RENDERED: JUNE 12, 2020; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001886-MR

BARDSTOWN CAPITAL CORPORATION
and FRANK CSAPO — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 16-CI-005521

SEILLER WATERMAN, LLC; BILL V. SEILLER; TERRY MAUNEY; PHILLIP STEWART; BETTIE STEWART; ELZIE WATSON; and BRIDGETTE WATSON — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: JONES, LAMBERT, AND L. THOMPSON, JUDGES.

LAMBERT, JUDGE: Bardstown Capital Corporation and Frank Csapo have appealed from the orders of the Jefferson Circuit Court granting the defendants' motion for summary judgment and dismissing their claim for wrongful use of civil

proceedings and dismissing their claim for abuse of process. We affirm the dismissal of the abuse of process claim, and we reverse the summary judgment.

Bardstown Capital Corporation is a property development company with a principal place of business in Louisville, Kentucky, and Frank Csapo is its owner and chief executive officer. We shall collectively refer to these two parties as Bardstown Capital. On November 4, 2016, Bardstown Capital filed a complaint against several homeowners on Wingfield Road in Louisville who opposed one of its development and rezoning proposals (as detailed below) (collectively, the homeowners); Seiller Waterman, LLC, the law firm representing the homeowners in the zoning case; and Bill V. Seiller, an attorney with Seiller Waterman (collectively, Seiller Waterman). Bardstown Capital sought damages for wrongful use of civil proceedings in the continued opposition to the approved zoning changes, stating that it had incurred lost profits in the amount of $12 million and legal fees totaling $73,752.33 as of the time of the filing of the complaint.

By way of background, we shall rely upon the recitation of the facts as set forth in this Court's opinion in the homeowners' appeal from the zoning decision:

> Bardstown Capital Corporation ("BCC") proposed to develop approximately 43.5 acres of property located in the southeast quadrant of the intersection of Bardstown Road and Interstate 265, and being bounded to the south by Wingfield Road. The proposed development, when complete, would contain a mixture of retail, restaurant

and other commercial uses intended to serve the entertainment and shopping needs of nearby residents and the region as a whole. The proposed development site consisted of numerous individual parcels owned by the Appellees. Each of the Appellants owns real property on Wingfield Road, directly adjoining the proposed development site. BCC convened neighborhood meetings concerning the proposal to inform interested parties and solicit feedback in September 2008 and July 2009. The Stewarts and Watsons attended both meetings.

In furtherance of the development plan, in August of 2009, BCC filed an application with Louisville Metro Planning and Design Services requesting: a change in zoning for the subject property from R-4, R-5 and OR-3 to C-2 and OR-1; a change in the form district from neighborhood to regional center; and approval of a general development and subdivision plan. Following this filing, a public review of the case was conducted on December 10, 2009, by the Land Development and Transportation Committee ("LD&T") of the Louisville Metro Planning Commission. Notice of the meeting was mailed to first and second tier adjoining property owners, including each of the Appellants. At the hearing, a date of February 4, 2010, was scheduled and announced for the public hearing required pursuant to [Kentucky Revised Statutes (KRS)] 100.214, and the case was scheduled to return to LD&T on January 14, 2010.

On December 29, 2009, an official notice of the February 4, 2010, public hearing before the Commission was mailed by first class mail to all first and second tier adjoining property owners, including each Appellant, as required by KRS 100.214(2). Mauney claims to have never received this notice. On December 31, 2009, approximately twelve signs were erected on and around the property notifying the public of the February 4, 2010, hearing.

The case returned to LD&T on January 14, 2010, and the floor was opened for public comments. Although the Stewarts were present at the meeting, they did not offer suggestions or comments. LD&T again announced the February 4, 2010, public hearing date and scheduled the matter to return to LD&T on January 28, 2010, for further review. On January 22, 2010, a notification of the public hearing date was published in *The Courier-Journal*, the primary daily newspaper for Louisville.

At the January 28, 2010, LD&T meeting—attended by the Stewarts and Mauneys—additional public comments were fielded, including comments from Carolyn Mauney. Approximately twelve seconds after Mrs. Mauney concluded her remarks, the LD&T chairman announced the February 4, 2010, public hearing date.

The full Commission convened on February 4, 2010, and announced in open session that the public hearing would be continued to March 4, 2010, and ordered the matter returned to LD&T on February 25, 2010, for further review. Additional public comments were taken at the February 25 meeting. At the March 4, 2010, Commission meeting, approximately three hours of public testimony and evidence was taken. It was then announced the hearing would be continued to March 18, 2010, so additional work could take place. On March 18, the Commission announced the hearing would be continued to April 1. That hearing was again rescheduled to April 15, and the continuance was announced in an open session. The hearing was once again rescheduled to May 20, and the matter was returned to the May 13, 2010, LD&T meeting for further review. Additional public comments were fielded by LD&T on May 13 and an announcement was made in open session about the May 20, 2010, public hearing date.

> Finally, on May 20, 2010, the Commission took approximately five and one-half hours of evidence and testimony, after which it unanimously recommended approval of the zoning change, form district change, and the general development and subdivision plan. The Commission forwarded its extensive written recommendation to the Council which then passed an ordinance approving the change in zoning and form district with only a single vote of nay.
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> On August 26, 2010, the Appellants filed a complaint and statement of appeal contesting the Commission's recommendation to approve the zoning and form district change and final approval of the Council's changes. Allegations were levied that the actions of the Commission and Council were erroneous, arbitrary and capricious, and done in violation of KRS Chapter 100. A lengthy period of discovery and motion practice ensued. Approximately three years later, both sides filed motions for summary judgment with supporting memoranda. After hearing oral arguments, the trial court granted summary judgment in favor of the Appellees.[1] This appeal followed.
>
> The issues raised in this appeal relate to the trial court's rejection of the Appellants' claims related to violations of the notice and certification requirements of KRS 100.214.

Mauney v. Louisville Metro Council, No. 2014-CA-000263-MR, 2016 WL 4255017, at *1-2 (Ky. App. Aug. 12, 2016) (footnotes omitted).

[1] The summary judgment stated that "[t]here is no support in KRS Chapter 100 or elsewhere for the Plaintiffs' position that they were entitled to additional written notices of continued hearing dates." This argument was briefly addressed in the appellants' corrected brief filed in the zoning appeal to this Court. The appellants stated they "did not have the opportunity to actively participate in the public hearing as none of them had actual knowledge of the rescheduled hearing date."

This Court affirmed on appeal, rejecting the three arguments the appellants raised. As to the first argument, this Court held:

> The Appellants first argue the notice provisions of KRS 100.214(2) require actual receipt by adjoining landowners of the notice of public hearing, a task which was not complied with in the instant matter as the [Mauneys] averred they did not receive the notice which was mailed to them.[2] Their contention focuses on the statute's use of the word "given" in relation to notice, and contend a person cannot be "given" notice if it is not placed in their possession or control. We believe this strained interpretation creates a higher burden than called for by the plain statutory language.

Id. at *3. "Contrary to the Appellants' assertion, the plain text of the statute does not indicate the Legislature intended to require the Commission to guarantee actual receipt of the mailed notices. The statute requires only mailing to interested parties 'by first-class mail' and certification that such task was accomplished." *Id*. at *4. "No ambiguity exists in the simple statutory language and we will not accept the Appellants' invitation to engage in logical gymnastics to graft an onerous burden

[2] Of nearly 300 notices sent by the Commission to first and second tier landowners regarding this particular project, only the Mauneys have complained of not receiving their notice. They expressly—without citation to any appropriate evidentiary support—accuse the Commission of failing to actually mail a notice to them. The sole support offered comes in the form of affidavits filed in the trial court which were not included in the administrative record. Because the trial court was sitting as an appellate court in this matter, KRS 100.347, these affidavits were not properly before it and any reliance thereon would have been wholly improper. *See City of Louisville v. Kavanaugh*, 495 S.W.2d 502, 505 (Ky. 1973) (circuit court confined to record made before planning commission and legislative body). [Footnote 4 in original.]

onto the statutory language when the General Assembly itself chose not to do so." *Id*.

As to the second argument, this Court held:

> Next, the Appellants contend the Commission failed to comply with the certification of mailing requirements set forth in KRS 100.214(2). Although they admit a writing exists which asserts the notices were mailed, they contend it "falls woefully short of a certification." In support, they cite only the definition of "certification" from Black's Law Dictionary and an example of a more formal document issued by one of the planning technicians involved in this matter. Our review indicated that while the certification at issue could have been more thorough and formal, it meets the technical requirements of being "an official document stating that a specified standard has been satisfied." CERTIFICATION, Black's Law Dictionary (10th ed. 2014). Although the Appellants contend the writing at issue is inadequate, the text of the statute requires only certification of mailing but does not specify the manner of such certification. The handwritten and attested notation that the notices were mailed in this matter was sufficient to satisfy the basic statutory requirements. There was no error.

Id.

And finally, this Court rejected the third argument, which was that "noncompliance with the statutory notice and certification provisions resulted in material prejudice to [Appellants,] specifically by denying them the opportunity to testify and present evidence in opposition to the proposed zoning and form district changes, and requires invalidation of the zoning ordinance, citing KRS 100.182."

Id. at *5 (footnote omitted). The Court had not found any flaw in the procedures used in this case and therefore the appellants could not have been materially prejudiced. *Id*. The appellants did not seek review of this opinion.

In their complaint in this action, Bardstown Capital contended that the homeowners wanted it to purchase their properties for an amount in excess of the fair market value. It alleged that attorney Seiller approached its counsel in August 2010 and "made statements that his clients were going to appeal the Metro Council approval of the rezoning. He went on to say 'my clients do not really want to appeal, they just want your clients to buy their properties.'" Bardstown Capital had offered to purchase the properties for fair market value. However, the property owners demanded $1.5 million for properties that had been assessed at $409,600.00 by the property valuation administrator. Both sets of defendants (Seiller Waterman and the homeowners) filed answers defending against Bardstown Capital's claims.

In its first amended complaint filed in February 2017, Bardstown Capital added allegations of abuse of process and malicious prosecution, in addition to the previously alleged claim of wrongful use of civil proceedings.

The same month, Seiller Waterman moved to dismiss Bardstown Capital's claims for malicious prosecution and abuse of process pursuant to Kentucky Rules of Civil Procedure (CR) 12.02 for failure to state a claim upon

which relief could be granted. It argued that Bardstown Capital could only allege a claim for wrongful use of civil proceedings, as malicious prosecution could only be raised in a criminal context. It also argued that the abuse of process claim was barred by the one-year statute of limitations, which it argued accrued at the time of the filing of the underlying complaint by the homeowners on August 26, 2010, or their filing of the notice of appeal on February 7, 2013. Because Bardstown Capital did not file its complaint in the present action until November 2016, the claim for abuse of process was filed several years after the statute of limitations expired. It noted that the last time the homeowners filed any kind of motion or response with the court was in February 2015, which would still make Bardstown Capital's claim untimely. In support of its abuse of process argument, Seiller Waterman relied upon this Court's unpublished opinion in *DeMoisey v. Ostermiller*, Nos. 2014-CA-001827-MR and 2014-CA-001864-MR, 2016 WL 2609321 (Ky. App. May 6, 2016).

Bardstown Capital objected to the motion to dismiss, arguing that *DeMoisey* was distinguishable because that case involved one tortious event, while the present case involved a multi-year process of tortious conduct designed to obtain a higher purchase price for the homeowners' properties, and that it should not be cited pursuant to CR 76.28(4)(c) as it was ordered not to be published by the Supreme Court of Kentucky. In addition, Bardstown Capital stated that it had filed

an action in September 2015 that was dismissed without prejudice on the defendants' motion as it was prematurely filed. Therefore, it argued the defendants waived this defense by seeking that dismissal. It went on to argue that the motion to dismiss was premature because discovery had just commenced.

The court heard oral arguments on the motion to dismiss on June 12, 2017. The parties discussed the single tort versus a continuing tort question as to the statute of limitations on the abuse of process claim, including the application of *DeMoisey*.

On August 31, 2017, the circuit court ruled on Seiller Waterman's motion to dismiss. First, the court merged Bardstown Capital's claims for malicious prosecution and wrongful use of civil proceedings into a single claim for relief based upon *Martin v. O'Daniel,* 507 S.W.3d 1 (Ky. 2016). Second, the court addressed whether the abuse of process claim was time-barred. It held:

> Abuse of process is considered a personal injury claim, and therefore has a one-year statute of limitation. *Raine v. Draisin*, 621 S.W.2d 895, 902 (Ky. 1981); KRS 413.140(1). However, no Kentucky court had addressed when the claim begins to accrue until the recent unpublished decision in *DeMoisey v. Ostermiller*, 2016 WL 2609321 (Ky. App. 2016). After considering Kentucky caselaw and decisions of other jurisdictions that had addressed the issue, the Court rejected the argument that abuse of process is a continuing tort and it commences "to run, from the termination of the acts which constitute the abuse complained of, and not from the completion of the action in which the process is issued." *DeMoisey* at *14-15, quoting J.A. Bock, *When*

> *Statute of Limitations Begins to run Against Action for Abuse of Process*, 1 A.L.R.3d 953 (1965).
>
> Plaintiffs allege that Seiller Waterman and Seiller deliberately delayed the underlying litigation, including the appeal to the Court of Appeals, with the intent to force Plaintiffs to purchase the individual defendants' properties for significantly more than the fair market value. The last complained of delay tactic is alleged to have occurred October 22, 2014 when Seiller Waterman moved the Court of Appeals for an extension of time to file supplemental briefs. As abuse of process does not require a favorable outcome as an element of the claim, Plaintiffs' claim accrued on October 22, 2015, one year after the last complained of action occurred. The Complaint alleging the claim was not brought until November 4, 2016, more than a year late[r]. It is therefore untimely.

The court therefore dismissed Bardstown Capital's claim for abuse of process with prejudice, but it denied the motion with respect to the malicious prosecution claim. The action continued.

In July 2018, Seiller Waterman amended its answer to assert a defense that Bardstown Capital's complaint and amended complaint were barred by the *Noerr-Pennington* doctrine, the First Amendment of the United States Constitution, and Section 1 of the Kentucky Constitution. And in August 2018, Seiller Waterman filed a motion for summary judgment, arguing that application of the *Noerr-Pennington* doctrine required dismissal of Bardstown Capital's wrongful use of civil proceedings claim, citing *Grand Communities, Ltd. v. Stepner*, 170 S.W.3d 411 (Ky. App. 2004). That doctrine protected the homeowners' First

Amendment right to free speech in their protest of governmental action, namely, the zoning decision. Seiller Waterman stated that, in the appeal in the underlying action, this Court had not addressed that a hearing had not been held on February 4, 2010; that counsel for Bardstown Capital did not intend for a hearing to take place that day; or that any of the notice requirements were satisfied for the dates when a hearing did take place. It noted that Bardstown Capital had not sought Rule 11 sanctions or sanctions under CR 73.02(4). Finally, it noted that the zoning appeal could not be considered "sham" litigation as subjective motivation did not apply, and the homeowners had a right to appeal the rezoning decision.

Bardstown Capital objected to the motion for summary judgment, arguing that both the homeowners and Seiller Waterman had ulterior purposes in filing the zoning appeal because of the money each set of defendants would obtain. The homeowners wanted a higher price for their properties, and Seiller Waterman's fee contract provided it would receive a 10% commission on the value of the properties if sold to Bardstown Capital. Therefore, the "sham" exception to the *Noerr-Pennington* doctrine applied in this case. It also argued that the doctrine did not apply in zoning cases because zoning appeals were not a constitutional right in Kentucky. Finally, it argued that the *Noerr-Pennington* doctrine required a fact-intensive analysis and, because discovery was not complete, the motion for summary judgment should be denied. Bardstown Capital stated that depositions of

key witnesses had not been taken, including named defendant Bill Seiller; his associate Gordon Rose, who drafted the fee agreement and legal arguments concerning notice for the planning and zoning meetings; the homeowners' previous zoning attorneys and real estate agent; or any planning commission officers. The court's determination of the "sham" exception was a question of fact for a jury to decide, not a question of law for the court. In reply, Seiller Waterman argued that, because the objective element of the "sham" exception had not been met, there was no need to consider the subject motivation prong of this exception. The homeowners moved to join in Seiller Waterman's motion for summary judgment.

The court heard oral arguments from the parties on the motion for summary judgment on November 19, 2018. Counsel for Seiller Waterman stated that, in filing the zoning appeal below, it was seeking to set aside an ordinance passed by the Louisville Metro Council in July 2010 changing an old law providing that it would be illegal to build a shopping center on this property. The new ordinance provided that one could be built on this property. The question then became whether the proper steps were followed, which would be decided in the circuit court, not by the Louisville Metro Council. The question was whether there was adequate notice for a public hearing on changing this ordinance pursuant to the applicable statute. Notice was provided for a hearing that was to take place on

February 4, 2010, at 1:00 p.m., but there was no statutory notice of the March 4, 2010, hearing or of a second hearing in May. Counsel stated that the statute provided how new notice was to be provided if a landowner wanted a new hearing, but that process was not followed by Bardstown Capital in this case. Counsel then argued that the *Noerr-Pennington* doctrine applied to lawsuits filed in protest of changes to land use, as held in *Stepner*. As long as there was a reasonable basis for the original action (the government did not follow the rules regarding notice), there was no need for the court to reach the motive question. Counsel for the homeowners argued that, because they believed they had not received proper notice, the lawsuit was permissible.

Bardstown Capital argued, in response, that there was sufficient notice for the February 4, 2010, meeting and that the only issue argued before the circuit court and this Court in the zoning action was whether the signs and letters were adequate notice for the February 4, 2010, hearing. There was no argument that there needed to be supplemental notice for each of the rescheduled hearings. When rescheduled dates are posted on the planning commission's website and mentioned on the record, that satisfies the notice requirement for the further hearings. There is no statutory requirement to pay for more yard signs and to send out additional letters. Counsel contended that application of the *Noerr-Pennington* doctrine was fact-intensive and constituted a jury question. In addition, discovery

had not been completed. Expert testimony was needed to provide the court with an understanding of how the zoning process is supposed to work, how it worked in this case, whether that was appropriate, and whether the lawsuit was appropriate. Objectively, there was notice for the first hearing, which was the only issue raised in the underlying proceeding. Subjectively, the purpose of the underlying proceeding was not to stop the development but was instead related to money. Seiller Waterman was entitled to 10% of the amount of any sale that happened, which meant that it wanted to increase the sales price as much as possible. After hearing counsels' arguments, the court took the motion under submission.

On November 28, 2018, the circuit court entered an opinion and order granting the motion for summary judgment and dismissing Bardstown Capital's remaining claim. The court held that the "sham" exception did not apply based upon Seiller Waterman's argument that pursuant to *Stepner*, where there is standing, a suit cannot be objectively baseless. It concluded:

> Like the previous Circuit Court Division and like the Kentucky Court of Appeals, this Court also finds that notice of the first hearing was properly given. KRS 100.[214] makes no mention of the necessity for a new notice upon a continuance.
>
> The Court also finds that the Noerr-Pennington doctrine, as interpreted by Stepner, does apply. While zoning cases are statutory, due process rights to notice are constitutional. Clearly, the fact that the bulk of the evidentiary hearing was held without fresh notice confers a reasonable basis for appeal. Applying Stepner, motive

> is irrelevant and therefore the sham exception to the doctrine could not bar Defendants' actions.

This appeal now follows.

On appeal, Bardstown Capital continues to argue: 1) that the circuit court should not have granted summary judgment as the *Noerr-Pennington* doctrine does not apply in this case and because summary judgment was entered prematurely; and 2) that the circuit court erred in dismissing its abuse of process claim. The appellees dispute these arguments.

We shall first consider whether summary judgment was proper on Bardstown Capital's wrongful use of civil proceedings claim based upon the application of the *Noerr-Pennington* doctrine. Our standard of review is set forth in *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996):

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, Ky., 833 S.W.2d 378, 381 (1992). "The record must 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." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest*, 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255

> (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . ." *Huddleston v. Hughes*, Ky.App., 843 S.W.2d 901, 903 (1992), *citing Steelvest, supra* (citations omitted).

"Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

In *Stepner*, 170 S.W.3d at 414-16, also a zoning case, this Court extensively discussed the *Noerr-Pennington* doctrine and adopted it in Kentucky.

> The Noerr-Pennington doctrine derived from two U.S. Supreme Court cases, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965). The *Noerr* case involved a dispute between the trucking industry and the railroad industry and their respective interests in, and competition for, the long-distance transportation of heavy freight. The trial court determined that the Eastern Railroad Presidents Conference, an association of the presidents of 24 railroads, had violated the Sherman Antitrust Act in its publicity campaign directed at lawmaking and law enforcement authorities and against truckers as competitors. The Supreme Court held, however, that no violation of the Act could be "predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135, 81 S. Ct. 523. The Court explained that:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.

Id. at 139, 81 S. Ct. 523. The Court further explained that:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

Id. at 143-44, 81 S. Ct. 523. Nevertheless, the Court acknowledged that there could be situations where the efforts toward influencing governmental action were merely a sham "to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor [.]" *Id*. at 144, 81 S. Ct. 523.

In the *Pennington* case four years later, the Supreme Court recognized its prior decision in the *Noerr* case and held that "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of

> intent of purpose." 381 U.S. at 670, 85 S. Ct. 1585. Thereafter, in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972), the Supreme Court extended its views in the *Noerr* and *Pennington* cases to efforts by citizens or groups of citizens to influence administrative agencies and courts. 404 U.S. at 510, 92 S. Ct. 609. The Court stated that "the right to petition extends to all departments of the Government." *Id*.
>
> In *Eastern Kentucky Resources v. Arnett*, Ky.App., 892 S.W.2d 617 (1995), a panel of this court noted that other federal and state courts have applied the Noerr-Pennington doctrine to petitioning activities such as zoning questions and other activities outside the antitrust field. *Id*. at 618. While the court stated that "this is an interesting area of the law," it declined to address it, concluding it was unnecessary to its opinion in that case. *Id*. Later, the Kentucky Supreme Court mentioned the Noerr-Pennington doctrine in *Simpson v. Laytart*, Ky., 962 S.W.2d 392, 396 (1998). However, it declined to adopt the doctrine "at this time" in light of other conclusions reached in the case. *Id*. The parties have neither cited to, nor are we aware of any other Kentucky case mentioning the Noerr-Pennington doctrine.
>
> The appellants have not argued, either to the circuit court or to this court, that the Noerr-Pennington doctrine should not be adopted by Kentucky courts. Based upon the reasons given by the U.S. Supreme Court in the *Noerr* case, we see no reason why Kentucky courts should not also adopt this doctrine.

Stepner, 170 S.W.3d at 414-15.

Bardstown Capital first argues that the *Noerr-Pennington* doctrine is not applicable in this case because the underlying lawsuit was not intended to petition the government to redress grievances, but rather it was directed against

Bardstown Capital, a private organization. And while the Louisville Metro Council was named as one of the parties in the zoning lawsuit, the only real parties in interest were the appellees and Bardstown Capital. It argued that extending the doctrine's intended protection of lobbying efforts to "frivolous lawsuits filed against private persons for their use of private property" was an overextension and should be rejected. Moreover, in 2017, the General Assembly enacted KRS 100.3471, which provides for the availability of sanctions for frivolous zoning appeals. While that statute was enacted after the events in this case took place, the passage of this statute established the Legislature's desire to regulate this statutory right to appeal in zoning cases. However, we must agree with the appellees that we are bound by our decision in *Stepner*, *supra*, in which we adopted the *Noerr-Pennington* doctrine in zoning actions. We perceive no reason to overturn our prior decision, but we do note that the Supreme Court of Kentucky has yet to address this issue.

Because we have rejected Bardstown Capital's argument that the *Noerr-Pennington* doctrine is not applicable to this case, we shall next examine whether the "sham" exception applies. In *Stepner, supra*, this Court discussed this exception as follows:

> This exception was mentioned by the Supreme Court in the *Noerr* case. *See Noerr*, 365 U.S. at 144, 81 S. Ct. 523.

The Supreme Court defined the sham exception in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993). That case also involved a Sherman Act violation. In discussing the sham exception to the Noerr-Pennington doctrine, the Court stated that its decision in the *California Motor Transp. Co.* case "left unresolved the question presented by this case—whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant." *Professional Real Estate Investors*, 508 U.S. at 57, 113 S. Ct. 1920. The Court answered the question in the negative and held that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." *Id*. Quoting from the *Pennington* case, the Court stated, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Professional Real Estate Investors*, 508 U.S. at 58, 113 S. Ct. 1920 *quoting Pennington*, 381 U.S. at 670, 85 S. Ct. 1585.

The Supreme Court in the *Professional Real Estate Investors* case set out a two-part definition of sham litigation. The Court stated that the first part of the definition was that "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id*. at 60, 113 S. Ct. 1920. The Court noted that courts could examine a litigant's subjective motivation only if the litigation was objectively meritless. *Id*. The Court held that if the first part of the definition of sham litigation is met, then courts should focus on whether the litigation conceals "an attempt to interfere directly with the business relationships of a competitor" through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id*. at 60-61, 113 S. Ct. 1920 *quoting Noerr*, 365 U.S. at 144, 81 S. Ct. 523 and *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991). (Emphasis in original.)

Stepner, 170 S.W.3d at 415.

Applying the "sham" exception, the *Stepner* Court analyzed the issue as follows:

> As a neighboring or adjacent property owner, Stepner had standing to challenge the zoning change. In connection with the appellants' claims of abuse of process and wrongful use of civil proceedings, we conclude that the circuit court properly determined that Stepner was shielded from liability by the Noerr-Pennington doctrine. Furthermore, given Stepner's standing to appeal the zoning decision, his appeal cannot be said to have been objectively baseless. Thus, his subjective motivation, whatever it may have been, is irrelevant, and the sham exception to the Noerr-Pennington doctrine does not apply.

Id. at 416 (citations omitted). The *Stepner* Court did not reach the subjective prong of the test.

Bardstown Capital contends that the application of the "sham" doctrine is a question of fact and that there remain disputed issues of material fact that would preclude summary judgment in this matter. We agree.

Bardstown Capital brings our attention to several federal cases describing the factual nature of this inquiry. "Noerr-Pennington confers antitrust immunity for conduct genuinely intended to influence governmental action. Whether something is a genuine effort to influence governmental action, or a mere sham, is a question of fact." *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253 (9th Cir. 1982). In *Hoffman-La Roche Inc. v.*

Genpharm Inc., 50 F. Supp. 2d 367, 380 (D.N.J. 1999), the federal district court instructed:

> The resolution of the question whether plaintiffs' suit is objectively baseless as to Genpharm involves the determination of whether plaintiffs undertook a reasonable investigation before filing suit, whether plaintiffs knew or should have known that Genpharm had not infringed the Syntex process patents, and whether a reasonable litigant could have realistically expected success on the merits at the time the suit was filed. Reasonableness is a question of fact, and the Court cannot make such factual determinations on a factual controversy roiled by a motion to dismiss.

And in *In re Flonase Antitrust Litigation*, 795 F. Supp. 2d 300, 310-11 (E.D. Pa. 2011), another federal district court more recently addressed the issue, relying extensively on *Professional Real Estate Investors* (*PRE)*, *supra*:

> The question whether a petition is a sham "is generally a question of fact for the jury[.]" A court should only rule on the objective baselessness prong as a matter of law "[w]here there is no dispute over the predicate facts of the underlying [petitions]."
>
> Under *PRE*, the burden falls on the party invoking the sham exception, here the Plaintiffs, to show that the conduct at issue constitutes a sham. First, Plaintiffs must show that the petition was "objectively baseless in the sense that no reasonable [party] could realistically expect success on the merits. If an objective [party] could conclude that the [petition] is reasonably calculated to elicit a favorable outcome, the [petition] is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail." This is known as the objective prong of the *PRE* test. The objective prong requires Plaintiffs to show that a reasonable petitioner could not

> realistically expect that the petition will succeed on its merits. Courts have sometimes referred to a showing of a realistic expectation of success on the merits as a showing of "probable cause." Both characterizations of the objective prong, however, ultimately raise the same question—whether any "reasonable litigant could realistically expect success on the merits" of the petition.
>
> "Only if challenged [conduct] is objectively meritless may a court examine the litigant's subjective motivation" to determine if the conduct "conceals 'an attempt to interfere directly with the business . . . of a competitor.'" This second prong is known as the subjective prong. If Plaintiffs can show that the petitions were objectively baseless, Plaintiffs must then show that the subjective intent of the petitioning party was to inhibit competition, rather than to petition the Government for redress. GSK concedes for purposes of this Motion that Plaintiffs have provided sufficient evidence to survive summary judgment on the second prong. The only issue before me is thus whether Plaintiffs have carried their burden in showing that GSK's conduct was objectively baseless.

(Citations and footnote omitted.)

Here, the circuit court held that the homeowners' appeals in the zoning action were not objectively baseless because the homeowners were contesting the lack of fresh notice of the rescheduled hearings before the planning commission. Bardstown Capital disputes this statement because the homeowners were in actuality contesting notice of the first hearing, not the lack of fresh notice for later hearings. The version of KRS 100.214 in effect at the time of the 2010 hearing provided as follows:

When in any planning unit containing any portion of a county containing a city of the first class or a consolidated local government a hearing is scheduled on a proposal by a property owner to amend any zoning map, the following notice shall be given in addition to any other notice required by statute, local regulation, or ordinance to be given:

(1) Notice of the hearing shall be posted conspicuously on the property the classification of which is proposed to be changed thirty (30) days immediately prior to the hearing. Posting shall be as follows:

> (a) The sign shall state "zoning change" and the proposed classification change in letters three (3) inches in height. The time, place, and date of hearing shall be in letters at least one (1) inch in height; and
>
> (b) The sign shall be constructed of durable material and shall state the telephone number of the appropriate zoning commission;

(2) Notice of the hearing shall be given at least thirty (30) days in advance of the hearing by first-class mail, with certification by the commission secretary or other officer of the planning commission that the notice was mailed, to the mayor and city clerk of any city of the fifth or sixth class so affected, to an owner of every parcel of property adjoining at any point the property the classification of which is proposed to be changed, to an owner of every parcel of property directly across the street from said property, and to an owner of every parcel of property which adjoins at any point the adjoining property or the property directly across the street from said property; provided, however, that no first-class mail notice, required by this subsection, shall be required to be given to any property owner whose property is more than five hundred (500) feet from the property which is proposed

to be changed. It shall be the duty of the person or persons proposing the map amendment to furnish to the planning commission the names and addresses of the owners of all property as described in this subsection. Records maintained by the property valuation administrator may be relied upon conclusively to determine the identity and address of said owner. In the event such property is in condominium or cooperative forms of ownership, then the person notified by mail shall be the president or chairman of the owner group which administers property commonly owned by the condominium or cooperative owners. A joint notice may be mailed to two (2) or more co-owners of an adjoining property who are listed in the property valuation administrator's records as having the same address;

(3) If the hearing has been scheduled for a time during normal working hours, and if, within fifteen (15) days of the scheduled date of the hearing the planning commission shall receive a petition from two hundred (200) property owners living within the planning unit requesting that the hearing be rescheduled for a time after normal working hours, then the planning commission shall reschedule the hearing for a time after normal working hours on a date no earlier than the date of the original hearing. The planning commission shall then publish notice of the new hearing time and date according to the provisions of KRS 100.211, except that notice shall occur at least seven (7) days prior to the public hearing. The sign required by subsection (1) of this section shall be changed to reflect the new hearing time and date at least seven (7) days prior to the public hearing. The persons who receive mail notice according to the provisions of subsection (2) of this section shall again be notified in the same manner of the new hearing time and date at least seven (7) days prior to the hearing. The hearing time shall not be changed more than once by the procedures of this section except in the event of intervening emergency which requires the cancellation of a hearing; and

> (4) Notice by mail shall include a list of the names and addresses of each person so notified, and a description of the procedure by which those notified can petition for a change in the hearing time.

The statute did not provide for fresh notice when a hearing was rescheduled, except as provided for in (3), which is not applicable in this case.

In its opinion leading to the original zoning appeal, the circuit court observed that "[t]here is no support in KRS Chapter 100 or elsewhere for the Plaintiffs' position that they were entitled to additional written notices of continued hearing dates." This argument was briefly addressed in the appellants' corrected brief filed in the zoning appeal to this Court. The appellants stated they "did not have the opportunity to actively participate in the public hearing as none of them had actual knowledge of the rescheduled hearing date" and that Bardstown Capital's zoning counsel "probably thought that the Planning Commission had mailed out notices [of the rescheduled hearings], as it should have." However, the homeowners were focusing in their argument section on how they were to have received notice in relation to the February 4, 2010, hearing date, including whether they were to receive actual notice and whether the certification process was followed. They did not appear to be trying to extend the statute to require fresh notice for a rescheduled hearing, and in fact the Court of Appeals did not even mention anything about fresh notice in its opinion. Therefore, we cannot hold that the circuit court's conclusion that a reasonable basis for appeal existed in this case

is a proper one. Rather, this appears to be a factual question that needs to be resolved.

Likewise, the subjective motivation prong of the "sham" exception remains a factual question that must be resolved by a fact-finder. The circuit court never got to the question of whether the homeowners' motivation in filing the zoning appeals was only intended to delay the matter in order to extract a higher purchase price for the properties.

Therefore, we agree with Bardstown Capital that the application of the "sham" exception to the *Noerr-Pennington* doctrine in this case is a question for the fact-finder to decide. There are disputed issues of material fact that remain, meaning that summary judgment was premature. Accordingly, we must reverse the summary judgment on Bardstown Capital's wrongful use of civil proceedings claim.

Next, Bardstown Capital argues that the circuit court erred in dismissing its abuse of process claim because it was filed outside of the applicable one-year statute of limitations period.

> A court should not grant a motion to dismiss a complaint "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union v. Kentucky Jockey Club*, Ky., 551 S.W.2d 801, 803 (1977). *See also James v. Wilson*, Ky.App., 95 S.W.3d 875, 883 (2002). In determining whether a

> complaint should be dismissed, the issue is a matter of law. *Id*. at 884.

Stepner, 170 S.W.3d at 416-17.

In considering this argument below, the circuit court relied upon the unreported opinion of this Court in *DeMoisey v. Ostermiller*, *supra*. In *DeMoisey*, this Court defined the tort of abuse of process as follows:

> "An action for abuse of process is 'the irregular or wrongful employment of a judicial proceeding.'" *Simpson v. Laytart*, 962 S.W.2d 392, 394 (Ky. 1998) (quoting *Stoll Oil Refining Co. v. Pierce*, 337 S.W.2d 263 (Ky. 1960)). "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which that process is not designed, is subject to liability to the other for harm caused by the abuse of process." *Sprint Commc'ns Co., L.P. v. Leggett*, 307 S.W.3d 109, 113 (Ky. 2010) (citing *Restatement (Second) of Torts* § 682 (1977)). "The essential elements of abuse of process, as the tort has developed, have been stated to be: First, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding." *Williams v. Cent. Concrete Inc.*, 599 S.W.2d 460, 461 (Ky. App. 1979).

DeMoisey, 2016 WL 2609321, at *13. After recognizing that a one-year statute of limitations applied pursuant to KRS 413.140(1)(a), the Court then considered the question of when an abuse of process claim accrued:

> It is correct that the statute of limitations does not begin to run on a malicious prosecution claim until the underlying litigation has been concluded. *See Dunn v. Felty*, 226 S.W.3d 68, 73 (Ky. 2007). However, "[w]hile the two torts of abuse of process and malicious prosecution often accompany one another, they are

distinct causes of action." *Garcia v. Whitaker*, 400 S.W.3d 270, 277 (Ky. 2013). "The distinction between an action for malicious prosecution and an action for abuse of process is that a malicious prosecution consists in maliciously causing process to be issued, whereas an abuse of process is the employment of legal process for some other purpose other than that which it was intended by the law to effect." *Raine*, 621 S.W.2d at 902. Thus, while the determination in a malicious prosecution centers on the legal justification for the action, which cannot be resolved until the termination of the action, abuse of process centers on the motivation behind the action, which is capable of ascertaining before conclusion of the action.

"Statutes of limitations are based on the accrual of a right of action and, therefore, begin to run from the time the cause or the foundation of the right came into existence." *Jordan v. Howard*, 246 Ky. 142, 54 S.W.2d 613, 615 (1932). "A cause of action accrues when a party has the right and capacity to sue[.]" *Lexington-Fayette Urban Cty. Gov't v. Abney*, 748 S.W.2d 376, 378 (Ky. App. 1988)[.]

While no Kentucky appellate case appears to have addressed when the statute of limitations on an abuse of process claim begins to accrue, of those jurisdictions which have done so, the rule is virtually universal that the statute of limitations for an abuse of process claim commences "to run, from the termination of the acts which constitute the abuse complained of, and not from the completion of the action in which the process issued." J.A. Bock, *When Statute of Limitations Begins to run Against Action for Abuse of Process*, 1 A.L.R.3d 953 (Originally published in 1965).

As previously set forth, an abuse of process claim, unlike a malicious prosecution claim, does not require as an element a successful outcome in the underlying action. Rather, the focus of such a claim is whether there was a

willful act in the use of the process not proper in the regular conduct of the proceeding. Thus, the claim rises or falls on the conduct occurring "at the time the [underlying] action was filed." *Morrow v. Brown, Todd & Heyburn*, 957 S.W.2d 722, 726 (Ky. 1997). For this reason, we hold that the cause of action for an abuse of process claim accrues at the time the conduct complained of by the plaintiff occurred, not at the termination of the underlying litigation. *See, e.g.*, *Read v. Fairview Park*, 146 Ohio App.3d 15, 17, 764 N.E.2d 1079, 1080 (Ohio App. 2001) ("[T]he statute of limitations for an abuse-of-process claim begins to run on the date of the allegedly tortious conduct"); *Corley v. Jacobs*, 820 S.W.2d 668, 672 (Mo. App. 1991) ("A cause of action for abuse of process generally accrues, and the statute of limitations begins to run, from the termination of the acts which constitute the abuse complained of, and not from the completion of the action in which the process issued."); *Yoost v. Zalcberg*, 925 N.E.2d 763, 771 (Ind. App. 2010) ("A cause of action for abuse of process accrues when the act complained of—here, the filing of Yoost's counterclaim—is committed.").

. . . .

However, DeMoisey argues that abuse of process is a continuing tort and, therefore, the statute of limitations should not accrue until total cessation has taken place. We disagree. Under the continuing tort doctrine, "where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortious overt act ceases[,]" and each day is considered a separate cause of action. *Stephenson v. CSX Transp., Inc.*, No. 2002-CA-001796-MR, 2003 WL 22113458, at *5 (Ky. App. Sept. 12, 2003) (citing 54 C.J.S. Limitations of Actions § 177 at 230-31 (1987)).

While DeMoisey may have continued to suffer some damage as a result of the lawsuit and/or legal

> opinion, the underlying tort was comprised of a single act, filing the complaint and/or opinion. Thus, DeMoisey's abuse of process claim does not meet the definition of a "continuing tort." *See No Drama, LLC v. Caluda*, 177 So.3d 747, 752 (La .App. 2015) ("In this case, we find that the abuse of process claim, based upon the willful and allegedly improper filing of the underlying lawsuit, is not a continuing tort. Although plaintiff alleges to have continuously sustained damages to its reputation and its finances until the dismissal of the underlying suit, the operating cause, the filing of the lawsuit, is not a continuous tort."); *Jones v. Slay*, 61 F. Supp. 3d 806, 844 (E.D. Mo. 2014) ("The Court concludes the Missouri continuing tort or continuing wrong doctrine does not apply to an abuse of process claim.").

DeMoisey, 2016 WL 2609321, at *14-15 (footnote omitted).

Based upon this holding, the circuit court in this case determined that the claim accrued, and the statute of limitations began running, on October 22, 2014, when Seiller Waterman filed a motion for extension of time to file supplemental briefs. This was the last action Seiller Waterman took in the appeal to this Court in the zoning proceedings. Therefore, Bardstown Capital filed its complaint outside the limitations period on November 4, 2016.

Bardstown Capital argues that *DeMoisey* is not binding precedent because this Court's opinion was ordered not to be published by the Supreme Court when it denied the motion for discretionary review;[3] that *DeMoisey* is

[3] Bardstown Capital, in footnote 84 of its brief, notes that the case between DeMoisey and Ostermiller is again before the Supreme Court on a motion for discretionary review. However,

distinguishable from this case; that its abuse of process claim filed in 2015 was dismissed as premature on Seiller Waterman's request; and that the motion to dismiss was premature as discovery was not complete. It also relies upon the Supreme Court's holding in *Alagia, Day, Trautwein & Smith v. Broadbent*, 882 S.W.2d 121, 125-26 (Ky. 1994), related to the occurrence rule: "Until the legal harm became fixed and non-speculative, the statute did not begin to run." It argues that its injuries continued throughout the underlying zoning litigation, meaning that its claim for abuse of process was not fixed and non-speculative and had not accrued. Finally, Bardstown Capital argues that Seiller Waterman waived this issue when it moved to dismiss the 2015 action as premature.

Seiller Waterman disputes Bardstown Capital's arguments, in particular that its 2015 complaint that was dismissed contained a claim for abuse of process. We have reviewed that complaint, and we agree with Seiller Waterman that it only pled a claim for wrongful use of civil proceedings, which did not accrue until the underlying action was final and was therefore premature as the circuit court's ruling was appealed to this Court. Accordingly, we cannot hold that

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that appeal arose from another lawsuit based on the same factual background. Of import to this case, this Court affirmed the circuit court's dismissal of the abuse of process claim based upon *res judicata* related to the holding in the 2016 opinion. *See DeMoisey v. Ostermiller*, No. 2017-CA-000730-MR, 2018 WL 2449117 (Ky. App. June 1, 2018). The Supreme Court has held the motion for discretionary review of that opinion in abeyance pending final disposition of *RLB Properties v. Seiller Waterman*, No. 2018-SC-000558-DG. In reviewing the briefs filed in *RLB Properties*, the accrual date of an abuse of process claim for statute of limitation purposes is not one of the issues raised in the appeal.

Seiller Waterman waived this defense. In addition, we agree with Seiller Waterman that Bardstown Capital's citation to *Alagia* does not support its argument, as that case addresses claims of legal malpractice rather than abuse of process.

Although the Supreme Court opted to depublish the opinion in *DeMoisey*, we nevertheless believe that this Court's holding that "the cause of action for an abuse of process claim accrues at the time the conduct complained of by the plaintiff occurred, not at the termination of the underlying litigation[,]" 2016 WL 2609321, at *14, is the correct statement of the law.[4] We reaffirm that holding here and hold that the circuit court properly concluded that Bardstown Capital brought its abuse of process claim past the one-year limitations period, as the claim began to accrue in October 2014. Bardstown Capital did not file its original complaint until November 2016, and it did not amend its complaint to add the abuse of process claim until February 2017.

For the foregoing reasons, the order dismissing the abuse of process claim is affirmed, the summary judgment is reversed, and this matter is remanded for further proceedings in accordance with this opinion.

[4] We cite this case pursuant to CR 76.28(4)(c): "Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court."

ALL CONCUR.

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