

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000879-MR

HANK INVESTMENTS, INC.,
d/b/a MALABU PUB & GRILLE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 12-CI-03361

CENTURY SURETY COMPANY

APPELLEE

OPINION
AFFIRMING
** ** *

BEFORE: LAMBERT, MAZE, AND MOORE, JUDGES.

MOORE, JUDGE: Hank Investments, Inc., d/b/a Malabu Pub & Grille

(“Malabu”), appeals a summary judgment entered by the Fayette Circuit Court in favor of Century Surety Company. Upon review, we affirm.

FACTUAL AND PROCEDURAL HISTORY

We set forth *infra* the pertinent underlying facts of this appeal.

However, to put the matters on appeal in context we note that Malabu filed this action as a declaratory judgment action to pay for costs and attorneys' fees incurred in successfully defending a dram-shop liability claim.

On November 16, 2010, Malabu was sued by the Estate of Anthony Travis Gibbs in an action styled *Ellis v. Alviter-Riveria, et al.*, Fayette Circuit Court Case No. 10-CI-2850), (hereinafter the *Ellis* case). The Estate's complaint in *Ellis* alleged that its decedent, Anthony Travis Gibbs, had been crossing Nicholasville Road on November 14, 2009, when a car driven by Hector Alviter-Riveria struck him. It further alleged:

10. In the hours prior to the collision, Mr. Gibbs became severely intoxicated while a patron at the Malabu Pub & Grille, owned and operated by Defendant, Hank Investments, Inc.

11. Upon information and belief, Defendant Alviter-Riveria had also been consuming intoxicating beverages at the Malabu Pub in the hours before the collision.

With these general allegations in mind, the *Ellis* complaint asserted causes of action against Alviter-Riveria, as well as Malabu and its owners, Henry and Catherine Wilson. The claims against Malabu and the Wilsons appeared in "Count II" of the complaint, which provided in relevant part as follows:

22. At all times relevant to the Complaint, the Malabu Pub was subject to KRS 413.241, the Kentucky law governing the liability of sellers of intoxicating beverages.

23. In relevant part, KRS 413.241 provides that no person “who sells or serves intoxicating beverages to a person over the age for the lawful purchase thereof, shall be liable to that person or to any other person or the estate, successors, or survivors of either for any injury suffered off the premises including but not limited to wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served, ***unless a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving.***” (Emphasis added).

24. On November 14, 2009, the Malabu Pub, through its employees or agents, continued to sell Mr. Gibbs intoxicating beverages after it would have been apparent to a reasonable person that he was already intoxicated at the time of sale.

25. The Defendant ultimately allowed Mr. Gibbs to leave the Malabu Pub in a severely intoxicated state.

26. Mr. Gibbs was ultimately killed after leaving the Malabu Pub as he attempted to cross Nicholasville Road.

27. The Malabu Pub owed Mr. Gibbs a duty to refrain from serving him alcoholic beverages after it was apparent that he was intoxicated.

28. The Malabu Pub owed Mr. Gibbs a duty to refrain from serving other patrons, like Defendant Alviter-Riveria, alcoholic beverages after it was apparent that Defendant Alviter-Riveria was intoxicated.

28. [Sic] The Malabu Pub, through its employees, breached its duties to the Plaintiff.

29. As a result of the Defendant’s conduct, the Plaintiff suffered serious injuries and ultimately died.

30. Plaintiff is entitled to recover all damages proximately caused by the Malabu Pub’s negligence

including pain, suffering and emotional distress from the time of the collision until death, past medical expenses, past and future lost wages, and funeral expenses.

After approximately two years of litigation in the *Ellis* case, the Fayette Circuit Court entered summary judgment in favor of Malabu. The claims against Henry and Catherine Wilson were similarly dismissed. The Estate did not file a notice of appeal.

At all times relevant to the *Ellis* case, Malabu was insured by Century Surety Company. During the pendency of the *Ellis* case, counsel for Malabu sent correspondence on several occasions to Century seeking coverage for a defense, and Century repeatedly denied coverage. When the *Ellis* case concluded, Malabu filed a declaratory judgment action in Fayette Circuit Court seeking reimbursement for its costs and attorneys fees in defending the *Ellis* case and punitive damages under the Unfair Claims Settlement Practices Act, Kentucky Revised Statutes (KRS) 304.12-320. Thereafter, Malabu filed a motion for summary judgment. Its sole argument was that it had a policy of general liability insurance with Century and that an insurer's duty to defend its insured from lawsuits was separate and distinct from its duty to pay a claim.

For its part, Century filed a cross-motion for summary judgment that cited a "liquor liability" exclusion in Malabu's general liability insurance policy which provided:

This insurance does not apply to:
"Bodily injury" or "property damage" for which
any insured may be held liable for reason of:

- a. causing or contributing to the intoxication of any person;
- b. furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- c. violation of any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

We have neither a duty to defend nor a duty to indemnify any insured if any proximate or contributing cause of an occurrence arises out of any “bodily injury” or “property damage” above. This exclusion applies to all insured regardless of whether you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. There is no duty to defend any aspect of the claim or “suit” and this insurance does not apply.

In short, Century argued that this provision specifically excluded coverage for paying *or* defending the claims asserted in *Ellis* and that Malabu’s suit against it was therefore untenable.

Subsequently, Malabu filed a reply brief conceding that the liquor liability exclusion in its policy did apply to the claim asserted against it in *Ellis* that sought to hold it liable for allegedly serving Gibbs alcoholic beverages after it was apparent that Gibbs was intoxicated. However, Malabu went on to argue that the liquor liability exclusion did not apply to the remaining claim that had been asserted against Malabu regarding Malabu’s service of alcoholic beverages to Alviter-Riveria. In support, Malabu argued in relevant part:

The only allegation as to Malabu’s conduct with respect to its patron Alviter-Riveria was that “upon information and belief, Alviter-Riveria had also been consuming

intoxicating beverages,”^[1] not that Malabu served Alviter-Riveria after he had been “visibly intoxicated,” or “under the influence of alcohol.”

Because there is no allegation in the Amended Complaint that Defendant Alviter-Riveria was either intoxicated or under the influence of alcohol at any time, the liquor liability exclusion does not apply to Count II with respect to the liability claims against Malabu for Alviter-Riveria’s subsequent actions after purportedly being served alcohol at Malabu Pub.

For the sake of clarity, we pause for a moment to remind the reader, as indicated earlier in this opinion, that the complaint in *Ellis* did *not* merely allege that “Alviter-Riveria had also been consuming intoxicating beverages.” It also asserted that Malabu shared some of the responsibility for Gibbs’ injuries and death because alcohol intoxication had caused Alviter-Riveria to negligently operate the vehicle that had ultimately killed Gibbs, and Malabu had breached a duty it owed to Gibbs by either causing or contributing to Alviter-Riveria’s intoxication. That much is apparent from a plain reading of paragraph “23,” the two paragraphs labeled “28,” and paragraph “29” of the *Ellis* complaint.

Incidentally, Malabu’s reply brief at least recognized the existence of the statements within the two paragraphs labeled “28.” Malabu only addressed them, however, by arguing that they should be ignored for the sake of determining coverage because they qualified as “legal conclusions,” rather than “factual allegations.”²

¹ As noted, this quote appeared in Paragraph 11 of the *Ellis* complaint.

² The extent of Malabu’s argument in this vein, as it appeared in its reply brief, was:

After this case was submitted for final adjudication, the circuit court considered the arguments presented and entered summary judgment regarding each of Malabu's claims³ in favor of Century. In particular, it held:

Applying the "Liquor Liability" exclusion to the allegations against Plaintiff [Malabu Pub & Grill] in the underlying tort lawsuit, the Ellis suit, the Court finds as a matter of law that Defendant [Century] had neither a duty to defend nor a duty to indemnify Plaintiff with respect to the Ellis Suit.

This appeal followed.

STANDARD OF REVIEW

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment

The only other reference to Alviter-Riveria is found in Paragraph 28, namely, the legal conclusion that Malabu had a duty not to serve alcoholic beverages to Alviter-Riveria after it was apparent that Defendant Alviter-Riveria was intoxicated. However, that legal duty, which of course is a statement of law, does not serve as a factual allegation.

³ Malabu's Unfair Claims Settlement Practices Act claim necessarily depended upon Century owing Malabu a duty to provide Malabu with a defense during the Ellis proceedings. *See Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993). The circuit court dismissed this claim after determining that no such duty existed. On appeal, Malabu does not argue that it was error for the circuit court to dismiss this claim. And, in light of our holding, such an argument would have been meritless in any event.

“is proper where the movant shows that the adverse party could not prevail under any circumstances.” *Id.* (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

On appeal, we must consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). Because summary judgment involves only questions of law and not the resolution of disputed material facts, an appellate court does not defer to the circuit court's decision. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). Our review is *de novo*. Likewise, the issues in this case involve the interpretation and meaning of terms in a contract. The interpretation of a contract or statute is a question of law for the courts and is subject to *de novo* review. *Cumberland Valley Contrs., Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).

ANALYSIS

Malabu has never argued that the liquor liability exclusion in its policy with Century is ambiguous, nor do we deem it so.⁴ Instead, the argument Malabu has preserved for appeal depends entirely upon Malabu's interpretation of

⁴ One of the arguments Malabu has attempted to raise for the first time in this appeal concerns the “doctrine of reasonable expectations.” Because there is no ambiguity concerning the liquor liability exclusion, this argument is not only unpreserved, it is also meritless. *See True v. Raines*, 99 S.W.3d 439, 443 (Ky. 2003) (explaining that the doctrine of reasonable expectations also has no application where no ambiguity exists in the policy language).

the claim asserted against it in the *Ellis* complaint involving Malabu's service of alcoholic beverages to Alviter-Riveria. As before, Malabu's interpretation:

1) completely focuses upon Paragraph 11, noted above; 2) completely ignores the paragraphs labeled "Paragraph 28" because it characterizes them as "legal conclusions," rather than "factual allegations"; and, thus, 3) reads this claim as asserting, essentially, that Malabu acted negligently toward Gibbs by allowing a person (*i.e.*, Alviter-Riveria) who consumed intoxicating beverages at the Malabu Pub, but who was *not* alleged to be intoxicated, to leave its premises. Armed with this interpretation, Malabu reasons that this claim was therefore not the type of claim to which the liquor liability exclusion could have applied, and that Century was, at least with respect to this claim, under a contractual duty to provide Malabu with coverage for a defense during the *Ellis* proceedings.

Not only is Malabu's characterization of this claim untenable, Malabu cites no Kentucky authority that would justify ignoring both of the paragraphs labeled "Paragraph 28" in the *Ellis* complaint simply because they might not fit within a strict definition of a "factual allegation," as opposed to a legal conclusion. Indeed, our Supreme Court has explained that when interpreting a complaint, the dispositive inquiry is not how each sentence of the complaint should be characterized, but whether the complaint provides adequate notice of the nature of the claims asserted:

In Kentucky, we have long since followed the Federal Rules of Civil Procedure in discarding the "skirmishing and shadowboxing of the strict pleaders" of the old

common law system for notice pleadings: “All that is necessary is that a claim for relief be stated with brevity, conciseness and clarity.” *See* Bertlesman and Phillips, Kentucky Practice, Rule 8.01, pp. 144–45, and the article by Judge Charles E. Clark, Simplified Pleading, 2 F.R.D. 456, quoted therein.

.....

All that our procedure presently requires is that the Complaint set out “facts or conclusions ... sufficiently to identify the basis of the claim.” Clay, Kentucky Practice, 3d ed., Rule 8.01, pp. 133–34. The former debate about “ultimate facts” or “conclusions of law” or “statements of evidence” is no longer viable. *Id.*

Natural Resources and Environmental Protection Cabinet v. Williams, 768 S.W.2d 47, 51 (Ky. 1989).

For the purpose of further pleading, the *Ellis* complaint was sufficient to put Malabu on notice of the claims asserted against it: Taken together, Paragraph 23, the two paragraphs labeled “Paragraph 28,” and Paragraph 29 of the *Ellis* complaint clearly asserted that Gibbs’ injuries and consequent death resulted, in whole or in part, from Malabu’s violation of KRS 413.241(2) and negligence in serving intoxicating beverages to Alviter-Riveria at a time when it should reasonably have known that Alviter-Riveria was already intoxicated. Likewise, we deem it sufficient to invoke the terms of the liquor liability exclusion within Malabu’s insurance policy; we are aware of no Kentucky authority, and Malabu presents none, to the contrary. With this in mind, the claim asserted against Malabu in the *Ellis* complaint involving Malabu’s service of alcoholic beverages to Alviter-Riveria was clearly the type of claim contemplated in the “liquor liability”

exclusion in Malabu’s policy with Century. And, by the plain terms of that exclusion, Century had no obligation to defend Malabu from that claim.

With that said, Malabu further argues that the liquor liability exclusion should not be enforced because doing so would render the Century policy illusory. In its reply brief, Malabu asserts that this Court should address this argument because it “was part and parcel of [its] fundamental argument that it was entitled to a defense against the Estate’s claims.” However, Malabu does not cite any part of the record, and we have not found any part of the record, indicating that this argument was preserved below.⁵ And, as noted in *Fischer v. Fischer*, 348 S.W.3d 582, 590 (Ky. 2011),

While it is correct that a court’s interpretation of a contract is reviewed de novo by any appellate court, *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 448 (Ky. 2005), such review is limited to the question of interpretation presented. It does not also include the whole universe of unraised questions of law that might touch on the contract. Similarly, a trial court’s interpretation of the law is reviewed de novo, meaning it is entitled to no deference by the appellate court, but that

⁵ In its reply brief, Malabu also asserts that if we should find that it failed to present this argument below—and we have—this argument should nevertheless be reviewed for manifest injustice, per Kentucky Rules of Civil Procedure (CR) 61.02.

It would be improper to review any argument, much less a request for palpable error review, raised for the first and only time in a reply brief. See *Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979) (“[a] reply brief is not a device for raising new issues which are essential to the success of the appeal”); see also CR 76.12(4)(e). Moreover, the scope of errors reviewable under CR 61.02 is limited, namely, to errors resulting from actions taken by the court, rather than actions or omissions by the attorneys or litigants. See *Fischer*, 348 S.W.3d at 589. Here, the court did not fail to properly apply the law to the arguments presented below, nor are we presented with any authority indicating that the circuit court had some affirmative duty to raise the doctrine of illusory contracts *sua sponte* and enter a judgment on that basis. Thus, CR 61.02 would not apply; if the substantial rights of Malabu were affected at all, they were affected by Malabu’s own failure to raise this argument below.

standard of review does not mean that the appellate court is free to then address any and all legal issues that might affect the case. Rather, the court is bound to address only the question of law presented before a trial court may be reversed.

CONCLUSION

For these reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Carroll M. Redford, III
Don A. Pisacano
Elizabeth C. Woodford
Lexington, Kentucky

BRIEF FOR APPELLEE:

Griffin Terry Sumner
Jeremiah A. Byrne
J. Kendrick Wells IV
Louisville, Kentucky