

Dismissed and Memorandum Opinion filed February 24, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-01150-CV

AUSTIN O'TOOLE, JR., Appellant

V.

MARILYN WILLIAMS LINLEY, Appellee

**On Appeal from the 308th District Court
Harris County, Texas
Trial Court Cause No. 2010-35526**

MEMORANDUM OPINION

This is an attempted appeal from a dismissal order signed September 3, 2010. The Harris County District Clerk's office advised the court that a motion for new trial was filed November 11, 2010, but no motion for new trial is included in the clerk's record. Appellant's notice of appeal was filed November 5, 2010. A second notice of appeal was filed November 19, 2010.

The record before this court does not contain a timely motion for new trial. *See* Tex. R. Civ. P. 329b(a) (requiring motion for new trial to be filed within 30 days after the

order complained of is signed). The notice of appeal must be filed within thirty days after the judgment is signed when appellant has not filed a timely motion for new trial, motion to modify the judgment, motion to reinstate, or request for findings of fact and conclusion of law. *See* Tex. R. App. P. 26.1. According to the record filed with this court, appellant's notice of appeal was not filed timely.

A motion for extension of time is necessarily implied when an appellant, acting in good faith, files a notice of appeal beyond the time allowed by rule 26.1, but within the fifteen-day grace period provided by rule 26.3 for filing a motion for extension of time. *See Verburgt v. Dorner*, 959 S.W.2d 615, 617-18 (1997) (construing the predecessor to Rule 26). Appellant's notice of appeal was not filed within the fifteen-day period provided by rule 26.3. *See* Tex. R. App. P. 26.3.

On February 3, 2011, notification was transmitted to all parties of the court's intention to dismiss the appeal for want of jurisdiction. *See* Tex. R. App. P. 42.3(a). In response, appellant filed a motion seeking to avoid dismissal. In the motion, appellant asserted that he filed a timely motion for new trial and notice of appeal on or about September 29, 2010, and the court clerk misplaced them. He stated that he then filed several documents to replace the lost filings. He has not provided this court with a file-stamped copy of a timely motion for new trial or notice of appeal. In the absence of a timely notice of appeal, this court lacks jurisdiction over the appeal. *See Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 564 (Tex. 2005).

Accordingly, we deny appellant's motion and the appeal is ordered dismissed.

PER CURIAM

Panel consists of Justices Brown, Boyce & Jamison.