In the
SUPREME COURT OF KENTUCKY
2005-SC-001023 and 2007-SC-00273
(2004 CA-001739MR)

SPRINT COMMUNICATIONS COMPANY, L.P. — APPELLANT

v. Appeal from Jefferson Circuit Court
01-CI-08663

ALBERT E. LEGGETT III, as Trustee
of the Albert E. Leggett Family Trust — APPELLEE

ALBERT E. LEGGETT III, as Trustee, etc. — CROSS-APPELLANT

v.

SPRINT COMMUNICATIONS COMPANY, L.P. — CROSS-APPELLEE

BRIEF FOR APPELLEE AND CROSS-APPELLANT ALBERT E. LEGGETT III, as Trustee, etc.

O. Grant Bruton
Middleton Reutlinger
2500 Brown & Williamson Tower
Louisville, Kentucky 40202
Tel: (502) 584-1135
Fax: (502) 561-0442
Counsel for Albert E. Leggett III, etc.
Appellee and Cross-Appellant

CERTIFICATE INSIDE COVER

INTRODUCTION

Sprint Communications Company L.P., ("Sprint") a telecommunications company, filed and later withdrew a condemnation action against Albert E. Leggett III, as Trustee of the Albert E. Leggett Jr. Family Trust, ("Leggett") seeking to condemn all of Leggett's property; Leggett counterclaimed, seeking compensation for the damage done to the value of his property by the filing of an unauthorized lawsuit in the public record. The Trial Court circumscribed Leggett's discovery into Sprint's intentions and bad faith and then entered summary judgment against Leggett, citing lack of evidence. The Court of Appeals affirmed in part and reversed in part; it remanded the case for trial on Leggett's claims for abuse of process and denial of civil rights but sustained the Trial Court's limitations on Leggett's discovery.

Sprint's Motion for Discretionary Review was granted by this Court on April 13, 2007 and Leggett's Cross-Motion for Discretionary Review was granted on February 13, 2008.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee / Cross-Appellant Albert E. Leggett, III, etc. agrees with Appellant / Cross-Appellee Sprint Communications Company L.P. that an oral argument would be helpful to the Court in deciding the issues presented in this case.

STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

(Appellee/Cross-Appellant Albert E. Leggett III, Trustee, etc. ["Leggett"] does not accept the Statement of the Case of Appellant/Cross-Appellee Sprint Communications Co., L.P. ["Sprint"]).

Preface

Sprint has ignored the mandate of CR 76.12(4)(c)(iv) which requires that its Statement of the Case contain "... ample references to the specific pages of the record ... supporting each of the statements narrated...." There is not a single record reference in Sprint's entire narrative. We know why. Sprint is the party which is attempting to defend a summary judgment, but the record does not support Sprint's misstatements of fact nor the inferences Sprint draws therefrom – so Sprint pretends there is no record. Leggett will show how and where the record contradicts many of Sprint's essential factual assertions and assumptions, including such concoctions as: "Sprint made a good faith effort to purchase Leggett's property;"[1] "Leggett had a full opportunity to conduct discovery;"[2] "There was no issue of fact as to whether Sprint had an ulterior motive;"[3] "There was absolutely no evidence that Sprint filed its petition "to pressure Leggett into selling its [*sic.*, "his"] property;"[4] "Leggett has not suffered any damages,"[5] *etc., etc.* Some of Sprint's assertions cannot be contradicted by the record because they are pure fabrications that can only be refuted by facts *dehors* the record.[6]

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[1] Brief p. 2.
[2] *Id.* p. 3.
[3] *Id.* p. 11.
[4] *Id.*
[5] *Id.* p. 15.
[6] *See* footnote 11, *infra.*, p. 3.

Statement of Facts

Leggett owns and operates a photography studio in a 9,700 square foot building built on a 22,172 square foot parcel of commercial real estate, located at 330-336 Baxter Avenue in Louisville. The property was acquired in 1990 by the Leggett Family Trust for a total consideration of $325,000.[7] Albert E. Leggett III holds the property in trust for himself and his children. Sprint's POP is next door, at 340 Baxter Ave. Contrary to Sprint's assertion at p. 12 of its brief, a POP is nothing like a telephone "right-of-way." A POP is a fortress-like building that houses many millions of dollars' worth of telecommunications equipment, including computers, monitors, cables, switching gear and banks of air conditioners.[8] It is constructed for Sprint's exclusive use; it is securely locked and is surrounded by a razor-wire fence.[9] As described by Sprint and by the Trial Court, it is "an air-conditioned building ... necessary to house computers ... back-up power generators and equipment for conversion ...," (Opinion of Trial Court, pp. 5-6).

Sprint asserts that it made a good faith effort to acquire Leggett's property; that it did not use the threat of a suit to pressure Leggett into selling his property and that, *after* suit was filed on December 17, 2001, Sprint experienced a downturn in business and "market conditions ... changed."[10] That, says Sprint, was the reason it served notice of the voluntarily dismissal of its action. Not so!

To address Sprint's last assertion first: At p.1 of its brief, Sprint asserts, without citing the record, that in 2001, the increase in its business and its "current rate of growth" required it to expand its POP and therefore to condemn Leggett's property. But then, in

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[7] Record on Appeal, (hereafter, "RA") p. 150.

[8] Leggett Affidavit, ¶¶ 2, 3, attached to "Defendant's Response to Plaintiff's Renewed Motion to Dismiss Counterclaim," filed 9/13/02; in Record on Appeal but bound separately.

[9] Photographs of Sprint's and Leggett's properties are Exhibit A to Leggett Affidavit, *supra.*

[10] Brief, p. 1.

an effort to show that it encountered hard times *after* it sued Leggett, requiring it to voluntarily dismiss its petition, Sprint states: "By this time, Sprint had acquired WorldCom and the telecommunications market had contracted severely." Not so! [11] As is shown by Sprint's 2001 Annual Report,[12] which reported an "asset impairment charge of $1,804 million to reduce overall operating costs," there was indeed a downturn, but it occurred much earlier in 2001. Connee A. Scott, a Kansas lawyer, whose title is "Senior Real Estate Negotiator" and who is head of Sprint's "Network Real Estate – Facilities Department,"[13] testified in her deposition[14] about massive layoffs that occurred in November, 2001, *before* Sprint sued Leggett, giving rise to the inference 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. When the $600,000 commissioners' award thwarted that plan, Sprint's dismissal "without prejudice" put a permanent cloud on the title; the threat of another condemnation action in the future would inhibit Leggett's sale of the property and Sprint might acquire it when its fortunes improved.

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[11] We ***challenge*** Sprint, to cite a reference in its next brief - in the record or out of it - proving the truth of that statement. Sprint never acquired WorldCom. On July 13, 2000 the financial media carried Sprint's and WorldCom's announcement that the proposed merger had been *called off.* Thereafter, WorldCom and its executives became engulfed in scandal, litigation and bankruptcy.

[12] Exhibit E to "Leggett's Reply to Sprint's Motion for Summary Judgment," filed 12/8/03; bound separately.

[13] Deposition of Connee A. Scott, 9/24/03, ("Scott dep.") pp. 4-5; 19.

[14] *Id* p. 144.

This inference is strengthened by the following facts: Sprint's own records prove that by 2001, Leggett's property, which was acquired in 1990 for $325,000, had substantially increased in value. In May, 2001, Steven Gilley, a Missouri lawyer in the Network...Facilities Department, corresponded by e-mail with acquisition agents "P. Cauley" and "T. Halmontaller" who had been sent to Louisville. The acquisition agents, in turn, consulted with Paul Semonin, Inc., a prominent Louisville real estate firm, and were told that the Baxter Avenue area had experienced "new development and values are increasing." The local realtor "gave me a value for the .509 acres, known as 530 Baxter Avenue of $500-525,000."[15] Gilley himself made a note that "a value of $600,000, plus or minus, would seem reasonable."[16] Gilley approached Leggett about buying the property and solicited a price. Because Leggett could not find suitable property within city limits, because a move to the suburbs would be very expensive and because he thought there was no compulsion to sell, Leggett said he would take $900,000 for the property. Gilley prepared a contract with that figure in it and sent it to Leggett; Leggett signed it and sent it back to Gilley.[17] But the "contract" was a ploy. Gilley had no intention of returning the signed contract to Leggett. Instead, Gilley made arrangements to obtain a trumped-up "lowball" appraisal.[18] The appraisal is, in and of itself, evidence of bad faith – so is the use Gilley tried to make of it. It valued the .509 acre property, with its 9,700 square foot building, as if it were a vacant lot; the appraisal used vacant lots for "comparables," ignored the $325,000 arms-length sale price paid eleven years

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[15] RA 671.
[16] Gilley dep. 9/24/03, pp. 43-44.
[17] Exhibit "D" to "Defendant's Response ..." *supra.*
[18] Gilley's e-mails to the appraiser should have been in Sprint's "project file," but they were missing by the time Gilley gave his deposition (Gilley dep. p. 49).

Company,[24] where the Supreme Court of Tennessee held that the owner of the underlying fee retains a reversion in a railroad right-of-way that goes across his property, so when Sprint laid its fiber-optic cable in the right-of-way, a "taking" of the landowner's reversion occurred, entitling the landowner to compensation. "An easement merely gives the railroad company a right-of-way in the land ... After the condemnation and payment of damages, the soil and freehold belong to the owner of the land, subject to the easement or incumbrance ...,"[25] Thus, Sprint knew the landowner's remainder, *vel non*, is the touchstone whereby the taking of a right-of-way is distinguished from the taking of a fee.

Gilley's threat prompted Leggett to employ Kentucky counsel, who immediately wrote Gilley demanding to know by what Kentucky authority Sprint, a telephone company, could condemn Leggett's entire property, as opposed to the "right-of-way" as set out in KRS 278.540 and 416.150.[26] In his letter, Leggett's counsel also instructed Gilley to "Please direct any further communications in this matter to this office; not to our client." [27] After he received counsel's letter, Gilley did more research into "statute and case law on Kentucky Eminent Domain Law,"[28] but Gilley never replied to counsel's query respecting Sprint's right to condemn Leggett's entire property.[29] Instead, the Missouri lawyer's first call was *not to Leggett's lawyer, but to Leggett himself.* Gilley

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[24] 840 S.W.2d 904 (Tenn.1992). *See also, Isaacs v. Sprint Corporation,* 261 F.3d 679 (7th Cir. 2001) wherein class action status for such suits was litigated.

[25] *Id.* p. 909.

[26] RA 147-148.

[27] *Id.*

[28] RA 666.

[29] This Court can take judicial notice of the fact that Rule 4.2 of the Model Rules of Professional Conduct, adopted by the American Bar Association in 1983, has been followed in every state in the Union.

earlier and came up with a $200,000 "value."[19] Despite the fact that the appraisal was $125,000 less than its 1990 sale price and a third of what Gilley himself thought was a "reasonable" value, Gilley sent Leggett a new contract with the $200,000 figure in it. When Leggett refused to sign it, Gilley threatened condemnation: "Q. So as one of your bargaining techniques, you mentioned a legal contest, did you not? A. I believe so."[20] He spoke darkly of the "time and legal costs associated with condemnation."[21]

There is abundant evidence in the record that, at the time he made the threat, Gilley - and Sprint - knew full well that Sprint did not have the right to condemn Leggett's entire property – as opposed to a right-of-way across it. Before Gilley threatened Leggett with condemnation, he [Gilley] had already "[C]hecked into Sprint's condemnation rights in Kentucky .... searched for and copied relevant condemnation statutes for Kentucky ..."[22] on three different days. Moreover, Sprint's organizational structure proves that it knew the difference between the acquisition of a right-of-way on one hand and of a fee on the other. Connee Scott, Gilley's superior in Sprint's Network ...Facilities Department, testified that her department acquires properties for "facilities," including POPs. There is a separate "right-of-way group" that acquires rights-of-way across properties; the landowner retains the use of his property, subject only to the right-of-way.[23] Further, Sprint knew, from its own litigation experience, that the difference between a right-of-way and a fee is that, in the former instance, the landowner retains a reversion and in the latter there is no reversion, *see: Buhl v. U.S. Sprint Communications*

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[19] A critique of the appraisal is at RA 150-152.
[20] Gilley dep. p. 59.
[21] RA 667.
[22] *Id.*
[23] Scott Dep. 1, p. 24.

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[25] *Id.* p. 909.

[26] RA 147-148.

[27] *Id.*

[28] RA 666.

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told Leggett that he "could talk to him [Gilley] any time," without his lawyer.[30] With some heat, counsel wrote a letter chastising Gilley and, with respect to the challenge that Gilley cite Kentucky authority, the letter stated: "Your aforesaid disregard of my direct instruction leads me to believe you have no answer. If you have none, now is the time to 'fess up and salvage what little credibility you have."[31] Gilley made a note: "Rec. fax indicating Mr. Bruton has not heard from me (in not very polite terms) --- seems to be upset because I contacted his client."[32] When Gilley's deposition was taken, Sprint's counsel instructed Gilley not to answer a question as to whether the Code of Professional Ethics of the Missouri Bar contains a prohibition similar to SCR 3.130(4.2), forbidding a lawyer's communication "with a party the lawyer knows to be represented by another lawyer."[33]

Gilley's refusal to answer the query as to the right of a telephone company to condemn for more than a "right-of-way" in Kentucky was a tacit admission that he knew Sprint had no such right. But Gilley's actions were even more significant as admissions than were his inactions. On the same day he reported "Mr. Bruton ... seemed to be upset...," he noted that he would "contact... the local development authority ... to investigate condemnation issue/procedure."[34] The next day, Gilley called the Louisville Development Authority in an effort persuade the City of Louisville to do what Sprint could not: Condemn Leggett's property in fee simple and then turn it over to Sprint.[35] He called "inquiring re: assistance by the city/state for ... condemnation ... and faxed him

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[30] Gilley Dep., p. 61.
[31] Exhibit E to Leggett's "... Motions to Compel Discovery ...," bound separately.
[32] RA 666.
[33] Gilley dep, p. 62.
[34] RA *loc. cit.*
[35] Gilley dep. pp. 67-69.

info on 330 Baxter. Told him our problem in trying to acquire expansion site,"[36] Gilley even tried to persuade the City to declare that Leggett's property was "blighted," so Urban Renewal could condemn it.[37] However, Gilley failed in his efforts to persuade the City to be Sprint's cat's paw. Gilley reported: "[T]hey could not justify their use of eminent domain on our behalf because not enough job creation,"[38] (*i.e.*, Sprint's proposed use of the property would not create not enough jobs to make the condemnation worthwhile.)

Gilley's admissions were documented, recorded and preserved in SEGIS,[39] an interdepartmental filing system and database maintained by Sprint for all its employees who have computers. Diary entries, e-mails, messages, documents and project files "dropped" into SEGIS are universally available to Sprint personnel. No effort was made by Sprint to preserve the confidentiality of material relating to the Leggett condemnation in SEGIS, or to restrict access thereto.[40] Gilley admitted that: "Pretty much anybody with access to SEGIS would have access to the project file...."[41]

SEGIS entries and other documents reveal that Gilley was not the only lawyer in Sprint's employ who doubted Sprint's authority to condemn a landowner's entire property, as opposed to a right-of-way for telephone lines. Sprint inadvertently turned

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[36] RA 666.

[37] RA *loc. cit.*

[38] RA *loc. cit.*

[39] Sprint's Connee A. Scott did not know what SEGIS was an acronym for. "I mean, it's become, you know, like Kleenex, SEGIS." Scott dep. p. 45.

[40] Sprint does have a protocol for preserving confidentiality of in-house communications. If a communication is to be kept confidential, it is labeled: "ATTORNEY-CLIENT WORK PRODUCT PRIVILEGE ... DO NOT read, copy or disseminate this communication unless you are the intended addressee ... etc ... DO NOT forward or disseminate this e-mail to any third party." (RA 710). No SEGIS entry is so labeled. Ironically, the reason Leggett is in possession of this allegedly privileged document is that Sprint turned it over to him. It is Exhibit G in the Appendix to this Brief.

[41] Gilley dep. p. 66.

over to Leggett many allegedly "privileged" documents that indicate that other lawyers at Sprint has similar misgivings, including:

On October 9, 2001, (approximately two months before it sued Leggett) Sprint filed an eminent domain action in Biloxi, Mississippi to condemn for a switching station. Sprint invoked a Mississippi statute which is similar to, but more liberal than, Kentucky's.[42] Sprint's local lawyer was Robert C. Galloway of the firm of Butler, Snow, O'Mara, Stevens & Cannada in Gulfport, Mississippi. Shortly after Sprint had sued Leggett, Galloway informed Margaret Pemberton, yet another lawyer in Sprint's Network...Facilities Department,[43] of the existence of Mississippi's statute and of a case construing it. Pemberton relayed the Mississippi lawyer's communication to her superior, Scott. Scott replied to Pemberton with an e-mail expressing concern about condemning property for the construction of a "**facility**" (emphasis supplied) in Biloxi, "since we're constructing a **facility** and not [telephone] lines."[44]

On January 10, 2002, (shortly after Sprint filed suit against Leggett in Kentucky) Pemberton sent an e-mail to Nancy Shelledy, another Sprint lawyer, regarding a proposed condemnation in Anaheim, California. Pemberton pointed out that Section 616 of the California Public Utilities Code allowed telephone companies to condemn property "necessary for the construction and maintenance of its telephone lines."[45] Pemberton asked: "Would condemnation authority allow Sprint to condemn property to expand the adjacent switch facility, or in the alternative to construct a new switch facility? ... This

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[42] Mississippi Code §77-9-717 provides: "Telegraph and telephone companies, for the purpose of constructing new lines, are empowered to exercise the right of eminent domain...."

[43] Scott dep. pp. 92-93.

[44] RA 713; Exhibit F in Appendix to this Brief.

[45] A criterion similar to, but less restrictive than Kentucky's, *see* KRS 278.540.

question has been discussed by NRE with outside counsel handling the condemnation litigation in Biloxi, MS. However the landowner in the Biloxi litigation is representing himself, and Sprint's authority to bring the condemnation action has gone unchallenged (so far). Sprint is likely to face stiff opposition from USA Storage in Anaheim." Shelledy replied "yes," without explaining why.[46] Leggett was prevented from taking Shelledy's deposition to ask her why.

On January 14, 2002, in preparation for a hearing in the Mississippi case, Sprint's local lawyer wrote a letter, labeled "CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION" to Margie Crawford, Sprint's Senior Legal Analyst,[47] Galloway observed, *inter alia,* that "Whether the purpose for which Sprint desires Mr. Pittman's property constitutes the 'construction of new lines' is basically a legal question. The Mississippi Supreme Court at various times has taken a very strict construction of that term and on other occasions a somewhat more liberal position." After the landowner in Mississippi hired a lawyer, who challenged Sprint's right to condemn and made discovery requests, Sprint moved to dismiss its complaint there. "Q. [J]ust as soon as the [Biloxi] landowner got a lawyer and the lawyer started asking for documents, Sprint dismissed? A. Well – your order of events, yes."[48]

An allegedly "privileged" e-mail Sprint turned over to Leggett reveals the "ivory-tower" contempt that Sprint's "in-house" lawyers felt, and probably still feel, toward "outside" lawyers (including lawyers Sprint employs) who have the temerity to tell "in-house" lawyers what they don't want to hear. Apparently doing his duty to inform his client of the consequences of Sprint's actions in filing, and then dismissing a questionable

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[46] RA 712; Exhibit D in Appendix.
[47] RA 624-625; Exhibit E in Appendix.
[48] Scott dep. 88.

condemnation action, Sprint's Mississippi counsel wrote of "the possibility of future retaliatory action" against Sprint by the landowner. Pemberton, who, apparently, was in charge of the case, reacted by berating, not opposing counsel, but her own lawyer:

> Please let us know if there is a specific reason you have raised this issue at this time and any steps you have taken to dissuade opposing counsel from proceeding with such frivolous litigation.... I am confused as to why you would be coordinating with ... [opposing counsel] regarding the amount of his fees. It was my impression ... that the court's award of reasonable attorney's fees in an eminent domain action is purely discretionary and not statutorily required.[49]

Despite misgivings on the part of Sprint's in-house lawyers, despite opinions from outside lawyers casting doubt on a telephone company's right to condemn an entire parcel of property instead of a right-of-way, despite all the research into "statute and case law on Kentucky Eminent Domain Law" and despite the fact that Kentucky's condemnation statutes are even more restrictive than California's and Mississippi's, Sprint determined to go ahead and bring an eminent domain action against Leggett.[50] Apparently, Sprint employed Kentucky counsel only after its people had decided to file suit.[51] In its brief to this Court, Sprint says that it "... conducted a survey of Kentucky law ... and determined that it could condemn the land for the purposes stated in its petition."[52] But the only evidence in the record respecting research into Kentucky law by Sprint were the notes posted by Gilley, who never responded to Leggett's challenge to cite authority for Sprint's condemnation of *all* of Leggett's property. There is *no* evidence in the record respecting the basis for Sprint's "determination" to condemn all of Leggett's property.

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[49] RA 708; Exhibit C in Appendix to this brief.
[50] RA 664.
[51] On October 4, 2001, Gilley reports that he called "T Black" [Terrell L. Black, of Tilford, Dobbins, Alexander, Buckaway and Black, Louisville attorneys], RA 666. At this point the SEGIS entries become so redacted, they are useless for the purpose of constructing a narrative.
[52] Sprint Brief p. 11.

Leggett was prevented from discovery of Sprint's decision-makers to examine the reasons for said "determination."

On October 10, 2001, Sprint's Kentucky counsel wrote Leggett's counsel. Sprint's counsel continued Gilley's tactic of using the threat of litigation as a club. They stated: "**In order to avoid the rigors of contest and associated unpleasantries**, Sprint Sites U.S.A. offers to acquire Leggett's entire property [not an "easement," note] for $250,000.00."[53] Hoping to avoid a suit against his client, Leggett's counsel asked Sprint's Kentucky counsel for "a written statement of your position, as a Kentucky lawyer, as to whether KRS 278.540 [or] KRS 416.150 authorizes your client to condemn a fee simple interest in my client's property, or anything other than a 'right-of-way...,'" Sprint's Kentucky counsel never answered the query. Leggett commissioned his own appraisal, which concluded that the fair market value of the property was $750,000.[54] After seeing Leggett's appraisal, Sprint offered a mere $25,000 more than the property's price in 1990. Leggett refused. Sprint filed suit on December 16, 2001.

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[53] RA 94; emphasis supplied. The "offer" is $75,000 *less* than the property's 1990 sales price.

[54] The "Executive Summary" of the appraisal is "Exhibit D" to "Leggett's Reply to Sprint's Motion for Summary Judgment," bound separately.

Proceedings Below

Sprint's Petition for Condemnation[55] was a sham; a sham it perpetuates at p. 2 of its brief in this Court. In an effort to pretend that it was condemning for something resembling a "right-of-way," Sprint says it was going to take a "permanent easement and a temporary construction easement."[56] But, as Sprint admits in its brief,[57] the "easement was commensurate with the total area of the property."[58] The "taking" was for an expanded POP, for Sprint's exclusive use, "permanent[ly]," leaving Leggett nothing. Continuing the charade, Sprint prepared and filed with its complaint a "Commissioner's Report," to be filled out by the Commissioners after they were appointed and performed their duties pursuant to KRS 416.580. The form prepared by Sprint invited the Commissioners to put a value on a "Remainder," even though there was obviously to be no "reversion," "residue" or "remainder" to be left for Leggett. The Commissioners were not misled. They valued the property at $600,000 and "$0" for the "Remainder."[59]

According to the affidavit of Leggett's appraisal witness, William Otto Spence, MAI, MS, [60] the filing of the condemnation action in the public record created a "cloud on the title of the property:"

> There is no doubt that Mr. Leggett suffered damage. The filing of the condemnation action ... was and is a matter of public record. The lawsuit had an immediate impact. The property became unsalable and unleaseable. No potential buyer no potential tenant is willing to buy or lease commercial property that is the subject of a condemnation action.

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[55] RA 1-27.
[56] Brief, p. 2.
[57] Brief, *loc cit.*
[58] If the "permanent easement" consisted of Leggett's entire property, *quare* the condemnation for a "temporary construction easement?"
[59] RA 30-31.
[60] Affidavit of Otto Spence, Exhibit F to "Defendant's Response...." *supra.*

Spence estimated the market value damage caused by the filing of the lawsuit to be between $71,600 and $86,707, as of the date of his affidavit, September 3, 2002. But Spence also described the "continuing damage" because Sprint's complaint had been dismissed "without prejudice:"

> Unfortunately, the dismissal of the lawsuit "without prejudice" did not remove the cloud on the title of the property and did not cure the depressing effect it had on the property's value. .... There remains a risk that Sprint, with its facility next door, might make another attempt to condemn the property.... The potential buyer or lessee would discount the sale price or rental to compensate for the risk ... the 'cloud' on the title of the property remains.

Leggett filed an Answer and Counterclaim.[61] Later, he filed a Restated and Supplemental Counterclaim, asserting *inter alia* that:

> Sprint wrongfully, maliciously and without probable cause threatened and then initiated this civil action in Sprint's effort to deprive defendant of a fundamental civil right, namely, defendant's right to own, and to continue to own, his property. To that wrongful end, Sprint misused and abused civil processes. Sprint has wrongfully acted under color of State law...[D]efendant no longer has full use of his property, nor can defendant lease it to a third party[62]

Shortly after the Commissioners submitted their aforesaid $600,000 report, Sprint served a "Notice of Voluntary Dismissal" of its Petition.[63] In open court, Sprint's counsel stated that Sprint tried to dismiss its complaint because: "The price the commissioners brought back was too high."[64] Leggett objected to the voluntary dismissal, in view of his pending Answer and Counterclaim. He asserted that Sprint had demonstrated bad faith and claimed that, as a condition of dismissal, "bad faith" damages and attorney's fees

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[61] RA 79-94.
[62] *Id.* 100.
[63] *Id.* 122.
[64] TAPE 3/11/02; 13:47:12. A disingenuous assertion, in view of Sprint's right to file exceptions thereto, KRS 416.610(3).

should be awarded.[65] The Trial Court did not award damages or attorneys' fees but it did rule that "Leggett has made sufficient allegations of bad faith on the part of Sprint in initiating this condemnation action ... Sprint's Complaint is NOT dismissed."[66] Leggett then moved for summary judgment on grounds that Sprint could only condemn a "right-of-way" under KRS 278.540 and KRS 416.150, not Leggett's entire property.[67] Leggett sought a dismissal of Sprint's Complaint on the merits, *i.e.* with prejudice, instead of a voluntary dismissal "without prejudice." Sprint moved to dismiss Leggett's Counterclaim as well as its own Complaint. On July 2, 2002, the Court denied Sprint's motion to dismiss Leggett's counterclaim and declared Leggett was to have "ample opportunity to conduct discovery." But the Court granted Sprint's motion to dismiss its own complaint "without prejudice" and denied as "moot" Leggett's motion for a dismissal on the merits.[68] Not satisfied, Sprint moved to reconsider. On October 23, 2002, the Court again denied Sprint's motion, observing, *inter alia*: "The relevant question is not whether Sprint *could* have reasonably believed its action was justified, but whether Sprint *did in fact* believe it had probable cause."[69]

With respect to discovery, from the very outset, Sprint mounted a "scorched earth" campaign to keep Leggett from discovering information relevant to issues of "bad faith," "wrongful use of proceedings" and "ulterior motive."[70] As he had a right to do, Leggett filed discovery requests at the outset of the case, including a notice to take CR 30.02 depositions. Sprint's response was to move to quash the discovery initiatives as

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[65] Pursuant to *Northern Port Authority, Inc, v. Cornett,* 700 S.W. 2d. 392 (Ky. 1985) and *Bernard v. Russell County Air Board,* 747 S.W. 2d 610 (Ky. App. 1988); RA 127-145.
[66] RA 299-300.
[67] *Id.* 784-837.
[68] *Id.* 428-431.
[69] *Id.* 456.
[70] Sprint's motions, objections etc. can be found at RA 39, 345, 353, 354, 504, 550, 752 and 926.

"premature."[71] Later, after the entry of the aforesaid orders and acting on the Court's rulings that Leggett had the right to "full discovery' respecting what "Sprint *did, in fact believe*" when it filed its condemnation action, Leggett undertook additional discovery. Sprint grudgingly supplied some - inadequate - responses.[72] Leggett moved to compel.[73] Sprint's response was to move for a protective order. The Court granted Sprint's motion for a protective order. Then there were further motions, responses and briefs, during the course of which the Court entered an agreed order that "Sprint will preserve, and not destroy, documents, evidence and/or electronic data which might be relevant to the allegations in Leggett's Counterclaim, or which might lead to the discovery of evidence relevant thereto....[74] On May 20, 2003, the Court clarified its previous protective order by holding that Leggett was entitled to "reasonable discovery to determine whether Sprint believed this was a valid claim at the time. This includes discovery of communications between Sprint and its counsel prior to the filing of the action."[75]

Relying upon the Court's May 20, 2003 order, Leggett decided to incur the expense of serving notice to take CR 30.02(6) depositions in Kansas City, where Sprint has its principal office, (Leggett could have served the notice to take the depositions in Kentucky, but, in order to fully explore whether "Sprint believed this was a valid claim at

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[71] *Id.*

[72] Which included a document called an "expansion report." The document Sprint did produce was so redacted as to be incomprehensible. Sprint refused to produce the original, claiming it was "privileged ... prepared in anticipation of litigation." Actually, it was prepared by engineers and not lawyers. It is Exhibit A to "Motions to Compel Discovery," filed September 13, 2002, bound separately. Eventually, Sprint was ordered to produce it, but when Sprint finally produced what it said was the "original copy" of the document, it differed from the redacted copy, *compare*: *Exhibit* X1 to *Exhibit* X3; Scott (Confidential) dep., 9/23/03. Sprint refused to produce a witness that could explain the discrepancy, *Id.* pp. 24-25.

[73] "Motion to Compel," *supra.*

[74] RA 376-377.

[75] *Id.* 527.

the time," Leggett chose a location where documents could be easily retrieved.) But Sprint's obstructionism continued. On the eve of the Kansas City depositions, it moved for yet another protective order, again claiming "privilege." Leggett filed a "Response to Sprint's Latest Motion for Protective Order," arguing that "privilege" did not apply because it had not been properly preserved, but if it did, that Sprint waived any "privilege" when it failed to keep the allegedly "privileged" communications confidential and when it voluntarily turned over to Leggett several allegedly "privileged" documents.[76] A hearing was held on September 19, 2003. There, Leggett learned for the first time that Sprint had filed with the Court, for *in camera* inspection, a volume that appeared to be two inches thick [77]which counsel said contained "e-mails and correspondence."[78] Sprint provided to the Court, but not to Leggett, a "cast of characters," with lawyers "highlighted."[79] Sprint did not supply any "privilege log" or affidavit listing the documents, generally describing their contents and stating why privilege applied; as a matter of fact, Sprint failed to supply any description at all of the withheld documents, such as the one referred to in *Lexington Public Library v. Clark*,[80] and the Federal cases cited and followed therein.[81] Because even the most rudimentary descriptions of the documents were kept from Leggett, the hearing became, in effect, an *ex parte* dialogue between Sprint and the Court. Leggett protested that he had gone to the trouble and expense of setting up the Kansas City depositions in reliance upon the Court's prior

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[76] *Id.* 605-606.
[77] Leggett designated the sealed volume to be included in the Record on Appeal. RA 1026-1027; Sprint objected.
[78] TAPE 9/19/03; 8:40:12; 8:41:49.
[79] TAPE 9/19/03; 8:42:01; 8:42:35.
[80] 90 S.W.3d 53 (Ky., 2002).
[81] *Id.* 61.

order[82] to no avail. The Court disavowed its previous order and granted Sprint's latest motion for a protective order from the bench[83] remarking "I'll get an order out but you'll probably be in St. Louis [*sic.*; Kansas City] before you get it."[84] On September 19, 2003, Sprint's tendered Order was entered. It provided that the tendered documents were "privileged and shall not be discovered and that the discussions between the employees (or contract employees) of Sprint regarding the litigation in this case is hereby protected from discovery."[85]

Emboldened by the Court's change in attitude, Sprint made the Kansas City depositions as nonproductive as possible for Leggett. Leggett had served a notice that he would take a CR 30.02(6) "corporate" deposition of persons with knowledge of Sprint's planning and decision-making processes, seeking to discover, *inter alia*: "All communications between all persons ... who had any part in plaintiff's decision to file this Action ... including ... contacts within plaintiff's various offices." [86] Sprint only produced Gilley and Scott. Despite the Court's earlier order to the effect that Leggett was entitled to inquire into "whether Sprint believed it had a valid claim," and despite the fact that the decision to sue Leggett involved a mixed question of law and fact, Scott – who is a lawyer - was instructed not to answer questions about Sprint's legal decisions, or, for that matter, questions that had any legal connotations whatsoever, including those relating to her "mental impressions regarding legal assistance,"[87] or even "the definition

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[82] TAPE 9/19/03; 8:55:48.
[83] TAPE 9/19/03; 9:17:54.
[84] TAPE 9/19/03; 9:19:34.
[85] RA 632.
[86] RA 639-641.
[87] Scott dep. p. 99.

of fee simple interest."[88] The Trial Court was called from Kansas City, but she declined to direct Sprint to answer Leggett's certified questions.

Scott, the "lead" deponent offered by Sprint, declined to testify about "expansion reports" and identified Frank Cooley, a planning engineer as being knowledgeable. Cooley, presumably, could explain why Leggett's property was condemned despite the prior contraction in Sprint's business; why Sprint abandoned its lawsuit after the Commissioners valued Leggett's property at $600,000 and why Sprint refused to dismiss its lawsuit "with prejudice." But Sprint refused to produce Cooley for cross-examination[89] and, after a call from Kansas City, the Trial Court refused to order it. (With cold irony, after having refused to let him be subjected to oral examination, Sprint later filed Cooley's affidavit in support of its motion for summary judgment,[90] leaving the aforesaid questions unanswered!)[91]

Thereafter, all of the Trial Court's substantive rulings went against Leggett. The Court denied Leggett's motion for further discovery, denied Leggett's Motion for Partial Summary Judgment[92] and entered a summary judgment dismissing Leggett's counterclaim.[93] The Court stated that "Sprint was well within its power when it initiated proceedings regarding Leggett's property ... the necessity of Sprint taking steps to condemn Leggett's property was *reasonable* and justified as outlined in *God's Center*

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[88] *Id.* p. 29.
[89] Scott (Confidential) Dep. pp. 24-25.
[90] Exhibit 3 to Sprint's Motion for Summary Judgment, RA 784-837.
[91] Later, Leggett tried to take Cooley's deposition in Louisville, to which Sprint objected (RA 752), preferring, we suppose, to base its case on an affidavit not subject to cross-examination. The Trial Court entered summary judgment dismissing Leggett's case before he could take Cooley's deposition.
[92] RA 734.
[93] *Id.* 941-947; Exhibit A in Appendix.

Foundation."[94] Leggett's post-judgment motions, including Leggett's motion to modify the Court's Order of July 2, 2002 so as to dismiss Sprint's Complaint with prejudice[95] were denied.

Leggett appealed. On September 9, 2005, the Court of Appeals handed down its Opinion Affirming in Part and Reversing and Remanding in Part. Leggett moved for reconsideration. A modified Opinion was issued on December 2, 2005.[96] *Inter alia*, the Court held that the Trial Court "erroneously relied on *God's Center Foundation* .... [T]here is a genuine issue of material fact as to whether Sprint had an ulterior purpose in commencing the condemnation action against Leggett .... 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 .... [T]here is 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"[97].... [and] there is sufficient evidence to raise a genuine issue of material fact as to whether Sprint violated Leggett's civil rights." The Court also ruled - erroneously, we think - that the Trial Court did not err when it limited Leggett's discovery and that the issue of the dismissal of Sprint's complaint "without prejudice" had not been preserved for appellate review.

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[94] *God's Center Foundation, Inc. v. Lexington Fayette Urban County Government*, 125 S.W.3d 295 (Ky. App. 2004)
[95] RA 1008-1018.
[96] Exhibit B in Appendix.
[97] Citing *Simpson v. Laytart*, 962 S.W.2d 392, 394 (Ky. 1998).

ARGUMENT

First Point: Issues of Fact and a Yet-to-be Completed Record Preclude a Summary Judgment in Sprint's Favor.

The record reflects issues of fact; Sprint glosses over them and makes allegations that are unsupported by the record. Despite Sprint's "stonewalling" of discovery, Leggett was able to uncover limited evidence of Sprint's ulterior motives; Sprint ignores the evidence that is inconsistent with Sprint's generalizations and proceeds to draw inferences from an incomplete record. But Sprint is attempting to defend a summary judgment; it should not be allowed to base arguments on facts and inferences unsupported by the record, *see: Bank One, Kentucky, N.A. v. Murphy*:[98]

> A party moving for summary judgment bears the burden of demonstrating entitlement to such relief....[99] When the record is incomplete and the Court would be required to draw inferences or find facts, summary judgment is inappropriate. This Court has long applied a stringent standard to motions for summary judgment, stating that the motion should not be granted unless it appears to be "impossible" for the non-moving party to prevail at trial...[100] Our recent decision in *Roethke v. Pan American Life*[101] is illustrative of our view.

Leggett, not Sprint, is entitled to have all issues of fact and inferences resolved in his favor: "[O]n motion for summary judgment we must accept plaintiffs' version .... as gleaned from the pretrial record, and all reasonable inferences therefrom."[102] Therefore, in this brief we assume - as is the right of a party against whom a motion for summary judgment was entered - that Leggett's version of the facts must be accepted and that inferences are to be drawn in his favor.

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98 52 S.W.3d 540, 545 (Ky. 2001).
99 Citing *Hubble v. Johnson,* 841 S.W.2d 169,171 (Ky. 1992).
100 Citing *Steelvest, Inc. v. Scansteel Service Center, Inc.* 807 S.W.2d 476 (Ky. 1991).
101 30 S.W.3d 128, 133 (Ky. 2000).
102 *Perkins v. Hausladen,* 828 S.W.2d 652, 654 (Ky. 1992).

Second Point: **There Are Issues of Fact Respecting Each of the Essential Elements of "Abuse of Process."**

(a) Sprint Knowingly Employed Legal Process and the Threat of Legal Process to Effect a Purpose the Law Forbids.

In the footnote on p. 4 of its brief, Sprint concedes that the Court of Appeals correctly rejected the centerpiece of the Trial Court's erroneous judgment: *God's Center Foundation, Inc. v. Lexington Fayette Urban County Government.*[103] But Sprint's "concession" is disingenuous and skirts the real issue. The Trial Court's basic error – and the error Sprint tries to perpetuate here – is not the misapplication of a case; it is Sprint's deliberate and cynical defiance of the plain language of the controlling statutes – all to Leggett's damage. As the Court of Appeals observed: "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." [104] Sprint should have known – and, we contend, Sprint *knew* – it could only take a strip of land across Leggett's property. Sprint should have known – and, we contend, Sprint *knew* – the statutes prohibit Sprint from condemning Leggett's entire property for Sprint's exclusive use.

KRS 278.540 provides in pertinent part:

> (2) Any telephone company ... may ... construct, maintain and operate **telephone lines** on or across real property, and if it cannot obtain the **right-of-way** by contract, it may ... condemn the **right-of-way** ...

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[103] *Supra,* 125 S.W.3d 295 (Ky. App. 2002). It is a cold irony that Sprint cited the *unpublished* opinion - before it became final - in its summary judgment memorandum to the Trial Court (RA 793) and then Sprint used every device it could to delay proceedings until discretionary review was denied. On February 11, 2002, after a long delay, Sprint filed an AOC-280 form as a signal to the Court that the opinion had become final.

[104] Slip Op. p. 17.

KRS 416.150 does not confer any additional authority to condemn. It merely makes reference to the procedure to be followed:

> Any telephone company desiring to condemn a **right-of-way** under authority of subsection (2) of KRS 278.540 shall proceed pursuant to the Eminent Domain Act of Kentucky.

When the Kentucky Legislature chose the term **"right-of-way"** to define - and to limit - the Eminent Domain powers granted to "telephone companies," it chose words that have a precise, well-defined meaning. In *Black's Law Dictionary,* **"right-of-way"** is defined as:

> The right of passage or of way is a servitude ... by virtue of which one has a right to pass ... through the estate of another.

As used in the above-quoted statutes, the words **"right-of-way,"** authorize a "telephone company" to string wires on a line of poles (or to bury the wires or cables) within a defined strip that runs across the landowner's property, *See: 3 Nichols on Eminent Domain*: [105]

> A telegraph or telephone company which condemns a strip of private land for the purpose for which it was incorporated acquires only an easement.[106] This easement consists of the right to erect poles and to suspend wires upon them, to maintain and repair the same, to use the structure for telegraph or telephone purposes, and to make such further use of the land as may be necessary and convenient for the principal purpose for which it was acquired. The only exclusive right of the company is in the ground actually occupied by the poles.

In contrast to the language of the statutes, Sprint would have taken it all and would have ejected Leggett from his property altogether.

At page 11 of its brief, Sprint asserts that "The process was issued pursuant to a statutory right...." This is a fallacy. The Kentucky Legislature delegated to Sprint the

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[105] §11.09, pp. 11-51-52.

[106] Citing many cases, including *Kentucky-West Virginia Gas Co. v. Hays*, 238 Ky. 189, 37 S.W.2d 17 (1931).

limited right to file an action to condemn a right-of-way, but the Legislature did not delegate to said corporation the right use court processes to take Leggett's *entire property*. Taking one's entire property is an entirely different "animal" than the taking of an "incorporeal hereditament"[107] across it. Well-settled principles of statutory construction dictate that the "statutory right" delegated to Sprint must be strictly limited and construed:

> The delegation of the power is usually exercised by the Legislature through a statutory enactment, and such statutes are to be strictly construed, since the power will not be conferred by implication.[108]

Sprint's attempt to use a lawsuit in order to take Leggett's entire property perverted the condemnation process to "accomplish an ulterior purpose for which it was not designed."[109] The legislature put specific limits on the eminent domain claims that can be asserted by a telephone company. This is why the cases cited by Sprint are distinguishable. Neither the legislature nor the courts have placed a limit on the scope of claims that can be asserted in a KRS 100.347(2) appeal from a planning commission ruling[110] and a party has a right to appeal respecting the zoning of his neighbor's property, even though the result of the proceeding causes damage to his neighbor.[111] But even in such appeals, there must be a limit; there must be a point where claims become excessive; when too much becomes too much. For example: A party taking issue with a

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[107] What an easement is called in *Henry Bickel Co. v. Texas Gas Transmission Corporation*, 336 S.W.2d 345, 347 (Ky. 1960) and *Illinois Cent. R. Co. v. Roberts*, 928 S.W.2d 822, 826 (Ky. App. 1996).

[108] *Bell's Committee v. Board of Education of Harrodsburg*, 192 Ky. 700, 234 S.W. 311, 312. (1921).

[109] W. Prosser, Torts, §121 (4th ed. 1971) quoted in *Williams v. Central Concrete, Inc.*, 599 S.W.2d 460, 461 (Ky. App. 1979).

[110] *Cf. Greater Cincinnati Marine Service, Inc. v. City of Ludlow*, 602 S.W. 2d 427 (Ky. 1980) (distinguished)

[111] *Cf. Simpson v. Laytart*, 962 S.W.2d 392 (Ky. 1998) (distinguished)

commission ruling has no right to do so by filing an alleged "appeal," which, in fact and in effect, is much more: A *quo warranto* action, wherein he makes extravagant claims that the planning statutes are illegal, that the commission has no valid existence, that all of its rulings are of no effect and that the planning process, itself, is void *ab initio*. If the filing of his unwarranted lawsuit casts doubt on everything the commission has ever done and if the values of his neighbors' properties are diminished because they depend on the validity of planning commission classifications and rulings, he should be liable to them.

Sprint's condemnation petition, which "sought an easement commensurate with the total area of the property,"[112] is, itself, evidence that Sprint knew the statutes prevented it from condemning the entire property. In this Court, Sprint's cynicism become amusing; it tries to equate a "telephone line" placed in a "right-of way" to a POP filled with computers, air conditioners and cables; surrounded by a razor-wire fence.[113] But Sprint cannot gainsay the fact that what it brought suit to take from Leggett has all the characteristics of a fee: Exclusive, perpetual possession, complete control of the property and its uses, including the construction of a substantial, permanent structure, no remainder, etc. The taking of a fee (or its equivalent) is what the Kentucky Legislature prohibited when it enacted the telephone company section of the Eminent Domain Act; it limited a telephone company's condemnation action to the taking of a right-of-way across a landowner's property, leaving the landowner with the right to use and enjoy the remainder in the underlying property.

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[112] Brief, p. 2.
[113] *Id.* p. 13.

(b) Leggett Suffered Compensable Damage When Sprint Abused the Condemnation Process by Filing a Groundless Lawsuit That Overstated its Claim.

Sprint knowingly and wrongfully invoked the limited power delegated to it when, in its petition, it claimed much more than a telephone company was entitled to take. Sprint thereby abused the condemnation process. As was held in *Williams v. Central Concrete, Inc.*:[114]

> Among the acts condemned by the law as subject to action for abuse of process are seizure of property not subject to the debt, **overstatement of claims** or seizure of excessive property. See 1 Am. Jur. 2d, *Abuse of Process,* §9 *et. seq.*

Williams involved a complaint filed by Central Concrete to enforce a mechanic's lien pursuant to KRS 376.010(1); the complaint contained a legal description that contained "some 65 acres not included in the tract upon which the building was constructed."[115] A default judgment was entered against the appellant and an attempted appeal therefrom was dismissed as untimely. Appellants then filed an action for abuse of process. The Trial Court dismissed Appellants' complaint on the basis of *res judicata.* The Court of Appeals *reversed*; it held that appellants' loss in the prior action did *not* prevent them from asserting a claim for abuse of process in the second action. It also held that:

> As the court stated in *Stoll Oil Refining Co. v. Pierce*, Ky., 337 S.E. 2d 263, 266 (1960), "abuse of process ... is the technical designation of the irregular or wrongful employment of a judicial proceeding....."

Stoll Oil, the case cited in *Williams*, is also applicable here because there, a cause of action for abuse of process was found to exist upon the wrongful issuance of process *alone*. There, a lessor evicted a tenant who was behind in his rent; "[T]he lessor had the

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[114] *Supra.*, 589 S.W.2d at 461 (emphasis supplied).
[115] *Id.* p. 460.

right to terminate the lease and did so in a proper way by notice."[116] But then the lessor commenced an action of trespass or ejection in addition to the proceeding for forcible detainer. A circuit clerk signed an order of ejectment directing the sheriff to take possession. The order was wrongfully issued; it was entered without a bond having been posted. Shortly after being served, the tenant surrendered possession. Later, the order of ejectment was set aside. The tenant sued and won a jury verdict. The Court of Appeals set aside a punitive damage verdict for the tenant and held that, because the lessor had the right to take possession, the tenant had proved no compensable damage. Therefore, only nominal damages were allowed. Even though the damages were nominal, *Stoll Oil* holds that the issuance of unauthorized process *alone*, in and of itself constitutes abuse of process. No "subsequent action" was required as an additional element of the tort of abuse of process.

Sprint caused Leggett to suffer compensable damage by the filing of process unauthorized by the statutes. Leggett's expert appraisal witness described in his affidavit that the filing of the condemnation petition *alone* diminished the value of Leggett's property by as much as $86,707.[117] Therefore, this case contains the element of damage that was missing in *Stoll Oil*, namely compensable damage. Here, a cause of action for abuse of process exists – and the damages are more than nominal.

Stoll Oil aligns Kentucky with the majority of courts which, when the issue has been squarely presented to them, have held that "The initial use of process itself may constitute the required overt act."[118] Although not binding on this Court, a leading case

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[116] 337 S.W.2d at 264.

[117] Affidavit of Otto Spence, Exhibit F to "Defendant's Response...." *supra.* In the next section will further describe and discuss the damages Leggett suffered.

[118] *Richardson v. Rutherford*, 787 P.2d 414, 421 (N.M. 1990); *see also: Givens v. Mullikin*, 75

from Iowa, *Mills County State Bank v. Roure,*[119] is instructive. There, the bank brought a mortgage foreclosure action against Dr. Roure and filed an application to attach his clinic, the clinic inventory and accounts as well as other, unimproved property. The doctor counterclaimed for malicious prosecution and abuse of process. *Inter alia,* he alleged "excessive attachment." The doctor paid off the obligation and the bank dismissed its petition, leaving only the doctor's counterclaim to be litigated. The Trial Court's summary judgment dismissing the malicious prosecution claim was affirmed, because of the doctor's payment of his obligation to the bank. The Trial Court also dismissed the abuse of process claim because there was no allegation or proof of "subsequent action" by the bank *after* the action was filed. The Supreme Court of Iowa *reversed* that portion of the judgment, citing extensive authority and holding that the Trial Court had erred in its assumption that "subsequent action" was an essential requirement for the tort of abuse of process.

> The existence of this cause of action recognizes that even in meritorious cases legal process may be abused. That abuse involves using the process to secure a purpose for which it is not intended. **We can see no reason why there must be subsequent activity to support the cause of action.** Such activity may be very probative in determining the intent to abuse; however**, there need not be such a subsequent action to commit the tort**. To rule otherwise would protect the tortfeasor when the abuse is most effective where the issuance of the process alone is sufficient to accomplish the collateral purpose.[120]

S.W.3d 383, 404 (Tenn. 2002); *Schmit v. Klumpyan*, 663 N.W. 331, 336 (Wis. App. 2003); *Sarvold v. Dodson,* 237 N.W.2d 447 (Iowa, 1976)

[119] 291 N.W.2d 1 (Iowa 1980).

[120] *Id.* p. 5, emphasis supplied.

The case was remanded for trial on the doctor's abuse of process claim. The Trial Court was also instructed to rule on the doctor's "request for information which the bank contends falls under the attorney-client privilege. This matter is not moot under our disposition of the appeal...."[121]

Fishman v. Brooks,[122] a Massachusetts case, is also of interest. There, a lawyer filed a groundless lawsuit against his former client. The client counterclaimed for abuse of process and malpractice. The lawyer took no "subsequent action" on his complaint; he voluntarily withdrew it. The client recovered a judgment which was *affirmed* by the Supreme Judicial Court of Massachusetts, including that part of the judgment that was based on abuse of process. The court observed:

> Proof of the groundlessness of an action is not an essential element of an action for abuse of process.... [citations omitted]... **That the person commencing the litigation knew or had reason to know his claim was groundless is relevant, however to show the process was used for an ulterior purpose.**[123]

Here, Sprint knew or should have known that it was filing a groundless action. As the Court of Appeals observed, proof of the groundlessness of Sprint's action is apparent from a reading of the statutes. Proof that Sprint "knew or had reason to know [its] claim was groundless" includes the behavior of, and the communications between, the lawyers in Sprint's Network ...Facilities department. And all this is "relevant ... to show the process was used for an ulterior purpose."

The Kentucky Court of Appeals in *Stoll Oil* and a majority of courts that have addressed the issue have held that: "The initial use of process itself may constitute the

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[121] *Id.*
[122] 487 N.E. 2d 1377 (Mass. 1986).
[123] *Id.* 487 N.E. at p. 1383. (Emphasis supplied)

required overt act."[124] As we will demonstrate in the next section of this brief, a "subsequent act" on Sprint's part, namely, its refusal to dismiss its complaint "with prejudice" caused damage - and is causing damage - to Leggett. Nevertheless, this Court should, again, recognize that a cause of action for abuse of process provides remedies when a claim for malicious prosecution may not. This Court should make explicit what was implicit in *Stoll Oil*, namely, that a "claim for abuse of process may be maintained in some cases when the only overt act is the initiation of litigation."[125]

(c) The Filing of Sprint's Unauthorized Condemnation Petition, by Itself, Rendered Leggett's Property Unsalable and Unleaseable - And the Damage Continues.

Without citing the record, Sprint asserts: "Leggett's claims for damages are not substantiated....[he] has not introduced any evidence that he lost money."[126] To the contrary, Leggett's evidence includes the September 3, 2002 affidavit of William Otto Spence, a qualified real estate appraiser, who states that the filing of the petition caused damage: "There is no doubt that Mr. Leggett suffered damage;" the filing of Sprint's petition in the public record put a "cloud on [Leggett's] title." Spence also stated that, as of the date of his affidavit, Leggett had incurred damages that range between $71,600 and $86,707 because:

> The filing of the condemnation action ... was and is a matter of public record. The lawsuit had an immediate impact. The property became unsalable and unleaseable. No potential buyer no potential tenant is willing to buy or lease commercial property that is the subject of a condemnation action.

Whether or not Leggett "lost money" is not the point. Leggett's damage was loss of *value*. It is well settled that such damage sustained by a landowner can be proved by the

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[124] *Richardson v. Rutherford, supra.*, 787 P.2d at p. 420.
[125] *Richardson v. Rutherford, loc. cit.*
[126] Brief p. 15.

expert testimony of a qualified appraisal witness.[127] Spence used loss of rental *value* (not loss of income or of rentals, note) as one of the bases for his opinion. Loss of rental *value* is well recognized as a basis for proving damage.

> [N]othing ... prohibits a property owner from showing the reasonable rental-producing qualities of property.... Income-producing quality of real estate in condemnation cases is not to be confused with loss of profits ....[128]

Spence also described the "continuing damage" arising out of the fact that, on Sprint's insistence, its complaint was dismissed "without prejudice." So the "cloud on the title" remained:

> Unfortunately, the dismissal of the lawsuit "without prejudice" did not remove the cloud on the title of the property and did not cure the depressing effect it had on the property's value. .... There remains a risk that Sprint, with its facility next door, might make another attempt to condemn the property.... The potential buyer or lessee would discount the sale price or rental to compensate for the risk ... the "cloud" on the title of the property remains.

Leggett tried, but failed, to secure a dismissal "with prejudice." While Sprint's motion to dismiss its own complaint "without prejudice" was pending, Leggett moved for summary judgment, seeking a dismissal on the merits.[129] He failed. The Trial Court allowed Sprint to dismiss "without prejudice," and denied Leggett's motion as "moot."[130] Later, Leggett again moved for a dismissal of Sprint's complaint "with prejudice," citing the reasons set forth above.[131] Although Sprint would suffer no appreciable harm from

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[127] *Whitesburg Municipal Housing Commission, Urban Renewal Section v. Bates*, 412 S.W.2d 225 (Ky. 1967).
[128] *Standard Oil Company v. Commonwealth, Department of Highways*, 414 S.W.2d 570 (Ky. 1967).
[129] RA 299-300.
[130] *Id.* 428-431.
[131] *Id.* 1008-1018.

Leggett's motion, Sprint opposed it[132] and it was denied. So, by reason of Sprint's "subsequent action" after the filing of its petition, namely, its refusal to dismiss its condemnation petition "with prejudice," Leggett's damage, the cloud on Leggett's title, continues to this day.

(d) Despite Sprint's "Stonewalling" of Discovery, the Record Already Contains Evidence of Sprint's Ulterior Motives.[133]

Without citing the record, Sprint is telling this Court that, on December 19, 2001, the increase in its business required it to expand its POP, so it filed suit to condemn Leggett's property.[134] After it did so, Sprint says, a downturn in its business prompted it to serve notice of voluntary dismissal of its suit.[135] But the record belies Sprint's assertions. The downturn in Sprint's business came *before* Sprint filed suit. Its Annual Report stated, *inter alia*, that in 2001, it had already experienced an "*asset impairment charge of $1,804 million to reduce overall operating costs.*"[136] Steps taken by Sprint to "reduce ... operating costs" included massive layoffs that were ordered in November, 2001, *before* Sprint sued Leggett on December 19, 2001.[137] The record reflects no downturn in business after that date, but the record does reflect that, on January 24, 2002, the Commissioners Report was filed, valuing Leggett's property at $600,000;[138] that shortly thereafter, Sprint served a Notice of Voluntary Dismissal and that its counsel said the reason for the attempted dismissal was: "The price the commissioners brought back

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[132] *Id.* 999-1002.
[133] These issues preserved by motions and objections set forth *supra.*, by Leggett's Motion for Summary Judgment, RA 301-344 and his Motion to Dismiss With Prejudice, RA 1008-1018.
[134] Brief, p. 1-2.
[135] *Id.* 3.
[136] Exhibit E to "Leggett's Reply to Sprint's Motion for Summary Judgment," filed 12/8/03; bound separately. Emphasis supplied.
[137] Scott dep. pp 4-4; 19.
[138] RA 30-35.

was too high."[139] The record contains no explanation of why, *after* Sprint experienced massive losses and *after* and it ordered massive layoffs, Sprint brought the suit against Leggett. Similarly, there is no credible evidence respecting why, after suit was filed, Sprint's decision-makers determined that they did not want Leggett's property after all.

Sprint did file the affidavit of one Frank Cooley,[140] in Sprint's "Facility Engineering & Management, "(FEM)," department, (this is the same person Sprint refused to produce for deposition and cross-examination in Kansas City.)[141] But Cooley's credibility is in issue and his affidavit raises more questions than it answers. The affidavit says that the increased demand for long-distance services made it "necessary" to sue Leggett, but it says nothing about why, after the downturn of Sprint's business in 2001, after the massive losses it experienced in that year and after massive layoffs in November 2001, Sprint nevertheless sued Leggett on December 19, 2001. Cooley's affidavit gives no support to Sprint's assertion that the downturn in Sprint's business occurred *after* December 19, 2001 causing Sprint to file a "Notice of Voluntary Dismissal" 55 days later, on March 6, 2002. In acronymic bureaucratic doublespeak, all Cooley says is: "CB and NSPP received an updated and revised expansion list did not include the Louisville POP," but he gives no explanation of why December's "project need for expansion" changed in such a short period of time.

Later in this brief, we will describe how Leggett was prevented by Sprint and the Courts Below from discovering anything about Sprint's decision-making process and the communication between its departments, but at this point, we will merely observe that a simple explanation of the foregoing timing and sequence of events is:

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[139] (TAPE 3/11/02; 13:47:12).
[140] RA 810-814.
[141] Scott (Confidential) Dep. pp. 24-25.

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, $600,000, for the property, Sprint backed off – or tried to do so.

The record does not explain another of Sprint's motives: Sprint objected vehemently to a dismissal of its suit "with prejudice."[142] The dismissal "without prejudice" leaves Sprint free to file another condemnation suit. If Sprint did not intend to sue Leggett again, what is the reason for Sprint's "dog in the manger" attitude? If Sprint did not need Leggett's property, what reason, other than a desire to punish the landowner and his pesky lawyer, did Sprint have for continuing to cloud Leggett's title?[143] Apparently, Sprint's early antipathy toward Leggett and his lawyer[144] carried over into its conduct after the lawsuit was filed.

Sprint should have known, and, Leggett submits, Sprint *knew* that:

In Kentucky, a private, for-profit, corporation has no right to use legal process to require a property owner to part with his property. A telephone company has no right to use legal process to require a property owner to part with all of his property. A private, for-profit telephone company has no right to use legal process to acquire another's property, not for public use but for resale. For Sprint to have determined to use legal processes for those purposes is evidence of ulterior motive; of abuse of process. For Sprint to have used the terms of dismissal of its lawsuit as a means for "getting back at"

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[142] RA 999 – 1002.

[143] See Affidavit of Otto Spence, Exhibit F to "Defendant's Response...." *supra.*

[144] For example, Sprint's contact man, Gilley, posted a note reflecting his resentment when he was accused of unethical conduct: "Mr. Bruton ... [wrote] (in not very polite terms) --- seems to be upset because I contacted his client." RA 666. *See also*: Pemberton's ire at the suggestion of a condemnee's "future retaliatory action" and his claim for attorneys' fees, (RA 708; Exhibit C in Appendix.)

an adversary is evidence of ulterior motive, of abuse of process. Therefore the – incomplete - record already contains some evidence of ulterior motive. Moreover, as the Supreme Judicial Court of Massachusetts observed: "That the person commencing the litigation knew or had reason to know his claim was groundless is relevant ... to show the process was used for an ulterior purpose."[145] In the next section of this brief, we will discuss why Leggett should have been permitted further discovery and inquiry into Sprint's purposes and motives.

Third Point: This Court Should Do What the Courts Below Failed to Do: Recognize That Waiver, Not Privilege, is The Issue.[146]

(a) Notwithstanding Sprint's Spurious Claims of "Privilege," Extensive Discovery On The Issues of "Ulterior Motive" and "Bad Faith" Should Have Been Allowed.

As the Court of Appeals observed, whether Sprint acted in bad faith when it sued Leggett is an *issue of fact*; did Sprint, *in fact*, know it was invoking and abusing a process unauthorized by Kentucky law? Leggett says yea; Sprint says nay. In its brief, Sprint makes the *factual* assertion that it made a good faith effort to comply with Kentucky law. Without producing any proof, Sprint tells this Court that it "fully *researched* the issue, conducted a survey of Kentucky law ... and *determined* that it could condemn...."[147] Sprint assumes, and expects this Court to assume, that its "determination" was correct and bona fide. On the other hand, as the Court of Appeals observed, "A cursory reading of the applicable statutes – KRS 278.540(2) and KRS 416.150 – would have put Sprint

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[145] *Fishman v. Brooks, supra,*. 487 N.E. at p. 1383.

[146] The arguments in this, and subsequent sections, were preserved by Leggett's: "... Objection to Plaintiff's Attempt to Dismiss," (RA 102-117, 120-121) and his motions "... To Compel Discovery," (in record, bound separately); "... Pursuant to KRE 409 and KRE 801A(b)," (RA 642-733); "...To Require Production of Privileged Documents," (RA 923-925); and his responses to motions for protective orders, (RA 600-629; 758-783).

[147] Brief p. 11. Emphasis supplied.

on notice that it did not have the authority to condemn Leggett's property."[148] On the other hand, again, Sprint's lawyer/point man, Gilley, researched Kentucky law but he never responded to Leggett's challenge to produce Kentucky authority authorizing Sprint to condemn all of Leggett's property. On the other hand, again, instead of responding to Leggett's challenge, Gilley asked the City of Louisville to condemn on Sprint's behalf, presumably because he knew Sprint could not. On the other hand, again, Gilley's boss, Scott, expressed doubt about Sprint's right to condemn in a state where the telephone condemnation statute is less restrictive than Kentucky's.

"Ulterior purpose" is one of the manifestations of "bad faith." These issues were raised early in the litigation and, at first, the Trial Court's rulings thereon were correct. When Sprint tried to take effect a "voluntary dismissal" by notice, Leggett objected pursuant to CR 41.01(2);[149] as a condition of dismissal he demanded compensation and attorney's fees pursuant to *Northern Kentucky Port Authority v. Cornett*[150] and *Bernard v. Russell County Air Board.*[151] On April 14, 2002, the Trial Court noted that Leggett "has made sufficient allegations of bad faith on the part of Sprint in initiating this condemnation action" and ruled "Sprint's Complaint is NOT dismissed."[152] Later, after considering further motions and responses, on July 1, 2002, the Trial Court ruled that Leggett was to have a "reasonable opportunity to conduct discovery" respecting his claim for abuse of process.[153] That order of the Trial Court was fully in accord with cases which hold that, when bad faith is an issue, broad discovery is warranted because the defendant

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[148] Slip Op. p. 17.
[149] RA 102 – 117.
[150] 700 S.W.2d 392 (Ky. 1985).
[151] 747 S.W.2d 610 (Ky. 1988).
[152] RA 299-300.
[153] RA 430-431.

itself must be the primary source of evidence, *see: Northern Kentucky Port Authority,* where the Court held that the Trial Court had "erred by refusing to allow discovery on the issue of the Port Authority's bad faith in maintaining its condemnation suit;"[154] *see also: Kentucky Farm Bureau Mut. Ins. Co. v. Troxell,*[155] where extensive inquiry into an insurance company's alleged bad faith was permitted.

Sprint grudgingly produced some discovery, but refused to respond to many substantive inquiries. Relying on the Trial Court's July 1, 2002 Order, Leggett moved to require Sprint to supplement the inadequate discovery. He pointed out that he had a right to inquire about similar condemnations in other states[156] and that he had a right to the production of e-mails, computerized data and descriptions of Sprint's computers and backup systems.[157] But, to Leggett's surprise, the Court reversed herself. She denied every item sought in Leggett's motion,[158] and entered a Protective Order which, in effect, halted Leggett's discovery cold.[159] Leggett moved to reconsider or clarify[160] and, for the next six months, the parties battled over discovery. Finally, on May 20, 2003, the Court entered an Order which included:

> Leggett is entitled to reasonable discovery to determine whether Sprint "believed there was a valid claim at the time" that it filed its action. .... This includes discovery of communications between Sprint and its counsel prior to the filing of this action.[161]

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[154] 700 S.W.2d at 393.
[155] 959 S.W.2d 82, 86 (Ky. 1977).
[156] *Volvo Car Corp. v. Hopkins*, 860 S.W.2d 777, 779 (Ky. 1993).
[157] *See: Bills v. Kenecott Corp.*, 108 F.R.D. 459 (D. Utah, 1985); *Sanders v. Levy*, 558 F. 2d 636 (2nd Cir. 1976), *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S. Ct. 2380, 57 L.Ed. 253 (1978), *Santiago v. Miles*, 121 F.R.D. 636, 640 (W.D.N.Y. 1988), *Daewoo Electronics Co. v. United States*, 10 C.I.T. 754, 650 F.Supp 1003 (C.I.T. 1986), and 8A C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure* 450 (1994).
[158] RA 449-452.
[159] *Id.* 459-462.
[160] *Id.* 470-472.
[161] *Id.* 527-530

This order is fully in accord with the law, and the parties might not be here today had the Trial Court stood by it. But she did not. Sprint again moved for a protective order, claiming "privilege" for a sheaf of documents given to the Court for examination *in camera*, without a producing a privilege log or any other description thereof. Again, the Trial Court reversed itself. On September 19, 2003, it held that the documents were "privileged and shall not be discovered and that the discussions between the employees (or contract employees) of Sprint regarding the litigation in this case is hereby protected from discovery."[162]

We will address some of these issues in our next argument, but here we will observe:

An issue of fact exists respecting the *bona fides* and ulterior motive of Sprint's "determination" to sue Leggett. Sprint cannot assume that said issue must be resolved in its favor. Having raised the issue of whether its "determination" to sue Leggett was based on a *bona fide* assessment of Kentucky law, Sprint cannot now be allowed use "privilege" to prevent Leggett's discovery into whether said "determination" was made in good faith. Sprint should not be allowed to use privilege as a sword as well as a shield, *see:*

> A popular image is that "the attorney-client privilege cannot at once be used as a shield and a sword." *United States v. Bilzerian*, 26 F.2d 1285, 1292 (2nd Cir.1991). This image is meant to convey that "the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications." [163]

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[162] RA 632.

[163] *Ross v. City of Memphis*, 423 F.3d 596, 601 (6th Cir. 2005).

(b) This Court Should Reaffirm That Kentucky Law Requires a Party to Inform the Court *and The Party's Adversary* How, Where and Why Privilege is Claimed. Otherwise, Privilege is Waived.

Leggett argued to the Court of Appeals that Sprint had waived "privilege" for several reasons, including its failure produce a privilege log which would identify the allegedly privileged documents and state the reasons why privilege applied. The Court of Appeals (Minton J.) responded: "Leggett has not any cited Kentucky authority requiring the preparation of such a privilege log." We read this statement as a suggestion that the Supreme Court of Kentucky should provide such "authority," but this Court need not "make" new law to do so. While the Kentucky Rules of Civil Procedure do not [yet] have a counterpart of FRCP 26(b)(5), *in hæc verba*, Kentucky Common Law imposes the same requirements on parties claiming privilege than does the Federal rule. As we will now demonstrate, Kentucky Common Law requires that said party "shall make the claim expressly and shall describe the nature of the documents ... not produced or disclosed in a manner that, without revealing information itself privileged and protected, *will enable other parties to assess the applicability of the privilege* ...."

Shobe v. EPI Corporation makes it clear that, unless the party claiming privilege "asserts and proves" proves that the privilege applies, the privilege is *waived*:

> A party seeking to protect the confidentiality of documents from discovery by an adverse party is required to assert and prove the applicable privilege before the trial court, or have the privilege waived. [164]

[164] 815 S.W.2d 395, 397 (Ky. 1991), (Emphasis supplied)

In *Lexington Public Library,* where a privilege log was produced and was examined by the trial court and both appellate courts, this Court cited Federal cases which hold that, *unless* a privilege log - *or its equivalent that "provides sufficient detail*" - is used, the privilege will be waived:

> [The burden of proof is upon the party seeking protection to meet] ... all of the requirements necessary to support a finding that each document falls within the lawyer-client privilege. *Hawkins v. Stables, supra,* at 381 (burden of proof is on the proponent of the privilege); *United States v. Construction Prods. Research, Inc.,* 73 F.3d 464, 473 (2d Cir.1996) ("If the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege his claim will be rejected.") (quotation omitted); *United States v. Abrahams,* 905 F.2d 1276, 1283 (9th Cir.1990) (proponent has the burden of establishing all of the conditions necessary for application of the privilege), *overruled on other grounds by United States v. Jose,* 131 F.3d 1325, 1329 (9th Cir.1997); *cf. Stidham v. Clark,* Ky., 74 S.W.3d 719, 725 (2002) ("Because privileges operate to exclude relevant evidence, the party asserting the privilege has the burden to prove the privilege applies.")[165]

The case at Bar demonstrates the necessity for the requirement that privilege must be preserved by a privilege log or an equivalent listing of documents, with reasons given why they are allegedly privileged. No listing was made available ***to Leggett***, to "*enable [him] to assess the applicability of the privilege.*" Instead, Sprint gave the Trial Court (only) a sheaf of documents of "e-mails and correspondence" with the "lawyers highlighted." Leggett had no opportunity to test or to determine whether the documents given to the Court were complete, whether Sprint was showing the Court only what Sprint wanted the Court to see – ***neither did the Court have that opportunity***. Leggett informed the Court that the privilege had been waived with respect to certain documents

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[165] 90 S.W.3d at p. 62.

because they had previously been turned over to him, but the Court simply declared that all the documents handed to her were privileged, and made no ruling respecting waiver.[166]

The *Catch 22* position into which Leggett was placed by the September 19, 2003 protective order and the absence of a privilege log - or its equivalent - is demonstrated at pp. 49-50 of Connee Scott's deposition. In an effort to discover more about Sprint's motivations and attitudes, and particularly its vindictiveness toward lawyers and landowners who had the temerity "fight back," Leggett's counsel showed Scott the e-mail that was sent by a Sprint in-house lawyer, Pemberton, to Sprint's local Mississippi counsel chastising him for mentioning the possibility of the landowner's "retaliatory litigation" and for negotiating with opposing counsel respecting fees due him on dismissal of the condemnation action.[167] Scott was instructed not to answer because the document was allegedly among those given to the Court for *in camera* inspection and was therefore the subject of a protective order. Leggett's counsel, ***who was in possession of the document because Sprint had voluntarily turned it over to him***, protested: "I have no way of knowing ... what was given to the judge ... I do know that [document] was produced voluntarily and therefore the privilege was waived..." The instruction to Scott was not changed. The Trial Court was called, which upheld Sprint's instruction not to answer.

FRCP 26(b)(5) and Kentucky Common Law require that adversaries, as well as the court, be given enough information that "will enable other parties to assess the applicability of the privilege." For good reason. An adversary is in the best position to

[166] Later, Leggett made a "Motion to Require Production of Allegedly "Privileged" Documents," RA 923-925 – which was denied.
[167] RA 708; Exhibit C in Appendix.

test whether or not a privilege is validly claimed, whether a privilege has been waived or whether a production of documents is adequate. A court, on its own, should not do so.

Sprint would not have been the first, and will not be the last, litigant to keep back documents it did not want a court or an adversary to see. Since the date Leggett served his first discovery requests, served, December 31, 2001, and since June 10, 2002, the date the parties entered into an Agreed Order requiring Sprint to "preserve, and not destroy, documents, evidence and/or electronic data which night be relevant to the allegations in Leggett's Counterclaim or which might lead to the discovery of evidence relevant thereto,"[168] cases such as *Zubilake v. UBS Warburg,*[169] dealing with inadequate discovery, have proliferated. Sanctions for incomplete disclosure, spoliation and noncompliance with preservation orders have become imaginative - and severe.[170] As a matter of fact, Sprint, itself, has been sanctioned by a Federal district court for destroying discoverable documents.[171] Although the sheaf of documents Sprint handed to the Court is in the Record on Appeal,[172] neither Leggett, nor the Trial Court nor this Court is in a position to test their adequacy or completeness or whether the privilege had been waived with respect to certain documents.

Privilege logs have become common in Kentucky practice. In *Grange Mutual Insurance Co. v. Trude*,[173] this Court suggested the use of a privilege log to preserve a

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[168] RA 376-377.

[169] 220 F.R.D. 212 (S.D.N.Y. 2003) and 229 F.R.D. 422 (S.D.N.Y. 2004) (decided before the Federal Rules of Civil Procedure were amended to include FRCP 26(b)(5)).

[170] *See: United States v. Philip Morris USA, Inc.*, 327 F. Supp.2d 21 (D.D.C. 2004); *Broccoli v. Echostar Communications Corp.* 229 F.R.D. 506, 510-511 (D. Md. 2005).

[171] *See; Applied Telematics, Inc. v. Sprint Communications Co.,* 1996 U.S. Dist LEXIS 14053 (E.D. Pa.). We hasten to add that we cite this unpublished case as a matter of *fact*, while Sprint has violated CR 76.28(4)(c) by citing unpublished opinions as *authority*, Brf. Pp 9, 10, 14.

[172] On Leggett's designation, RA 1026-1027, objected to by Sprint, Supplemental RA 1.

[173] 151 S.W. 3d 803, 817 (Ky. 2004).

claim of irreparable injury. In the case at bar, a privilege log - or its equivalent - should have been used in order to properly "assert and prove the applicable privilege before the trial court, or have the privilege waived."[174] Only a privilege log or an equivalent listing and description, can identify the documents with respect to which the privilege was not waived. It was not enough for the Courts Below to examine documents *in camera* and conclude that they were apparently privileged; the Courts should have gone on to determine whether the privilege was *waived.*

(c) In Kentucky, the Attorney-Client Privilege is Strictly Construed and Confidentiality is Lost by Voluntary Disclosure.

Sisters of Charity Health Systems, Inc. v. Raikes[175] is one of many Kentucky cases which hold that claims of "privilege" are to be strictly construed:

> We begin our analysis with the nearly universal rule that privileges should be strictly construed, because they contravene the fundamental principle that "the public ... has a right to every man's evidence." *Trammel v. United States,* 445 U.S. 40, 45, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980), quoting *United States v. Bryan,* 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950). Or, as we have stated recently, "broad claims of 'privilege' are disfavored when balanced against the need for litigants to have access to relevant or material evidence." *Meenach v. General Motors Corp.,* Ky., 891 S.W.2d 398, 402 (1995), citing *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Thus, claims of privilege are carefully scrutinized, [*Nazareth Literary & Benevolent Society v. Stephenson*, 503 S.W.2d 177, 179 (Ky. App. 1973)]). Moreover, the burden of proving that a privilege applies rests on the party claiming its benefit. *See* Robert G. Lawson, *The Kentucky Evidence Law Handbook,* § 505, p. 229 (3d ed. Michie 1993).

Professor Lawson writes that the "strict construction" principle is especially applicable to the attorney-client privilege:

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[174] *Shobe v. EPI Corporation, supra.* 815 S.W.2d at 397.
[175] 984 S.W.2d 464, 469 (Ky. 1998).

> Like other privileges, the lawyer-client privilege impedes the search for truth and contravenes the general duty of all persons to disclose information needed in litigation. Thus, courts have universally held that it must be strictly construed and given no greater application than is necessary to further its objectives.[176]

Therefore, the attorney-client privilege is waived by disclosure to an "outsider:"

> **[C]ommunications that occur in confidence lose their confidentiality (and the protection of the privilege) if the client voluntarily discloses them to third persons.** As put by one court, "a breach of confidentiality forfeits the client's right to claim the privilege."

These principles were applied in *Lexington Public Library v. Clark*, *supra.*, a case involving the wrongful termination complaint of Diana Koonce against the Lexington Public Library, her former employer. Koonce claimed the library unlawfully retaliated against her because she had filed a complaint against her supervisor, Bob Patrick. Koonce later learned that Patrick had been terminated by the library, and served a request for "all documents relating to the termination of Bob Patrick." The defendant invoked the attorney-client and work product privileges respecting certain documents. To preserve its claims of privilege, the defendant there did what Sprint has failed to do here: A *privilege log* was submitted and, without revealing the contents thereof, reasons were given as to the claim of privilege for each document. The documents in question were given to the Court to examine *in camera*. The Trial Court denied the claims of privilege and ordered the defendant to produce all the documents but one. The discovery dispute was then put

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[176] Robert G. Lawson, *The Kentucky Evidence Law Handbook,* § 5.10, p. 282 (3d ed. Michie 1993).

before the Court of Appeals by means of a Writ of Prohibition.[177] The Court of Appeals denied the Writ. The case was appealed to the Supreme Court, which affirmed the Trial Court and the Court of Appeals.

This Court addressed the claims of the library that certain allegedly privileged documents should not be produced. With respect to a memorandum that was "drafted [by Patrick] with the assistance of the library's attorney," the Court held that "even if it was based primarily on privileged information, any privilege was waived when the information was voluntarily disclosed to Patrick," because, even though he was still Koonce's supervisor when the memorandum was prepared, he was not "a representative of the client" effectuating legal representation of the client and a "potential adversary."[178] Court went on to hold:

> [C]ommunications that occur in confidence lose their confidentiality (and the protection of the privilege) if the client voluntarily discloses them to third persons." *Lawson, supra*, §5.10, at 236 citing, *inter alia*, *Hawkins v. Stables*, 148 F.3d 379, 384 n. 4 (4th Cir. 1998) (implied waiver occurs when client discloses confidential communications to anyone not covered by the privilege) and *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir.1989) (privilege lost even if the disclosure is inadvertent)....[179]

The record in this case proves that Sprint waived the privilege in several ways and in several instances. It retained, and retains, e-mails and documents in the data collection and storage system it calls SEGIS. Sprint's SEGIS files are kept in the ordinary course of Sprint's business. They are available to many people who are not "representatives of the

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[177] Even since *Bender v. Eaton*, 343 S.W.2d 799 (Ky. 1961), Writs of Prohibition or Mandamus have been used as a means of obtaining appellate review of discovery disputes. Here, Leggett chose to present the issue on appeal from a final order, and not by means of an extraordinary writ, thereby avoiding arguments over "irreparable injury" and "adequate remedy by appeal."

[178] 90 S.W.3d at p. 61.

[179] *Id.*

client" for the purpose of "effectuating legal representation," including, negotiators, clerks, people in other departments and, apparently, even an independent real estate firm. The SEGIS pages given to Leggett include extensive redactions, and even include redactions of entries made by Sprint personnel that predate October 4, 2001, when there was a telephone contact with "out-house" Kentucky counsel. Gilley testified that: "Pretty much anybody with access to SEGIS would have access to the project file...."[180] The "project" files in Leggett's case and in other similar "Network ... Facilities" cases were and are kept in SEGIS. Occasionally, (but seldom in Leggett's and similar cases) an e-mail or document would be stored in SEGIS, with the following label thereon:

> *DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and privileged information intended only for the addressees. Anyone who receives this e-mail by error should treat it as confidential and is asked to contact ... [sender] at the number above. DO NOT forward or disseminate this e-mail to any third party*[181]

Leggett, who has not seen the sheaf of allegedly privileged documents and who has not seen a privilege log, can deduce from the size of the redactions in the documents given to him that few allegedly "privileged" documents were thus "protected." Ironically, Leggett is in possession of this allegedly "privileged" document, *because Sprint voluntarily turned it over to him!*

Other documents *Sprint voluntarily turned over to Leggett* include an exchange of e-mails between Scott and Pemberton, wherein Mississippi eminent domain statutes (which are less restrictive than Kentucky's) are discussed; Scott expresses doubt about

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[180] Gilley dep. p. 66.
[181] RA 710; document is Exhibit G in the Appendix to this brief. Italics in original.

Sprint's right to condemn, "since we're constructing a facility and not lines?"[182] Similar doubts are expressed concerning a liberal California law (permitting condemnation of property "necessary for the construction and maintenance of its telephone lines.") These doubts are expressed in an exchange of e-mails between Pemberton and Nancy Shelledy.[183] Sprint even gave Leggett a copy letter from an "outside" lawyer, written shortly after Sprint sued Leggett, labeled "CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION" stating "Whether the purpose for which Sprint desires Mr. Pittman's property constitutes the 'construction of new lines' is basically a legal question." [184] And, of course, Sprint gave Leggett a copy of the e-mail, described above, wherein Pemberton berated her own lawyer for having the temerity to report that there might be "retaliatory litigation" and for negotiating with opposing counsel respecting the attorney fees due him on dismissal.[185]

It does not lie in Sprint's corporate mouth to intone that Leggett had "no proof of ulterior motive," because it was Sprint that persuaded the Trial Court to abort Leggett's discovery into the subject. Despite the undeniable fact that Leggett was in possession of the documents because Sprint gave them to him and despite the parallels to Leggett's case, Leggett was prevented from "following through;" he was prevented from exploring the purposes, methods and motives, "ulterior" or otherwise, of Sprint's decision makers.

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[182] RA 713; Exhibit F.
[183] RA 712; Exhibit D.
[184] RA 709; Exhibit E.
[185] RA 708; Exhibit C. None of these e-mails contained the "*DO NOT read, copy or disseminate...*" label, found on Exhibit G.

(d) The Federal Cases Followed by Lexington Public Library Prove That Kentucky is a "Strict Liability" Jurisdiction, Where a Disclosure, Even if Inadvertent, Will Waive the Privilege Applicable to All Similar Communications.

In the Fourth Edition of *The Kentucky Evidence Law Handbook*, Professor Lawson states:

> There has been no interpretation of KRE 509 since its inception and thus no clear-cut resolution of the important question of whether the lawyer-client privilege is waived when disclosure of protected information occurs inadvertently.[186]

We respectfully disagree with Professor Larson. We believe the "important question" was resolved in *Lexington Public Library.* The Federal cases which this Court chose to cite and follow hold that disclosure of a privileged communication, inadvertent or not, results in a waiver of the privilege, not only with respect to that particular communication, but with respect to all similar communications. Kentucky has been, and is, a jurisdiction where the privilege is strictly construed and where there is little tolerance for negligence in safeguarding confidentiality.

One case cited in *Lexington Public Library* is *Hawkins v. Stables, supra.* That case holds that the privilege is deemed waived when there is a disclosure to "anyone not covered by the privilege." Furthermore:

> [S]uch a disclosure not only waives the privilege as to the specific information revealed, but also waives the privilege as to the subject matter of the disclosure. *See Sheet Metal Workers Int'l Assoc.*, 29 F.3d at 125; *Oloyede*, 982 F.2d at 141; *In re Martin Marietta Corp.*, 856 F.2d at 623; *In re Grand Jury Proceedings*, 727 F.2d at 1357; *Jones*, 696 F.2d at 1072.[187]

In the case at Bar, Leggett is an adversary, so there is no question but that the privilege was waived.

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[186] *The Kentucky Evidence Law Handbook*, §5.30 [1], p. 395 (Fourth Ed. 2003 Matthew Bender).
[187] *Hawkins v. Stables*, 148 F.3d at 384.

Another case cited is *In re Sealed Case*, *supra.*, which states why the privilege was waived even though the disclosure was "inadvertent:"

> Even assuming Company's disclosure was due to "bureaucratic error," which we take to be a euphemism that necessarily implies human error, that unfortunate lapse simply reveals that **someone** in the company and thereby Company itself (since it can only act through its employees) **was careless** with the confidentiality of its privileged communications... **In other words, if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels - if not crown jewels....**[188]

Moreover, the D.C. Circuit Court of Appeals held that the inadvertent disclosure of one document waived the privilege with respect to five other documents that dealt with the "same subject matter:"

> Appellant would confine the waiver to the one document, but, as we have previously said, a waiver of the privilege in an attorney-client communication extends 'to all other communications relating to the same subject matter,[189]

See *also: Lutheran Medical Center of Omaha, Nebraska v. Contractors, Teamsters and Engineers Health and Welfare Plan,*[190] wherein the defendant Plan produced a letter from the Plan's attorney, "discussing an unrelated claim, but one which was similar to" the plaintiff's claim. Despite the Plan's claim of privilege, the Eighth Circuit affirmed the introduction of the letter in evidence at trial. *See also: United States v. Western Electric Co.*: "US West has waived attorney-client privilege as to any and all communications addressing those topics, in whole or in part." [191]

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[188] *Id.* 877 F.2d at 889. Emphasis supplied.
[189] *Id.*
[190] 25 F.2d 616, 622 (8th Cir., 1994).
[191] 132 F.R.D. 1 (DC DC 1990).

Some jurisdictions take a less stringent approach when there has been an inadvertent waiver. *Hydraflow, Inc. v. Enidine Incorporated*[192] applied a "balancing test," wherein the court considered:

> (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosure, (4) the promptness of measures taken to rectify the disclosure, and (5) whether the overriding interests of justice would or would not be served by relieving the party of its error.

Leggett submits that such a balancing test is inconsistent with the "strict liability" rule that *Lexington Public Library* adopted. However, in this case, *the Trial Court applied no "test,"* "strict," "balanced" or otherwise. The Trial Court simply looked at the sheaf of documents concluded they were privileged, *and ignored the many "privileged" Sprint documents already in Leggett's possession - undeniable proof of waiver.*[193] There was no inquiry by the Court respecting the circumstances under which the documents were turned over to Leggett; [194] there was no determination respecting the scope of the waiver. Not only was Leggett prevented from further inquiry, he even prohibited from "following through" with respect to the documents he already had.

Sprint asserts that it "determined" it had the right to condemn all of Leggett's property. But there is evidence in the record indicating that Sprint *knew* it did not have the right to condemn a fee simple interest (or its equivalent) in this state and that Sprint acted in bad faith when it sued Leggett. Sprint turned over allegedly "privileged" documents which show that, at the time it sued Leggett, Sprint harbored misgivings about

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[192] 145 F.R.D. 626, 637 (W.D. N.Y. 1993).

[193] Some of which are in the Appendix to this Brief; Exhibits C – G.

[194] For example, in *F.C. Cycles Int'l. v. Fila Sport Spa,* 184 F.R.D. 64, (DC MD 1998,) the "inadvertent waiver" rule was applied even in a case where the documents involved were much more voluminous than in the case at Bar.

bringing such condemnation actions in states that give a telephone company broader powers to condemn than does Kentucky; its doubts about the validity of its condemnation action in Kentucky should have been more pronounced. Sprint turned over a document that showed Sprint's vindictiveness when a landowner demanded compensation and attorneys' fees after the dismissal of an unauthorized lawsuit; Leggett was not allowed to explore Sprint's vindictiveness toward him. There was a waiver of privilege, not only with respect to Sprint's other contemplated condemnations in Anaheim and Biloxi, but with respect to all documents relating to the subject matter of Sprint's right to condemn for "facilities." But, with respect to Sprint's condemnation in Kentucky, although the same Sprint personnel were involved, Leggett was prevented from further inquiry into Sprint's decision-making processes. The Courts Below erred when they allowed Sprint to use "privilege" as a means of hiding Sprint's misgivings, bad faith and ulterior motives.

Fourth Point: This Court Should Reaffirm Kentucky's Policy Against the Promiscuous Use of Eminent Domain Powers by Reaffirming That There are Remedies Available to Victims of Abuse of Those Powers.[195]

(a) Kentucky Law Does Not Allow Condemnations For Private Profit.

On September 13, 2001, Sprint's point man, Gilley received a fax from Leggett's counsel, chastising the Missouri lawyer for contacting Leggett directly and challenging Gilley to come up with Kentucky authority authorizing Sprint to condemn all of Leggett's property. [196] Gilley, who had researched Kentucky law, never responded to the challenge, because he knew there was no such authority. Another note Gilley made on that same date proves that he knew full well that Sprint had no right to condemn all of Leggett's property. He wrote that he would "contact... the local development authority ... to investigate condemnation issue/procedure."[197] The next day, Gilley called the Louisville Development Authority in an effort persuade the City of Louisville to do what Sprint could not: Condemn Leggett's property in fee simple and then turn it over to Sprint.[198] He called "inquiring re: assistance by the city/state for ... condemnation ... and faxed him info on 330 Baxter. Told him our problem in trying to acquire expansion site."[199] He tried to persuade the City to declare that Leggett's property was "blighted," so Urban Renewal could condemn it.[200] However, Gilley failed in his efforts to persuade the

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[195] These arguments were preserved by Leggett's "... Restated and Supplemented Counterclaim," RA 95-102; his CR 12.06 Motion to Strike Insufficient Defense, RA 127-145, his Motion for Summary Judgment, filed April 19, 2002, RA 301-344; his "... Reply to Plaintiff's Motions to Dismiss its Own Complaint," RA 381-386; 418-423 and his "Motion for Partial Summary Judgment," filed October 16, 2003, RA 734-745.

[196] RA 666.

[197] *Id.*

[198] (Gilley dep. pp 67-69).

[199] RA 666.

[200] *Id.*

City to condemn on Sprint's behalf. Gilley reported: "[T]hey could not justify their use of eminent domain on our behalf **because not enough job creation.**"[201]

The foregoing exchange between Gilley and the Louisville Development Authority is deeply disturbing to those of us who are familiar with the exercise of the awesome power of Eminent Domain and the limitations that are, or should be, placed thereon by the Federal and Kentucky constitutions. The representative of a private, for-profit, corporation, knowing that the law would not authorize his corporation to condemn a fee simple interest, asked the City of Louisville to use its power to do so. The City declined because "**not enough job creation.**" **BUT** the unsettling implication is that ***if* there was "enough job creation"** the City would have condemned the property of a private individual in order to turn it over to a private corporation – for no "public purpose" other than an economic one. What is also disturbing is that this exchange occurred just eleven years after this Court's landmark decision in *Prestonia Area Neighborhood Association v. Abramson*[202] wherein the City of Louisville was told, in no uncertain terms, that mere economic benefits and an unsupported finding of "blight"do not justify the exercise of the power of eminent domain. Quoting from *City of Owensboro v. McCormick,*[203] this Court held:

> **Naked and unconditional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such an alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections** whether they be cast in the fundamental

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[201] *Id.* Emphasis supplied.
[202] 797 S.W.2d 708 (Ky. 1990).
[203] 581 S.W.2d 3 (Ky. 1979).

> fairness component of due process or in the prohibition against the exercise of arbitrary power.[204]

"[B]enefit to the public" cannot be the criterion, because "[U]nder this rule the property of the citizen would never be safe from invasion."

City of Owensboro v. McCormick, made an important distinction: "The parties have not cited nor does our research reveal a single Kentucky case which declares that either "public benefit" or "public purpose" is equivalent to "public use" in the eminent domain sense,"[205] **BUT** while *Leggett v. Sprint* was before the Court of Appeals, the Supreme Court of the United States decided *Kelo v. City of New London*[206] and held that under Connecticut law and under the Takings Clause of the United States Constitution, "public use" could be equated to "public purpose." "Public purpose" justified the condemnation of people's homes and turning the land over to a private corporation, which, presumably, would make better economic use of the property. In her eloquent dissent, Ms. Justice O'Connor lamented:

> Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded – *i.e.* given to an owner who will use it in a way that the legislature deems more beneficial to the general public – in the process.[207]

Reaction to *Kelo* was swift – and negative.[208] Many state courts refused to follow *Kelo*, citing state laws and constitutions.[209] Up to now, Kentucky's reaction has been

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[204] 797 S.W.2d. at p. 711.
[205] 581 S.W.2d at p. 5.
[206] 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed. 439 (2005) (criticized).
[207] *Id.* 545 U.S. at p. 494.
[208] *See:* Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings, *Harvard Journal of Law and Public Policy, Spring 2006.*
[209] *See: Board of County Commissioners of Muskogee County v. Lowery,* 136 P.3d 639 (OK 2006), 21 A.L.R. 6th 855

legislative. In 2006, the Kentucky Legislature enacted KRS 416.675,[210] which eliminates the "public purpose" criterion and requires that:

> (1) Every grant of authority contained in the Kentucky Revised Statutes to exercise the power of eminent domain shall be subject to the condition that the authority be exercised only to effectuate **a public use** of the condemned property.[211]

Moreover, the Kentucky legislature has repeated Kentucky's bias against condemnations for private use by negating the very criteria upon which the decision in *Kelo* was based:

> (3) **No provision in the law of the Commonwealth shall be construed to authorize the condemnation of private property for transfer to a private owner for the purpose of economic development that benefits the general public only indirectly, such as by increasing** the tax base, tax revenues, or **employment**, or by promoting the general economic health of the community.... [N]o property may be condemned primarily for the purpose of facilitating an incidental private use.[212]

In addition to the Kentucky legislature's response, the case at Bar should be used by this Court to provide a judicial response to those who would use Kentucky courts to abuse of the power to condemn, not for "public use," but for private profit.

(b) Sprint's Unauthorized Condemnation Action Violated Leggett's Constitutional Right to Own Property, for Which 42 USC §1983 Provides a Remedy.

This Court does not countenance unauthorized condemnation actions. In *Bernard v. Russell County Air Board*,[213] this Court invalidated an unauthorized condemnation. It stated that "The power to condemn is not to be taken lightly" because courts have a high

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[210] Acts 2006, Ch. 73, Sec. 1.
[211] Emphasis supplied.
[212] Emphasis supplied.
[213] 718 S.W.2d 123 (Ky. 1986) ("*Bernard I*").

regard for the sanctity of private property. Again, this Court quoted from *City of Owensboro v. McCormick, supra*:

> The opportunity for tyranny, particularly by the self-righteous, exists in condemnation of private property to a vastly greater degree than in the levying of taxes and the expenditure of public funds.[214]

Leggett alleged, and alleges, a "Civil Rights" cause of action under 42 USC §1983 because Sprint's unauthorized attempt to condemn was "conducted under the color and pretense of State law in a manner that seeks to deprive [him] of rights guaranteed by the Constitutions of the United States and Kentucky, including [his] right to own property and not to be deprived thereof without due process of law."[215] It is "black letter law" that: "By the plain terms of 42 U.S.C.A. §1983 two and only two allegations are required in order to state a cause of action under §1983: the complaint must allege that (1) some person has deprived the plaintiff of a federal right and (2) the person who has deprived the plaintiff of that right acted under the color of state law."[216] In its brief, Sprint admits that the second proposition applies here. Sprint admits that it "is a private individual deemed to have the status of a state actor."[217] But Sprint also impliedly admits the applicability of the first proposition. Sprint goes on to say that: "[I]f Sprint brought this action with a good faith belief of Sprint's right to do so, there can be no liability."[218] Therefore Sprint impliedly admits that if Sprint DID NOT "bring this action in good faith," then it is liable therefore under 42 USC §1983.

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[214] 718 S.W.2d at 126.
[215] RA 100-101.
[216] 15 *Am. Jur.* 2d, *Civil Rights* §148 (2000).
[217] Brief p. 16.
[218] *Loc. cit.*

As usual, Sprint cites no evidence in the record to support its claim of "good faith," whereas throughout this brief, Leggett has referred this Court to specific evidence of Sprint's *bad faith* that that can *already* be found in the *partial* record. When this case is remanded with instructions to the Trial Court to address the issue of waiver of privilege and to allow Leggett to complete his discovery, we are confident that additional evidence of bad faith will be unearthed.

The Court of Appeals stated that "The circuit court did not address this issue; so on remand, the court must determine whether the record supports Leggett's argument that Sprint's commencement of this action resulted in a violation of his civil rights." By holding that Kentucky recognizes a cause of action under 42 USC §1983 for unauthorized condemnations, and by remanding this case with instructions that Leggett should be allowed full discovery, this Court can send a signal to would-be condemnors that they run the risk of paying damages and attorneys' fees if they file groundless suits seeking to deprive citizens of their property.

(c) This Court Should Reaffirm That an Unauthorized Condemnation Action, Filed in Bad Faith, Entitles the Condemnee to Attorney's Fees.

There is another way for this Court to inhibit the abuse of eminent domain powers: By publishing an opinion reaffirming the principle that condemnation suits filed in bad faith will result in the payment of the condemnees' attorneys' fees. To do so, this Court need only follow existing precedents: *Bernard v. Russell County Air Board,*[219] (*"Bernard II"*) and *Northern Kentucky Port Authority v. Cornett.*[220]

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[219] 747 S.W. 2d 610 (Ky. 1988) (*"Bernard II."*).
[220] 700 S.W. 2d 392 (Ky. 1985).

In *Bernard II*, the Court of Appeals *reversed* a trial court because it had not awarded damages for an unauthorized condemnation case. In a previous opinion, (*Bernard I, supra.*) the Court had held that an attempted condemnation was unauthorized. On the second appeal by the condemnees, the Court declared in that "The sole issue presented by this appeal is whether the trial court abused its discretion by not awarding attorney's fees to appellants [landowners] after the successful defense against a condemnation proceeding brought by appellee [condemnor]."[221] The Court found that the condemnor "did not abide by the provisions of KRS Chapter 416 ... [this was] not a legitimate condemnation action,"[222] The Court recognized the "general rule disallowing attorney's fees," but went on to say:

> However, an exception to the general rule disallowing attorney's fees is recognized in condemnation actions upon a showing of bad faith on the part of the condemnor ... [therefore] this case is remanded with directions that it assess attorney's fees in favor of appellants as against the appellee."[223]

One of the cases followed in *Bernard II* was *Northern Kentucky Port Authority v. Cornett, supra.,* where this Court remanded a "dismissed" condemnation case with specific instructions to the trial court to conduct a hearing on the issue of the condemnor's bad faith and:

> If a trial court should determine that the condemnor acted in bad faith, it should also determine whether he [condemnee] could be made reasonably whole by the imposition of costs and fees as a term or condition to the granting of the dismissal.[224]

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[221] *Id.* 747 S.W.2d at 611.
[222] *Id.* 747 S.W.2d at 612.
[223] *Id.* 747 S.W.2d at 613.
[224] *Id.* 700 S.W.2d at 394-5.

In *Bernard II*, the appellate Court, itself, found that the condemnor had acted in bad faith, and ordered that the condemnees recover their attorney's fees. In *Northern Kentucky Port Authority*, the Court ordered the Trial Court to conduct a hearing and, if bad faith was found, attorney's fees were to be awarded. In the case at Bar, Sprint knew or should have known that it "did not abide by the provisions of KRS Chapter 416" when it filed its unauthorized condemnation action - and then attempted to dismiss it. The Trial Court noted that Leggett "has made sufficient allegations of bad faith on the part of Sprint in initiating this condemnation action;" it ruled that "Sprint's Complaint is NOT dismissed"[225] and ordered discovery to proceed. Leggett's limited discovery uncovered evidence of bad faith, but then the Trial Court changed its mind and prevented Leggett from discovering more. There has been no hearing to determine whether Sprint acted in bad faith.

This Court should reaffirm the principle that, in Kentucky, economic development is not a basis for condemnation; a private corporation is not allowed to enhance its profits by filing an unauthorized condemnation action. This case should be remanded with instructions to afford Leggett full discovery, then the Trial Court should be ordered to conduct a trial on Leggett's causes of action for abuse of process and denial of civil rights under 42 USC §1983. If bad faith is found, Leggett should be awarded his attorneys' fees.

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[225] RA 299-300.

CONCLUSION

Sprint persuaded the Trial Court to cut short Leggett's discovery and then to enter a summary judgment. But Leggett's limited discovery revealed, and the record reflects, issues of fact that preclude a summary judgment, including:

There is an issue of fact respecting whether Sprint knew that it did not have the right to file suit to condemn all of Leggett's property. There is evidence in the record that Sprint's personnel knew that condemnation of a right-of-way, leaving the landowner with a remainder, is entirely different proceeding than the condemnation of Leggett's entire property, leaving him with nothing. Nevertheless, Sprint wrongfully used the condemnation process to secure a purpose for which it was not intended; an objective not legitimate in the use of the process. Sprint filed a groundless judicial proceeding, claiming much more than the law permitted. By doing so, Sprint violated Leggett's constitutional right to own and enjoy his property. There are issues of fact with respect to Sprint's ulterior motives. Sprint's explanations for the timing of the filing of its complaint and of its "voluntary" dismissal are contradicted by the record.

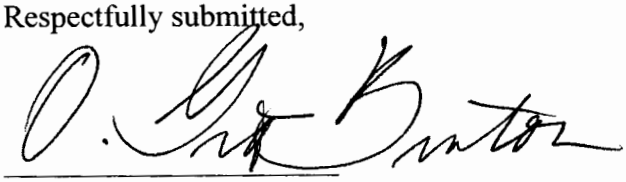
There are issues of fact with respect to the damage Leggett suffered and continues to suffer. There is evidence in the record that Sprint's initial complaint destroyed the value of Leggett's property by rendering the property unsalable and unleaseable. The damage continues, because after Sprint filed the original action, its insistence on a dismissal of its complaint "without prejudice" continues to depress the value of Leggett's property; potential buyers or lessees will discount their offers when they see that the property next door is owned by an aggressively litigious corporation, which once claimed it has the right to condemn Leggett's entire property and might do so again.

There are issues of fact respecting the good faith of Sprint's decision-makers. Without citing a scintilla of proof, Sprint claims they acted in good faith. But there is already evidence in the partial record to the contrary, including the actions of, and communications between, Sprint's personnel. Moreover, the fact Sprint knew or had reason to know its complaint was groundless is relevant to show its ulterior purpose.

Leggett was and is entitled to further discovery into the issues mentioned above, but his discovery was prematurely, and wrongly, cut off. Sprint asserted that communications with its decision-makers were "privileged," and not subject to any inquiry. Unfortunately, the Courts Below accepted Sprint's untested assertions that certain documents were "privileged," that the "privileged" documents examined *in camera* were complete and that no further inquiry was to be permitted. Unfortunately, the Courts Below made no inquiry into, and made no determination with respect to, *waiver*. There is evidence in the record that Sprint did not preserve the confidentiality of its allegedly "privileged" communications; many were put into a database that was accessible to all employees and some outsiders; few communications contained warnings identifying them as privileged. Sprint also waived the claimed privilege when it failed to identify to the Court and to Leggett, by a privilege log or otherwise, which documents were privileged and why. Moreover, Sprint turned over to Leggett many obviously privileged documents dealing with the same subject matter, thereby waiving the claimed privilege with respect to all similar documents that are relevant to Sprint's decisions and determinations about condemnation actions.

Therefore, so much of the Opinion of the Court of Appeals which reverses the Trial Court's summary judgment in favor of Sprint and which orders a trial on the issues of abuse of process and denial of civil rights should be affirmed. However, so much of the Opinion of the Court of Appeals which affirms the Trial Court's limitations on discovery on the grounds of "privilege," without addressing the issue of *waiver* should be reversed. The case should be remanded to the Trial Court with instructions that when Sprint released privileged documents to Leggett, Sprint waived the confidentiality and privilege of all similar documents. This Court should restate Kentucky law to the effect that waiver occurred, whether or not the release of the privileged documents was inadvertent. The Trial Court should be instructed that Leggett should be allowed full discovery respecting Sprint's decisions and motives and that Leggett is has a right to a trial on his claims of bad faith, abuse of process and denial of civil rights.

Respectfully submitted,



O. Grant Bruton
Middleton Reutlinger
2500 Brown & Williamson Tower
Louisville, Kentucky 40202
Telephone (502) 584-1135
Counsel for Albert E. Leggett III, etc.
Appellee and Cross-Appellant