IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

JOE MYERS,

Plaintiff,

v.

TIMOTHY F. McCUNE, JOSEPH H. CHIVERS, JACK W. MURTAUGH JR., GRAYDON BREWER, CARL V. NANNI, JACK LEWIS, JIM GALLAGHER, HANK LEYLAND, GREG LOVERICK, EDWARD TASSEY, AK STEEL et al, UAW (formerly Butler Armco Independent Union) et al.,

Defendants.

CIVIL DIVISION

No. 2019-10516

HONORABLE THOMAS J. DOERR

BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS

Filed on Behalf of the Defendant, HONORABLE TIMOTHY F. McCUNE

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JURY TRIAL DEMANDED

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

JONESPASSODELIS, PLLC

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JOE MYERS, Plaintiff, v. TIMOTHY F. McCUNE, JOSEPH H. CHIVERS, JACK W. MURTAUGH JR., GRAYDON BREWER, CARL V. NANNI, JACK LEWIS, JIM GALLAGHER, HANK LEYLAND, GREG LOVERICK, EDWARD TASSEY, AK STEEL et al, UAW (formerly Butler Armco Independent Union) et al., Defendants.	CIVIL DIVISION No. 2019-10516 HONORABLE THOMAS J. DOERR

BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS

I. STATEMENT OF THE CASE

This lawsuit is a *pro se* civil action alleging a variety of causes of action against a disparate and wide-ranging group of named defendants. The Complaint pleads very little in the way of allegations of fact. As best as can be ascertained, this lawsuit arises out of an employment claim in the early 2000s between Plaintiff and AK Steel, who was ostensibly his employer. It also asserts claims against Plaintiff's union (the United Auto Workers), several attorneys, and other individuals involved in his dispute with his former employer.

The Complaint alleges that at the time in question, Defendant Timothy F. McCune served as the Butler County District Attorney.[1] The Complaint alleges "all the other Defendants" (i.e. other than McCune) did to Plaintiff "is a crime." Complaint at (numbered) ¶ 2, p.7.

The Complaint alleges that then-DA McCune stated "'I have no opinion about your [Plaintiff's] claims with AK Steel.'" *Id.* Because he declined to prosecute Plaintiff's adversaries, the Complaint alleges that McCune "committed fraud by turning a blind eye" to these alleged crimes. Complaint at (numbered) ¶ 2, p.7. In Plaintiff's estimation, his declination to prosecute "makes him complicit." *Id.*

The Complaint alleges that by not prosecuting Plaintiff's enemies, then-District Attorney McCune violated Plaintiff's due process rights and the Rules of Professional Responsibility. *Id.* Plaintiff seeks to have the Court "start disbarment proceedings" against McCune as well as "all Defendants that have a law license." *Id.*

II. QUESTIONS PRESENTED

I. MUST ANY STATE COMMON LAW CLAIM AGAINST FORMER DISTRICT ATTORNEY McCUNE BE DISMISSED WITH PREJUDICE BECAUSE HE IS SHIELDED FROM ANY SUCH CLAIM BY THE DOCTRINE OF HIGH PUBLIC OFFICIAL IMMUNITY?

Suggested answer: Yes. The doctrine of high public official immunity shields high public officials, like prosecutors, from civil liability for their actions in their official capacities. Plaintiff alleges that when McCune was the Butler County District Attorney, he should have brought charges against third parties, but did

[1] While it is not stated in the Complaint, and needs not be considered in evaluating these Preliminary Objections, McCune served as the District Attorney of Butler County from 1996 to 2005. In 2006, he took the bench as a Judge of the Court of Common Pleas of Butler County. While the allegations in the Complaint are vague, the actions at issue in this case occurred, at the earliest, fourteen years ago. Suffice it to say, even if this case were to survive preliminary objections, the claim is fatally flawed in that it was not timely filed. Pa. R. Civ. P. 1028 expressly provides that the "defense of the bar of a . . . statute of limitations can be asserted only in a responsive pleading as new matter under Rule 1030." The claim as to McCune is so overwhelmingly flawed that the issue of the statute of limitations will never need to be reached. Nonetheless, it bears mention because it is yet another example of the myriad ways that the claim against McCune fails.

not. The decision whether or not to initiate charges falls squarely within the doctrine of high public official immunity. He is immune from suit under Pennsylvania law.

II. MUST ANY FEDERAL CAUSE OF ACTION AGAINST FORMER DISTRICT ATTORNEY McCUNE BE DISMISSED WITH PREJUDICE BECAUSE HE IS SHIELDED FROM ANY SUCH CLAIM BY THE DOCTRINE OF ABSOLUTE PROSECUTORIAL OFFICIAL IMMUNITY?

Suggested answer: Yes. For the same reasons any state law claim would fail, the doctrine of absolute prosecutorial immunity would prevent Plaintiff from pursuing any federal (including constitutional) claim against the prosecutor arising out of the non-prosecution of a third party.

III. MUST ALL CLAIMS AGAINST FORMER DISTRICT ATTORNEY McCUNE BE DISMISSED BECAUSE PLAINTIFF LACKS STANDING TO CHALLENGE A PROSECUTOR'S DECISION WHETHER OR NOT TO INITIATE CRIMINAL CHARGES AGAINST A THIRD PERSON?

Suggested answer: Yes. Citizens do not have standing to challenge a prosecutor's decision not to bring criminal charges against a third person.

IV. EVEN IN THE ABSENCE OF THE IMMUNITY AND STANDING DEFENSES, DOES THE COMPLAINT STILL FAIL TO STATE A PRIMA FACIE CLAIM AGAINST FORMER DISTRICT ATTORNEY McCUNE?

Suggested answer: Yes. Even in the absence of the immunity and standing defenses, what Plaintiff alleges former District Attorney McCune to have done (or not done) does not constitute "fraud" or any other legally-cognizable cause of action.

III. ARGUMENT

A. Standards applicable to Preliminary Objections

In reviewing preliminary objections in the nature of a demurrer, a Court accepts as true the facts pled in the complaint. *Richardson v. Beard*, 942 A.2d 911, 913 (Pa. Cmwlth. 2008). A Court need not, however, accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Id.* Preliminary objections will be

sustained where it is clear that the complaint fails to set forth a claim for which relief can be granted. *Id.*

B. The doctrine of high public official immunity prevents Plaintiff from pursuing any state law claims against Defendant McCune arising out of his term as the Butler County District Attorney.

Plaintiff cannot pursue a claim against then-District Attorney McCune for any state law claims because any such claim is barred by the doctrine of high public official immunity.

As the Supreme Court of Pennsylvania explained, it "has long been held [in Pennsylvania] that high public officials are immune from suits seeking damages for actions taken or statements made in the course of their official duties." *Durham v. McElynn*, 772 A.2d 68, 68 (Pa. 2001)

> Absolute privilege, as its name implies, is unlimited, and exempts a high public official from all civil suits for damages arising out of false defamatory statements and even from statements or actions motivated by malice, *provided the statements are made or the actions are taken in the course of the official's duties or powers and within the scope of his authority, or as it is sometimes expressed, within his jurisdiction*[.]

Id. (quoting *Matson v. Margiotti*, 88 A.2d 892, 895 (Pa. 1952) (emphasis in original; citations omitted)). The rationale for forbidding claims arising out of a high public official's actions was explained as follows:

> Even though the innocent may sometimes suffer irreparable damage, it has been found to be in the public interest and therefore sounder and wiser public policy to "immunize" public officials, for to permit slander, or libel, or malicious prosecution suits, where the official's charges turn out to be false, would be to deter all but the most courageous or the most judgment-proof public officials from performing their official duties and would thus often hinder or obstruct justice and allow many criminals to go unpunished.

Id. (quoting *Matson*, 88 A.2d at 899-900). *See also Gregg v. Pettit*, 2009 WL 57118 (W.D. Pa. Jan. 8, 2009) (citing *Durham*, dismissing all pendent state common law claims against prosecutor on the basis of high public official immunity).

District Attorneys are high public officials. In *Durham*, *supra*, the Supreme Court of Pennsylvania held that even Assistant District Attorneys are high public officials to whom this immunity applies. *Durham*, 772 A.2d at 70. (Affirming dismissal, on Preliminary Objections, of malicious prosecution claim against an Assistant District Attorney).

Here, Plaintiff takes issue with a purported decision not to prosecute the other persons named as Defendants in the Complaint. The decision whether or not to initiate charges falls squarely within the official actions of a District Attorney. Pennsylvania high public official immunity applies to all conduct within the course of the official's duties, and does not distinguish among prosecutorial, advocative, investigative or administrative conduct by a prosecutor. *Matson*, 88 A.2d at 895.

The doctrine of high public official immunity prevents Plaintiff from bringing common law tort claims against a District Attorney. Further pleading could not change that fact. For that reason, amendment of the Complaint would be futile. Dismissal with prejudice is appropriate.

C. The doctrine of absolute prosecutorial immunity prevents Plaintiff from pursuing any federal law claims against Defendant McCune arising out of his term as the Butler County District Attorney.

Due to the vagueness of the Complaint, it is unclear what causes of action Plaintiff is attempting to bring against Defendant McCune. To the extent that the Complaint is intended to be read to assert any claims against McCune for alleged violations of Plaintiff's rights under the

U.S. Constitution (or any other federal right), those claims would be barred by the doctrine of absolute prosecutorial immunity.

The Supreme Court of the United States has long recognized the defense of absolute immunity for prosecutorial duties that are "intimately associated with the judicial process," such as initiating and pursuing a criminal prosecution. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). What is pertinent is the function or nature of the act which the prosecutor is performing, not his motivation or reason. *See, e.g., Rose v. Bartle*, 871 F.2d 331, 337 (3d Cir. 1989); *Jennings v. Schuman*, 567 F.2d 1213, 1221-22 (3d Cir. 1977).

For example, in *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992), defendant Dawson was the District Attorney of Crawford County. Plaintiff Kulwicki was his opponent in an upcoming election. District Attorney Dawson instructed a police detective sergeant to conduct an investigation of Kulwicki, which ultimately resulted in Kulwicki being prosecuted. After being acquitted, Kulwicki brought a claim against DA Dawson. *Kulwicki,* 969 F.2d at 1457. Kulwicki's malicious prosecution claim alleged that District Attorney Dawson initiated criminal charges for "purely political motives." *Kulwicki,* 969 F.2d at 1463. District Attorney Dawson argued that he was entitled to absolute prosecutorial immunity. *Id.* The United States Court of Appeals for the Third Circuit agreed, holding that the District Attorney was entitled to absolute prosecutorial immunity because "[t]he decision to initiate a prosecution is at the core of a prosecutor's judicial role. A prosecutor is absolutely immune when making this decision, even when he acts without a good faith belief that any wrongdoing had occurred." *Kulwicki,* 969 F.2d at 1463. The Third Circuit observed that "[c]onsideration of personal motives is directly at odds with the

Supreme Court's simple functional analysis of prosecutorial immunity[.]" *Kulwicki,* 969 F.2d at 1464. The Third Circuit observed:

> The decision to initiate a prosecution is at the core of a prosecutor's judicial role. Harm to a falsely-charged defendant is remedied by safeguards built into the judicial system -- probable cause hearings, dismissal of the charges -- and into state codes of professional responsibility.

Id. at 1463-64. Accordingly, the Third Circuit held that the District Attorney was absolutely immune and reversed the district courts finding to the contrary.

As *Kulwicki* correctly observes, "[t]he decision to initiate a prosecution is at the core of a prosecutor's judicial role." *Id.* at 1463. It does not matter whether the result of that decision is to prosecute, or not to prosecute. That decision cannot be challenged. A prosecutor is immune from suit for such a claim. Dismissal with prejudice is appropriate.

D. Even in the absence of an immunity defense, Plaintiff still could not pursue this claim against former District Attorney McCune because he lacks standing to pursue it.

As is noted above, prosecutors are shielded from suits like this by both state and federal law. Even in the absence of that immunity, Plaintiff's claim would still fail because he lacks standing to pursue it. Citizens lack standing to bring such a claim. *Snyder v. Aaron*, 2006 WL 544466 (W.D. Pa. March 6, 2006) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (observing that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another")). For this reason as well, Plaintiff's claims against Judge McCune are appropriately dismissed with prejudice.

E. Plaintiff's claim against Defendant McCune also fails substantively, because citizens have no right to have another person criminally charged.

The gravamen of Plaintiff's claim is his belief that the other Defendants committed "crimes" and that as the District Attorney at that time, McCune should have prosecuted them.

That theory fails as a matter of law because under Pennsylvania law, "individuals cannot dictate to the Commonwealth who and when to prosecute. The district attorney is afforded the power to prosecute on behalf of the Commonwealth, and to decide whether and when to prosecute." *Hearn v. Myers*, 699 A.2d 1265, 1267 (Pa. Super. Ct. 1997) (citing *Petition of Piscanio*, 344 A.2d 658, 660 (Pa. Super. 1975)).

Similarly, under federal law, a citizen has no constitutional right to have others charged with a crime. *See, e.g., Eskridge v. Peters*, 2008 WL 859177 at *7 (W.D. Pa. March 31, 2008) (noting that "'a private citizen lacks a judicially cognizable interest in the prosecution of another.'") (*quoting Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)).

The Complaint alleges that the decision not to prosecute was "fraud." The elements of a prima facie cause of action for fraud are ""(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance."" *Kit v. Mitchell*, 771 A.2d 814, 819 (Pa. Super. 2001) (quoting *Gruenwald v. Advanced Computer*, 730 A.2d 1004, 1014 (Pa.Super.1999) (citing *Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994)). What is alleged in the Complaint satisfies none of these elements. There was no "transaction at hand" in which Plaintiff had any cognizable interest. Plaintiff had no right to have anyone prosecuted. Accordingly, there was no justifiable reliance by Plaintiff on anything

McCune may or may not have said about the subject. Further, Plaintiff suffered no legally-cognizable injury.[2]

IV. CONCLUSION

Respectfully, Plaintiff's pro se claim against Judge McCune arising out his tenure as District Attorney fails in essentially every way a claim could fail. No amount of pleading and re-pleading could remedy the fatal flaws in this claim. He should be dismissed from this case immediately, and with prejudice.

JURY TRIAL DEMANDED

Respectfully submitted,

JONESPASSODELIS, PLLC

By: _____
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Counsel for Defendant,
HONORABLE TIMOTHY F. McCUNE

[2] It should be noted that Defendant AK Steel's Preliminary Objections correctly note that the Complaint fails for lack of specificity. Those arguments are well-reasoned, and apply with equal force to the claims against Defendant McCune. There was little reason to belabor that point due to the myriad immunity, standing and other defenses asserted herein. It is respectfully submitted that Plaintiff should not be given another opportunity to plead additional facts against Defendant McCune, because doing so would be futile and would undoubtedly result in another set of Preliminary Objections raising these same issues. Dismissal should be with prejudice so as not to waste the Court's judicial resources, and to not cause the defense to incur additional litigation expenses when the defenses are already crystal clear.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been forwarded to counsel of record and unrepresented parties by:

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