

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

TRICIA FILBY,	:	MEMORANDUM OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2016-G-0054
DAVID LEE FILBY,	:	
Defendant-Appellant.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 13 DC 000638.

Judgment: Appeal dismissed.

Robert E. Zulandt, Jr., Zulandt & Smalheer, 114 East Park Street, Chardon, OH 44024 (For Plaintiff-Appellee).

David Lee Filby, pro se, 63 Sector Drive, Bedford, OH 44146 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, David Lee Filby, filed a pro se notice of appeal from an August 14, 2015 entry from the Geauga County Court of Common Pleas. Also attached to his notice of appeal was an entry dated December 29, 2015.

{¶2} The record in this matter reveals that on July 11, 2013, appellee, Tricia Filby, filed a complaint for divorce against appellant. The trial court issued a judgment entry of divorce on August 14, 2015. Following the issuance of the divorce decree, appellant filed several motions with the trial court, including a motion for new trial. In a December 29, 2015 entry, the trial court considered five “documents filed by [appellant]

on September 14, 2015,” one of which was the motion for new trial. Regarding the motion for new trial, the trial court found that “there is no date or separate signature on the certificate of service, and pursuant to Civ.R. 5(E) the court is not permitted to consider it as a motion.” Appellant filed the instant appeal on January 29, 2016.

{¶3} On February 25, 2016, appellee filed a motion to dismiss the appeal on the grounds that the notice of appeal was untimely filed. Appellee posits that the January 29, 2016 notice of appeal from an August 14, 2015 entry of divorce was five and one-half months late and that none of the motions filed by appellant subsequent to the judgment entry of divorce would extend the time for filing the appeal.

{¶4} On March 1, 2016, appellant filed his response in opposition to appellee’s motion to dismiss the appeal. He asserts that the time to file his notice of appeal was extended, pursuant to App.R. 4(B)(2)(b), when he filed a motion for new trial.

{¶5} App.R. 3(A) expressly states that the only jurisdictional requirement for the filing of a valid appeal is to file a notice of appeal within the time allowed by App.R. 4. The Supreme Court of Ohio has held that the failure to comply with the time requirements of App.R. 4(A) is a jurisdictional defect, which is fatal to an appeal. *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, ¶ 17, citing *State ex rel. Pendell v. Adams Cty. Bd. of Elections*, 40 Ohio St.3d 58, 60 (1988).

{¶6} App.R. 4(A)(1) states that, “[s]ubject to the provisions of App.R. 4(A)(3), a party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry.” Further, “[i]n a civil case, if the clerk has not completed service of the order within the three-day period prescribed in Civ.R. 58(B), the 30-day periods referenced in App.R. 4(A)(1) and 4(A)(2) begin to run on the date when the clerk actually completes service.” App.R. 4(A)(3).

{¶7} Civ.R. 58(B) directs the clerk of courts to serve the parties with notice of the judgment within three days of entering the judgment upon the journal. If the Civ.R. 58(B) service does not occur within three days, the time to appeal does not begin to run until service is made and noted in the appearance docket. *Coles v. Lawyers Title Ins. Corp.*, 163 Ohio App.3d 659, 664, 2005-Ohio-5360.

{¶8} The record in this case clearly shows that the trial court issued its judgment entry of divorce on August 14, 2015. On August 19, 2015, the clerk of courts noted on the appearance docket that copies of that order were issued to the parties. Since service was not made on appellant within the three day period required in Civ.R. 58(B), the thirty day time period began to run on the date service was made and noted on the docket, i.e. August 19, 2015. Accordingly, the deadline for appellant to file his notice of appeal was September 18, 2015, which was not a holiday or a weekend.

{¶9} Instead of filing a notice of appeal, on September 14, 2015, appellant filed a motion for new trial pursuant to Civ.R. 59. The motion for new trial was filed 31 days after the divorce decree was entered. Pursuant to App.R. 4(B)(2), one of the post judgment motions that tolls the time for appeal is a “timely and appropriate” motion for new trial. Civ.R. 59(B) states that a motion for new trial “shall be served not later than **twenty-eight days** after the entry of the judgment.” (Emphasis added.)

{¶10} “An untimely motion for new trial, however, does not extend the 30-day period for appealing a final judgment or order. If a motion for new trial could be filed beyond the time required by App.R. 4 and still act to delay the time in which a notice of appeal must be filed, the 30-day period set forth in App.R. 4 would be meaningless.” *Citibank v. Abu-Niaaj*, 2d Dist. Green No. 2011 CA 45, 2012-Ohio-2099, at ¶ 9. Therefore, if a timely and appropriate motion for a new trial is filed, the time for filing a

notice of appeal from a judgment begins to run when the trial court enters an order resolving the post-judgment motion.

{¶11} In this case, the trial court entered its judgment entry of divorce on August 14, 2015. Appellant filed his motion for new trial on September 14, 2015, which is more than 28 days after the judgment was entered. Accordingly, appellant's motion for new trial was untimely and did not toll his time for filing a notice of appeal from the August 14, 2015 divorce decree. In order for the motion for new trial to be timely, it would have had to be filed by September 11, 2015. Accordingly, appellant's January 29, 2016 notice of appeal from the August 14, 2015 entry was untimely.

{¶12} Furthermore, an appeal from the December 29, 2015 judgment entry, which was attached to appellant's notice of appeal, is also untimely. The deadline for filing an appeal from that entry would have been January 28, 2016, which was not a holiday or a weekend.

{¶13} This court is not empowered to extend the time deadline in civil cases. *Pendell, supra*, at 60; *see also* App.R. 14(B). Therefore, appellant untimely filed his notice of appeal on January 29, 2016.

{¶14} Based upon the foregoing, appellee's motion to dismiss the appeal is hereby granted, and this appeal is dismissed pursuant to App.R. 4(A).

{¶15} Appeal dismissed.

TIMOTHY P. CANNON, J.,

THOMAS R. WRIGHT, J.,

concur.