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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **DEBRA SMITH,**

3 Plaintiff-Appellant,

4 v.

NO. 34,433

5 **MARK W. MOORE and**

6 **SUSAN M. MOORE,**

7 **Husband and Wife,**

8 Defendants-Appellees.

9 **APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY**

10 **Mark T. Sanchez, District Judge**

11 Eric D. Dixon

12 Portales, NM

13 for Appellant

14 McCormick, Caraway, Tabor & Byers, LLP

15 Jay Francis

16 Carlsbad, NM

17 for Appellees

18 **MEMORANDUM OPINION**

19 **VIGIL, Judge.**

1 {1} Plaintiff Debra Smith filed a docketing statement, appealing from the district
2 court's final order, entered on December 10, 2014. [RP 295; DS 2] This Court issued
3 a calendar notice, proposing to summarily dismiss the appeal for lack of a final order.
4 [CN 1, 4] Plaintiff timely filed a memorandum in opposition (MIO). We have given
5 due consideration to the memorandum in opposition, and, remaining unpersuaded, we
6 dismiss the appeal for lack of a final order.

7 {2} In this Court's notice of proposed disposition, we explained that, because there
8 was a pending motion to reconsider, the underlying proceedings are deemed non-final,
9 and Plaintiff's appeal is premature. [CN 2–3] We therefore proposed to dismiss for
10 lack of a final order. [CN 4] We note that in our notice of proposed disposition, we
11 stated that the motion to reconsider was filed by Plaintiff when, in fact, it was filed by
12 Defendants. [See CN 2–3; RP 297] Nevertheless, the identity of the movant does not
13 change our conclusion.

14 {3} In her memorandum in opposition, Plaintiff argues that the motion to reconsider
15 was, in fact, a motion for attorney fees, untimely filed (as a motion for attorney fees).
16 [MIO 1–2] As arguments regarding attorney fees can proceed simultaneously with an
17 appeal, see *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶ 41, 113 N.M.

1 231, 824 P.2d 1033 (holding that the filing of a notice of appeal does not deprive the
2 district court of “jurisdiction to rule on matters
3 “collateral to” or “separate from” the judgment” (internal quotation marks and citation
4 omitted)), Plaintiff argues that the motion does not render the final order non-final for
5 purposes of appeal. [MIO 2]

6 {4} However, as indicated above, it was *not* Plaintiff who filed the motion to
7 reconsider, so her proposed re-characterization of the motion as simply a motion for
8 attorney fees, to suit Plaintiff’s needs on appeal, is not persuasive. Additionally, the
9 actual title of the motion is “motion to reconsider,” and the motion requests that the
10 case be reopened to allow in new evidence that was discovered after the hearing, so
11 we are unpersuaded that the motion does not seek a reconsideration by the district
12 court of its final order. [RP 297-98] Further, although the motion does ask for attorney
13 fees, it requests such fees in light of the new evidence seemingly as part of an altered
14 damages request or as a sanction or punishment and, as such, could impact the final
15 order if greater damages are awarded in light of the purported malicious and
16 fraudulent prosecution of the case, in the form of attorney fees. [*See id.*] *See Exec.*
17 *Sports Club, Inc. v. First Plaza Trust*, 1998-NMSC-008, ¶ 8, 125 N.M. 78, 957 P.2d

1 63 (stating that there is a distinction between “*Kelly Inn*-type” attorney fees and
2 attorney “fees that are substantively part of compensatory damages necessary to
3 remedy the plaintiff’s injury” and reiterating that cases involving attorney fees as an
4 aspect of compensatory damages are appropriately dismissed as premature for lack of
5 jurisdiction (internal quotation marks and citation omitted). As such, we conclude that
6 the district court has retained jurisdiction to address such post-judgment motion,
7 including determining whether the motion to reconsider does, in fact, impact the final
8 judgment previously entered by the district court. *See* NMSA 1978, § 39-1-1 (1917)
9 (stating that the district court retains jurisdiction to address post-judgment motions
10 directed at the final order or judgment); *see also* *Grygorwicz v. Trujillo*, 2009-NMSC-
11 009, ¶ 8, 145 N.M. 650, 203 P.3d 865 (explaining that “if a party makes a
12 post-judgment motion directed at the final judgment pursuant to Section 39-1-1, the
13 time for filing an appeal does not begin to run until the district court enters an express
14 disposition on that motion”); *Dickens v. Laurel Healthcare, LLC*, 2009-NMCA-122,
15 ¶ 6, 147 N.M. 303, 222 P.3d 675 (explaining that, when a “motion that challenges the
16 district court’s determination of the rights of the parties[] is pending in the district
17 court, the judgment or order entered by the district court remains non-final . . . and
18 [the] appeal is premature” (citation omitted)). Because the district court has not yet
19 ruled on Defendant’s motion to reconsider, the appeal is premature.

1 {5} Thus, for the reasons stated in this Opinion and set forth in this Court's notice
2 of proposed disposition, we dismiss the appeal for lack of a final order.

3 {6} **IT IS SO ORDERED.**

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MICHAEL E. VIGIL, Judge

6 **WE CONCUR:**

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CYNTHIA A. FRY, Judge

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TIMOTHY L. GARCIA, Judge