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TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001232-MR
AND
NO. 2004-CA-000633-MR

KUHLMAN ELECTRIC CORPORATION — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 01-CI-03147

STEPHEN R. CHAPPELL AND THOMAS M. COOPER, INDIVIDUALLY AND AS PARTNERS AND/OR EMPLOYEES OF LANDRUM & SHOUSE, A KENTUCKY GENERAL PARTNERSHIP; LANDRUM & SHOUSE, A KENTUCKY GENERAL PARTNERSHIP; AND LANDRUM & SHOUSE, L. L. P., A KENTUCKY LIMITED LIABILITY PARTNERSHIP; AND GEORGE PARKER, JIM SMIRZ, CECIL DUNN, DAVID A. FRANKLIN, JOHN BURRUS, LIONEL A. HAWSE, STEPHEN M. O'BRIEN, SHEILA HIESTAND, WILLIAM SHOUSE, MARK MOSELEY, PIERCE HAMBLIN, LESLIE VOSE, JOHN MARTIN, JR., LARRY DEENER, MARK HINKEL, JOHN MCNEILL, SANDRA DAWAHARE, KENT WESTBERRY, DOUGLAS HOOTS, DANIEL MURNER, AND DAVID WHALIN, BEING THE REMAINING PARTNERS OF LANDRUM & SHOUSE, A KENTUCKY GENERAL PARTNERSHIP, BETWEEN AUGUST 18, 1991 AND JUNE 29, 2000, INDIVIDUALLY AND D/B/A LANDRUM & SHOUSE, A KENTUCKY GENERAL PARTNERSHIP; AND AMERISURE MUTUAL INSURANCE COMPANY (FORMERLY KNOWN AS MICHIGAN MUTUAL INSURANCE COMPANY) — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, DYCHE, AND SCHRODER, JUDGES.

DYCHE, JUDGE: Kuhlman Electric Corporation appeals from an order of the Fayette Circuit Court granting appellees, Landrum & Shouse, Landrum & Shouse, L.L.P., and various former and/or current partners of Landrum & Shouse (collectively Landrum & Shouse) summary judgment in a legal malpractice case wherein Kuhlman Electric alleges various causes of action in connection with litigation in a workers' compensation case (Case No. 2003-CA-001232-MR). In a consolidated companion case, Kuhlman Electric appeals from an order granting Amerisure Mutual Insurance Company (f/k/a Michigan Mutual) (Amerisure), the insurance company which retained Landrum & Shouse to represent Kuhlman Electric in the workers' compensation matter, summary judgment upon the appellant's various claims against the insurer in connection with the workers' compensation case. (Case No. 2004-CA-000633-MR.) Kuhlman Electric alleges that the circuit court erroneously granted summary judgment to Landrum & Shouse and Amerisure. Because Kuhlman Electric is unable to demonstrate damages in either case, we affirm.

PROCEDURAL BACKGROUND

Kuhlman Electric purchased and maintained a workers' compensation insurance policy through Amerisure covering work-related injuries sustained by its employees during at least the period of April 15, 1977, through October 1, 1988. Among other things, the insurance policy provided that Amerisure would provide legal representation and a defense to Kuhlman Electric against any workers' compensation claims brought against Kuhlman Electric arising from injuries sustained during the policy period.

On April 15, 1977, Kuhlman Electric employee, William Burgess, suffered a work-related back injury. Burgess subsequently filed a claim seeking workers' compensation benefits. Amerisure retained Landrum & Shouse to represent Kuhlman Electric in the ensuing workers' compensation litigation. On July 30, 1979, the Workers' Compensation Board (Board) entered an order awarding Burgess workers' compensation benefits for the April 15, 1977, injury.

On April 6, 1988, Burgess filed a motion to reopen his workers' compensation claim, asserting that there had been a worsening of his condition. Amerisure again retained Landrum & Shouse to defend Kuhlman Electric in the action. The motion to reopen was initially granted by the Administrative Law Judge

(ALJ), but, upon appeal, that determination was reversed by this Court.

On October 1, 1988, Kuhlman Electric terminated its workers' compensation insurance coverage with Amerisure, and became self-insured for workers' compensation purposes. Amerisure, however, had a continuing obligation to Kuhlman Electric for claims arising from events occurring within the policy period, including the Burgess injury.

On November 14, 1991, Burgess filed a second motion to reopen his 1977 case, and Amerisure again retained Landrum & Shouse to represent Kuhlman Electric. On behalf of Kuhlman Electric, Landrum & Shouse objected to Burgess's motion to reopen. However, on February 26, 1992, the ALJ issued an order granting Burgess's motion to reopen his previous workers' compensation claim based upon a change in his condition and an increase in his occupational disability attributable to the April 15, 1977 work-related injury.

On August 24, 1992, Landrum & Shouse, on behalf of Kuhlman Electric as insured by Amerisure, filed a motion to join Kuhlman Electric in its capacity as a self-insurer as a party to the workers' compensation action. The motion argued that Burgess had not, in August 1991, suffered a worsening of his 1977 injury (which would be subject to coverage by Amerisure) but, rather, had suffered a new injury (which, if so, would be

subject to coverage by Kuhlman Electric in its self-insured capacity). Kuhlman Electric, in its capacity as self-insured, did not object to the joinder motion at that time. On November 20, 1992, the ALJ entered an order granting the motion to add Kuhlman Electric in its self-insured capacity as a party to the workers' compensation action.

The case languished, and it was not until 1996 that Burgess filed a motion alleging that a new injury, rather than a worsening of the original 1977 injury, had occurred in August 1991. At this time Kuhlman Electric, as self-insured, objected to the new injury claim based upon lack of notice and expiration of the statute of limitations for bringing the new injury claim. These defenses were rejected, however, based upon the ALJ's determination that Kuhlman Electric was estopped from raising the defenses because the company itself (in the August 24, 1992, motion filed by Landrum & Shouse) had originally suggested that the August 1991 injury was a new injury rather than a worsening of the 1977 injury.

Ultimately, the ALJ determined that Burgess had incurred a new injury, and that he had suffered no increase in occupational disability from the 1977 injury. As a result, Kuhlman Electric, in its self-insured capacity, was required to pay workers' compensation benefits to Burgess. The ALJ's

decision was upheld by the Workers' Compensation Board, this Court, and the Supreme Court.

On August 22, 2001, Kuhlman Electric filed an action in Fayette Circuit Court against Landrum & Shouse and Amerisure. As amended, the complaint alleged causes of action against Landrum & Shouse based upon professional negligence, breach of contract, negligent and intentional breach of fiduciary duties, gross negligence, and breach of implied covenant of good faith and fair dealing. As amended, the complaint stated causes of action against Amerisure based upon breach of contract, breach of fiduciary duties, aiding and abetting Landrum & Shouse in its breach of fiduciary duties, and bad faith.

On March 14, 2003, Landrum & Shouse filed a motion for summary judgment. On May 12, 2003, the circuit court entered an order granting the appellees summary judgment on all claims against Landrum & Shouse. Kuhlman Electric filed a motion to alter, amend, or vacate, which was denied by order dated June 2, 2003. Kuhlman Electric subsequently filed its notice of appeal from these rulings (Case No. 2003-CA-001232-MR).

On July 8, 2003, Amerisure filed a motion for summary judgment. On March 1, 2004, the circuit court entered an order granting summary judgment to Amerisure. Kuhlman Electric subsequently filed its notice of appeal from that ruling (Case No. 2004-CA-000633-MR). By order dated June 29, 2004, this

Court ordered that Case Nos. 2003-CA-001232-MR and 2004-CA-000633-MR be consolidated.

PRESERVATION OF ERROR

We begin with a procedural issue. Landrum & Shouse argues in its brief that Kuhlman Electric's brief to this Court fails to comply with the Kentucky Rules of Civil Procedure ("CR"), and should be stricken from the record. Landrum & Shouse argues that Kuhlman Electric's brief fails to provide references to the record to support its factual statement of the case (CR 76.12(4)(c)(iv)), and that it has failed to identify how, and where in the record, it has preserved its issues for appeal (CR 76.12(4)(c)(v)). Landrum & Shouse is correct; the initial brief of Kuhlman Electric in the action against Landrum & Shouse makes no attempt whatsoever at compliance with the rule.

Violation of this rule has been held to justify dismissal of the appeal or summary affirmance. As early as 1986, in Skaggs v. Assad, by and through Assad, 712 S.W.2d 947 (Ky. 1986), and continuing through numerous cases such as Elwell v. Stone, 799 S.W.2d 46 (Ky.App. 1990), Phelps v. Louisville Water Co., 103 S.W.3d 46 (Ky. 2003), and Parrish v. Kentucky Board of Medical Licensure, 145 S.W.3d 401 (Ky.App. 2004), the appellate courts of this Commonwealth have enforced the rule requiring an appellant to specifically designate where and how

the alleged errors were preserved for review, and explained its purpose:

> CR 76.12(4)(c)(iv) [now (v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court.

Massie v. Persson, 729 S.W.2d 448, 452 (Ky.App. 1987), overruled on other grounds by Conner v. George W. Whitesides Co., 834 S.W.2d 652 (Ky. 1992).

When such a violation is brought to the offending party's attention, the defect can be cured in its reply brief. Hollingsworth v. Hollingsworth, 798 S.W.2d 145, 147 (Ky.App. 1990) provides that "a reply brief may be used to both supplement an appellant's original brief and to correct a procedural defect related to CR 76.12(4)(c)(iv)[now (v)]." Kuhlman Electric has made a half-hearted effort at compliance in its reply brief:

> Appellant preserved the issue of whether attorney-appellees represented Kuhlman in the underlying litigation in its Motion to Alter, Amend, or Vacate filed on May 22, 2003 which was overruled by the Court. (ROA, Vol. 4, p. 564, 608).

We will accept this as minimal compliance with the rule.

Kuhlman Electric's brief filed in the action against Amerisure attempts to comply with the rule by stating that each contention of error is preserved by the filing of the Notice of Appeal. From the language in Massie, one can easily see that a Notice of Appeal can serve no such purpose. But, in case it is not abundantly clear, we take this opportunity to state unequivocally that a Notice of Appeal does not satisfy the requirement of CR 76.12(4)(c)(v) as far as stating whether and in what manner errors are preserved.

Because of the minimal compliance in its reply brief, we will examine the merits of Kuhlman Electric's contention that Landrum & Shouse and Amerisure breached duties to it, and/or violated the contract between them. The issues raised by Kuhlman Electric concerning the scope or timing of the trial court's ruling are unpreserved or without merit.

STANDARD OF REVIEW

Both appeals addressed in this opinion are from orders granting summary judgment. Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (*citing* Paintsville Hospital Co. v. Rose, 683 S.W.2d 255 (Ky. 1985)). The trial court must view the record "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, 807 S.W.2d at 480 (*citing* Dossett v. New York Mining & Manufacturing Co., 451 S.W.2d 843 (Ky. 1970), and Rowland v. Miller's Adm'r, 307 S.W.2d 3 (Ky. 1956)). However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." Hubble v. Johnson, 841 S.W.2d 169, 171 (Ky. 1992)(*citing* Steelvest, supra at 480). This Court has previously stated that "[t]he 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. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue." Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996)(citations omitted).

CASE NO. 2003-CA-001232-MR

In Case No. 2003-CA-001232-MR, Kuhlman Electric contends that the circuit court erred by granting summary judgment to Landrum & Shouse on its complaint alleging causes of action for professional negligence, breach of contract, negligent and intentional breach of fiduciary duties, gross

negligence, and breach of implied covenant of good faith and fair dealing.

The record demonstrates that Landrum & Shouse litigated the Burgess reopening with the objective of shifting liability from Amerisure to Kuhlman Electric in its self-insured capacity. For example, in a letter from Landrum & Shouse to Amerisure dated April 20, 1995, Landrum & Shouse stated as follows:

> On or about July 13, 1992, I tried to convince plaintiff's attorney to claim that plaintiff's current condition is at least partially caused by work which plaintiff performed in 1991 at Kuhlman. I did this because it was my understanding that we were no longer on the risk in 1991.
>
> As explained by the enclosed motion to remove this case from abeyance which plaintiff's attorney has filed, it looks like plaintiff's attorney has decided to go with my theory. It will be hard to convince ALJ Kerr to buy such an argument, but I believe it is our best chance of having additional liability apportioned to another party other than the Special Fund. I will try to accomplish the same thing for you in this case that I accomplished in the Abner vs. ASI case. This case, however, will be much tougher.

Similarly, in a letter from Landrum & Shouse to Amerisure dated April 29, 1996, Landrum & Shouse stated as follows:

> I predict this is a 100% occupational disability case because plaintiff has now had two back fusions, has demonstrated his determination to work by returning to work for seven years after the first back fusion

> in 1984, and is now 54 years old and believes he can no longer cut it due to back pain. Our best chance is to place as much liability as possible on Kuhlman as a self-insured employer under the theory that plaintiff's work at Kuhlman after our risk ended in October 1988 resulted in the eventual breakdown of the first fusion. We could lose this argument and get stuck with a 100% occupational disability award although any award would still be apportioned 60% to the Special Fund and 40% to us.
>
> We will need to have good medical testimony to support our theory. To this end, I had a private conference with plaintiff's attorney at the conclusion of plaintiff's deposition of April 17. I suggested to plaintiff's attorney that we share the expense of having a private conference with Dr. Bean and a second private conference with Dr. Vaughn. This will allow us to find out if either Dr. Bean or Dr. Vaughn can support our theory of this case. If either doctor supports our theory, then plaintiff can go ahead and take the required medical depositions, or I can do so.
>
> Plaintiff's attorney is willing to consider this approach because we share a common interest in placing as much liability as possible on Kuhlman as a self-insured employer. Plaintiff gains from such a result because any increase in occupational disability benefits for which Kuhlman as a self-insured employer may be found liable will be calculated at a higher disability rate since plaintiff has a higher average weekly wage in 1991 than he had in 1977.

Finally, in a letter to Amerisure dated June 14, 1996, Landrum & Shouse stated as follows:

> Mike, I am fighting this case as hard as I can. I assume you want me to keep fighting

> in spite of the Campbell decision which I enclosed in my letter to you of May 20, 1996.
>
> Also, I believe this is the very last case which I am working for [Amerisure]. I would really appreciate it if you could send me additional cases because I need the work.

The above communications reflect that Landrum & Shouse regarded its client in the 1991 Burgess reopening litigation to be Amerisure rather than Kuhlman Electric. The circuit court determined likewise, stating in its order granting summary judgment that "[t]he Landrum Defendants never, during these proceedings, represented Kuhlman Electric Corporation as self-insured, or the individual corporate entity, Kuhlman Electric Corporation." Before us, Landrum & Shouse again argues in support of this multiple-identity hypothesis, advocating the legal fiction that the Kuhlman Electric which is a party to this lawsuit is an altogether different entity than the Kuhlman Electric entity it represented in the Burgess reopening, and that, accordingly, Landrum & Shouse owed no duty to the Kuhlman Electric entity which is a party to this lawsuit.

We recognize the quandary Landrum & Shouse was confronted with upon being retained by Amerisure to represent Kuhlman Electric after Kuhlman Electric became self-insured; we cannot, however, endorse the view of Landrum & Shouse and the circuit court regarding the status of Kuhlman Electric in the

Burgess reopening matter. Under the hypothesis advocated by Landrum & Shouse and the circuit court, though Kuhlman Electric was a client in the matter, it was proper for Landrum & Shouse to subordinate the interests of the company to the interests of the insurer, Amerisure. This subordination of interests of the insured to the insurer is against the weight of authority in cases where an insurance company retains an attorney to represent an insured, and Landrum & Shouse has cited us to no authority that there is an exception to this principle in workers' compensation cases.

The attorney-client relationship is a fiduciary relationship which imposes upon the attorney the duty to exercise "the most scrupulous honor, good faith and fidelity" to his or her client's interest. Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky.App. 1978). "[C]ourts and commentators recognize universally that the tripartite relationship between insured, insurer, and defense counsel contains rife possibility of conflict." Atlanta Intern. Ins. Co. v. Bell, 475 N.W.2d 294, 297 (Mich. 1991)(footnote omitted). "The interest of the insured and the insurer frequently differ." Id. "Accordingly, courts have consistently held that the defense attorney's primary duty of loyalty lies with the insured, and not the insurer." Id. (citations omitted). "An attorney's representation of two or more clients with adverse or

conflicting interests constitutes such misconduct as to subject the attorney to liability for malpractice, unless the attorney has obtained the consent of the clients after full disclosure of all the acts concerning the dual representation." 7 Am. Jur. 2d, *Attorneys at Law* § 213 (1997). "[T]here are situations in which a conflict of interest may arise between insurer and insured represented by the same attorney. If such a conflict does exist, the attorney may continue to represent both clients only after full disclosure and full consent; and if he fails to make such full disclosure, he will be held liable in a malpractice action." 28 A.L.R.3d 389, *Malpractice: Liability of Attorney Representing Conflicting Interests* § 6 (1969). Further, our courts are under a duty to protect and preserve the attorney-client relationship for the benefit of the general public. In re Gilbert, 274 Ky. 187, 118 S.W.2d 535 (1938); American Continental Ins. Co. v. Weber & Rose, P.S.C., 997 S.W.2d 12, 13-14 (Ky.App. 1998).

The situation may arise in workers' compensation cases in which a company is represented by multiple workers' compensation carriers. See, e.g., Phoenix Manufacturing Company v. Johnson, 69 S.W.3d 64 (Ky. 2001). In the typical case the insured company may be ambivalent regarding how liability is apportioned among the multiple carriers. In this case, however, Kuhlman Electric had an interest in avoiding the shifting of

liability away from Amerisure because the target of the shift was to the company itself in its self-insured capacity. The client has the prerogative of determining the objectives of the representation. Kentucky Rules of Supreme Court (SCR) 3.130, Rule 1.2. Hence, the conflict-of-interest imposed upon Landrum & Shouse in its representation of the company is patent.

In our view, there is no exception to an attorney's duties to his client in workers' compensation cases, and an attorney must be cautious in proceeding in such cases if he is currently representing, or has formerly represented, the company in the matter, and then advocates a position on behalf of the insurance carrier which is adverse to the interests of the company. At minimum the attorney should disclose the conflict to his company-client, and obtain its consent to the dual representation. SCR 3.130, Rule 1.7.

In summary, because Kuhlman Electric was a client of Landrum & Shouse upon the 1991 reopening, and because Landrum & Shouse sought on behalf of the insurer to shift liability to the company in its self-insured capacity, we cannot, as a matter of law, conclude that there was not a violation of the duties owed by Landrum & Shouse to Kuhlman Electric.

Nevertheless, summary judgment was proper because Kuhlman Electric is unable to show damages in connection with the violation of any duties owed to it by Landrum & Shouse. In

order to succeed in a legal malpractice claim, the plaintiff must show that his attorney's wrongful conduct has caused him to lose something to which he would have otherwise been entitled. Kirk v. Watts, 62 S.W.3d 37 (Ky.App. 2001). In this respect, a legal malpractice case must recognize and resolve the "'suit within a suit.'" Marrs v. Kelly, 95 S.W.3d 856, 860 (Ky. 2003)(footnote omitted). "To prove that the negligence of the attorney caused the plaintiff harm, the plaintiff must show that he/she would have fared better in the underlying claim; that is, but for the attorney's negligence, the plaintiff would have been more likely successful." Id. Under the circumstances of this case, Kuhlman Electric is unable to do this.

At the time of the 1991 reopening 803 KAR 25:010 provided that in workers' compensation claims litigation "all persons shall be joined as defendants against whom the ultimate right to any relief pursuant to KRS Chapter 342 may exist, whether jointly, severally, or in the alternative." The original injury occurred in 1977. Burgess's disabling condition occurred in August 1991. Because of this time lapse from the original injury, the question of whether the injury was a new injury rather than a worsening of the 1977 injury was obvious. And because Kuhlman was self-insured in August 1991, it was a person against whom relief pursuant to Chapter 342 may exist.

Thus 803 KAR 25:010 mandated that Kuhlman Electric as self-insured be joined into the 1991 litigation.

If Landrum & Shouse, upon the joinder of Kuhlman Electric as self-insured, instead of continuing its participation had withdrawn or, in the alternative, had advocated solely on behalf of Kuhlman Electric without regard to the interests of Amerisure, nevertheless, Amerisure, as a defendant also joined in the litigation under 803 KAR 25:010, would have, as a matter of course, retained alternative counsel to protect its position in the proceedings.

In the normal course of events, alternative counsel, too, would undoubtedly have advocated the position that Burgess's August 1991 injury was a new injury as opposed to a worsening of the 1977 injury. Under the circumstances – the original injury occurred in 1977 and the final disabling condition occurred in 1991 – the theory that the August 1991 injury was a new injury and not a worsening of the old injury was not a particularly novel theory. Any competent counsel retained by Amerisure would have been expected to argue this position. The theory having been interjected into the litigation, there is no reason to suppose the same result would not have occurred, i.e., the ALJ would have determined that there was a new injury which was the responsibility of Kuhlman Electric as self-insured, and this decision would have been

upheld through the appeals process. Hence, Kuhlman Electric would have been no better off even if alternative counsel, rather than Landrum & Shouse, had advocated the new injury theory.

Because Kuhlman Electric is unable to show damages in connection with its claims against Landrum & Shouse, the circuit court properly granted summary judgment on all causes of action alleged by the appellant. Steelvest, supra.

CASE NO. 2004-CA-000633-MR

In Case No. 2004-CA-000633-MR, Kuhlman Electric contends that the circuit court erred by granting summary judgment on its claims against Amerisure for breach of contract, breach of fiduciary duties, aiding and abetting the breach of fiduciary duties, and bad faith.

As with the claims against Landrum & Shouse, however, Kuhlman Electric cannot demonstrate damages associated with its claims against Amerisure. Again, in any event Amerisure would have retained counsel to protect its position in the litigation, in which event the interjection of the new injury theory would have been inevitable, and in which event the same outcome would have been expected. Summary judgment was accordingly proper on Kuhlman Electric's claims against Amerisure. Steelvest, supra.

For the foregoing reasons the judgments of the Fayette Circuit Court granting summary judgment to Landrum & Shouse and Amerisure are affirmed.

SCHRODER, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING IN RESULT. I agree with the majority that the circuit court judgments should be affirmed. However, I agree for the reasons stated by the circuit court rather than the reasons stated by the majority herein. I agree with the argument advanced by the appellees that Kuhlman Electric as insured by Amerisure (Michigan Mutual) is a different entity than Kuhlman Electric in its self-insured capacity. As such, Landrum & Shouse had no conflict of interest. Thus, I respectfully concur in the result only.

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