[Cite as *Blair v. Wallace*, 2010-Ohio-2734.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

SHANNON K. BLAIR fka WALLACE	C. A. No. 24819
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
SCOTT B. WALLACE	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. 2004 02 0502

DECISION AND JOURNAL ENTRY

Dated: June 16, 2010

Per Curiam.

{¶1} Appellant, Scott Wallace ("Husband"), appeals the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court reverses.

I.

{¶2} On February 10, 2004, appellee, Shannon Wallace, nka Blair ("Wife"), filed a complaint for divorce against Husband. Husband answered and counterclaimed for divorce. The parties proceeded with discovery, and both parties ultimately filed motions to compel. On January 3, 2005, Husband filed a motion for sanctions arising out of discovery disputes.

{¶3} On January 25, 2005, the parties appeared for a pretrial at which time they informed the court that they had reached a settlement. Counsel for the parties read the terms of the parties' agreement into the record before the magistrate. On May 6, 2005, the magistrate issued an order directing the parties to appear for hearing on June 13, 2005, if no final judgment entry decree of divorce was filed by May 16, 2005.

{¶4} On May 11, 2005, Husband filed a motion for fees and to modify and enforce the parties' agreement. He attached a proposed final decree of divorce to his motion, because no final decree had yet been journalized. The proposed decree included a provision that Wife pay Husband $3000.00 for his attorney fees, although that matter was not recited by counsel on the record before the magistrate on January 25, 2005. On May 25, 2005, Wife filed a motion to enforce settlement agreement and approve her attached proposed divorce decree.

{¶5} On June 8, 2005, the final decree of divorce proposed by Wife was filed by the domestic relations court. The decree was signed by both the judge and magistrate. Wife and her counsel both signed as having approved the decree, although neither Husband nor his counsel signed the document.

{¶6} On August 22, 2008, Husband filed a motion for contempt, alleging that Wife had violated terms of the final decree of divorce. On the same day, Husband filed a motion to set a hearing on his January 3, 2005 motion for sanctions. On November 4, 2008, the trial court denied the motion for a hearing, concluding that it had previously entertained the pending motion for sanctions when it adopted the parties' final decree of divorce which asserts that "the parties reached an agreement as to all issues." Husband appealed from the post-decree order. On May 13, 2009, this Court affirmed. *Blair v. Wallace*, 9th Dist. No. 24526, 2009-Ohio-2227 ("*Wallace I*").

{¶7} On June 17, 2009, Husband again filed a notice of appeal, appealing from the June 8, 2005 divorce decree. Husband raises two assignments of error, which this Court consolidates for purposes of review.

II.

{¶8} Husband assigns error as to the June 8, 2005 final decree of divorce.

{¶9} Husband filed his notice of appeal on June 17, 2009, more than four years after the journalization of the divorce decree. As a preliminary matter, we must determine whether the timing of the appeal divests this Court of jurisdiction to consider the appeal.

{¶10} App.R. 3(A) states in relevant part: "An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4." App.R. 4(A) states in relevant part: "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 period in Rule 58(B) of the Ohio Rules of Civil Procedure." This Court has recognized that "[t]his time requirement is jurisdictional and may not be extended. Where an untimely appeal has been filed, an appellate court lacks jurisdiction to consider the merits, and the appeal must be dismissed. (Citations omitted)" *Metropolitan Bank & Trust Co. v. Roth*, 9th Dist. No. 21174, 2003-Ohio-1138, at ¶15.

{¶11} Civ.R. 58(B) provides:

> "When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The 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)."

{¶12} The Ohio Supreme Court has stated:

> "In those cases in which both Civ.R. 58(B) and App.R. 4(A) are applicable, if service of the notice of judgment and its entry is made within the three-day period of Civ.R. 58(B), the appeal period begins on the date of judgment, but if the appellants are not served with timely notice, the appeal period is tolled until the appellants have been served. *In re Anderson* (2001), 92 Ohio St.3d 63, 67. Consequently, App.R. 4(A) 'tolls the time period for filing a notice of appeal ***

> if service is not made within the three-day period of Civ.R. 58(B).' *State ex rel. Hughes v. Celeste* (1993), 67 Ohio St.3d 429, 431." *State ex rel. Sautter v. Grey*, 117 Ohio St.3d 465, 2008-Ohio-1444, at ¶16.

The high court reasoned that "if a right of appeal from a trial court's judgment is to have meaning, the parties to the judgment or their attorneys of record must be given notice of the judgment before the time for appeal begins to run." Id. at ¶10.

{¶13} In this case, the trial court never endorsed upon the final divorce decree the required "direction to the clerk to serve upon all parties *** notice of the judgment and its date of entry upon the journal" as required by Civ.R. 58(B). In addition, there is no indication in the domestic relations court's docket that Husband was ever served with notice of the final divorce decree. "Therefore, the time for filing a notice of appeal never began to run because the trial court failed to comply with Civ.R. 58(B). Therefore, [Husband's] appeal in this case was timely filed under App.R. 4(A)." *In re Anderson*, 92 Ohio St.3d at 67. Accordingly, this Court has jurisdiction to consider the appeal.

{¶14} Moreover, Husband is not foreclosed from filing the instant appeal notwithstanding his earlier appeal. In *Wallace I*, Husband appealed the trial court's post-decree order denying his motion for a hearing on his pre-decree motion for sanctions. We overruled his assignment of error and affirmed the trial court's denial of his motion for a hearing. Although we stated that a challenge to the enforceability of the 2005 final decree of divorce would be untimely, that issue was not squarely before us for review. Although Husband noted in his statement of the facts in his brief submitted in *Wallace I* that neither he nor his attorney signed Wife's proposed final divorce decree, he did not argue on appeal that the decree was unenforceable for that reason. In fact, he did not assign any error arising out of the final decree.

{¶15} The Ohio Supreme Court has stated:

> "Litigants in Ohio are entitled to an appeal from a trial court judgment when a notice of appeal is filed within the time allowed. The right to an appeal is a property interest and a litigant may not be deprived of that interest without due process of law." *Rothman v. Rothman*, 124 Ohio St.3d 109, 2009-Ohio-6410, at ¶4.

The *Rothman* court reversed this Court's prior dismissal of an appeal from a divorce decree on the basis of an untimely appeal. We had concluded that the appeal was untimely because the notice of appeal was filed more than 30 days after the filing of the final decree, although only six days after the trial court issued a QDRO. The settled law in effect in this district at the time of the filing of the divorce decree was that no decree was a final, appealable order until the QDRO had been issued. By the time the husband appealed after the QDRO had been issued, the Ohio Supreme Court issued its decision in *Wilson v. Wilson*, 116 Ohio St.3d 268, 2007-Ohio-6056, holding that "[a] divorce decree that provides for the issuance of a [QDRO] is a final, appealable order, even before the QDRO is issued." Id. at syllabus. Applying *Wilson*, this Court dismissed Mr. Rothman's appeal as untimely. *Rothman v. Rothman*, 9th Dist. No. 07CA009295, 2008-Ohio-4501. The Supreme Court reversed, holding that "[a] party's right to appeal is rendered meaningless unless he has a reasonable opportunity to file a timely appeal." *Rothman*, 124 Ohio St.3d 109, at ¶6.

{¶16} Notwithstanding our statement in *Wallace I* that an appeal from the June 2005 divorce decree would have been untimely, Husband is not foreclosed from appealing from the decree in this first instance. The time to appeal has not yet begun to run because of the trial court's failure to direct the clerk to serve the parties with the decree pursuant to Civ.R. 58(B). Moreover, the clerk has not so served the parties. Husband did not appeal from the decree in *Wallace I.* To bar him from directly appealing from the divorce decree in the first instance

would render his right to appeal meaningless. See *Rothman* at ¶6. Accordingly, this Court addresses Husband's assignments of error on the merits.

III.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AS A MATTER OF LAW WITH PREJUDICE TO MR. WALLACE WHEN IT FAILED TO ISSUE A MAGISTRATE'S DECISION AS REQUIRED BY CIV.R. 53 AND DOM. REL. LOC.R. 12.01 FOLLOWING A FINAL HEARING BEFORE THE MAGISTRATE."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT PREJUDICED MR. WALLACE BY DENYING HIS RIGHT TO BASIC DUE PROCESS OF LAW BY IGNORING CIV.R. 53, THE LOCAL DOMESTIC RELATIONS RULES, AND ITS OWN ORDER; BY CANCELING THE HEARING SCHEDULED TO ADDRESS COMPETING PROPOSED JOURNAL ENTRIES; AND BY ACCEPTING AN INACCURATE JOURNAL ENTRY."

{¶17} Husband argues that the trial court erred by issuing a final divorce decree with the magistrate and that he was prejudiced by his inability to file objections. Specifically, Husband argues that the trial court erred by failing to comply with Civ.R. 53. This Court agrees.

{¶18} Civ.R. 53(D)(3)(a)(i) provides: "Subject to the terms of the relevant reference, a magistrate shall prepare a magistrate's decision respecting any matter referred under Civ.R. 53(D)(1)." This Court has repeatedly held that a trial court's failure to comply with Civ.R. 53 warrants reversal, where the failure has resulted in prejudice to the appellant. *Swain v. Swain* (Nov. 22, 2000), 9th Dist. No. 20048; see, also, *Erb v. Erb* (1989), 65 Ohio App.3d 507, 510.

{¶19} In this case, the parties read their agreement into the record before the magistrate. Although the magistrate did not direct the attorneys to prepare a judgment entry for approval, counsel implied on the record that Wife's attorney would prepare the judgment. When the parties failed to timely submit a divorce decree, the magistrate ordered that they do so by May

16, 2005. Both parties submitted proposed final divorce decrees to the court. Both the magistrate and the domestic relations court judge signed Wife's proposed decree. The magistrate failed to file a decision approving the Wife's proposed decree. Accordingly, Husband was prejudiced by his inability to file objections to the adoption of Wife's proposed decree in lieu of his own. Moreover, because the magistrate failed to issue a decision, the domestic relations court was precluded from making its own independent analysis regarding the validity of the magistrate's decision, further prejudicing Husband. See *Swain*, supra. Accordingly, the domestic relations court erred to the prejudice of Husband by failing to comply with Civ.R. 53. Husband's assignments of error are sustained.

IV.

{¶20} Husband's assignments of error are sustained. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

CLAIR E. DICKINSON
FOR THE COURT

DICKINSON, P. J.
CONCURS

BELFANCE, J.
CONCURS, SAYING:

{¶21} I concur. In *In re Anderson* (2001), 92 Ohio St.3d 63, 67, the trial court never endorsed upon the judgment entry the required direction to serve upon all parties the notice of the judgment and its date of entry upon the journal as required by Civ.R. 58(B). Further, the docket contained no indication that the appellant was ever served with notice. Id. The *Anderson* Court concluded that "the time for filing a notice of appeal never began to run because the trial court failed to comply with Civ.R. 58(B)." Id.

{¶22} These facts are present in the case before us, namely, the trial court failed to comply with Civ. R. 58(B) and there is no indication that the Appellant was ever served with notice. In *Anderson*, the appellant filed his appeal well after the judgment was rendered and it is unclear whether or when the appellant actually was aware of the existence of the court's judgment. Id. at 64. In this case, it is evident that Appellant was aware of the trial court's judgment in August 2008 because he filed a motion for contempt alleging that Appellee failed to comply with the terms of the final decree. Arguably, because Appellant had actual notice of the decree, he should not be able to sit back on his rights when he had knowledge of judgment and

could thus exercise his appellate rights. Notwithstanding, the Supreme Court of Ohio has not carved out an exception to the clear holding in *Anderson*.

{¶23} With respect to the merits of the appeal in this case, the parties submitted two competing journal entries. While the magistrate was thus put in a position of making a determination as to which journal entry properly reflected the agreement of the parties, the magistrate did not issue a decision reflecting the reasons for choosing one proposed decree over the other. Appellee suggests that permitting Appellant the opportunity to object to the magistrate's decision at this juncture will result in the trial court expending unnecessary time and resources because the court will simply re-issue the same decree. However, should that occur, the trial court will have done so after having fully considered any objections to the magistrate's decision and conducting an independent review of the matter. Accordingly, I concur.

CARR, J.
DISSENTS, SAYING:

{¶24} I respectfully dissent. I would dismiss the appeal as untimely.

{¶25} Husband assigns error as to the June 8, 2005 final decree of divorce. He filed his notice of appeal, however, on June 17, 2009, more than four years after the journalization of the divorce decree. Although this Court denied both of Wife's pre-argument motions to dismiss the appeal, we reserved the right to revisit those motions. I would do so now and conclude that the timing of the appeal divests this Court of jurisdiction to consider the appeal.

{¶26} App.R. 3(A) states in relevant part: "An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4." App.R. 4(A) states in relevant part: "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 period in Rule 58(B) of the Ohio Rules of Civil Procedure." This Court has recognized that "[t]his time requirement is jurisdictional and may not be extended. Where an untimely appeal has been filed, an appellate court lacks jurisdiction to consider the merits, and the appeal must be dismissed. (Citations omitted)" *Metropolitan Bank & Trust Co. v. Roth*, 9th Dist. No. 21174, 2003-Ohio-1138, at ¶15.

> **{¶27}** Civ.R. 58(B) provides:
>
> "When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The 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)."
>
> **{¶28}** The Ohio Supreme Court has stated:
>
> "In those cases in which both Civ.R. 58(B) and App.R. 4(A) are applicable, if service of the notice of judgment and its entry is made within the three-day period of Civ.R. 58(B), the appeal period begins on the date of judgment, but if the appellants are not served with timely notice, the appeal period is tolled until the appellants have been served. *In re Anderson* (2001), 92 Ohio St.3d 63, 67. Consequently, App.R. 4(A) 'tolls the time period for filing a notice of appeal *** if service is not made within the three-day period of Civ.R. 58(B).' *State ex rel. Hughes v. Celeste* (1993), 67 Ohio St.3d 429, 431." *State ex rel. Sautter v. Grey*, 117 Ohio St.3d 465, 2008-Ohio-1444, at ¶16.

The high court reasoned that "if a right of appeal from a trial court's judgment is to have meaning, the parties to the judgment or their attorneys of record must be given notice of the judgment before the time for appeal begins to run." Id. at ¶10. Accordingly, Civ.R. 58(B) was enacted to ensure that a party has notice of a final judgment so that he might appeal. In this case, that purpose has been effectuated.

{¶29} Although the trial court never endorsed upon the final divorce decree the required "direction to the clerk to serve upon all parties *** notice of the judgment and its date of entry upon the journal" as required by Civ.R. 58(B), it is evident that Husband had notice of the final judgment giving rise to his right to appeal.

{¶30} First, Husband was a participant in the creation of the final decree. He was present with counsel at the hearing at which the parties read their agreement into the record regarding all joint stipulations as to the substance of the final decree. Accordingly, he had actual knowledge of the terms of the final decree.

{¶31} Second, Husband filed two post-decree motions, including a motion for contempt in which he alleged that Wife had failed to comply with the terms of the parties' final decree. Moreover, Husband filed a prior appeal regarding issues arising out of the final divorce decree. Specifically, he challenged the trial court's conclusion that the issue of sanctions had been resolved by agreement of the parties as part of their final divorce decree. The trial court reasoned that, because the motion was pending before the parties entered their agreement, and the final decree of divorce stated that "the parties reached an agreement as to all issues," then the court had entertained the motion for sanctions when it approved the final decree.

{¶32} This Court affirmed in *Wallace I,* and further noted that Husband also argued in his first appeal that the divorce decree was not enforceable because neither he nor his attorney signed it. We concluded that his appeal regarding the enforceability of the June 8, 2005 divorce decree was untimely. Id. at ¶7. If he disagreed, Husband could have filed either an application for reconsideration with this Court pursuant to App.R. 26(A) or a notice of appeal to the Ohio Supreme Court. He did neither.

{¶33} I would conclude that Husband's instant appeal from the June 8, 2005 final divorce decree is untimely, and this Court lacks the jurisdiction to consider it.

APPEARANCES:

SUSAN K. PRITCHARD, Attorney at Law, for Appellant.

CRAIG M. EOFF, and KEVIN G. DAVIS, II, Attorneys at Law, for Appellee.