiff gave no notice she intended to apply Canadian law. The Complaint makes no allegation that put Defendant on notice of her intent. Discovery was completed on July 17, 2017 without any notice from Plaintiff. Plaintiff offers no justification for why she would be entitled to Canadian law now. Plaintiff should not be permitted to rely on Canadian law because she failed to give the reasonable notice required under Fed. R.C.P. 44.1. While Rule 44.1 does not require that notice be given in pleadings, it does require notice to be reasonable. *See* Fed. R.C.P. 44.1 Advisory Committee Notes; *see also Berger v. Cushman & Wakefield of Pa., Inc.* 2017 U.S. Dist. LEXIS 132587. Moreover, it is obvious Constand’s own Complaint — which framed the parties’ approach to discovery — presumed Pennsylvania law would apply. To cite but one example, it purports to state a claim for false light invasion of privacy (*See* Ex. A at Count II), yet it appears this Pennsylvania law claim is not even recognized under the law of Canada. *See e.g. Parasiuk v. Canadian Newspapers Co.* 2 W.W.R. 737 (Man. Q.B. 1988); *Jones v. Tsige*, 2012 ONCA 32 (CanLII); *Jane Doe 464533 v. N.D.*, 2016 ONSC 541 (CanLII).

By way of background, Castor was the District Attorney of Montgomery County Pennsylvania between 2000 and 2008. In January 2005, Plaintiff accused William Cosby of sexual assault. The alleged assault occurred in 2004 in Montgomery County, Pennsylvania. The Montgomery County District Attorney investigated the allegations. During the investigation, Plaintiff participated in interviews with various law enforcement departments. *See* Exhibits G, H, I, and J. Following a thorough investigation, District Attorney Bruce Castor made the decision not to charge Cosby and issued a Press Release dated February 17, 2005 explaining this decision. *See* Ex. B. In the Press Release, Castor described the investigation and explained that he “reviewed the statements of the parties involved, those of all witnesses who might have firsthand knowledge of the alleged incident.” Following the investigation, he found “insufficient credible, and admissible evidence exists upon which any charge could be sustained beyond a reasonable doubt.” *See* Ex. B.

Three weeks later, on March 8, 2005, Plaintiff filed a civil suit against Cosby alleging defamation, assault, battery, invasion of privacy and infliction of emotional distress. *See* Ex. C. The civil suit ended with Cosby paying a monetary settlement to Constand. Plaintiff admits to never providing any information learned during her civil suit against Cosby to District Attorney Castor either personally or through counsel. *See* Ex. K at 82.

In 2015, Castor was running for Montgomery County District Attorney against Kevin Steele. Steele made Castor’s decision that there was insufficient credible and admissible evidence to sustain a conviction of Cosby beyond a reasonable doubt a central aspect of Steele’s campaign. *See* Ex. E. In July 2015, the deposition Cosby gave in the civil case brought by Constand, which had been sealed, was unsealed. *See* Ex. D. Around this time, then Montgomery County District Attorney Risa Ferman, Castor’s successor after he left the office in 2008, re-opened the

investigation into the sexual assault. *Id.* Charges were filed against Cosby on December 30, 2015. *Id.* Cosby was charged with three felony counts of aggravated assault.

On October 26, 2015, one week before the election for District Attorney, Plaintiff filed this lawsuit against Castor, alleging that two statements attributed to Castor during the last weeks of the 2015 campaign in regard to his 2005 decision not to prosecute Cosby were defamatory, causing her to suffer great financial loss and damage as well as emotional distress and damage to her reputation.² *See* Ex. A at ¶51. On November 3, 2015, Kevin Steele was elected District Attorney and he assumed the prosecution of Cosby. The criminal trial against Cosby took place from June 5 through June 12, 2017 in the Court of Common Pleas of Montgomery County. A mistrial was declared on June 17, 2017 after the jury could not reach a unanimous decision. Legal experts opined that the jury was not able to convict Cosby because of Constand's inconsistencies in her statements to the police in 2005. *See* Ex. L. To date, Castor is unaware of any action filed by Plaintiff against any of the legal experts interviewed by the press who gave their opinions.

A. Alleged defamatory statements

In the instant matter, Plaintiff has alleged that two statements attributed to Castor during the last weeks of the 2015 campaign in regard to his 2005 decision not to prosecute Cosby were defamatory.

The first statement was contained in a 9/23/15 Associated Press article entitled "Bill Cosby seeks defense lawyer as prosecutors revisit 2005 sexual-assault complaint." *See* Ex. F. Castor is quoted as having said "[i]f the allegations in the civil complaint were contained with that detail in

² While Plaintiff a week before the election in a widely publicized complaint claimed she "suffered in her business" and that she lost income related to the loss of clients in her massage practice, Plaintiff withdrew that claim and is not pursuing a claim that she lost clients or business income. Further, as discussed in detail below, Constand's deposition testimony establishes her inability to prove any connection between alleged defamatory statements and damage to her reputation. Thus, the allegation of financial loss a week before the election turned out to be unsubstantiated, but by then the election had passed and Steele elected.

her statement to the police, we might have been able to make as case of it.” *See* Ex. A at ¶¶27 and 41. The article also quotes then Montgomery County District Attorney, now Judge Risa Ferman, as having said in a recent statement “prosecutors have a responsibility to review past conclusions ... when current information might lead to a different conclusion.” *See* Ex. F.

The second statement was “Inky: Cosby victim told police much different than she told court in her lawsuit. First I saw that in story. Troublesome for the good guys. Not good.” *See* Ex. A at ¶¶29, 31 and 41. This comment was posted on social media with a link to an article published by the Philadelphia Inquirer entitled “Time hasn’t run out on possible charges against Cosby in Pa.” *See* Ex. F. The article explained that Plaintiff’s claims against Cosby had gotten stronger over time. *Id.* It quoted then District Attorney Risa Ferman as stating that she had a responsibility to review prior conclusions “when current information might lead to a different decision.” *Id.* The article referenced admissions from Cosby’s recently unsealed deposition as well as accusations from dozens of other women. *Id.* Castor was quoted in the article as stating “the statement she gave to the police did not provide sufficient detail on which a criminal charge could be based” and “her statement was consistent with a woman who had been drugged and couldn’t remember what happened to her.” *Id.* He was further quoted as stating “I felt Cosby was being deceptive ... but you can’t stand up in court and say ‘my gut feeling is that he did it.’” *Id.*

Castor now seeks summary judgment because, as a threshold matter, these two statements attributed to Castor, considered in their context, are not capable of a defamatory meaning. Therefore, Plaintiff’s defamation claims must fail as a matter of law. However, even if this Court finds the statements were capable of a defamatory meaning, the statements are true and therefore Plaintiff’s claims for defamation and false light must fail as a matter of law. With the close of discovery and based on the undisputed material facts, it is clear as a matter of law that Plaintiff

cannot sustain the claim for defamation, defamation *per se*, false light, or any other theory of liability against Castor, and, therefore, summary judgment is proper.

II. Legal Argument

A. Standard of Motion For Summary Judgment

Summary Judgment is proper “if the pleadings, the discovery, and the disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c)(2); *see Knabe v. Boury*, 114 F.3d 407, 410 n.4 (3d Cir. 1997) (quoting Fed. R. Civ. P. 56(c)). A factual dispute is “material” only if it may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Id.* at 247-48 (emphasis in original).

In considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. *Int’l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248. A fact is material when it might affect the outcome of the suit under the governing law. *Id.* Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant’s burden of proof at trial. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate

specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. *Id.* at 324.

B. Burden of Proof for Defamation Claims

In Pennsylvania, a person bringing a defamation claim bears the burden of proving the following elements:

- (1) The defamatory character of the communication;
- (2) Its publication by the defendant;
- (3) Its application to the plaintiff;
- (4) The understanding by the recipient of its defamatory meaning;
- (5) The understanding by the recipient of it as intended to be applied to the plaintiff;
- (6) Special harm resulting to the plaintiff from its publication;
- (7) Abuse of a conditionally privileged occasion.

42 Pa. Cons. Stat. Ann. § 8343(a); *see also Resnick v. Manfredy*, 52 F.Supp.2d 462 (E.D.Pa. 1999); *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 903 (Pa. 2007). In order to sufficiently state a claim for defamation, the plaintiff alleging defamation has the burden to plead and prove the defamatory nature of the communication. *Rockwell v. Allegheny Health, Education, and Research Foundation*, 19 F. Supp. 401 (E.D. Pa. 1998) (*citing Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 196 (3d Cir 1998)). Furthermore, under the statute, if the plaintiff establishes the above elements, the defendant has the burden of proving, when the issue is properly raised:

- (1) The truth of the defamatory communication;
- (2) The privileged character of the occasion on which it was published;

(3) The character of the subject matter of defamatory comment as of public concern.

In this matter, Plaintiff has not met, and in fact cannot meet, her burden. The alleged defamatory statements are incapable of defamatory meaning under Pennsylvania law, and are true, and, therefore, judgment in favor of Castor is proper. There is no need for a jury trial.

C. Mr. Castor's statements are not capable of defamatory meaning

As a threshold matter, it is the function of the court to decide whether or not the challenged statement is capable of the defamatory meaning ascribed to it by the plaintiff. *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1053 (1996); *see also Maier v. Maretti*, 671 A.2d 701 (Pa. Super. 1995). The Court, not the jury, determines whether a communication is capable of bearing a defamatory meaning. *Vitteck v. Washington*, 389 A.2d 1197. Only then will the question of whether or not the recipient understood the statement to be defamatory go to the jury. *Parano v. O'Connor*, 641 A.2d 607 (Pa. Super. 1993)(stating only if the court decides that the statement is “capable of a defamatory meaning does the jury consider the defamatory nature of the communication”).

In determining this threshold question of whether a statement is capable of being defamatory, “the court must view the statements in context and determine whether they were maliciously published and tended to blacken a person’s reputation or to injure him in his business or profession.” *Baker v. Lafayette College*, 532 A.2d 399, 402 (1987), *citing Corabi v. Curtis Publishing Company*, 273 A.2d 899, 904 (1971); *see also U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 922 (3rd Cir. 1990)(*quoting Birl v. Philadelphia Electric Co.*, 167 A.2d 472 (1960)(stating a defamatory statement is one that “tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons for

associating or dealing with him”).

Further, in evaluating whether a statement is capable of defamatory meaning, the court considers the effect hearing or reading the statement would have on the mind of the average person. “The words must be given by judges and juries the same significance that other people are likely to attribute to them.” *Rush v. Philadelphia Newspapers, Inc.*, 732 A.2d 648, 652 (Pa. Super. 1999)(quoting *Maier* 671 A.2d at 704). “While a statement may be embarrassing or annoying, annoyance does not constitute defamation; to be defamed, one must have suffered the kind of harm that grievously fractures the plaintiff’s standing in the community of respectable society.” *Beckman v. Dunn*, 1978 Phila. Cty. Rptr. LEXIS 70 (quoting *Scott-Taylor, Inc. v. Stokes*, 229 A.2d 733 (1967); see also *Tucker v. Phila. Daily News*, 848 A.2d 113, 124 (2004). The court must view the statement in the context it was made. *Baker*, 532 A.2d at 402.

Expressions of opinion cannot give rise to liability for defamation. *Restatement (Second) of Torts 566 and Comments b and c*. “A simple expression of opinion based on disclosed facts or assumed non-defamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.” *Rockwell*, 19 F. Supp. at 409; see also *Baker*, 532 A.2d at 402. Here, the complained of statements were expressions of Mr. Castor’s opinion. Pennsylvania Courts have dismissed defamation claims prior to trial where the court determined that the alleged defamatory statements were expressions of opinion and therefore, as a matter of law, not actionable “unless they imply undisclosed, false, and defamatory facts.” *Parano*, 641 A.2d at 609; see also *Remick v. Manfredy*, 238 F.3d 248, 361 (3rd Cir. 2001). In *Parano*, the plaintiff alleged that defendant’s comments that the plaintiff was adversarial and uncooperative were defamatory. The court determined that the statements were not capable of defamatory meaning because the facts upon which the opinions were formulated had been

disclosed. *Id.* Similarly, in *Baker v. Lafayette College*, the Supreme Court of Pennsylvania affirmed the lower courts' dismissal of the case based on the defendant's preliminary objections, in part because the statements the department chairperson made about the plaintiff were expressions of his personal opinions and did not imply undisclosed false or defamatory facts and therefore, not capable of defamatory meaning. 532 A.2d 399 (1987).

i. First Alleged Defamatory Statement

As described above, Plaintiff has alleged that the following statement attributed to Castor was defamatory - "*If the allegations in the civil complaint were contained with the detail in her statement to the police, we might have been able to make as case of it.*" See Ex. A at ¶¶27 and¶41; see Ex. F. It is plain and obvious that Plaintiff's civil complaint against Cosby contained different details from her statements to the police³. Castor opined that they (the District Attorney's office) "might" have been able to make a case against Cosby had Constand's multiple statements to the police contained the same level of detail and precision as the allegations in her civil complaint. This is a pure expression of opinion. This opinion was not based on undisclosed, defamatory facts. To the contrary, as set forth in Constand's Complaint against Castor, Castor disclosed the decision not to prosecute Cosby, and the basis for the decision, in 2005 when he issued the Press Release. See Ex. B. Constand's Civil Complaint against Cosby was a public record and the contents of the police statements were publically included in the Criminal Complaint filed on December 30, 2015. See Ex. D.

Regardless, this statement is not a statement that would tend "to blacken a person's reputation or to injure him in his business or profession." The context of the statement must be

³ See the different dates of the alleged assault, different events that pre-dated the alleged assault, different durations of how long Constand and Cosby had been acquainted, details of nature of their relationship, differing accounts of contact following the assault, and different accounts of the physical trauma after the assault. Ex. G-I, C.

considered. The context of the statement is that it is an opinion of the former District Attorney, who in 2015 was still a public official⁴, being asked to explain the 2005 decision not to prosecute Cosby. The article discusses the new information that had come to light since the 2005 decision, including numerous other accusers and the unsealing of Cosby's deposition. See Ex. F. This statement, read in context, is simply not capable of a defamatory meaning under Pennsylvania law.

ii. Second Alleged Defamatory Statement

Plaintiff further alleges that the following statement was defamatory "*Inky: Cosby victim told police much different than she told court in her lawsuit. First I saw that in story. Troublesome for the good guys. Not good.*" See Ex. A at ¶29, ¶31 and ¶41. This statement is also not capable of a defamatory meaning. Again, the contents of the police statements were publically available in December of 2015. In fact, the contents were part of the Criminal Complaint which is posted to the Montgomery County website. The Civil Complaint Constand filed against Cosby is a public record. The article referenced in the statement was a Philadelphia Inquirer article entitled "*Time hasn't run out on possible charges against Cosby in Pa.*" See Ex. F. The article discussed the fact that new information had come to light, which might, according to then District Attorney Ferman, lead to charges against Cosby. The article explained that Plaintiff's claims against Cosby had gotten stronger over time. It quoted then District Attorney Risa Ferman as stating that she had a responsibility to review prior conclusions "when current information might lead to a different decision." *Id.* The article referenced admissions from Cosby's recently unsealed deposition as well as accusations from dozens of other women. *Id.* Castor was quoted in the article as stating "the statement she gave to the police did not provide sufficient detail on which a criminal charge could be based" and "her statement was consistent with a woman who had been drugged and

⁴ Defendant Bruce Castor was a County Commissioner in Montgomery County, Pennsylvania from 2008-2016.

couldn't remember what happened to her." *Id.* He was further quoted as stating "I felt Cosby was being deceptive ... but you can't stand up in court and say 'my gut feeling is that he did it.'" *Id.* District Attorney Ferman had not determined if charges would be brought, stating "while it takes tremendous courage for a victim of a sexual assault to stand up and speak out, charging decisions are not made based on our respect for the courage of a witness... rather, they are made based upon a review of the factual information available about the time and a prosecutor's analysis of whether allegations of criminal conduct can be proven beyond a reasonable doubt." *Id.* In this context, it is clear as a matter of law that Mr. Castor's statement, "*Inky: Cosby victim told police much different than she told court in her lawsuit. First I saw that in story. Troublesome for the good guys. Not good*", is not capable of a defamatory meaning.

Neither of Castor's statements gives rise to a cognizable claim for defamation. Plaintiff has not, and cannot, establish the defamatory character of the complained of statements. Therefore, Plaintiff cannot meet her burden of proof and summary judgment is proper. Furthermore, as described below, where a plaintiff is a public figure and the matter is one of public concern, the plaintiff in a defamation case has an additional burden and must prove the falsity of the alleged defamatory statements.

D. Mr. Castor's statements were true

i. The statements involved a matter of public concern.

Although normally the defendant in a defamation case must prove the truth of the statement alleged to be defamatory as a defense, when the matter is of public concern, under the First Amendment to the United States Constitution, the plaintiff bears the burden of proving the statement was false. *Today's Housing v. Times Shamrock Communications, Inc.*, 21 A.3d 1209, 1213 (Pa. Super. 2011), *citing Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1985);

Joseph v. Scranton Times, LP, 89 A.3d 251, 260-261 (Pa. Super. 2014)(plaintiff must prove falsity if defendant is member of the media or the statement is on a matter of public concern).

A public controversy has been defined as “a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.” *Iafrate v. Hadesty*, 621 A.2d 1005, 1007 (Pa. Super. 1993). It must involve a real dispute “the outcome of which affects the general public or some segment of it.” *McDowell v. Paiewonsky*, 769 F.2d 942, 948 (3d Cir. 1985). Here, Plaintiff pleads that the statements attributed to Castor were made in the course of an election campaign, which is a matter of public concern. *Curinga v. City of Clairton*, 357 F.3d 305, 313 (3d Cir. 2004). Moreover, the statements were offered by a former District Attorney to help explain why a decision not to prosecute was made a decade earlier.⁵

ii. *Constand is a limited purpose public figure*

Similarly, a public figure must prove falsity of the alleged defamatory statements by clear and convincing evidence. *Tucker v. Philadelphia Daily News.*, 848 A.2d 113, 127-128 (Pa. 1994); *see also Ertel v. Patriot News*, 674 A.2d 1038 (Pa. 1996) (in response to a motion for summary judgment, plaintiff must produce evidence of falsity). Here Plaintiff is a limited purpose public figure. Limited purpose public figures are those who have inserted themselves into the forefront of a particular public controversy. In determining whether a plaintiff is a limited purpose public figure, courts consider whether the plaintiff “voluntarily inject[ed]” himself into the particular public controversy giving rise to the defamation. *See e.g. Iafrate*, 621 A.2d at 1007. “[W]hen an individual undertakes a course of conduct that invites attention, even though such attention is

⁵ Further, this Court has already determined that issues raised in the civil complaint brought by Constand against Cosby was a matter of public importance. In this Court’s July 6, 2015 Opinion regarding the unsealing of the Cosby civil deposition, this Court explained that the public has an interest in the “serious allegations concerning improper (and perhaps criminal) conduct” of Cosby. *See* July 6, 2015 Opinion of Judge Robreno attached as Exhibit “M” at p. 15, 16, and 18.

neither sought nor desired, he may be deemed a public figure.” *McDowell*, 769 F.2d at 949 (internal citations omitted).

Courts also consider whether the alleged defamation involves a public controversy, and the nature and extent of plaintiff’s involvement in the controversy. *See e.g. McDowell*, 769 F.2d at 948. Ordinarily, a victim of sexual assault would not be a limited purpose public figure by virtue of the celebrity status of the alleged perpetrator of the sexual assault. Plaintiff is not a limited purpose public figure because she accused William Cosby, a celebrity, of sexual assault. However, in her civil case against Cosby, Plaintiff has sought court relief to publicize certain documents related to Cosby. On July 8, 2015, Plaintiff filed a motion in the civil case against Cosby requesting that the confidentiality agreement be negated and that certain documents be released to “assist other women who have been victimized and bring awareness of the fact that sexual assault is not just committed with a gun or knife but is also committed by mentors who engage in exploitative behaviors.” *See* Motion for Sanctions filed by Constand attached as Exhibit “N” at pgs. 7-8. Accordingly, by taking steps to publicize documents concerning Cosby, Plaintiff has inserted herself into a public controversy, making her a limited purpose public figure.

iii. Plaintiff admits that Castor’s statements are true

Thus, in this case involving a matter of public concern and a case where the Plaintiff is a public figure, Plaintiff has the burden of proving the falsity of the statements alleged to be defamatory in order to prevail on her defamation claims and to survive summary judgment. Plaintiff cannot do so. Plaintiff’s statements to the police were, in fact, and admittedly contradictory. *See* Ex. K at p. 46, 54-55, 91-94.⁶ The recent criminal trial of Cosby in the Court

⁶ On page 46, Plaintiff admits she stated that the alleged incident may have occurred on March 16, 2004 but that this was not accurate; on Page 54 -5 and 91-94, Plaintiff admits that in the January 22, 2005 interview she may have lessened and misrepresented the extent of physical trauma; on page 91, Plaintiff acknowledges the inconsistencies regarding the date of the assault.

of Common Pleas of Montgomery County, and the resulting hung jury, is further proof of the significant extent of the contradictions.

iv. The defense of truth bars Plaintiff's claims

In the event this Court finds as a threshold matter the statements are capable of defamatory meaning, and does not find the statements are opinions or that Plaintiff has the burden of proving the falsity of the statements, truth of the defamatory communication is a complete and absolute defense under Pennsylvania law. *See* 42 Pa. Cons. Stat. § 8342(b), *see also Pelagatti v. Cohen*, 536 A.2d 1337, 1345-46 (Pa. 1987) (stating “truth is a complete and absolute defense to a civil action for defamation”).

Castor has established that the undisputed material facts show that he was telling the truth when he made the complained of statements. On June 17, 2017, a jury agreed with Castor. In 2005, Plaintiff was, unfortunately, inconsistent in what she told the police. When victims are inconsistent that is troublesome for the law enforcement community because convictions become more difficult or impossible. *See* relevant portion of transcript of Bruce Castor attached as Exhibit “O”. Moreover, Plaintiff has agreed she provided differing accounts to the police during her interviews and between what she told the police and what she alleged in her civil lawsuit against Cosby. *See* Ex. K at p. 46, 54-55, 91-95. The statements made by Castor are true. Therefore, the affirmative defense of truth is a complete and absolute bar to Plaintiff’s claim.

E. Plaintiff has not produced or uncovered any evidence to meet her burden of proof as to the third and fourth elements necessary for a defamation claim

Even if the Court were to determine that the statements were capable of defamatory meaning and were false, in order to prevail on her defamation claim, Plaintiff must also prove the following: the understanding by the recipient of the statement’s defamatory meaning and the understanding by the recipient of the statement as intended to be applied to the plaintiff. 42 Pa.

Cons. Stat. Ann. § 8343(a). In this case, Plaintiff has not produced or uncovered any evidence to support her burden of proof on these two essential elements to her cause of action. Therefore, Plaintiff's claims cannot survive summary judgment.

Plaintiff alleged in her Complaint that, because of Mr. Castor's statements, she has "been brought into scandal and reproach, and has been held up to scorn and contempt among her neighbors, business acquaintances, and other good citizens and is suspected by them of engaging in false accusations..." *See* Ex. A at 51. However, despite these allegations in the Complaint, splashed over headlines and electronic media a week before the election, Plaintiff has not articulated any instance of scorn and contempt that she has been held up to by her neighbors or business acquaintances as a result of Castor's statements.⁷ Plaintiff cannot identify a single person who has said derogatory remarks to her since Castor's statements and cannot identify any person who has a lower opinion of her because of Castor's social media comment. *See* Ex. K at p. 114. None of her neighbors, friends or family members told her they thought less of her because of Castor's comment on social media and in fact, has "received a lot of support." *Id.* at p. 107 and 113. Plaintiff does not personally know any of the people who have posted negative comments about her on the internet nor does Plaintiff know any of the people who made comments about her in response to news stories; critically, she admits she does not know how any of these people felt about her prior to Castor's statements. *Id.* at p. 104, 106, and 114. Plaintiff also admits that she received nasty phone calls in 2005 during the time of the lawsuit with William Cosby. *Id.* at p. 114.

⁷ As with Plaintiff's unsubstantiated fiscal harm *see footnote 2 Infra.*, by the time it became evident that Plaintiff had no such evidence of "scandal and reproach," "scorn and contempt among her neighbors, business acquaintances, and other good citizens..." the election had passed and Steele, the one of the two candidates who advocated for arresting Cosby, was elected district attorney was then able to advance Plaintiff's criminal case.

With the completion of discovery, it is clear that Plaintiff cannot meet her burden of proof as to these elements essential to her cause of action. In order to survive summary judgment, Plaintiff must go beyond her pleadings and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. Plaintiff's own testimony unequivocally establishes that she will not be able to do so, and summary judgment is, therefore, proper.

F. Plaintiff cannot meet her burden of proof for Defamation *per se*

Plaintiff has also accused Castor of defamation *per se*. However, the allegations in this Complaint are not capable of giving rise to liability for defamation *per se*. Defamation *per se* can be either words imputing criminal offense, loathsome disease, or business or serious sexual misconduct. *Clemente v. Espinosa*, 749 F. Supp. 672, 677 (E.D. Pa. 1990). "A statement is defamation *per se* as an accusation of business misconduct if it 'ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business.'" *Syngy Inc. v. Scott-Levin, Inc.*, 51 F. Supp. 2d 570, 580 (E.D. Pa. 1999).

In this case, on the face of the Complaint, Plaintiff has not plead that the alleged defamatory statements suggested she committed a criminal offense or had a loathsome disease or that she engaged in business or sexual misconduct. *See* Ex. A. The first statement was contained in a 9/23/15 Associated Press article entitled "Bill Cosby seeks defense lawyer as prosecutors revisit 2005 sexual-assault complaint." *See* Ex. F. Castor is quoted as having said "If the allegations in the civil complaint were contained with that detail in her statement to the police, we might have been able to make as case of it." *See* Ex. A at ¶27 and 41. The second statement was "Inky: Cosby victim told police much different than she told court in her lawsuit. First I saw that in story. Troublesome for the good guys. Not good." *See* Ex. A at ¶29, 31 and 41. There is no way either

of these statements can be read that would suggest Castor was accusing Constand of having committed a criminal offense, had a loathsome disease, or engaged in business or sexual misconduct. Further, at the close of discovery, Plaintiff has not uncovered any evidence to support the defamation *per se* claim. Therefore, based on the allegations pled and evidence revealed in discovery, there can be no finding of defamation *per se* and the claim for defamation *per se* should be dismissed as a matter of law.

G. Plaintiff cannot meet her burden of proof for False Light / Invasion of Privacy

Count II of Plaintiff's Complaint purports to assert a claim for False Light/Invasion of Privacy. *See* Ex. A. Plaintiff's relies on the same alleged defamatory statements described above to support her claim for false light / invasion of privacy. Pennsylvania has adopted the Restatement (Second) of Torts definition of the tort of false light, which states as follows: One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy if (a) the false light claim in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. Restatement (Second) of Torts § 652E; *Graboff v. Colleran Firm*, 2013 U.S. Dist. LEXIS 44245 (E.D. Pa. Mar. 28, 2013). The tort of false light / invasion of privacy involves "publicity that unreasonably places the other in a false light before the public." *Rush*, 732 A.2d at 654.

A plaintiff alleging false light must plead and prove the following elements: (1) publicity, (2) given to private facts, (3) which would be highly offensive to a reasonable person and (4) which are not of legitimate concern to the public. *Rush* 732 A.2d at 654. To support a claim for false light, there must be a misrepresentation of the plaintiff's character, history, activities or beliefs that

the average person would find seriously offensive. *Id.*; see also *Curran v. Children's Service Center of Wyoming County, Inc.*, 578 A.2d 8, 12-13 (Pa. Super. 1990). The false light in which the plaintiff is placed must "entail such a 'major misrepresentation of [the plaintiff's] character, history, activities or beliefs that serious offense may reasonably be expected to be taken.'" *Puchalski v. Sch. Dist. of Springfield*, 161 F. Supp. 2d 395, 410 (E.D. Pa. 2001) (quoting *Curran*, 578 A.2d at 13). In such a case, it is the plaintiff who must prove publicity was given to private facts, which would be highly offensive to a reasonable person, and which are not of legitimate concern to the public. *Dice v. Johnson*, 711 F.Supp.2d 340, 359-360 (M.D. Pa. 2010).

In this case, the undisputed facts show that Castor did not disclose or make public any of Plaintiff's private information. There is no evidence even suggesting a misrepresentation of Plaintiff's character, history, activities or beliefs. Plaintiff has failed to uncover evidence that would establish the requisite elements to sustain her claim, namely the publication of private facts. To the extent Plaintiff claims that Castor's statements created a false impression, the hung jury in the recent criminal trial of Cosby shows that the facts related to her allegations were not private. The massive publicity of the very facts which Plaintiff seems to allege are private, shows they are not.

Furthermore, "[t]he plaintiff must prove that the defendant either had knowledge of the falsity of the statements or acted in reckless disregard of the falsity of the statements." See Restatement (Second) of Torts § 652E. As discussed above, the subject statements are true. Further, the statements relate to a matter of legitimate concern to the public. Accordingly, as there is nothing even to suggest any publicity given to private facts, and the statements were true and of concern to the public, Plaintiff cannot sustain her claim for false light/invasion of privacy and will

not be able to meet her burden of proof at trial. Therefore, as a matter of law, the claim for false light should be dismissed and summary judgment entered in favor of Castor.

III. Conclusion

In order to survive summary judgment, Plaintiff has to point to evidence in the record that would establish the falsity of the statements attributed to Castor which she will not be able to do. Further, Plaintiff cannot rely on the pleadings and instead must point to specific facts to show that there is a genuine issue for trial. If Plaintiff fails to do so, summary judgment must be entered in favor of Bruce Castor, as there will be no need for a jury trial. For the reasons set forth above, Defendant Bruce Castor respectfully requests this Honorable Court grant Defendant's Motion pursuant to Rule 56 of the Federal Rules of Civil Procedure and enter judgment in favor of Bruce Castor.

Respectfully Submitted,

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