

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2012-CA-002171-MR

JOSE PANTOJA, JR. AND  
JOSE PANTOJA, SR.

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 10-CI-04181

TIC PROPERTIES MANAGEMENT, LLC

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KRAMER, CHIEF JUDGE; COMBS AND JONES, JUDGES.

JONES, JUDGE: This appeal came to us following remand by the Kentucky Supreme Court. We originally dismissed this appeal in its entirety on the basis that it was untimely. In light of *Kentucky Farm Bureau Mut. Ins. Co. v. Conley*, 456 S.W.3d 814 (Ky. 2015), we hold that Appellants' appeal against TIC Property

Management, LLC (“TIC”), while timely, attempts to raise new issues that were not preserved during the proceedings below. As such, we affirm.

### **I. BACKGROUND**

On July 19, 2009, Appellants were patrons at Baker’s 360 (“Baker’s”), a nightclub and restaurant located atop the J.P. Morgan Chase Building (“Chase”) in Lexington, Kentucky. At approximately 2:00 a.m., Jose Pantoja, Jr. and a friend of his took the elevator down to the Chase lobby and exited the building to smoke a cigarette. After they were finished smoking, they tried to return to Baker’s via the first floor elevator. Two “bouncers” employed by Baker’s, Alonzo Ryan and Zackary Flowers, would not allow them to return to the restaurant. The encounter soon became physical. Pantoja, Jr. alleges that as he turned to leave the building, Ryan attacked him from behind, shoved him into a glass door and then threw him onto the floor where he proceeded to assault him with his hands and feet. The dispute spilled over onto the sidewalk outside the building where Pantoja, Jr. alleges that Ryan again assaulted him. At some point, Jose Pantoja, Sr. came down; he alleges that Flowers pushed him to the ground when he attempted to break up the fight. Pantoja, Jr. and Pantoja, Sr. both claim to have sustained substantial injuries during the events.

As a result, on July 16, 2010, they filed suit against several individuals and entities including Baker’s and TIC, the property management company for the Chase. The only claims that are directly relevant to this appeal are their claims against TIC and Baker’s.

TIC moved for summary judgment in January 2011. Appellants responded, providing a video of the incident in the lobby, but did not argue that the bouncers were employees or agents of TIC. The court denied the motion as premature at that time. Depositions of the parties and witnesses were taken in the summer of 2011. TIC filed another motion for summary judgment on January 17, 2012. Appellants did not file a response. A hearing was held on January 27, 2012. At the hearing, the trial court determined that TIC neither owed nor breached any duty to Appellants after they left the building premises. This extinguished all of the claims related to the assaults that occurred on the sidewalk. The only claim left against TIC related to the first assault on Pantoja, Jr. in the lobby. Citing to *Murphy v. Second Street Corp.*, 48 S.W.3d 571 (Ky. App. 2001), the trial court also determined that neither TIC nor U.S. Security owed a duty to Pantoja, Jr. to *prevent* the alleged attack by the Baker's bouncer. Left unresolved, however, was the claim that TIC was negligent for failing to *break up* the altercation in the lobby.<sup>1</sup>

Thereafter, Baker's filed its own motion for summary judgment. At the same time, TIC filed a motion for summary judgment on the remaining claim against it for failing to intervene/break up the altercation. Appellants responded only to Baker's motion. On June 7, 2012, following a hearing, the trial court orally announced from the bench that it was going to grant both motions. The trial court then requested the parties to tender an agreed proposed order to it. However, the

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<sup>1</sup> In April of 2011, the Appellants voluntarily dismissed all claims against Chase and U.S. Security.

parties could not agree on the language. As a result, TIC submitted a separate proposed order relating to its motion. The trial court signed this order, which was entered by clerk on July 24, 2012. This order states that it is “a final and appealable order and there is no just cause for delay.”

On August 2, 2012, Appellants filed a motion to alter, amend, or vacate, which they noticed for hearing on August 24, 2012. Although a written order had not yet been entered with respect to Baker’s motion, the Appellants apparently intended their motion to alter, amend or vacate to address all their remaining claims. The motion itself is sparse, to say the least. It states simply:

Come the Plaintiffs, by and through counsel, and moves [sic] this Court pursuant to CR 60.02 and CR 59.01 to alter, amend or vacate its Order of July 23, 2012, which dismissed Plaintiff’s Complaint.

Grounds for said motion is [sic] that the Court’s July 23, 2012 Order does not comply with current law.

A memorandum will be filed by the Plaintiffs no later than August 20, 2012.

(R. at 621). Notwithstanding their prior representation, Appellants did not file a memorandum by August 20.

On August 21, 2012, the trial court entered an order granting Baker’s motion for summary judgment. This order also included the necessary finality language. On August 22, 2012, Appellants filed a “notice” stating as follows: “please take notice that the Motion to Alter, Amend, or Vacate the Order of July 23, 2012, is hereby reset for 8:30 a.m. on September 21, 2012.” Another notice

was filed by Appellants on August 28, 2012, “rescheduling” their prior motion to alter, amend, or vacate to November 2, 2012.

On October 26, 2012, Appellants served, via electronic mail, a “Memo Substantiating Plaintiff’s Motion to Alter, Amend or Vacate.” While this document was *served* on opposing counsel, it does not appear to have been *filed* of record with the court at that time. Moreover, as pointed out by TIC’s response, the arguments are directed entirely at Appellants’ claims against Baker’s; there is nothing about TIC in the document.

On November 2, 2012, Baker’s filed its response. Therein, Baker’s asserted that Appellants had failed to file a motion to alter, amend or vacate with respect to the trial court’s August 20, 2012, order in favor of it. It argued that the trial court no longer had the ability to modify its prior judgment because the judgment was now final. On November 7, 2012, Appellants filed a lengthy response to the procedural issue raised by Baker’s. In their response, Appellants indicate they never agreed to submit a proposed order separating their claims, and apparently believed even after a separate order with finality language was signed by the court, that a “combined order” would be substituted at some point. At any rate, Appellants maintain that all parties were aware that their original motion was intended to address both TIC and Baker’s and that the hearing was rescheduled so that their motions could be heard together.

On December 11, 2012, the trial court entered an order denying Appellants any relief from its summary judgment orders. Appellants filed a notice

of appeal on December 18, 2012. Prior to briefing, TIC and Baker's moved to dismiss on the basis that the appeal was untimely as to both. This Court granted both motions. We held that Appellants failed to serve a timely CR<sup>2</sup> 59 motion after the trial court entered judgment in favor of Baker's on August 21, 2012, making their appeal of that judgment untimely. A majority of the panel concluded that the appeal was untimely as to TIC because the motion failed to state the grounds for relief with particularity, and therefore, the motion did not toll the time to file a notice of appeal.

Appellants petitioned the Kentucky Supreme Court to accept discretionary review. On June 3, 2015, the Kentucky Supreme Court granted discretionary review, vacated our dismissal, and remanded this matter to us for further consideration in light of its recent opinion in *Kentucky Farm Bureau Mut. Ins. Co. v. Conley*, 456 S.W.3d 814 (Ky. 2015). On remand, Baker's and TIC filed renewed motions to dismiss. A panel of this Court granted Baker's motion, but denied TIC's motion. Thereafter, Appellants were directed to file a brief addressing only arguments regarding TIC.

### III. ANALYSIS

While a previous panel of this Court denied TIC's motion to dismiss, it did so without any accompanying analysis. In light of the Kentucky Supreme Court's directive that we reconsider dismissal in light of *Conley*, we will briefly discuss the timeliness of Appellants' appeal as related to TIC.

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<sup>2</sup> Kentucky Rules of Civil Procedure.

The judgment in favor of TIC was entered by the trial court on July 24, 2012. This order states that it is “a final and appealable order and that this is no just cause for delay.” Appellants filed a CR 59.05 motion on August 2, 2012. The motion was not accompanied by a memorandum, but stated that one would be forthcoming. A memorandum was eventually served on TIC; that memorandum, however, only addressed Appellants’ claims against Baker’s.

Appellants presented a skeletal, bare-bones CR 59.05 motion to the trial court. The only substantive assertion they ever made with respect to TIC was that the judgment in its favor did not conform to the law. They never once explained the shortcomings with any sort of detail. Nevertheless, we are cognizant that a CR 59.05 motion was timely filed with respect to TIC. “[T]he remedy for an insufficiently particular CR 59.05 motion may be loss of that motion or sanctions, but it is not the loss of the right to an appeal.” *Conley*, 456 S.W.3d at 820. Therefore, we will now turn to the merits of Appellants’ arguments with respect to TIC.

After all the procedural wrangling, the substantive issue is largely an open and shut matter. Other than producing a video of the lobby altercation, Appellants never presented the trial court with any evidence to support their claims against TIC. The arguments they present to us on appeal center on their theory that the “bouncers” were agents of TIC. Appellants *never* made this argument to the trial court either before summary judgment was entered in favor of TIC or after

during the lengthy CR 59.05 proceedings.<sup>3</sup> Their arguments centered on the theory that TIC had a duty to stop or break-up the altercation because it was the building manager.

As Kentucky's appellate courts are fond of saying, “appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court. In other words, an appellant preserves for appellate review only those issues fairly brought to the attention of the trial court.” *Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012) (internal quotations and citations omitted). Therefore, we hold that the errors raised in Appellants’ brief as related to TIC are unpreserved, preventing us from reviewing them. We also note that because these issues were not addressed in the proceedings below, even if we were inclined to take them up for consideration, they would not support reversal because Appellants failed to put sufficient evidence in the record to support these theories.

#### IV. CONCLUSION

For these reasons we affirm the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher A. Spedding  
Lexington, Kentucky

BRIEF FOR APPELLEE:

William J. Partin, Jr.  
Lexington, Kentucky

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<sup>3</sup> We cannot locate, and Appellants have failed to point to, anywhere in the record where this argument was preserved for review pursuant to CR 76.12(4)(c)(v).