

SWARTZ CAMPBELL LLC

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BRUCE L. CASTOR, JR., ESQUIRE,
Plaintiff,

v.

ANDREA CONSTAND % BEBE H. KIVITZ,
ESQUIRE, BEBE H. KIVITZ, ESQUIRE,
JACOBS KIVITZ & DRAKE, LLC,
DOLORES M. TROIANI, ESQUIRE AND
TROIANI & GIBNEY, LLP,
Defendants.

: COURT OF COMMON PLEAS
: PHILADELPHIA COUNTY
:

: OCTOBER TERM, 2017
: NO. 000755
:

**PRELIMINARY OBJECTIONS OF DEFENDANTS, BEBE H. KIVITZ, ESQUIRE,
JACOBS, KIVITZ & DRAKE, LLC, DOLORES M. TROIANI, ESQUIRE AND
TROIANI & GIBNEY, LLP TO PLAINTIFF’S AMENDED COMPLAINT**

Defendants, Bebe . Kivits, Esquire, Jacobs, Kivitz & Drake, LLC, Dolores M. Troiani,
Esquire and Troiani & Gibney, LLC, through their counsel, Swartz Campbell LLC, assert
preliminary objections to plaintiff’s amended complaint and, in support thereof, state as follows:

1. This action for abuse of process and civil conspiracy arises from the prosecution
of an existing lawsuit by defendant, Andrea Constand (“Constand”) against plaintiff, Bruce
Castor (“Castor”).

2. Castor filed his complaint in this action on November 1, 2017.

3. Defendants, Kivitz, Troiani and their law firms filed preliminary objections to the complaint on November 21, 2017.

4. Thereafter, on December 18, 2017, Castor filed an amended complaint.¹

5. The amended complaint, like the original complaint, involves claims for abuse of process and civil conspiracy asserted by Castor against Constand and her lawyers and their law firms. *See generally*, Amended Complaint.

6. Constand is the complainant in the Commonwealth's criminal case against Bill Cosby.

7. Castor was the district attorney of Montgomery County when Constand reported she had been sexually assaulted by Cosby. Amended Complaint at ¶¶ 4, 9.

8. Castor declined to prosecute Cosby. Amended Complaint at ¶ 9.

9. Castor pursued election as the district attorney for Montgomery County. Amended Complaint at ¶¶ 13.

10. During his campaign, Castor made statements to the press about Constand to justify and explain his decision not to prosecute Cosby. Amended Complaint at ¶ 69-70.

11. Constand commenced a civil 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. Amended Complaint at ¶¶ 24, 71, Exhibit H.

12. Constand's lawsuit against Castor has not terminated and continues against him. Amended Complaint at ¶¶ 81, 97, 101.

13. Defendants, Kivitz and Troiani, are lawyers who represent Constand in her action against Castor.

¹ A copy of the Amended Complaint is attached hereto as Exhibit A.

14. Kivitz and Troiani were the lawyers “involved in procuring, initiating and continuing the frivolous underlying action.” Amended Complaint at ¶¶ 35, 37.

15. Kivitz is affiliated with the law firm Jacobs, Kivitz & Drake, LLC and Troiani is affiliated with the law firm Troiani & Gibney. Amended Complaint at ¶¶ 36, 38.

16. The law firms are included for vicarious liability. Amended Complaint at ¶ 39.

17. Castor relies on a proceeding--*Constand v. Castor*, No. 15-cv-05799 (U.S.D.C. E.D. Pa.)-- for the process he contends was abused by defendants. *See* Amended Complaint at ¶¶ 17, 18, 24, 25, 26, 29, 30, 32, 76, 77, 79, 80, 85, 86, 87, 95 and 96.

18. Castor contends he was and continues to be wrongfully sued in the *Constand* lawsuit. Amended Complaint at ¶ 33.

19. Castor alleges Constand’s lawsuit against him is:

- “a tactically pled and timed lawsuit” (Amended Complaint at ¶ 17);
- A “tactically timed, patently frivolous and knowingly false lawsuit” (Amended Complaint at ¶ 24);
- a “legally flawed lawsuit” (Amended Complaint at ¶ 26);
- “a sham lawsuit” (Amended Complaint at ¶ 27);
- a “frivolous malicious filing” (Amended Complaint at ¶ 32);
- a “bogus lawsuit” (Amended Complaint at ¶¶ 23, 29);
- a “knowingly frivolous” lawsuit (Amended Complaint at ¶¶ 33, 35, 37, 96)
- a “knowingly false and frivolous lawsuit” (Amended Complaint at ¶¶ 71)
- a “frivolous lawsuit” (Amended Complaint at 76, 77);
- an “outlandish” lawsuit (Amended Complaint at ¶ 81);
- a “baseless lawsuit” (Amended Complaint at ¶ 81); and

- a malicious action (Amended Complaint at ¶ 85).

20. 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. Amended Complaint at ¶¶ 28, 33, 35, 37, 71, 76, 77, 85, 86, 90, 96, 99.

21. The alleged improper purpose was to fix the 2015 district attorney election, destroy Castor's political prospects and reputation and further the defendants' own goals. Amended Complaint at ¶ 97.

22. Castor does not allege or identify a definite act or threat by Kivitz or Troiani not authorized by process or aimed at an objective not legitimate in the use of process.

23. 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 the *Constand* action.

24. Castor does not allege the *Constand* lawsuit has terminated in his favor. The *Constand* lawsuit is still being actively litigated and has not terminated. Amended Complaint at ¶ 81.

25. In addition to the initiation, procurement and continuation of the *Constand* lawsuit, Castor lists the following litigation activities as acts of abuse of process committed by defendants during the *Constand* action:

- submitting discovery requests in the *Constand* case to harass Castor;
- continuing to pursue knowingly false claims that Constand suffered lost earnings until defendants withdrew Constand's claim for lost earnings;
- continuing to pursue knowingly false claims that Constand suffered in her business until defendants withdrew that claim;

- pursuing knowingly false claims that Constand 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” when the defendants knew these claims were fabricated;
- continuing to prosecute a defamation *per se* claim when the claim does not fit into the criteria for this claim;
- filing a motion seeking application of Canadian law to the lawsuit when defendants knew or should know that Canadian law does not recognize false light as a cause of action;
- filing a motion to reopen discovery after discovery had closed;
- failing to withdraw the false light claim in light of the “frivolous” motion to apply Canadian law; and
- continuing to file motions after Constand testified that Castor’s statements were true.

Amended Complaint at ¶ 98.

26. The litigation activities include the continued prosecution of certain claims, the filing of certain motions and the pursuit of discovery.

27. Castor does not allege or identify a definite act or threat committed by Kivitz or Troiani which was not authorized in the use of listed litigation activities.

28. Castor does not allege an act or threat by Kivitz and Troiani aimed at an objective not legitimate in the use of the litigation activities.

29. Castor does not allege defendants sought anything other than the authorized conclusion of the claims, motions or discovery.

30. Castor’s civil conspiracy claim is based on an alleged conspiracy to abuse process. *See* Amended Complaint at ¶¶ 88-93.

31. Castor contends Constand conspired with her attorneys “and with third parties” to harm Castor and his reputation by filing and continuing the *Constand* lawsuit. Amended Complaint at ¶¶ 89-90.

32. The only person, other than defendants, identified as a conspirator, is Kevin Steele, Castor’s opponent in the general election for district attorney. Amended Complaint at ¶ 16.

33. The sole allegation relating to Steele’s participation in the alleged conspiracy states as follows:

16. As part of their scheme and plot against Castor, Defendants assisted Kevin Steele, Castor’s opponent in the General Election for District Attorney, leading the public to believe that Castor had carelessly overlooked the Cosby prosecution in 2005, thereby assisting with and conspiring with Steele in making Castor’s decision not to prosecute Cosby a central issue in the campaign.

Amended Complaint at ¶ 16.

34. Castor alleges no conduct by Steele in furtherance of a conspiracy. Castor alleges no facts to support the existence of an agreement between defendants and Steele for the prosecution of *Constand* lawsuit.

35. Castor does not allege any involvement by Steele in the *Constand* lawsuit. Castor does not allege facts to establish the existence of an agreement between defendants and Steele made for the sole purpose of injuring Castor. Amended Complaint at ¶¶ 89-93.

36. The conduct by Kivitz and Troiani which forms the basis of Castor’s conspiracy claim is conduct in the representation of their client for the *Constand* lawsuit. *See* Amended Complaint at ¶¶ 35, 37 (alleging Troiani and Kivitz involved in procuring, initiating and continuing the frivolous underlying action).

37. Castor also does not allege facts to establish the existence of an agreement between defendants made for the sole purpose of injuring Castor. Amended Complaint at ¶¶ 89-93.

38. Castor does not explain or identify how the filing of the *Constand* lawsuit was illegal or was accomplished by unlawful means. *Id.*

39. Castor, by way of relief for his abuse of process and conspiracy claims, seeks compensatory damages, attorneys' fees, costs and punitive damages. *See* Amended Complaint at pp. 30, 32.

40. Castor asserts a claim for abuse of process in Count II of his amended complaint. Abuse of process is a common law cause of action.

41. 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).

42. Illegitimate purposes include, for example, "extortion, forcing a defendant to surrender a legal right, or blackmail." *Mawson v. Pittston Police Dep't*, No. 13-1714, 2014 U.S.

Dist. LEXIS 102166, 2014 WL 3735133, at *10 (M.D. Pa. July 28, 2014); *Price v. City of Phila.*, 239 F. Supp. 3d 876, 904 (E.D. Pa. 2017).

43. “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)).

44. “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)).

45. Abuse of process is not an alternative to wrongful use of civil proceedings.

46. 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).

47. 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).

48. 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).

49. Continuing to pursue a claim that was initiated with malice does not transform a wrongful use or malicious prosecution claim into an action for abuse of process. *See Evans v. Durham Life Ins. Co.*, No. 00-281, 2001 U.S. Dist. LEXIS 9302, 2001 WL 770803, at *2 (E.D. Pa. 2001); *Giordano v. Murano-Nix*, No. 12-7034, 2014 U.S. Dist. LEXIS 1861, at *41 (E.D. Pa. Jan. 7, 2014).

50. Count II of Castor's complaint, although titled abuse of process, is based on the procurement, initiation and continuation of the *Constand* lawsuit.

51. Castor alleges the *Constand* lawsuit was filed maliciously, for an improper purpose, lacked probable cause and was the product of grossly negligent conduct. *See* Amended Complaint at ¶ 95.

52. Castor also identifies certain litigation activities he contends are acts of abuse of process which occurred during the *Constand* lawsuit. Amended Complaint at ¶ 98.

53. Redress for a frivolous and ill-motivated lawsuit is allowed only 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.*

54. Section 8351 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).

55. 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).

56. 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).

57. 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 expire. *Buchleitner v. Perer*, 794 A.2d 366 (Pa. Super. 2002); *Ludmer v. Nernberg*, 520 Pa. 218, 553 A.2d 924 (1989).

58. The language of Castor’s amended complaint tracks the language of the Dragonetti Act, 42 Pa.C.S.A. § 8351.

59. Castor’s amended complaint, based on the procurement, initiation and continuation of the *Constand* lawsuit, is based on a proceeding rather than process.

60. Castor asserts he was wrongfully sued in the *Constand* lawsuit. Amended Complaint at ¶ 33.

61. The wrongful procurement, initiation or continuation of a lawsuit alleged in, *inter*

alia, paragraphs 32, 35, 37, 85, 86, 87 and 95 of Castor’s amended 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.

62. Pursuit of the *Constand* lawsuit is not actionable as an abuse of process.

63. Kivitz, Troiani and their law firms are not alleged to have received any personal benefit as a result of the *Constand* action that is not authorized.

64. 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.

65. “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).

66. The privilege is impenetrable.

67. 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).

68. The pendency of the *Constand* lawsuit precludes Castor from stating a claim for wrongful use of civil proceedings.

69. Castor cannot satisfy the “termination in favor of” element of a wrongful use

claim. *See* 42 Pa. C.S.A. § 8351(a)(2).

70. While Castor seeks to avoid the “termination in favor of” requirement by asserting abuse of process as his claim, Castor’s amended complaint, based on the commencement and continuation of the *Constand* lawsuit, does not allege an abuse of process claim.

71. 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.

72. An abuse of process claim is not a permissible means for Castor to collaterally attack the *Constand* lawsuit.

73. The pendency of the *Constand* lawsuit also precludes Castor from stating an abuse of process claim based on the procurement, initiation and continuation of the *Constand* lawsuit.

74. For an abuse of process claim to be ripe for adjudication, the alleged abusive process must complete. *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).

75. 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.

76. 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.

77. The *Constand* litigation continues and has not been completed. Amended Complaint at ¶¶ 33, 81.

78. Castor’s claim is not ripe for adjudication.

79. Castor’s amended complaint also identifies certain litigation activities in the *Constand* lawsuit as the basis for his abuse of process claim. *See* Amended Complaint at ¶ 98.

80. These include: the submission of discovery requests to allegedly harass Castor; filing a motion seeking the application of Canadian law to the *Constand* lawsuit; filing a motion to reopen discovery after it closed; filing motions after *Constand* allegedly testified Castor’s statements were true; and the continued pursuit of claims for damages in the form lost earnings and harm to reputation and for false light invasion of privacy and defamation *per se* after it allegedly became clear there was no evidence to support the claims. Amended Complaint at ¶ 98.

81. None of the litigation activities is a basis for an abuse of process claim.

82. The continued pursuit of claims for false light invasion of privacy, defamation *per se* and particular damages is not an abuse of process.

83. Continuing to pursue a claim that allegedly was initiated with malice does not transform a wrongful use claim into an action for abuse of process. *See Evans v. Durham Life Ins. Co.*, 2001 U.S. Dist. LEXIS 9302 at *7-8, 2001 WL 770803, at *2; *Giordano v. Murano-Nix*, 2014 U.S. Dist. LEXIS 1861, at *41.

84. Castor does not allege ‘perversion’ of properly issued process in connection with the continuation of these claims.

85. Castor does not allege facts to establish the continued pursuit of claims in the *Constand* litigation is use of a process to accomplish a purpose for which the process was not designed.

86. The continued prosecution of claims to their conclusion is not a basis for liability for abuse of process, even if done with bad intentions. *Hart v. O’Malley*, 436 Pa. Super. at 173.

87. The amended complaint does not include facts to establish the submission of discovery requests or the filing of motions in the *Constand* action was an abuse of process.

88. Castor does not allege facts to establish Troiani or Kivitz, in connection with the pursuit of discovery, committed an act or made a threat not authorized for discovery.

89. There is no allegation Kivitz and Troiani sought or attempted to obtain anything other than responses to the requests.

90. There is no allegation, for example, the discovery requests were used to extort a payment from Castor or to coerce Castor to surrender a legal right.

91. Castor does not describe use of discovery other than as authorized. The allegation that the discovery requests were “targeted to harass Castor,” is not a basis for liability.

92. “[T]here is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose

of benefit to the defendant.” *Rosen v. Am. Bank of Rolla*, 627 A.2d at 192.

93. Similarly, the amended complaint does not contain facts to establish that the motions were filed for a purpose for which they were not designed.

94. There are no facts alleged to establish the motions were filed reasons other than the adjudication of the issues raised therein.

95. Finally, the amended complaint does not allege the discovery requests or the motions were not carried out to their authorized conclusions. *See Shiner*, 706 A.2d at 1236 (no liability for abuse of process where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions).

96. Count II of Castor’s amended complaint fails to state a claim for abuse of process.

97. Count II should be dismissed with prejudice.

98. Castor asserts a claim for civil conspiracy in count one of the amended complaint.

A conspiracy claim requires a substantive tort the defendants conspired to commit. *Rose v. Wissinger*, 439 A.2d 1193, 1199 (Pa. Super. 1982).

99. The substantive tort defendants allegedly conspired to commit was abuse of process.

100. There was no object of the conspiracy because Castor fails to state a claim for abuse of process.

101. Whether Castor states a claim for conspiracy also depends on Castor having alleged sufficient facts to establish the elements of a conspiracy claim.

102. To state a cause of action for civil conspiracy, Castor 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).

103. 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).

104. “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)).

105. “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*).

106. There is no liability for an agreement which does not have tortious conduct as the objective of the conspiracy.

107. 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).

108. 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.

109. 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).

110. 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).

111. 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.

112. “[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). See also, *Thompson Coal Co.*, 488 Pa. 198, 412 A.2d 466 (where facts presented indicated that one of the alleged conspirators was acting to advance the legitimate business interests of his client and his own interests, conspiracy claim failed).

113. 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).

114. Castor’s conspiracy claim is based on a conspiracy between Constand, her attorneys and “third parties.” Amended Complaint at ¶ 89.

115. The only third party identified in the amended complaint as an alleged conspirator

is Kevin Steele, Castor's opponent in the election or Montgomery County District Attorney. Amended Complaint at ¶ 16.

116. Defendants and Steele allegedly conspired to make "Castor's decision not to prosecute Cosby a central issue in the campaign." *Id.*

117. The amended complaint, however, does not allege facts to establish an agreement between the defendants and Steele to abuse process.

118. The amended complaint is devoid of any allegations of involvement by Steele in the procurement, initiation or continuation of the *Constand* lawsuit or the pursuit of discovery or motion practice in the *Constand* lawsuit.

119. There are no facts alleged from which an agreement between defendants and Steele can be inferred such as meetings, conferences, telephone calls or written statements. *See Petula*, 138 Pa. Commw. at 419.

120. There is no allegation that defendants made an agreement with Steele to engage in concerted conduct to commit an unlawful act or a lawful act by unlawful means.

121. The filing and pursuit of Constand's action against Castor was permitted by law.

122. Castor does not allege facts to establish the requisite malice--that the sole purpose of defendants' and Steele's conduct was to injure Castor.

123. Steele's alleged conduct in making Castor's decision not to prosecute Cosby a central issue in the election was for the legitimate purpose of advancing Steele's interests in winning the election.

124. 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.

125. Castor fails to allege facts to establish a conspiracy between defendants and Kevin Steele.

126. Count I of the amended complaint should be dismissed with prejudice.

127. Castor cannot allege a conspiracy claim based on a conspiracy between lawyers and their client.

128. It is well-settled that lawyers 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).

129. 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.

130. 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.

131. 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.

132. A lawyer cannot be liable for conspiracy if his or her 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).

133. 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).

134. 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.

135. 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.

136. 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 (9th Cir. 1982)).

137. Castor's conspiracy claim is based on conduct by Kivitz and Troiani as lawyers in the representation of their client.

138. They are alleged to be the attorneys involved in procuring, initiating and continuing the allegedly frivolous *Constand* lawsuit against Castor. Amended Complaint at ¶¶ 35, 37.

139. 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.

140. Castor's conspiracy claim against Kivitz, Troiani and their law firms is barred by the intra-corporate conspiracy doctrine.

141. Castor, as a matter of law, cannot state a claim against Kivitz, Troiani or their law firms for conspiracy.

142. Count I of the amended complaint should be dismissed against Kivitz, Troiani and their law firms with prejudice.

143. Castor also fails to allege facts to establish an agreement existed between the defendants to abuse process.

144. There are no facts alleged to establish defendants made an agreement with each

other to engage in concerted conduct to commit an unlawful act or a lawful act by unlawful means.

145. The filing and pursuit of Constand's action against Castor was permitted by law and the litigation activity complained of by Castor was authorized litigation activity.

146. Castor also does not allege facts to establish malice on the part of defendants.

147. Kivitz's and Troiani's actions were in their capacity as attorneys to their client, Constand, 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.

148. Because Castor fails to allege facts to establish the elements for a civil conspiracy between defendants, Count I of the amended complaint should be dismissed.

149. Castor, in the *ad damnum* clause of each count of his amended complaint, seeks recovery of attorney's fees incurred in the prosecution of this action.

150. 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.

151. 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.)

152. 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 amended complaint.

153. Pennsylvania law does not permit the recovery of attorney's fees from an adverse party for those claims.

154. Castor's requests for attorney's fees should be stricken from the amended complaint.

155. 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. Amended Complaint at ¶¶ 8, 41-63, and exhibits A-F.

156. Paragraphs 8, 41 through 63 and exhibits A through F of Castor's amended complaint describe in graphic detail the sexual assault suffered by Ms. Constand and the criminal investigation that ensued.

157. The averments and exhibits are immaterial to Castor's civil conspiracy and abuse of process claims.

158. 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.

159. 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*.

160. 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.

161. To require defendants to respond to what are plainly irrelevant and immaterial allegations would prejudice them.

162. 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.

163. Paragraphs 8, 41-63, and exhibits A-F of the amended complaint should be stricken as scandalous and impertinent matter.

164. 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* Amended Complaint at ¶¶ 12, 13, 65, 66, and 67.

165. 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.

166. 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.

167. 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.

168. 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.

169. Defendants should not be required to expend time and expense responding to averments which have no conceivable relevance to the claims alleged by Castor.

170. Paragraphs 12, 13, 65, 66, and 67 of the amended complaint also should be stricken as scandalous and impertinent matter.

WHEREFORE, Defendants, Bebe H. Kivitz, Esquire, Jacobs Kivitz & Drake, LLC, Dolores M. Troiani, Esquire, and Troiani & Gibney, LLP, respectfully request the Court sustain their preliminary objections and dismiss plaintiff's amended complaint with prejudice.

Alternatively, defendants request the Court strike paragraphs 8, 12, 13, 41-63, 65-67 and exhibits A-F of the Amended Complaint and strike plaintiff's requests for attorneys' fees incurred in the prosecution of this action.

Respectfully submitted,

SWARTZ CAMPBELL LLC

/s/Jeffrey B. McCarron

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Dated: January 8, 2018

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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.	:	

BRIEF OF DEFENDANTS, BEBE H. KIVITZ, ESQUIRE, JACOBS, KIVITZ & DRAKE, LLC, DOLORES M. TROIANI, ESQUIRE AND TROIANI & GIBNEY, LLP IN SUPPORT OF PRELIMINARY OBJECTIONS TO PLAINTIFF’S AMENDED COMPLAINT

I. Introduction

This action for abuse of process and civil conspiracy arises from the prosecution of an existing lawsuit by defendant, Andrea Constand (“Constand”) against plaintiff, Bruce Castor (“Castor”). Castor’s amended complaint does not resolve the deficiencies of his claims.¹ Castor is still pursuing recovery for a lawsuit he has not won. His added adjectives and list of litigation

¹ A copy of the Amended Complaint is attached hereto as Exhibit A.

activities do not make a valid case. None of the listed litigation activities reflects process was used for a purpose for which it was not designed. Castor's list--discovery requests, motions and the continued assertion of claims--are authorized activities during litigation and were not used for another purpose. Castor's amendments did not alter the nature of the case as a claim for frivolous litigation against lawyers representing their client. The action remains invalid.

Constand sued Castor for defamation and false light invasion of privacy. Castor's lawsuit, based on his contention that Constand's lawsuit is frivolous, ill-motivated and influenced voters causing him to lose the election for Montgomery County District Attorney, is premature. No claim has accrued because Constand's lawsuit has not terminated and Castor has not received an adjudication in his favor. Castor cannot pursue Constand and her lawyers while he faces liability to Constand.

Castor's contention that his claim is for abuse of process is inconsistent with his description of the basis for his claim. Castor contends Constand's lawsuit and her lawyer's litigation related conduct 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 only 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 a proceeding.

Castor's addition of a list of litigation activity he contends were used during the proceeding, *Constand* lawsuit, does not identify process that was misused or not carried out to its authorized conclusion. Castor's 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. Although Castor now contends defendants conspired with Kevin Steele, Castor's opponent in the election for district attorney, the amended complaint contains no facts to establish Steele was part of an agreement to abuse process. Castor has 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. However, a lawyer is not a conspirator with a client. Castor also did not allege an agreement existed between defendants, they acted illegally or by unlawful means, or that 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, 41-63, 65-67 and exhibits A-F of the amended 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, by not prosecuting Cosby, he set the stage for Constand to obtain a big payment also is not a defense to the defamation and false light claims. Scandalous and impertinent matter is not permitted and should be stricken from the amended complaint.

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 plaintiff's amended 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 Castor's amended complaint states a claim for abuse of process?

Suggested Answer: No.

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

Suggested Answer: No.

C. Whether Castor'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, 41-63, and exhibits A-F should be stricken from the amended complaint?

Suggested Answer: Yes.

E. Whether impertinent allegations relating to the settlement of the civil lawsuit against Mr. Cosby contained in paragraphs 12, 13, 65-67 should be stricken from the amended complaint.

Suggested Answer: Yes.

IV. Facts

Castor filed his complaint in this action on November 1, 2017. Defendants, Kivitz, Troiani and their law firms filed preliminary objections to the complaint on November 21, 2017. Thereafter, on December 18, 2017, Castor filed an amended complaint. The amended complaint, like the original complaint, involves claims for abuse of process and civil conspiracy asserted by Castor against Constand and her lawyers and their law firms. *See generally*, Amended Complaint. 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. Amended Complaint at ¶¶ 4, 9. Castor declined to prosecute Cosby. Amended Complaint at ¶ 9.

Castor pursued election as the district attorney for Montgomery County. Amended Complaint at ¶¶ 13. During his campaign, Castor made statements to the press about Constand to justify and explain his decision not to prosecute Cosby. Amended Complaint at ¶ 69-70. Constand commenced a civil 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. Amended Complaint at ¶¶ 24, 71, Exhibit H. Constand's lawsuit against Castor has not terminated and continues against him. Amended Complaint at ¶¶ 81, 97, 101.

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." Amended Complaint at ¶¶ 35, 37. Kivitz is affiliated with the law firm Jacobs, Kivitz & Drake, LLC and Troiani is affiliated with the law firm Troiani & Gibney. Amended Complaint at ¶¶ 36, 38. The law firms are included for vicarious liability. Amended Complaint at ¶ 39.

Castor relies on a proceeding--*Constand v. Castor*, No. 15-cv-05799 (U.S.D.C. E.D. Pa.)-- for the process he contends was abused by defendants. *See* Amended Complaint at ¶¶ 17, 18, 24, 25, 26, 29, 30, 32, 76, 77, 79, 80, 85, 86, 87, 95 and 96. Castor contends he was and continues to be wrongfully sued in the *Constand* lawsuit. Amended Complaint at ¶ 33. Castor alleges Constand's lawsuit against him is:

- "a tactically pled and timed lawsuit" (Amended Complaint at ¶ 17);
- A "tactically timed, patently frivolous and knowingly false lawsuit" (Amended Complaint at ¶ 24);
- a "legally flawed lawsuit" (Amended Complaint at ¶ 26);
- "a sham lawsuit" (Amended Complaint at ¶ 27);
- a "frivolous malicious filing" (Amended Complaint at ¶ 32);
- a "bogus lawsuit" (Amended Complaint at ¶¶ 23, 29);

- a “knowingly frivolous” lawsuit (Amended Complaint at ¶¶ 33, 35, 37, 96)
- a “knowingly false and frivolous lawsuit” (Amended Complaint at ¶¶ 71)
- a “frivolous lawsuit” (Amended Complaint at 76, 77);
- an “outlandish” lawsuit (Amended Complaint at ¶ 81);
- a “baseless lawsuit” (Amended Complaint at ¶ 81); and
- a malicious action (Amended Complaint at ¶ 85).

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. Amended Complaint at ¶¶ 28, 33, 35, 37, 71, 76, 77, 85, 86, 90, 96, 99. The alleged improper purpose was to fix the 2015 district attorney election, destroy Castor’s political prospects and reputation and further the defendants’ own goals. Amended Complaint at ¶ 97. Castor does not allege or identify a definite act or threat by Kivitz or Troiani not authorized by process or aimed at an objective not legitimate in the use of process. 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 the *Constand* action. Castor does not allege the *Constand* lawsuit has terminated in his favor. The *Constand* lawsuit is still being actively litigated and has not terminated. Amended Complaint at ¶ 81.

In addition to the initiation, procurement and continuation of the *Constand* lawsuit, Castor lists the following litigation activities as acts of abuse of process committed by defendants during the *Constand* action:

- submitting discovery requests in the *Constand* case to harass Castor;
- continuing to pursue knowingly false claims that Constand suffered lost earnings until defendants withdrew Constand’s claim for lost earnings;

- continuing to pursue knowingly false claims that Constand suffered in her business until defendants withdrew that claim;
- pursuing knowingly false claims that Constand 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” when the defendants knew these claims were fabricated;
- continuing to prosecute a defamation *per se* claim when the claim does not fit into the criteria for this claim;
- filing a motion seeking application of Canadian law to the lawsuit when defendants knew or should know that Canadian law does not recognize false light as a cause of action;
- filing a motion to reopen discovery after discovery had closed;
- failing to withdraw the false light claim in light of the “frivolous” motion to apply Canadian law; and
- continuing to file motions after Constand testified that Castor’s statements were true.

Amended Complaint at ¶ 98. The litigation activities include the continued prosecution of certain claims, the filing of certain motions and the pursuit of discovery. Castor does not allege or identify a definite act or threat committed by Kivitz or Troiani which was not authorized in the use of listed litigation activities. Castor does not allege an act or threat by Kivitz and Troiani aimed at an objective not legitimate in the use of the litigation activities. Castor does not allege defendants sought anything other than the authorized conclusion of the claims, motions or discovery.

Castor’s civil conspiracy claim is based on an alleged conspiracy to abuse process. *See* Amended Complaint at ¶¶ 88-93. Castor contends Constand conspired with her attorneys “and with third parties” to harm Castor and his reputation by filing and continuing the *Constand*

lawsuit. Amended Complaint at ¶¶ 89-90. The only person, other than defendants, identified as a conspirator, is Kevin Steele, Castor's opponent in the general election for district attorney.

Amended Complaint at ¶ 16. The sole allegation relating to Steele's participation in the alleged conspiracy states as follows:

16. As part of their scheme and plot against Castor, Defendants assisted Kevin Steele, Castor's opponent in the General Election for District Attorney, leading the public to believe that Castor had carelessly overlooked the Cosby prosecution in 2005, thereby assisting with and conspiring with Steele in making Castor's decision not to prosecute Cosby a central issue in the campaign.

Amended Complaint at ¶ 16. Castor alleges no conduct by Steele in furtherance of a conspiracy. Castor alleges no facts to support the existence of an agreement between defendants and Steele for the prosecution of *Constand* lawsuit. Castor does not allege any involvement by Steele in the *Constand* lawsuit. Castor does not allege facts to establish the existence of an agreement between defendants and Steele made for the sole purpose of injuring Castor. Amended Complaint at ¶¶ 89-93

The conduct by Kivitz and Troiani which forms the basis of Castor's conspiracy claim is conduct in the representation of their client for the *Constand* lawsuit. See Amended Complaint at ¶¶ 35, 37 (alleging Troiani and Kivitz involved in procuring, initiating and continuing the frivolous underlying action). Castor also does not allege facts to establish the existence of an agreement between defendants made for the sole purpose of injuring Castor. Amended Complaint at ¶¶ 89-93. Castor does not explain or identify 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 Amended Complaint at pp. 30, 32.

V. Argument

A. Preliminary Objection Standard

1. Demurrer

Kivitz, Troiani and their law firms challenge the legal sufficiency of the claims asserted by plaintiff in his amended 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 asserts a claim for abuse of process in Count II of his amended 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). Illegitimate purposes include, for example, “extortion, forcing a defendant to surrender a legal right, or blackmail.” *Mawson v. Pittston Police Dep't*, No. 13-1714, 2014 U.S. Dist. LEXIS 102166, 2014 WL 3735133, at *10 (M.D. Pa. July 28, 2014); *Price v. City of Phila.*,

239 F. Supp. 3d 876, 904 (E.D. Pa. 2017). “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). Continuing to pursue a claim that was initiated with malice does not transform a wrongful use or malicious prosecution claim into an action for abuse of process. *See*

Evans v. Durham Life Ins. Co., No. 00-281, 2001 U.S. Dist. LEXIS 9302, 2001 WL 770803, at *2 (E.D. Pa. 2001); *Giordano v. Murano-Nix*, No. 12-7034, 2014 U.S. Dist. LEXIS 1861, at *41 (E.D. Pa. Jan. 7, 2014).

2. The Procurement, Initiation or Continuation of the *Constand* Lawsuit Is Not an Abuse of Process

Count II of Castor's complaint, although titled abuse of process, is based on the procurement, initiation and continuation of the *Constand* lawsuit. Castor alleges the *Constand* lawsuit was filed maliciously, for an improper purpose, lacked probable cause and was the product of grossly negligent conduct. *See* Amended Complaint at ¶ 95. Castor also identifies certain litigation activities he contends are acts of abuse of process which occurred during the *Constand* lawsuit. Amended Complaint at ¶ 98.

Redress for a frivolous and ill-motivated lawsuit is allowed only 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.* Section 8351 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 expire. *Buchleitner v. Perer*, 794 A.2d 366 (Pa. Super. 2002); *Ludmer v. Nernberg*, 520 Pa. 218, 553 A.2d 924 (1989).

The language of Castor’s amended complaint tracks the language of the Dragonetti Act, 42 Pa.C.S.A. § 8351. Castor’s amended complaint, based on the procurement, initiation and continuation of the *Constand* lawsuit, is based on a proceeding rather than process. Castor asserts he was wrongfully sued in the *Constand* lawsuit. Amended Complaint at ¶ 33. The wrongful procurement, initiation or continuation of a lawsuit alleged in, *inter alia*, paragraphs 32, 35, 37, 85, 86, 87 and 95 of Castor’s amended 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.

Pursuit of the *Constand* lawsuit is not actionable as an abuse of process. Kivitz, Troiani and their law firms are not alleged to have received any personal benefit as a result of the

Constand action that is not authorized. 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 satisfy the “termination in favor of” element of a wrongful use claim. *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 amended 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.

The pendency of the *Constand* lawsuit also precludes Castor from stating an abuse of process claim based on the procurement, initiation and continuation of the *Constand* lawsuit. For an abuse of process claim to be ripe for adjudication, the alleged abusive process must complete.

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. Amended Complaint at ¶¶ 33, 81. Castor’s claim is not ripe for adjudication.

3. Castor Fails to Identify a Misuse of Process for Litigation Activities in the *Constand* Lawsuit

Castor’s amended complaint also identifies certain litigation activities in the *Constand* lawsuit as the basis for his abuse of process claim. *See* Amended Complaint at ¶ 98. These

include: the submission of discovery requests to allegedly harass Castor; filing a motion seeking the application of Canadian law to the *Constand* lawsuit; filing a motion to reopen discovery after it closed; filing motions after Constand allegedly testified Castor's statements were true; and the continued pursuit of claims for damages in the form lost earnings and harm to reputation and for false light invasion of privacy and defamation *per se* after it allegedly became clear there was no evidence to support the claims. Amended Complaint at ¶ 98. None of these litigation activities is a basis for an abuse of process claim.

The continued pursuit of claims for false light invasion of privacy, defamation *per se* and particular damages is not an abuse of process. Continuing to pursue a claim that allegedly was initiated with malice does not transform a wrongful use claim into an action for abuse of process. *See Evans v. Durham Life Ins. Co.*, 2001 U.S. Dist. LEXIS 9302 at *7-8, 2001 WL 770803, at *2; *Giordano v. Murano-Nix*, 2014 U.S. Dist. LEXIS 1861, at *41. Castor does not allege 'perversion' of properly issued process in connection with the continuation of these claims. Castor does not allege facts to establish the continued pursuit of claims in the *Constand* litigation is use of a process to accomplish a purpose for which the process was not designed. The continued prosecution of claims to their conclusion is not a basis for liability for abuse of process, even if done with bad intentions. *Hart v. O'Malley*, 436 Pa. Super. at 173.

The amended complaint does not include facts to establish the submission of discovery requests or the filing of motions in the *Constand* action was an abuse of process. Castor does not allege facts to establish Troiani or Kivitz, in connection with the pursuit of discovery, committed an act or made a threat not authorized for discovery. There is no allegation Kivitz and Troiani sought or attempted to obtain anything other than responses to the requests. There is

no allegation, for example, the discovery requests were used to extort a payment from Castor or to coerce Castor to surrender a legal right. Castor does not describe use of discovery other than as authorized. The allegation that the discovery requests were “targeted to harass Castor,” is not a basis for liability. “[T]here is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant.” *Rosen v. Am. Bank of Rolla*, 627 A.2d at 192. Similarly, the amended complaint does not contain facts to establish that the motions were filed for a purpose for which they were not designed. There are no facts alleged to establish the motions were filed reasons other than the adjudication of the issues raised therein. Finally, the amended complaint does not allege the discovery requests or the motions were not carried out to their authorized conclusions. *See Shiner*, 706 A.2d at 1236 (no liability for abuse of process where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions).

Count II of Castor’s amended complaint fails to state a claim for abuse of process. Count II should be dismissed with prejudice.

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 asserts a claim for civil conspiracy in count one of the amended 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 fails to state a claim for abuse of process.

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, Castor 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. Mellody*, 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). 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). See also, *Thompson Coal Co.*, 488 Pa. 198, 412 A.2d 466 (where facts presented indicated that one of the alleged conspirators was acting to advance the legitimate business interests of his client and his own interests, conspiracy claim failed). 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).

a. Castor Fails to Allege a Conspiracy with Kevin Steele

Castor's conspiracy claim is based on a conspiracy between Constand, her attorneys and "third parties." Amended Complaint at ¶ 89. The only third party identified in the amended complaint as an alleged conspirator is Kevin Steele, Castor's opponent in the election or Montgomery County District Attorney. Amended Complaint at ¶ 16. Defendants and Steele allegedly conspired to make "Castor's decision not to prosecute Cosby a central issue in the campaign." *Id.* The amended complaint, however, does not allege facts to establish an agreement between the defendants and Steele to abuse process. The amended complaint is devoid of any allegations of involvement by Steele in the procurement, initiation or continuation of the *Constand* lawsuit or the pursuit of discovery or motion practice in the *Constand* lawsuit. There are no facts alleged from which an agreement between defendants and Steele can be inferred such as meetings, conferences, telephone calls or written statements. *See Petula*, 138 Pa. Commw. at 419. There is no allegation that defendants made an agreement with Steele 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 does not allege facts to establish the requisite malice--that the sole purpose of defendants' and Steele's conduct was to injure Castor. Steele's alleged conduct in making Castor's decision not to prosecute Cosby a central issue in the election was for the legitimate purpose of advancing Steele's interests in winning the election. 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.

Castor fails to allege facts to establish a conspiracy between defendants and Kevin Steele. Count I of the amended complaint should be dismissed with prejudice.

b. Civil Conspiracy Claims Against Lawyers Are Not Actionable

Castor cannot allege a conspiracy claim based on a conspiracy between lawyers and their client. It is well-settled that lawyers 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. Oriel*, 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 or her 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 (9th 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. Amended Complaint at ¶¶ 35, 37. 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 amended complaint should be dismissed against Kivitz, Troiani and their law firms with prejudice.

c. Castor Fails to Allege Facts to Establish the Elements for a Civil Conspiracy Between Defendants

Castor also fails to allege facts to establish an agreement existed between the defendants to abuse process. There are no facts alleged to establish 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 and the litigation activity complained of by Castor was authorized litigation activity. Castor also does

not allege facts to establish malice on the part of defendants. Kivitz's and Troiani's actions were in their capacity as attorneys to their client, Constand, 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 elements for a civil conspiracy between defendants, Count I of the amended 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 amended 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 amended complaint. Pennsylvania law does not permit

the recovery of attorney's fees from an adverse party for those claims. Castor's requests for attorney's fees should be stricken from the amended 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. Amended Complaint at ¶¶ 8, 41-63, and exhibits A-F. Paragraphs 8, 41 through 63 and exhibits A through F of Castor's amended 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, 41-63, and exhibits A-F of the amended 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* Amended Complaint at ¶¶ 12, 13, 65, 66, and 67. 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, 65, 66, and 67 of the amended 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 the Court sustain their preliminary objections and dismiss plaintiff's amended complaint with prejudice. Alternatively, defendants request the Court strike paragraphs 8, 12, 13, 41-63, 65-67 and exhibits A-F of the Amended Complaint and

strike plaintiff's requests for attorneys' fees incurred in the prosecution of this action.

Respectfully submitted,

SWARTZ CAMPBELL LLC

/s/Jeffrey B. McCarron

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Gibney, LLP*

Dated: January 8, 2018

CERTIFICATE OF SERVICE

Jeffrey B. McCarron, Esquire certifies that he caused a true and correct copy of the preliminary objections of defendants, Bebe H. Kivitz, Esquire, Jacobs Kivitz & Drake, LLC, Dolores M. Troiani, Esquire and Troiani & Gibney, LLP, to plaintiff's amended complaint to be served on counsel listed below by email and U.S. Mail, postage prepaid on January 8, 2018:

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