

FILED

APR 08 2008

CLERK  
SUPREME COURT

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
ACTION NO. 2005-SC-1023-DG and 2007-SC-0273-DG  
COURT OF APPEALS NO. 2004-CA-001739-MR

SPRINT COMMUNICATIONS COMPANY, L.P.

APPELLANT

v.

Appeal from Jefferson Circuit Court  
Division #11, Action No. 01-CI-08663

ALBERT E. LEGGETT, III  
As Trustee of the Albert E. Leggett Family Trust

APPELLEE

---

BRIEF FOR APPELLANT

---

Submitted by:

Stuart E. Alexander III  
Kathleen M.W. Schoen  
TILFORD DOBBINS ALEXANDER  
BUCKAWAY & BLACK, PLLC  
401 W. Main Street, Ste. 1400  
Louisville, Kentucky 40202  
(502) 584-1000  
*Counsel for Appellant Sprint Com. Co., L.P.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 7th day of April, 2008, to O. Grant Bruton, Middleton Ruetlinger, 2500 Brown & Williamson Tower, Louisville, Kentucky 40202; Clerk, Court of Appeals, 360 Democrat Dr., Frankfort, Kentucky 40601; and Hon. Judith McDonald-Burkman, Trial Judge, Jefferson Circuit Court, Division 11, Justice Center, 700 West Jefferson Street, Louisville, Kentucky 40202. The undersigned further certifies that Appellant Sprint Com. Co., LP has not withdrawn the record on appeal.

KMW Schoen  
Stuart E. Alexander, III  
Kathleen M.W. Schoen

## INTRODUCTION

Appellant/Movant Sprint Communications Company, L.P. (“Sprint”) filed a verified petition to condemn property belonging to Appellee/Respondent Albert E. Leggett III, as trustee of the Albert E. Leggett Family Trust (“Leggett”). Leggett filed a “counterclaim” to Sprint’s petition, alleging a denial of due process, malicious prosecution, and abuse of process. After a Commissioners’ report and after a substantial downturn in the national telecommunications market, the trial court permitted Sprint to voluntarily dismiss its eminent domain complaint.

Sprint filed a Motion for Summary Judgment on Leggett’s counterclaims. The trial court granted Sprint’s Motion and found that Leggett had no facts to sustain his allegation that Sprint committed the torts of malicious prosecution and abuse of process by filing the petition and then voluntarily dismissing it when market conditions had changed.

Leggett appealed the trial court’s order granting summary judgment. The Court of Appeals affirmed summary judgment on the issue of Leggett’s malicious prosecution counterclaim but reversed on the issue of abuse of process and violation of Leggett’s civil rights.

The Kentucky Supreme Court granted Sprint’s Motion for Discretionary Review on April 13, 2007.

**STATEMENT CONCERNING ORAL ARGUMENT**

Appellant/Movant Sprint requests an oral argument and believes oral argument would be helpful to the Court in deciding the issues presented in this case.

## STATEMENT OF POINTS AND AUTHORITIES

|  |           |
|--|-----------|
| INTRODUCTION   | i         |
| STATEMENT CONCERNING ORAL ARGUMENT   | ii        |
| STATEMENT OF POINTS AND AUTHORITIES  | iii       |
| STATEMENT OF THE CASE  | 1-4       |
| QUESTIONS OF LAW INVOLVED  | 5         |
| ARGUMENT   | 5-16      |
| <b>I. STANDARD OF REVIEW</b>   | <b>5</b>  |
| <u>Steevest, Inc. v. Scansteel Serv. Ctr., Inc.</u> , Ky., 807 S.W.2d 476 (1991)   | 5         |
| <u>Bob Hook Chevrolet Isuzu, Inc. v. Corn. Transp. Cabinet</u> , Ky., 983 S.W.2d 488 (1998)  | 5         |
| <b>II. BECAUSE LEGGETT HAS NOT AND CANNOT MEET THE ELEMENTS OF AN ABUSE OF PROCESS CLAIM, SUMMARY JUDGMENT WAS APPROPRIATE AS A MATTER OF LAW.</b> | <b>6</b>  |
| <b>A. Elements of an Abuse of Process Claim</b>  | <b>6</b>  |
| <u>Stoll Refining Co. v. Pierce</u> , Ky., 337 S.W.2d 263 (1960)   | 6         |
| <u>Simpson v. Laytart</u> , Ky., 962 S.W.2d 392 (1998)   | 6,7       |
| <u>Raine v. Drasin</u> , Ky., 621 S.W.2d 895 (1981)  | 6,7       |
| <u>Flynn v. Songer</u> , Ky., 399 S.W.2d 491 (1966)  | 6,10      |
| <u>Mullins v. Richards</u> , Ky.App., 705 S.W.2d 951 (1986)  | 6,8       |
| <u>Bonnie Brae Farms, Inc. v. Robinson</u> , Ky.App., 598 S.W.2d 765 (1980)  | 6         |
| <u>Williams v. Central Concrete, Inc.</u> , Ky.App., 599 S.W.2d 460 (1979)   | 6         |
| W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 121 (4 <sup>th</sup> ed. 1971), p. 865   | 7         |
| 1 Am.Jur.2d, Abuse of Process, § 5, p. 414 (2d. ed. 1995)  | 8         |
| <u>Dantley v. Burge</u> , 77 S.E.2d 107 (1953)   | 8         |
| <u>Cohen v. Hurley</u> , 480 N.E.2d 658 (1985)   | 8         |
| <u>MHC, Inc. v. International Union, United Mine Workers of America</u> , 685 F.Supp. 1370 (E.D. Ky. 1988)   | 9         |
| <u>Nowak v. Pennyrile Citizens Bank</u> , 1984 Ky.App. LEXIS 595 (Ky.App. 1984)  | 10        |
| <u>Johnson v. University of Louisville</u> , 1985 Ky.App. LEXIS 548 (Ky.App. 1985)   | 10        |
| <b>B. There Was No Issue of Fact As To Whether Sprint Had an Ulterior Motive.</b>  | <b>11</b> |
| <u>Figg v. Louisville &amp; N. R. Co.</u> , Ky., 75 S.W. 269 (1903)  | 12        |
| KRS § 278.540  | 12        |
| KRS § 416.150  | 12        |

|  |           |
|--|-----------|
| KRS § 467d-1   | 12        |
| <u>Cornwell v. Central Ky. Natural Gas Co.</u> , Ky., 249 S.W.2d 531 (1952)  | 12        |
| Ind. Code Annotated § 8-1-8-1  | 12 n.2    |
| 220 ILCS 65/4  | 12 n.2    |
| § 523.010 R.S. Mo.   | 12 n.2    |
| W. Va. Code § 54-1-2   | 12 n.2    |
| ORC Ann. 4931.04   | 12 n.2    |
| <u>Cohen v. Hurley</u> , 480 N.E.2d 658 (1985)   | 13        |
| <br>   |           |
| <b>C. There Was No Issue of Fact As To Whether Sprint Improperly Used the Issuance of Process Outside the Course of Proceedings.</b> | <b>14</b> |
| <br>   |           |
| <u>Mullins v. Richards</u> , Ky.App., 705 S.W.2d 951 (1986)  | 14        |
| <u>Simpson v. Laytart</u> , Ky., 962 S.W.2d 392 (1998)   | 14        |
| <u>Nowak v. Pennyrile Citizens Bank</u> , 1984 Ky.App. LEXIS 595 (Ky.App. 1984)  | 14        |
| <u>Dantley v. Burge</u> , 77 S.E.2d 107 (1953)   | 15        |
| <u>Cohen v. Hurley</u> , 480 N.E.2d 658 (1985)   | 15        |
| <br>   |           |
| <b>D. Leggett's Abuse of Process Claim Also Fails Because Leggett Has Not Suffered Any Damages.</b>                                  | <b>15</b> |
| <br>   |           |
| <u>Raine v. Drasin</u> , Ky., 621 S.W.2d 895 (1981)  | 15        |
| <u>Flynn v. Songer</u> , Ky., 399 S.W.2d 491 (1966)  | 15        |
| <u>Stole Oil Refining Co. v. Pierce</u> , Ky., 337 S.W.2d 263 (1960)   | 15        |
| 1 Am Jur. 2d, Abuse of Process § 7, p. 416 (2d ed. 1995)   | 15        |
| <br>   |           |
| <b>III. LEGGETT CANNOT PROVE A CAUSE OF ACTION FOR DEPRIVATION OF HIS PROPERTY RIGHTS WITHOUT DUE PROCESS.</b>                       | <b>16</b> |
| <br>   |           |
| 42 U.S.C. § 1983   | 16        |
| <u>Bd. of Regents of Univ. of State of New York v. Tomanio</u> , 100 S.Ct. 1790, 446 U.S. 478 (1980)                                 | 16        |
| <u>Goree v. Gunning</u> , 738 F.Supp. 79 (E.D.N.Y. 1990)   | 16        |
| <u>Richardson v. McKnight</u> , 521 U.S. 399, 117 S.Ct. 2100 (1997)  | 16        |
| <br>   |           |
| <b>CONCLUSION</b>  | <b>17</b> |
| <br>   |           |
| <b>APPENDIX</b>  | <b>18</b> |
| <br>   |           |
| Court of Appeals Opinion entered December 2, 2005  |           |
| Trial Court Opinion entered May 4, 2004  |           |

## STATEMENT OF THE CASE

Sprint is a line-based long distance carrier and public utility. As part of its fiber optic and traditional line based telephone system, Sprint has a "Point of Presence," or "POP," located at 330 Baxter Avenue in Louisville, Kentucky. A POP functions as a point of interface between Sprint long-distance lines and local company telephone lines or other long distance carriers. The site converts high-speed optical signals to electrical impulses for use by the local telecommunications companies or other carriers. Fiber optic cable and telephone lines run to the POP, which consists substantially of equipment for conversion of optic signals. When a POP is constructed, an air-conditioned building is necessary to house the computers for routing calls, back-up power generators, and equipment for conversion of local to long-distance signals.

By April of 2001, Sprint determined that at the current rate of growth, it would not be able to adequately service its customers, the local telecoms, and other carriers such as BellSouth and AT&T, in the Louisville, Kentucky area. Sprint's contract with the University of Louisville and the demands of Bell South and other telecoms had all increased the volume of demand for long-distance services. Sprint determined that its ability to comply with its FCC requirements would be adversely impacted if unable to expand its POP capacity.

The expanded POP, or switching station, would permit Sprint to provide service to the University of Louisville without the intervention of local telecoms. Bell South and other competing telecoms would also route local calls through this facility.

In May of 2001, Sprint sought additional property to expand the existing POP functions based on the growth projections. Leggett's property is located at 340 Baxter Avenue. Sprint identified the Leggett property as being appropriate for the necessary expansion. Sprint had first analyzed other nearby properties but decided that Sprint's most cost effective and technically

appropriate choice was the Leggett property. The Leggett property adjoins Sprint's current POP facility and is near the fiber optic easement running along the nearby railway line. As the trial court correctly stated, "[t]he only way to expand its [Sprint's] services was to condemn Leggett's property." (Opinion and Order, 5/4/04, at p. 6).

Sprint retained a well-respected commercial real estate appraiser who appraised the Leggett property at \$200,000. Sprint then approached Leggett with an offer to purchase the property for this amount. Leggett rejected this offer. Sprint then offered \$250,000. Leggett rejected this offer and countered with a demand of \$900,000. Sprint subsequently offered to purchase the property for \$350,000.00. Leggett then offered to sell the property for \$785,000.00. As the trial court noted, ". . . Sprint made a good faith effort to purchase Leggett's property as mandated by KRS §§ 278.540(2), 416.150." (Opinion and Order, 5/4/04, at p. 6). After the parties could not agree on a price, Sprint filed its complaint on December 19, 2001.

Pursuant to KRS 416.150 and KRS 278.540, Sprint filed an action to exercise its right of eminent domain. Sprint's petition sought to condemn property located at 340 Baxter Avenue in Louisville, Kentucky for a permanent utility easement and a temporary construction easement for a period of six months for the purpose of constructing the project shown on the plat attached to Sprint's petition. The petition sought an easement commensurate with the total area of the property.

Leggett filed a counterclaim alleging that Sprint's actions deprived Leggett of his right to own property without due process and that Sprint had abused the process of the Court by "wrongfully and maliciously threatening, and later filing and prosecuting" the action.

The Circuit Court appointed three commissioners, and the Commissioner's Report found that the property (in fee simple) had a value of \$600,000.00. While Sprint was considering

making an offer based on the Commissioners' value of \$600,000, the company issued revised projected growth forecasts for the Louisville area and for the entire country that showed significantly less future growth than previously expected. By this time, Sprint had acquired WorldCom, and the telecommunications market had contracted severely. Sprint was laying off a substantial percentage of its workforce, and expansion was put on hold. (Affidavit of Frank Cooley, Ex. 3, Sprint's Motion for Summary Judgment).

On March 5, 2002, Sprint petitioned the trial court to voluntarily dismiss its action and Leggett objected, arguing that the petition for condemnation could not be dismissed without his consent, because "Defendant has an absolute right to a trial on bad faith and damages." (Memorandum on Defendant's Objection). The Court granted Sprint's motion to dismiss in its Opinion and Order of July 1, 2002. Only Leggett's counterclaim remained.

Leggett then conducted extensive discovery, scheduling depositions of Sprint employees and contractors in Kansas City and making extensive document requests. Leggett requested documents including correspondence from and to attorneys. The trial court, exercising its sound discretion over discovery issues, excluded correspondence to and from attorneys and *in camera* review of Sprint's entire email and correspondence file.

After Leggett had a full opportunity to conduct discovery, Sprint moved for summary judgment. The trial court granted Sprint's motion on May 4, 2004. The court held that Leggett had not produced evidence establishing the elements of an abuse of process claim and that Leggett's malicious prosecution claim was not ripe because the suit had not terminated in Leggett's favor. (Trial Court Opinion and Order, 5/4/04, p. 3). The trial court noted that "[a]n action for an abuse of process claim is the irregular or wrongful employment of the judicial process." *Id.* at p. 4. The trial court stated that "there is no liability since Sprint has done nothing



more than what it was authorized to do in this judicial process.” (Trial Court Opinion and Order, 5/4/04, p. 6).

Leggett appealed the trial court’s order granting summary judgment. The Court of Appeals affirmed in part, reversed in part, and remanded the case to the trial court for proceedings consistent with its opinion. The Court of Appeals affirmed the grant of summary judgment on the malicious prosecution claim but reversed the grant of summary judgment on the claims of abuse of process and violation of Leggett’s civil rights. The Court of Appeals, citing KRS 278.540(2) and KRS 416.150, charged Sprint with “notice that it did not have the authority to condemn Leggett’s property” and found that “Sprint commenced this action without the proper authority to assert eminent domain over all of Leggett’s property and without the power to exercise eminent domain for the expansion of its POP facility.” The Court of Appeals held that there was “sufficient evidence to create a factual issue about whether Sprint filed its petition for condemnation to pressure Leggett into selling his property” and that Sprint’s “motivation” for filing the condemnation action was “a factual determination.” The Court, without explanation, also held that there was a genuine issue of material fact “as to whether Sprint’s actions were ‘aimed at an objective not legitimate in the use of the process.’” (Court of Appeals Opinion, 12/2/05, at p. 18).<sup>1</sup>

---

<sup>1</sup> The Court of Appeals also held that the Circuit Court erred as a matter of law in holding that Sprint’s filing of the eminent domain action was justified under the holding in God’s Center Foundation, Inc. v. Lexington Fayette Urban County Government, Ky. App., 125 S.W.3d 295 (2002). While Sprint agrees with the Circuit Court’s holding on this issue, it is not directly relevant to the matters raised in Sprint’s Motion for Discretionary Review. The Circuit Court did not need to rely on God’s Center to hold that Leggett’s abuse of process claim should be dismissed as a matter of law. Leggett’s abuse of process claim fails regardless of the holding in God’s Center or the Circuit Court’s application of that holding; Leggett cannot meet the essential elements of the tort.

## QUESTIONS OF LAW INVOLVED

(1) Did the Court of Appeals correctly interpret and apply the elements of an abuse of process claim?

(2) Did the Court of Appeals correctly hold that there was sufficient evidence to raise a genuine issue of material fact as to whether Sprint committed an abuse of process?

(3) Did the Court of Appeals correctly hold that there was sufficient evidence to raise a genuine issue of material fact as to whether Sprint violated Leggett's civil rights pursuant to 42 U.S.C. § 1983?

## ARGUMENT

The Court of Appeals incorrectly interpreted and applied the elements of abuse of process to the facts of this case. Simply stated, Leggett did not and cannot establish a claim for abuse of process. This Court should reverse the Court of Appeals' reversal of the trial court on this issue. Because Leggett cannot establish a claim for abuse of process, Leggett's claim for violation of civil rights must also fail.

### **I. STANDARD OF REVIEW**

The standard of review for summary judgments is whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991). Where there are no material disputes of fact, the question is one of law and "may be reviewed *de novo*." Bob Hook Chevrolet Isuzu, Inc. v. Corn. Transp. Cabinet, Ky., 983 S.W.2d 488, 490 (1998).

II. BECAUSE LEGGETT HAS NOT AND CANNOT MEET THE ELEMENTS OF AN ABUSE OF PROCESS CLAIM, SUMMARY JUDGMENT WAS APPROPRIATE AS A MATTER OF LAW.

A. *Elements of an Abuse of Process Claim*

Abuse of process is “the irregular or wrongful employment of a judicial proceeding.” Stoll Oil Refining Co. v. Pierce, Ky., 337 S.W.2d 263, 266 (1960). It has been more particularly defined as “the employment of legal process for some other purpose than that which it was intended by the law to effect.” Simpson v. Laytart, Ky., 962 S.W.2d 392, 394 (1998); Raine v. Drasin, 621 S.W.2d 895, 902 (Ky. 1981); Flynn v. Songer, Ky., 399 S.W.2d 491 (1966). The essential elements of the tort of abuse of process are (1) an ulterior purpose, and (2) a willful act in the use of process not proper in the regular conduct of the proceeding.” Simpson v. Laytart, 962 S.W.2d at 394; Mullins v. Richards, Ky. App., 705 S.W.2d 951 (1986); Bonnie Braes Farms, Inc. v. Robinson, Ky. App. 598 S.W.2d 765 (1980).

In Williams v. Central Concrete, Inc., Ky.App., 599 S.W.2d 460, 461 (1979), the Court quoted W. PROSSER, TORTS, § 121 (4<sup>th</sup> ed. 1971), p. 856, *et seq.*, stating that it provided a “clear statement of the elements of the action known as abuse of process.” Prosser distinguished abuse of process from the tort of malicious prosecution:

The action for malicious prosecution, whether it be permitted for criminal or civil proceedings, has failed to provide a remedy for a group of cases in which the legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless **has been perverted to accomplish an ulterior purpose for which it was not designed.** In such cases a tort action has been developed for what is called abuse of process...

Abuse of process differs from malicious prosecution in that the gist of the tort is **not commencing an action or causing process to issue without justification, but misusing, or misapplying, process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance.** Consequently in an action for abuse of process, it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor, or that the process was obtained without

probable cause or in the course of a proceeding begun without probable cause. It is often said that proof of “malice” is required; but it seems well settled that, except on the issue of punitive damages, this does not mean spite or ill will or anything other than the improper purpose itself for which the process is used, **and that even a pure spite motive is not sufficient where process is used only to accomplish the result for which it was created.**

Id. (emphasis added).

In an action for abuse of process, “[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required, and there is **no liability where the defendant does nothing more than carry out the process to its authorized conclusion, even though with bad intentions.**” W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 121 (4<sup>th</sup> ed. 1971), quoted in Simpson v. Laytart, Ky., 962 S.W.2d 392, 394-95 (1998) (emphasis added).

The allegation that a party had a “bad intention” or “ulterior motive” is, by itself, insufficient to establish an abuse of process claim. It must also be alleged that a willful and improper use of the process was made after its issuance for a purpose outside the scope of the process, and that this use of the process was not proper in the regular course of the proceeding. See Raine v. Drasin, Ky. 621 S.W.2d 895 (1981); Simpson v. Laytart, Ky., 962 S.W.2d 392, 395. Such conduct “usually takes the form of coercion to obtain a collateral advantage not properly involved in the proceeding itself. . . by the use of the process as a threat or a club. There is, in other words, a form of extortion, and it is **what is done in the course of negotiation**, rather than the issuance or any formal use of the process itself, which constitutes the tort.” W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 121 (4<sup>th</sup> ed. 1971) (emphasis added), quoted in Simpson v. Laytart, 962 S.W.2d at 395.

An action for abuse of process cannot be maintained where the process was

employed to perform no other function than that intended by law. 1 Am Jur 2d, Abuse of Process, § 5, p. 414 (2d ed. 1995), citing Dantley v. Burge, 77 S.E.2d 107 (Ga. Ct. App. 1953), and Cohen v. Hurley, 480 N.E.2d 658 (Mass. Ct. App. 1985). In Dantley, the plaintiff was in possession of property under a purchase agreement. Though plaintiff was not in default as to any payment due, the defendant evicted plaintiff under an "intruder's warrant." The court found that there was no abuse of process because while the plaintiff may not have been an "intruder," the process was designed to accomplish eviction and to gain possession of the premises, and it was used to accomplish that end. "It cannot, then, be said that the process was perverted or put to a use which the law did not intend that it be put. The object attained by suing out the warrant was not a perversion of the process. *The obtaining possession of the premises was the very object of suing out the warrant.*" Dantley, 77 S.E.2d at 109 (emphasis added).

In Cohen v. Hurley, 480 N.E.2d 658 (Mass. Ct. App. 1985), the court found that commencement of litigation challenging a proposed subdivision, although groundless, was aimed at defeating the proposal and nothing more; thus, there was no collateral end sought and no abuse of process. The court stated that "commencement of litigation to enforce a claim which the person commencing the litigation knows or reasonably should have known to be groundless" does not constitute abuse of process without proof of an "ulterior purpose." "Groundless Cohen's action may have been, but it was aimed, professedly and actually, at defeating the subdivision proposal, nothing more or different." Cohen, 480 N.E.2d at 660.

The Kentucky case Mullins v. Richards, Ky.App., 705 S.W.2d 951 (1986), is further illustrative of the necessity for the improper use of the issuance of process outside the course of proceedings. In Mullins, customers of an automobile repair shop contested the quality and cost of their repairs and refused to pay for the repairs. After hearing testimony from the disgruntled

customers, the grand jury returned indictments against the shop owner for theft by deception. A mistrial was subsequently declared at the criminal trial. The shop owner thereupon brought an action for abuse of process against the customers. In affirming the civil trial court's dismissal of the shop owner's case, the Court of Appeals noted the fatal absence of a crucial element of the shop owner's abuse of process case, stating "[a]lthough appellees [the disgruntled customers] may have had an ulterior purpose in securing the indictments against appellant, the record contains no evidence that appellees attempted to use the indictments outside the criminal proceeding. *Id.* at 395 (emphasis added). In fact, the Court noted that the shop owner "had no contact with appellees between the date of the indictment and the date of trial." The Court stated that "If appellees [the disgruntled customers] had offered to drop the indictments in return for a release of their debts to appellant [the shop owner], then appellant would have stated a cause of action on his claim for abuse of process."

In MHC, Inc. v. International Union, United Mine Workers of America, 685 F.Supp. 1370 (E.D. Ky. 1988), plaintiff initiated a RICO claim against defendants, and defendants alleged abuse of process. The court found that while "the possibility exists that the plaintiffs commenced the action with bad intentions," there was no evidence to suggest that the plaintiffs attempted to achieve an objective not intended by the civil RICO provisions. Plaintiffs had alleged in their RICO action that their business was damaged by the defendants' activities, and recovery for such damages was the intended purpose of RICO. This, there were no grounds for the abuse of process claim. *Id.*

By contrast, in Kentucky cases where an abuse of process *has* been found, an improper use of the process, *for a purpose outside the scope of the process*, has clearly occurred. For example, in Nowak v. Pennyrile Citizens Bank, 1984 Ky.App. LEXIS 595 (Ky.App. 1984),

when Nowak failed to pay per the terms of his note, the bank accelerated Nowak's loan and also filed criminal charges of "defrauding a secured creditor." While the criminal charges were pending against Nowak, a bank officer admitted to Nowak's attorney that the bank "just wanted its money" from Nowak. The court stated that the purpose of criminal process was not to collect civil debt, and "to use criminal process as a collection agency is a misuse of that process." Id.

Also, in Johnson v. University of Louisville, 1985 Ky.App. LEXIS 548 (Ky.App. 1985), Johnson, a former University employee, filed a malpractice claim against the law firm that had represented him in his earlier claims against the University. Johnson admitted that the malpractice action was initiated just so Johnson could depose University employees and repair damage to his reputation, and not to establish a malpractice suit against his former attorney. The court stated that "[t]he purpose intended by the malpractice laws is to punish an attorney for some dereliction of duty. The obvious conclusion was that the appellant's purpose was not the one intended by the law." Id. at \* 8-9.

Finally, in Flynn v. Songer, Ky., 399 S.W.2d 491 (1966), defendant, whose wages had been garnished, had plaintiff properly arrested for practicing law without a license. Thereafter, defendant communicated an attempt to negotiate a release of the garnishment to the plaintiff. In overturning the trial court's dismissal, the Kentucky Court of Appeals explained that "the gist of [abuse of process] is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which was designed to accomplish. *The purpose for which the process is used, once it is issued, is the only thing of importance...*" Id. at 494.

*B. There Was No Issue of Fact As To Whether Sprint Had an Ulterior Motive.*

In this case, Sprint commenced this action for the purpose of condemning Leggett's property in order to obtain a permanent easement for the provision of utility services. (See Affidavit of Gregory Thompson, attached to Sprint's Verified Petition.) Sprint has an undisputed statutory right to do this. There was no evidence of an ulterior motive, nor has Leggett alleged any. Sprint filed its petition for condemnation because prior attempts to negotiate a sale of the property with Leggett had been unsuccessful. Sprint needed the property in order to provide adequate services to its customers. The process was issued pursuant to a statutory right for the very purpose stated by the petition, as the trial court and the Court of Appeals correctly noted. (Ct. of Appeals Opinion, 12/2/05, p. 11); (Trial Ct. Opinion and Order, 5/4/04, p. 5).

In its Opinion, the Court of Appeals stated:

A cursory reading of the applicable statutes—KRS 278.540(2) and KRS 416.150—would have put Sprint on notice that it did not have the authority to condemn Leggett's property. Yet, Sprint nonetheless chose to file its petition. We think there is sufficient evidence to create a factual issue about whether Sprint filed its petition for condemnation to pressure Leggett into selling his property; therefore, we think Sprint's motivation for filing the condemnation action is a factual determination.

(Ct. of Appeals Opinion, 12/2/05, p. 17-18). Sprint respectfully disagrees. There was absolutely no evidence presented showing that Sprint filed its petition "to pressure Leggett into selling its property." Sprint filed the petition for condemnation in order to condemn the property and to complete the necessary expansion of its services. Sprint fully researched the issue, conducted a survey of Kentucky law and the laws of other surrounding states, and determined that it could condemn the land for the purposes stated in its petition. Sprint's research on the issue was outlined extensively in the summary judgment pleadings.



Kentucky case law has long had a broad understanding of what a “right-of-way” is. Clearly, rights-of-way and easements in Kentucky have been so extensive as to preclude all other use of the property by the owner in many instances. Railroad rights of way, as demonstrated by the Figg v. Louisville & N.R.Co., 75 SW 269 (Ky. 1903) case cited in Defendant’s Memorandum in Support of Summary Judgment, are such. A right-of-way in Kentucky can be very extensive. In Figg, the court stated that a right-of-way is “not the intangible right to use it, but the strip of land which the railroad company appropriates for its use, and upon which it builds its roadbed, its right of way.” Id. at 270. Sprint conducted extensive research and found no law in Kentucky which says that a telephone company’s right of way for its telephone lines cannot be so extensive.

In the past two decades, the telecommunications industry has changed, and the infrastructure of a line-based telephone system is now fundamentally different than it was in 1976, when KRS §278.540 and §416.150 were enacted, or in 1904, when the language at issue was first made law. KRS § 4679d-1. Sprint determined that the law of Kentucky is not rigid in the face of technological change. More specifically, “Well it may be said that the right of eminent domain is not static but has kept abreast with scientific and technological progress.” Cornwell v. Central Ky. Natural Gas Co., 249 S.W.2d 531, 533 (Ky. 1952). Sprint also researched the laws of other states extensively before filing its petition for condemnation.<sup>2</sup>

---

<sup>2</sup> Indiana would permit Sprint to condemn the land, “or any easement in any such lands, necessary to the carrying out of its objects, whether the same be for its building, structures,...line of poles, wires, mains, conduits.” *Ind. Code Annotated § 8-1-8-1*. Illinois would also permit this condemnation. *220 ILCS 65/4*. Missouri would also permit this condemnation. *§ 523.010 R.S.Mo.* West Virginia would permit it. *W. Va. Code § 54-1-2*. (“private property may be taken or damaged..for the construction and maintenance of...telephone...systems, lines, conduits, stations...when for public use.”) Ohio would permit it. *ORC Ann. 4931.04*. (“A telegraph company...may appropriate so much of such land...as it deems necessary for the construction and maintenance of its telegraph poles, cables, conduits, piers, abutments, wires, and other necessary fixtures, stations.”) Sprint was aware of no state that has forbidden a condemnation such as the one it sought in this case.

In this case, what Sprint proposed to do with Leggett's property was "upon making just compensation...to construct, maintain and operate its lines." KRS §278.540(1). Since it was unable to obtain the right-of-way by contract, Sprint sought to condemn the right-of-way "to construct, maintain and operate telephone lines." While the law of eminent domain must be strictly construed, it is clear that poles can be erected in the right of way, though they are not mentioned in the statute. Condemnation for burying fiber-optic cable is also appropriate. Thus, it is not necessary that the "lines" be the traditional copper wire sheathed in rubber. Telephone companies now compact the physical size of the telephone system by running local telephone wires and fiber-optic lines into one location – and that is the location in question – the POP. The computers for routing calls and equipment for conversion of local to long-distance signals are located here, at the POP. These must be sheltered in a climate-controlled building. There is no definition of "telephone line" in Kentucky law, but no one can contend that it means the same thing that it did in 1904. The POP is an integral part of the telephone system, a part of the "telephone line." Sprint concluded that eminent domain may be invoked to "construct, maintain and operate" the POP.

After fully researching the issue, Sprint felt that it had every right to file its petition for condemnation. However, under the law, even if Sprint had known that its petition was "groundless," this would not constitute abuse of process without proof of an "ulterior purpose." See Cohen v. Hurley, 480 N.E.2d 658, 660 (Mass. Ct. App. 1985). Sprint's petition was aimed at condemning the property, nothing more or different, and thus cannot be an abuse of process. Cohen, 480 N.E.2d at 660.

There was no “ulterior purpose” in filing this action. Sprint had no purpose other than condemning Leggett’s land. Therefore, Leggett cannot meet the “ulterior purpose” element of an abuse of process claim.

*C. There Was No Issue of Fact As To Whether Sprint Improperly Used the Issuance of Process Outside the Course of Proceedings.*

The second element of an abuse of process claim is “a willful act in the use of process not proper in the regular conduct of the proceeding.” Mullins v. Richards, Ky.App., 705 S.W.2d 951 (1986). Sprint never used the issuance of process for an end other than what it was designed to accomplish. Therefore, Leggett cannot meet the second element of an abuse of process claim. The Court of Appeals only very briefly addressed this essential second element of an abuse of process claim in its opinion. (Opinion, 9/9/05, p. 18).

Sprint never tried to use the fact that it filed a petition for condemnation as “coercion to obtain a collateral advantage not properly involved in the proceeding itself. . . by the use of the process as a threat or a club.” There was never any “extortion . . . done in the course of negotiation.” Simpson v. Laytart, 962 S.W.2d at 395. In fact, after the petition was filed, there was never any further negotiation. Sprint never went to Leggett after filing the condemnation action and said, for example, “Leggett, sell us your property in fee simple and we will drop the condemnation suit.” This simply did not occur, and Leggett does not allege that it has. Sprint never had this type of contact with Leggett after filing its action. Cf. Nowak v. Pennyriple Citizens Bank, 1984 Ky.App. LEXIS 595 (Ky. App. 1984), discussed supra.

Sprint urges this Court to review Mullins v. Richards, Ky.App., 705 S.W.2d 951 (1986), discussed infra. In Mullins, **the Court made it clear that in order to maintain an abuse of process claim, there would have to be some type of act occurring subsequent to the process being issued**. This act would necessarily involve using the issuance of process to obtain some

type of advantage not authorized by the proceeding itself. See also Dantley v. Burge, 77 S.E.2d 107 (1953) and Cohen v. Hurley, 480 N.E.2d 658 (1985), discussed *infra*. No such act occurred in the present case, and Leggett's abuse of process claim, therefore, must necessarily fail.

***D. Leggett's Abuse of Process Claim Also Fails Because Leggett Has Not Suffered Any Damages.***

Leggett's abuse of process claim also fails because there are insufficient allegations as to damages, something the Court of Appeals did not address. Leggett alleged that he suffered the following damages in his Restated and Supplemented Counterclaim at paragraph 23:

By reason of Sprint's aforesaid actions, including its wrongful threats of, and the prosecution of this civil action and by reason of Sprint's slander of defendant's title, defendant no longer has full use of his property, nor can defendant lease it to a third party. Defendant will be required to sell it and thereby incur capital gains taxes and the costs of moving defendant's equipment, inventories and personal property.

Leggett's claims for damages are not substantiated. Leggett has had full use of his property.

Leggett has not introduced any evidence showing that he lost money due to being unable to lease his property because of Sprint's actions. "An action for abuse of process will not lie unless there has been an injury to the person or his property. Injury to name or reputation is not sufficient."

Raine v. Drasin, *supra*, Flynn v. Songer, Ky. 399 S.W.2d 491 (1966); Stole Oil Refining Co. v. Pierce, Ky. 337 S.W.2d 263 (1960), 1 Am Jur 2d., Abuse of Process, § 7, p. 416 (2d ed 1995).

### III. LEGGETT CANNOT PROVE A CAUSE OF ACTION FOR DEPRIVATION OF HIS PROPERTY RIGHTS WITHOUT DUE PROCESS.

Leggett alleges that Sprint violated 42 USC §1983 when it “carried on and conducted under color and pretense of state law in a manner that seeks to deprive Defendant of rights guaranteed by the Constitution of the United States, including defendant’s right to own property... without due process.” Leggett does not state that any action other than filing the lawsuit violated 42 USC §1983. (Defendant’s Restated and Supplemented Counterclaim, paragraph 19). Thus, his cause of action pursuant to 42 USC § 1983 is essentially identical to his abuse of process claim. If the latter fails, so must this claim. Because Leggett’s abuse of process claim fails, this claim fails as well.

In the absence of federal law for adjudication of abuse of process claims, a §1983 claim based upon such allegations must be governed by state law regarding abuse of process. Board of Regents of University of State of N.Y. v. Tomanio, 100 S.Ct. 1790, 446 U.S.478 (1980); Goree v. Gunning, 738 F.Supp. 79 (E.D.N.Y. 1990)(There is no applicable law regarding malicious prosecution, a similar tort cause of action). Leggett cannot set forth a competent claim for relief based upon abuse of process, and the §1983 claim must also fail.

Furthermore, Sprint is a private individual deemed to have status as a state actor. As such, if Sprint brought this action with a good faith belief of Sprint’s right to do so, there can be no liability. Richardson v. McKnight, 521 U.S. 399, 117 S.Ct. 2100 (1997). Sprint had good faith in bringing this action. After conducting extensive research on the matter, Sprint believed that it was fully entitled to do so.

CONCLUSION

For the reasons set forth above, Sprint respectfully requests that this Honorable Court reverse the Court of Appeals' reversal of the Trial Court's order granting summary judgment in favor of Sprint.

Respectfully submitted,



---

Stuart E. Alexander, III  
Kathleen M.W. Schoen  
TILFORD, DOBBINS, ALEXANDER,  
BUCKAWAY & BLACK, PLLC  
401 W. Main St., Suite 1400  
Louisville, KY 40202  
(502) 584-1000