[Cite as *Agee v. Cuyahoga Cty.*, 2016-Ohio-2728.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103464

DOROTHY AGEE

PLAINTIFF-APPELLANT

vs.

COUNTY OF CUYAHOGA, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-840992

BEFORE: S. Gallagher, J., Keough, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: April 28, 2016

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SEAN C. GALLAGHER, J.:

{¶1} Appellant Dorothy Agee appeals the trial court's decision that granted the motion to dismiss of appellees Cuyahoga County Prosecutor and Office of the Cuyahoga County Prosecutor and the motion to dismiss of appellee Cuyahoga County on the basis of immunity and lack of subject-matter jurisdiction. Because the appeal was not timely filed, we dismiss the appeal for lack of jurisdiction.

{¶2} After this appeal was filed, appellees Cuyahoga County Prosecutor and Office of the Cuyahoga County Prosecutor filed a motion to dismiss, claiming the court lacked jurisdiction over the appeal because the appeal was not timely filed. The motions panel for the court denied appellees' motion to dismiss the appeal and deemed the appeal timely. The issue was again raised in the brief of appellees Cuyahoga County Prosecutor and Office of the Cuyahoga County Prosecutor. Upon review, we find that appellees' motion to dismiss was improvidently denied and that we are without jurisdiction over the appeal.

{¶3} App.R. 4(A) requires that "a party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 *within 30 days of that entry*." (Emphasis added.) Compliance with App.R. 4(A) is a jurisdictional requirement, and where a notice of appeal is not timely filed, the court of appeals has no jurisdiction to entertain the appeal. *Wells Fargo Bank, N.A. v. Fields*, 8th Dist.

Cuyahoga Nos. 101814 and 101985, 2015-Ohio-4580, ¶ 14; *Bounce Props., L.L.C. v. Rand*, 8th Dist. Cuyahoga No. 92691, 2010-Ohio-511, ¶ 6.

{¶4} A judgment is effective when entered by the clerk upon the journal. Civ.R. 58(A)(1). Pursuant to Civ.R. 58(B), the court is to instruct the clerk to serve interested parties with "notice of the judgment and its date of entry upon the journal." The clerk is to serve the parties "in a manner prescribed by Civ.R. 5(B)" and note service on the docket "within three days of entering the judgment upon the journal." Civ.R. 58(B). Civ.R. 5(B)(2)(f) authorizes service by email, "in which event service is complete upon transmission." However, "[t]he failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App.R. 4(A)." Pursuant to App.R. 4(A)(3), in a civil case, if the clerk does not complete service within the three-day period prescribed in Civ.R. 58(B), then the 30-day period will begin to run on the date when the clerk actually completes service.

{¶5} As the Ohio Supreme Court has recognized,

> Timeliness is defined as 30 days from the date of the final order or from the date that the clerk completes service if service is not completed within three days of entering the judgment on the journal. App.R. 4(A)(1). By maintaining a strict 30-day deadline, there is no doubt as to when the notice of appeal is due.

Clermont Cty. Transp. Improvement Dist. v. Gator Milford, L.L.C., 141 Ohio St.3d 542, 2015-Ohio-241, 26 N.E.3d 806, ¶ 7.[1]

{¶6} The trial court's judgment entry was entered on July 31, 2015. The docket reflects that the clerk served notice of the judgment and its date of entry upon the journal to respective counsel on the same date by email and noted service on the docket. Appellant concedes that this email was sent to counsel. Thus, the clerk complied with the requirements of Civ.R. 58(B), service was complete upon transmission, and there was no basis upon which to extend the time for filing the notice of appeal. The notice of appeal was required to be filed within 30 days of the final judgment entry. App.R. 4(A).

{¶7} Appellant did not file her notice of appeal until September 1, 2015, which was 32 days after the judgment entry, and thus untimely. A court of appeals lacks jurisdiction over any appeal that is not timely filed. *State ex rel. Pendell v. Adams Cty. Bd. of Elections*, 40 Ohio St.3d 58, 60, 531 N.E.2d 713 (1988); *Wells Fargo Bank, N.A.* at ¶ 14.

{¶8} Appellant argued in her opposition to the motion to dismiss the appeal that the trial court's judgment entry was received for filing almost 17 minutes after the clerk's office had closed and, therefore, should be deemed filed and served on Monday, August 3, 2015. In denying the motion to dismiss the appeal, the motions panel agreed with this argument, relying on Section XIII(4)(c) of the First Amended Temporary Administrative

[1] The issue in *Clermont Cty. Transp. Improvement Dist.* was whether actual knowledge and receipt of a judgment entry was a sufficient substitute for service of notice of the judgment by the clerk's office. *Id.* at ¶ 1-2.

Order of the Cuyahoga County Court of Common Pleas, which states that for the purpose of computing the time to respond to a document received by the court electronically, "any documents received after 4:30 p.m. * * * shall be deemed filed on the next Court business day that is not a Saturday, Sunday, or legal holiday." However, that section applies to computing the response time from the electronic service of filings by parties who are registered users of the court's e-filing system. It has no application to the computation of time for filing a notice of appeal from the trial court's judgment entry. Any other reading of the local provision would be contrary to the Rules of Appellate Procedure and the Rules of Civil Procedure. Pursuant to App.R. 14(B), "[t]he court may not enlarge or reduce the time for filing a notice of appeal[.]"

{¶9} "App.R. 4 governs the timing of appeals and must be carefully followed because failure to file a timely notice of appeal under App.R. 4(A) is a jurisdictional defect." *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, 900 N.E.2d 607, ¶ 17. The local rules may not be construed to circumvent the filing requirements of App.R. 4(A) and to confer jurisdiction where none exists. As recognized by the Ohio Supreme Court, "App.R. 4(A) is precise in its requirements, and appellant's possible reliance to her detriment upon an informal local practice, although unfortunate, cannot alter the operation of that Rule." *Kauder v. Kauder*, 38 Ohio St.2d 265, 267, 313 N.E.2d 797 (1974).

{¶10} Appellant further argued that the email notice in this case was not valid because it was "merely a cut-and-paste of the Journal Entry" and there was no signature

on the email. The service to be afforded includes "notice of the judgment and its date of entry upon the journal." Civ.R. 58(B). The email notice that was served to appellant was from the Cuyahoga County Clerk of Courts and included notice of the judgment entry and the docket date, and quoted the text of the court's judgment entry. A copy of the judgment entry was attached to the email. We are not persuaded by appellant's argument that there is no authority for the clerk to simply "attach" a journal entry to an email. The clerk's email notification fully complied with all the requirements to serve appellant with notice of the judgment entry and its date of entry upon the journal within the prescribed three-day period under Civ.R. 58(B).

{¶11} In order to perfect her appeal, appellant was required to file her notice of appeal within 30 days of the July 31, 2015 judgment entry. Because appellant's notice of appeal was not filed within the 30-day jurisdictional requirement set forth in App.R. 4(A), this court lacks jurisdiction over the appeal.

{¶12} Appeal dismissed.

It is ordered that appellees recover from appellant costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., CONCURS;
MARY EILEEN KILBANE, J., DISSENTS (SEE SEPARATE OPINION)

MARY EILEEN KILBANE, J., DISSENTING:

{¶13} I respectfully dissent. I would conclude that this court has jurisdiction to address appellant Dorothy Agee's ("Agee") appeal. However, after review, I find that the appeal lacks merit, and therefore, I would affirm the trial court's order dismissing Agee's complaint against defendants-appellees the Cuyahoga County Prosecutor ("prosecutor"), the office of the Cuyahoga County Prosecutor ("prosecutor's office"), and Cuyahoga County ("the county") (collectively referred to as "defendants").

{¶14} Agee filed this tort action against the defendants alleging that defamatory information about her was included in a Complaint Summary and Bond Report ("CSBR") made available to the public on the county's website, www.cuyahogacounty.us. Agee alleged claims for defamation per se (first claim), false light invasion of privacy (second claim), and negligence, gross negligence, and recklessness (third claim). She also sought a declaratory judgment from the trial court in order to invalidate the settlement agreement that she entered into with the county.

{¶15} On July 31, 2015, the trial court granted the defendants' motions to dismiss, stating that

> [t]he court dismisses counts one, two, and three of the amended complaint as defendants are entitled to immunity pursuant to O.R.C. 2744. The court dismisses count four of the amended complaint for lack of subject matter

> jurisdiction. The court finds that count four falls within the scope of O.R.C. 4117 and jurisdiction is exclusive to the State Employee Relations Board ["SERB"].

{¶16} The majority has concluded that this court does not have jurisdiction over Agee's appeal because she filed her notice of appeal on September 1, 2015, or 32 days after the July 31, 2015 final judgment. However, Rule XIII of the First Amended Temporary Administrative Order for implementation of the electronic filing ("e-filing") system provides that, in calculating the time within which a party must respond to a document, documents received after 4:30 p.m. are deemed to have been filed on the next business day. Under this rule, I would find that the trial court's order, which was received by the clerk on Friday, July 31, 2015 at 4:46:59 p.m. is actually deemed filed on the next court business day, which was August 3, 2015, thereby rendering Agee's September 1, 2015 notice of appeal timely.

{¶17} Additionally, under *Clermont Cty. Transp. Improvement Dist. v. Gator Milford, L.L.C.*, 141 Ohio St.3d 542, 2015-Ohio-241, 26 N.E.3d 806, the time for appeal does not begin to run until the clerk has complied with the service and notice requirements of Civ.R. 58(B). Here, the Cuyahoga County Clerk's Office sent an email to counsel on July 31, 2015 at 4:49 p.m. advising them of the court's order. The email contained the text of the order, but it was not signed or journalized. Therefore, it is not clear that the email complied with the requirements of Civ.R. 58(B), starting the 30-day period for filing an appeal.

{¶18} Having found jurisdiction to address the appeal, I would proceed to the merits. After reviewing the assignments of error, just as the trial court concluded, I also conclude that defendants are immune from liability on Agee's first, second, and third claims for relief (defamation, false light invasion of privacy, and negligence, gross negligence, and recklessness). The county is a political subdivision, and the clerk's office, the prosecutor, prosecutor's office, and the county's prosecutorial functions are all governmental functions. R.C. 2744.01(C)(2)(f); *Newton v. Cleveland Law Dept.*, 8th Dist. Cuyahoga No. 102042, 2015-Ohio-1460, ¶ 14; *Lambert v. Clancy*, 125 Ohio St.3d 231, 2010-Ohio-1483, 927 N.E.2d 585, ¶ 17. Consequently, under the first tier of the analysis set forth in *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, they are presumptively immune from liability from Agee's first three claims.

{¶19} Further, because Agee's allegations do not involve the five exceptions to immunity set forth in R.C. 2744.02(B), I would conclude that Agee cannot overcome the grant of statutory immunity. *See also Coleman v. Cleveland School Dist. Bd. of Edn.*, 8th Dist. Cuyahoga Nos. 84274 and 84505, 2004-Ohio-5854 (school board was entitled to statutory immunity from a teacher's defamation claim); *Hubbard v. Cleveland Metro. School Dist. Bd. of Edn.*, 195 Ohio App.3d 708, 2011-Ohio-5398, 961 N.E.2d 722 (8th Dist.) (school board employee was immune for allegedly making slanderous remarks while on school grounds, during a school function).

{¶20} In addition, I would conclude that Agee's allegations concerning the prosecutor clearly fall within the prosecutor's advocacy function because they pertain to

the initiation of criminal proceedings and the initial obtaining, reviewing, and evaluating of evidence. Therefore, the prosecutor is immune from liability. *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). I would additionally conclude that the complaint is also subject to dismissal because the four corners of the complaint reveal that it is barred by Agee's settlement agreement. *Compare Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268.

{¶21} Lastly, I would find, as the trial court found, that Agee's fourth claim, pertaining to the signing of the settlement agreement, alleges unfair labor practices within the scope of R.C. 4117.11. Therefore, I would conclude that jurisdiction over this claim is exclusive to SERB.