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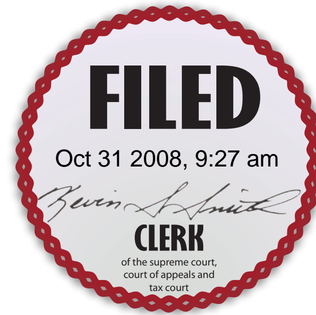

ATTORNEYS FOR APPELLANT:

MARK R. WATERFILL
JAMES B. CHAPMAN II
Dann Pecar Newman & Kleiman, P.C.
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

FRANCIS H. BARROW
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOSEPH PRIMERANO,)
)
Appellant-Plaintiff,)
)
vs.) No. 49A02-0801-CV-12
)
INDIANA STATE POLICE,)
)
Appellee-Defendant.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth H. Johnson, Judge
Cause No. 49D02-0603-PL-13564

October 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Joseph Primerano appeals from the trial court's entry of summary judgment in favor of the Indiana State Police ("ISP") on Primerano's complaint to enforce an arbitration award. Primerano presents several issues for our review. But we do not reach the merits of his appeal, because he did not timely file his Notice of Appeal after the trial court's summary judgment entry.

We dismiss.

FACTS AND PROCEDURAL HISTORY

In 2003, Primerano, an officer with ISP, operated his state vehicle while intoxicated, in violation of the Police Personnel Rules of the Indiana State Police Department. On December 8, 2003, Primerano signed a Last Chance Agreement, which provided in relevant part: "Any substantiated violation of a Department Rule, Regulation or Standard Operating Procedure [within two years from the date of the agreement] will result in [Primerano's] immediate removal from employment with [ISP] with no right to challenge or appeal such action." Appellant's App. at 176. On January 2, 2004, Primerano was arrested for public intoxication, and on January 6, ISP Superintendent Melvin Carraway terminated Primerano's employment with ISP.

Primerano filed a grievance with his Union, and an arbitration was scheduled to address the dispute. An attorney for ISP appeared at the arbitration, but objected to the arbitration on the grounds that the arbitrator did not have jurisdiction over the dispute and that the dispute was not arbitrable. The arbitrator proceeded with the arbitration and found in favor of Primerano. When ISP did not reinstate Primerano pursuant to the

arbitration award, he filed a complaint requesting that the trial court enforce the arbitration award. Both parties moved for summary judgment, and the trial court entered summary judgment in favor of ISP on December 4, 2007. This appeal ensued.[1]

DISCUSSION AND DECISION

The timely filing of a Notice of Appeal is a jurisdictional prerequisite. See Marlett v. State, 878 N.E.2d 860, 864 (Ind. Ct. App. 2007) ("This court lacks subject matter jurisdiction over cases that are not timely initiated."), trans. denied; Trinity Baptist Church v. Howard, 869 N.E.2d 1225, 1227 (Ind. Ct. App. 2007), trans. denied. Failure to conform to the applicable time limits results in forfeiture of an appeal. Ind. Appellate Rule 9(A)(5). Here, the trial court's order entering summary judgment in favor of ISP is dated and file-stamped December 4, 2007. Primerano filed his Notice of Appeal on January 9, 2007, more than thirty days after the summary judgment entry, in violation of Indiana Appellate Rule 9(A)(1).

Primerano points out that his counsel did not receive notice of the trial court's order on the summary judgment motions until December 10, 2007, and that the trial court had not entered the order into either the Record of Judgments and Orders ("RJO") or the Chronological Case Summary ("CCS") at the time that he filed his Notice of Appeal. Primerano contends that the thirty-day time limit for filing his Notice of Appeal did not begin to run until December 10, 2007. We cannot agree.

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[1] ISP moved to dismiss this appeal, and a motions panel of this court granted that motion. Primerano thereafter filed a petition for rehearing, which the majority of a second motions panel granted, reinstating the appeal. We may reconsider a ruling by the motions panel where there is "clear authority" establishing that the motions panel "erred as a matter of law." Oxford Fin. Group, Ltd. v. Evans, 795 N.E.2d 1135, 1141 (Ind. Ct. App. 2003). As discussed below, we find that the law is clear that Primerano's appeal was not timely filed and, therefore, we are without jurisdiction to consider this appeal.

It is true that the date of a judgment's entry into the RJO is generally the date from which the appellate time limit begins to run. Smith v. Deem, 834 N.E.2d 1100, 1110 (Ind. Ct. App. 2005), trans. denied. But that rule does not apply where, as here, a party has actual notice of the trial court's order before its entry into the RJO. See id. Indeed, here, Primerano filed his Notice of Appeal before the judgment had been entered into either the RJO or the CCS.

The circumstances of this case are analogous to those in In re Estate of Hester, 780 N.E.2d 848, 849 (Ind. Ct. App. 2002), trans. denied. In Hester, the order from which the appellants were appealing was "signed by the trial court on August 28, 2002, it was file-stamped as being filed in open court on August 28, 2002, and the chronological case summary shows that the order was entered on August 28, 2002." Id. The appellants filed their Notice of Appeal on October 3, 2002, outside the thirty-day time limit. In response to the appellee's motion to dismiss the appeal, the appellants presented this court with the affidavit of Margaret LeMare, Probate Clerk of Lake Superior Court, who "attest[ed] that she received the case file and order on September 3, 2002. She [further attested] that on September 3, 2002, she entered the order into the computer but 'reflecting the signed date of August 28, 2002.'" Id. The appellants argued that "since the order was entered on September 3, 2002, the Notice of Appeal they filed on October 3, 2002, was timely." Id.

We disagreed and held in relevant part:

> 3) The final order was signed by the trial court on August 28, 2002, it was file-stamped as filed in open court on August 28, 2002, and the chronological case summary shows that it was entered on August 28, 2002.
>
> 4) Therefore, even though the probate clerk made a computer record of the judgment on September 3, 2002, judgment was entered on August 28,

> 2002. Accordingly, the Appellants' October 3, 2002, Notice of Appeal was not timely, and this appeal is DISMISSED WITH PREJUDICE. . . .

Id.

Here, as in Hester, the summary judgment order was signed by the trial court on December 4, 2007, and it was file-stamped as "filed" on December 4, 2007. The only difference between the order at issue in this case and that in Hester is that the CCS included in the appendix on appeal here does not show the date the judgment was entered. Regardless, we think the same reasoning applies here, and we hold that the summary judgment was entered on December 4, 2007, for purposes of the thirty-day deadline for filing the Notice of Appeal.

Primerano's sole argument against dismissal is that "under the circumstances"[2] and given "Indiana's public policy of having courts determine issues and disputes on the merits," we should hold that he timely filed his Notice of Appeal. Reply Brief at 3-4. But Indiana Appellate Rule 9(A)(5) clearly states that "[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited[.]" In both his Notice of Appeal and Case Summary, Primerano states that the summary judgment order from which he is appealing is dated December 4, 2007. See Smith, 834 N.E.2d at 1110 n.18 (observing that it was "telling" that appellant's Notice of Appeal "itself claims to be appealing from an order which at the time of the filing of the Notice was sixty-seven days old.").

[2] Primerano states that there was a "significant delay" between the summary judgment hearing and the December 4 order. Brief of Appellant at 3. But Primerano fails to explain how that delay impacted his ability to timely file his Notice of Appeal.

Contrary to Primerano's assertion, under the circumstances presented here,[3] there is simply no basis in the law to hold that the thirty-day deadline runs from the date that an appellant receives notice of an order. We hold that Primerano's appeal was untimely, and we dismiss this appeal. See Hester, 780 N.E.2d at 849.

Dismissed.

ROBB, J., and MAY, J., concur.

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[3] There may be circumstances where the actual notice exception in Deem should not apply, such as where a party does not receive notice of a judgment until only a few days before the deadline to file the notice of appeal or after the deadline has passed. Such is not the case here, however. Primerano received actual notice of the trial court's judgment, including the date of the judgment, twenty-four days prior to the deadline to file his notice of appeal. This is more than enough time to prepare and file the appropriate paperwork. Therefore, Primerano cannot argue that the failure of the trial court or clerk of the court to make a contemporaneous entry of the court's order in the RJO or CCS prejudiced his ability to meet the deadline.