

IMBODEN V. IMBODEN

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DONNA KAREN IMBODEN,
Petitioner-Appellee/Cross-Appellant,
v.
LESLIE EARL IMBODEN,
Respondent-Appellant/Cross-Appellee.

NO. 29,677

COURT OF APPEALS OF NEW MEXICO

December 10, 2009

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY, H.R. Quintero, District
Judge

COUNSEL

Lopez & Associates, P.C., William Perkins, Silver City, NM, for Appellee/Cross-Appellant

Jim Foy & Associates, Jim Foy, Norman R. Wheeler, Silver City, NM, for Appellant/Cross-Appellee

JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: CYNTHIA A. FRY, Chief Judge,
MICHAEL E. VIGIL, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

Respondent Leslie Earl Imboden (Husband) appeals, and Petitioner Donna Karen Imboden (Wife) cross-appeals, from the district court's division of the parties'

marital property. Our notice proposed to reverse and remand for the district court to consider the merits of Husband's motion to reconsider. Wife filed a timely memorandum in opposition. We are not persuaded by Wife's arguments and, therefore, reverse and remand.

On March 16, 2009, the district court entered its judgment and order regarding disposition of marital property. **[RP 137]** On April 15, 2009, Husband filed a "motion to reconsider and stay." **[RP 154]** On June 10, 2009, the district court entered an order denying the motion to reconsider (order). **[RP 193]** The order sets forth the district court's determination that Husband's motion to reconsider was filed pursuant to NMSA 1978, Section 39-1-1 (1917) and was deemed denied by operation of law on May 16, 2009. **[RP 193]** However, the 2006 amendment to Rule 1-054.1 NMRA superseded the portion of Section 39-1-1 that states that post-judgment motions filed under that statute are automatically denied if not granted within thirty days of filing. See *Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-051, ¶ 15, 142 N.M. 527, 168 P.3d 99; see also *Dickens v. Laurel Healthcare, LLC*, 2009-NMCA-122, ¶ 6, ___ N.M. ___, ___ P.3d ___ (No. 29,239, June 18, 2009) (viewing *Redi-Mix* as holding that when a post-judgment motion that challenges the district court's determination of the parties' rights is pending in the district court, the judgment or order entered by the court remains non-final). Because the "deemed denied" provision of Section 39-1-1 is not applicable, we decline to consider the merits of the parties' issues and instead reverse and remand with instructions for the district court to consider the merits of Husband's motion to reconsider.

In opposition to remand, Wife essentially asserts that this Court is over-reading *Albuquerque Redi-Mix, Inc.* In this respect, Wife argues that the *Redi-Mix* holding is intended to address only the lifting of the automatic denial provision when post-judgment motions are made pursuant to the Rules of Civil Procedure, such as the motion to reconsider filed under Rule 1-059(E) NMRA as in *Redi-Mix*. **[MIO 6]** According to Wife's position, the ability to supersede the "deemed denied" provision is limited to instances of motions made under the rules and when Section 39-1-1 is not invoked. **[MIO 6-7]** Case law, however, does not support this view. See *Grygorwicz v. Trujillo*, 2009-NMSC-009, ¶ 8, 145 N.M. 650, 203 P.3d 865 (explaining that, "if a party makes a post-judgment motion directed at the final judgment pursuant to Section 39-1-1, the time for filing an appeal does not begin to run until the district court enters an express disposition on that motion"). Apart from case law, the rules themselves provide that Section 39-1-1 post-judgment motions are no longer subject to a "deemed denied" provision. See Rule 12-201(D) NMRA (stating that "[i]f a party timely files a motion pursuant to Section 39-1-1 . . . , the full time prescribed in this rule for the filing of the notice of appeal shall commence to run and be computed from the entry of an order expressly disposing of the motion"); Rule 1-054.1 (2006 amendment as approved by Supreme Court Order 06-8300-17, effective August 21, 2006, superseding the portion of Section 39-1-1 that stated that post-judgment motions were automatically denied if not granted within thirty days of filing).

Based on the foregoing discussion, we reverse and remand with instructions that the district court consider the merits of Husband's motion to reconsider.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

CYNTHIA A. FRY, Chief Judge

MICHAEL E. VIGIL, Judge