

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60630
Conference Calendar

SERGIE RAY FOXWORTH,

Plaintiff-Appellant,

versus

TRUSTMARK NATIONAL BANK,

Defendant-Appellee.

- - - - -
Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 2:94-CV-25 PS

- - - - -
June 28, 1995

Before JONES, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

The sole issue is whether Foxworth's notice of appeal was filed timely. "The time limitation for filing a notice of appeal is jurisdictional, and the lack of a timely notice mandates dismissal of the appeal." United States v. Garcia-Machado, 845 F.2d 492, 493 (5th Cir. 1988). The issue of the timeliness of Foxworth's notice of appeal turns on whether Foxworth's service of his Rule 59 motion on the defendant without his ever filing it with the district court interrupts the 30-day period provided by

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Fed. R. App. P. 4(a) in which Foxworth had to appeal the district court's June 1, 1994, judgment dismissing his claims.

The certificate of service indicates that Foxworth served his postjudgment motion on the defendant on June 15, 1994, which was within 10 days of the entry of final judgment. Service alone, however, is not sufficient. The district court issued an order explicitly stating that, pursuant to Rule 5(d), June 24, 1994, was a reasonable time by which Foxworth must file his motion with the court. He failed to do so. The district court thereafter held that there was no postjudgment motion before it.

Foxworth noticed his appeal from that order but he does not assert that the district court erred in determining that there was no Rule 59(e) motion before it. Because he does not argue, much less establish, that he had filed such a motion such that the running of Fed. R. App. P. 4's 30-day appeal time was interrupted, Foxworth had 30 days from the entry of the district court's June 1, 1994, judgment to notice his appeal. Foxworth's notice of appeal, filed on September 8, 1994, is untimely.

The court also notes that Foxworth's attorney's conduct in the district court and in this court raises serious questions about his fitness to practice law. Foxworth's counsel is reminded of his duty to follow the governing rules of procedure, both in the district court and in this court. We caution counsel that this court has the power to discipline an attorney who fails to comply with these rules. See Fed. R. App. P. 46(c).

Foxworth's appeal is DISMISSED.