Worley v. Columbia Gas, Inc.: Advice of Counsel as a Defense to an Action for Malicious Prosecution--The Kentucky Position

Eric Steven Smith  
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Torts Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol63/iss1/9

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsuaky.edu.
In a malicious prosecution action, the defendant often raises the defense that he relied upon the advice of an attorney in setting the proceedings in motion against the plaintiff. Under certain conditions, such reliance can provide a complete defense for the defendant. In Kentucky the law controlling this defense, although well settled, is not simple; and in order for a court to rule such a defense conclusive as a matter of law, the defendant must satisfy a number of specific and subtle requirements. These requirements deal not only with the defendant's own actions and intentions in seeking and relying upon counsel's advice but also with counsel's capability to give advice upon which the defendant may safely rely.

In light of these requirements, to say simply that reliance upon “advice of counsel is a complete defense to an action for malicious prosecution” is a misleading over-simplification and is especially serious when uttered by a high court in a factually complex and unusual case. This recently occurred in Worley v. Columbia Gas, Inc., wherein the Sixth Circuit Court of Appeals coupled this overly simplistic statement with an incorrect and incomplete statement of the requirements necessary under Kentucky law for a valid advice of counsel defense. Although these statements were only dicta, when taken together, in light of the unusual facts of that case, they could have a serious tendency to mislead practitioners not only as to the complexity of the advice of counsel defense but also as to the requirements necessary to sustain it.

In order to convey a correct and complete understanding of the “advice of counsel” defense in malicious prosecution actions, its operation will be detailed in the following sections.

---

2 Id. at 256.
3 Id. at 263, 264.
Malicious Prosecution

In Kentucky, five elements are necessary to sustain a cause of action for malicious prosecution. Each of these must affirmatively appear; the absence of any one of them will void the action. 4 The elements are: (1) the defendant must have been the proximate cause setting the law in motion against the plaintiff in the original action; 5 (2) he must have done so maliciously; 6 (3) his action must have been instigated without probable cause; 7 (4) the prior action must have been terminated favorably to the plaintiff; 8 and (5) the plaintiff must have suf-

4 See Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Cravens v. Long, 257 S.W.2d 548 (Ky. 1953); Harter v. Lewis Stores, Inc., 240 S.W.2d 86 (Ky. 1951); Smith v. Smith, 178 S.W.2d 613 (Ky. 1944).

5 Cravens v. Long, 257 S.W.2d 548 (Ky. 1953); Bazzel v. Illinois Cent. Ry., 262 S.W. 966 (Ky. 1924); McClarty v. Bickel, 159 S.W. 783 (Ky. 1913). A cause of action for malicious prosecution may result from either prior criminal or prior civil proceedings. Cravens v. Long, supra.

6 Cravens v. Long, 257 S.W.2d 548 (Ky. 1953); Lexington Cab Co. v. Terrell, 137 S.W.2d 721 (Ky. 1940). However, malice may be inferred from want of probable cause. Sneeny v. Howard, 447 S.W.2d 865 (Ky. 1969); Cravens v. Long, supra; Hendrie v. Perkins, 42 S.W.2d 502 (Ky. 1931); Davis v. Brady, 291 S.W. 412 (Ky. 1927). Whether or not such malice exists, however, is a question for the jury under the circumstances of each case. Bowles v. Katzman, 214 S.W.2d 1021 (Ky. 1948); Mosier v. McFarland, 106 S.W.2d 641 (Ky. 1937).

7 Freeman v. Logan, 475 S.W.2d 636 (Ky. 1972); Flynn v. Songer, 399 S.W.2d 491 (Ky. 1966); Christopher v. Henry, 143 S.W.2d 1069 (Ky. 1940). However, while malice may be inferred from lack of probable cause, lack of probable cause may never be inferred from evidence of malice. Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Cravens v. Long, 257 S.W.2d 548 (Ky. 1953); Emler v. Fox, 189 S.W. 469 (Ky. 1916).

8 Freeman v. Logan, 475 S.W.2d 636 (Ky. 1972); Massengale v. Lester, 403 S.W.2d 697 (Ky. 1966); Blackenship v. Staton, 348 S.W.2d 925 (Ky. 1961); Conder v. Morri-
ffered some damage or incurred some expense in defending himself in that action. These requirements are consistent with the original development of this cause of action and echo those required in the majority of jurisdictions.

The cause of action for malicious prosecution represents a policy consideration in favor of protecting defendants from unjustifiable litigation by giving them recourse against those who wrongfully invoke legal proceedings against them. These interests, however, are counterbalanced in most jurisdictions by public policies favoring (1) the exposure of wrongdoing and crime and (2) free access to civil courts to determine the rights of the parties, without fear of suits for damages if unsuccessful. As a result, malicious prosecution actions, in the majority of jurisdictions, are not favored in the law. Kentucky is among the majority.

OPERATION OF ADVICE OF COUNSEL AS A DEFENSE TO MALICIOUS PROSECUTION

One of the most frequently and successfully asserted defenses to suits for malicious prosecution is the claim that the defendant consulted an attorney and relied upon his advice in instigating the action against the plaintiff. The Kentucky Court of Appeals first recognized this defense in 1891, when it stated that a reliance on advice of counsel would serve to make
out a case of probable cause\textsuperscript{16}—that is, the attorney's advice that a valid cause of action existed would provide the defendant with probable cause for bringing the original action. Since lack of probable cause in initiating the original proceeding is one of the elements essential to sustaining an action for malicious prosecution, a finding of probable cause was (and still is) fatal to the plaintiff's cause.

In the early cases, mere reliance upon advice of counsel did not conclusively establish probable cause; conclusiveness was dependent upon the strength of the case as developed at trial.\textsuperscript{17} A mere assurance by an attorney that the defendant was justified in setting the law in motion against the plaintiff, when it was clear that the opposite was true would not create a valid defense. A claim of reliance would not operate to protect a defendant who wrongfully used legal process against the plaintiff.\textsuperscript{18}

Between 1896 and 1925, the Kentucky Court used several different phrases to describe the operation of this defense, variously indicating that advice of counsel would: (1) establish the existence of probable cause,\textsuperscript{19} (2) exempt the party acting upon such advice from the imputation of proceeding maliciously and

\textsuperscript{16} Rives v. Wood, 15 S.W. 131 (Ky. 1891); Burke v. Rhodes, 13 Ky. L. Rptr. 431 (1891).

\textsuperscript{17} Rives v. Wood, 15 S.W. 131 (Ky. 1891); Burke v. Rhodes, 13 Ky. L. Rptr. 431 (1891).

\textsuperscript{18} An action for abuse of process is to be distinguished from an action for malicious prosecution; the prior action lies in cases where legal process is employed (and thus an action commenced) in order to accomplish a purpose other than a redress of a wrong. In actions for abuse of process, therefore, the purpose for which the action or proceeding was initiated is the only thing of importance. Lack of probable cause to sustain the prior action or that the prior action terminated in the plaintiff's favor need not be proven.

An action for malicious prosecution will lie, however, when civil or criminal proceedings are commenced without justification, that is, when the original plaintiff maliciously caused process to be issued.

An example commonly given is as follows: where an innocent person is prosecuted for a criminal offense, without reasonable grounds (probable cause) to believe he is guilty of that offense, the action is for malicious prosecution; if a person is prosecuted by another in order to collect payment of a debt, the action is for abuse of process.

For a more complete, though general, analysis of the distinction between these two causes of action see, Stoll Oil Refining Co. v. Pierce, 337 S.W.2d 263 (Ky. 1960); Prosser § 121.

\textsuperscript{19} Ahrens & Ott Mfg. Co. v. Hoeher, 51 S.W. 194 (Ky. 1899); Anderson v. Columbia Fin. & Trust Co., 50 S.W. 40 (Ky. 1899).
without probable cause,20 and (3) evidence the existence of probable cause (but not conclusively establish it).21 Today, however, different jurisdictions use these three phrases to indicate distinctly different effects arising from the invocation of this defense. Some jurisdictions hold that establishing the existence of probable cause prevents the showing of the lack of probable cause necessary to sustain the malicious prosecution action.22 Other jurisdictions exempt the party acting on counsel's advice from the imputation of proceeding maliciously and without probable cause, negating two of the elements necessary to the cause of action, viz., a showing of a lack of probable cause and a showing that the action was maliciously commenced.23 In contrast, some courts say that if the defendant does not conclusively establish the existence of probable cause, but merely provides evidence of its existence, reliance on advice of counsel creates a rebuttable presumption that probable cause existed.24

While a literal reading of the Kentucky decisions of the 1896 to 1925 period would indicate that the Court of Appeals, too, held three different views of the operation of advice of counsel, it is more likely that the Court was only giving fuller expression to the 1891 view.25 That view, emerging from this early period without special comment by the Court, held that reliance upon the advice of counsel conclusively establishes the existence of probable cause. As thus stated, the defense has remained largely unchanged and operates in like fashion today in Kentucky26 and in the majority of jurisdictions.27 It is likely that the variations in language during the 1896 to 1925 period allude to what later developed as separate and distinct condi-

21 Elmer v. Fox, 189 S.W. 469 (Ky. 1916).
24 Peppas v. Miles, 61 S.E.2d 429 (Ga. 1950).
25 This was the view introduced by the Kentucky Court in Rives v. Wood, 15 S.W. 131 (Ky. 1891) and Burke v. Rhodes, 13 Ky. L. Rptr. 431 (1891).
26 Hale v. Baker, 483 S.W.2d 133 (Ky. 1972).
27 Id. See also Tate v. Connel, 416 P.2d 213 (Ariz. 1966); Adler v. Segal, 108 So. 2d 777 (Fla. 1959); Peoples Protective Life Ins. Co. v. Neuhoff, 407 S.W.2d 190 (Tenn. 1966).
tions precedent and subsequent to a valid advice of counsel defense. These conditions will be covered more fully hereinafter.

Since lack of probable cause for bringing the original action is an essential element of subsequent action for malicious prosecution, if the defendant can prevent the plaintiff from showing a lack of probable cause, he will have a complete defense in the second action. Just how reliance on advice of counsel operates to aid the defendant in this regard may best be described as follows: Probable cause has been held to have sufficed to induce a man of ordinary prudence to believe the plaintiff was guilty of the offense charged or that a valid cause of action against him existed. This calls for a conclusion by the defendant as to whether or not the facts within his knowledge are sufficient to support the instigation of legal proceedings. An ordinary man is presumed to know the law, and a defendant runs a considerable risk in determining whether he has probable cause if he does not consult an attorney. His judgment as to the sufficiency of his factual basis may be affected by the emotion-charged atmosphere of the situation in which he finds himself, and the result may be a mistaken decision to prosecute. Indeed, mistakes of this nature often form the basis of malicious prosecution actions. This problem, under the Kentucky and majority view, is entirely avoided by reliance on the advice of counsel. When the defendant places the facts before an attorney and asks for his conclusion as to their sufficiency, the lawyer's advice becomes the reasonable grounds upon which the defendant's belief in the sufficiency of his factual basis can be placed. As the Court of Appeals stated

---

28 Freeman v. Logan, 475 S.W.2d 636 (Ky. 1972); Flynn v. Songer, 399 S.W.2d 491 (Ky. 1966); Christopher v. Henry, 143 S.W.2d 1069 (Ky. 1940).
29 Freeman v. Logan, 475 S.W.2d 636 (Ky. 1972); Flynn v. Songer, 399 S.W.2d 491 (Ky. 1966); Christopher v. Henry, 143 S.W.2d 1069 (Ky. 1940).
30 Haseldon v. York, 112 S.W.2d 984 (Ky. 1938); Westerfield v. Prudential Ins. Co., 94 S.W.2d 986 (Ky. 1936); Stephens v. Gravit, 124 S.W. 414 (Ky. 1910); Blair v. Meshew, 7 Ky. Opin. 103 (1873). As can be readily seen, advice of counsel is not the only means by which probable cause may be established. See Smith v. Kidd, 246 S.W.2d 155 (Ky. 1952); Stamper v. McCally, 229 S.W.2d 54 (Ky. 1950); Figuccion v. Prudential Ins. Co., 116 S.W.2d 291 (Ky. 1938).
31 See Lancaster v. Langston, 36 S.W. 521 (Ky. 1896).
in *Lancaster v. Langston*,

"[w]hether the facts amount to probable cause is the very question submitted to counsel in such cases, and when the client is instructed that they do, he has taken all the precautions demanded of a good citizen."

It is important to note that the defendant's complete defense is not voided by the attorney's mistake as to the legal sufficiency of the factual basis for the action. This result is correct, because the attorney's advice that the facts are sufficient, *not the insufficient facts themselves*, is the ground upon which the defendant's belief rests. If the defendant decides by himself, without seeking an attorney's advice, that he has sufficient grounds upon which to proceed, no such defense is available to him. Indeed, such an erroneous decision is often the primary basis of the plaintiff's malicious prosecution action in the first place.

In Kentucky, there is no requirement that this defense must be specifically pleaded in order to be raised. The defendant must, however, satisfy certain requirements before this defense becomes available to him. If any one of these requirements is not satisfied, reliance on counsel's advice will not establish probable cause. At best, counsel's advice then becomes only a factor to be considered in mitigation. These requirements will now be considered.

**Good Faith**

Good faith on the part of the defendant in seeking and relying on advice of counsel was the original, basic requirement necessary to insure that reliance on advice of counsel would be a conclusive defense. Over the years, certain criteria have evolved to determine whether or not this broad good faith re-

---

32 Id.
33 Id. at 522.
34 Baber v. Fitzgerald, 224 S.W.2d 135 (Ky. 1949); L. & N. Ry. v. Sharp, 140 S.W.2d 383 (Ky. 1940); Lancaster v. Langston, 36 S.W. 521 (Ky. 1896).
35 See Lancaster v. Langston, 36 S.W. 521 (Ky. 1896).
36 Prosser, supra note 10, at 842.
37 Cravens v. Long, 257 S.W.2d 548 (Ky. 1953); Emler v. Fox, 189 S.W. 469 (Ky. 1916).
38 See Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Peel v. Bramblett, 204 S.W.2d 565 (Ky. 1947); Figuccio v. Prudential Ins. Co., 116 S.W.2d 291 (Ky. 1938); Cracraft v. McDaniel, 294 S.W. 812 (Ky. 1927).
quirement has been met; these include the "full and fair disclosure" test as well as various tests to determine whether the attorney consulted is qualified to give competent advice upon which a defendant can rely. Recognizing that these tests represent the primary constituents of the broad good faith requirement, the Court of Appeals seems, through repeated use, to have transformed them into independent standards and has gradually dropped the "good faith" phraseology. As a result the dual requirements of (1) seeking counsel's advice in good faith and (2) relying on counsel's advice in good faith have become rather narrowly defined and are seldom invoked. Still, these requirements have not been completely abandoned, and an analysis of their present, albeit restricted, form and operation is certainly in order.

In 1896, the Kentucky Court delineated the requirement that the defendant must seek counsel's advice in good faith in *Lancaster v. Langston,* when it said "to manifest the good faith of the party, it is important that he should resort to a professional advisor . . . [and] he cannot . . . make such resort a mere cover for the prosecution." Since probable cause is established by a reasonable belief that the party against whom the original action was brought was guilty of some offense or that a valid cause of action against him existed, a belief by the party who initiated the original action that his opponent is innocent or that the suit is groundless makes the establishment of probable cause impossible and thereby voids the advice of counsel defense. Subsequently seeking and ob-

---

40 See Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Smith v. Kidd, 246 S.W.2d 155 (Ky. 1952); Lexington Cab Co. v. Terrell, 137 S.W.2d 721 (Ky. 1940); Figuccion v. Prudential Ins. Co., 116 S.W.2d 291 (Ky. 1938); Hendrie v. Perkins, 42 S.W.2d 502 (Ky. 1931); Shoemaker v. Southwestern Petroleum Co., 281 S.W. 533 (Ky. 1926); Bowman v. Combs, 273 S.W. 719 (Ky. 1925).

41 See Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Smith v. Kidd, 246 S.W.2d 155 (Ky. 1952); Davis v. Brady, 291 S.W. 412 (Ky. 1927); J.B. Colt Co. v. Grubbs, 268 S.W. 817 (Ky. 1925); Kroger Grocery & Baking Co. v. Hamlin, 235 S.W. 4 (Ky. 1921); Emler v. Fox, 189 S.W. 469 (Ky. 1916); Dyer v. Singer Sewing Mach. Co., 175 S.W. 1037 (Ky. 1915).

42 See, e.g., Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Smith v. Kidd, 246 S.W.2d 155 (Ky. 1952); Stephens v. Gravit, 124 S.W. 414 (Ky. 1910).

43 See, e.g., Mesker v. McCourt, 44 S.W. 975 (Ky. 1899); Lancaster v. Langston, 36 S.W. 521 (Ky. 1896).

44 *Lancaster v. Langston,* 36 S.W. 521 (Ky. 1896).

45 Id. at 522.
taining counsel's advice cannot remedy this and provides no defense. 46

Similarly, if, during the course of the action, any facts come to the attention of the defendant which would lead a reasonable man to believe that the plaintiff is innocent or that a cause of action against him is groundless, the complaining party may not continue to rely on the advice of counsel previously given. That advice no longer constitutes a conclusive defense. 47 Although the cases treating these good faith requirements are old, the principles they outline are sound and are supported by more recent decisions in other jurisdictions. 48

Full and Fair Disclosure

Full and fair disclosure of the facts of the case by the defendant, before obtaining and relying on counsel's advice, is a necessary condition of proceeding in good faith. Although the Kentucky Court has held that only the material facts of the case need be disclosed to satisfy this requirement, 49 it has often said that if all the facts are fully and fairly disclosed the defense will be conclusive. 50 This should not be viewed as an inconsistency in the rule, but rather as advice to defendants who wish to run no risk that their defense will not be conclusive. If the plaintiff challenges the fullness of the defendant's factual disclosure and it is found that the defendant did not place all the facts before counsel, it becomes a question for the jury as to whether or not the facts disclosed satisfy the requirements. 51 The danger is that very often, the jury will reason that the facts not disclosed "... were facts which should have been disclosed to the attorney, and ... that in failing to make such disclosure ... [the defendant] has not met the conditions of

44 Id.
45 Mesker v. McCourt, 44 S.W. 975 (Ky. 1898); Lancaster v. Langston, 36 S.W. 521 (Ky. 1895).
47 Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Reid v. True, 302 S.W.2d 846 (Ky. 1957).
48 Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Smith v. Kidd, 246 S.W.2d 155, 159 (Ky. 1952). See Lexington Cab Co. v. Terrell, 137 S.W.2d 721 (Ky. 1940).
49 Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Smith v. Kidd, 246 S.W.2d 155 (Ky. 1952); Cracraft v. McDaniel, 294 S.W. 812 (Ky. 1927).
the rule . . . .”52 However, if all the facts have been disclosed, the condition is satisfied and the defense becomes conclusive as a matter of law, entitling the defendant to a peremptory instruction to that effect (provided these facts were fairly presented and the other necessary conditions specified in this comment are met).53 As a practical matter, therefore, a defendant who wishes to rely on advice of counsel as a complete defense runs considerably less risk if he has disclosed all the facts to his attorney, rather than only those facts which he considers material.

Only a full disclosure of the actual facts themselves will satisfy the rule; conclusions drawn as to the existence or nonexistence of facts are not sufficient to sustain the defense.54 The Court of Appeals addressed this requirement in Shoemaker v. Southwestern Petroleum Co.,55 a case involving a dispute as to whether an agreement had been reached for the tapping of a gas well. Therein it stated:

If the appellant's version was correct he was not criminally liable for making such connections. This was a point on which advice of counsel was important and it cannot be said that [the defendant] . . . fully or fairly informed counsel of the facts relative thereto by merely saying that [the plaintiff] "was trying to claim a contract, but he never had any." This conclusion assumed the nonexistence of controverted facts, and advice of counsel predicated on such an assumption would be no defense . . . .56

Misrepresentation of the facts will also void the defense.57

In making a full disclosure of the facts, the defendant must lay before counsel not only all those facts within his knowledge, but also all information obtainable through the use of reasonable care and diligence.58 As the Court stated in Ahrens v. Ott...
He who consults an attorney about a matter affecting a third person ought to use that care which men of ordinary prudence would ordinarily use in matters of like magnitude. Less than this would not show good faith.\(^6\)

The majority of jurisdictions, however, are not this strict and merely require that the defendant disclose the facts known to him.\(^6\) In view of the heavy burden placed on the plaintiff in malicious prosecution actions, this extra burden placed on defendants in Kentucky seems both equitable and reasonable, as it: (1) serves to prevent the defendants from isolating themselves from further inquiry into the case; (2) helps insure that the attorney will have all the facts reasonably available on which to base his advice; and (3) demands an exercise of due care by defendants, requiring them to look for exonerating facts before rushing off to the courts. This additional burden on the defendant is further justified by the origin of the full and fair disclosure rule in the requirement that the defendant have proceeded in good faith. A showing of good faith seems to require the exercise of reasonable care in obtaining all the available facts before subjecting a third party to the stress of litigation.

Kentucky's stringent full and fair disclosure requirement thus requires the defendant to show more than that he sued on the advice of an attorney. Not surprisingly, when a plaintiff is faced with an advice of counsel defense, he most often seeks to invalidate the defense by showing that the full disclosure requirement has not been satisfied. Since the defendant often presents only his most righteous position and often leaves out those facts which might establish the innocence of the plaintiff, the argument that the defendant relied on advice of counsel can easily be rebutted on cross-examination by showing that there was not a fair and truthful disclosure.

There are two situations, however, in which a defendant who does not make a full and fair disclosure may still rely on advice of counsel as a complete defense. First, the defendant

\(^{65}\) Manufacturing Co.; \(^{66}\) Hendrie v. Perkins, 42 S.W.2d 502 (Ky. 1931); Bowman v. Combs, 273 S.W. 719 (Ky. 1925).

\(^{67}\) 51 S.W. 194 (Ky. 1899).

\(^{68}\) Id. at 196.

\(^{69}\) PROSSER, supra note 10, at 843.
need not repeat material facts that the attorney already knows. As the Court of Appeals has stated:

[If] the appellants knew that the attorneys by previous information, no matter how obtained, knew of the nature of the controversy . . . it was unnecessary to state the facts over again at the time this advice was given.63

Second, if after hearing the defendant’s incomplete statement, the attorney makes an independent investigation before giving his advice, his advice will satisfy the full and fair disclosure requirement for the defendant.64 This latter exception rests upon the assumption that the attorney has used good faith and reasonable diligence in conducting the investigation.

Counsel’s Qualifications

In Kentucky, as in the majority of jurisdictions,65 the defense of reliance on advice of counsel is valid only if the person consulted, and upon whose advice the defendant relies, is a reputable,66 competent,67 practicing attorney.68 He may be either a private attorney or a public prosecutor,69 but in any event he must be disinterested and unbiased.70 Advice of magistrates and others connected with the law who are not practicing attorneys cannot be relied upon.71

It should be noted that the standards requiring counsel to be reputable and competent are seldom used to challenge the advice of counsel defense. It has been observed, in this connection, that:

[a] plaintiff in an action for malicious prosecution who chal-

---

63 Id. at 312.
64 Hale v. Baker, 483 S.W.2d 133 (Ky. 1972).
65 Prosser, supra note 10, at 844.
66 Davis v. Brady, 291 S.W. 412 (Ky. 1927).
68 Stephens v. Gravit, 124 S.W. 414 (Ky. 1910).
69 Smith v. Kidd, 246 S.W.2d 155 (Ky. 1952); J.B. Colt Co. v. Grubbs, 268 S.W. 817 (Ky. 1925); Dyer v. Singer Sewing Mach. Co., 175 S.W. 1037 (Ky. 1915).
70 Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Kroger Grocery & Baking Co. v. Hamlin, 235 S.W. 4 (Ky. 1921); Emler v. Fox, 189 S.W. 469 (Ky. 1916); Smith v. Fields, 129 S.W. 325 (Ky. 1910).
71 Stephens v. Gravit, 124 S.W. 414 (Ky. 1910).
lenges the reputation of counsel who gave the defendant the advice usually finds himself trying another case than his own, which situation at once attracts attention by the desperate character of the enterprise. Consequently, such plaintiff does not desire to make an issue of the competency of counsel.\(^2\)

Plaintiffs have more frequently attacked the nature of the advice given by focusing on the requirement that the attorney consulted be disinterested and unbiased. Only four cases litigating this requirement have ever been presented to the Court of Appeals.\(^7\) Of those four, *Kroger Grocery & Baking Co. v. Hamlin*\(^7\) is the leading case defining disqualifying interests. Therein, the Court held that

\[\ldots \text{the interest which would disqualify the attorney should grow out of the fact that he was financially interested in the outcome, or that he was related to the parties, or that he was so biased because of enmity against the accused, or some other equally substantial reason [as would keep him] from giving good faith advice.}\(^5\)

What constitutes a disqualifying interest is not a matter for jury speculation, but rather is a matter of law requiring a defining instruction.\(^7\)

The fact that the attorney consulted was the defendant’s regularly employed attorney, who had represented him in previous litigation, will not render the attorney interested under the rule.\(^7\) Nor will the fact that the attorney assisted the defendant in the investigation of the case disqualify him.\(^7\) The Court has held, however, that advice given by an attorney during the excitement of a trial may not result in a complete defense, because the facts may show, as a matter of law, that under the circumstances the advice was not given “by a wholly disinterested and unbiased attorney.”\(^7\) In such situations, a trial court

\(^7\) Annot., 81 A.L.R. 516, 517 (1932).
\(^7\) Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Kroger Grocery & Baking Co. v. Hamlin, 235 S.W. 4 (Ky. 1921); Emmer v. Fox, 189 S.W. 469 (Ky. 1916). Smith v. Fields, 129 S.W. 325 (Ky. 1910).
\(^7\) 235 S.W. 4 (Ky. 1921).
\(^7\) Id. at 7.
\(^7\) Id.
\(^7\) Id.
\(^7\) Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966).
\(^7\) Smith v. Fields, 129 S.W. 325, 326 (Ky. 1910).
would not be authorized to give the defendant a peremptory instruction. 80

The attorney himself may be liable in an action for malicious prosecution if he, in bad faith, prosecutes or causes to be prosecuted a charge he knows to be groundless. 81 Moreover, a client may be held liable on agency principles for the acts of his attorney, when it is shown that he ratified those acts. 82 Collusion or conspiracy between the attorney and the client to prosecute a groundless suit will obviously void any advice of counsel defense a defendant might assert, because of the lack of good faith demonstrated. 83

Worley: The Sixth Circuit Interpretation

No “guidance” is more misleading, no “kindly light” is more will-o’-the wisp than an obiter dictum sometimes contrives to be. 84

The Worley 85 case is the Sixth Circuit’s most recent brush with a Kentucky malicious prosecution action. Therein, the court reversed the plaintiff’s lower court victory and held that he had not established any of the elements of the prima facie case of malicious prosecution. 86 Lack of any one of those elements would have been sufficient grounds for reversal; the court, however, took the opportunity to say that

[e]ven if Worley had been able to establish a prima facie case, the defendants would have had an affirmative defense in that all recommendations for obtaining warrants came from an attorney. Under Kentucky law such advice of counsel is a complete defense to an action for malicious prosecution. 87

This simplistic generalization is misleading, for under Kentucky law, as the preceeding discussion makes clear, much more is required for an advice of counsel defense than the mere fact that the advice relied on came from an attorney. Indeed,

80 Id.
81 See Miller v. Metropolitan Life Ins. Co., 89 S.W. 183 (Ky. 1905).
82 54 C.J.S. Malicious Prosecution § 66 (1948).
86 Id. at 263.
87 Id.
the only indication that the court considered any of the afore-
mentioned tests in determining whether the defendant had a
valid advice of counsel defense is found in the court's statement
that "[t]here is no indication in the record that attorney
Clarke was operating with insufficient facts . . . ."88 This
statement implies that the defense is complete when the court
is satisfied that the attorney did not predicate his advice to the
defendant to proceed with the original suit upon insufficient
facts. To rely on such an assumption would be a mistake. It
must be remembered that whether or not sufficient facts have
been given to counsel is a question of fact for a jury and that,
under the full and fair disclosure requirement, the burden is on
the defendant to show that he fully and fairly informed counsel
of the facts.89 Although the court stated that there was no indi-
cation that the attorney was without sufficient facts, neither
was there any indication in the court's opinion that the attor-
ney had been fully and fairly informed of the facts by the
defendants. Nor was it indicated that the attorney had inde-
pendent knowledge of the facts or had obtained the facts
through independent investigation.90

More disturbing, however, is the Sixth Circuit's incorrect
statement of the requirements for a valid advice of counsel
defense. In its order denying a petition for rehearing, the court
said:

Kentucky law requires only that an attorney be in possession
of all the facts, not that he be disinterested, for the defense
of advice of counsel to be valid in a malicious prosecution
case.91

Under Kentucky law, the attorney consulted must be disinter-
ested and unbiased for reliance on his advice to be a valid
defense to a malicious prosecution action.92 Although certain
prior involvements with a client or his case (as noted in a

---

88 Id.
89 Figuccion v. Prudential Ins. Co., 116 S.W.2d 291 (Ky. 1938).
90 See Hale v. Baker, 483 S.W.2d 133 (Ky. 1972); Illinois Cent. Ry. v. Anderson,
268 S.W. 311 (Ky. 1925).
91 Worley v. Columbia Gas, Inc., 491 F.2d 256, 264 (6th Cir. 1973) (emphasis
added).
92 Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Kroger Grocery & Baking Co. v.
Hamlín, 235 S.W. 4 (Ky. 1921); Emler v. Fox, 189 S.W. 469 (Ky. 1916); Smith v.
Fields, 129 S.W. 325 (Ky. 1910).
preceding section) have been held not to disqualify an attorney as interested under the rule, it might have been a close question, in Worley, whether or not the attorney would have qualified as disinterested and unbiased. The court thus relied upon a pat, technically incorrect statement of the law to resolve what may have been a compelling issue.

Beyond this, the peculiar facts of Worley raise additional questions worthy of special consideration. In that case, all parties were engaged in the construction of a gas pipeline. Worley, a subcontractor, claimed that he and the contractor under whom he worked had entered into an agreement whereby the contractor was to make good any overdrafts issued by Worley in meeting his payroll. The contractor did, in fact, retain an attorney to pay off payroll checks issued by Worley in return for release from any lien claims the recipients of those checks might have had against the project. However, when certain of Worley’s checks were dishonored by the bank for insufficient funds and Worley asserted that the contractor had made arrangements to cover such checks, the contractor denied ever making the agreement. Moreover, when the recipients of the “cold” checks went to the attorney’s office seeking payment, he informed them that in his opinion an offense had been committed and that they were entitled to obtain warrants against Worley. The attorney then determined which parties were willing to sign complaints and escorted them to the courthouse to do so. There is no indication in the opinion that these people sought this advice from the attorney. Moreover, it is quite obvious that no attorney-client relationship ever existed between them. Indeed, it is likely that these people sought no more from this attorney than payment of the checks they had received. It appears then that the attorney, while acting as an agent of the defendant (who was engaged in a dispute with Worley over the issuance of the checks), may have actively encouraged the recipients of those checks to prosecute Worley. In the subsequent suit for malicious prosecution against the contractor, two of the contractor’s principal officers, the pipeline company, and the public utility, the defendants sought to rely upon the “advice”

83 See Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Kroger Grocery & Baking Co. v. Hamlin, 235 S.W. 4 (Ky. 1921).
given to the third party checkholders as a complete defense. This is a very unusual situation, for those who usually wish to rely upon the advice of counsel defense are those who have sought the advice of the attorney themselves and have relied upon the advice which was given to them in deciding to institute legal proceedings.

This raises the interesting question of whether or not an attorney's possibly unsolicited advice, rendered to a third party on some matter, can be a valid defense for the person who actually employed him concerning that matter but who did not himself take any action in reliance on the advice. No Kentucky cases have commented on this precise issue, and no other jurisdiction seems to have definitely resolved it. One possible argument is that the issue should be analyzed in terms of whether or not the attorney's advice would have been a valid defense, under the previously discussed requirements, if the advice had been rendered to the defendants and not to the third parties. This approach would be unsatisfactory, however, for it would resolve the problem by divorcing it from the facts which gave rise to it. It would seem more likely that the defense of advice of counsel would be valid for defendants, in this situation, only if the defense would have been valid for those third parties who actually took action against the plaintiff. This assumes that the good faith and other essential requirements could be satisfied, not only by these third persons, but also by the attorney and those who employed him.

In Worley, under this theory, the defendants might have been hard pressed to successfully assert their advice of counsel defense. The third parties to whom the advice was given had not employed the attorney, nor is it likely that they sought his advice. Therefore, they were not advised by an attorney whom they had consulted and retained, but were merely advised by an agent-attorney acting for and employed by a defendant. Obviously, this attorney might not satisfy Kentucky's "disinterested and unbiased counsel" requirement with respect to the third parties he advised; and, under the aforementioned theory, that advice might then fail to constitute a defense for the defendants.

Moreover, in light of Worley's charge of conspiracy on the part of the defendants to maliciously prosecute him for issuance of "cold" checks, the court should have carefully exam-
ined these unusual facts for possible good faith violations before stating that "the defendants would have had an affirmative defense in that all recommendations for obtaining warrants came from an attorney." Indeed, the facts concerning the attorney's employment and the lengths to which he went in assisting the recipients of Worley's checks to obtain warrants easily lend themselves to the interpretation that violations of the good faith requirement occurred. As previously noted, any such violation will void an advice of counsel defense.

CONCLUSION

In Kentucky, to sustain an action for malicious prosecution the plaintiff must show (among the other necessary elements, detailed earlier) that the prior action against him by the defendant was instigated without probable cause. Under Kentucky law, a defendant's reliance on advice of counsel can establish the existence of probable cause, as a matter of law, and can thus provide the defendant with a complete defense. However, essential to such a conclusive defense is the satisfaction of numerous specific requirements dealing not only with the defendant's actions and intentions in seeking and relying on counsel's advice, but also with counsel's capability to give advice upon which a defendant could safely rely. These requirements, which evolved from a general good faith standard, dictate that the defendant must: (1) seek counsel's advice in good faith; (2) fully and fairly disclose to such counsel all the material facts available to him through the use of reasonable care and diligence; (3) consult only a reputable, competent, practicing attorney who is disinterested and un-

[2] Freeman v. Logan, 475 S.W.2d 636 (Ky. 1972); Flynn v. Songer, 399 S.W.2d 491 (Ky. 1966); Christopher v. Henry, 143 S.W.2d 1069 (Ky. 1940).
[3] Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Lancaster v. Langston, 36 S.W. 521 (Ky. 1896).
[5] Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Reid v. True, 302 S.W.2d 846 (Ky. 1957).
[6] Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Smith v. Kidd, 246 S.W.2d 155 (Ky. 1952); Peel v. Bramblett, 204 S.W.2d 565 (Ky. 1947).
biased; and (4) rely on counsel’s advice in good faith throughout the entire action. A failure to satisfy each of these requirements will void a defendant’s advice of counsel defense. The Sixth Circuit need not have addressed the advice of counsel defense in disposing of Worley; indeed the above criticized portion of that decision is pure dictum. Nevertheless, in commenting on the advice of counsel question, it became incumbent upon the court to correctly state the applicable Kentucky law and to do so in sufficient depth to detail the proper application of that law to the facts of the case. In Worley, the court did neither. Although the unusual and complex facts of that case easily lend themselves to an interpretation that strongly suggests a violation of at least some of the standards required for a valid advice of counsel defense, the court merely stated that all advice to obtain warrants came from an attorney and that such advice was all that was necessary to provide the defendants with a complete defense. Such a cursory analysis is not sufficient, for practitioners may be led to the simplistic conclusion that the only requirement necessary for a valid advice of counsel defense is that the advice came from an attorney. Moreover, the court went on to state that “... Kentucky law requires only that an attorney be in possession of all the facts, not that he be disinterested, for the defense of advice of counsel to be valid.” With that incorrect statement, the court has created more opportunities for confusion, for Kentucky law demands not only that the attorney consulted be disinterested and unbiased, but that good faith requirements be satisfied as well. If the court was determined to comment on the advice of counsel defense, it could have explored whether (and how), the Kentucky rules could cope with the novel fact situation of the Worley case. Instead, it resorted to unwarranted dictum, which, when read in light of the unusual facts of the case could have a serious tendency to mislead practitioners as to the nature of this defense and the requirements necessary to successfully invoke it in Kentucky.

Eric Steven Smith

183 Puckett v. Clark, 410 S.W.2d 154 (Ky. 1966); Kroger Grocery & Baking Co. v. Hamlin, 235 S.W. 4 (Ky. 1921); Emler v. Fox, 189 S.W. 489 (Ky. 1916).
184 Mesker v. McCourt, 44 S.W. 975 (Ky. 1898); Lancaster v. Langston, 36 S.W. 521 (Ky. 1896).
186 Id. at 264.