

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

**PRELIMINARY OBJECTIONS**

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

Counsel of Record for This Party:

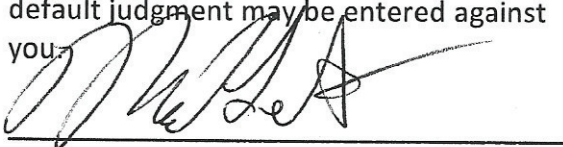
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**NOTICE TO PLEAD**

TO: Plaintiff

You are hereby notified to plead to the  
enclosed Preliminary Objections within  
twenty (20) days from service hereof or a  
default judgment may be entered against  
you.



Counsel for 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

By: 

MICHAEL R. LETTRICH, ESQUIRE  
MARIE MILIE JONES, ESQUIRE

Counsel for Defendant,  
HONORABLE TIMOTHY F. McCUNE

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**PRELIMINARY OBJECTIONS**

AND NOW, comes the HONORABLE TIMOTHY F. MCCUNE, one of the Defendants, by and through his undersigned counsel, JonesPassodelis, PLLC, and files the within Preliminary Objections pursuant to Pa. R. Civ. P. 1028, averring as follows:

1. 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.

2. The *pro se* Complaint is largely devoid of allegations of fact. Instead, it alleges that "Plaintiff has provided all evidence at [www.1776totyranny.com](http://www.1776totyranny.com) that is available to download by Defendants or anyone." Complaint at (unnumbered) ¶ 2. (This website purportedly has key documents which should have been attached to his pleading, as they are referenced in it.)

3. The Complaint appears to arise 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.

4. As the Court is aware, the Honorable Timothy McCune, also named, is a judge of the Court of Common Pleas of Butler County.

5. The Complaint pleads no allegations against him in his capacity as a judge. Instead, it appears to take issue with actions taken (or more precisely, not taken) in his former capacity as a District Attorney many years ago.

6. The Complaint alleges that what "all the other Defendants" (i.e. other than McCune) did to Plaintiff "is a crime." Complaint at (numbered) ¶ 2, p.7.

7. The Complaint avers that "McCune was responsible to INVESTIGATE and prosecute" the other Defendants for their alleged "fraud and fraudulent acts." *Id.* (capitalization in the original).

8. The Complaint alleges that then-District Attorney McCune stated "'I have no opinion about your [Plaintiff's] claims with AK Steel.'" *Id.*

9. Because then-District Attorney McCune declined to prosecute Plaintiff's adversaries, the Complaint alleges that then-District Attorney McCune "committed fraud by turning a blind eye" to some alleged crimes. Complaint at (numbered) ¶ 2, p.7.

10. The Complaint alleges that because Plaintiff's adversaries were not prosecuted as he believes they should have been, then-District Attorney McCune's declination to prosecute "makes him complicit." *Id.*

11. The Complaint also 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.*

12. Plaintiff's Complaint argues that the Court "must also start disbarment proceedings" against McCune as well as "all Defendants that have a law license." *Id.*

**FIRST PRELIMINARY OBJECTION**  
**Demurrer pursuant to Pa. R. Civ. P. 1028(a)(4)**  
**High Public Official Immunity**

13. Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure permits the filing of a preliminary objection for "legal insufficiency of a pleading (demurrer)[.]"

14. Plaintiff cannot pursue a claim against then-District Attorney McCune under Pennsylvania law because any such claim is barred by the doctrine of high public official immunity, which holds 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).

15. 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).

16. The decision of whether or not to file criminal charges is a core prosecutorial function. Such a decision is made in the course of a District Attorney's official duties.

17. Accordingly, the doctrine of high public official immunity bars any state law claim in this case and further pleading would be futile. The claim against former District Attorney McCune are appropriately dismissed with prejudice.

**SECOND PRELIMINARY OBJECTION**  
**Demurrer pursuant to Pa. R. Civ. P. 1028(a)(4)**  
**Absolute Prosecutorial Immunity**

18. While high public official immunity bars any state law claim, any claim under federal law would also fail because the decision to initiate criminal charges and to prosecute Plaintiff is shielded by absolute prosecutorial immunity. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

19. "The 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 v. Dawson*, 969 F.2d 1454, 1463 (3d Cir. 1992).

20. Plaintiff simply cannot bring his claims under any cause of action, state or federal, and amendment would be futile. Dismissal with prejudice is appropriate.

**THIRD PRELIMINARY OBJECTION**  
**Demurrer pursuant to Pa. R. Civ. P. 1028(a)(4)**  
**Lack of standing**

21. Plaintiff lacks standing to pursue a claim arising out of the non-prosecution of others.

22. Citizens lack standing to bring a claim because someone they want to be charged was not so charged. *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"))).

23. For this reason as well, Plaintiff's claims against Judge McCune are appropriately dismissed with prejudice.

**FOURTH PRELIMINARY OBJECTION**  
**Demurrer pursuant to Pa. R. Civ. P. 1028(a)(4)**  
**Failure to state a claim**

24. 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" cannot support a cause of action.

25. It is well-settled that in Pennsylvania, "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)).

26. The Complaint alleges that the decision not to prosecute was "fraud." That is nonsense. What is alleged does not constitute fraud.

27. 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)).

28. What the Complaint alleges fits none of these elements.

29. The Complaint's claims against Judge McCune are clearly barred by the doctrines of high public official immunity and absolute prosecutorial immunity. Plaintiff lacks standing to bring a claim arising out of a decision not to prosecute.

30. Further, even in the absence of these immunity and standing defenses (and, ultimately, a statute of limitations defense), there was no fraud committed by former District Attorney McCune, even if the Court assumes the truth of all of the fanciful allegations in the Complaint. Further amendment of the Complaint would be futile and dismissal with prejudice is appropriate.

WHEREFORE, it is respectfully requested that these Preliminary Objections be granted and all claims be dismissed against Defendant McCune, with prejudice.

**JURY TRIAL DEMANDED**

Respectfully submitted,

JONESPASSODELIS, PLLC

By: 

MICHAEL R. LETTRICH, ESQUIRE  
MARIE MILIE JONES, ESQUIRE

Counsel for Defendant,  
HONORABLE TIMOTHY F. McCUNE



**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:

- U.S. First Class Mail, Postage Paid
- Hand Delivery
- Certified Mail, Return Receipt Requested
- Facsimile Transmittal
- UPS Delivery
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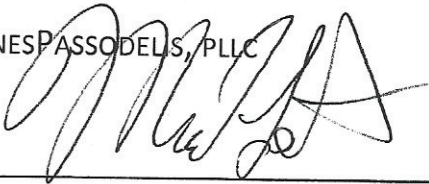
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Dated: 7/3/19

JONESPASSODELS, PLLC  


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Counsel for Defendant,  
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No. 2019-10516

HONORABLE THOMAS J. DOERR

**ORDER OF COURT**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2019, the Preliminary Objections filed by the Honorable Timothy F. McCune are GRANTED. All claims against him are dismissed. Because it is apparent that further amendment of the Complaint would be futile, dismissal is WITH PREJUDICE. Judgment is entered in Judge McCune's favor and against Plaintiff, and his name is hereby removed from the caption of this case.

BY THE COURT:

\_\_\_\_\_, J.