

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

SAMUEL PARATORE, et al.,	:	MEMORANDUM OPINION
Plaintiffs-Appellants,	:	
- vs -	:	CASE NO. 2009-P-0093
CONSOLIDATED RAIL CORPORATION, et al.,	:	
Defendants,	:	
NORFOLK SOUTHERN RAILWAY CO.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 1174.

Judgment: Appeal dismissed.

Douglas A. King, 34 South Main Street, Chagrin Falls, OH 44022-3200 (For Plaintiffs-Appellants).

Thomas E. Dover and *Joseph J. Santoro*, Gallagher, Sharp, Fulton & Norman, Sixth Floor, Bulkley Building, 1501 Euclid Avenue, Cleveland, OH 44115-2108 (For Defendant-Appellee).

MARY JANE TRAPP, P.J.

{¶1} On December 30, 2009, appellants, Samuel Paratore and Janet Coulter, filed a notice of appeal from a November 25, 2009 entry of the Portage County Court of Common Pleas.

{¶2} On January 15, 2010, appellee, Norfolk Southern Railway Company, filed a motion to dismiss the appeal as untimely.

{¶3} Appellants filed a brief in opposition to the motion to dismiss on February 3, 2010. Appellants allege that the entry appealed from was journalized on November 30, 2009, and that the appeal was filed within thirty days of the date of journalization. On February 10, 2010, appellants also filed a supplemental memorandum in opposition to the motion to dismiss. In their supplemental motion, appellants argue that pursuant to Civ.R. 6(E), they were allowed an additional three-day extension because they received service by mail.

{¶4} On February 19, 2010, appellee filed a reply to appellants' supplemental memorandum in opposition to the motion to dismiss the appeal.

{¶5} App.R. 4(A) states that:

{¶6} "A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day rule period in Rule 58(B) of the Ohio Rules of Civil Procedure."

{¶7} Loc.R. 3(D)(2) of the Eleventh District Court of Appeals provides:

{¶8} "In the filing of a Notice of Appeal in civil cases in which the trial court clerk has not complied with Ohio Civ.R. 58(B), *and the Notice of Appeal is deemed to be filed out of rule*, appellant shall attach an affidavit from the trial court clerk stating that service was not perfected pursuant to Ohio App.R. 4(A). The clerk shall then perfect service and furnish this Court with a copy of the appearance docket in which date of service has

been noted. Lack of compliance shall result in the *sua sponte* dismissal of the appeal under Ohio App.R. 4(A).” (Emphasis sic.)

{¶9} In the instant matter, the order appealed from was filed on November 25, 2009, and bears the date stamp of that date. Appellants have not demonstrated that notice of the judgment entry was not provided within three days as prescribed by Civ.R. 58(B).

{¶10} Civ.R. 6(E) does not extend the time for filing the notice of appeal. See *Leach v. Rosenblum* (Sept. 1, 2000), 1st Dist. No. C-000476, 2000 Ohio App. LEXIS 3964. Appellants contend that any time the clerk of courts mails a judgment entry to the parties, Civ.R. 6(E) requires that the parties have an additional three days beyond the thirty-day requirement set forth in App.R. 4(A). “This argument must fail because the application of Civ.R. 6(E) to the filing of a notice of appeal in a civil case would impermissibly expand the jurisdiction of this court.” *Id.* The time requirement is jurisdictional in nature and may not be enlarged by an appellate court. *State ex rel. Pendell v. Adams Cty. Bd. of Elections* (1988), 40 Ohio St.3d 58, 60; App.R. 14(B). Since the thirty-day rule set forth in App.R. 4(A) is mandatory and jurisdictional, Civ.R. 6(E) cannot extend the appeal period.

{¶11} Here, the judgment entry appealed from was time-stamped November 25, 2009, and was mailed via ordinary mail to the parties within three days pursuant to Civ.R. 58(B), i.e. November 30, 2009.¹ Therefore, the notice of appeal was due on Monday, December 28, 2009, which was not a holiday or a weekend. Appellants have

1. The third day fell on Saturday, November 28, 2009, so the next business day was Monday, November 30, 2009.

neither complied with the thirty-day rule set forth in App.R. 4(A) nor alleged that there was a failure by the trial court clerk to comply with Civ.R. 58(B).

{¶12} Accordingly, appellee's motion to dismiss is granted. This appeal is dismissed pursuant to App.R. 4(A).

{¶13} Appeal dismissed.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.