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

7 **MELVIN A. ELKINS, JR. and**
8 **WANDA L. ELKINS,**

9 Plaintiffs-Appellants,

10 v.

NO. 30,683

11 **WATERFALL COMMUNITY WATER**
12 **USERS ASSOCIATION,**

13 Defendant-Appellee.

14 **APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY**
15 **James Waylon Counts, District Judge**

16 David McNeill, Jr.
17 Las Cruces, NM

18 for Appellants

19 Jefferson R. Rhodes
20 Alamogordo, NM

21 for Appellee

22 **MEMORANDUM OPINION**

23 **KENNEDY, Judge.**

24 Plaintiffs appeal from an order denying their motion for summary judgment and

1 granting Defendant’s motion for partial summary judgment. [RP 485] We proposed
2 to dismiss in a notice of proposed summary disposition because Defendant’s
3 counterclaims remained outstanding. Plaintiffs filed a memorandum in opposition
4 which we have duly considered. We remain of the opinion that Plaintiffs’ appeal is
5 not sufficiently final and thus dismiss the appeal.

6 As discussed more fully in our previous notice, the right to appeal is usually
7 restricted to final judgments and decisions. *See* NMSA 1978, § 39-3-2 (1966); *Kelly*
8 *Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 234-40, 824 P.2d 1033, 1036-42 (1992).
9 “For purposes of appeal, an order or judgment is not considered final unless all issues
10 of law and fact have been determined and the case disposed of by the trial court to the
11 fullest extent possible.” *B.L. Goldberg & Assocs. v. Uptown, Inc.*, 103 N.M. 277, 278,
12 705 P.2d 683, 684 (1985).

13 In the order granting Defendant’s motion for partial summary judgment, the
14 district court found that Plaintiffs only own the water rights on the land that they also
15 own because ownership of the water has not, and can not, be severed from ownership
16 of the land. [RP 485] The court made no findings as to exactly who owns the
17 remainder of the water rights or the water distribution system. [RP 485-486] It also
18 made no determination on Defendant’s counterclaims that Plaintiffs have failed to pay
19 for their use of the water distribution system and other claims involving Plaintiffs’

1 allegedly wrongful actions in connection with the water rights and the water
2 distribution system. [RP 117-119, 486] Instead, the order indicates that Defendant’s
3 counterclaims will proceed to trial. [RP 486]

4 Based upon the outstanding counterclaims, we proposed to dismiss Plaintiffs’
5 appeal for lack of a sufficiently final order. *See Govich v. North Am. Sys., Inc.*, 112
6 N.M. 226, 229, 814 P.2d 94, 97 (1991) (stating that an order dismissing fewer than all
7 of the claims generally is not “a final order from which appeal properly may be
8 taken”); *Watson v. Blakely*, 106 N.M. 687, 691, 748 P.2d 984, 988 (Ct. App. 1987)
9 (stating that “[a]n order disposing of the issues contained in the complaint but not the
10 counterclaim is not a final judgment”), *overruled on other grounds by Kelly Inn No.*
11 *102, Inc.*, 113 N.M. at 239, 824 P.2d at 1041. We proposed to dismiss because
12 resolving the issues raised in Plaintiffs’ appeal before trial on the counterclaims would
13 be contrary to this Court’s policy against fragmenting issues and piecemeal appeals.
14 *See Kelly Inn No. 102*, 113 N.M. at 239, 824 P.2d at 1041.

15 In their memorandum in opposition, Plaintiffs claim that we should consider the
16 merits of their appeal because it pertains to the underlying issue in the case which is
17 whether Plaintiffs own the water rights or whether Defendant owns them in trust.
18 [MIO 3] They claim that the issue raised in their appeal, whether separate ownership
19 of water rights and the real estate to which those rights are beneficially applied

1 constitutes a “severance” under New Mexico law, underlies the entire case and is
2 determinative of all other claims. [MIO 2] Thus, they contend that their appeal is
3 sufficiently final if the substance of that judgment is considered. [MIO 3-7] We
4 disagree.

5 First, even though Plaintiffs may eventually prevail, the district court’s decision
6 does not practically dispose of the merits of the action [MIO 4] because Defendant’s
7 counterclaim for damages remains outstanding. *See Board of Trustees of Village of*
8 *Los Ranchos de Albuquerque v. Sanchez*, 2004-NMCA-128, ¶ 6, 136 N.M. 528, 101
9 P.3d 339 (noting that “[w]hen the issue of damages remains, the order or judgment has
10 not practically disposed of the merits of the case,” and “New Mexico courts adhere to
11 the rule that an order or judgment is not final for purposes of appeal if the issue of
12 damages is outstanding”). Therefore, contrary to Plaintiffs’ contentions, this case is
13 not practically final even though Plaintiffs’ ultimate success might negate the need for
14 trial on Defendant’s counterclaim because the determination of Defendant’s
15 counterclaim for damages is not “more or less ministerial.” [MIO 4] *See id.* ¶ 11
16 (rejecting the respondents’ argument urging this Court to “interpret the rule of finality
17 practically rather than technically” based on their contentions that “they have a strong
18 case on the merits and the issue of damages will not be examined if they are successful
19 in [the] appeal” because a judgment or order that fails to resolve damages is neither

1 final nor within the “twilight zone of finality”).

2 Finally, to the extent Plaintiffs may be correct that resolution of the issues
3 raised in their appeal may be dispositive on the entire case, their appeal may have been
4 appropriate for interlocutory appeal. *See* NMSA 1978, § 39-3-4 (1999); Rule 12-203
5 NMRA. However, Plaintiffs did not comply with the requirements set forth in Section
6 39-3-4 and Rule 12-203. In any application for interlocutory appeal, the order
7 appealed must contain the necessary certification language. *See* § 39-3-4(A) (stating
8 that an order certifying a matter for interlocutory appeal must contain language that
9 the matter “involves a controlling question of law as to which there is substantial
10 ground for difference of opinion and an immediate appeal from this order may
11 materially advance the ultimate termination of the litigation”). However, Plaintiffs
12 failed to obtain an order containing the requisite language, and therefore interlocutory
13 review would be improper. *See generally State v. Lobato*, 2006-NMCA-051, ¶ 38,
14 139 N.M. 431, 134 P.3d 122 (recognizing that incorporation of the mandated
15 certification language is required to permit interlocutory review). Moreover, the case
16 is not appropriate for interlocutory review because Plaintiffs failed to file an
17 application or their notice of appeal within fifteen days. *See* § 39-3-4(B); Rule 12-
18 203(A); *Systems Technology, Inc. v. Hall*, 2004-NMCA-130, ¶ 14, 136 N.M. 548, 102
19 P.3d 107 (holding that the plaintiff’s attempt to perfect an interlocutory appeal failed

1 because it failed to file its application until seventeen days after the filing of the
2 district court's order).

3 **CONCLUSION**

4 Based upon the foregoing, we remain of the opinion that resolution of the issues
5 raised in Plaintiffs' appeal would be premature. Therefore, for the reasons set forth
6 above and in our notice of proposed summary disposition, we dismiss Plaintiffs'
7 appeal because it is not sufficiently final for purposes of appeal.

8 **IT IS SO ORDERED.**

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10

RODERICK T. KENNEDY, Judge

11 **WE CONCUR:**

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CYNTHIA A. FRY, Judge

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MICHAEL E. VIGIL, Judge