IN THE UTAH COURT OF APPEALS

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Liberty Bell Subdivision Water Users' Association, a Utah non-profit corporation; Don Van Camp; Darlene Lake; Bruce Christensen; David Berry; Vern Brown; Kevin Bailey; and Ellen Fowers Plaintiff and Appellee, v. Roy Young and Karen Young, Defendants and Appellants.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20090453-CA F I L E D (September 10, 2010) 2010 UT App 248

Second District, Ogden Department, 030907381
The Honorable Pamela G. Heffernan

Attorneys: Roy Young and Karen Young, Eden, Appellants Pro Se
John M. Webster and Matthew A. Bartlett, Riverdale, for Appellee

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Before Judges Davis, Voros, and Christiansen.

VOROS, Judge:

Plaintiff Liberty Bell Subdivision Water Users' Association (Liberty Bell) expelled Defendants Roy and Karen Young (the Youngs) from the association. Litigation ensued. Liberty Bell and named individual plaintiffs sued the Youngs, and the Youngs counterclaimed. After a bench trial, the district court ruled in favor of Liberty Bell, and the Youngs appealed. We dismiss the appeal for lack of jurisdiction.

The underlying factual dispute is not relevant to our disposition because we decide it solely on the jurisdictional question. Suffice it to say that after many of the claims had been disposed of, the district court held a bench trial on the last remaining claims, which were the Youngs' counterclaims against Liberty Bell.

On August 8, 2008, at the conclusion of the bench trial, the district court issued a memorandum decision dismissing the Youngs' counterclaims for lack of standing. On August 28, Liberty Bell's counsel drafted a proposed "Trial Order" and faxed and mailed it to the Youngs' counsel. This proposed order included a paragraph stating that Liberty Bell intended to submit the order to the court after eight days unless the Youngs objected in writing before that time. The Youngs' counsel acknowledged receiving this proposed trial order. Seven business days later, on September 9, the district court entered the order (the September 9 order). Liberty Bell did not serve a notice of entry of judgment upon the Youngs as required by rule 58A(d) of the Utah Rules of Civil Procedure, see Utah R. Civ. P. 58A(d).

Apparently at about this same time, the Youngs' counsel telephoned Liberty Bell's counsel to propose the addition of a "(1)" to two statutory citations in the proposed order. Liberty Bell's counsel agreed and, according to the certificate of service, served a revised trial order (the second trial order) on the Youngs' counsel, filing the original with the court on September 10. The Youngs' counsel indicated that he was not given the opportunity to review this second proposed order.

The second trial order was signed by the district court on October 10 but was not entered at that time. On November 21, the Youngs moved to set aside the second trial order. Their motion does not seek relief from--or even mention--the September 9 order. On December 29, the district court entered the second trial order, and on January 7, 2009, it denied the Youngs' motion to set it aside. On January 13, the Youngs filed a motion for a new trial, which the district court denied on April 28. On May 26, within thirty days of that denial--but some seven months after entry of the September 9 order--the Youngs filed a notice of appeal.

On appeal, Liberty Bell filed a motion to dismiss for lack of jurisdiction, contending that the Youngs' notice of appeal was untimely. "[A] notice of appeal . . . shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from." Utah R. App. P. 4(a). This requirement is jurisdictional. See Serrato v. Utah Transit Auth., 2000 UT App 299, ¶ 7, 13 P.3d 616. Such "a jurisdictional failure requir[es] dismissal of the appeal." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 571 (Utah Ct. App. 1989) (internal quotation marks omitted). "This court does not have jurisdiction over an appeal unless it is taken from a final judgment, Utah R. App. P. 3(a), or qualifies for an exception to the final judgment

rule." Loffredo v. Holt, 2001 UT 97, ¶ 10, 37 P.3d 1070.[1] "For an order or judgment to be final, it must dispose of the case as to all the parties, and finally dispose of the subject-matter of the litigation on the merits of the case." Gudmundson v. Del Ozone, 2010 UT 33, ¶ 12, 232 P.3d 1057 (internal quotation marks omitted). Here, no one has argued that the September 9 order did not meet those criteria; it disposed of the case as to all the parties and it finally disposed of the subject matter of the litigation.

That the district court arguably entered the September 9 order one day early does not affect its validity. Rule 7(f)(2) requires the prevailing party to serve on the other parties "a proposed order in conformity with the court's decision." Utah R. Civ. P. 7(f)(2). "Objections to the proposed order shall be filed within five days after service." Id. Upon being served with an objection or upon expiration of the time to object, the party preparing the order must file the proposed order. See id. Here, Liberty Bell served the proposed order on the Youngs and filed it with the court on the same day, and the court entered the order one day before the Youngs' five-day period to object had expired. However,

> nothing in rule 7(f) requires the trial court to wait for the expiration of a party's objection period prior to signing a proposed judgment or order. To the contrary, Utah case law indicates that the rules pertaining to the entry of proposed judgments and orders are binding only on the litigants and not on the trial court.

Henshaw v. Estate of King, 2007 UT App 378, ¶ 25, 173 P.3d 876 (citation omitted) (holding that the entry of a proposed order one day before the five-day period expired was not error).

Similarly, Liberty Bell's failure to serve a notice of entry of judgment does not render the September 9 order non-final. Rule 58A(d) of the Utah Rules of Civil Procedure requires the party preparing the judgment to serve a copy of the signed judgment on the opposing party. See Utah R. Civ. P. 58A(d). However, "[t]he time for filing a notice of appeal is not affected by this requirement." Id.; see also Naves v. Friel, 2007 UT App 138U, para. 4, (mem.) (per curiam) ("[T]he time for filing a notice of appeal begins to run when the judgment is

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1. The parties have not argued that any of those exceptions applies here.

entered, regardless of whether the parties receive notice of the judgment

Finally, notwithstanding the statement on the proposed order that it would be entered absent an objection on their part, the Youngs intimate that they were misled by Liberty Bell's counsel into believing that the September 9 order had not been entered, thus excusing their failure to file a timely notice of appeal. A party may obtain relief under rule 60(b)(6) of the Utah Rules of Civil Procedure upon a showing that the party was "actually misled . . . as to whether there had been entry of judgment." Henshaw, 2007 UT App 378, ¶ 28; see also Oseguera v. Farmers Ins. Exch., 2003 UT App 46, ¶ 9, 68 P.3d 1008. The rule 60(b) motion gives the district court an opportunity to test the motion's factual basis by taking evidence if necessary. Here, however, the Youngs did not file a rule 60(b) motion seeking relief from the September 9 order on the ground that they had been actually misled as to its entry. Without such a motion, the district court had no reason to hold a hearing, enter findings of fact, or even rule on the issue. With no factual record, we are in no position on appeal to determine that the September 9 order was entered on the basis of fraud, misrepresentation, or other misconduct of an adverse party as provided in rule 60(b). On the contrary, all judgments of a court enjoy a presumption of validity. See King v. King, 717 P.2d 715, 715 (Utah 1986) (per curiam). Nothing we have seen in the record comes close to rebutting that presumption here.

We conclude that the Youngs did not file their notice of appeal within thirty days of the September 9 order, which was a final, appealable order. We therefore lack jurisdiction over this appeal. See Serrato, 2007 UT App 299, ¶ 7 ("If an appeal is not timely filed, this court lacks jurisdiction to hear the appeal."). Accordingly, we dismiss this appeal.

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J. Frederic Voros Jr., Judge

WE CONCUR:

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James Z. Davis,
Presiding Judge

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Michele M. Christiansen, Judge