



COAKY Distinguishes Wrongful Use of Civil Proceeding From Malicious Prosecution, Discusses Which Findings Are For Judge And Which Are For Jury

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In [*Bates v. Curtis*, 2010-CA-990 \(8/17/2012\)](#), the Kentucky Court of Appeals discussed the difference between a claim of wrongful use of civil proceedings and a claim of malicious prosecution. The former claim arises when there has been wrongful initiation of a civil action without probable cause and primarily for a purpose other than that of proper adjudication of the underlying claim. Malicious prosecution, on the other hand, arises when one has wrongfully instituted criminal proceedings against another. The Court of Appeals noted that malice is not an element of the civil cause of action, while it remains an element of malicious prosecution.

Moreover, advice of counsel is an absolute defense to such a claim, provided the client acted in good faith and disclosed all relevant facts to his or her attorney, who then advised the client to pursue the matter.

The Court in *Bates v. Curtis* also discussed at length which findings are for the judge to make and which are reserved for the jury in such an action. Specifically, the judge determines whether: (a) a civil proceeding has been initiated; (b) the proceeding was terminated in favor of the plaintiff; (c) the defendant had probable cause for his action; and (d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.

The jury determines the following: (a) the circumstances under which the proceedings were initiated to the extent necessary to enable the court to determine whether the defendant had probable cause for initiating the claim; (b) whether the defendant acted primarily for a purpose other than that of securing the proper adjudication of the underlying claim; (c) the circumstances under which the proceedings were terminated; (d) the amount that the plaintiff is entitled to recover as general and special damages; and (e) whether punitive damages are to be awarded, and if so, in what amount.

Wrongful use of civil proceedings should also be distinguished from a claim of abuse of process, a claim that arises when one uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which that process is not designed. *See, e.g., Sprint Communications Co., L.P. v. Leggett*, 307 S.W.3d 109 (Ky. 2010).

Bates v. Curtis is not yet final, but was designated for publication in the South Western Reporter. Cases that are not final may not be cited as authority in Kentucky.