

Brief in Support of Motion For Entry of Judgment

No formal judgment has been entered in favor of Deborah Foster aka Debbie Foster although the Court found that she was the prevailing party under the Copyright Act and entered an order awarding her costs and attorneys' fees under the Copyright Act.

Fed.R.Civ.Pro. 58 provides in part, “. . . Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). ”

Fed.R.Civ.Pro. 79 provides:

All papers filed with the clerk, . . . orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word “jury” on the folio assigned to that action.

No separate document identifying a judgment in this matter in favor of Defendant Deborah Foster aka was entered. Nor was a form of judgment entered or offered by counsel.²

The purpose of the separate judgment is to identify the time for appeal. “The sole purpose of the separate-document requirement, which was added to **Rule 58** in 1963, was to clarify when the time for appeal under **28 U.S.C. § 2107** begins to run. *Bankers Trust Co. v. Mallis*, 435 U.S.

² **Rule 58** forbids attorneys from offering a form of judgment: “. . .Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.” **Rule 58**. Thus, Defendant Deborah Foster had no obligation to offer a form of the judgment to be entered.

381, 98 S.Ct. 1117, 1120 (1978). The purpose of the rule was to end the uncertainties as to the sufficiency of a pronouncement, filed document or entry as a final judgment. The 1963 Advisory Committee notes requires the separate judgment because “The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document--distinct from any opinion or memorandum--which provides the basis for the entry of judgment.” cited in *Bankers Trust, id.*

Although no notice was entered in *Bankers Trust*, an appeal was filed and neither party contested the jurisdiction on appeal and the court deemed the failure to contest a waiver of the separate judgment requirement. However, waiver of the separate judgment requirement is not relevant in this case since neither party herein sought an appeal, premature or otherwise, and the question of when the appeal time begins to run has still not been resolved because no separate judgment was entered. If Plaintiffs wanted the certainty of a final judgment, it could have filed a motion for the court to enter a separate judgment.

If Plaintiff has relied upon the delay of entry of formal judgment to delay the time for appeal, the question of when the time to appeal has begun has still not been answered.

“The 1963 amendment to **Rule 58** made clear that a party need not file a notice of appeal until a separate judgment has been filed and entered. See *United States v. Indrelunas*, 411 U.S. 216, 220-222, 93 S.Ct. 1562, 1564-1565, 36 L.Ed.2d 202 (1973).” cited in *Bankers Trust*, 98 S.Ct. at 1120.

Application of the separate judgment rule should not be used to defeat jurisdiction. See *Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc.*, 479 U.S. 966, 107 S.Ct. 468, 470-107 (1986) (Blackmun dissenting from denial of certiorari). This is the established procedure in the Tenth

Circuit:

Our ability to review the merits of the district court's order depends in the first instance on whether Hassan's apparently untimely Notice of Appeal defeats our appellate jurisdiction. Because we conclude that the district court's failure to enter a separate final judgment in this case prevented the thirty-day filing deadline from beginning to run for Hassan's Notice of Appeal, we hold that we have proper appellate jurisdiction in this case.

Under the Federal Appellate Rules, an appeal is commenced when a party files a notice of appeal with the district court. See **Fed. R.App. P. 3(a)**. The time for filing this notice of appeal in a civil case in which the United States is not a party is “30 days after the date of entry of the judgment or order appealed from.” See **Fed. R.App. P. 4(a)(1)**. Furthermore, “[a] judgment or order is entered within the meaning of this **Rule 4(a)** when it is entered in compliance with **Rules 58** and **79(a)** of the Federal Rules of Civil Procedure.” See **Fed. R.App. P. 4(a)(7)**.

Rule 58 provides that “[e]very judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in **Rule 79(a)**.” See **Fed.R.Civ.P. 58**. The purpose of this rule is to eliminate confusion as to exactly when the clock for an appeal begins to run. See *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) (per curiam) (“The sole purpose of the separate-document requirement, which was added to **Rule 58** in 1963, was to clarify when the time for appeal under **28 U.S.C. §2107** [and **Fed. R.App. P. 4(a)**] begins to run.”) In the past, we have stressed the importance for district courts to abide by this rule and to apply it mechanically by routinely entering a separate final judgment when the court resolves all outstanding issues. See *United States v. City of Kansas City*, 761 F.2d 605, 606-07 (10th Cir., 1985) (“[T]he separate-document requirement must be ‘mechanically applied’ in determining whether an appeal is timely.”); see also *Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc.*, 479 U.S. 966, 969, 107 S.Ct. 468, 93 L.Ed.2d 413 (1986) (Blackmun, J., dissenting from the denial of certiorari) (“[T]he separate-document requirement must be applied mechanically in order to protect a party's right of appeal.”).

On the other hand, some of our cases have held that it is appropriate to overlook the mechanical application of **Rule 58**'s “separate document” requirement when a district court enters an order “containing neither a discussion of the court's reasoning nor any dispositive legal analysis.” See *Clough v. Rush*, 959 F.2d 182, 185 (10th Cir. 1992); see also *Kline v. Department of Health & Human Servs.*, 927 F.2d 522, 523-24 (10th Cir. 1991). In these cases, we have sought to preserve the interests of the parties to obtain appellate review of the merits of their dispute and held that the appealed-from lower court orders were “effective” as final judgments

in spite of the absence of a separate document. See *Clough*, 959 F.2d at 185; *Kline*, 927 F.2d at 524.

In Hassan's case, the district court's abbreviated discussion suggests that the reasoning in *Clough* and *Kline* might apply here. If we were to do so, however, the result would be to overlook the failure of the district court to enter a separate final judgment, and we would be forced to hold that Hassan missed the deadline to file a notice of appeal.

We reach a different result in this case, though, because we are persuaded by the reasoning of a recent unpublished Order and Judgment that dealt with the same kind of jurisdictional intersection between the thirty-day filing deadline of **Fed. R.App. P. 4(a)(1)** and the separate-judgment requirement of **Fed.R.Civ.P. 58**. See *Crislip v. Shanks*, No. 94-2221, 1996 WL 156757 (10th Cir. Apr.4, 1996) (unpublished Order & Judgment). In *Crislip*, the court recognized that if it followed the reasoning of *Clough* and *Kline*, the appellants “would be denied their opportunity for review on the merits.” See *id.* at *1. As *Crislip* noted, the Supreme Court has interpreted **Rule 58** with a view toward ensuring appellate jurisdiction rather than defeating jurisdiction through technical deficiencies. See *Bankers Trust*, 435 U.S. at 387 (“ ‘It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.’ ”) (quoting *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). The *Crislip* court noted that the holding in *Bankers Trust* requires an appellate court to “interpret **Rule 58** in order to preserve the right to appeal, not to jeopardize it.” See *Crislip*, 1996 WL 156757, at *2; see also *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir.1992) (holding that a notice of appeal filed more than eleven months after the appellant had stipulated to the dismissal of his remaining claims was still timely because the district court had failed to enter a separate final judgment); *United States v. Carter*, 906 F.2d 1375, 1376 (9th Cir.1990) (holding that a notice of appeal filed more than three months after the district court entered a summary judgment order on all of the appellant's claims was still timely because the district court had failed to enter a separate final judgment).

In light of *Bankers Trust* and *Crislip*, we conclude that “the absence of a **Rule 58** separate judgment in this case means that the time for filing a notice of appeal has not yet begun to run.” *Crislip*, 1996 WL 156757, at *2. As a result, Hassan's appeal is not untimely, and we may exercise appellate jurisdiction under **Fed. R.App. P. 4(a)**.

Hassan v. Allen, 149 F.3d 1190, 1190 (10th Cir. 1998).³

In *Clough v. Rush*, 959 F.2d 182 (10th Cir., 1992), the Plaintiff appealed from an order granting summary judgment to Defendants although no separate judgment was entered. Defendants moved to dismiss the appeal based upon the noncompliance with **Rule 58**. The Circuit denied the motion holding it had jurisdiction and the failure to comply with **Rule 58** could not be used to defeat jurisdiction even though a failure to comply with **Rule 58** was not fatal to the appeal. In the instant case, the appeal period, thus, has not run. See *Shalala v. Schaefer*, 113 S. Ct. 2625, 2632 (1993); see also *Eckstein v. Balcov Film Investors*, 8 F.3d 1121, 1125 (7th Cir., 1993)(stating that although party may sometimes appeal final decision without **Rule 58** judgment, “it is always entitled to wait for (and rely on) the separate **Rule 58** judgment”) (citing *Schaefer*) (further citation omitted), *cert. denied*, 114 S. Ct. 883 (1994).

Conclusion

Wherefore the Court should enter judgment consistent with the Court’s Orders dated July 13, 2006 [Doc. 125-126], February 6, 2007 [Doc. 162] April 23, 2007 [Doc. 212], February 6, 2007 and July 13, 2007 [Doc. 245].

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³ *Hassan* and *Crislip* are unpublished and copies are filed herewith as Attachments B and C.

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CERTIFICATE OF SERVICE

This is to certify that on this 13th day of August 2007, I electronically transmitted the above and forgoing to the Clerk of the Court using the ECF System for filing. Based on the electronic records current on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the all ECF registrants in this case:

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