NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

CLAUDE DE BOTTON, NEWTOWN SQUARE EAST, L.P., NATIONAL DEVELOPERS, INC. AND NEWTOWN G.P., LLC,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
KAPLIN STEWART REITER & STEIN, P.C., MARC B. KAPLIN, ESQUIRE, BARBARA ANISKO, ESQUIRE AND PAMELA M. TOBIN, ESQUIRE (COLLECTIVELY "KSMRS"),	:	
Appellants	:	No. 1635 EDA 2012

Appeal from the Order Dated May 22, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division No(s).: 001997, October Term, 2010

CLAUDE DE BOTTON, NEWTOWN SQUARE EAST, L.P., NATIONAL DEVELOPERS, INC. AND NEWTOWN G.P., LLC,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
BPG REAL ESTATE INVESTORS, CAMPUS INVESTORS OFFICE B, L.P., CAMPUS INVESTORS 25, L.P., CAMPUS INVESTORS I BUILDING, L.P., CAMPUS INVESTORS H BUILDING, L.P., CAMPUS INVESTORS D BUILDING, L.P., CAMPUS INVESTORS COTTAGES, L.P., CAMPUS INVESTORS OFFICE 2B, L.P., ELLIS PRESERVE OWNERS ASSOCIATION, KELLY PRESERVE OWNERS ASSOCIATION, COTTAGES AT ELLIS OWNERS ASSOCIATION, GENBER/ MANAGEMENT CAMPUS, LLC, BERWIND	:	

PROPERTY GROUP, LTD., EXECUTIVE BENEFIT PARTNERSHIP CAMPUS, MANAGEMENT PARTNERSHIP BENEFIT, L.P. AND ELLIS ACQUISTION, L.P., KAPLIN STEWART MELOFF REITER & STEIN, P.C., MARC B. KAPLIN, ESQUIRE, BARBARA ANISKO, ESQUIRE, AND PAMELA M. TOBIN	:	
	:	No. 1734 EDA 2012
APPEAL OF: BPG DEFENDANTS	:	

Appeal from the Order Dated May 22, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division No(s).: 001997, October Term, 2010

BEFORE: FORD ELLIOTT, P.J.E., MUNDY, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED FEBRUARY 11, 2014**

Appellants, Kaplin Stewart Reiter & Stein, P.C., Marc B. Kaplin, Esq., Barbara Anisko, Esq., Pamela M. Tobin, Esq. (collectively, "Kaplin"), BPG Real Estate Investors, Campus Investors Office B, L.P., Campus Investors 25, L.P., Campus Investors I Building, L.P., Campus Investors H Building, L.P., Campus Investors D Building, L.P., Campus Investors Cottages, L.P., Campus Investors Office 2B, L.P., Ellis Preserve Owners Association, Kelly Preserve Owners Association, Cottages at Ellis Owners Association, Genber/Management Campus, LLC, Berwind Property Group, Ltd., Executive Benefit Partnership Campus, Management Partnership Benefit, L.P., and Ellis

* Former Justice specially assigned to the Superior Court.

Acquisition, L.P. (collectively, but excluding Kaplin, "BPG"),[1] appeal from the order entered in the Philadelphia County Court of Common Pleas ordering the production of privileged documents to Appellees, Claude de Botton, Newtown Square East, L.P., National Developers, Inc., and Newtown G.P., LLC (collectively, "de Botton").[2] Kaplin and BPG contend that the trial court erred by ordering the production of privileged information. As set forth in further detail below, this case—which has been litigated in the United States District Court for the Eastern District of Pennsylvania, the Court of Common Pleas of Delaware County, and the Court of Common Pleas of Philadelphia County—has consumed significant judicial resources. We vacate the order below and remand for further proceedings consistent with this decision.

We quote the findings of facts and conclusions of law as set forth in a prior decision by the United States District Court for the Eastern District of Pennsylvania:[3]

> [BPG] sue the defendants[4] for, *inter alia*, federal antitrust violations[.] According to the Amended

---

[1] BPG contends that BPG Real Estate Investors-Straw Party 1, L.P. and BPG Real Estate Investors-Straw Party 2, L.P., are also parties to the appeal but they are not named in the caption. ***See*** BPG's Brief at 4 n.1.

[2] Kaplin and BPG each filed a notice of appeal and an appellate brief. For ease of disposition, we resolve both appeals together.

[3] For clarity, we reformatted the federal court's decision and excluded docket numbers and parentheticals.

[4] In the federal lawsuit, there were numerous defendants not involved in the instant, underlying Philadelphia County lawsuit. The federal court labeled

> Complaint, BPG and the de Botton Defendants own parcels of land in Newtown Township, on which each of them would like to develop a "mixed use town center" ("MUTC")[.] The plaintiffs describe an MUTC as a "planned integration of mutually supportive commercial, retail, residential, entertainment and community uses in a pedestrian friendly environment on one parcel of land," Am. Compl. at ¶ 2[.] Simply stated, BPG alleges that the defendants have done a variety of illegal things to slow down or prevent BPG's development of an MUTC on its parcel of land[.] The defendants have purportedly taken these actions to eliminate competition with their own MUTC in Newtown Township[.]

BPG Real Estate Investors—Straw Party 1, L.P. v. de Botton, 09-1714 (E.D. Pa. Apr. 29, 2010) (order), at 2-3 (footnotes omitted) ("Fed. Order"). For example, in support of their antitrust allegations, BPG alleged that de Botton, *inter alia*, disparaged BPG, deterred potential MUTC tenants from signing leases with BPG, and abused the judicial process. Fed. First Am. Compl., 6/15/09, at 20, 29. BPG also claimed that de Botton bought a specific piece of property in order to have legal standing to object to BPG's development. ***Id.*** at 16.

We continue quoting from the federal district court's decision:

> BPG sues the de Botton Defendants in Count I for attempted monopolization in violation of § 2 of the Sherman [Antitrust] Act, and BPG brings claims in Count II against all defendants for antitrust conspiracy pursuant to § 1 of the Sherman Act[.] The de Botton Defendants move to dismiss Count I, and all defendants move to dismiss Count II[.] The defendants raise many arguments

---

Claude de Botton, National Developers, Inc., and Newtown G.P., LLC, as the "de Botton Defendants."

in favor of dismissal, but we will address only their contention that BPG fails to allege a relevant geographic market, as BPG must do to maintain its antitrust claims[.]

BPG has the burden of proving the relevant geographic market, and at this stage BPG must therefore allege facts in the Amended Complaint that could plausibly support its proposed relevant geographic market[.] The relevant geographic market is "the area in which a potential buyer may rationally look for the goods or services he or she seeks," ***Tunis Brothers Co. v. Ford Motor Co.***, 952 F.2d 715, 726 (3d Cir. 1991) (internal quotations omitted), *quoted* in ***U.S. Horticultural Supply v. Scotts Co.***, 2010 WL 729498 *4 (3d Cir. Mar. 4, 2010)[.] "[T]he geographic market is not comprised of the region in which the seller attempts to sell its product, but, rather, is comprised of the area where customers would look to buy such a product," ***U.S. Horticultural Supply***, 2010 WL 729498 at *4[.]

The plaintiffs allege that "[t]he relevant market in this action is the business of developing and operating mixed use town centers located at the intersection of Route 3, an east/west axis, and Route 252, a north/south axis in [Newtown] Township," Am. Compl. at ¶ 28[.] BPG also claims that the relevant geographic market is "[t]he approximately five mile area surrounding the cross roads of the two major access and travel roads (Routes 3 and 252)," ***Id.*** at ¶ 38[.] In BPG's response to the de Botton Defendants' motion to dismiss, they then puzzlingly argue that the relevant geographic market is Newtown Township, BPG Resp. to de Botton Mot. Dismiss at 22-23[.]

We could dismiss the antitrust claims due to the plaintiffs' failure to clearly and consistently allege a relevant geographic market[.] But BPG does not allege facts that could support a conclusion that **any** of its proposed geographic boundaries—the intersection, a five-mile radius around the intersection, or the Township as a whole—meets the requirements for a relevant geographic market[.] BPG does not, for example, allege any facts that could support a conclusion that the intersection or a five-mile radius of it—as opposed to a four-mile or ten-mile radius—is the boundary of the area in which a customer

> would rationally seek look to buy or use any of the goods or services that BPG hopes to offer at its MUTC[.] The same is true with respect to the entirety of Newtown Township[.] "The mere delineation of a geographical area, without reference to a market as perceived by consumers and suppliers, fails to meet the legal standard necessary for the relevant geographic market," ***Tunis Brothers***, 952 F.2d at 727[.]
>
> BPG argues that the defendants target similar geographic areas for marketing their MUTC, but this is unavailing because (1) the defendants' marketing plans do not determine the relevant geographic market for antitrust purposes and (2) the relevant geographic market is defined from the buyer's perspective, not the seller's[.] BPG states that "there are relatively few areas within the Philadelphia area where a mixed use town center can realistically be developed," but this does not address the relevant inquiry[.] BPG also contends that "consumer convenience" is a factor in defining the relevant geographic market and that it is possible to have a relatively small geographic market, Pl. Resp. Madison Marquette Mot. Dismiss at 21[.] This may be true, but BPG fails to allege any facts regarding "consumer convenience" that could support—much less plausibly support—a conclusion that its customers would not take advantage of MUTC offerings outside the small areas that BPG proposes as relevant geographic markets[.]
>
> We may take judicial notice of geography, and we therefore note that Newtown Township is a suburb of Philadelphia that is surrounded by other suburban towns and cities[.] Any of the potential customers of BPG's MUTC—*e.g.*, residential renters and buyers, upscale retailers, shoppers, and those seeking office space—could easily get those services from an MUTC at a different intersection, outside the five-mile radius, or outside of Newtown Township[.] BPG does not allege any facts to suggest that a potential customer of its MUTC would not seek goods or services from an MUTC that is, for example, five-and-a-half miles away from the intersection or in a neighboring suburb[.] We thus conclude that BPG has failed to allege a relevant geographic market, and we will

> dismiss its antitrust claims in Counts I and II, which are the only federal law claims in the Amended Complaint[.]

Fed. Order, at 3-9 (footnotes omitted). Accordingly, the district court dismissed the two federal antitrust claims. It also declined to exercise supplemental jurisdiction over BPG's remaining state claims of business disparagement, tortious interference, abuse of process, and civil conspiracy, and transferred the case to the Delaware County Court of Common Pleas. ***Id.*** at 12; ***see also*** Fed. First Am. Compl., 6/15/09, at 33-37.

The Delaware County Court of Common Pleas received the federal case on June 15, 2010. On November 22, 2010, BPG filed a second amended complaint in that court raising four claims: abuse of process, business disparagement, tortious interference with contractual rights and prospective economic advantage, and civil conspiracy. BPG's Second Am. Compl., 10-7352, 11/10/10, at 25-30 (Delaware Co.).

Similar to the federal action, BPG alleged in the Delaware County action that de Botton engaged in "a variety of illegal things to slow down or prevent BPG's development of an MUTC." ***See*** Fed. Order at 3. For example, for its abuse of process claim, BPG alleged that de Botton purchased a particular parcel of land in order to establish legal standing to oppose BPG's development. BPG's Second Am. Compl. at 17, 25 (Delaware Co.). De Botton, BPG claimed, subsequently abused legal process to interfere with BPG's development. ***Id.*** Another example is BPG's allegation

that de Botton's illegal acts interfered with BPG's prospective contractual relations with potential MUTC tenants. ***Id.*** at 29.

Meanwhile, on October 15, 2010, de Botton filed the instant suit in Philadelphia County against Kaplin and BPG. De Botton's Compl., 101001997, 10/15/10 (Phila. Co.). De Botton alleged claims of wrongful use of civil proceedings and abuse of process. ***Id.*** at 25, 28. The complaint referenced de Botton's ownership of the parcel of land set forth above, ***id.*** at 10, and that the parties were competing for prospective MUTC tenants. ***Id.*** at 9.

In response, BPG, in Delaware County, filed a motion to stay the Philadelphia County lawsuit and transfer it to Delaware County for coordination. BPG's Mot. for Immediate Stay, Transfer and Coordinate de Botton's Later Filed Phila. Action., 11/22/10 (Delaware Co.). De Botton opposed, and the Delaware County trial court denied BPG's motion without prejudice. Order, 2/2/11 (Delaware Co.). In denying the motion, the court relied on the representations of de Botton's counsel that discovery for the Philadelphia County action would "be conducted with 'laser-like precision' and limited solely to the issues" of whether Kaplin and BPG "acted without probable cause and for an improper purpose in filing [federal antitrust] claims against" de Botton. ***Id.*** at 1. The court permitted BPG to renew its request if discovery exceeded the "laser-like precision." ***Id.*** at 2.

Discovery thus continued in the Philadelphia County lawsuit. On April 13, 2011, de Botton served interrogatories and requests for documents on Kaplin and BPG. BPG and Kaplin objected on grounds of, *inter alia*, attorney-client privilege and work product doctrine. The parties then executed, and the Philadelphia court approved, a clawback agreement.[5]

> 1. In response to [de Botton's] requests for production and interrogatories served on April 13, 2011, [Kaplin] and BPG shall produce documents that constitute work product which was [sic] collected or created in connection with defining the relevant market for purposes of bringing the Federal Antitrust Claims in the Federal Court Action (herein referred to as the "Defendants' Designated Work Product Documents"). The production of the Defendants' Designated Work Product Documents shall not constitute a waiver of the Work Product Protection in the Philadelphia Action for all other documents which constitute work product in the Federal Action. Nor shall production of the Defendants' Designated Work Product Documents constitute a waiver by Defendants of Work Product Protection or any other privilege for the Philadelphia Action, Delaware County Action, or any other action previously brought or hereafter brought. Defendants' Designated Work Product Documents shall be protected from disclosure in the Delaware County Action, the Philadelphia Action, and any other action to the same degree as if BPG and [Kaplin] did not produce Defendants' Designated Work Product Documents in the Philadelphia Action pursuant to this agreement. [De Botton] may use, in the Philadelphia Action only, the Defendants' designated Work Product Documents.
>
> 2. This Agreement does not constitute a waiver, or an agreement to waive, attorney-client privilege by any party.

[5] A clawback agreement permits the production of documents without an intent to waive privilege and requires the return of mistakenly produced documents. ***See*** cmt. to Fed. R. Civ. P. 26.

> 3. [De Botton] agree[s] that they will not utilize in the Delaware County Action or any other pending or subsequent litigation any documents designated as Defendants' Designated Work Product Documents and produced in the Philadelphia Action. Nothing contained in this Agreement shall prohibit the use of any documents in the Delaware County Action properly obtained during the course of discovery in the Delaware County Action.
>
> 4. [De Botton] agree[s] that they will not use or rely on the production of the Defendants' Designated Work Product Documents to advance or support any argument in the Philadelphia Action or in any other pending or subsequent litigation between the parties that BPG or [Kaplin] have waived the Attorney-Client Privilege, Work Product Protection (except, in the Philadelphia Action, to the extent set forth above in paragraph 1 and subject to paragraph 5 below), or any other applicable privilege recognized at law.

Stipulated Non-Waiver and Clawback Agreement and Order, 10/26/11, at 4-5 (Phila Co.). Kaplin subsequently produced 290 pages of work product and a privilege log identifying withheld documents.

The parties, however, disputed the adequacy of the production. On February 7, 2012, de Botton filed a motion to compel Kaplin to produce selected documents for the court's *in camera* review. Kaplin opposed and the court granted de Botton's motion, reasoning as follows:

> At the heart of this wrongful use of civil process action are the very communications which [Kaplin] seek[s] protection for under the attorney-client privilege or the attorney work product doctrine. Therefore, they are relevant and discoverable and ostensibly not covered by the cited privileges. As an added layer of protection, this Court will conduct an in camera inspection of the un-redacted communications identified in [Kaplin's] Redaction Log attached to their Answer. . . .

Order, 4/18/12 (Phila. Co.).

Meanwhile, Kaplin and BPG filed a motion to stay the Philadelphia lawsuit in Philadelphia County on February 10, 2012. The Philadelphia trial court denied the motion on March 21, 2012, and adopted the rationale of the Delaware County trial court. Order, 3/21/12, at 9-10 (Phila. Co.).

Kaplin complied and submitted the disputed documents to the Philadelphia County trial court for *in camera* review. The court, focusing only on the documents' purported relevance to the underlying claims, granted in part de Botton's motion to compel. Order, 5/22/12, at 9-10 (Phila Co.). The trial court reasoned as follows:

> Therefore, the scope of discovery should allow for inquiry into the areas which include acts by [Kaplin and BPG] which are relevant to:
>
> 1. How the relevant geographic market was defined in the underlying Federal Complaint;
>
> 2. Issues concerning the level of fact pleading necessary to satisfy the pleading requirement established under ***Twombly***[6] and its progeny;

---

[6] In ***Ashcroft v. Iqbal***, 556 U.S. 662 (2009), the Supreme Court explained the holding of ***Bell Atlantic Corp. v. Twombly***, 550 U.S. 544 (2007):

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in ***Twombly***, . . . the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the

> 3. Issues concerning the ***Noerr-Pennington***[7] Doctrine which involve [de Botton's] right to petition governmental agencies as part of permitted political conduct and [de Botton's] inherent *First Amendment Rights*.
>
> 4. Issues concerning whether the petition activities were "mere sham."

Id. at 4. The trial court subsequently, for four pages, quoted from the underlying federal complaint and opined that after an *in camera* review, thirty documents were discoverable. ***Id.*** at 9. The court did not discuss the attorney-client privilege or work product doctrine. Kaplin and BPG each filed a timely notice of appeal[8] and a court-ordered Pa.R.A.P. 1925(b) statement.

Kaplin raises the following issues:

> elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."

Ashcroft, 556 U.S. at 677-78 (citations omitted); ***see generally*** Fed.R.Civ.P. 8. Unlike federal court, Pennsylvania is a fact pleading jurisdiction. ***Griffin v. Rent-A-Center, Inc.***, 843 A.2d 393, 395 (Pa. Super. 2004).

[7] The ***Noerr-Pennington*** antitrust immunity doctrine immunizes an individual "from liability for[, *inter alia*,] exercising his First Amendment right to petition the government" unless the individual is using the petition process to harass. ***Penllyn Greene Assocs., L.P. v. Clouser***, 890 A.2d 424, 429 n.5 (Pa. Cmwlth. 2005).

[8] An order compelling the disclosure of privileged information is appealable under the collateral order doctrine. ***Ben v. Schwartz***, 729 A.2d 547, 552 (Pa. 1999); ***accord Commonwealth v. Harris***, 32 A.3d 243, 249 (Pa. 2011) (reaffirming holding of ***Ben***, ***supra***, and disagreeing with contrary holding of ***Mohawk Indus., Inc. v. Carpenter***, 558 U.S. 100 (2009)).

> Did the lower court err by ordering [Kaplin] to produce attorney client privileged communications in this wrongful use of civil proceedings action where (a) reliance on counsel has not been asserted as a defense; (b) de Botton acknowledged the privilege was preserved pursuant to a stipulation previously approved by the lower court and (c) the privileged communications relate to claims asserted by [BPG] against [de Botton] in the Court of Common Pleas of Delaware County ("Delaware County Action").
>
> Did the lower court err by ordering [Kaplin] to produce attorney work product that (a) exceeded the scope of the parties' agreement set forth in the Stipulated Non-Waiver and Clawback Agreement and Order approved by the lower court and (b) pertains to [BPG's] state law claims pending in the underlying case against [de Botton] in the Delaware County Action.
>
> Because the discovery the court ordered in the wrongful use action infringes on the attorney client privilege and work product protection in the Delaware County Action, should the Court exercise its supervisory powers to stay the wrongful action in accordance with this Court's directive in ***Betts Industries, Inc. v. Heelan***, 33 A.3d 1262 (Pa. Super. Ct. 2011).

Kaplin's Brief at 5.

BPG raises the following issues:

> Did the trial court err in its Order of May 22, 2012 by directing [Kaplin] to produce documents protected from discovery and disclosure by the attorney-client privilege that exists between [Kaplin] and [BPG]?
>
> Where [BPG has] not asserted advice of counsel as a defense in this litigation or otherwise waived their attorney-client privilege with respect to confidential communications with [Kaplin], did the trial court err in its Order of May 22, 2012 by directing [Kaplin] to produce documents protected by the attorney-client privilege that exists between [Kaplin] and [BPG]?

> Where there has been no argument or finding that the attorney-client privilege was waived by [Kaplin] or [BPG], did the trial court err in its Order of May 22, 2012 by directing [Kaplin] to produce documents protected by the attorney-client privilege that exists between [Kaplin] and [BPG]?
>
> Where there has been no argument or finding that a recognized exception to the attorney-client privilege applies, did the trial court err in its Order of May 22, 2012 by directing [Kaplin] to produce documents protected by the attorney-client privilege that exists between [Kaplin] and [BPG]?

BPG's Brief at 4-5.

We summarize the argument for Kaplin's first and second issues and BPG's issues. Kaplin contends the trial court failed to ascertain whether the attorney-client privilege or work product doctrine applies. It asserts the court failed to enforce its own non-waiver order enforcing the parties' stipulation regarding the privilege and doctrine. Kaplin argues the court compelled production of the documents without citing any legal authority. BPG similarly stresses that the trial court never held that the privilege did not exist, was waived, or otherwise eliminated. BPG also maintains that the documents are subject to privilege, which has not been waived, and there is no exception permitting the court to negate the privilege. We hold that Kaplin and BPG are entitled to relief.

The standard of review for an order compelling the disclosure of privileged information is *de novo*. ***Nationwide Mut. Ins. Co. v. Fleming***, 924 A.2d 1259, 1263 (Pa. Super. 2007).

> [A] two-part inquiry has been used to resolve disputes over disclosure of communications for which attorney-client privilege has been asserted. The first part of the inquiry is whether attorney-client privilege does indeed apply to a particular communication. If the court holds that the privilege does apply, then the court must engage in the second part of the inquiry: whether an exception or waiver applies, thereby overcoming the privilege and permitting disclosure.

Id. at 1265-66 (citation omitted). The inquiry entails shifting burdens of proof:

> The party who has asserted attorney-client privilege must initially set forth facts showing that the privilege has been properly invoked; then the burden shifts to the party seeking disclosure to set forth facts showing that disclosure will not violate the attorney-client privilege, *e.g.*, because the privilege has been waived or because some exception applies.

Id. at 1266 (citation omitted). The ***Fleming*** Court conducted a comprehensive, detailed review of the document in question in resolving whether privilege attached. ***Id.*** at 1269. The trial court should also review the documents at issue, "rule on the relevance of each [document] or explain why the privileges raised were inapplicable." ***Gocial v. Indep. Blue Cross***, 827 A.2d 1216, 1223 (Pa. Super. 2003) (remanding to have trial court "issue a ruling with respect to each document actually sought").

With respect to the work product doctrine, we initially note "that the interpretation and application of a Pennsylvania Rule of Civil Procedure presents a question of law." ***Barrick v. Holy Spirit Hosp. of the Sisters***

of Christian Charity, 32 A.3d 800, 808 (Pa. Super. 2011) (*en banc*), *appeal granted*, 52 A.3d 221 (Pa. 2012).

The Pennsylvania Rules of Civil Procedure set forth the attorney work-product doctrine, which provides as follows.

> **Rule 4003.3. Scope of Discovery. Trial Preparation Material Generally**
>
> Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa.R.C.P. 4003.3 (emphasis added). According to the explanatory comment accompanying Pa.R.C.P. 4003.3, "[t]he Rule is carefully drawn and means exactly what it says." "The underlying purpose of the work-product doctrine is to shield the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case. The doctrine promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients." Thus, Pa.R.C.P. 4003.3 specifically "immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more."

This Court, however, has recognized that "the work-product privilege is not absolute and items may be deemed

discoverable if the 'product' sought becomes a relevant issue in the action." Importantly, the explanatory comment reveals that this limited exception to the work-product doctrine only pertains to situations when an attorney's work product itself becomes relevant.

> There are, however, situations under the Rule where the legal opinion of an attorney becomes a relevant issue in an action; for example, an action for malicious prosecution or abuse of process where the defense is based on a good faith reliance on a legal opinion of counsel. The opinion becomes a relevant piece of evidence for the defendant, upon which defendant will rely. The opinion, even though it may have been sought in anticipation of possible future litigation, is not protected against discovery. A defendant may not base his defense upon an opinion of counsel and at the same time claim that it is immune from pre-trial disclosure to the plaintiff.
>
> As to representatives of a party, and sometimes an attorney, there may be situations where his conclusions or opinion as to the value or merit of a claim, not discoverable in the original litigation, should be discoverable in subsequent litigation. For example, suit is brought against an insurance carrier for unreasonable refusal to settle, resulting in a judgment against the insured in an amount in excess of the insurance coverage. Here discovery and inspection should be permitted in camera where required to weed out protected material.

Pa.R.C.P. 4003.3, Explanatory Comment at ¶ 4–5. Thus, as the comment makes clear, documents ordinarily protected by the attorney work-product doctrine may be discoverable if the work product itself is relevant to the underlying action. The work-product privilege contained within Pa.R.C.P. 4003.3 cannot be overcome, however, by merely asserting that the protected documents reference relevant subject matter. Rather, to overcome the work-product privilege, either an attorney's mental impressions,

> conclusions, opinions, memoranda, notes, summaries, legal research or legal theories must be directly relevant to the action.

Id. at 811-12 (emphases and most citations omitted).

As set forth above, in the federal lawsuit, BPG raised claims of attempted monopolization under § 2 of the Sherman Act and antitrust conspiracy under § 1 of the Sherman Act. "Liability under § 2 requires '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" ***Broadcom Corp. v. Qualcomm Inc.***, 501 F.3d 297, 306-07 (3d Cir. 2007) (quoting ***United States v. Grinnell Corp.***, 384 U.S. 563, 570-71 (1966)). The second element—willful acquisition or maintenance—requires proof of "[c]onduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive." ***Id.*** at 308 (citations omitted).

Liability under § 1 of the Sherman Act requires proof of the following elements: "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action." ***Gordon v. Lewistown Hosp.***, 423 F.3d 184, 207 (3d Cir. 2005) (citations omitted).

BPG also raised, in the Delaware County action, state claims of abuse of process, business disparagement, tortious interference with contractual rights and prospective economic advantage, and civil conspiracy.

We note:

> "Abuse of process" is defined as "the use of legal process against another primarily to accomplish a purpose for which it is not designed."
>
> > To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff.
>
> Abuse of process is, in essence, the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process. Thus, the gravamen of this tort is the perversion of legal process to benefit someone in achieving a purpose which is not an authorized goal of the procedure in question.
>
> Abuse of process is a state common law claim.

Werner v. Plater-Zyberk, 799 A.2d 766, 785 (Pa. Super. 2002) (citations omitted). Unlike a wrongful use claim, an abuse of process claim does not require establishing gross negligence or absence of probable cause. ***See Cruz v. Princeton Ins. Co.***, 972 A.2d 14, 19 n.5 (Pa. Super. 2009) (*en banc*).

Business disparagement, *i.e.*, trade libel or injurious falsehood, requires proof of the following elements:

> (1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably

> should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows that the publication is false or acts in reckless disregard of its truth or falsity.

Maverick Steel Co., L.L.C. v. Dick Corporation/Barton Malow, 54 A.3d 352, 354 (Pa. Super. 2012) (citation omitted), *appeal denied*, 65 A.3d 415 (Pa. 2013).

The following elements are required to establish a claim for tortious interference with contractual rights:

> (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party;
>
> (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;
>
> (3) the absence of privilege or justification on the part of the defendant; and
>
> (4) the occasioning of actual legal damage as a result of the defendant's conduct.
>
> In determining whether a particular course of conduct is improper for purposes of setting forth a cause of action for intentional interference with contractual relationships, or, for that matter, potential contractual relationships, the court must look to section 767 of the Restatement (Second) of Torts. This section provides the following factors for consideration: 1) the nature of the actor's conduct; 2) the actor's motive; 3) the interests of the other with which the actor's conduct interferes; 4) the interests sought to be advanced by the actor; 5) the proximity or remoteness of the actor's conduct to interference, and 6) the relationship between the parties.

Id. at 355 (citation omitted).

The elements of a civil conspiracy claim are set forth below:

> In order to state a civil action for conspiracy, a complaint must allege: 1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; 2) an overt act done in pursuance of the common purpose; and 3) actual legal damage. Additionally, absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act. Proof of malice is an essential part of a cause of action for conspiracy. The mere fact that two or more persons, each with the right to do a thing, happen to do that thing at the same time is not by itself an actionable conspiracy.

Goldstein v. Phillip Morris, Inc., 854 A.2d 585, 590 (Pa. Super. 2004) (citations and quotation marks omitted).

As discussed above, in the Philadelphia lawsuit, de Botton raised claims of wrongful use of civil proceedings and abuse of process with respect to the two federal antitrust claims. The elements for a claim of wrongful use of civil proceedings are set forth by statute:

> **(a) Elements of action.—**A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:
>
> (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
>
> (2) The proceedings have terminated in favor of the person against whom they are brought.

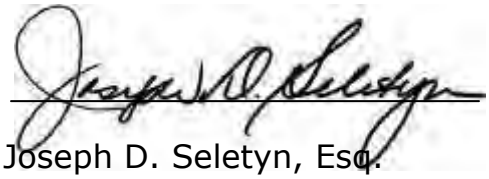
42 Pa.C.S. § 8351(a)(1)-(2). "Thus, in an action for wrongful use of civil proceedings, the plaintiff first must demonstrate that the person taking part in the initiation, procurement or continuation of civil proceedings either acted in a grossly negligent manner, or that he lacked probable cause." ***Werner***, 799 A.2d at 786 (citation omitted). The elements for de Botton's abuse of process claim were set forth above.

Instantly, the trial court failed to discuss the attorney-client privilege or work product doctrine in compelling the production of thirty documents. ***See Barrick***, 32 A.3d at 811-12; ***Fleming***, 924 A.2d at 1265-66. The court's heavy emphasis on the documents' purported relevance to establishing the claims in the Philadelphia County lawsuit did not justify the court's *de facto* holding that the attorney-client privilege and work product doctrine did not apply to the documents in question. The court, similarly, did not discuss the applicability, if any, of the parties' stipulated, court-enforced clawback agreement. Moreover, the broad, generalized nature of the court's rationale necessarily precluded individualized explanations as to why the attorney-client privilege or work product doctrine did not apply to a particular document or discrete category of closely related documents. ***Cf. Fleming***, 924 A.2d at 1268-69 (examining document in ascertaining whether privilege attached); ***Gocial***, 827 A.2d at 1223 (remanding to have trial court render individualized rulings for each document at issue). Absent

any such meaningful discussion,[9] this Court is unable to ascertain whether the trial court properly compelled the production of these documents. Accordingly, having discerned an error of law, we are constrained to vacate the order and remand to have the trial court apply the factors for disclosing or not disclosing the documents at issue, particularly in the context of the claims raised in this case, ***see, e.g.***, ***Werner***, 799 A.2d at 786, and a court-approved clawback agreement. ***See Barrick***, 32 A.3d at 808; ***Fleming***, 924 A.2d at 1263; ***see also Gocial***, 827 A.2d at 1223.

Order vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/11/2014

[9] As with any privilege log, any such discussion need not encroach upon privileged or otherwise protected information.