

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>ANTHONY NOVAK,</b>	)	<b>CASE NO. 1:16-cv-02325</b>
	)	
<b>Plaintiff,</b>	)	<b>JUDGE DAN AARON POLSTER</b>
	)	
<b>v.</b>	)	
	)	<b>DEFENDANT TIMOTHY DOBECK'S</b>
<b>THE CITY OF PARMA, et al.,</b>	)	<b>MOTION TO DISMISS PLAINTIFF'S</b>
	)	<b>COMPLAINT</b>
<b>Defendants.</b>	)	
	)	

Defendant Timothy Dobeck, City of Parma Prosecutor, respectfully requests that the Court dismiss all claims against him pursuant to Fed. Civ.R. 12(b)(6) for failure to state a claim against him upon which relief can be granted. Prosecutor Dobeck is entitled to full prosecutorial immunity from the plaintiff's claims.

A memorandum in support of this motion is attached hereto and incorporated herein.

Respectfully submitted,

s/ Melanie R. Irvin

**D JOHN TRAVIS (0011247)**  
**STEVEN D. STRANG (0085444)**  
**MELANIE R. IRVIN (0084407)**  
GALLAGHER SHARP LLP  
Sixth Floor Bulkley Building  
1501 Euclid Avenue  
Cleveland, Ohio 44115  
(216) 241-5310 (phone)  
(216) 241-1608 (fax)  
[jtravis@gallaghersharp.com](mailto:jtravis@gallaghersharp.com)  
[sstrang@gallaghersharp.com](mailto:sstrang@gallaghersharp.com)  
[mirvin@gallaghersharp.com](mailto:mirvin@gallaghersharp.com)  
*Counsel for Defendants*

**MEMORANDUM IN SUPPORT**

**I. ALLEGATIONS IN THE COMPLAINT**

This suit arises out of the plaintiff creating a City of Parma Police Department Facebook profile page, nearly identical in appearance to the real one, and making posts on that page regarding supposed police department activities. (Complaint, ¶2.) Plaintiff was arrested by the Parma Police Department and charged with a violation of Ohio's disrupting public services statute, R.C. 2909.04(B), a fourth degree felony. (Complaint, ¶¶2,10.) Plaintiff also alleges that a Grand Jury seated in Cuyahoga County indicted the plaintiff on one count of violating R.C. 2909.04(B) on April 11, 2016. (Complaint, ¶ 36.) Plaintiff further alleges that he was then prosecuted by the Cuyahoga County Prosecutor's office, through a jury trial, which eventually resulted in an acquittal. (Complaint, ¶¶ 37-40.)

Plaintiff filed suit on September 19, 2016 against the City of Parma, Detective Kevin Riley in his individual and professional capacities, Detective Thomas Connor in his individual and professional capacities, and Prosecutor Dobeck in his individual and professional capacities, seeking a declaratory judgment that R.C. §2909.04(B) is unconstitutional, and alleging claims for First Amendment retaliation, unreasonable search and seizure, false arrest and imprisonment, malicious prosecution, violation of the Ohio constitutional right to free speech, unreasonable search and seizure under the Ohio Constitution, and civil conspiracy. All of the allegations against Prosecutor Dobeck stem from his role as a prosecuting attorney, therefore Prosecutor Dobeck now moves to dismiss the plaintiff's complaint with prejudice because he is entitled to full prosecutorial immunity from all of the plaintiff's claims.

## II. LAW & ARGUMENT

### A. FED. CIV.R. 12(B)(6) STANDARD.

A motion to dismiss under Civ. R. 12(b)(6) attacks the legal sufficiency of the complaint. *Roth Steel Prod. v. Sharon Steel Co.*, 705 F.2d 134, 155 (6th Cir. 1983). In determining whether dismissal on this basis is appropriate, the complaint must be construed in the light most favorable to the plaintiff, and all well-pleaded facts must be accepted as true. *Bower v. Federal Express Corp.*, 96 F.3d 200, 203 (6th Cir. 1996); *Misch v. The Comty. Mutual Ins. Co.*, 896 F. Supp. 734, 738 (S.D. Ohio 1994). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do. Factual allegations must be enough to *raise a right to relief above the speculative level* on the assumption that all of the complaint’s allegations are true.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), paragraph one of the syllabus (emphasis added).

The purpose of a Rule 12(b)(6) motion is to allow the court to eliminate claims that are fatally flawed in their legal premises and destined to fail and, thus, spare litigants the burdens of unnecessary pretrial and trial activity. *Advanced Cardiovascular Systems, Inc. v. Slimed Life Systems, Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993) (citing *Nusku v. Williams*, 490 U.S. 319, 326-27 (1989)). As noted by the district court in *Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 567 (D. R.I. 1996), “[I]ike a battlefield surgeon sorting the hopeful from the hopeless, a motion to dismiss invokes a form of legal triage, a paring of viable claims from those doomed by law.”

**B. PROSECUTOR DOBECK IS ENTITLED TO FULL PROSECUTORIAL IMMUNITY FROM THE §1983 CLAIMS.**

*1. The Federal Claims Fail as a Matter of Law.*

In *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009), the Supreme Court of the United States held that absolute immunity protects a prosecutor when he prepares to initiate a judicial proceeding. *Van de Kamp* relies on *Imbler v. Pachtman*, 424 U.S. 409 (1976), to explain the reaches of prosecutorial immunity. Prosecutors are absolutely immune from liability in §1983 suits for actions that are “intimately associated with the judicial phase of the criminal process.” *Imbler*, 424 U.S. at 428. The grant of immunity is based on a concern that “a defendant will ‘transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State’s advocate.’” *Id.* at 425. Claims related to §1983 are particularly at issue because “public trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.” *Id.* at 424-25.

*Imbler* expressly noted that prosecutorial immunity may not apply when a prosecutor is engaged in investigative or administrative tasks. 424 U.S. at 431. However, when a prosecutor’s duties are “intimately associated with the judicial phase of the criminal process,” prosecutorial immunity applies with full force. *Id.* at 430.

The Sixth Circuit has held that prosecutors are immune for the following conduct: (1) malicious prosecution, *Spurlock v. Thompson*, 330 F.3d 791, 797 (6th Cir. 2003) (citing *Burns v. Reed*, 500 U.S. 478, 485 n. 4 (1991)); (2) appearances at probable cause and grand jury hearings, *id.* (citing *Burns*, 500 U.S. at 487, n. 8); (3) professional evaluation of evidence assembled by police and appropriate presentation of that evidence at trial or before the grand jury, *id.* (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993)); (4) preparation of witnesses for trial, *id.*

(citing *Higgason v. Stephens*, 288 F.3d 868, 878 (6th Cir. 2002)); and even (5) knowing presentation of false testimony at trial, *id.* (citing *Imbler*, 424 U.S. at 430; *Buckley*, 509 U.S. at 267 n. 3). *See, also, Koubriti v. Convertino*, 593 F.3d 459, 468 (6th Cir. 2010) (“The . . . non-disclosure of exculpatory information [is] certainly entitled to absolute immunity.”); *see also Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir. 1986) (a prosecutor's alleged “use of perjured testimony[,] the non-disclosure of exculpatory information[,]”... are all “related to the acts of an advocate and thus come within the area of prosecutorial immunity” based on *Imbler*.)

Prosecutor Dobeck is protected from the plaintiff's allegations by prosecutorial immunity. The allegations against Prosecutor Dobeck are all “intimately associated with the judicial phase of the criminal process,” and thus he is immune and should be dismissed. *See Vaughan v. City of Shaker Heights*, No. 1:10-CV-0609, 2011 U.S. Dist. LEXIS 136208 (Aug. 30, 2011) (dismissing all claims against the county prosecutor).

## **2. The State Claims Fail as a Matter of Law.**

Prosecutors also have common law absolute immunity concerning state law claims such as those brought in this case. *O'Connor v. Kelty*, No. 4:10CV0338, 2010 U.S. Dist. LEXIS 66789, \*2 (N.D. Ohio Jul. 2, 2010), (citing *Webb v. Greene Cnty. Sheriff's Office*, 494 F.Supp.2d 779, 797 (S.D. Ohio 2007)); *Willitzer v. McCloud*, 6 Ohio St.3d 447, 449 (1983) (recognizing possible application of prosecutorial immunity in context of state law claim).

## **III. CONCLUSION**

For the forgoing reasons, the plaintiff's complaint against Timothy Dobeck should be dismissed for failure to state a claim upon which relief can be granted pursuant to Fed. Civ. R. 12(b)(6).

Respectfully submitted,

s/ Melanie R. Irvin

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**STEVEN D. STRANG (0085444)**

**MELANIE R. IRVIN (0084407)**

GALLAGHER SHARP LLP

Sixth Floor - Bulkley Building

1501 Euclid Avenue

Cleveland, Ohio 44115

(216) 241-5310 (phone)

(216) 241-1608 (fax)

Email: [jtravis@gallaghersharp.com](mailto:jtravis@gallaghersharp.com)

[sstrang@gallaghersharp.com](mailto:sstrang@gallaghersharp.com)

[mirvin@gallaghersharp.com](mailto:mirvin@gallaghersharp.com)

*Counsel for Defendants*

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 28th day of November, 2016 the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Melanie R. Irvin

**D JOHN TRAVIS (0011247)**

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*Counsel for Defendants*