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/CROSS-APPELLEE

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/CROSS-APPELLANT

APPELLANT'S COMBINED REPLY AND RESPONSE BRIEF

Submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 30th day of July, 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 Co., LP has not withdrawn the record on appeal.

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

TABLE OF POINTS AND AUTHORITIES

ARGUMENT

I. LEGGETT DID NOT PROPERLY PLEAD ABUSE OF PROCESS AND STILL OFFERS NO FACTS SUPPORTING AN ABUSE OF PROCESS CLAIM

Leggett has failed to plead the essential elements of an abuse of process claim and has failed to establish the existence of any genuine issue of material fact upon which relief may be granted. In Kentucky, 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. Mullins v. Richards, Ky.App., 705 S.W.2d 951 (1986); Bonnie Braes Farms, Inc. v. Robinson, Ky.App., 598 S.W2d 765 (1980). Even when examining the facts of this case in the light most favorable to Leggett, Leggett fails to establish the existence of any genuine issue of material fact, and summary judgment was properly granted as a matter of law.

A. Leggett Has Failed to Plead or Establish Any "Ulterior Purpose," the First Element of Abuse of Process.

On page 21 of his Appellate Brief, Leggett alleges that he "was able to uncover limited evidence of Sprint's ulterior motives." If Leggett has uncovered evidence of Sprint's alleged "ulterior motives," he has yet to present it before this Court or any of the lower courts. Despite liberal discovery, Leggett has been unable to show *any* "ulterior purpose." Sprint needed Leggett's land in order to expand its POP facility. Leggett would not sell Sprint the land for a reasonable purchase price, so Sprint proceeded with its Petition for Condemnation. Contrary to the sinister picture Leggett seeks to portray, Sprint had no dark or hidden motive.

Sprint simply employed the judicial process to achieve its authorized end: condemnation of Leggett's land in order to expand its POP facility. There is no liability for abuse of process where the party has done nothing more than carry out the process to its authorized conclusion. Simpson v. Laytart, Ky., 962 S.W.2d 392, 395, *quoting* W. Prosser, Handbook of the Law of

Torts, Sec. 121 (1971); *see also* Raine v. Drasin, Ky., 621 S.W.2d 895 (1981), quoting Stoll v. Pierce Ky., 337 S.W.2d 263 (1960). This is the case *even if*, unlike in the present case, the party acts with bad intentions. As the Trial Court properly stated in its Opinion,

> Although Leggett contends that Sprint was malicious when initiating its condemnation proceeding and that it had an unlawful/ulterior purpose therein, Kentucky law allows a utility such as Sprint to exercise its power of Eminent Domain over private property. KRS §§278.540(2), 416.150. . . . Sprint was well within its power when it initiated proceedings regarding Leggett's property (Trial Court Opinion and Order, 5/4/04, p. 4).

Sprint sought condemnation out of necessity. In 2000, growth projections for the Louisville, Kentucky market indicated that the Sprint POP was rapidly reaching capacity, and without expansion of the facility and fiber optics, it may not be possible for Sprint to adequately accommodate the forecasted future growth. Therefore, it was necessary to expand Sprint's Louisville lines, cabling, fiber, and POP (See Affidavit of Frank Cooley, attached as Exhibit 3 to Sprint's Memo. In Support of SJ, RA 784-837). After evaluating Leggett's property and the property across the street, Sprint determined that the most cost effective and technically efficient choice was the Leggett Property (Deposition of Connee Scott, p. 136, attached as Exhibit 6 to Sprint's Memo. In Support of SJ, RA 784-837; and Affidavit of Frank Cooley, attached as Exhibit 3 to Sprint's Memo. In Support of SJ). Sprint then approached Leggett about purchasing the property.

By mid-November 2001, and because Sprint and Leggett could not agree on a purchase price for the Leggett Property, Sprint decided to seek condemnation of the property for purposes of a permanent easement. Prior to filing the Petition for Condemnation, Sprint's counsel as well as local counsel in Louisville, Kentucky conducted a thorough survey of Kentucky law, including Sprint's statutory condemnation rights, and determined that Sprint could go forth with condemnation of Leggett's property. (See Deposition of Connee Scott, p. 96-97, attached as

Exhibit 13 to Sprint's Memo. in Support of SJ, RA 784-837; Deposition of Stephen Gilley, p. 33, 55, 60). Based upon review of all information available, Sprint formed the good-faith, reasonable belief that it was a condemning authority under Kentucky law, that there was a pressing necessity to expand Sprint's lines, cables, and operations, and that Sprint's intended use of Leggett's property was one allowed by Kentucky law. (See id.). Sprint's determination is further evidenced by the Affidavit of Gregory Thompson, dated December 12, 2001, and attached to Sprint's Petition for Condemnation (RA 1-26).

Sprint filed its Petition for Condemnation on December 19, 2001 (RA 1-26). The Commissioners assessed the value of the property, including improvements thereon, at $600,000 on January 20, 2002.

By January 2002, the telecommunications industry and the economy in general had weakened considerably (Connee Scott depo. p. 144-145). Sprint's growth forecasts had changed and showed slower future growth than had previously been expected.[1] As a result, Sprint froze expansion plans for sites throughout the country, including its expansion plans in Louisville. The slowing of projected future demand for telecommunications services, combined with next-generation equipment that allowed existing space to be reconfigured more efficiently, resulted in Sprint determining that it no longer needed to expand the Louisville POP site to service its expected growth (Affidavit of Frank Cooley, attached as Exhibit 3 to Sprint's Memo. In Support of SJ, RA 784-837; Deposition of Connee Scott, p. 144-145). As soon as Sprint realized that it no longer needed the Leggett Property for network expansion, it moved to dismiss its condemnation action, which the Trial Court allowed.

[1] The expansion projects show that Sprint was in acquisition mode until the Telecom industry began to experience significant and rapid overall decline and contraction in late 2001. Projections were drastically reduced, and acquisitions were almost frozen across the board (Connee Scott depo. p. 145). Sprint and other carriers laid off workers (Sprint laid off 8,000 workers) and drastically cut its growth forecast (Connee Scott depo., p. 144).

While Sprint's right to expand the POP, in conjunction with the addition of lines, cable, and fiber, may be a case of first impression in Kentucky, it is certainly contemplated by the clear language of KRS 278.540. KRS 278.540 (2) states that:

> Any telephone company authorized to do business in this state may, by contract with any person, construct, maintain, and operate telephone lines on and across the real property of that person, and if it cannot obtain the right of way by contract it may, except as provided in KRS 416.090, condemn the right of way in the manner provided in the Eminent Domain Act of Kentucky.

Without a POP, a telecommunications company is not able to maintain or operate its lines, cable and fiber. Sprint has produced extensive documentation demonstrating Sprint's good faith and reasonable belief that it was acting in complete compliance with Kentucky law when it filed its action in Eminent Domain, based upon Sprint's showing of significant necessity based upon the then existing growth forecasts. Sprint's resort to condemnation to obtain a permanent easement across Leggett's property was not unreasonable under the circumstances.

Though the Court of Appeals stated that "[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," Sprint respectfully disagrees. In the past two decades, the telecommunications industry has changed dramatically, 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. (See KRS § 4679d-1). While Kentucky has not defined "telephone lines," telephone companies regularly use eminent domain in Kentucky to obtain the right of way to lay fiber optic cable. If Leggett's argument about strict construction was taken to its logical conclusion, this would not be so. While the language in the Kentucky statute specifying "telephone lines" has not changed since 1904, 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 could have reasonably believed, and did reasonably believe, that Kentucky's law allowed for a permanent easement to expand its POP facility.

In AT&T v. Proffitt, 903 S.W.2d 309 (Tn. App. 1995), the Tennessee Court of Appeals considered the argument of a landowner for strict construction of Tenn. Code Ann. § 65-21-201, the Tennessee equivalent of KRS 278.540. AT&T sought to bury cable, and the statute provided for construction and maintenance of communications lines "on and over the lands of private individuals," but not *under* them. The landowner argued that "grants of powers of eminent domain are in derogation of private property rights and will be strictly construed against the condemnor and liberally in favor of the rights of property owners." The Tennessee Court of Appeals agreed with this, but observed that "the doctrine of strict construction 'does not exclude reasonable and sound construction of [a] particular statute.'" Id. at 312 (citations omitted). The Court further found that "[t]he Landowner's proposed construction of the statutory language is overly narrow and contrary to the legislative intent to delegate the power of eminent domain to telecommunications corporations to utilize the statute as technology develops." Id. at 313. The same may be said in the present case.

What Leggett does not point out is that no state bordering Kentucky has adopted the standard proposed by Leggett, either by statute or jurisprudence, and explicitly forbidden telephone companies to use eminent domain for obtaining interests in property to build things like switching stations or POP's. 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 or poles, wires, mains, conduits." Ind. Code Ann. § 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.") Pennsylvania would permit condemnation of property reasonably appropriate for the accomplishment of telecommunications. 15 Pa. C.S. § 1511. In fact, Sprint is aware of no state that has forbidden a condemnation such as the one it sought in this case.

The clear trend in the law is to allow condemnation in order to facilitate the public's increasing need for modern telecommunications. For example, California and Idaho both have general eminent domain statutes that refer only to "telephone lines" but also have separate public utility statutes that were passed specifically for expanding the definition of "telephone line" to include buildings, such as POP sites, necessary for telecommunications companies to facilitate communication. See Idaho Code § 61-120 and Cal. Pub. Util. Code § 233. Both states define a "telephone line" very broadly to include "all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires." See id. A California case further states that "telephone line" can be interpreted as a fiberoptic system *facility*. See Anderson v. Time Warner Telecom of California, 129 Cal. App. 4th 411, 417, 28 Cal. Rptr.3d 289 (Cal. App. 5th Dist. 2005). Kentucky's statute does not define "telephone line," but Sprint

had a good-faith belief that the POP facility would fall under Kentucky's broad definition in light of the national trend to accommodate technological advances.

As far as seeking an easement commensurate with the size of Leggett's property, Kricorian v. Chesapeake and Potomac Telephone Company of Virginia, 217 Va. 284, 227 S.E.2d 725 (1976), holds that it can be reasonable for a company to condemn an entire personal property. The case Figg v. Louisville & N.R.Co., 116 Ky. 135, 75 S.W.269 (1903), which involves a railroad right-of-way, makes it clear that in Kentucky, rights-of-way and easements have been so extensive as to preclude all other uses of the property by the owner of the estate in many instances. There is no law in Kentucky which says that a telephone company's right of way for its telephone lines cannot be so extensive.

In this case, what Sprint proposed to do with Leggett's property was ready to "upon making just compensation. . . to construct, maintain and operate its lines." KRS 278.540(1). While there is no definition of "telephone line" in Kentucky law, 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.

Leggett argues that Sprint sought to "take his entire property" in fee simple (Leggett's Brief at p. 24-25), and that in doing so, "abused" the condemnation process. Sprint did not seek to "take" Leggett's property in fee simple. Sprint sought an easement, a "right of way," after negotiations to purchase the property failed. It is true that the easement sought was commensurate with the total area of Leggett's property. However, this area was "reasonably necessary to answer the public purpose in view," KENTUCKY PRACTICE: METHODS OF PRACTICE, ROBERT W. KEATS, ET AL., Ch. 14.10, p. 371, and upon abandonment of that public purpose, the

land would revert back to Leggett, the grantor, who would still hold the estate. This is so even if the public purpose in view necessarily excludes any other practical use for decades. See Mammoth Cave Nat'l. Park Ass'n v. State Highway Comm'n., 261 Ky. 769, 88 S.W.2d 931 (1935); City of Louisville v. Louisville Scrap Metal, Ky., 932 S.W.2d 352 (1966) (CSX railroad easement reverts after more than 100 years); Illinois Central Railroad Company v. Roberts, Ky.App., 928 S.W.2d 822 (1996). Therefore, contrary to Leggett's statements on page 25 of his Brief, Sprint was not seeking a "fee simple," and the easement sought did not have "all the characteristics of a fee." Sprint would not have owned the land and could not have sold the land.

B. Mere Initiation of the Action, Even With an Ulterior Purpose, Does Not Constitute An Abuse of Process, and Leggett Has Failed to Plead or Establish the Second Element of Abuse of Process.

The allegation that a party had a "bad intention" or "ulterior motive" is, by itself, insufficient for 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. Raine v. Drasin, Ky., 621 S.W. 895 (1981). Thus, in a case in which litigants did indeed have an ulterior purpose in securing indictments against opposing parties, because there was no evidence that those litigants attempted to use the indictments against the opposing party outside the criminal proceeding, dismissal was in order. See Mullins v. Richards, Ky.App., 705 S.W.2d 951, 952 (1986) ("If appellees had offered to drop the indictments in return for a release of their debts to appellant, then appellant would have stated a cause of action on his claim for abuse of process.") As the Court of Appeals stated in Flynn v. Songer, Ky., 399 S.W.2d 491 (1966), "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 it was designed to accomplish. The purpose for which the process is used, once it is

issued, is the only thing of importance." **These cases make it clear that in order to maintain an abuse of process claim, there must be some type of act occurring subsequent to the process being issued.**

In this case, Sprint commenced this action for the purpose of condemning Leggett's property in order to obtain an easement for the provision of utility services (See Affidavit of Gregory Thompson, attached to Verified Petition for Condemnation, RA 1-26). Sprint has a statutory right to do this. The process was issued pursuant to a statutory right for the very purpose stated by the Petition—*and was used, once issued, for no end other than that for which it was designed to accomplish.* See Flynn v. Songer, Ky., 399 S.W.2d 491 (1966).

Throughout the course of this case, Leggett has failed to show Sprint's "ulterior purpose" *or* "willful act in the use of process not proper in the regular conduct of the proceeding," and, thus, has failed to plead the elements of an abuse of process claim. Now, Leggett argues that Sprint's act of filing the Petition may itself constitute an abuse of process, without the need for a subsequent unauthorized act. Leggett cites to out-of-state cases that purportedly support this claim. (See Leggett's Brief at p. 24-28). However, this simply is not the law in Kentucky. In Kentucky, initiation of the action itself does **not** amount to an abuse of process; **there must be some type of act not authorized by the process occurring subsequent to the process being issued.** See Mullins v. Richards, Ky.App., 705 S.W.2d 951 (1986); Raine v. Drasin, Ky., 621 S.W.2d 895, 902 (1981); Flynn v. Songer, Ky., 399 S.W.2d 491 (1966).[2] This subsequent action is essential and "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." W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 121 (4th ed. 1971) (emphasis added), quoted in Simpson v.

[2] Contrary to Leggett's assertions, Stoll Oil Refining Co. v. Pierce, Ky., 337 S.W.2d 263 (1960), does not hold otherwise and, in fact, does not address the issue at all.

Laytart, 962 S.W.2d at 395. Leggett has not, and cannot, allege such an act, because no such act occurred. In fact, Sprint had no contact with Leggett after filing its condemnation action.

Other jurisdictions are in agreement that the initiation of an action, *even with ill motive or without probable cause*, does not constitute a claim for abuse of process. As stated in Ramona Unified School Dist. v. Tsiknas, 135 Cal.App. 4th 510, 37 Cal. Rptr. 3d 381 (Cal. App. 4th Dist. 2005), although initiating a meritless claim for an improper purpose can expose a party to damages for the tort of malicious prosecution, **the mere initiation of a lawsuit, even if for an improper purpose, does *not* support a claim for abuse of process.** See also Neurosurgery and Spine Surgery, S.C. v. Goldman, 339 Ill.App.3d 177, 790 N.E.2d 925 (Ill. App. 2003); Weststar Mortg. Corp. v. Jackson, 133 N.M. 114, 61 P.3d 823 (2002) (for abuse of process claim, there must be a misuse of process beyond the mere initiation of proceedings without probable cause); Vanover v. Cook, 260 F.3d 1182 (10th Cir. Kan. 2001) (for abuse of process claim, there must be an ulterior purpose *and* an act in the use of such process not proper in the regular prosecution of the proceeding; no liability accrues for the abuse of process where the lawsuit is initiated to obtain damages or a collection procedure to recover a debt, even though the process is instituted with bad intentions or without probable cause). Loeffelholz v. C.L.E.A.N., 119 Wn. App. 665, 82 P.3d 1199 (Div. 2 2004) (the mere institution of a legal proceeding, even with a malicious motive, does not constitute an abuse of process).

These cases underscore the importance of the second element of an abuse of process claim – without a subsequent act after the process has been issued, the tort of abuse of process cannot be met, regardless of whether an ulterior purpose exists, and regardless of whether the action was initiated in bad faith or without probable cause. Therefore, Leggett's claim that the mere initiation of an action meets the elements of an abuse of process claim is without merit.

Leggett also attempts the argument that Sprint's dismissal of the case *without* prejudice instead of *with* prejudice could count as the second element of his abuse of process claim (Leggett Brief at p. 30, 32). This argument fails. Dismissal of an action is not an improper use of the process outside the scope of the proceeding. Dismissal of the condemnation action is just that – a dismissal—which is what Leggett stated that he wanted at the outset of the action, and not a misuse of the process to obtain some sort of collateral advantage.

II. THE IDEA THAT SPRINT SOUGHT TO ACQUIRE LEGGETT'S PROPERTY IN ORDER TO SELL IT FOR PROFIT AT A LATER DATE IS OUTLANDISH AND UNSUBSTANTIATED.

As Sprint has maintained throughout the litigation of Leggett's counterclaim, Sprint never had any "ulterior motive" in filings its Petition for Condemnation. Sprint filed the action to condemn the property and for no other reason. Because Leggett has continuously been unable to establish any "ulterior purpose," Leggett now, for the first time in this case, makes the odd and unsubstantiated accusation that Sprint sought to obtain Leggett's land in order to sell it at a later date. Without citing *any* evidence whatsoever, Leggett states that "Sprint's actual motive in filing a lawsuit it knew was groundless was to acquire the property "on the cheap" and then to sell it at a profit" (Leggett Brief p. 3). Leggett further elaborates on this imaginary scenario later in his Brief:

> A simple explanation of the foregoing timing and sequence of events is: Sprint, whose business was shrinking, sued Leggett in order to acquire his property cheaply – not for expansion of its business – but for later resale. Then, when the Commissioner's Report was filed, and when Sprint realized it would probably have to pay fair market value. . . Sprint backed off – or tried to do so. (Leggett Brief p. 33-34).

This theory is flawed for several reasons. First, there is absolutely no evidence to support it. Second, Leggett admitted in his deposition that Sprint's only motive for pursuing this action was to expand its POP facility (Deposition of Albert Leggett, III, p. 39). Third, Sprint, one of the

largest telecommunications corporations in the country, is not in the real estate business. Sprint had no interest in obtaining Leggett's ½ acre of land in Louisville, Kentucky, just so that Sprint could resell it at some later date. Fourth, Sprint sought an easement, not fee simple, so Sprint would have been unable to sell the property even if it wanted to. Sprint sought the property in order to expand its POP facility and for no other reason. When growth projections indicated that expansion of the POP was no longer necessary, Sprint abandoned the condemnation action, as it had a right to do. Commonwealth of Kentucky, Dept. of Highways v. Fultz, Ky.App., 360 S.W.2d 216 (1962).

III. LEGGETT HAS NO DAMAGES, AND DAMAGES ARE NECESSARY FOR AN ABUSE OF PROCESS CLAIM.

Even if Leggett did meet the elements for an abuse of process claim, his claim would fail as a matter of law because he has suffered no damages. "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, Ky., 621 S.W.2d 895 (1981); Flynn v. Songer, Ky., 399 S.W.2d 491 (1966).

Leggett filed a statement of damages with the Trial Court claiming damages exceeding $307,000 (RA 633-634). Review of the facts and evidence in this matter demonstrates how ludicrous a claim Leggett makes. Sprint's condemnation action was only on file for approximately four (4) months. At no time prior to filing, during, or following dismissal of the action did Leggett actively market or offer the Leggett property for sale or rent (Deposition of Albert Leggett III, p.8, lines 5-18). Leggett has suffered no loss of rent during and after dismissal of the action, as Leggett has had the same tenant, his girlfriend, occupying the space since January, 2002 (Deposition of Albert Leggett, III, pp. 17-19). In spite of the fact that

Leggett has not produced evidence to support any of his claims against Sprint, Leggett has claimed damages exceeding $307,000 as a result of Sprint's actions.

Included in Leggett's damages is a claim in the amount of the cost of his loan on his newly purchased residence and the cost of his moving expenses from the building on the Leggett property to the new residence. The Defendant/Appellee in this case is the "Leggett Trust," not Albert Leggett III, individually. Mr. Leggett claims that he purchased a farm in Oldham County because he thought that if Sprint took his property, *he*, personally (as opposed to the Trust itself) would need studio space. Leggett apparently included this purchase price of the "cost" of his mortgage loan in his damage disclosure. Also included is a claim for the payment of the appraisal performed on behalf of Leggett prior to the litigation, as a negotiating tool for the discussions of the sale of the Leggett property, and not related to the condemnation action. Additionally, Leggett claims loss of rental value, even though the property was never marketed, and even though Leggett testified that he would not rent any more of the alleged space (See, Deposition of Albert Leggett III, p.8, 5-18; p.20, 1-14). Purported damages related to the "cloud" on Leggett's title extend until the present date, as well as attorneys' fees, including fees incurred in negotiations to sell the property to Sprint and fees incurred for services after dismissal of the condemnation action, even though Sprint dismissed its action and is entitled to summary judgment as a matter of law on all of Leggett's counterclaims. Leggett is **not** eligible for reimbursement of any of these alleged damages.

Kentucky courts generally reject the idea of allowing fees and costs incurred in the defense of a condemnation action. If an action is completed, the condemnee recovers his expense through his award absent a showing of the condemnor's bad faith or reasonable delay. In the case of a successful defense to a condemnation action, the landowner has won and

prevented the taking of his property, and the courts do not want to place the litigants in the position of allowing a landowner to gamble on litigation rather than to accept legitimate offers of settlement. Northern Kentucky Port Authority, Inc. v. Cornett, Ky., 700 S.W.2d 392, 393 (1985). As borne out by Leggett's speculative and unsupportable claim of damages, Leggett's conduct (and the tone adopted by his counsel) throughout his contact with Sprint is a prime example of a landowner gambling on the possibility of finding some evidence of bad faith where none exists for the sole purpose of entitling him to damages he solely ran up on his completely unrewarded search for some wrongdoing.

Kentucky case law provides that a condemnor is not liable upon abandonment of condemnation proceedings absent bad faith or unreasonable delay. Northern Kentucky Port Authority, Inc. v. Cornett, 700 S.W.2d at 394. See also J.F. Schneider & Sons, Inc. v. Watt, Ky., 252 S.W.2d 898 (1952); Kroger Co. v. Louisville & Jefferson Co. Air Bd., Ky., 308 S.W.2d 435 (1958), and Commonwealth v. Fultz, Ky., 360 S.W.2d 216 (1962) ("Kentucky case law provides that, absent bad faith or unreasonable delay, a condemnor is not liable for any damages incurred by the landowner when the condemnation proceedings are abandoned before the owner's right to compensation is vested"). See J.F. Schneider & Sons, Inc. v. Watt, Ky., 252 S.W.2d 898 (1952); Kroger Co. v. Louisville & Jefferson Co. Air Bd., Ky., 308 S.W.2d 435 (1958), and Commonwealth v. Fultz, Ky., 360 S.W.2d 216 (1962). Kentucky courts generally do not allow attorneys' fees as a part of costs in the absence of a statute. Leggett has produced no genuine issue of material fact supporting, or even inferring, that Leggett is entitled to prevail on his claims related to those statutes which might have afforded attorneys' fees under different circumstances than exist in this case.

Any "cloud" of title dissipated when Sprint dismissed its action. If Leggett is correct in his argument that Sprint cannot condemn Leggett's land, then any threat of future condemnation is nonexistent. Leggett has maintained his right and ability to use the property for his own purposes since this action was filed, and any claim to the contrary is inaccurate. Leggett has not pointed to any opportunities that were lost as a result of Sprint's condemnation action and, in fact, has not tried to sell the property at any time. Any "damages" incurred are not recoverable and are a direct result of Leggett's overzealous and misguided pursuit of his meritless counterclaims.

IV. THE TRIAL COURT PROPERLY LIMITED THE SCOPE OF DISCOVERY.

Leggett asks this Court to declare that the courts below erroneously prohibited discovery based on the attorney-client privilege. Because Leggett has failed to show that the Trial Court abused its discretion in prohibiting the discovery of privileged documents, this Court must affirm the lower courts' rulings on these matters.

Sprint produced all relevant and nonprivileged information and documentation to Leggett. Sprint fully complied with the rules of civil procedure, which allow parties to obtain discovery that is not privileged and that is relevant to the subject matter of the pending action. Leggett's demand for *carte blanche* access to all documents, records, computer systems, files, and correspondence, whether or not privileged or even relevant to the issues before the court, was unjustifiable, as it far exceeded the scope of permissible discovery in these circumstances.

The Trial Court permitted Leggett liberal discovery in this case. The Trial Court permitted Leggett to acquire information with regard to what facts and information Sprint relied upon preceding the filing of its Petition for Condemnation. Leggett conducted discovery over the course of well over a year. Leggett had a full and complete opportunity to obtain discoverable,

non-privileged documents and to depose the parties involved in the decisions that Sprint made regarding condemnation in this case. The Trial Court has broad discretion to rule on evidentiary matters, and the Court did not abuse its discretion in prohibiting the discovery of privileged documents. Stidham v. Clark, Ky., 74 S.W.3d 719 (2002).

A. The Documents In Question Are Protected By The Attorney-Client Privilege, and No Further Review Is Required.

Upon Sprint's motion for a protective order, the Trial Court entered such an order on November 27, 2002 (RA 459-462). The order precluded Leggett from obtaining certain material as privileged under the attorney-client privilege. The Court also entered an order on September 19, 2003, finding that certain documents submitted by Sprint and reviewed by the court *in camera* were privileged (RA 632). The Trial Court had a full and complete opportunity to review all documents—some of which had been previously inadvertently disclosed to Leggett. The Trial Court conducted its review *in camera*, as it was required to do pursuant to Stidham v. Clark, Ky., 44 S.W.3d 719 (2002), and found that the documents were protected by attorney-client privilege.

In its December 2, 2005 Opinion, the Court of Appeals addressed Leggett's discovery arguments and, citing KRE 503(b),[3] affirmed the Trial Court's ruling and held that the documents in question were properly protected by the attorney-client privilege. The Court of Appeals then *independently reviewed* the documents that Sprint had submitted to the trial court for *in camera* review. The Court's independent review of the documents led the Court of Appeals to conclude that "the circuit court correctly found that the materials referenced in the September 19, 2003, order are protected from discovery by the attorney-client privilege." In

[3] KRE 503(b) states that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client."

support of its decision, the Court cited St. Luke Hospitals, Inc. v. Kopowski, 160 S.W.3d 771, 777 (Ky. 2005), which held that "attorney-client privileged communications do not fall within the ambit of CR 26, and are not discoverable even when the information is essential to the underlying case and cannot be obtained from another source."

In his Cross-Motion for Discretionary Review, Leggett falsely stated that "Leggett alleged that Sprint acted with an "ulterior motive" and in bad faith, but Leggett was prevented from full discovery of Sprint's decision-makers respecting Sprint's decision to sue him" (Leggett's Cross-Motion for Discretionary Review at p. 1). In fact, Leggett, who *was* allowed full discovery of non-privileged documents, did *not* allege that Sprint acted with an ulterior purpose. Leggett failed to plead the essential elements of abuse of process, as Sprint addressed at length in its appellate briefs and motion for discretionary review. Since abuse of process requires an "ulterior purpose" and a willful act in the use of process not proper in the regular course of the proceedings, Leggett had the burden of offering some facts that would sustain this cause of action. See Simpson v. Laytart, Ky., 962 S.W.2d 392, 394 (1998). Though he was permitted to conduct ample discovery, Leggett still was unable to present a single fact that would sustain his argument that Sprint had an "ulterior purpose" in filing its condemnation action.

The Trial Court did not abuse its discretion in issuing protective orders for privileged documents, and the Trial Court's judgment with regard to the issuance of protective orders limiting discovery of privileged or proprietary information must be affirmed.

B. The Attorney-Client Privilege Was Not Waived By Any Inadvertent Disclosure.

Leggett argues that because certain emails regarding possible condemnations in Anaheim, California and Biloxi, Mississippi were inadvertently disclosed, the attorney-client privilege with regard to the present case was waived. This is not the case. First, condemnations

in Anaheim and Biloxi have nothing whatsoever to do with this case and do not even remotely concern Leggett's land or the parties involved in this case. *C.f.* Lexington Public Library v. Clark, Ky. 90 S.W.3d 53 (2002); In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989). Communications regarding these condemnations are totally irrelevant to the present case. Leggett has cited to no law holding that an attorney-client privilege is waived if communications regarding unrelated cases, with unrelated parties and unrelated subject matter, are disclosed. Leggett has also failed to cite to any Kentucky authority holding that inadvertent disclosure of privileged materials waives the attorney-client privilege as to all materials regarding the same subject matter.

Leggett simply cannot use Sprint's discussions of condemnations in Anaheim and California as authority for obtaining attorney-client communications containing legal advice in the present case.

C. A "Privilege Log" Was Not Required.

Leggett argues that this Court "can and should use this case to adopt clear guidelines" requiring parties claiming "privilege" to provide it with "privilege logs." The Court of Appeals held on this matter that "the fact that Sprint failed to create a privilege log summarizing the materials it claims are privileged before submitting the materials for the lower court's review is not fatal to its claim of privilege because Leggett has not cited to any Kentucky authority requiring the preparation of such a privilege log" (Opinion, 12/2/05, p. 21, n.34). Indeed, there is no such Kentucky authority requiring the preparation of a "privilege log." Id. As even Leggett admits, the Kentucky Rules of Civil Procedure do not have a counterpart to FRCP 26(b)(5), and it is not the Court's role to create new law. Because Kentucky law does not require the creation

of a privilege log, this Court must affirm the lower courts on this matter. Sprint cannot retroactively be held to a "privilege log" requirement that does not exist in Kentucky law.

CONCLUSION

Parties have a right to assert rights and to seek remedies in court. It is only the "irregular use of judicial proceedings" that are improper and which are tortious. Stoll Oil Refining Co v. Pierce, Ky., 337 S.W.2d 263 (1960).

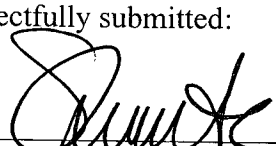
The parties in this case attempted to negotiate a sale of Leggett's property. When that sale was unsuccessful, Sprint instituted eminent domain proceedings. Sprint held a good-faith belief that it had statutory authority to condemn property that was needed to allow Sprint to provide telecommunications services to the public. Sprint does have the right of eminent domain to "maintain and operate telephone lines on or across the real property" of another person if it cannot obtain the right-of-way by contract. KRS 275.540(2). When the market conditions changed, Sprint voluntarily dismissed its complaint for eminent domain. Leggett maintained full use of his property at all times.

Leggett has spent thousands of dollars and many hours in attempting to extract "damages" from Sprint although Leggett has already obtained what he stated in his answer to be his objective, a dismissal of the condemnation action and the right to enjoy his property free from Sprint's right-of-way.

The Trial Court properly found that Leggett did not plead and could not prove the elements of the causes of action asserted in his counterclaim. The Trial Court gave Leggett much latitude and as much time as necessary to discover facts that may support his cause of action.

The Trial Court properly exercised its discretion regarding the scope of discovery and, having reviewed all documents (including the privileged documents) *in camera*, concluded that Leggett had not presented any facts sufficient to support the causes of action he asserted. Accordingly, this Court should reverse the Court of Appeals' Order and affirm the Trial Court's order granting summary judgment in favor of Sprint.

Respectfully submitted:



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