[Cite as *Graham v. Graham*, 2009-Ohio-6876.]

STATE OF OHIO, NOBLE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DENISE L. GRAHAM,	)	
	)	
PLAINTIFF-APPELLANT,	)	
	)	
VS.	)	CASE NO. 08-NO-353
	)	
KENNETH I. GRAHAM,	)	OPINION
	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas of Noble County, Ohio Case No. 207-0149
JUDGMENT:	Affirmed in part Remanded in part
APPEARANCES: For Plaintiff-Appellant	Attorney Kent D. Biegler 139 W. 8th Street P.O. Box 640 Cambridge, Ohio 43725
For Defendant-Appellee	Attorney Andrew J. Warhola 110 North 7th Street Cambridge, Ohio 43725

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 28, 2009

[Cite as *Graham v. Graham*, 2009-Ohio-6876.]
DONOFRIO, J.

{¶1} Plaintiff-appellant, Denise Graham, appeals from a Noble County Common Pleas Court judgment granting a divorce between her and defendant-appellee, Kenneth Graham. She takes issue with the trial court's spousal support award, its distribution of the parties' income tax refund, and its visitation order.

{¶2} The parties were married on October 13, 1984. They have one child, a daughter born January 17, 2005. Appellant filed a complaint for divorce on October 10, 2007.

{¶3} The trial court heard evidence from the parties. It then issued a decree of divorce, which contained the following orders pertinent to this appeal:

{¶4} Appellant is to be the child's residential parent. Appellee will pay child support of $852.73 per month and provide health insurance for her. Appellee is granted reasonable visitation. The first three visits are to be in appellant's home. After that, appellee may take the child outside of appellant's home. Considering appellee's work schedule and the fact that the child is not yet in school, once appellee reaches his seasonal lay off period, it is anticipated that the child will visit with appellee for up to a week at a time.

{¶5} Appellant is awarded the marital home. Appellant is responsible for the three liens on the home.

{¶6} The parties have $5,448.46 from a former income tax refund. Of that money, $532.50 shall be paid to the Southeastern Ohio Regional Medical Center in payment of an outstanding medical bill. Additionally, $3,326.54 shall be paid to the Noble County Child Support Enforcement Agency (NCCSEA) in payment of appellee's existing arrearage. The balance of the tax refund shall be released to appellant.

{¶7} If the parties receive a rebate stimulus check, they shall divide it equally.

{¶8} Appellee shall pay appellant spousal support of $400 per month for ten months. Appellee shall also pay the balances due on the Chase Visa, the Sears MasterCard, the Advantage Bank Visa, and the Discover Card, and all such

payments shall be considered spousal support.

{¶9} Appellant filed a notice of appeal from this order on July 9, 2008. In an August 17, 2009 judgment entry, this court found her notice of appeal to be timely due to some confusion regarding the date on which the decree of divorce was filed and the readability of the time-stamp on appellant's copy of the decree.

{¶10} Appellant requested a stay of the portion of the judgment entry that granted appellee unsupervised visits with their daughter. The trial court denied the stay. She then filed an identical motion for stay with this court, which we too denied.

{¶11} Appellant now raises four assignments of error, the first of which states:

{¶12} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY LIMITING SPOUSAL SUPPORT TO $400.00 PER MONTH FOR A PERIOD OF 10 MONTHS WHERE THE PARTIES HAD BEEN MARRIED FOR 23 YEARS, WHERE THE WIFE HAD LITTLE EDUCATION AND/OR EMPLOYMENT EXPERIENCE AND WAS NOT EMPLOYED, WHERE THE HUSBAND DID NOT WANT THE WIFE TO WORK, WHERE THE WIFE'S EXPENSES EXCEEDED THE SUPPORT ORDERED AND WHERE THE HUSBAND HAD THE ABILITY TO PAY ADDITIONAL SUPPORT."

{¶13} Appellant argues that the trial court erred in ordering spousal support of only $400 per month for ten months. She contends that based on the applicable statutory factors, it is evident that she needs additional support for a longer duration in order to meet her basic needs. She points to such factors as appellant's $62,000 yearly income, her poor earning ability, the 23-year duration of the marriage, and her monthly expenses of $2,401. She further contends that appellee has the means to provide more support.

{¶14} Appellant also contends that she needs spousal support for more than ten months because that is not enough time for her to become self-sustaining. Appellant argues that the trial court erroneously relied on her statements that she was looking into a training program for medical billing as a guarantee that this would provide her with sufficient living income in just ten months. She asserts that the trial

court had no indication when she would enroll in the program, when she would have the tuition money, and when she could purchase a computer.

{¶15} Finally, appellant argues that the trial court should have reserved jurisdiction over the issue of spousal support so that it could grant spousal support for an indefinite period and then revisit the issue once appellant completed her anticipated training and gained employment.

{¶16} We review matters surrounding spousal support decisions for an abuse of discretion. *Corradi v. Corradi,* 7th Dist. No. 01-CA-22, 2002-Ohio-3011, at ¶51. Abuse of discretion connotes more than an error in judgment; it implies that the trial court's judgment is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶17} R.C. 3105.18(C)(1) sets out the factors a court must consider when determining whether a spousal support award is appropriate and reasonable and in determining the nature, amount, terms, and duration of the payments:

{¶18} "(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

{¶19} "(b) The relative earning abilities of the parties;

{¶20} "(c) The ages and the physical, mental, and emotional conditions of the parties;

{¶21} "(d) The retirement benefits of the parties;

{¶22} "(e) The duration of the marriage;

{¶23} "(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;

{¶24} "(g) The standard of living of the parties established during the marriage;

{¶25} "(h) The relative extent of education of the parties;

{¶26} "(i) The relative assets and liabilities of the parties, including but not

limited to any court-ordered payments by the parties;

{¶27} "(j) The contribution of each party to the education, training, or earning ability of the other party, * * *;

{¶28} "(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

{¶29} "(l) The tax consequences, for each party, of an award of spousal support;

{¶30} "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

{¶31} "(n) Any other factor that the court expressly finds to be relevant and equitable."

{¶32} In reviewing a spousal support award, an appellate court examines the record to determine whether the trial court considered the relevant statutory factors. *Long v. Long*, 176 Ohio App.3d 621, 2008-Ohio-3006, at ¶28. The trial court need not have expressly commented on each factor. Id. However, the court must set forth sufficient detail to enable a reviewing court to determine that the award is fair, equitable, and in accordance with the law. *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, at paragraph two of the syllabus. The court must, at the least, state the "underlying basis for the award." *Schneider v. Schneider* (1996), 110 Ohio App.3d 487, 494. An appellate court should not speculate regarding the deliberative process of the trial court used in awarding spousal support. *Gray v. Gray* (June 28, 2001), 8th Dist. No. 78419.

{¶33} In this case, the trial court did not make any findings at all as to the relevant factors. Nor did it provide the underlying basis for its award. We could speculate that the ten-month duration of the court's award was related to appellant's testimony that it would take her ten months to complete an on-line training program. But as the case law indicates, this court will not engage in such speculation.

Furthermore, we have no indication why the court picked $400 per month as the amount of spousal support.

{¶34} For these reasons, this matter will be remanded to the trial court so that it can make findings sufficient for this court to review the appropriateness of the spousal support award.

{¶35} Appellant's second assignment of error states:

{¶36} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHERE IT ORDERED PAYMENT OF APPROXIMATELY $18143.26 IN CREDIT CARD DEBT AS SPOUSAL SUPPORT WHERE THERE WAS NO CONSIDERATION OF THE TAX IMPLICATIONS OF SUCH ORDER AND APPELLANT DEMONSTRATED A NEED FOR GREATER DIRECT SUPPORT."

{¶37} Here appellant argues that the trial court ignored the tax consequences of ordering $18,143.26 in credit card debt to be paid by appellee as spousal support. She asserts that she will suffer a tax burden from this order because since the payments will be treated as spousal support, they will be taxable income to her. Appellant contends that this order creates the possibility that she will owe taxes when she otherwise would not.

{¶38} As this assignment of error also deals with spousal support, it will be reviewed for abuse of discretion.

{¶39} In commenting on the evidence at the conclusion of the hearing, the court stated:

{¶40} "Although I'm going, because I've got to run a bunch of numbers here, but I'm going to tell you where we're headed. Okay. I don't, okay, *I don't think there's any money to be had without some severe tax consequences at least in the short fall*. So, I'm faced with relatively limited assets, the big assets are the house, the 12 thousand dollars worth of equity in that and the Plaintiff is probably going to end up with it. I got 20 thousand dollars worth of unsecured debt. What am I going to do with that? No way I can offset it. I'm going to have to figure out some way to deal with it. I don't think there's any way that the Plaintiff can pay that, but just

because the Defendant can that doesn't mean that he shouldn't not receive some sort of consideration for it." (Emphasis added; Tr. 114).

{¶41} Thus, when the court was considering the parties' credit card debt, it was specifically mindful of the tax consequences.

{¶42} Accordingly, appellant's second assignment of error is without merit.

{¶43} Appellant's third assignment of error states:

{¶44} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ORDERING THAT A MARITAL ASSET OF THE PARTIES, THEIR 2007 FEDERAL INCOME TAX REFUND, BE USED TO SATISFY APPELLEE'S CHILD SUPPORT ARREARAGE OBLIGATION AND ALSO PERMITTING APPELLEE TO RETAIN ONE-HALF OF ANY STIMULUS REBATE RECEIVED."

{¶45} In the divorce decree, the trial court ordered that the parties' 2007 income tax refund of $5,448.46 be divided as follows: $532.50 to Southeastern Ohio Regional Medical Center for a joint outstanding medical bill; $3,326.54 to the Noble County Child Support Enforcement Agency (NCCSEA) to liquidate appellee's arrearage; and the remaining balance ($1,589.42) to appellant.

{¶46} Appellant states that this tax refund was marital property. Therefore, she argues, the court should have divided it equally between the parties after payment of the joint medical debt. Instead, appellant asserts that appellee received $3,326.54 by virtue of the liquidation of his arrearage while she received only $1,589.42. Appellant argues that she, in effect, paid almost $1,000 of appellee's child support arrearage.

{¶47} "Marital property" includes all real or personal property owned by either or both spouses that was acquired by either or both spouses during the marriage. R.C. 3105.171(A)(3)(a)(i). In a divorce action, the trial court shall divide the marital property equally unless an equal division would be inequitable. R.C. 3105.171(C)(1). In such a case, the court shall make an equitable division of the marital property. R.C. 3105.171(C)(1).

{¶48} In this case, there is no question that the parties' joint tax refund money

was marital property. Therefore, the trial court should have divided it equally unless it found an equal distribution would be inequitable.

{¶49} The court did not indicate that it found an equal division of the tax refund money would be inequitable. It did, however, order that $3,326.54 of the refund money be paid to the NCCSEA in satisfaction of appellee's arrearage.

{¶50} Had the court divided the balance of the tax refund (after paying the joint medical bill) equally, each party would have received $2,457.98. Instead, the court ordered that appellee's child support arrearage was to be paid and the remainder was to go to appellant. Appellant received $1,589.42, or $868.56 less than if the court had made an equal division here.

{¶51} But we need not consider whether the court erred in ordering appellee's arrearage to be paid from the parties' tax refund money. Any error here, if one even exists, was a result of appellant's own request.

{¶52} When asked what the court should do with the balance of the parties' income tax refund, appellant stated, "Well, I would take some of those funds towards the back child support that is due." (Tr. 66). She testified that it was approximately $3,500 that was due in past-due child support. (Tr. 66). Appellant's counsel then acknowledged appellant's request in her closing arguments: "In regards to the tax refund, I'm not sure if Mr. Graham was asked what he wanted to have done with that. Attorney Warhola asked Denise and her testimony was catch up on child support, which I guess is a benefit to Mr. Graham as well and then the remaining monies be given to her." (Tr. 107).

{¶53} Under the doctrine of "invited error," a party cannot take advantage of an error that it invited or induced the trial court to make. *Center Ridge Ganley, Inc. v. Stinn* (1987), 31 Ohio St.3d 310, 313. In the case before us, the trial court was simply carrying out appellant's request when it used a portion of the tax refund to settle appellee's child support arrearage. The court did precisely what appellant requested that it do with the money, it ordered that the money be used to pay the back child support due to appellant and then awarded the remainder to appellant.

Thus, appellant cannot now argue that the trial court erred in making the exact distribution she requested.

{¶54} Accordingly, appellant's third assignment of error is without merit.

{¶55} Appellant's fourth assignment of error states:

{¶56} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHERE IT ALLOWED REASONABLE VISITATION TO THE APPELLEE AFTER AN ALLEGATION OF SEXUAL ABUSE AND WHERE THE APPELLEE ACKNOWLEDGED TO CONSUMING MORE THAN A SIX-PACK OF BEER PER DAY AND TO HAVING LIMITED CONTACT AND INVOLVEMENT WITH THE CHILD."

{¶57} Appellant contends here that the trial court abused its discretion in granting appellee unsupervised visitation with their daughter.

{¶58} For support, appellant first points to her own allegations, both by affidavit and testimony, that appellee sexually abused their daughter. She states that the reason her affidavit and her testimony were not identical is because she did not want to include a detailing of the event in her affidavit knowing that it would become a public record.

{¶59} Second, appellant points to appellee's drinking habits. She notes that appellee admitted to consuming a six-pack of beer a day and even more on the weekends. Appellant argues that because most of the time appellee will spend with their daughter will be on the weekends, the trial court should have prohibited him from drinking during that time or ordered that his visits be supervised.

{¶60} Third, appellant asserts that appellee has had no relationship with their daughter. She contends that he had not seen their daughter since November 2007. Furthermore, appellant claims that even before the parties separated, appellee did not take part in their daughter's daily care and notes that he did not change a diaper until she was 11 months old.

{¶61} When reviewing matters concerning visitation rights, appellate courts must apply an abuse of discretion standard of review. *Booth v. Booth* (1989), 44

Ohio St.3d 142, 144.

{¶62} R.C. 3109.051 governs visitation rights of nonresidential parents: "If a divorce* * * proceeding involves a child and if the court has not issued a shared parenting decree, the court * * * shall make a just and reasonable order or decree permitting each parent who is not the residential parent to have parenting time with the child at the time and under the conditions that the court directs, unless the court determines that it would not be in the best interest of the child to permit that parent to have parenting time with the child and includes in the journal its findings of fact and conclusions of law." R.C. 3109.051(A).

{¶63} Thus, the trial court was to make a just and reasonable visitation order for appellee to spend time with his daughter unless the court determined that it would not be in the child's best interest to permit appellee to have such parenting time.

{¶64} Appellant takes issue with three main areas of concern: her allegations of sexual abuse; appellee's lack of a relationship with their daughter; and appellee's drinking. We will address each concern in turn.

{¶65} As to the abuse allegations, appellant signed an affidavit that was filed with the court along with an ex parte request for custody of their daughter during the pendency of the divorce. (Tr. 43). The affidavit contained the following allegations: appellee has a severe alcohol problem and becomes violent when he drinks; appellee has been sexually abusive towards their daughter on "several occasions;" and appellant walked in on appellee digitally penetrating their daughter.

{¶66} Appellant then testified regarding these allegations. She stated that on December 25, 2005, she left appellee in the living room changing their daughter's diaper and when she returned she saw appellee digitally penetrating their daughter and French kissing her. (Tr. 44). She stated that she contacted law enforcement the next day. (Tr. 51). However, she did not take her daughter to the hospital. (Tr. 51). The parties' daughter was 11 months old at the time.

{¶67} Appellant stated that after that day, she did not let her daughter out of her sight. (Tr. 45). Despite this incident, appellant testified that she stayed at home

and tried to make her family work. (Tr. 51). She stated that she did not separate from appellee until August 2007. (Tr. 51).

{¶68} On cross examination, counsel asked appellant about the "several" occasions referenced in her affidavit where she stated she saw appellee being sexually abusive since she only testified regarding one occasion. Appellant then stated that she also saw appellee expose himself to their daughter. (Tr. 52). However, she admitted that she did not include this alleged incident in her affidavit. (Tr. 53). When asked again whether she actually saw appellee digitally penetrate their daughter, appellant became evasive and repeatedly asked what counsel meant by the term "penetration." (Tr. 54). She also admitted that she did not include in her affidavit an allegation that she saw appellee French kissing their daughter. (Tr. 55). Appellant stated that she did not include this detail in her affidavit because the affidavit would become public record. (Tr. 67-68).

{¶69} In response to appellant's abuse allegations, appellee testified that he never sexually abused his daughter, never digitally penetrated her, never French kissed her, and never exposed himself to her. (Tr. 90-91). As to the specific allegation by appellant, appellee stated that he was changing his daughter's diaper on Christmas day. (Tr. 90). Admittedly, this was the first diaper appellee changed even though their daughter was 11 months old. (Tr. 90). He stated that when appellant walked into the room he threw his hands off of the diaper because he did not want to change it. (Tr. 90).

{¶70} In discussing why it thought appellant's allegations of sexual abuse were false, the court gave a detailed explanation:

{¶71} "Now, I've heard the testimony here and I have some concerns. I am told that an incident happened around Christmas of 2005, pretty explicitly by the Plaintiff. Then I listen and look closely at what she said. She indicated that she left the child on the couch, half way through changing the diaper, and then got interrupted and had to go to the kitchen. And said, she had no reason to be concerned by leaving the child in that situation. She comes back and then the story

goes on, and then she says that from that day forward I never let this child be with her dad unobserved. Today, she stands by her statement that there were several occasions of sexual abuse to this child. When? There was no concern about anything that happened before Christmas of 2005. This child was never left alone with him after that. When did these several things happen? I don't think they did. I heard that we don't want to broadcast to the world that anything happened to this little girl. I'm told that we couldn't put the French kissing incident because we didn't want the world to know. Okay for the world to know that he digitally penetrated her but we're not going to talk about French kissing. Hard for me to except [sic.] and certainly based on the testimony that the Plaintiff gave here today there's no way she would know if this child was digitally penetrated or not. Now she can make some assumptions. But based on the testimony I have a real problem with you know what the Defendant has alleged to have done. I don't think it happened." (Tr. 116-17).

{¶72} Thus, after considering the parties' testimony and weighing the evidence, the court concluded that appellee was entitled to visitation.

{¶73} The issue of whether appellee sexually abused his daughter was a matter of credibility for the trial court to determine. The trial court scrutinized this issue as can be seen from its comments. It carefully compared appellant's testimony to the statements in her affidavit and noted the inconsistencies. All of its comments are accurate descriptions of what the evidence showed. Additionally, the trial court was in the best position to weigh the credibility of appellant's and appellee's testimony because it was able to observe their demeanor, gestures, and voice inflections in evaluating whether the testimony appeared to be truthful.

{¶74} As to appellee's lack of a relationship with his daughter, appellant testified that appellee has seen their daughter only once since the two separated in September 2007. (Tr. 46).

{¶75} Appellee testified as to why he had not seen his daughter for approximately seven months. He stated that a restraining order was in effect that prevented him from communicating with appellant or seeing their daughter. (Tr. 90).

He said he asked appellant if he could visit with their daughter and she refused. (Tr. 90).

{¶76} As is demonstrated by the record, on October 15, 2007, the trial court granted appellant temporary custody of the parties' daughter throughout the pendency of the divorce and issued a restraining order against appellee having contact with appellant. After the hearing on a motion for temporary orders on January 16, 2008, the court ordered that appellee was to have no parenting time.

{¶77} Given these court orders, appellee had no opportunity to visit with his daughter. From October to January, appellant had custody of the child and appellee was restrained from having contact with appellant. From January to May (the time of the divorce hearing), the court had ordered no parenting time for appellee. Thus, although appellee did not visit with his daughter for approximately seven months, the lack of visitation was not by his choice but rather by court order.

{¶78} Furthermore, the trial court was mindful of the fact that appellee and his daughter needed to re-establish a relationship. For that reason, the trial court ordered that the first three visits between them take place in appellant's home where the child would be more comfortable reconnecting with her father.

{¶79} As to appellee's drinking, appellant testified that it is a concern to her. (Tr. 40). She stated that while they were in Arizona, appellant got drunk and beat her up. (Tr. 41). She stated that he has had several DUIs. (Tr. 42). She stated that he would drink all the time when he was at home. (Tr. 42). She stated that she called the police during the incident in Arizona and again at home when appellee got drunk and beat her. (Tr. 41, 43).

{¶80} Kathryn Snavely, appellant's mother, also testified as to appellee's drinking. She testified that appellee drank frequently and was frequently intoxicated. (Tr. 8). She also described the incident that occurred in Arizona where appellee drank too much and beat up appellant. (Tr. 8).

{¶81} And Cathy Kreager, appellant's friend, testified about appellee's drinking. She stated that she has witnessed appellee intoxicated on many

occasions. (Tr. 17).

{¶82} Appellee testified that he has had two DUIs. (Tr. 98-99). He stated that he drinks everyday, "[e]very bit of a 6 pack a day[,] sometimes more on the week-ends." (Tr. 99). However, he stated that he does not believe he has a drinking problem because he has never missed a day of work in 27 years. (Tr. 99).

{¶83} The trial court was aware of appellee's drinking habits and indicated that this would be taken into consideration along with many other factors. (Tr. 117-118). The trial court was in the best position to observe the parties, listen to their testimony, and determine whether it was in their daughter's best interest to have unsupervised visitation with her father. There was no testimony that appellee ever acted violently towards his daughter, that he ever endangered her as a result of his drinking, or that he gets drunk in her presence. Consequently, we cannot conclude that the trial court abused its discretion in granting appellee unsupervised parenting time with his daughter.

{¶84} Accordingly, appellant's fourth assignment of error is without merit.

{¶85} For the reasons stated above, the trial court's judgment is hereby remanded on a limited basis. On remand, the trial court is to issue findings sufficient to enable this court to review the appropriateness of the spousal support award. As to all other matters, the trial court's judgment is hereby affirmed.

Waite, J., concurs.
DeGenaro, J., dissents; see dissenting opinion.

DeGenaro, J. dissent:

{¶86} I would dismiss this appeal because Appellant failed to timely file the notice of appeal. A close examination of the appearance docket maintained by the Clerk of Courts and the actual file-stamped decree of divorce in the file reveals a discrepancy. Whereas the docket notes a date of June 9, 2008 as the date the divorce was granted, in fact, the actual decree of divorce was time-stamped on June 6, 2008. This discrepancy does not overcome the fact that we lack jurisdiction to

consider the merits of this appeal. The time to file an appeal runs from the date stamped on the judgment entry.

{¶87} The procedural history of this case begins with the parties' decree of divorce, which was filed-stamped on Friday, June 6, 2008. The trial court sent notice of this judgment entry the following Monday, June 9, 2008. The trial court then issued a nunc pro tunc judgment entry on June 13, 2008 to correct a minor clerical error in the original divorce decree. Appellant, Denise L. Graham filed a notice of appeal on July 9, 2008, referencing the June 13, 2008 judgment entry.

{¶88} Because the trial court sent notice of the decision within three days after its entry, the 30 day time limit within which to file an appeal began to run on June 6, 2008. App.R. 4(A); Civ.R. 58(B). Thirty days thereafter would have been July 6, 2008. Because July 6, 2008 fell on a Sunday, the last day to file a notice of appeal would have been Monday, July 7, 2008. Civ.R. 6(A). The docket and record indicate that Appellant filed a notice of appeal which was time-stamped on July 9, 2008, two days late.

{¶89} The fact that the docket shows the incorrect date that the divorce decree was filed is troubling. Although a straightforward task, timely filing of a notice of appeal is significant, because failure to do so is a complete bar in civil cases from appellate review. *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, 649 N.E.2d 1229, syllabus (timely notice is a jurisdictional requirement for valid appeal). But despite the consequences in this or any other case, that incorrect date cannot be used to trigger the time frame within which to file a notice of appeal. "According to App.R. 4(A), the time for filing a civil appeal begins when the judgment entry is filed." *Flynn v. General Motors Corp*., 7th Dist. No. 02 CO 71, 2003-Ohio-6729, at ¶23, not the date the docket states the judgment was filed. To permit otherwise has the potential to create uncertainty in the progression of a case to the appellate court for review. As noted by the Sixth District:

{¶90} "Endorsing the fact and date of filing on the judgment entry itself is evidence that it was filed on that date * * *. All judgment entries (and other papers)

must be file-stamped on the date they are filed. It is impossible for an appellate court, on its own, to determine whether an appeal is timely filed, if the judgment entry from which the appeal is being prosecuted bears no file stamp * * *. Just as a judgment entry that has not been journalized, or filed with the clerk for journalization, is not a final appealable order, so a judgment entry that has not been filed-stamped by the trial court clerk is not a final appealable order." *In re Hopple* (1983), 13 Ohio App.3d 54, 55, 468 N.E.2d 129 (internal citations and footnote omitted).

{¶91} In *Hopple*, the appellant was making a second attempt to obtain review of his case via a habeas petition. His first attempt had been an appeal which the Sixth District dismissed for lack of a final appealable order. In both instances, Hopple was seeking review of a trial court order which had not been time-stamped. *Hopple* reinforced the directive of App.R. 4 to appellate courts that we are to look to the time-stamped judgment entry being appealed to make our determination as to whether or not the notice of appeal was timely filed.

{¶92} Further, the trial court's June 13, 2008 nunc pro tunc judgment entry does not extend the time within which a party may file an appeal. *Gold Touch, Inc. v. TJS Lab, Inc.* (1998), 130 Ohio App.3d 106, 109, 719 N.E.2d 629. The notice of appeal should have referenced the original judgment entry, which was filed Friday, June 6, 2008.

{¶93} For these reasons, I respectfully dissent, because we lack jurisdiction to review this appeal.