

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

ESTATE OF : **MEMORANDUM OPINION**
JOHN E. WINFREY, DECEASED :
CASE NO. 2010-T-0080

Civil Appeal from the Trumbull County Court of Common Pleas, Probate Division, Case No. 2007 EST 0261.

Judgment: Appeal dismissed.

Robert Winfrey, pro se, P.O. Box 3141, Warren, OH 44485 (Appellant).

Michael D. Rossi, Guarnieri & Secret, 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Appellee, John M. Rossi).

CYNTHIA WESTCOTT RICE, J.

{¶1} On June 11, 2010, appellant, Robert Winfrey, pro se, filed a notice of appeal from an October 31, 2008 entry of the Trumbull County Court of Common Pleas, Probate Division.

{¶2} On June 24, 2010, appellee, John M. Rossi, Administrator WWA of the estate of John E. Winfrey, Deceased, filed a motion to dismiss the appeal as untimely and for the imposition of sanctions under App.R. 23.

{¶3} Appellant filed a brief in opposition to the motion to dismiss on June 28, 2010. Appellant alleges that pursuant to App.R. 4(B)(2), the appeal period had been tolled due to the filing of his Civ.R. 59 motion for new trial, which was filed with the trial court on November 17, 2008. In addition, appellant claims that he voluntarily dismissed

his November 17 motion on June 11, 2010, which is the same day he filed his notice of appeal. However, appellant's argument fails because the notice of appeal time is only tolled under App.R. 4(B)(2) when the motion for new trial is timely filed. In this case, appellant filed his motion for new trial seventeen days after the entry of judgment. Pursuant to Civ.R. 59(B), a motion for new trial "shall be served not later than fourteen days after the entry of judgment."

{¶4} App.R. 4(A) states that:

{¶5} "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."

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

{¶7} "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.)

{¶8} Here, the notice of appeal was due on Monday, December 1, 2008 which was not a holiday or a weekend. Appellant has 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). 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).

{¶9} Accordingly, appellee's motion to dismiss is granted. This appeal is dismissed pursuant to App.R. 4(A). That part of appellee's motion requesting sanctions pursuant to App.R. 23 is overruled.

{¶10} Appeal dismissed.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDALL, J.,

concur.