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ALAN R. LEVY and LISA S.
VANDEVER-LEVY,

Appellants/Plaintiffs/Counter-Defendants,

vs.

TOM O'REILLY, JOANNA
PAPADAKIS, BILL TOMKIEWICZ,
RAHWAY COMMUNITY VOICE, JOHN
DOES 1-10 (FICTITIOUS NAMES
REPRESENTING UNKNOWN
INDIVIDUALS) AND/OR XYZ CORP. 1-
10 (FICTITIOUS NAMES
REPRESENTING UNKNOWN
CORPORATIONS, PARTNERSHIPS,
AND/OR LIMITED LIABILITY
COMPANIES OR OTHER TYPES OF
LEGAL ENTITIES),

*Respondents/Defendants/Counter-
Plaintiffs.*

SUPERIOR COURT OF NEW
JERSEY APPELLATE DIVISION

Appellate Docket No.: A-000760-25

On an Appeal from the Superior
Court of New Jersey Chancery
Division: Union County

Sat Below:
The Hon. Robert J. Mega, P.J.Ch.

Trial Court Docket No.:
UNN-C-0088-24

**OPENING AMENDED BRIEF OF
APPELLANTS/PLAINTIFFS/
COUNTER-DEFENDANTS IN
SUPPORT OF APPEAL**

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INTRODUCTION

The Litigation Privilege bars tort claims arising from conduct and statements made in the course of judicial proceedings. See Loigman v. Twp. Comm. of Twp. of Middletown, 185 N.J. 566 (2009). It is unquestionable that no tort claim arises when the alleged tortious conduct is *filing of a motion*. Certainly, there can be *consequences* for improper motions. Sanctions are available, and so is bar discipline. A tort? No. The Litigation Privilege bars that. The lower court misunderstood that.

In the underlying action, Appellants are Plaintiffs in a free speech case who moved to disqualify Respondents' counsel. They lost that motion. Respondents then filed a Counterclaim for Malicious Abuse of Process. What was the underlying conduct that the Respondents claim was an abuse of process? The filing of a motion and extrajudicial statements that the Appellants made about public officials.¹ Appellants moved to Dismiss the Counterclaim per New Jersey's Anti-SLAPP law, the Uniform Public Expression Protection Act ("UPEPA"). See N.J.S.A. § 2A:53A-49 *et. seq.* However, the Lower Court denied the motion, holding the UPEPA doesn't apply since filing motions does not fit the definition of petitioning activity (which doesn't make sense), and the Litigation Privilege does not apply to motions (a never-before-recognized exception to the Litigation Privilege).

¹ There is no accusation that the extrajudicial statements are defamatory, merely that they were "critical." (Pa150-152)

While the underlying action is not germane to the appeal, the Court may appreciate context: The underlying action is a “Pruneyard Case,” which is when a state’s free speech clause applies to censorship in privately owned venues, if it is held out as a “town square.” While the First Amendment generally doesn’t apply to private actors or property, Article I, §6 of New Jersey’s State Constitution protects freedom of speech as a *positive right*, not merely a negative restriction on governmental power. See State v. Schmid, 84 N.J. 535 (1980) citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980). (privately owned “public squares” are bound by State Constitution free speech protections) Appellants/Plaintiffs/Counter-Defendants, ALAN R. LEVY and LISA S. VANDEVER-LEVY (“Appellants”) are politically active residents of the CITY OF RAHWAY who filed suit alleging they suffered viewpoint discrimination from Respondents/Defendants/Counter-Plaintiffs, THOMAS O’REILLY, JOANNA PAPADAKIS, and BILL TOMKIEWICZ (“Respondents”) as a result of being censored and banned from the Rahway Community Voice, a privately owned social media page holding itself out as Rahway’s “public square.” Appellants were banned for criticizing Rahway public officials, and filed their Pruneyard case against Respondents.

Respondent, O’REILLY retained Rainone Coughlin & Minchello and moved to dismiss the case. After the Motion to Dismiss was denied, Appellants filed a Motion to Disqualify Rainone Coughlin & Minchello from simultaneously

representing all three Respondents due to unwaivable conflicts of interests. The Lower Court denied disqualification with no allegation or hint the Disqualification Motion was frivolous or improper. Respondents then filed a Counterclaim alleging Appellants committed Malicious Abuse of Process filing the Motion to Disqualify with an “ulterior motive” and because Appellants wrote social media posts criticizing their law firm along with Rahway elected officials. The entire Counterclaim is an attack on Appellants’ rights of speech and petitioning. A proper application of UPEPA’s two-step process, requires dismissal of the Counterclaim.

Step One of the UPEPA is doubly met in this case since the Counterclaim is “based on” Appellants: 1) engaging in petitioning activity and 2) exercise of speech on “matters of public concern.” Meanwhile, Step Two is met since a Malicious Abuse of Process claim fails under any standard. Motions in active litigation are immune from civil liability due to the Litigation Privilege and Noerr-Pennington doctrine. Also, a motion does not meet the legal definition of “Process.” Even if it did, there was nothing improper about the disqualification motion.

This Court should remand this matter to the trial court with instructions to dismiss the Counterclaim with prejudice, awarding fees and costs.

RELEVANT PROCEDURAL HISTORY²

On 10/3/24, Appellants filed an Amended Verified Complaint against Respondents alleging they were censored/banned from The Rahway Community Voice in violation of the New Jersey State Constitution. (Pa25-38). On 2/18/25, the Lower Court denied Respondent O'REILLY's Motion to Dismiss. (Pa39-44). O'REILLY filed an Answer on 3/4/25 while PAPADAKIS and TOMKIEWICZ filed their Answers on 4/9/25. (Pa45-64).

On 4/21/25, Appellants moved to Disqualify Rainone Coughlin & Minchello from representing all three Respondents simultaneously due to unwaivable conflicts of interests because of simultaneous representation of Rahway and their interference with a settlement agreement. (Pa65-98).³ On 6/24/25, the Lower Court denied Plaintiff's Motion to Disqualify. (Pa131-136). On 7/21/25, Defendants filed the Counterclaim. (Pa143-153).⁴

On 8/28/25, Appellants filed an Order to Show Cause under the UPEPA to dismiss the Counterclaim with prejudice. (Pa17-153). On 9/30/25, Respondents Opposed Appellants' OTSC. (Pa154-179). Oral Argument was held on 10/10/25. (1T1-11). On 10/29/25, the Lower Court denied Appellants' OTSC. (Pa1-16). On 10/30/25, Appellants filed a Notice of Appeal. (Pa180-183).

² Pa = Appendix of Appellants: 1T1-11 = Transcript of 10/10/25 Oral Argument.

³ Pursuant to R. 2:6-1(a)(2), Appellants' Lower Court Brief is included in the Appendix because it is referred to in the Lower Court Order/Decision which is subject to this Appeal. (Pa14).

⁴ The Counterclaim heading says "Malicious Use of Process," an obvious typo.

STATEMENT OF RELEVANT FACTS

Appellants are Rahway residents who were censored and banned from the Rahway Community Voice, due to viewpoint discrimination in violation of the State Constitutional protections for freedom of expression. (Pa25-38). Appellants filed a lawsuit to vindicate their rights. (Id.)

Shortly after Respondent, O'REILLY's Motion to Dismiss was denied, Appellants filed a Motion to Disqualify Counsel based upon the reasonable belief that a Conflict of Interest existed. (Pa65-98) On 6/24/25, the Court denied the Motion in part, holding that New Jersey rules of ethics do not require counsel to communicate settlement offers to their clients if counsel does not want to do so (Pa131-136).⁵ Respondents filed their Counterclaim on 7/21/25. (Pa143-153).⁶ Counts #6 and #7 of the Counterclaim *explicitly* target Appellants' political speech:

6. Plaintiffs are admitted critics of the City of Rahway, its Mayor, and the law firm of Rainone Coughlin Minchello.
7. Plaintiffs routinely post comments on social media sites criticizing the City, its Mayor, and this law firm.

(Pa150-52). Counts #10 and #11 of the Counterclaim target petitioning activity:

10. Plaintiffs' attempt to disqualify this law firm from its continued representation of Defendants based upon Plaintiffs' admitted animosity towards the City and this law firm is an abuse of the

⁵ This novel view of the rules of ethics is not the subject of this appeal. Nevertheless, attorneys clearly have an obligation to communicate settlement offers to their clients. If that has changed in this state, then this Court should pronounce that departure from existing law with clarity. It might be helpful to address that in dicta, despite it not being a dispositive issue.

⁶ The Counterclaim heading says "Malicious Use of Process," an obvious typo.

legal process to intimidate, harass, and coerce Defendants to obtain a collateral advantage, specifically to obtain a settlement of the Plaintiffs' claim against Defendants.

11. Plaintiffs' Motion to Relieve Counsel is based upon ulterior motives by Plaintiffs against the City, its Mayor, and this law firm and was initiated with malice.

(Id.)

It is unusual for an Anti-SLAPP law to be triggered by claims against *both* speech and petitioning activity, but this Counterclaim runs the table. On 8/28/25, Appellants filed their OTSC to dismiss the Counterclaim with prejudice pursuant to the UPEPA. (Pa17-153). The Lower Court denied the OTSC on 10/29/25 and is the subject of this Appeal. (Pa1-16).

The Counterclaim *facially* violates the UPEPA. (Pa151) Appellants' Motion to Disqualify was filed in good faith, and Respondents have never even alleged that the Motion was frivolous, they simply opposed it on its merits. More importantly, even if the motion was improper or frivolous, any claim sounding in tort for Malicious Abuse of Process is precluded by the Litigation Privilege and the Noerr-Pennington doctrine. The Counterclaim is a SLAPP-suit retaliating against Appellants for exercising free speech and for petitioning the courts.

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

UPEPA denials are reviewed *de novo*. See Satz v. Starr, 482 N.J. Super. 55 (App. Div. 2025) (citing Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 9 (2019)).

II. OVERVIEW OF THE UPEPA’S TWO-STEP PROCESS. (RAISED BELOW, Pa8-10)

The UPEPA was enacted to protect citizens from retaliatory lawsuits designed to punish them for their right to speak freely and petition the courts on “matters of public concern.” *Id.* at § 2A:53A-50(b)(3). Here, Respondents filed a Counterclaim for Malicious Abuse of Process to punish Appellants for filing a motion in active litigation and for publicly criticizing governmental/political actors.

Upon signing the UPEPA into law on 9/7/23, New Jersey State Governor Phil Murphy issued a signing statement:

For far too long, the powerful have abused the justice system to suppress free speech through illegitimate lawsuits. By pursuing meritless court cases, these powerful parties aim to silence their critics by making it impossible for those with fewer resources to spend the time and money necessary to legally defend themselves. This law will expedite the process to get these cases dismissed on behalf of the journalists, small businesses, activists, and countless others who have been unfairly targeted by these lawsuits over the years.

Press Release, Off. of the Governor, Governor Murphy Signs Bipartisan Bill Protecting Against Lawsuits Designed to Suppress Free Speech (Sept. 7, 2023).⁷ See N.J.S.A. § 2A:53A-49 *et. seq.*; see also, Satz, 482 N.J. Super. at 55; Paucek v. Shaulis, 349 F.R.D. 498 (D.N.J. May 6, 2025); Stern v. Thomasson, 2025 N.J. Super. Unpub. LEXIS 1497 (Law Div. July 28, 2025). The UPEPA was enacted to protect citizens from retaliatory lawsuits designed to punish them for their right to speak

⁷ <https://www.nj.gov/governor/news/news/562023/20230907d.shtml>

freely and petition the courts on “matters of public concern.” Id. at § 2A:53A-50(b)(3). Here, Respondents filed a Counterclaim for Malicious Abuse of Process to punish Appellants for filing a motion in active litigation and for publicly criticizing governmental/political actors. The Lower Court’s ruling violates the UPEPA’s public policy goals and effectively gives permission to powerful parties to freely use Counterclaims to punish critics, journalists, activists, who seek to engage in and defend their Constitutional rights.

The UPEPA requires a two-step process. First, the moving party must establish that the cause of action against them is “based on” the movant’s:

1. communication in a legislative, executive, judicial, administrative, or other governmental proceeding;
2. communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or
3. exercise of the right of freedom of speech or of the press, the right to assembly or petition, or the right of association, guaranteed by the United States Constitution or the New Jersey Constitution, on a matter of public concern.

N.J.S.A. § 2A:53A-50(b). Once the movant makes this showing, the burden shifts to the non-movant to show one of the exceptions from N.J.S.A. § 2A:53A-50(b) prevents application of the statute; but no exception applies to this case.

Then the UPEPA proceeds to the second step which requires that the Counterclaim must be dismissed if any of the following three standards apply:

- (a) the responding party fails to establish a prima facie case as to each essential element of any cause of action in the complaint; or
- (b) the moving party establishes that:
 - (i) the responding party failed to state a cause of action upon which relief can be granted; or
 - (ii) there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

N.J.S.A. § 2A:53A-55(a)(3); see also Paucek, at *22-23. The Court must “consider the pleadings, the order to show cause application and supporting certifications, briefs, any reply or response to the order to show cause, and any evidence that could be considered in ruling on a motion for summary judgment.” N.J.S.A. § 2A:53A-54. If Movant prevails, the Court must award costs, reasonable attorney’s fees, and reasonable litigation expenses. See N.J.S.A. § 2A:53A-58(1); Paucek, at *25 (UPEPA’s fee-shifting provisions is “an important economic incentive reflecting the Legislature’s intention to broadly protect free speech rights,”).

While New Jersey has recently sprouted case law interpreting UPEPA, there is a national body of law which this Court may rely on in order to comply with the requirement that “in applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.” N.J.S.A. § 2A:53A-60.

The UPEPA provides an expedited procedure to dismiss claims that chill the exercise of fundamental constitutional rights including the rights of speech and

petition, both of which are explicitly targeted by the Counterclaim. Any claims implicating the UPEPA are subject to heightened early-case scrutiny and immunity from suit, not merely a defense against ultimate liability. See Satz v. Starr, 482 N.J. Super. 55, 64 (App. Div. 2025). Additionally, the statute imposes a presumption on the court to enter a stay of the underlying action while it is considering the OTSC. See N.J.S.A. § 2A:53A-52. Finally, the UPEPA also provides that, “a moving party may appeal as a matter of right from an order denying, in whole or in part, an order to show cause.” N.J.S.A. § 2A:53A-57.⁸

The Lower Court failed to properly apply the UPEPA’s two-step analysis. First, the Counterclaim is based on Appellants’ free speech and petitioning activity, hence Step One is triggered. Second, Step Two requires dismissal of Malicious Abuse of Process Counterclaim as it is precluded by the Absolute Immunity provided by the Litigation Privilege and Noerr-Pennington doctrine. Third, a motion is not “process” anyway.

III. UPEPA STEP ONE: THE UPEPA IS TRIGGERED BECAUSE THE COUNTERCLAIM TARGETS APPELLANTS’ FREE SPEECH AND RIGHT TO PETITION. (RAISED BELOW, Pa10-11)

Step One of the UPEPA applies to lawsuits “based on” a person’s:

exercise of the right of freedom of speech or of the press, the right to assembly or petition, or the right of association, guaranteed by the

⁸ R. 2:2-3(a)(3) that “non final” Orders are Appealable as of right “in such cases as are provided by law.”

United States Constitution or the New Jersey Constitution, on a matter of public concern

N.J.S.A. § 2A:53A-50(b)(3). see also Navellier v. Sletten, 52 P.3d 703, 711 (Cal. 2002) (with regard to California’s anti-SLAPP statute, that “[t]he . . . statute’s definitional focus is not the form of the plaintiff’s cause of action but, rather, the defendant’s activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning”).

UPEPA applies. In fact, it *doubly* applies since the Counterclaim is based on *both* the speech and petitioning activity of Appellants. Thus, the Counterclaim is *per se* “based on” the Plaintiffs’ exercise of their freedom of speech on matters of public concern as guaranteed by the New Jersey and United States Constitutions.

a) APPELLANTS’ RIGHT TO FREE SPEECH. (RAISED BELOW, Pa10-11)

The question of whether the Respondents’ Counterclaim is “based on” Appellants’ speech on a matter of public concern is apparent on the face of the counterclaim – they do not even try to hide it.

6. Plaintiffs are admitted critics of the City of Rahway, its Mayor, and the law firm of Rainone Coughlin Minchello.
7. Plaintiffs routinely post comments on social media sites criticizing the City, its Mayor, and this law firm.

(Pa150-52).

All that is required by Step One is that the Counterclaim is “based on” Appellants’ speech which the Counterclaim says for itself. What this is really about

is that Appellants criticized Rahway’s public officials and their law firm.⁹ As a high profile and politically connected firm, this firm is often the subject of *public* criticism.¹⁰ They seem to be offended by this criticism and are using this case as a vehicle to dissuade others from engaging in that kind of speech.

Appellants’ free speech rights are robustly protected by the Federal and State Constitutions. “Speech involving matters of public concern needs adequate breathing room in a democratic society [to promote] unrestrained debate.” Senna v. Florimont, 196 N.J. 469, 498 (2008) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 (1964)); Rocci v. Ecole Secondaire Macdonald-Cartier, 165 N.J. 149, 158 (2000) (“Speech related to matters of public concern occupies the highest rung of the hierarchy of First Amendment values, and such speech requires maximum protection.”). Viewed in full context, the chilling effect of Respondents’ Counterclaim is a message to political critics: if you express public criticism of elected officials or Rainone Coughlin & Minchello, you do so at your peril. You

⁹ This raises the question of whether the counterclaim was brought for the interests of the Respondents or the interests of the law firm. On its face, the purpose of the Counterclaim is to silence Appellants from engaging in political speech that the City, the Mayor, and Rainone Coughlin & Minchello don’t like. Why would Respondents authorize a claim to try to punish another party for criticizing their lawyers? The law firm of Rainone Coughlin & Minchello seems to be promoting their own interests while creating nothing but risk for their own clients.

¹⁰ “Assembly speaker’s law firm has made millions since he took power. Critics cry foul.” April 25, 2024: The Star Ledger (NJ). <https://www.nj.com/politics/2024/04/assembly-speakers-law-firm-has-made-millions-since-he-took-power-critics-cry-foul.html> “Income for Coughlin’s law firm doubled during his first year as speaker.” July 17, 2019: Politico, <https://www.politico.com/states/new-jersey/story/2019/07/17/income-for-coughlins-law-firm-doubled-during-his-first-year-as-speaker-1103416>

will be silenced; and if you use the Courts to petition for your Constitutional rights, you will face additional punishment—like frivolous Counterclaims. The Court must reverse the Lower Court’s denial of the UPEPA motion.

b) APPELLANTS’ RIGHT TO PETITION. (RAISED BELOW, Pa10-11)

The question of whether the Respondents’ Counterclaim is “based on” Appellants’ petitioning activity should take less than 30 seconds, because Respondents do not even try to hide it.

10. Plaintiffs’ attempt to disqualify this law firm from its continued representation of Defendants based upon Plaintiffs’ admitted animosity towards the City and this law firm is an abuse of the legal process to intimidate, harass, and coerce Defendants to obtain a collateral advantage, specifically to obtain a settlement of the Plaintiffs’ claim against Defendants.
11. Plaintiffs’ Motion to Relieve Counsel is based upon ulterior motives by Plaintiffs against the City, its Mayor, and this law firm and was initiated with malice.

(Pa150-152). It should not be controversial to say that filing a motion is petitioning activity. However, the Lower Court held that Step One of the UPEPA was not triggered by Appellants’ petitioning activity, holding:

In the present action, although the filing of a motion is in theory petitioning of the government – i.e., the Courts – the Court is nonetheless unpersuaded that UPEPA bars Defendants’ counterclaim. As a preliminary matter, the Court notes that the “petitioning activity” prong can be met by alleging a violation of guaranteed rights by the United States Constitution or the New Jersey constitution on a matter of public concern, as pled.

...

Accordingly, the Court finds that Defendants' counterclaim appears to be filed in response to Plaintiffs' motion to disqualify their current Defense counsel.

(Pa10-11). This holding makes no sense. First, the Lower Court says "the filing of a motion is in theory petitioning of the government..." Id. Appellants Agree – and that ends the Step One analysis. However, the Lower Court implied that while a lawsuit qualifies as "petitioning activity," once we reach motion practice, the petitioning has ended. Id. The Lower Court seemed to be creating new law as to the definition of "petitioning activity."

It is a fundamental Constitutional principle that "the right to petition under the First Amendment includes a right to access both courts and administrative agencies." Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972); Harz v. Borough of Spring Lake, 2016 N.J. Super. Unpub. LEXIS 2501, *18 (App. Div. 2016). After a Complaint is filed with a court, the filing of a Motion is a mechanism that allows parties to seek a Judge's ruling on procedural and substantive issues that arise during litigation. Appellants' Disqualification Motion is "petitioning activity." It is illogical to hold that filing a Complaint is petitioning activity, but a Motion in furtherance of the underlying case is not. If it is not petitioning, then what is it? Is it a rare species of activity seeking to participate in public life that is neither speech nor petitioning? Of course not. It is beyond question that a motion invokes the petition clause *and* the speech clause.

Jurisdictions throughout this country hold that a Counterclaim for Malicious Abuse of Process *per se* triggers an Anti-SLAPP law because it targets petitioning activity. See Hidalgo v. Watch City Constr. Corp., 105 Mass. App. Ct. 148, 151 (2024) (“claims for malicious prosecution and abuse of process are based solely on the opposing party’s petitioning activity, and thus are prima facie subject to dismissal under the anti-SLAPP statute”); see also Microsoft Corp. v. Media, 2018 U.S. Dist. LEXIS 238438, at *19-20 (C.D. Cal. Mar. 13, 2018) (“Anti-SLAPP motions targeting litigation activity via claims such as abuse of process...are routinely granted based on the litigation privilege.”); Blaha v. Rightscorp, Inc., 2015 U.S. Dist. LEXIS 108460, 2015 WL 44776888, at *2-3 (C.D. Cal. May 8, 2015) (granting Anti-SLAPP motion to strike abuse of process claim based on litigation privilege); G.R. v. Intelligator, 185 Cal. App. 4th 606, 619, 110 Cal. Rptr. 3d 559 (2010) (affirming Anti-SLAPP dismissal of invasion of privacy claim based on litigation privilege).

Of course, this does not mean the Anti-SLAPP application motion must automatically be *granted*; rather it means the motion has cleared Step One because the Counterclaim is aimed at petitioning. The Court is required to move on to Step Two analysis; whether the Disqualification Motion forms the basis of a Malicious Abuse of Process Counterclaim that could ever survive scrutiny. It can not.

IV. UPEPA STEP TWO: THE COUNTERCLAIM MUST BE DISMISSED BECAUSE IT FAILS TO MAKE A *PRIMA FACIE* CASE FOR MALICIOUS ABUSE OF PROCESS ARISING FROM APPELLANTS' MOTION TO DISQUALIFY. (RAISED BELOW, Pa11-16)

Having established that the UPEPA applies pursuant to Step One, the Second Step of the UPEPA examines the substance (or lack thereof) of the Counterclaim requiring dismissal if any of the following three standards apply:

- (a) the responding party fails to establish a prima facie case as to each essential element of any cause of action in the complaint;
- or
- (b) the moving party establishes that:
 - (iii) the responding party failed to state a cause of action upon which relief can be granted; or
 - (iv) there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

N.J.S.A. § 2A:53A-55(a)(3).

It does not matter which standard applies. The Counterclaim cannot survive because the *prima facie* elements of Malicious Abuse of Process are missing. The standard for Malicious Abuse of Process requires an improper act that is a “perversion or abuse of the legitimate purposes of that process,” that it loses its legitimate function as a reasonably justifiable litigation procedure. Baglini v. Lauletta, 338 N.J. Super. 282, 294 (App. Div. 2001), quoting Penwag Prop. Co., Inc. v. Landau, 148 N.J. Super. 493 (App. Div. 1977) aff’d, 76 N.J. 595 (1978). Malicious

Abuse of Process is different than its sibling Malicious Use of Process. See Hoffman v. AsSeenOnTV.com, Inc., 404 N.J. Super. 415, 431 (App. Div. 2009) (“[M]alicious use of process involves ‘employment of process for its ostensible purpose, although without reasonable or probable cause, whereas the malicious abuse is the employment of a process in a manner not contemplated by law.’”); “Malicious Use of Process” deals with the *initiation* of a lawsuit and is often referred to as “Malicious Prosecution.” LoBiondo v. Schwartz, 199 N.J. 62, 89 (2009). Meanwhile, Malicious Abuse of Process deals with actions taken after a lawsuit is initiated. See Id.

Simply put, there is no viable Counterclaim for Malicious Abuse of Process pursuant to several well-settled principles of law. Some of which have been in effect for hundreds of years of common law.

a) THE LITIGATION PRIVILEGE BESTOWS ABSOLUTE IMMUNITY TO APPELLANTS ARISING FROM MOTIONS MADE IN THE COURSE OF LITIGATION. (RAISED BELOW, Pa15-16)

It is a fundamental principle of New Jersey law that the Litigation Privilege gives attorneys/litigants Absolute Immunity from civil liability arising from conduct and statements made in the course of judicial proceedings, such as the filing of motion practice during ongoing litigation. See Loigman v. Twp. Comm. of Twp. of Middletown, 185 N.J. 566 (2009); Hawkins v. Harris, 141 N.J. 207, 216 (1995); Erickson v. Marsh & McLennan, Co., 117 N.J. 539, 563 (1990). This Court has also stated, “*we reject plaintiffs’ argument that the litigation privilege is not applicable*

to malicious abuse of process causes of action.” Baglini v. Lauletta, 338 N.J. Super. 282, 287 (App. Div. 2001) (emphasis added)

However, the Lower Court inexplicably and unilaterally decided that the Litigation Privilege doesn't apply to Motion practice made during a pending case.

It appears to this Court that the Defendants in this action are not targeting Plaintiffs for malicious prosecutions made during the course of these proceedings – but rather whether their ulterior motives in bringing the action may be to deprive Defendants of their choice of counsel, thus incurring costs by the Defendants in order to proceed. The Litigation privilege does preclude Defendants from litigating their claim of malicious abuse of prosecution in response to the actions Plaintiff has taken throughout the course of the proceedings. Therefore, the Court finds that Plaintiffs' application to dismiss Defendants' Counterclaim pursuant to the litigation privilege is hereby DENIED without prejudice.

(Pa16). This ruling makes no sense. It also fails to include any supporting case law and reveals a substantive misunderstanding of how the Litigation Privilege operates. See Loigman, 185 N.J. at 584. (“As we have previously recognized, the litigation privilege is the backbone to an effective and smoothly operating judicial system.”)

Simply put, the filing of a motion, even an unsuccessful one, cannot be the subject of a *private* tort action. Improper motions can be punished – but only by *public* sanctions by the Judiciary. The litigation privilege is an absolute bar on a private civil lawsuit over the filing of a motion. Loigman has already ruled on this issue with white hot clarity. In that case, the State Supreme Court held that even if a township's attorney lied in a Motion to Sequester an activist from attending a

municipal public hearing, both the movant and their attorney were absolutely immune from a lawsuit or civil liability under the Litigation Privilege. See Id., at 587-88 (litigants and counsel are “free to pursue the best course charted for their clients without the distraction of a vindictive lawsuit looming on the horizon.”). The Loigman Court gives explicit detail how the Litigation Privilege doctrine has been recognized in common law for over 500 years. See Id., supra.

The privilege has deep roots in the common law, dating back to medieval England. E.g., Cutler v. Dixon, 76 Eng. Rep. 886, 887-88 (K.B. 1585) (reasoning that allowing action for words spoken in “course of justice” would hinder litigation for “those who have just cause for complaint”); Buckley v. Wood, 76 Eng. Rep. 888, 889 (K.B. 1591) (holding that “no action lies” for defamation even if words were false when spoken in “course of justice”); Hodgson v. Scarlett, 171 Eng. Rep. 362, 363 (C.P. 1817) (“It is necessary to the due administration of justice; that counsel should be protected in the execution of their duty in Court; and that observations made in the due discharge of that duty should not be deemed actionable.”).

...

The litigation privilege has long been embedded in New Jersey’s jurisprudence. Fenning v. S.G. Holding Corp., 47 N.J. Super. 110, 117 (App. Div. 1957) (observing that absolute immunity doctrine is firmly established principle and is “indispensable to the due administration of justice,” and that lawyers and litigants must “be permitted to speak and write freely without the restraint of fear of an ensuing defamation action”). The public policy rationale for the litigation privilege has not changed in half a millennium.

Id., at 579-80; see also Hawkins v. Harris, 141 N.J. 207, 216 (1995); Erickson v. Marsh & McLennan, Co., 117 N.J. 539, 563 (1990) (even defamatory statements are immune from liability if “made in the course of judicial, administrative, or

legislative proceedings.”); DeVivo v. Ascher, 228 N.J. Super. 453, 457 (App. Div. 1988) (“an absolute privilege may be extended to statements made in the course of a judicial proceeding *even if the words are written or spoken maliciously*, without any justification or excuse, and from personal ill will or anger against the party defamed”) (emphasis added). Even if, hypothetically, Appellants’ Disqualification Motion was abusive, frivolous, and violated attorney ethics rules (it wasn’t, but *arguendo*), the Litigation Privilege *still* provides Appellants with absolute civil immunity, just as broad as the immunity provided by Judicial Privilege.

In applying the privilege, we consider neither the justness of the lawyers’ motives nor the sincerity of their communications. See Hawkins, *supra*, 141 N.J. at 213-15 (observing that “[t]he trouble with privileges is that they are granted to good and bad alike,” and comparing litigation privilege with judicial immunity, which ““is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.”” (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967))).

Loigman, 185 N.J. at 586-87; *see also*, Emolo v. McDaniel, 2009 N.J. Super. Unpub. LEXIS 2043, *18-19 (App. Div. 2009).

The New Jersey Supreme Court goes further, holding that Litigation Privilege provides Absolute Immunity which gives more protection than Qualified Immunity. See Loigman, at 185 N.J. at 589; Hawkins, 141 N.J. at 215; Erickson, 117 N.J. at 563 (“a qualified privilege, on the other hand, enjoys a lesser degree of immunity and is overcome on a showing of actual malice.”); Rainier’s Dairies v. Raritan Valley

Farms, 19 N.J. 552, 558 (1955) (“the difference is that the absolute privilege affords complete protection whereas the qualified privilege affords protection only if there is no ill motive or malice in fact.”) see also, Butz v. Economou, 438 U.S. 478, 512 (1978) (U.S. Supreme Court describing “the litigation privilege has been described a more of an immunity for litigators, by contrast to a qualified immunity.”)

Most jurisdictions apply Litigation Privilege just like New Jersey, as an Absolute Immunity. See Ramona Unified School Dist. v. Tsiknas, 135 Cal. App. 4th 510, 522, 37 Cal. Rptr. 3d 381 (2005); see also, O’Brien & Gere Eng’rs, Inc. v. City of Salisbury, 447 Md. 394, 410 (Ct. of Appeals 2016); Lucky Kim Int’l, Inc. v. SEO In Corp, 2010 U.S. Dist. LEXIS 152023, 2010 WL 11549638, at *3 (C.D. Cal. June 3, 2010) (granting Anti-SLAPP motion to strike abuse of process counterclaim based on litigation privilege); Drum v. Bleau, Fox & Associates, 107 Cal. App. 4th 1009 132 Cal. Rptr. 2d 602 (2003) (“applications for judicial orders fall within privilege.”); Morrison v. Hamilton, 2025 Conn. Super. LEXIS 228, *11 (Superior Ct. 2025) (“[T]he litigation privilege ... provides absolute immunity from suit... The privilege applies regardless of whether the representations at issue could be characterized as false, extreme or outrageous.”); see also, Button, et al. v. Melcher, No. 25-1316 (1st Cir. Dec. 16, 2025) (collecting cases).

This is not to say that Appellants argue for absolute immunity from *consequences* for improper conduct in litigation. For certain, the filing of a motion

must remain within established guardrails, or there are consequences – some quite severe, such as sanctions or attorney discipline. But courts maintain *exclusive* authority to impose *public* discipline against those who violate the Court’s tenets, thus precluding any private cause of action, such as Respondents’ Counterclaim. Loigman, *supra*, 185 N.J. at 587 (“Wayward attorneys” who engage in unethical or improper conduct are still subject to the court’s disciplinary system and judicially sanctions.); Hawkins, *supra*, 141 N.J. at 220-21. (“Because of their extraordinary scope, absolute privileges have been limited to situations in which authorities have the power both to discipline persons whose statements exceed the bounds of permissible conduct and to strike such statements from the record.”))

The Supreme Court of Texas conforms with New Jersey law saying:

Even conduct that is wrongful in the context of the underlying suit is not actionable if it is part of the discharge of the lawyer's duties in representing his or her client. An attorney cannot be held liable to a third party for conduct that requires the office, professional training, skill, and authority of an attorney. ***However, other mechanisms are in place to discourage and remedy such conduct, such as sanctions, contempt, and attorney disciplinary proceedings. If an attorney's conduct violates his professional responsibility, the remedy is public, not private.***

Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481-82 (Tex. 2016) (citations omitted) (emphasis added). There is not, nor can there be, tort liability for filing a motion, even one that fails; or every failed motion would be subject to a Malicious Abuse of Process claim. This is exactly why Litigation Privilege exists. If this Court

decides otherwise, then every failed motion in this State not only might, but *should* be the subject of an abuse of process counterclaim. Why would any lawyer fail to play this card? Motion to dismiss fails? Abuse of process claim! Motion to compel fails? Abuse of process! Motion for a continuance? Abuse of Process! The lower court's decision is not just contrary to UPEPA and established law – it invites a new era of litigation madness and the end of “half a millennium” of public policy.

b) THE NOERR-PENNINGTON DOCTRINE PRECLUDES THE COUNTERCLAIM. (RAISED BELOW, Pa14-15)

Parallel to the litigation privilege is the Noerr-Pennington doctrine¹¹, which holds parties are immune from civil liability for claims arising from utilizing the Courts to vindicate their rights. See Main St. at Woolwich, LLC v. Ammons Supermarket, Inc., 451 N.J. Super. 135, 143-144 (App. Div. 2017) (the Noerr-Pennington doctrine gives immunity from “*common-law torts such as malicious prosecution and abuse of process*”) (emphasis added); Fraser v. Bovino, 317 N.J. Super. 23, 37 (App. Div. 1998); quoting Prof'l Real Estate Inv'rs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56 (1993); Structure Bldg. Corp. v. Abella, 377 N.J. Super. 467, 471 (App. Div. 2005) (homeowners' group pursued unsuccessful

¹¹ Derived from United Mine Workers of America v. Pennington, 381 U.S. 657 (1965); Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) which originally provided civil immunity to parties seeking relief from Antitrust legislation.

litigation against a land developer's effort to obtain subdivision approval was entitled to civil immunity under the Noerr-Pennington).¹²

While the Lower Court's order is given no special deference, as we are on *de novo* review, the Lower Court issued a ruling that was so strange that this Court should protect other litigants from such misstatements of the law:

The Court is not satisfied that the Noerr-Pennington Doctrine is applicable to Plaintiffs' claim at this time. Plaintiffs, at this stage, have not engaged in any protected petitioning activity against any governmental entity.

(Pa15). The Lower Court cited no case law to support this holding and Appellants are unaware of any court that has ever held the Noerr-Pennington doctrine requires a claim against a governmental entity to be applicable,

c) A MOTION TO DISQUALIFY IS NOT "PROCESS." (RAISED BELOW, Pa12)

Malicious Abuse of Process requires misuse of formal legal *process* – the “procedural methods used by a court to ‘acquire or exercise its jurisdiction over a person or over specific property,’ including “the ‘summons, mandate, or writ used by a court to compel the appearance of the defendant in a legal action or compliance with its orders,’” Ruberton v. Gabage, 280 N.J. Super. 125, 131 (App. Div.)

¹² The Noerr-Pennington doctrine is often referred to as identical to Anti-SLAPP statutes throughout the nation. See Valenzuela v. My Way Holdings, LLC, 541 P.3d 191, 200 (N.M. 2024); Wagenaar v. Robinson, 2014 U.S. Dist. LEXIS 119112 (D. Nev. 2014) (“The principals behind Nevada’s anti-SLAPP statute and the Noerr-Pennington doctrine are essentially the same.”); Select Portfolio Servicing v. Valentino, 875 F. Supp. 2d 975, 988 (N.D. Cal. 2012).

(citations omitted), certif. denied, 142 N.J. 451 (1995); see also Wozniak v. Pennella, 373 N.J. Super. 445, 461 (App. Div. 2004). A Motion to Disqualify does not involve the acquisition of jurisdiction over any person or thing; hence does not meet the legal definition of “Process” which has existed for over a century:

Process in that context has a well understood, if not perfectly defined, meaning. It is typically that which compels a party to appear in court. Usually, process will issue from a court or through counsel with the authority of the court. Most commonly, process consists of a summons, an order to show cause, a court order, a subpoena, a warrant, or even a writ. Williams v. Bd. of Educ., 124 N.J.L. 380 (Sup. Ct. 1940); In re Martin, 86 N.J. Eq. 265, 273-274 (Ch. 1916); R. 5:4-1; R. 4:52-1(b); R. 4:67-1.

State v. Anastasia, 356 N.J. Super. 534, 539 (App. Div. 2003).

The case of Batiz v. Brown, 2013 U.S. Dist. LEXIS 36595 (D.N.J. Mar. 14, 2013), describes abuse of process as one involving coercion or extortion, where the process is used to compel an action unrelated to its intended purpose, for example, a subpoena to discover information unrelated to the litigation. The Batiz court reiterated the plaintiff must show a coercive, illegitimate, or improper use of the judicial process, coupled with an ulterior motive and a further act representing the perversion of the process. Id. at *8.

Other jurisdictions have also held that a mere unsuccessful Motion does not meet the definition of “process.”

RUSD’s claim that the attorney fees motion was an abuse of process is unpersuasive. Even disregarding the absolutely privileged nature of this motion, *an abuse of process claim cannot be premised on merely*

seeking or obtaining a court ruling on a motion, but instead requires some proof there was a “subsequent abuse, by a misuse of the judicial process for a purpose other than that which it was intended to serve. The gist of the tort is the improper use of the process after it is issued.” Because defendants’ motion was unsuccessful, there was no legal process that was subsequently improperly used, and therefore RUSD’s abuse of process claim is not well taken.

Ramona v. Unified School Dist. V. Tsiknas, 135 Cal. App. 4th 510, 522, 37 Cal.Rptr.3d 381 (2005) (quoting Adams v. Superior Court, supra, 2 Cal.App.4th 521, 530-531, 3 Cal.Rptr.2d 49 (1992)) (emphasis added). Accordingly, Plaintiffs’ Disqualification motion was not even “process” as the law defines it.

In denying Appellants’ Anti-SLAPP Motion, the Lower Court acknowledged one of Appellants’ opposition arguments:

[Appellants] assert that the filing of a motion is not “process” within the meaning of the tort itself.

(Pa12). However, the Lower Court never actually ruled on this argument nor even addressed it again anywhere in its decision. The Lower Court ignored well-settled New Jersey law and in other jurisdictions that clearly hold, a Motion simply does not qualify as “Process” which requires dismissal of the Counterclaim.

d) EVEN IF A MOTION TO DISQUALIFY IS CONSTRUED TO BE “PROCESS” IF AN ACT ITSELF WAS PROPER, THEN A MALICIOUS ABUSE OF PROCESS COUNTERCLAIM FAILS. (RAISED BELOW, Pa12-14)

The disqualification motion itself should have been granted. While its denial does not wipe away litigation privilege, had it been granted we certainly would not be looking at an Abuse of Process claim based on a *successful* motion. Therefore,

if the Court has not already been satisfied at this point that the UPEPA motion should have been granted, it is worth examining whether the motion to disqualify should have been granted.

The very notion that Appellants' Motion to Disqualify Counsel was a "perversion" or "not contemplated by law," is meritless since such Motions are routinely made in the course of litigation. See State in the Int. of S.G., 175 N.J. 132, 140 (2003); Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218 (1988); Reardon v. Marlayne, Inc., 83 N.J. 460, 471 (1980); Dental Health Assocs. S. Jersey, P.A. v. RRI Gibbsboro, LLC, 471 N.J. Super. 184, 192 (App. Div. 2022); Escobar v. Mazie, 460 N.J. Super. 520, 526 (App. Div. 2019). The fact that the non-movant is displeased when one is filed does not make filing a Motion into a tortious act.

It is telling that Respondents' Counterclaim never alleges that the Disqualification Motion, itself, was improper – only that it was filed "based upon ulterior motives" to gain a "collateral advantage" or encourage settlement. (Pa151-152). This hardly requires analysis, since the claim is already dead – nevertheless, the Appellants will address this in the alternative and in the hypothetical. If a motion was "process" and if it could be subject to tort liability at all, once we blow past those impossibilities, the Counterclaim would still fail on its merits. A Malicious Abuse of Process claim only lies if an act itself was improper and a "perversion or abuse of the legitimate purposes of that process," such that it loses its legitimate

function as a reasonably justifiable litigation procedure. Baglini, 338 N.J. Super. at 294, quoting Penwag, 148 N.J. Super. at 493.

The censorious actions leading to the complaint were not mere matters of taste or personal dispute. Rather, O'REILLY, as the Chairman of the Rahway Democratic Campaign Committee, used his role as one of Rahway Community Voice's three admins to censor and ban Appellants. (Pa39-44, Pa69-76, Pa80-82, Pa91-94). Hence, the real motivation behind O'REILLY's censorship was classic viewpoint discrimination prohibited by Schmid/Pruneyard. After O'REILLY's Motion to Dismiss was denied, on 2/25/25, the other two Respondents, PAPADAKIS and TOMKIEWICZ, (then unrepresented) initiated settlement overtures by contacting LEVY, agreeing in principle to reinstate Appellants to the Rahway Community Voice. (Pa76-79, Pa84-85). Hence, by mid-March 2025, the underlying dispute was on the precipice of being resolved, at least with two of the three defendants.

However, before the settlement was finalized, on 3/19/25, Rainone Coughlin & Minchello entered appearances for PAPADAKIS and TOMKIEWICZ and instructed LEVY to cease communication with them. (Pa76-79), (Pa84-85). When LEVY asked counsel whether PAPADAKIS and TOMKIEWICZ were going to fulfill their settlement agreement, the 3/21/25 response was:

You asked me that question the day I was advised that I was representing Joanna and Bill. I have not had any opportunity to have that discussion with them as my priority was getting your pending motion adjourned. I also do not need to communicate to my new clients

that you are eager to settle with them as you have already done that. Again, I wait for your proffer regarding the nature of those settlement discussions. (Pa78).

This email shows Rainone Coughlin & Minchello failed to speak with their new clients about their prior settlement negotiations before entering into a retainer agreement, which violates RPC 1.7(b)(1). The claim that they “do not need to communicate to my new clients that you are eager to settle with them as you have already done that...” is especially troubling Id.¹³ Based upon these facts, it is clear that Rainone Coughlin was acting at the behest of one client against the interests of others – and that they were refusing to forward settlement offers. Thus the Motion should have been granted.

e) **RESPONDENTS’ CLAIM THAT THE MOTION WAS FILED FOR ULTERIOR MOTIVES IS IRRELEVANT, AND EVEN IF IT WERE THAT DOES NOT EQUAL ABUSE OF PROCESS. (RAISED BELOW, Pa12-14)**

New Jersey Law holds that even if Appellants had ulterior motives or bad intentions, *that does not matter* when filing a Motion, even an unsuccessful Motion.

Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and *there is no liability where the defendant has done nothing more than*

¹³ Refusing to forward a settlement communication to one’s client is a violation of attorney ethics rules. See RPC 1.2(a) and RPC 1.4; see also, Vastano v. Algeier, 178 N.J. 230, 234 (2003); Morris Properties, Inc. v. Wheeler, 476 N.J. Super. 448, 462 (App. Div. 2023) (“We recognize an attorney must communicate all settlement offers to his or her client...”) It should be noted that Appellants had made settlement offers to Papadakis and Tomkiewicz to resolve the case for no monetary payment. Meanwhile, after numerous months, Respondents’ counsel has not even confirmed that these settlement offers have even been communicated. (Pa117-119, 122-125).

carry out the process to its authorized conclusion, even though with bad intentions.

Gambocz v. Apel, 102 N.J. Super. 123, 128 (App. Div. 1968) (quoting Prosser, Law of Torts, § 115, pp. 876-77 (3d ed. 1964)) (emphasis added); Emolo, *supra*, at *11. (“An ulterior motive is not in and of itself sufficient; it must be used outside the scope of the process to be considered improper. Regular and legitimate use of process with bad intentions is likewise not malicious abuse of process.”) citing, Earl v. Winne, 34 N.J. Super. 605, 614 (Law Div. 1955); Penwag, 148 N.J. Super. 493, 498 (App. Div. 1977) (“Regular and legitimate use of process, *though with a bad intention*, is not malicious abuse of process.”) quoting ADM Corp. v. Speedmaster Packaging Corp., 384 F. Supp. 1325, 1349 (D.N.J. 1974), mod. on other grounds, 525 F. 2d 662 (3rd Cir. 1975). Therefore, let us presume that the Appellant filed the motion for nothing but the most evil and perfidious motives. That is still not qualified as abuse of process.

Even if the Court believes Respondents’ Counterclaim did allege the Motion was improper (it does not), Count #10 of the Counterclaim alleges Appellants’ ulterior motive (i.e. impropriety) was to “obtain a collateral advantage, specifically to obtain a settlement of the Plaintiffs’ claim against Defendants.” The notion that seeking settlement is an “ulterior motive” is offensive to the basic principles of the legal system and flies in the face of well-settled law, “Settlement of litigation ranks high in our public policy.” Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (quoting

Jannarone v. W.T. Co., 65 N.J. Super. 472 (App. Div.) certif. den. 35 N.J. 61 (1961)); “It is the policy of the law to encourage settlements...” Judson v. Peoples Bank and Trust Co., 25 N.J. 17, 35 (1957).

Respondents are correct in one aspect; that among the reasons they filed the Motion to Disqualify Counsel was to try to facilitate a settlement of the underlying action. In fact, *there was a settlement in place* with two of the Respondents, PAPADAKIS and TOMKIEWICZ, before the Rainone Coughlin & Minchello firm sabotaged it out of apparent loyalty to non-parties, not to their clients. Then they repeatedly refused to communicate settlement offers to PAPADAKIS and TOMKIEWICZ. (Pa76-79), (Pa84-85). Again, as an apparent act of loyalty to non parties. This gave Appellants more than enough reason to believe a Conflict of Interest existed justifying the Motion to Disqualify Counsel. (Pa65-98). Appellants’ motive was proper because the Conflict of Interest was an impediment to resolving the case. Even if the Motion wasn’t successful, it falls far short of being “a perversion of the legitimate use of any process.” If anything is a perversion of the process, it is a law firm taking the position that it has no obligation to communicate settlement offers and sabotaging a simple and clean resolution, because its *other clients* prefer to keep the status quo.

V. THE COUNTERCLAIM SEEKS TO IMPROPERLY CIRCUMVENT R. 1:4-8. (RAISED BELOW IN PLAINTIFFS/COUNTER-DEFENDANTS' BRIEF)

If Respondents felt the Motion to Disqualify was frivolous or brought in bad faith and wanted to seek counsel fees, they could have invoked R. 1:4-8, *but they never did*. By not complying with R. 1:4-8, Respondents should be precluded from now arguing Appellants' Motion was frivolous, improper, or subject to sanctions. See Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401, 410 (App. Div. 2009) (“Accordingly, defendants’ failure to serve notice and demand relevant to the issue on which they prevailed in the trial court precluded an award of fees and costs against plaintiff.”); Community Hosp. Group, Inc. v. Blume, Goldfaden, Berkowitz, Donnelly, Fried & Forte, P.C., 381 N.J. Super. 119 (App. Div. 2005) (noncompliance with R. 1:4-8 “requires rejection of a motion” for sanctions.). Even if the Disqualification Motion had been sanctioned pursuant to R. 1:4-8, the Litigation Privilege still precludes a private cause of action against Appellants. The sanction is the disincentive and the source of punishment for a wayward motion – not tort liability.

The fact that Respondents chose to forego relief by way of R. 1:4-8 reveals that it is the Counterclaim that was brought in bad faith in order to delay the proceedings and force Appellants to incur unnecessary litigation costs. If Respondents wanted to recoup counsel fees for the motion or properly punish

Appellants for bringing it, R. 1:4-8 provides the exclusive and most logical manner to do so. However, bringing a Counterclaim alleging Malicious Abuse of Process is nonsensical since that remedy, even if allowed, would require the parties to engage in discovery, summary judgment motion practice, and a potential Trial over a period of months. Meanwhile, a simple R. 1:4-8 application would have resolved the question in a matter of weeks.

The Counterclaim is further magnificent in its lack of logic because even if Respondents prevailed on a Malicious Abuse of Process claim, the only possible outcome is less than they could have received by seeking sanctions. The remedy in an abuse of process action can include counsel fees incurred in defending the malicious action (i.e. the motion to disqualify), they are not entitled to reimbursement of counsel fees in pursuing the claim. See Penwag Prop. Co. v. Landau, 76 N.J. 595, 598 (1978); Harraka v. Bender, 2016 N.J. Super. Unpub. LEXIS 677, *6-7 (App. Div. 2016); see also, Technical Computer Servs., Inc. v. Buckley, 844 P.2d 1249, 1256 (Colo. Ct. App. 1992); (“It is true that, in an action for malicious prosecution or abuse of process, a plaintiff may recover attorney fees incurred in defending against the earlier wrongful litigation by the defendant. However, ... attorney fees incurred in litigating a claim are not recoverable as an item of damages in a contract or tort action on that claim.”); Jevne v. Kooi, 2020 N.M. App. Unpub. LEXIS 98, *4 (N.M. Ct. App. 2020); 2 D.B. Dobbs, Law of Torts

§ 440, at 1242 (2001) (recovery for malicious abuse of process counterclaim does not include counsel fees pursuing the counterclaim).

Meanwhile, in a motion for sanctions under R. 1:4-8¹⁴ both the fees incurred in bringing the motion for sanctions as well as the fees incurred in fighting against the motion to disqualify would have been on the table. By bringing an improper counterclaim instead of a motion for sanctions, Respondents left more than half the potential remedies on the table, all in exchange for what? Their own exposure to UPEPA fees. Their upside is nonexistent, but their downside is exposure to discovery, exposure to a UPEPA motion, and all of the tribulations of trial – all with the maximum hypothetical recovery of the fees incurred in defending the motion to disqualify. The malpractice here exposes either gross incompetence or a legal strategy rooted in serving a non-party, rather than serving the clients in the instant case. The stark nature of this reality is what predicated the motion to disqualify in the first place. While the motion failed, Appellants maintain its righteousness, and have only been driven deeper into that belief by subsequent actions.

The Counterclaim’s objection that the Disqualification Motion was filed in order “to obtain a collateral advantage” to obtain a settlement, contradicts the fundamental principle that the civil litigation process is adversarial. Indeed, every

¹⁴ The failure of Respondents to seek relief pursuant to R. 1:4-8 raises the question of whether the Counterclaim was filed to defend the interests of the Respondents or the Respondents’ law firm. Had an R. 1:4-8 application been brought, if it was denied it would not expose Respondents to the risks of Anti-SLAPP consequences.

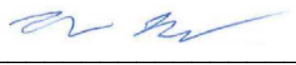
strategic decision, motion, discovery demand, etc. is to gain an advantage for a victory or a favorable settlement in that lawsuit. Otherwise, what is the point? Is there a type of motion that is filed in furtherance of a disadvantage? The counterclaim does not even try and masquerade as legitimate. The entire crux of Respondents' Counterclaim is to impose tort liability on Appellants for filing a motion that they didn't like – petitioning activity. Whether the Disqualification motion was properly denied or not is not at issue in this Appeal.¹⁵ What matters is that the Motion to Disqualify was Appellants' exercising their right to petition for which they are immune from any Malicious Abuse of Process claim.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the Order/Decision of the Hon. Robert J. Mega, P.J.Ch. dated 10/29/25 be reversed and remanded with instructions to dismiss the Respondents' Counterclaim with Prejudice pursuant to N.J.S.A. §§ 2A:53A-51 & 55 and to award the mandatory attorneys' fees and costs as provided for by UPEPA.

¹⁵ Nevertheless, the Appellants maintain that it was error to deny it – but that appeal is not yet a matter before this Court.

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