IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

Vinit Khanna; OKS Group, LLC; and OKS Group International Pvt. Ltd.	:	Case ID: 230800139
v.	:	
Duane Morris LLP	:	
	:	No. 2662 EDA 2025

OPINION

ERDOS, J. **February 13, 2026**

This appeal arises from a discovery dispute and the Order granting Defendant/Appellee Duane Morris LLP's ("Duane Morris") motion to compel production of documents that are typically privileged.

FACTS AND PROCEDURAL HISTORY

From July 2018 to July 2020, Duane Morris represented Plaintiffs/Appellants Vinit Khanna, OKS Group, LLC, and OKS Group International Pvt. Ltd. (collectively, "OKS") in the United States. In 2018, Duane Morris represented OKS in an arbitration proceeding with Servis One, Inc., d/b/a BSI Financial Services ("BSI"). OKS and BSI did some business in India, OKS alleged BSI stole trade secrets and then reported BSI's alleged criminal conduct to Indian law enforcement, and the arbitration ended in a settlement agreement.

In 2020, BSI brought the first of two federal actions against OKS. This federal suit is referred to as *BSI v. OKS I* and involved BSI's motion to enforce the 2018 settlement

agreement with OKS, part of which had required resolving all pending civil and criminal disputes.[1] In March of 2020, Duane Morris represented to the federal court in *BSI v. OKS I* that the parties had reached a settlement. OKS alleges Duane Morris did so without OKS's authorization or knowledge. Duane Morris terminated their representation of OKS on July 24, 2020. Around this time, OKS also named BSI in a protest petition in India relating to criminal charges previously alleged by OKS against BSI.

BSI once again sued OKS in federal court in *BSI v. OKS II* in an attempt to enforce the 2020 settlement agreement from *BSI v. OKS I*. Another company, Axtria, Inc. ("Axtria"), also sued OKS around this time to enforce a 2017 settlement with OKS, and that suit ended at the summary judgment phase.

OKS filed the present suit against Duane Morris in August 2023, alleging legal malpractice and breach of fiduciary duty surrounding the disputed 2020 settlement agreement in the first federal action. OKS seeks to recover as compensatory damages attorneys' fees and costs spent defending *BSI v. OKS II* and the Axtria case, which add up to around $2.3 million.

Duane Morris filed this motion to compel contributory negligence and proximate causation discovery in July of 2025. A hearing was held on September 17, 2025, at which the parties informed the Court that they had narrowed the issues in dispute. The Court granted Duane Morris's motion. OKS filed a motion for reconsideration, which the Court denied. OKS filed this timely and permissible interlocutory appeal.

ISSUES

Appellant raises the following errors in his statement of errors filed pursuant to Pa.R.A.P. 1925(b), shortened and consolidated for brevity:

---

1 There appears to be disagreement between Duane Morris and OKS's counsel in India regarding the methods and extent to which OKS legally could withdraw or otherwise resolve the criminal proceedings against BSI in India.

1. The Court erred in its Order of September 17, 2025 by compelling Plaintiffs to produce attorney-client privileged communications and documents, and documents protected by the work product doctrine in the two underlying cases.
2. The Court erred in its Order of September 17, 2025 by accepting Defendant's argument for an "at-issue" waiver of attorney-client and work product communications without a showing that Plaintiffs affirmatively asserted their state of mind.
3. The Court erred in its Order of September 17, 2025 by requiring Plaintiffs to produce information concerning settlement communications and positions that comprise "mediation communications" and "mediation documents" as defined and prohibited by 42 Pa. C.S. § 5949, despite no statutory exception.
4. The Court erred when it failed to make express findings about any at-issue waiver of the attorney-client privilege or work product doctrine.
5. The Court erred in its Order of October 17, 2025 by denying Plaintiffs' Emergency Motion for Reconsideration of the Order of September 17, 2025.

DISCUSSION

Under Rule 408 of the Pennsylvania Rules of Evidence, evidence of "furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and conduct or a statement made during compromise negotiations about the claim" is not admissible "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." However, 408(b) allows such evidence to be admitted for another purpose, such as proving a witness's bias, and does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. Whether any documents produced at discovery will be admissible at trial is a

question for later, but in any case Appellee seeks communications regarding compromise negotiations of the *BSI v. OKS II* and the Axtria Action, not to prove the validity or invalidity of the claims, but rather to discover whether Appellant had other goals in pursuing the litigation separate from the merits of the claims themselves.

Appellant objects to the fact that Appellee never served any written discovery requests seeking the documents at issue but instead sought the documents for the first time on this motion to compel. Parties do not file all their discovery requests on the docket, so it is difficult for the Court to know about formal or informal requests made outside of motions. That being said, even if Appellee did not strictly conform with the procedure for requesting production of documents, Appellant was not unduly prejudiced. Both parties had the opportunity to brief their positions and have oral argument.

I. RELEVANCY

Appellant argues that information regarding settlement discussions or lack thereof is irrelevant to any issue in the case, including contributory negligence and proximate cause, because it had no duty to settle. But Appellee does not claim Plaintiff had a duty to settle. Rather, it raises as an affirmative defense that it was not the proximate cause of OKS's claimed compensatory damages.

The three prongs of a legal malpractice action are 1) the employment of the attorney; 2) the failure of the attorney to exercise ordinary skill and knowledge; and 3) that such negligence was the proximate cause of damage to the plaintiff. *Rizzo v. Haines*, 555 A.2d 58, 65 (Pa. 1989). OKS alleges that Duane Morris fraudulently settled the first federal action in 2020, *BSI v. OKS I*, without OKS's authorization. But for the fraudulent settlement, it argues, BSI would not have sued OKS to enforce said settlement and OKS would not have accrued the attorney fees associated with that second federal action. Duane Morris's position is that OKS did agree to the 2020 settlement, and had OKS simply complied with the 2020

settlement, OKS would not have had to pay to defend itself against BSI. Duane Morris argues that the second federal action and $2 million plus in legal fees were unnecessary and completely self-inflicted.

Communications between OKS and its counsel regarding their goals and objectives, and the reasons for it incurring fees and expenses to defend against the federal actions, may be relevant and discoverable if, for instance, these discussions involved attempting to extract a greater financial settlement from BSI than their previous 2020 settlement and leveraging the refusal to withdraw the criminal case in India to that end. *N.T. 9/17/26*, 40:16–22. This would show that OKS—and not Duane Morris—was the cause of the attorney fees and costs in defending the second federal case. Of course, if no such discussions occurred, then there is nothing for Appellant to produce in that regard.

II. AT-ISSUE WAIVER OF PRIVILEGE

The attorney-client privilege protects from disclosure "confidential communications between a client and an attorney made for the purpose of obtaining or providing professional legal advice and applies to both communications from the client to the attorney and communications from the attorney to the client." *Carlino E. Brandywine, L.P. v. Brandywine Vill. Associates.*, 301 A.3d 470, 479 (Pa. Super. 2023). However, this privilege can be waived by a party "asserting a claim, defense or argument that places the attorney's communications or actions in issue or attempts to prove a claim or defense by reference to privileged material." *Id.* An at-issue waiver "is not limited to situations where the party specifically pleads reliance on advice of counsel or actually relies on privileged or protected documents and can also be found based on a party's affirmative assertion of its state of mind as a defense or issue in the case where that state of mind could be based on attorney advice or communications." *Id.*

Appellant argues that assertion of state of mind is thus required for an at-issue waiver of privilege, and that such an assertion of state of mind does not exist here; therefore, there can be no waiver. Unfortunately, case law from the Pennsylvania courts on this issue is not robust. The *Carlino* case appears to give two options for at-issue waiver: 1) the client asserts a claim or defense that puts the attorney's communications at issue; or 2) the client does not rely on privileged documents/communications in their claim, but does raise their state of mind as a defense, and that state of mind is potentially based on the privileged communications.

In this case, OKS has a claim for legal malpractice and breach of fiduciary duty against Duane Morris. The third prong of a legal malpractice claim requires the negligence of the attorney to be the proximate cause of damage to the plaintiff. The damages claimed here are the attorney fees and costs spent in defending the *BSI v. OKS II* and the Axtria Action. In order to allow Duane Morris to raise a defense as to proximate cause and damages, they should be permitted discovery on the Plaintiff's objectives and reasons for defending against BSI and Axtria and the reasonableness of the $2 million in fees put forward by OKS as their damages. At the heart of the proximate cause issue is OKS's state of mind during *BSI v. OKS II* and the Axtria Action. Either OKS's communications reveal that it believes they did not agree to the 2020 settlement and that is why they had to spend a great deal of time and money defending against BSI, or OKS believes they did agree to the 2020 settlement but regretted agreeing afterwards.

Appellee cites to other jurisdictions to support the view that a malpractice plaintiff places communications about causation at issue by seeking to recover subsequent attorneys' fees. Although not binding, the Court find those cases persuasive. *See Aurora Loan Services, Inc. v. Posner, Posner & Associates, P.C.,* 499 F. Supp. 2d 475 (S.D.N.Y. 2007) (finding plaintiffs in legal malpractice action placed privileged communications with subsequent

counsel "at-issue" by seeking damages on the basis of lost interest related to the failure of defendant law firm to prosecute plaintiff's claims); *Pappas v. Holloway*, 114 Wash. 2d 198 (1990) (finding plaintiff in legal malpractice action waived attorney client privilege over communications with subsequent and concurrent counsel by taking the affirmative act of counterclaiming malpractice and holding that allowing plaintiff to block defendant's request for communications relating to subsequent litigation would deny defendants an adequate defense); *Lyon Financial Services, Inc. v. Vogler Law Firm P.C.*, 2011 WL 3880948 (S.D. Ill. Sept. 2, 2011) (finding an implied at-issue waiver of privileged communications because otherwise defendants would be effectively precluded from challenging the causation and actual damages prongs of legal malpractice).

Public Policy

Appellant additionally raises a public policy argument, claiming that if the Court's order is not reversed, Pennsylvania clients seeking advice of counsel must be wary about the confidentiality of their communications because they may later be found to have unwittingly waived the privilege if they end up in litigation in which those communications are requested in discovery. This would be so, it asserts, even though the clients did not plead advice of counsel or otherwise take any litigation positions that they could have reasonably expected would result in an "at-issue" waiver.

The Pennsylvania Rules of Evidence are clear that there are exceptions and waivers to the attorney-client privilege, so Pennsylvania clients seeking advice of counsel must always keep that in mind, regardless of whether waiver exists in this case. Here, Appellant has sued its former counsel and claimed that but for their former counsel's actions during representation, the subsequent litigation would not have occurred. Because Appellant is the party who introduced the issue of the fees in the underlying litigation, it would be reasonable

to expect that the necessity and extent of the fees and costs would prompt discovery and potentially put proximate cause and damages at issue.

III. SETTLEMENT COMMUNICATIONS

Appellant states that the Court erred by requiring it to produce information concerning settlement communications and positions that comprise "mediation communications" and "mediation documents" as those terms are defined in 42 Pa. C.S. § 5949, which includes its communications with two settlement mediators and with its own counsel about the mediations, and work product concerning the mediations. This is because that statute prohibits compelled disclosure of such materials "through discovery or any other process," and no statutory exception applies in this case.

The part of the September 17 Order regarding settlement communications reads as follows: "Plaintiffs shall produce all documents [. . .] relating to [. . .] Plaintiffs' settlement position and settlement discussions in the Second Federal Enforcement Action and Axtria Action, including the reasons for Plaintiffs' opposition to enforcement of the settlements at issue in those cases."

Section 5949(c) defines "mediation communication" as "[a] communication, verbal or nonverbal, oral or written, made by, between or among a party, mediator, mediation program or any other person present to further the mediation process when the communication occurs during a mediation session or outside a session when made to or by the mediator or mediation program." This section defines "mediation documents" as "[w]ritten material, including copies, prepared for the purpose of, in the course of, or pursuant to mediation. The term includes, but is not limited to, memoranda, notes, files, records and work product of a mediator, mediation program or party."

It can be seen by these definitions that § 5949 primarily concerns interactions with mediators. The Court agrees that communications and documents between the parties and

mediators is not discoverable under this statute. There is also a limitation on some of the documents written by parties in the course of the mediation, but not discussions prior to mediation proceedings. At the discovery hearing, the parties appeared to only dispute communications between counsel and Plaintiff; there was no mention of communications with mediating bodies. And again, although it was not written in the Order, the Court planned, if requested, on reviewing the potentially applicable discovery documents in camera before requiring their disclosure. *N.T. 9/17/25*, 42:13–20.

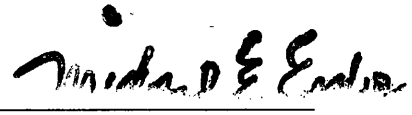
IV. EXPRESS FINDINGS

Appellant claims the Court committed legal error by failing to make express findings about any at-issue waiver of the attorney-client privilege or work product doctrine so that it could identify documents containing attorney-client communications or work product subject to the purported waiver and provide them to the Court for review. The Court anticipated reviewing documents produced under its Order to first be reviewed in camera before they were provided to Appellee. *N.T. 9/17/25*, 42:13–20. While a more detailed order with express findings would certainly have been helpful to the parties, failing to do so is not a legal error, and Appellant cites no authority to the contrary.

V. RECONSIDERATION MOTION

Appellant also argues that the Court erred by denying Appellant's Emergency Motion for Reconsideration. The motion for reconsideration raised no new arguments, and the Court was not persuaded to change its mind.

BY THE COURT:



MICHAEL ERDOS, J.

DATE: February 13, 2026