

RENDERED: DECEMBER 2, 2005; 2:00 P.M.
TO BE PUBLISHED

PRIOR OPINION OF SEPTEMBER 9, 2005, WITHDRAWN

SUPREME COURT GRANTED DISCRETIONARY REVIEW:

FEBRAURY 13, 2008
(2007-SC-0273-DG)

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001739-MR

ALBERT E. LEGGETT, AS TRUSTEE OF
THE ALBERT E. LEGGETT FAMILY TRUST

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
CIVIL ACTION NO. 01-CI-008663

SPRINT COMMUNICATIONS COMPANY, L.P.

APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

** ** * * *

BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: Albert E. Leggett III, as trustee of the
Albert E. Leggett Family Trust, appeals from a summary judgment
granted by the Jefferson Circuit Court in favor of Sprint

Communications. The court ruled that there were no genuine issues of material fact on Leggett's counterclaim against Sprint for malicious prosecution, abuse of process, and violation of his civil rights. We agree with the circuit court that summary judgment on the issue of malicious prosecution was proper. And we affirm on that issue. But because there are material factual issues on Leggett's claims of abuse of process and violation of his civil rights, we reverse and remand.

I. FACTUAL SUMMARY.

Leggett, as trustee for his family's trust, owns a photography studio located in a 9,700 square foot building on a half-acre tract at 330-336 Baxter Avenue in Louisville. Leggett bought this property in 1990 for \$325,000.

Next to Leggett's property, at 340 Baxter Avenue, Sprint owns and operates a "Point of Presence," or "POP," facility. Sprint uses the POP facility to "transmit[] long-distance telephone signals through fiber optic cable." The facility also "forms a continuance between long-distance lines and local carrier lines for voice and data communications."

In 2000, Sprint projected that the telecommunications market was gaining momentum and that its current POP facility needed to be expanded. The company examined properties around its Baxter Avenue facility to determine which one would best fit its expansion needs; it settled on Leggett's property as the "most cost effective and technically appropriate choice."

Sprint retained a commercial real estate appraiser, who valued Leggett's property at \$200,000. Sprint then offered Leggett \$200,000 for his property. Leggett countered with \$900,000.

Further negotiations between the parties proved fruitless. Leggett hired his own appraiser, who valued the land at \$750,000; and he offered to sell for that amount. Sprint answered with \$350,000; Leggett never responded, and Sprint filed a condemnation suit in circuit court.

II. PROCEDURAL HISTORY.

In its petition for condemnation, Sprint alleged it had the "power to acquire real property through the exercise of eminent domain pursuant to KRS¹ 416.150 and KRS 278.540." Sprint also claimed it had "the authority to acquire by purchase, lease, gift or condemnation such property or interest therein as [it] may determine to be necessary, proper and convenient for its corporate purposes." The petition further claimed that Sprint needed to acquire Leggett's property for a "permanent utility easement and a temporary construction easement" and requested the court appoint commissioners "to make an award of fair market value of the easement."

The total area Sprint claimed it needed for the permanent utility easement was 22,172 square feet, which happened to be the exact area of Leggett's property. Therefore,

¹ Kentucky Revised Statutes.

Sprint's petition called for the condemnation of all of Leggett's land.

After Sprint filed its petition, the court-appointed commissioners appraised the fair market value of Leggett's property to be \$600,000.

Following the commissioners' report, Leggett filed his answer and counterclaim. He argued Sprint had failed to state a claim upon which relief could be granted because neither KRS 416.150 nor KRS 278.540 gave Sprint the power to condemn all of his land for a permanent easement. Leggett also counterclaimed for abuse of process, malicious prosecution, and violation of his civil rights.

Sprint then sought voluntary dismissal of its condemnation petition and dismissal of Leggett's counterclaim, arguing as a defense that Leggett had failed to state a claim upon which relief could be granted because the condemnation petition had been "voluntarily dismissed."

Leggett objected to the dismissal of the petition and filed a motion to strike the answer to his counterclaim for insufficient defense under CR² 12.06. In granting Leggett's motions, the trial court concluded that Sprint could only dismiss its action "with the approval of the Court as provided in CR 41.01(2)." And since Sprint had not obtained approval, the petition for condemnation was not dismissed at that point in the litigation; therefore, Sprint's defense to Leggett's

² Kentucky Rules of Civil Procedure.

counterclaim was insufficient as a matter of law. Ultimately, the circuit court dismissed the condemnation petition and allowed Leggett to proceed in discovery on his counterclaim.

Sprint moved for summary judgment, and Leggett moved for partial summary judgment. The court granted Sprint's motion. It ruled that based upon the holding in God's Center Foundation, Inc. v. Lexington Fayette Urban County Government,³ Sprint had the power to exercise eminent domain over Leggett's private property. The court also held Leggett failed to establish the necessary elements of malicious prosecution or abuse of process. So the court concluded there was no genuine issue of material fact, and Sprint was entitled to judgment as a matter of law. This appeal follows.

III. ARGUMENTS ON APPEAL.

Leggett claims the circuit court erred by relying on God's Center Foundation; he argues that Sprint knew or should have known that Kentucky law does not allow the condemnation of Leggett's entire property and that Sprint abused its discretion in pursuing the condemnation action. Leggett also asserts that Sprint's filing of this petition for condemnation amounted to malicious prosecution, abuse of process, and a violation of his civil rights under 42 U.S.C.⁴ § 1983. Finally, Leggett claims

³ 125 S.W.3d 295 (Ky.App. 2002).

⁴ United States Code.

the circuit court erroneously prevented him from discovering certain documents that Sprint claimed as privileged.

A. Standard of Review.

Our standard of review when a court grants a motion for summary judgment is "whether the trial court correctly found there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."⁵ Our courts have repeatedly held that summary judgment is to be applied "cautiously."⁶ Evidence should be "viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."⁷ "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact," this Court "need not defer to the trial court's decision and will review the issue *de novo*."⁸

**B. The Circuit Court's Reliance
on God's Center Foundation.**

Leggett first argues the court erroneously relied on God's Center Foundation in concluding that Sprint had authority to exercise eminent domain over his entire property. We agree with Leggett.

⁵ Hallahan v. The Courier Journal, 138 S.W.3d 699, 704-705 (Ky.App. 2004).

⁶ Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

⁷ *Id.*

⁸ Lewis v. B & R Corporation, 56 S.W.3d 432, 436 (Ky.App. 2001).

Eminent domain is "the power of the nation or a sovereign state to take, or to authorize the taking of, private property for a public use without the owner's consent, conditioned upon the payment of just compensation."⁹ This power is limited by the "constitutional restriction that the taking be for 'public use' and the condemnee receive 'just compensation.'"¹⁰ The "right to authorize the exercise of the power is legislative, and there can be no taking of private property for public use against the will of the owner without direct authority from the legislature."¹¹ It is well established that "[t]he legislature may delegate its power of eminent domain to its agencies, such as a public utilities commission, a municipality, or various educational bodies."¹²

Eminent domain statutes "are not to be extended or broadened by inference or implication or by judicial construction."¹³ Rather, "the extent to which [an eminent domain

⁹ 26 AM.JUR.2D *Eminent Domain* § 2 (1996).

¹⁰ God's Center Foundation, 125 S.W.3d at 299; see also, U.S. CONST. Amend. V. ("[N]or shall private property be taken for public use, without just compensation."); Ky. Const. § 13 ("[N]or shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."); Ky. Const. § 242 ("Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction.").

¹¹ 26 AM.JUR.2D *Eminent Domain* § 5 (1996).

¹² *Id.* at § 19.

¹³ *Id.* at § 20.

statute] may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained."¹⁴

KRS 416.550, a provision of The Eminent Domain Act of Kentucky,¹⁵ provides:

[w]hensoever any condemnor cannot, by agreement with the owner thereof, acquire the property right, privileges or easements needed for any of the uses or purposes for which the condemnor is authorized by law, to exercise its right of eminent domain, the condemnor may condemn such property, property rights, privileges or easements pursuant to the provisions of KRS 416.550 to 416.670.

In God's Center Foundation, the Lexington Fayette Urban County Government (LFUCG) filed a petition for condemnation. LFUCG wanted to condemn the Lyric Theater, a historic landmark that was originally built as an entertainment venue for African-Americans. The stated purpose for condemnation was to allow LFUCG to renovate the theater in accordance with a Memorandum of Understanding between LFUCG and the Commonwealth of Kentucky following the settlement of a lawsuit. The Memorandum of Understanding required LFUCG to "use its best efforts to obtain all necessary titles or rights of entry for the construction of this project including taking any necessary eminent domain actions"¹⁶

¹⁴ *Id.*

¹⁵ KRS Chapter 416.

¹⁶ 125 S.W.3d at 297.

At the time the petition for condemnation was filed, Lyric Theater was owned by a group called "God's Center," a non-profit, religious-based organization. Years earlier, God's Center had purchased the building in serious disrepair; although the group performed minor maintenance on the theater, it had not reopened the facility to the public.¹⁷

Shortly after agreeing to the Memorandum of Understanding, LFUCG negotiated with God's Center for the purchase of the theater. LFUCG offered God's Center the higher of two appraisal values; but God's Center did not want to sell the building, offering instead to give LFUCG an easement in the building.

LFUCG was unable to reach an agreement with God's Center. So it filed a petition for condemnation under the Eminent Domain Act. God's Center "question[ed] the sincerity of the LFUCG's stated purpose" in seeking condemnation, and civil proceedings ensued.¹⁸ Eventually, the circuit court granted LFUCG's petition to acquire the theater and God's Center appealed.

On appeal, this Court held that LFUCG had an "undisputed" right to condemn the Lyric Theater "through the sovereign power of eminent domain of the Commonwealth" ¹⁹ Noting that the "condemning body" typically "has broad

¹⁷ *Id.*

¹⁸ *Id.* at 301.

¹⁹ *Id.* at 299.

discretion in exercising its eminent domain authority including the amount of land to be taken," we also cautioned that the courts must "review the condemning body's exercise of discretion for arbitrariness or action in excess of its authority."²⁰

Although KRS 416.550 allows a condemning body to exercise eminent domain when negotiations prove to be ineffective, we observed that the statute does not allow the condemnor to "acquire the property in fee simple if it can obtain access or use of the property through other privileges or easements."²¹

So the holding in God's Center Foundation authorized Sprint, as a condemning authority, to exercise its power of eminent domain; and we agree that Sprint had "broad discretion" in exercising that power. But we perceive that the statutory authority given to telephone companies under KRS 278.540(2) and KRS 416.150 limited Sprint's power of condemnation.

KRS 278.540(2) reads:

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

KRS 416.150 also states that "[a]ny telephone company desiring to condemn a right of way under the authority of subsection (2)

²⁰ *Id.* at 300.

²¹ *Id.*, quoting City of Bowling Green v. Cooksey, 858 S.W.2d 190, 192 (Ky.App. 1992).

of KRS 278.540 shall proceed pursuant to the Eminent Domain Act of Kentucky.”

Under KRS 278.540(2), Sprint was authorized to contract with Leggett for a right of way across his property. And, under KRS 416.150 and KRS 416.550, Sprint had the power to condemn a right of way across Leggett’s property when they were unable to reach an agreement. But under a strict interpretation of these statutes, Sprint did not have power to condemn the entirety of Leggett’s property; nor did Sprint have the statutory authority to condemn Leggett’s property for the purpose of expanding its POP facility.

KRS 278.540(2) limits a telephone company’s power to condemn land to a *right of way* for the purpose of *constructing, maintaining and operating telephone lines*. Sprint’s petition for condemnation requested a “permanent utility easement” and a “temporary construction easement” encompassing a total area of 22,172 square feet—the whole of Leggett’s property.

We believe this petition exceeded Sprint’s statutory authority to condemn a “right of way” across Leggett’s property; rather than an easement, Sprint was attempting to obtain a fee simple interest in Leggett’s land. We also believe Sprint exceeded its power in attempting to condemn the property for purposes of expanding its POP facility. Although the POP facility serves as a conduit for long distance telephone signals, it is not a “telephone line” for purposes of the

statute. Rather, it is a large building that houses computers and other telecommunications equipment.

Sprint abused its discretion when it attempted to condemn the whole of Leggett's property for the purpose of expanding its POP facility. Because Sprint exceeded its statutory authority to exercise eminent domain, we believe the circuit court erred as a matter of law in holding that Sprint's actions were justified under the holding in God's Center Foundation.

C. Malicious Prosecution, Abuse of Process, and Violation of Civil Rights.

Having concluded that the circuit court erroneously concluded that Sprint had the authority to condemn Leggett's property, we must now determine whether there is sufficient evidence to establish a genuine issue of material fact regarding Leggett's allegations of malicious prosecution, abuse of process, and violation of his civil rights.

Leggett argues the record is "replete" with evidence that Sprint filed its petition for condemnation in bad faith. He claims the court erred by ignoring "the abundant evidence of Sprint's bad faith and constru[ing] the evidence against [him], instead of against Sprint." Leggett further asserts:

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.

It is these actions that Leggett argues amount to malicious prosecution, abuse of process, and violation of his civil rights. We will discuss each of his claims separately.

i. Malicious Prosecution.

Leggett first argues Sprint's actions amount to malicious prosecution. We disagree.

The tort of malicious prosecution protects individuals against the misuse of legal actions "as a means of causing harm."²² Because "[p]ublic policy requires that all persons be able to freely resort to the courts for redress of a wrong[,] . . . one must strictly comply with the prerequisites of maintaining an action for malicious prosecution."²³

There are six elements an individual must prove to establish a cause of action for malicious prosecution:

(1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.²⁴

²² W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 870 (5th ed., 1985).

²³ Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981).

²⁴ *Id.*

In granting Sprint's motion for summary judgment, the circuit court concluded that Leggett's cause of action for malicious prosecution was "not ripe" because the suit was "still pending." We agree with this assessment. To sustain a claim for malicious prosecution, there must be a termination of the proceedings "in defendant's favor." Clearly, this suit was not terminated in favor of Leggett. As Sprint notes, "[e]ven if Sprint's action was terminated in favor of Leggett when the Court permitted Sprint to voluntarily dismiss its complaint, no action for malicious prosecution has been filed by Leggett after the voluntary dismissal was approved by the Trial Court and after such a tort would have arisen." Therefore, we affirm the circuit court's conclusion that Leggett did not have a cause of action for malicious prosecution.

ii. Abuse of Process.

Second, Leggett argues that Sprint's commencement of a condemnation action against him constituted abuse of process. Abuse of process is an action for "the irregular or wrongful employment of a judicial proceeding."²⁵ It is unlike malicious prosecution "in that malicious prosecution consists of commencing an action or causing process to issue maliciously or without justification. Abuse of process, however, consists of 'the employment of legal process for some other purpose than that which it was intended by the law to effect.'"²⁶ A cause of

²⁵ Simpson v. Laytart, 962 S.W.2d 392, 394 (Ky. 1998).

²⁶ *Id.*, quoting Raine, 621 S.W.2d at 895.

action for abuse of process may exist even though "legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success. . . ."27

The essential elements of abuse of process are whether the process "has been perverted to accomplish an ulterior purpose for which it was not designed"28 and whether there has been "a willful act in the use of the process not proper in the regular conduct of the proceeding."29 This second element requires "[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process."30 A party is not liable where it has done nothing more than "carry out the process to its authorized conclusion even though with bad intentions."31

The circuit court concluded that "Sprint was well within its power when it initiated proceedings regarding Leggett's property" and that there was nothing in the record to indicate Sprint had an "'ulterior purpose' when it initiated condemnation proceedings against Leggett." So the court concluded Leggett failed to raise a genuine issue of material fact with regard to his abuse of process claim. We must disagree with the court's conclusion.

²⁷ KEETON, *supra*, at 897.

²⁸ *Id.*

²⁹ Simpson, *supra*, at 394.

³⁰ *Id.*

³¹ *Id.* at 394-395.

First, there is a genuine issue of material fact as to whether Sprint had an ulterior purpose in commencing the condemnation action against Leggett. After unsuccessful attempts at purchasing Leggett's property at a price that was arguably below market value, Sprint opted to file a petition for condemnation. Sprint commenced this action without the proper authority to assert eminent domain over all of Leggett's property and without the power to exercise eminent domain for the expansion of its POP facility. When the commissioners returned with an appraisal of \$600,000, Sprint sought to dismiss its petition.

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

Second, we question whether Sprint's actions amount to a "willful act in the use of the process not proper in the regular conduct of the proceeding."³² Specifically, we believe there is a genuine issue of material fact as to whether Sprint's

³² *Id.* at 394.

actions were "aimed at an objective not legitimate in the use of the process."³³ Although Sprint followed the proper procedural requirements in filing the condemnation action, we believe its purpose in filing the petition is also a factual determination.

Based on these two elements and viewing the evidence in a light most favorable to Leggett, there are genuine issues of material fact as to whether Sprint abused civil proceedings by filing a petition for condemnation against Leggett.

Therefore, we must reverse the summary judgment granted by the Jefferson Circuit Court.

iii. Violation of Civil Rights.

Finally, Leggett argues Sprint's actions violated his civil rights. Specifically, he claims Sprint's actions were "deliberate, wilful [sic] and continuing" and were "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."

42 USC § 1983 reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

³³ *Id.*

be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Upon review of the record, there is sufficient evidence to raise a genuine issue of material fact as to whether Sprint violated Leggett's civil rights. Leggett had a right to own and enjoy his property; and Sprint attempted to deprive him of that property under color of state law—namely, KRS 278.540(2), KRS 416.150, and KRS 416.550.

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.

D. Circuit Court's Limitation on Discovery.

Leggett also argues that the circuit court erroneously prohibited discovery based on Sprint's claims of attorney-client privilege. More specifically, Leggett takes issue with the circuit court's September 19, 2003, order finding that certain documents submitted by Sprint and reviewed by the court *in camera* are privileged.

Kentucky Rule of Evidence (KRE) 503(b) provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client[.]" We have independently reviewed the documents submitted by Sprint for *in camera* review, separately sealed in the clerk's record, and

mentioned in the trial court's September 19, 2003, order. Those documents consist of copies of email messages and other communications—most of them repetitive—between Sprint employees, in-house counsel, and outside counsel regarding the proposed acquisition of Leggett's property, as well as a similar condemnation proceeding in Mississippi. Our review of these documents leads us to the conclusion that the circuit court correctly found that the materials referenced in the September 19, 2003, order are protected from discovery by the attorney-client privilege. So despite Leggett's claim that those documents are vital to support his abuse of process claim, we must affirm the circuit court's order finding the documents to be privileged.³⁴

E. Dismissal with Prejudice.

In his petition for rehearing, Leggett contends that the circuit court erred by failing to dismiss Sprint's claims with prejudice. However, Leggett did not raise this issue in his original brief. Therefore, we will not consider it on rehearing.³⁵

³⁴ "In short, attorney-client privileged communications do not fall within the ambit of CR 26, and are not discoverable even when the information is essential to the underlying case and cannot be obtained from another source." The St. Luke Hospitals, Inc. v. Kopowski, 160 S.W.3d 771, 777 (Ky. 2005). Also, the fact that Sprint failed to create a privilege log summarizing the materials it claims are privileged before submitting the materials for the lower court's review is not fatal to its claim of privilege because Leggett has not cited to any Kentucky authority requiring the preparation of such a privilege log.

³⁵ See CR 76.32(1)(b) ("Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appeal");

IV. DISPOSITION.

We affirm the Jefferson Circuit Court's decision with regard to the issue of malicious prosecution. We reverse the summary judgment on the issue of abuse of process and violation of Leggett's civil rights. And we affirm the court's decision to preclude Leggett from discovering certain privileged material. The case is remanded to the circuit court for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

O. Grant Bruton
Louisville, Kentucky

BRIEF FOR APPELLEE:

Stuart E. Alexander III
Louisville, Kentucky

Herrick v. Wills, 333 S.W.2d 275, 276 (Ky. 1960) ("Errors not called to the attention of the appellate court prior to the time a decision is rendered may be deemed waived. Except for most extraordinary cause, we will not consider an issue on appeal raised for the first time in a petition for rehearing.").