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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE HARRY VILLE TALERMO, Debtor.	BAP No. WY-13-021
GARY A. BARNEY, Trustee, Plaintiff – Appellee, v. STEVE ROBINSON, Defendant – Appellant.	Bankr. No. 11-20806 Adv. No. 12-02010 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the District of Wyoming

Before NUGENT, KARLIN, and SOMERS, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

Steve Robinson appeals an order of the United States Bankruptcy Court for the District of Wyoming granting summary judgment avoiding his liens on the debtor's car and boat, and the order denying reconsideration of that order. Because the record contains several genuine issues of material fact and because the bankruptcy court's judgment contains legal errors, we REVERSE the bankruptcy court's orders and REMAND the matter for trial or other disposition

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

consistent with this opinion.[1]

I. Factual Background

Robinson lent $20,000 to Harry Talermo before he filed this case. Talermo secured his promise to repay the debt by granting Robinson a security interest in Talermo's car, boat, and trailer. On July 7, 2011, Talermo and Robinson went to the Teton County Clerk's office to record the liens as Wyoming law requires. The Teton County Recorder noted a $20,000 lien in favor of Robinson on the certificates of title to the car and boat. Talermo filed his Chapter 7 petition eighteen days later on July 25, 2011.

The Trustee sued Robinson for turnover of the car, boat, and trailer under 11 U.S.C. § 542 and to avoid Robinson's purported liens on them either as statutory liens under § 545 or as preferential transfers under § 547. In his Answer, Robinson pleaded that the liens he received were for "current consideration" (his words), citing §§ 547(c)(1)(A) and (B). That subsection excepts from avoidance an otherwise preferential transfer that is given as a "contemporaneous exchange for new value given to the debtor" and which is "in fact a substantially contemporaneous exchange."[2] Beyond general denials, Robinson posted no defenses to the statutory lien claim. Robinson eventually abandoned his lien on the trailer.

The bankruptcy court granted the Trustee's motion for summary judgment, concluding that the Trustee could "avoid statutory liens that are not perfected or enforceable on the date of the petition against a bona fide purchaser." The court concluded that Robinson had failed to properly perfect his security interest in the

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[1] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

[2] 11 U.S.C. § 547(c).

properties because "he failed to file a financing statement or security agreement in the office of the Teton County Clerk concurrently with having the notation of his lien indicated on the titles."[3] In reaching that legal conclusion, the court relied on the following findings of fact. It found that Talermo borrowed $18,000 from Robinson in late June or early July of 2012 and that Talermo pledged the boat, the trailer, and the 1991 Jaguar as collateral. The court found that at Robinson's request, the Teton County Clerk had placed lien notations on the certificates of title for the boat and car. In addition, Robinson relied on a handwritten UCC-1 financing statement that was unsigned and not stamped by any filing office. By contrast, the Trustee "provided evidence" of a UCC lien search conducted in the Wyoming Secretary of State's Office that reflected no active or lapsed financial statements. From this sparse record, the court concluded that "there are no facts in controversy" and that summary judgment could be granted, avoiding Robinson's "statutory lien" under § 545(2).

On February 20, 2013, Robinson sought reconsideration of the Summary Judgment Order based on what he claimed was newly discovered evidence – a document bearing a Teton County file stamp indicating a security instrument between Talermo and Robinson had been filed on July 7, 2011 with the Teton County Clerk's Office.[4] The bankruptcy court denied Robinson's motion to reconsider, finding "Defendant failed to show that the newly discovered evidence is such that it could not, by the exercise of due diligence, have been discovered in adequate time to present at the original proceeding."[5] Robinson appeals both the

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[3] Opinion on Cross Motions for Summary Judgment (the "Summary Judgment Order") at 4-5, *in* Appellant's Appendix (App.)" at 68-69.

[4] U-131754 County of Teton File Stamp, *in* App. at 76. This stamp references the title numbers associated with Talermo's Jaguar and boat, and the certificates of title also reference the identical file stamp number, U-131754.

[5] Order Denying Defendant's Motion to Alter or Amend Summary Judgment (continued...)

Order Denying Reconsideration and the Summary Judgment Order.

II. Standards of Review

Multiple standards of review apply in this case. We review orders denying motions to reconsider for abuse of discretion.[6] An appeal from a ruling on a Rule 59(e) motion makes the bankruptcy court's underlying judgment subject to review by this court.[7]

We review orders granting summary judgment *de novo*, meaning that we accord the bankruptcy court's findings no deference. That requires us to consider the motions and responses anew and to apply the standards set out in Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056, as the bankruptcy court would do in the first instance to determine whether the Trustee was entitled to judgment as matter of law.[8] But before we consider whether either of the bankruptcy court's rulings are correct, we must satisfy ourselves as to our jurisdiction to consider this case at all.

III. Appellate Jurisdiction

A close examination of the Notice of Appeal prompted us to order *sua sponte* that the Appellant Robinson show cause why the appeal should not be dismissed ("OSC").[9] We noted that, throughout the litigation below, pleadings

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[5] (...continued)
("Order Denying Reconsideration"), *in* App. at 80-83.

[6] *In re Rafter Seven Ranches LP*, 362 B.R. 25, 28 (10th Cir. BAP 2007), *aff'd*, 546 F.3d 1194 (10th Cir. 2008).

[7] *Hawkins v. Evans*, 64 F.3d 543, 546 (10th Cir. 1995) (an appeal from the denial of a motion to reconsider construed as a Rule 59(e) motion permits consideration of the merits of the underlying judgment).

[8] *Tillman ex rel. Estate of Tillman v. Camelot Music, Inc.*, 408 F.3d 1300, 1303 (10th Cir. 2005).

[9] A court has "an independent duty to inquire into its jurisdiction over a dispute, even where neither party contests it and the parties are prepared to concede it." *In re Am. Ready Mix, Inc.*, 14 F.3d 1497, 1499 (10th Cir. 1994).

were frequently signed by Appellant's counsel "Respectfully submitted *for the Debtor Harry Talermo* on behalf of Steve Robinson."[10] Counsel similarly signed the Notice of Appeal "Respectfully submitted for the Defendant Steve Robinson by Harry Talermo."[11] The preamble of the Notice of Appeal states: "COMES NOW the Debtor named above, Harry Talermo, by counsel . . . and as an interested party and on behalf of the Defendant Steve Robinson whose interests the Debtor has pledged[] to protect for their mutual benefit, he does hereby appeal[.]"[12] These statements make it appear that the appellant is Talermo, not Robinson, and we questioned the standing of the debtor to appeal for the defendant below.[13] Appellant's counsel responded to our order stating that "the parties fully intended Robinson to be the Appellant" as the appeal was "submitted for the Defendant Steve Robinson."[14] He explained that "the language in the notice of appeal referencing action by the Debtor on behalf of the Defendant was primarily intended to continue the disclosure of dual representation."[15] He suggested that it could be argued that Talermo has direct standing to appeal as the loss of his primary vehicle has an adverse pecuniary effect on him, but that

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[10] Answer to Complaint at 3, *in* App. at 20 (emphasis added).

[11] Notice of Appeal at 2, *in* App. at 85. *See also* Defendant's Response to the Plaintiff's Motion for Summary Judgment at 2, *in* App. at 52; Motion for Summary Judgment at 2, *in* App. at 54; Brief in Support of the Defendant's Motion for Summary Judgment at 7, *in* App. at 61 (slight variation: "Respectfully submitted for the Defendant Steve Robinson by counsel for Harry Talermo.").

[12] *Id.* at 1, *in* App. at 84.

[13] Generally, only named parties to a lawsuit may appeal an adverse final judgment and only to assert their own claims. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"); *Abeyta v. City of Albuquerque*, 664 F.3d 792, 795 (10th Cir. 2011) (recognizing well-settled rule that only parties to a lawsuit may appeal adverse judgment).

[14] Response to [OSC] at 3, ¶ 8, and 5, ¶ 10, Docket Entry No. 24.

[15] *Id.* at 3, ¶ 8.

argument was unnecessary as Robinson is the Appellant herein.[16] The Trustee maintained that Talermo filed the appeal, not Robinson, and argued that Talermo's appeal should thus be dismissed for lack of jurisdiction. Because Talermo, through McCartney, has disavowed filing the notice of appeal, we need not decide whether Talermo has standing to appeal the Summary Judgment Order or the Reconsideration Order, but we are left with the question of whether the Notice of Appeal adequately specified that Robinson was the party seeking appellate review.

Federal Rule of Bankruptcy Procedure 8001(a) describes what is required for a notice of appeal to be sufficient: The notice of appeal shall (1) conform substantially to the appropriate Official Form, (2) contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee.[17] Bankruptcy Official Form 17 is the form referenced in Rule 8001(a) and suggests that the name of the appellant is a key ingredient:

> _____, the plaintiff [*or* defendant *or* other party] appeals under 28 U.S.C. § 158(a) or (b) from the judgment, order, or decree of the bankruptcy judge (describe) entered in this adversary proceeding [*or other proceeding, describe type*] on the _____ day of _____.
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> The names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys are as follows:[18]

While Rule 8001(a) grants the court broad discretion to take any appropriate action for failure to comply with non-jurisdictional missteps,[19] the failure to name

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16 *Id.* at 4-5, ¶ 10.

17 Fed. R. Bankr. P. 8001(a).

18 Bankruptcy Form 17.

19 Fed. R. Bank. P. 8001(a) ("An appellant's failure to take any step other (continued...)

a party in the notice of appeal is fatal because it means that party did not appeal.[20]

Although the Notice of Appeal filed in this case did not follow Form 17's format, we conclude that Robinson's failure to comply literally with Rule 8001 does not defeat our jurisdiction. The rule itself requires the appellant to "conform substantially," not literally. Robinson's Notice of Appeal conforms substantially to Form 17 to the extent that it contains all of the information required by Rule 8001(a) – the party appealing and the names of all the parties to the judgment. While counsel's reference to Talermo appealing "on behalf of the Defendant Steve Robinson whose interests the Debtor has pledged[] to protect for their mutual benefit" raises questions, it appears that counsel acted primarily in Robinson's interest. Robinson's appellate counsel also represented Robinson in the adversary proceeding below. The Summary Judgment Order avoided Robinson's liens. And the fact that the Trustee never questioned the identity of the appellant prior to the show cause order indicates he was never confused about who filed the appeal.[21]

The caption on the Notice of Appeal identified the names of all the parties to the judgment – the Trustee as Plaintiff and Robinson as Defendant, and the contents of the Notice identified the parties' respective attorneys. Consistent with

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[19] (...continued)
than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal."). *See also Groetken v. Davis (In re Davis)*, 246 B.R. 646, 655 (10th Cir. BAP 2000), *aff'd in part and vacated in part*, 35 F. App'x 829 (10th Cir. 2002).

[20] *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988) (interpreting Fed. R. App. P. 3(c) which states the notice of appeal shall specify the party or parties taking the appeal).

[21] The Tenth Circuit has rejected the "harmless error" argument as applied to jurisdictional defects in a notice of appeal. *In re Woosley*, 855 F.2d 687, 688 (10th Cir. 1988). *But see Becker v. Montgomery*, 532 U.S. 757, 767 (2001) (interpreting Fed. R. App. P. 3(c)(2) and (4) and noting that "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court").

Tenth Circuit authority, we therefore conclude the Notice of Appeal provided all of the necessary information under Rule 8001 and substantially conforms to Form 17.

In *Raley v. Hyundai Motor Co., Ltd.*, the Tenth Circuit held that the key to determining whether a particular party has appealed a decision is whether the notice of appeal, or a functionally equivalent document filed within the appeal period, makes it "objectively clear" that the party intended to appeal, either by naming the specific party or by using a term that encompasses that party, including such terms as "et al," "all plaintiffs" or "the defendants."[22] The party claiming appellate jurisdiction bears the burden of establishing the court's subject matter jurisdiction.[23] And courts may not "look beyond the notice of appeal and scour the record to figure out who does and doesn't wish to appeal."[24]

In *Raley*, a mother who sued Hyundai for manufacturing a defectively designed car, but for whom BancFirst had been substituted as the real party in interest and sole plaintiff in the case, appealed a judgment entered in favor of Hyundai. The Tenth Circuit dismissed her appeal because she listed herself instead of BancFirst as the plaintiff-appellant in the case, and BancFirst had filed nothing. Our case is different because, unlike in *Raley*, our appellant (Robinson) was specifically named in the notice of appeal, albeit not in the conventional fashion suggested by Form 17. By contrast, Ms. Raley's notice of appeal failed to

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[22] *Raley v. Hyundai Motor Co., Ltd.*, 642 F.3d 1271, 1277 (10th Cir. 2011) (test for determining who appealed is whether a timely notice of appeal makes it objectively clear that party intended to appeal); *Hubbert v. City of Moore*, 923 F.2d 769, 772 (10th Cir. 1991) ("defects in a notice of appeal may be remedied by filing other documents supplying omitted information" but the corrective documents must be filed "within a time limit for filing a notice of appeal").

[23] *Raley*, 642 F.3d at 1275.

[24] *Id.* at 1277. In this case, no document other than the Notice of Appeal itself was filed within the time for taking an appeal, so we have limited our analysis to the Notice of Appeal, giving no weight to McCartney's response to the OSC.

mention BancFirst at all. As the Circuit said in *Raley*, "To be sure, just as we now construe more liberally what is *in* the notice of appeal, we also liberally construe what *is* a notice of appeal, treating timely filings that otherwise comply with Rule 3(c) as the 'functional equivalent' of a notice of appeal even when they are not formally denominated as such."[25] Because Robinson was the only defendant below and was so named in the Notice of Appeal by the attorney who represented him in bankruptcy court, the Notice of Appeal is adequate to specify Robinson as the appellant. Robinson timely filed the Notice of Appeal from the bankruptcy court's final orders and the parties have consented to this Court's jurisdiction by not electing to have the appeal heard by the United States District Court for the District of Wyoming. We therefore have jurisdiction to decide this appeal.[26]

IV. Discussion

The peculiarities in this case do not end with the notice of appeal. Before we consider whether Robinson's motion to alter and amend should have been granted, we must first consider whether the underlying summary judgment should have been granted. We review the bankruptcy court's findings of fact and conclusions of law *de novo*, giving no deference to the court's findings. That review reveals that not only was the motion decided on the wrong legal basis, but there also remain important factual controversies unlikely to be resolved short of a trial.

Summary judgment is appropriate if the pleadings, depositions, answers to

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[25] *Id.* at 1278.

[26] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3; *In re Giaimo*, 440 B.R. 761 (6th Cir. BAP 2010) (order granting summary judgment to Chapter 7 trustee to avoid lien on debtor's vehicle was final, appealable order); *In re San Miguel Sandoval*, 327 B.R. 493, 505 (1st Cir. BAP 2005) (Bankruptcy court order denying reconsideration is "final" appealable order if underlying order was final appealable order, and together the orders end litigation on merits.).

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The burden for establishing entitlement to summary judgment rests on the movant.[27] A genuine dispute over a material fact exists when the "evidence supporting the claimed factual dispute [is] shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."[28] When reviewing motions for summary judgment, the Court must view the record in the light most favorable to the nonmoving party.[29] Cross-motions for summary judgment do not automatically empower the court to dispense with the determination of whether questions of material fact exist.[30]

Here, the bankruptcy court concluded that "there are no facts in controversy,"[31] but the record contains several important unresolved material controversies. First, the parties dispute the timing of the two loans and Robinson's efforts to perfect his liens. The Trustee says that the loans were given by Robinson in "May or June 2011," supporting that with references to the debtor's deposition while Robinson claims that he gave the second loan, for $18,000, to Talermo on the same day he attempted to perfect the liens on the boat, trailer and car, July 7, 2011. To the extent the Trustee seeks to avoid this

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[27] Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

[28] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)).

[29] *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 613 (10th Cir. 1988).

[30] *Mo. Pac. R. Co. v. Kan. Gas and Elec. Co.*, 862 F.2d 796, 799 (10th Cir.1988) ("[I]t is important to note that cross-motions for summary judgment do not automatically empower the court to dispense with the determination whether questions of material fact exist. They require no less careful scrutiny than an individual motion. [The court] must be convinced in all instances that the issues before [it] may be resolved as a matter of law.") (citation and quotation marks omitted).

[31] Summary Judgment Order at 3, *in* App. at 67.

transaction as a preference and Robinson relies on the contemporaneous exchange for value defense to that claim, whether the transfer was "in fact a substantially contemporaneous exchange" is material.[32]

Second, the Trustee asserts that Robinson failed to file a lien statement in the Teton County Clerk's Office, but supports that assertion by citing to a search conducted at the Wyoming Secretary of State, not at the county clerk's office. Robinson relies on two documents, one a handwritten but unsigned and not stamped UCC-1 financing statement describing the three items, and the other a receipt reflecting that Robinson filed some instrument to achieve the County's notation of the lien on the certificates of title for the three pieces of collateral. The dispute about what exactly was filed in Teton County is, as will be discussed below, of material importance in determining whether Robinson perfected his liens in compliance with the Wyoming certificate of title statutes or whether the Trustee can avoid those liens as unperfected. The presence of these two material factual disputes should have prevented the bankruptcy court from entering summary judgment.

There are fatal legal flaws in the order as well. In his complaint, the Trustee pled three theories of recovery. He sought the turnover of the boat, trailer and car under § 542. He asked to avoid the transfer of the liens by Talermo to Robinson as preferential under § 547(b). And, curiously, he sought to avoid these liens as statutory liens under § 545(2). Equally curious, he did not seek to exercise his strong arm powers to avoid the liens as unperfected under § 544(a)(1). Not until he filed his motion for summary judgment, and only after the pleadings were closed, did the Trustee incorporate and argue at length his theory of recovery under § 544(a).

The Trustee and Robinson each filed motions for summary judgment that

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[32] 11 U.S.C. § 547(c)(1)(B).

also served as responses (or "traverses" in Wyoming parlance) to one another's motions. After concluding that there were no remaining factual controversies, the bankruptcy court concluded that because the Trustee can "void statutory liens that are not perfected on the date of the petition against a bona fide purchaser," and because Robinson had failed to perfect his security interest as Wyoming law required, his liens could be avoided as unperfected statutory liens under § 545(2). The bankruptcy court did not address the Trustee's other claims.

But § 545(2) did not apply here. That provision may be used to avoid a statutory lien that–

> is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law[.][33]

The Code defines "statutory lien" at § 101(53) as–

> [a] lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, *but does not include security interest or judicial lien*, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.[34]

A "security interest" is defined at § 101(51) as "[a] lien created by an agreement."[35] Robinson's liens appear to be security interests, at least as that term is defined in the Bankruptcy Code,[36] and by definition cannot be statutory liens. Avoiding Robinson's liens under this provision was error.

In his dispositive motion, the Trustee invoked for the first time his most

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[33] 11 U.S.C. § 545(2).

[34] 11 U.S.C. § 101(53) (emphasis added).

[35] 11 U.S.C. § 101(51).

[36] It is unclear on this record whether Talermo authenticated a written security agreement that the Wyoming Uniform Commercial Code would require to create a security interest, *see* Wyo. Stat. Ann. § 34.1-9-203.

powerful avoidance tool, his strong-arm power as a § 544(a) hypothetical lien creditor. He argued that because Robinson did not complete the two step perfection process mandated under Wyoming law for items that are subject to a certificate of title, he could avoid any transfer of the debtor to whom a hypothetical creditor had extended credit and who had obtained a judicial lien on the property after receiving a judgment on a simple contract in connection with that credit. The bankruptcy court appears to have analyzed the case as though it had been brought under § 544(a) because it considered whether Robinson's liens had been properly perfected, but instead elected to decide the case under § 545.

Bankruptcy courts look to state law to determine whether a property interest has been perfected.[37] Wyoming treats boats and cars similarly as it requires every owner of any vehicle that has an identifying number, including watercraft, to apply for a certificate of title.[38] Wyoming law requires two steps to perfect a lien in a vehicle or motor vehicle:

> (1) A financing statement or security agreement must be filed in the office of the county clerk of the county in which the vehicle is located; and
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> (2) A notation of the security interest must be endorsed on the certificate of title to the vehicle or motor vehicle, the endorsement to be made concurrently with the filing of the financing statement or security agreement.[39]

In Wyoming's version of Article Nine, the County Clerk's office is the place of

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[37] *Johnson v. Smith (In re Johnson)*, 501 F.3d 1163, 1175 (10th Cir. 2007).

[38] Wyo. Stat. Ann. § 31-2-101(b) ("Every owner or transferee upon transfer of ownership of any vehicle that has an identifying number pursuant to W.S. 31-1-101(a)(ix), including off-road recreational or multipurpose vehicles and, for the purpose of titling under this section, including snowmobiles and watercraft, shall apply for a certificate of title at the office of a county clerk.").

[39] Wyo. Stat. Ann. § 31-2-801. Wyoming did not adopt § 9-311 of the Uniform Commercial Code, which provides that compliance with the perfection provisions of a state's certificate of title statute is the equivalent of filing a financing statement.

perfection of a security interest in a vehicle.[40]

By themselves, the lienholder notations on the boat and Jaguar certificates of title suggest that someone presented some evidence of the encumbrances to the Teton County Clerk's Office. The lien notations are located under the section marked "**For County Clerk's Use Only**" and presumably the county clerk would only note these liens on the titles had he or she been provided with a financing statement. This would be consistent with Wyo. Stat. Ann. § 29-7-103(b), which instructs the clerk's office to note a lien on the certificate of title concurrently with the filing of a lien statement.[41]

Both Robinson's and Talermo's deposition testimony could also support an inference that a lien statement had been presented to the Teton County Clerk's Office. Robinson testified that he and Talermo went to the courthouse together, both of them signed a document, and Talermo filed it at the county courthouse.[42] Talermo testified that the perfection process was going to the county clerk's

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[40] Wyo. Stat. Ann. § 34.1-9-501(a)(iii).

[41] Wyo. Stat. Ann. § 29-7-103(b) provides:

> A lien statement relating to a motor vehicle or other property, title to which is evidenced by a certificate of title, shall not be valid as to the motor vehicle or property unless the county clerk concurrently with the filing of the lien statement places on the certificate of title an appropriate notation showing the date, the amount of the lien and the name of the lien claimant. Each notation under this subsection after the first shall be accompanied by a fee of one dollar ($1.00) paid to the county clerk. **If the county clerk issues the certificate of title, he shall immediately endorse the same encumbrance data on the certificate copy on file in his office.** If the certificate is issued in some other county or state the county clerk shall promptly transmit to the state or county officer who issued the certificate of title the same encumbrance data. The other county officer shall promptly place the data on the certificate copy on file in his office.

(Emphasis added).

[42] Transcript ("Tr.") of July 23, 2012, Deposition of Steven S. Robinson at 13-14, *ll.* 22-25, 1, *in* App. at 46.

office, signing some paperwork, and filing it.[43]

The Trustee and ultimately the bankruptcy court relied on a UCC Lien Search Report issued by the Wyoming Secretary of State indicating that there are "no active or lapsed financing statements [] which name the debtor listed above [Talermo] and specific city and which are on file in [the central filing] office.[.]"[44] But the fact that no financing or lien statement was filed of record in the Secretary of State's office in Cheyenne has no bearing on whether the appropriate document was filed in Teton County as the vehicle perfection statute and the Wyoming UCC require. The bankruptcy court's reliance on the central filing search was legal error.

The bankruptcy court did not address the Trustee's preference claim at all. Suffice it to say that the perfection or attempted perfection of these liens within the 90-day look back period of § 547(b) may amount to an avoidable preference unless Robinson can demonstrate that he and Talermo intended that these liens be conferred and perfected as a contemporaneous exchange for value and that their granting was substantially contemporaneous in fact. Thus, determining the precise timing sequence of loans and liens here is material to whether an avoidable preference occurred and can be recovered.

After the bankruptcy court entered its summary judgment order, Robinson filed a motion for reconsideration. While there is no "motion to reconsider" mentioned in the Federal Rules of Civil or Bankruptcy Procedure, Civil Rule 59(e) provides that a judgment may be altered or amended when a court has misapprehended the facts, a party's position, or controlling law.[45] Grounds that

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[43] Tr. of Jan. 30, 2012, Deposition of Harry Ville Talermo at 47-48, *in* App. at 35.

[44] UCC Lien Search Report, *in* Appellee's Appendix at 77.

[45] *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

warrant altering or amending a judgment include (1) an intervening change in the controlling law; (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.[46] Robinson claimed that no county clerk would record a lien on a title without receiving supporting documentation, and attached an e-mail thread dated February 20, 2013, the day after the summary judgment order was issued, from an employee in the Teton County Clerk's office affirming that statement and confirming that a financing statement had in fact been filed by including a file stamp dated July 7, 2011. He also argued that neither he nor Talermo knew they needed a writing to be recorded in addition to securing lien notations on the titles. The bankruptcy court correctly noted that the file stamp was not part of the record on summary judgment, was in existence at the time of Robinson's response to the Trustee's motion, and could not be deemed "newly discovered evidence." The court denied the motion.

While we agree that the stamp may not be newly discovered evidence, because the court should have denied the Trustee's motion for summary judgment in the first instance, we are compelled to conclude that it likewise erred in denying the motion to reconsider that erroneous judgment.[47]

V. Conclusion

We REVERSE the bankruptcy court's Summary Judgment Order and Order Denying Reconsideration, and REMAND this adversary proceeding to the bankruptcy court for trial or other disposition consistent with this opinion.

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[46] *Id.*

[47] "An abuse of discretion occurs where the [lower] court clearly erred or ventured beyond the limits of permissible choice under the circumstances." *Wright ex rel. Trust Co. of Kan. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1233 (10th Cir. 2001).