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1892 WDA 2019

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 1892 WDA 2019

JOE MYERS
Appellant,
v.

TIMOTHY J. McCUNE, *et. al.*
Appellees

BRIEF OF APPELLEE TIMOTHY J. McCUNE

Appeal from the November 21, 2019 Order entered by the Court of Common Pleas of Butler County, Civil Division, at No. A.D. 19-10516 sustaining Defendants' Preliminary Objections and dismissing the Complaint with prejudice

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I. COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Were former District Attorney McCune's Preliminary Objections properly sustained on the basis of absolute prosecutorial and high public official immunity, Appellant Myers' theory that the district attorney is liable to him because he exercised his prosecutorial discretion not to prosecute Myers' enemies?

Answered in the affirmative by the trial court. In its Opinion of November 21, 2019, the trial court opined, inter alia, that Myers lacked standing to pursue a claim arising out of the non-prosecution of others, that any state law claim is barred by the doctrine of high public official immunity, and the acts at issue are shielded from any federal claim by the doctrine of absolute prosecutorial immunity.

2. Does Myers' belated claim against defense counsel fail when he was never granted leave to add them as parties, and when the basis for the claim arises out of their filing Preliminary Objections and appearing in court at oral argument to present them, which does not state a viable cause of action?

Answered in the affirmative by the trial court. Its Rule 1925(a) Statement details it advised Appellant how parties can be added, that Appellant ignored its directives, and that Appellant's attempt to join defense counsel is without merit.

II. COUNTER-STATEMENT OF THE CASE

This lawsuit underlying this appeal arises out of a dispute between Appellant Joe Myers and his former employer, AK Steel, 20 years ago that resulted in the termination of his employment.[1] (Complaint at ¶ 1, p.6) While neither the Complaint nor the Brief of Appellant are models of clarity, Myer's Brief of Appellant adds certain details of that dispute.

According to the Brief of Appellant, Myers was driving a "stake truck" for AK Steel down a steep hill when the truck rolled onto its side. (*Id.* at 29). He attributes the accident to the manner in which a "pinion gear" his truck was hauling was secured. (*Id.* at 29). His employer disciplined him for the accident, and held a disciplinary meeting concerning the incident on December 12, 2000. (*Id.* at 31-32). The discipline imposed was the termination of his employment. (*Id.* at 33; Complaint at ¶ 1, p.6)

The Complaint alleges that at the time in question, Appellee Timothy F. McCune served as the Butler County District Attorney. (*Id.* at ¶ 2, p.7) The Complaint alleges "all the other Defendants" (i.e. his employer, union, and lawyers) did to Plaintiff "is a crime." The Brief of Appellant states that Myers sent District Attorney McCune a letter dated November 29, 2001 that opined that he

[1] Appellant did not designate or file a Reproduced Record. Accordingly, references will be to the pleadings and the docket of the Court of Common Pleas of Butler County.

was the victim of a "conspiracy" and "extortion." (*Id.* at 43). On December 19, 2001, then-District Attorney McCune wrote Myers acknowledging receipt of the November 29, 2001 letter, but declining to prosecute. Stating "'I have no opinion about your claims with AK Steel.'" (*Id.* at ¶ 38; Complaint at ¶ 2, p.7).

Because McCune declined to prosecute Myers' adversaries, the Complaint alleges that he "committed fraud by turning a blind eye" to these alleged crimes. (Complaint at ¶ 2, p.7). The Complaint alleges that McCune's decision not to prosecute "makes him complicit." *Id.*

According to the Brief of Appellant, Myers also wrote to, *inter alia*, then-Attorney General of the United States John Ashcroft, FBI Director Robert Mueller, and Pennsylvania Attorney General Mike Fisher about what he perceived as criminal activity by AK Steel. (Brief of Appellant at 41-42). None of Myers' filings allege that criminal charges were filed. *See id.*

Myers' dispute with AK Steel was arbitrated and litigated in various forums over the coming years, including the Court of Common Pleas of Butler County, the United States District Court for the Western District of Pennsylvania, and the United States Court of Appeals for the Third Circuit. (*See* Complaint at ¶¶ 10-25, pp. 10-14; *see generally Myers v. AK Steel Corp.*, 156 Fed. Appx. 528 (3rd Cir. 2005)).

On May 29, 2019, Myers filed the underlying action pro se in the Court of Common Pleas of Butler County. Myers' Complaint alleges, as to then-District Attorney McCune, that by not prosecuting Plaintiff's former employer, McCune violated Plaintiff's due process rights and the Rules of Professional Responsibility. (Complaint at ¶ 2, p.7). The Complaint sought to "start disbarment proceedings" against McCune as well as "all Defendants that have a law license." *Id.*

On July 5, 2019, Preliminary Objections and a Brief in Support were filed on behalf of Appellant McCune, raising, *inter alia*, the defenses of absolute prosecutorial immunity and high public official immunity. (*See* docket in underlying lawsuit) On July 15, 2019, Myers filed his Response in Opposition. *Id.* The other Defendants, through their respective counsel, also filed Preliminary Objections to the Complaint, on other grounds. *Id.*

Because at that time Timothy McCune was a Court of Common Pleas of Butler County Judge, the other judges recused themselves. *Id.* Senior Judge William R, Cunningham of the Court of Common Pleas of Erie County was assigned. *Id.* On September 5, 2019, Judge Cunningham issued an Order scheduling oral argument on the various Defendants' Preliminary Objections for October 22, 2019. *Id.*

On November 6, 2019, without leave of Court, Myers filed a pleading titled "Amended Pleading Adding Defendants and for Continued Violation of Plaintiff's

Constitutional Rights of the United States of America" [sic] purporting to add all the defense attorneys and Judge Cunningham himself as defendants in the case. *Id.*

On November 21, 2019, Judge Cunningham issued his Opinion granting the various Defendants' Preliminary Objections. *Id.*

On December 30, 2019, Myers filed his Notice of Appeal. *Id.*

III. SUMMARY OF THE ARGUMENT

The trial court appropriately granted McCune's Preliminary Objections. It is well-settled that a citizen lacks a cognizable interest in the prosecution or non-prosecution of another person, and lacks standing to assert a claim against a district attorney for a decision not to prosecute. The decision whether or not to prosecute is a core prosecutorial function that is shielded under Pennsylvania law by the doctrine of high public official immunity and under federal law by the doctrine of absolute prosecutorial immunity. Myers cannot pursue a claim against McCune. The trial court correctly sustained his Preliminary Objections in the nature of a demurrer.

The docket of this appeal erroneously lists defense counsel as being parties to this appeal. This arose out of the Prothonotary of the Court of Common Pleas of Butler County erroneously listing all of the defense attorneys and Judge Cunningham himself as defendants after a filing by Myers that violated the Rules of Civil Procedure in numerous respects. That error was carried over when the

docket was transmitted to the Superior Court. Further, any claim against defense counsel would be futile. There is no basis for a plaintiff in a lawsuit to bring a claim against opposing counsel for filing preliminary objections and arguing them in court.

IV. ARGUMENT

The Brief of Appellant presents nine questions. Because of the differences between the nature of the claims against former District Attorney McCune and the other Appellants as well as the trial court's bases for sustaining his Preliminary Objections, only one of those questions is germane to whether that decision should be affirmed. *See* Appellant's question 5. Relative to the claims against defense counsel, only question 3 is in any way pertinent. Each will be addressed in turn.

A. The trial court correctly sustained former District Attorney McCune's Preliminary Objections.

The gravamen of Myers' claim against former District Attorney McCune was his decision not to prosecute AK Steel and others for what Myers believed to have been crimes.

Judge Cunningham's November 21, 2019 Opinion sustaining the Defendants' Preliminary Objections correctly observes that Myers lacks standing to assert a claim arising out of the non-prosecution of others. (Opinion dated 11/21/19 at 3). Further, any state law claim arising out of the decision not to prosecute would be barred by the doctrine of high public official immunity. *Id.* at

4. Any federal claim would be barred by the doctrine of high public official immunity. *Id.* Judge Cunningham observed that the Complaint never specified who should have been prosecuted, or for what crime. *Id.* The Opinion observes that eighteen years had passed between Myers' request to then-District Attorney McCune and the filing of his civil lawsuit, which is outside the statute of limitations. *Id.* Finally, the Opinion observes that the requested relief of the disbarment of McCune is not a remedy in that lawsuit. *Id.*

Under the applicable standard of review, this Court "'will reverse a trial court's decision to sustain preliminary objections only if the trial court has committed an error of law or an abuse of discretion.'" *Lerner v. Lerner*, 954 A.2d 1229, 1234 (Pa. Super. 2008) (quoting *Kramer v. Dunn*, 749 A.2d 984, 990 (Pa. Super. 2000). Judge Cunningham neither committed an error of law nor abused his discretion. His Opinion is well reasoned, and should be affirmed.

1. Myers does not have standing to sue a prosecutor for not bringing a criminal prosecution.

Judge Cunningham's November 21, 2019 Opinion correctly observes that Myers "does not have standing to sue McCune for failing to prosecute a fellow citizen. It has long been the law that a private citizen cannot sue the prosecutor for exercising the core function of making prosecutorial decisions." (Opinion dated 11/21/19 at 3) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (holding

that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."). The Opinion observes,

> The rationale [for the lack of standing in such instances] is based upon the need for prosecutors to exercise independent professional judgment grounded on the facts and law and without regard to whether private citizens can file suit. It also prevents private citizens from seeking revenge on a perceived enemy by attempting to coerce a prosecutor to file criminal charges for fear of liability.

Id. at 4.

Judge Cunningham's Opinion is entirely correct. 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.*, 410 U.S. at 619).

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. *The Doctrine of High Public Official Immunity bars any claim under Pennsylvania law.*

As noted above, Judge Cunningham's Opinion observes that policy considerations behind the lack of standing to sue a prosecutor for not bringing criminal charges another individual also inform Pennsylvania's doctrine of high public official immunity. (Opinion dated 11/21/19 at 4) (citing *Durham v. McElynn*, 772 A.2d, 68, 68 (Pa. 2001)).

Again, Judge Cunningham's Opinion is correct. 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*, 772 A.2d at 68.

> 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)).

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

Durham, 772 A.2d at 70 (quoting *Matson*, 88 A.2d at 899-900).

Appellant does not, and respectfully cannot, offer any basis to reverse Judge Cunningham's ruling on this point.

3. The Doctrine of Absolute Prosecutorial Immunity bars any civil rights claim under federal law.

The Complaint never precisely identifies the cause of action asserted against former District Attorney McCune, but does reference the founding fathers and references the United States Constitution. Judge Cunningham's Opinion correctly observes that like the immunity afforded to prosecutors under state law, prosecutors are also absolutely immune from suit under federal law. (Opinion dated 11/21/19 at 4) (citing *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992)).

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).

In *Kulwicki*, cited by Judge Cunningham, 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." *Id.* 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." *Id.* 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[.]" *Id.* at 1464.

In short, Myers cannot pursue a lawsuit against former District Attorney McCune for not initiating criminal proceedings against AK Steel, the other parties to this Appeal, or anyone else. Judge Cunningham appropriately dismissed the claim against him with prejudice. Myers does not, and cannot, raise any basis to reverse Judge Cunningham's well-reasoned Opinion. It is respectfully submitted that the dismissal with prejudice of the claim against Appellant McCune should be affirmed.

B. Counsel for Appellants are not proper parties to the underlying case or this appeal. Even if they were, there is no legally-cognizable claim that could be asserted against them.

The docket of this appeal reflects the trial judge and all defense counsel as being parties to the underlying case and to this appeal. Respectfully, that is in error.

The procedural history relevant to this issue is as follows. Oral argument on the Defendants' Preliminary Objections were heard by Judge Cunningham on October 22, 2019 (*see* docket). Defense counsel appeared before Judge Cunningham as ordered and argued their respective Preliminary Objections on behalf of their clients.

On November 6, 2019, without leave of Court, Myers filed a pleading titled "Amended Pleading Adding Defendants and for Continued Violation of Plaintiff's Constitutional Rights of the United States of America" [sic] purporting to add all the defense attorneys and Judge Cunningham himself as defendants in the case. *Id.* Appellant's "Amended Pleading" appeared to be calculated to remove Judge Cunningham from the case. It argues that he must "immediately be removed from this case because he is now a defendant!" (Amended Pleading Adding Defendants and for Continued Violation of Plaintiff's Constitutional Rights of the United States of America at 1). It argued that the defense attorneys who appeared at oral argument on the Preliminary Objections "never once plead the innocence of their clients, but rather used procedure and UNCONSTITUTIONAL LAWS in an

attempt to keep Plaintiff from his Constitutional Right to a JURY TRIAL, DUE PROCESS and EQUAL PROTECTION OF THE LAWS." *Id.* at 2 (capitalization in the original).

Under Rule 2253(a)(2) of the Pennsylvania Rules of Civil Procedure, Myers would have had to receive leave of court to add additional parties. He received neither. (*See* Butler County docket) Further, the "Amended Pleading" is not the correct way to add additional defendants – they must be added by way of a Complaint. Pa. R. Civ. P. 2255(a). Unfortunately, the Butler County Prothonotary's docket incorrectly listed Judge Cunningham and all defense counsel as defendants. When Myers' case was dismissed in its entirety and his appeal was filed, the Butler County docket was transmitted to the Superior Court, resulting in the erroneous listing of Judge Cunningham and all defense counsel as appellants.

The trial court's Rule 1925(a) statement details how the trial judge explained to Myers that he cannot just add parties at will, how that advice was ignored, and how any attempt to add defense counsel was in error.

Subsequently, Judge Cunningham and all defense counsel (apparently other than Attorney Michael R. Lettrich) have been removed as defendants from the Butler County Docket (a copy of which is attached to Appellee Chivers' Motion to Correct Caption and for Ancillary Relief as Exhibit 2). Plainly, the failure to remove Lettrich was obviously an oversight – there is no difference between the

manner in which he was purportedly added from any of the other defense counsel. It is respectfully submitted that all defense counsel be stricken from the docket of this appeal.

Even if Myers had followed the appropriate rules, the claim would still fail. The basis for the claim against the defense attorneys is that they presented Preliminary Objections on behalf of their clients. Myers' pleadings provide no basis for any cognizable claim against them.

In Pennsylvania, "[t]he doctrine of judicial privilege provides '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.'" *Freundlich & Littman, LLC v. Feierstein*, 157 A.3d 526, 530 (Pa. Super. 2017) (quoting *Bochetto v. Gibson*, 860 A.2d 67, 71 (Pa. 2004) (citation, footnote, emphasis, and internal quotations omitted)). "Judicial immunity is granted to judges, lawyers, witnesses, and all others directly involved in a judicial proceeding to make comments relevant to the proceeding. The immunity is absolute with respect to defamatory statements made in the pleadings or in the courtroom." *Barto v. Felix*, 378 A.2d 927, 929 (Pa. Super. 1977) (citing *Greenberg v. Aetna Insurance Co.*, 235 A.2d 576 (Pa. 1967), cert. denied, 392 U.S. 907 (1968)).

Further, to the extent that Myers is arguing that the defense attorneys violated his rights under the United States Constitution, such claims can be pursued only against persons who were acting under color of state law. *See* 42 U.S.C. § 1983. A private defense attorney does not act under color of state law. *See, e.g., Davis v. Macias*, 1990 WL 171263 at *1 (E.D. Pa. Nov. 5, 1990) (dismissing claim civil rights claim against private attorney arising out of settlement of accident claim, because private lawyers do not act under color of state law). "[L]lawyers who participate in the trial of private state court litigation are not state functionaries acting under color of state law, and that although an attorney is an 'officer of the court' he is not an official of any state." *M. W. Farmer & Co. v. Runner*, 23 Pa. D. & C.4th 230, 234–35 (Com. Pl. 1995) (citing *Kovacks v. Goodman*, 383 F. Supp. 507 (E.D. Pa. 1974), aff'd, 515 F.2d 507 (3d Cir. 1975).

Respectfully, no claim presently exists against defense counsel. Any attempt to assert such a claim would be futile.

V. CONCLUSION

For all these reasons, the trial court correctly interpreted and applied the law. The trial court's judgment should be affirmed.

Respectfully submitted,

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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.

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