[Cite as *Kilbarger v. Kilbarger*, 2019-Ohio-247.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

Kristin E. Kilbarger,	:	Case No. 18CA14
Plaintiff-Appellee,	:	
v.	:	**DECISION AND JUDGMENT ENTRY**
James E. Kilbarger,	:	
Defendant-Appellant.	:	**RELEASED 01/14/2019**

{¶1} This matter comes before the Court on Appellee Kristin E. Kilbarger's motion to dismiss for lack of jurisdiction, Appellant James E. Kilbarger's memorandum opposing Appellee's motion to dismiss, and Appellee's reply in support of her motion. For the reasons that follow, we **GRANT** the motion and dismiss this appeal.

{¶2} Mr. Kilbarger appealed the Hocking County Court of Common Pleas' judgment entry–decree of divorce of May 7, 2018 and the judgment entry denying Defendant's motion for new trial of August 6, 2018. The parties agree that Mr. Kilbarger faxed his notice of appeal to the Hocking County Clerk of Courts on September 5, 2018, the deadline for filing the notice of appeal. Mrs. Kilbarger moves to dismiss the appeal on the ground that a notice of appeal cannot be fax filed and, therefore, Mr. Kilbarger failed to file a timely notice of appeal. Mr. Kilbarger contends that his notice of appeal can be faxed under the Rules of the Court of Common Pleas Hocking County and that the Clerk actually accepted and time stamped his notice of appeal so it is valid.

{¶3} Courts of appeals lack jurisdiction over untimely filed appeals. *Kemper*

Securities, Inc. v. Schultz, 111 Ohio App.3d 621, 676 N.E.2d 1197 (10th Dist. 1996). Pursuant to App.R. 4(A), a notice of appeal in a civil case must be filed within thirty days of the later of the entry of judgment or order appealed from or service of the notice of judgment and its entry if service is not made within three days as required by Civ.R. 58(B). The journal entry appealed from was journalized on August 6, 2018 and the Hocking County Clerk of Courts' online docket indicates that copies were mailed to the parties on the same day. The 30th day after the journalization of the entry was September 5, 2018; therefore, if the fax filed notice of appeal is not valid, the time to appeal has expired.

{¶4} In *Louden, et al. v. A.O. Smith Corp., et al.*, 121 Ohio St.3d 95, 2009-Ohio-319, the appellants filed timely electronic notices of appeal pursuant to the trial court's case management order requiring that an online docketing system be utilized. The clerk did not forward the electronic notices of appeal to the 8th District Court of Appeals and appellants later filed paper copies of the notices of appeal, which were forwarded to the appellate court. The 8th District dismissed those appeals as untimely. Appellants challenged the dismissal of their appeals, arguing that their notices of appeal were timely because the trial court had ordered that all filings be submitted electronically and, therefore, the electronically filed notices of appeal were timely and satisfied the requirements of App.R. 3(A) and 4(A).

{¶5} The Supreme Court rejected the appellants' contention noting that "[a]lthough a notice of appeal is filed with the clerk of the trial court, it is the Rules of Appellate Procedure that 'govern *procedure in appeals* to courts of appeals.'" (Emphasis added.). Id. at ¶ 2, citing App.R. 1(A). And, pursuant to App.R. 3(A), an

appeal is "taken by *filing* a notice of appeal with the clerk of the trial court within the time allowed by Rule 4." (Emphasis added.) Id. at ¶ 12. Although "filing" is not defined in the Rules of Appellate Procedure, the Supreme Court of Ohio noted that, "historically, 'filing' occurs when a person manually presents a paper pleading to the clerk of courts." Id. at ¶ 15 (citations omitted). Although advancements in technology now allow for the filing of documents electronically, the Supreme Court of Ohio noted that documents can only be filed electronically in the courts of appeals if a local rule is adopted pursuant to App.R. 13[1] and Sup.R. 27[2] and the 8th District had not adopted such a rule so it did not permit pleadings – including notices of appeal - to be filed electronically. Id. at ¶¶ 16-26.

{¶6} We are required to follow the holding of *Loudon* and, like the 8th District in that case, this Court has not adopted a local rule permitting the electronic – or in this case facsimile – filing of pleadings or documents. Therefore, pursuant to the Appellate Rules and the Supreme Court's holding, Mr. Kilbarger could not file his notice of appeal by facsimile and we cannot recognize it.

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1 App.R. 13 states:

> (A) * * * A court may provide, by local rules adopted pursuant to the Rules of Superintendence, for the filing of documents by electronic means. If the court adopts such local rules, they shall include all of the following:
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> (1) Any signature on electronically transmitted documents shall be considered that of the attorney or party it purports to be for all purposes. If it is well established that the documents were transmitted without authority, the court shall order the filing stricken.
> (2) A provision shall specify the days and hours during which electronically transmitted documents will be received by the court, and a provision shall specify when documents received electronically will be considered to have been filed.
> (3) Any document filed electronically that requires a filing fee may be rejected by the clerk of court unless the filer has complied with the mechanism established by the court for the payment of filing fees.

2 Sup.R. 27 provided that local rules of practice relating to the use of information technology must be submitted to and approved by the Supreme Court Commission on Technology and the Courts for review, and such rules had no force and effect unless the Commission determined that the rules complied with the minimum standards adopted by the Commission. Sup.R. 27 is no longer in effect. Instead, Sup.R. 5(B) now requires that all local rules related to the use of information technology must be filed with the Supreme Court Commission on Technology and the Courts. The Commission is no longer required to

{¶7} Mr. Kilbarger attempts to distinguish his appeal from *Loudon*. First, he argues that the local rules of Hocking County permit the fax filing of his notice of appeal. Specifically, Loc.R. 37 provides that pleadings and other papers may be filed with the Clerk of Courts by facsimile transmission subject to certain conditions. Sections 1.01 and 1.02 specify that the rule applies to civil, criminal, and domestic relations proceedings in the Hocking County Common Pleas Court but not to small claims, probate, juvenile, and appellate proceedings and, in those proceedings, no facsimile transmission of documents will be accepted. Mr. Kilbarger argues that, because the notice of appeal is filed in the underlying domestic relations case and not in an appellate proceeding, Section 1.01 and not Section 1.02 applies to the notice of appeal.

{¶8} Although Mr. Kilbarger is correct that notices of appeal from trial court decisions are filed in the trial court cases, the Supreme Court specifically held that "unless a local rule of *the appellate court*, * * *, expressly permits filing of a notice of appeal by electronic means, a party appealing a trial court order must file a paper copy of the notice of appeal with the clerk of the trial court pursuant to App.R. 3." (Emphasis added.) *Loudon* at ¶ 32. Therefore, even assuming that the Rules of the Court of Common Pleas Hocking County permitted the filing of the notice of appeal by facsimile transmission, the Local Rules of the Fourth Appellate District do not and the local appellate rules govern the filing of the notice of appeal even though it is actually filed in the trial court.

{¶9} Mr. Kilbarger also argues that, even if the local rules did not authorize the filing of the notice of appeal by facsimile, the clerk of courts still accepted and file stamped the notice within the 30 day timeframe so the appeal is timely filed. Mr.

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approve the local rules though.

Kilbarger notes that "failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal * * *." App.R. 3(A). However, as previously noted, the Supreme Court held in *Loudon* that a notice of appeal is not "filed" if it is presented to the clerk of courts electronically rather than manually with a paper copy unless authorized by local appellate rules. Therefore, even though the clerk time stamped and filed the notice, it was not "filed" in accordance with the appellate rules.

{¶10} This Court prefers to decide cases on their matters; however, we are also bound by the dictates of the Supreme Court of Ohio. Accordingly, we conclude that the notice of appeal was not filed with the Clerk of Courts in accordance with the appellate rules. Therefore we lack jurisdiction to hear this appeal and **DISMISS** this case.

COSTS TO APPELLANT.

{¶11} The clerk shall serve a copy of this entry on all counsel of record at their last known addresses by ordinary mail. **SO ORDERED.**

McFarland, J.: Concurs.
Hoover, J.: Dissents.

FOR THE COURT

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Peter B. Abele
Administrative Judge