

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-001123-MR

JASON PALMER, IN HIS OFFICIAL  
CAPACITY AND INDIVIDUAL  
CAPACITY AS A KENTUCKY  
STATE POLICE OFFICER,  
LEXINGTON, KENTUCKY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA GOODWINE, JUDGE  
ACTION NO. 08-CI-02413

PAUL CARTER, SR.<sup>1</sup>

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING

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BEFORE: LAMBERT, MAZE, AND MOORE, JUDGES.

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<sup>1</sup> Pleadings filed by Palmer and Carter throughout this litigation, as well as court orders from both the United States District Court and Fayette Circuit Court, have continuously vacillated between referring to Paul Carter as “Sr.” or “Jr.” However, the notice of appeal filed in this case refers to him as “Paul Carter, Sr.” Accordingly, we will refer to him by that name for the purpose of this appeal.

MOORE, JUDGE: Jason Palmer appeals a decision of the Fayette Circuit Court denying him summary judgment on a claim of malicious prosecution that was filed against him by appellee, Paul Carter, Sr. Upon review, we affirm in part, reverse in part, and remand for further proceedings.

The matter on appeal before us is a continuation of a suit that was originally filed in Fayette Circuit Court and then removed to United States District Court where all claims except a state claim for malicious prosecution were dismissed with prejudice. The remaining state claim was remanded back to state court. By way of background,<sup>2</sup> the underlying case originates from an October 14, 2006 traffic stop in Lexington, Kentucky. Jason Palmer, a Kentucky State Police (KSP) trooper, initiated the traffic stop on Paul Carter, Sr.; conducted a frisk of Carter; and searched Carter's vehicle. Palmer placed Carter under arrest and lodged various criminal charges. Specifically, and as described by the uniform citation prepared by Palmer, Carter was charged with: 1) possession of marijuana, both in his vehicle and at the detention facility after he was escorted there following arrest; 2) possession of drug paraphernalia; 3) tampering with physical evidence; 4) operating a motor vehicle under the influence; 5) promoting contraband; and 6) possession of cocaine. Carter spent twelve days in jail before his family posted a property bond securing his release.

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<sup>2</sup> This background is derived from the United States District Court's discussion of this case in *Carter v. Porter*, 2011 WL 778408 at \*1-\*2 (E.D. Ky. March 1, 2011) (unpublished). As noted in that opinion, the facts were discussed in favor of Carter, the non-movant, and were assembled largely from his complaint and response to various summary judgment motions.

On October 24, 2006, the Fayette District Court conducted a preliminary hearing. Palmer testified at that hearing, and both sides had an opportunity to examine the witnesses. On December 27, 2006, the grand jury indicted Carter and the matter was set for trial.

Thereafter, Carter moved to suppress evidence seized from his person and vehicle, contending that Palmer lacked a reasonable and articulable basis for the traffic stop. At the suppression hearing, Palmer testified under oath that no video recording of the traffic stop existed. The trial court denied the motion to suppress. However, a KSP supervisor subsequently located a video recording of the traffic stop. Carter moved to reopen the motion to suppress, and the court conducted a status conference. The court ordered Palmer to be produced for further examination and commented that the Commonwealth may want to dismiss the case to “save a State Trooper’s hide.”

On May 16, 2007, the parties presented an agreed order of dismissal, which the trial court entered. This order referenced suppression testimony and dismissed all charges against Carter with prejudice.

On May 15, 2008, Carter filed a lawsuit against several defendants, including Palmer in his individual capacity. His complaint alleged federal and state law causes of action, including unlawful and malicious detention, denial of equal protection of the laws, failure to train, negligent hiring and retention, false arrest, false imprisonment, intentional infliction of emotional distress, and malicious prosecution.

On June 2, 2008, the case was removed to the United States District Court. As indicated earlier, the federal court eventually dismissed all of Carter's claims with prejudice except for his claim against Palmer for malicious prosecution asserted under Kentucky law.<sup>3</sup> However, the federal court exercised its discretion to decline supplemental jurisdiction over Carter's malicious prosecution claim; this claim was remanded back to state court.

Carter filed no appeal, but reasserted his remaining malicious prosecution claim against Palmer in Fayette Circuit Court. In response, Palmer moved the circuit court to dismiss on the basis of collateral estoppel, arguing that Carter's federal malicious prosecution action (which Carter had asserted under the purview of 42 United States Code (U.S.C.) § 1983) shared at least one element in common with his state malicious prosecution action (*i.e.*, probable cause); Carter's § 1983 malicious prosecution action had been dismissed on the merits for Carter's failure to demonstrate a lack of probable cause; and, Carter was now precluded from rearguing whether probable cause existed.<sup>4</sup> Alternatively, Palmer argued that he was entitled to summary judgment based upon 1) the merits of Carter's claim; 2) qualified official immunity; and 3) absolute immunity, to the extent that Carter's

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<sup>3</sup> Aside from *Carter v. Porter*, 2011 WL 778408, *supra*, the progress of Carter's suit at the federal level is detailed in *Carter v. Porter*, 617 F.Supp.2d 514 (E.D.Ky. 2008); *Carter v. Porter*, 2009 WL 960144 (E.D.Ky. Apr 06, 2009); *Carter v. Porter*, 2009 WL 1421040 (E.D.Ky. May 18, 2009); and *Carter v. Porter*, 2012 WL 298479 (E.D.Ky. Feb 01, 2012).

<sup>4</sup> In order for collateral estoppel to apply, the following elements must be met: (1) at least one party to be bound in the second case must have been a party in the first case; (2) the issue in the second case must be the same as the issue in the first case; (3) the issue must have been actually litigated; (4) the issue was actually decided in that action; and (5) the decision on the issue in the prior action must have been necessary to the court's judgment and adverse to the party to be bound. *See Miller v. Admin. Office of Courts*, 361 S.W.3d 867, 872 (Ky. 2011).

claim was based upon any testimony Palmer had offered over the course of the preliminary hearing, grand jury hearing, or suppression hearing.

Upon consideration, the circuit court denied Palmer's motion to dismiss. This appeal followed.

For his first argument, Palmer again points out that the United States District Court dismissed Carter's 42 U.S.C. § 1983 malicious prosecution claim against him after determining that probable cause supported each of the charges Carter was indicted upon. *See Carter*, 2011 WL 778408 at \*8-\*14. Palmer also points out that Carter did not appeal the federal court's judgment. As such, Palmer argues that Carter's state malicious prosecution claim against him, which is based upon exactly the same facts and circumstances as Carter's unsuccessful § 1983 action, must now fail as a matter of law.

Probable cause is an essential element of a malicious prosecution claim under Kentucky law and in the context of a federal § 1983 action. *See Phat's Bar & Grill v. Louisville Jefferson County Metro Gov't*, 918 F.Supp.2d 654, 660 and 664 (W.D. Ky. 2013) (discussing elements of both "malicious prosecution" actions). Moreover, Kentucky's standard for determining probable cause is the same as the federal standard. *See, e.g., Williams v. Commonwealth*, 147 S.W.3d 1, 12 (Ky. 2004) (applying standard for probable cause described in *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142, 145 (1964)). But, to the extent that Palmer is asking this Court to determine that an essential element of Carter's malicious prosecution suit now fails due to collateral estoppel,

we have no authority to make such a determination at this point in time even though we very likely would have decided the issue differently from the lower court. Reluctantly our hands are tied on this because while a denial of summary judgment based upon a claim of immunity is subject to interlocutory appeal, a denial of summary judgment based upon collateral estoppel is not. *See Abbott v. Chesley*, 413 S.W.3d 589, 602 (Ky. 2013) (denial of summary judgment is interlocutory and generally not appealable); *South Woodford Water Dist. v. Byrd*, 352 S.W.3d 340, 342 (Ky.App. 2011) (explaining that interlocutory orders denying motions to dismiss based on immunity are exempt from the general rule and immediately appealable). Consequently, we lack jurisdiction to review the merits of the collateral estoppel issue.

Palmer's argument also encompasses an assertion of qualified immunity, which is properly before the Court on an interlocutory appeal. Specifically, Palmer asserts that the Federal Court's findings of probable cause and the evidence of record conclusively demonstrate that he performed a discretionary duty within the scope of his authority in good faith. *See Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001) (explaining qualified immunity applies to (1) discretionary acts or functions (2) performed in good faith and (3) within the scope of the official's authority).

But, there are at least two reasons why qualified immunity cannot apply to a claim of malicious prosecution under Kentucky law.<sup>5</sup> First, as the

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<sup>5</sup> Our discussion in this vein is limited to qualified immunity under Kentucky law. It has no bearing upon the applicability of absolute immunity to a malicious prosecution claim, or of

Kentucky Supreme Court explained in *Yanero*, qualified immunity applies only to claims sounding in negligence. *Id.*; *see also id.* at 524 (providing that a public official is not entitled to qualified immunity if “the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive”).

Malicious prosecution does not sound in negligence because “malice” is one of its essential elements, and “malice” is defined as “the *intentional* doing of a wrongful act to the injury of another, with an evil or unlawful motive or purpose.”

*Stearns Coal Co. v. Johnson*, 238 Ky. 247, 37 S.W.2d 38, 40 (1931) (emphasis added); *see also Martin v. O’Daniel*, Nos. 2009-CA-001738-MR, 2009-CA-001795-MR, 2009-CA-001739-MR, 2011 WL 1900165 at \*6 (Ky. App. May 20, 2011), review denied (March 14, 2012) (holding qualified immunity unavailable in the context of malicious prosecution claim because it “is an intentional tort, requiring proof of malice; and the trial court believed there were genuine issues of material fact regarding malice on the part of appellants”).<sup>6</sup>

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qualified immunity to a federal § 1983 claim.

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For the proposition of law discussed herein, we find *Martin* to be persuasive authority in this case and proper to cite as it fulfills the criteria of Civil Rule (CR) 76.28(4)(c).

We are aware of *Smith v. Nesbitt*, 2003-CA-000331-MR, 2003 WL 22462413 (Ky. App. Oct. 31, 2003), review denied (April 15, 2004), another unpublished case with a somewhat contrary result. At the circuit court level, Palmer pointed out that *Smith* affirmed a circuit court judgment that extended qualified immunity and alternatively absolute quasi-judicial immunity to a pair of non-prosecutors in the context of a malicious prosecution action.

However, *Smith* does not persuade this Court that qualified immunity applies, or should apply, to a Kentucky malicious prosecution claim. To begin, it is unclear whether the plaintiff in *Smith* asserted a federal malicious prosecution action under § 1983, as opposed to a Kentucky malicious prosecution action. If so—and the *Smith* opinion does indicate that the action was based upon “civil rights”—then *Smith* is distinguishable. While a cause of action under § 1983 for “malicious prosecution” is susceptible to a claim of qualified immunity, it does not require proof of malice to succeed. *Sykes v. Anderson*, 625 F.3d 294, 308-309 (6th Cir. 2010).

Furthermore, if the claim in *Smith* was asserted under Kentucky law, the *Smith* Court itself noted that the doctrine of qualified immunity only applies to “mere negligence”, *id.* at \*3,

Second, qualified immunity is a confession and avoidance; that is, it requires the defendant to admit every element of the cause of action while claiming that his conduct giving rise to the cause of action was nevertheless justified. *See Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 608 (Ky. 2014) (“qualified immunity . . . [is] a type of pleading dealing in confession and avoidance, *i.e.*, pleading “more or less to admit the general complaint and yet to suggest some other reason why there was no right . . .” (citation omitted)); *Rich v. Commonwealth*, 305 S.W.2d 771, 772 (Ky. 1957) (in a “civil plea of confession and avoidance . . . the accused admits doing the act and seeks to be excused for some legal or affirmative reason”); *see also* 61A Am. Jur.2d Pleading § 279.<sup>7</sup>

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and it offered no explanation of why qualified immunity should apply to an intentional tort. Indeed, it is unclear why the circuit court even resorted to the doctrine of qualified immunity as a justification for dismissing the malicious prosecution claim at issue in that litigation rather than simply basing its decision to dismiss upon the plaintiff’s failure to prove an essential element of the claim. *Id.* at \*4 (finding qualified immunity applied because the record sufficiently demonstrated grounds to establish probable cause).

<sup>7</sup> 61A Am.Jur.2d Pleading § 279 is particularly informative on this point. In relevant part, it provides:

A “plea in confession and avoidance” is one which avows and confesses the truth in the averment of the facts in the petition, either expressly or by implication, but then proceeds to allege new matter which tends to deprive the facts admitted of their ordinary legal effect, or to obviate, neutralize, or avoid them, or to destroy the cause of action and defeat recovery. The element of confession in such a plea is as essential as that in avoidance. The plea avers that even if the petition is true, the plaintiff cannot prevail because there are additional facts that permit the defendant to avoid legal responsibility. A plea of confession and avoidance is a plea in which a defendant admits the allegations but pleads additional facts that deprive the admitted facts of an adverse legal effect, or pleads a legal reason why the plaintiff cannot have recovery on the claim. An affirmative defense is one of avoidance rather than a defense in denial; the avoidance must be pleaded coextensively with the confession, and must be an answer to the whole of what is adversely alleged. “Avoidance” is a defense which goes beyond the basic elements of the opposing party’s cause and depends upon additional facts to defeat the claim. . . .

(Internal footnotes and citations omitted.)



Thus, applying qualified immunity in the context of a claim for malicious prosecution would be illogical because it would effectively be a plea of *denial*. That is, the defendant asserting immunity would confess to *intentionally and maliciously* acting without probable cause in order to assert that he *mistakenly but in good faith* acted without probable cause. *See Chaney v. Slone*, 345 S.W.2d 484, 485 (Ky. 1961) (“A defense proceeding by way of confession and avoidance—namely, an ‘affirmative’ defense—is in its very nature inconsistent with a denial of any material allegations of the complaint.” (Internal quotations and citation omitted)).

Next, Palmer argues that he is entitled to absolute immunity from Carter’s malicious prosecution suit because it is based entirely upon testimony he offered at a grand jury proceeding.

Generally speaking, pertinent and relevant testimony given in judicial proceedings cannot supply a basis for a civil action. *Smith v. Hodges*, 199 S.W.3d 185, 193 (Ky. App. 2005). This type of immunity applies even when a witness willfully and maliciously gives false testimony, and it further applies to suits for malicious prosecution based solely upon allegations that a police officer lied to a grand jury, or in some other pretrial proceeding, in order to secure an indictment. *See Reed v. Isaacs*, 62 S.W.3d 398 (Ky. App. 2000) (citing *McClarty v. Bickel*, 155 Ky. 254, 159 S.W. 783, 784 (1913)). Thus, to the extent that Carter’s malicious prosecution suit against Palmer is based upon the substance of any testimony

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Palmer offered at the preliminary hearing, grand jury hearing, or suppression hearing described earlier in this opinion, Palmer was absolutely immune from suit. This would necessarily include any discrepancies in Palmer's testimony over the course of these hearings, along with Palmer's statement that a video recording of his stop and arrest of Carter did not exist.<sup>8</sup> Therefore, we reverse the circuit court in this respect.

That is not to say that the entirety of Carter's suit should be dismissed on grounds of absolute testimonial immunity, however. Carter's complaint and other pleadings indicate that his suit is also based upon a non-testimonial, pretrial act, namely, Palmer's authoring of a citation charging him with offenses which-- according to Carter and his interpretation of the stop and arrest video-- Palmer knew were baseless. *See Gregory v. City of Louisville*, 444 F.3d 725, 739 (6th Cir. 2006) (“[N]ontestimonial, pretrial acts do not benefit from absolute immunity, despite any connection these acts might have to later testimony.”)

We reemphasize that our interlocutory review of this matter is limited to the immunity defenses decided by the circuit court. And, “[a]n appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim.” *See Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). For that reason, whether

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<sup>8</sup> We pause to note that we are somewhat bewildered regarding Palmer's testimony that no video recording existed; perhaps, he was just mistaken about its existence. Nonetheless, this lapse of memory is unfortunate because it has raised unnecessary suspicion around the underlying reasons for the traffic stop.

Carter's allegations amount to a legally cognizable claim against Palmer for malicious prosecution, or whether the record could even sustain such a claim, is beyond the scope of our jurisdiction over this appeal; having resolved the immunities issues presented in this appeal, our review is at an end.

In conclusion, the judgment of the Fayette Circuit Court is AFFIRMED to the extent that it determined that qualified immunity does not apply to Carter's malicious prosecution claim against Palmer. It is REVERSED to the extent that it found any statement given by Palmer over the course of the preliminary hearing, grand jury hearing, or suppression hearing to supply any basis for Carter's malicious prosecution claim. We REMAND for further proceedings otherwise consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

William E. Johnson  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gayle E. Slaughter  
Lexington, Kentucky