

Opinion filed September 26, 2013



In The

# Eleventh Court of Appeals

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No. 11-13-00256-CV

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**DAVID MICHAEL BROOKS, Appellant**

**V.**

**WAL-MART STORES, INC., Appellee**

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**On Appeal from the 35th District Court**

**Brown County, Texas**

**Trial Court Cause No. 1210368**

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## **MEMORANDUM OPINION**

David Michael Brooks, Appellant, attempts to appeal from a May 28, 2013 summary judgment rendered in favor of Wal-Mart Stores, Inc. Upon reviewing the documents on file in this case, this court wrote the parties and informed them that the motion for new trial appeared to be untimely, thereby making the notice of appeal untimely. We requested that Appellant respond and show grounds to

continue the appeal. Appellant filed a response urging that his notice of appeal was timely pursuant to TEX. R. APP. P. 26.1(a)(4) because he timely filed a request for findings of fact and conclusions of law. *See* TEX. R. CIV. P. 297. Because Rule 26.1(a)(4) is not applicable in this case, we dismiss the appeal for want of jurisdiction pursuant to TEX. R. APP. P. 42.3(a).

The judgment from which Appellant attempts to appeal is a summary judgment. Findings of fact and conclusions of law are not proper when the appeal is from a summary judgment. *Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994). Thus, a request for findings of fact and conclusions of law does not extend the time in which to file a notice of appeal. *Id.*; *Scott v. Wood Cnty. Comm'rs Court*, No. 12-13-00037-CV, 2013 WL 776660 (Tex. App.—Tyler Feb. 28, 2013, no pet.) (mem. op.).

In his response to our letter, Appellant did not address the timeliness of his motion for new trial as requested by this court. Our records reflect that the motion for new trial was filed on June 28, 2013, which was thirty-one days after the date that the trial court signed the order granting summary judgment. The motion for new trial was filed one day late. *See* TEX. R. CIV. P. 329b(a). Absent a timely filed motion for new trial, the notice of appeal was due to be filed on June 27, 2013, thirty days after the summary judgment was signed. *See* TEX. R. APP. P. 26.1. However, Appellant did not file his notice of appeal until August 26, 2013, ninety days after the summary judgment was signed. Appellant's notice of appeal was, therefore, untimely.

Absent a timely notice of appeal, this court is without jurisdiction to consider this appeal. *See Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005); *Garza v. Hibernia Nat'l Bank*, 227 S.W.3d 233 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *see also Verburgt v. Dorner*, 959 S.W.2d 615,

617 (Tex. 1997). Because Appellant did not timely file a notice of appeal, we have no jurisdiction to entertain this appeal.

We dismiss this appeal for want of jurisdiction.

PER CURIAM

September 26, 2013

Panel consists of: Wright, C.J.,  
McCall, J., and Willson, J.