

STATE EX REL. ROCK SCAPES V. RVC, INC.

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**STATE OF NEW MEXICO FOR
USE OF ROCK SCAPES OF NEW
MEXICO, INC.,
Plaintiff/Counterdefendant-Appellee,
v.
RVC, INC.,
Defendant/Counterplaintiff-Appellant,
and
WESTFIELD INSURANCE COMPANY,
Defendant.**

NO. A-1-CA-35703

COURT OF APPEALS OF NEW MEXICO

December 12, 2018

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

COUNSEL

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JUDGES

HENRY M. BOHNHOFF, Judge. WE CONCUR: STEPHEN G. FRENCH, Judge,
JENNIFER L. ATTREP, Judge

AUTHOR: HENRY M. BOHNHOFF

MEMORANDUM OPINION

BOHNHOFF, Judge.

{1} After a jury trial, the district court awarded Plaintiff Rock Scapes of New Mexico, Inc. (Rock Scapes), an interest penalty pursuant to the Prompt Payment Act (PPA), NMSA 1978, §§ 57-28-1 to -11 (2001, as amended through 2007); an alternative award of pre- and post-judgment interest; and attorney fees. Defendant Rio Vista Construction, Inc. (RVC) appeals the post-trial relief. We affirm in part and reverse in part.

BACKGROUND

{2} In early 2008, Albuquerque Public Schools (APS) entered into a contract (the Contract) with RVC to make certain improvements at Eldorado High School in Albuquerque, New Mexico (the Project). The contract price was approximately \$5.1 million. RVC in turn entered into a subcontract (the Subcontract) with Rock Scapes to provide labor and materials for the interior and exterior concrete work involved with the Project at a contract price of \$303,985.76.

{3} The Subcontract provided that Rock Scapes would submit to RVC on a monthly basis a statement (referred to by the parties as a “pay app”) of the work performed to date and the amount due for that work. Upon and to the extent of RVC’s approval of the pay app and “upon receipt of [Rock Scapes’] funds from [APS],” RVC would pay Rock Scapes 95% of the amount of the pay app, with the remaining 5% being withheld pending final completion of the Subcontract work.

{4} RVC’s practice, to which Rock Scapes did not object, was to incorporate all of the subcontractors’ monthly pay requests, including change orders, into an “initial global pay app” that it would review with APS’s architect. Based on an inspection of the construction site, the architect would advise RVC how much of the initial global pay app he would approve. RVC would then prepare a revised global pay app that reflected only the amounts approved by the architect, the architect would sign the revised global pay app, and APS would issue a check for the approved amount, whereupon RVC would pay each subcontractor the component amount to which it was due.

{5} Prior to completion of the contemplated concrete work, RVC terminated the Subcontract with Rock Scapes. RVC used its own employees and another subcontractor to complete the concrete work. RVC did not make any further payments for work that Rock Scapes had performed prior to the termination and was the subject of previously submitted pay apps. RVC instead took the position that it would withhold payment of amounts that otherwise were due for such work pending determination of RVC’s “damages and costs to complete the project.”

{6} Rock Scapes filed suit for breach of contract and statutory violations, and RVC similarly counterclaimed for breach of contract and statutory violations. In addition to claiming compensatory damages, Rock Scapes sought punitive damages on the theory that RVC’s motivation for terminating Rock Scapes was to hire another concrete subcontractor that would perform the work at a lower cost. Rock Scapes filed for bankruptcy in July 2011.

{7} At the conclusion of the trial, the jury made special verdict findings against RVC and, on the basis of those findings, the district court entered judgment in favor of Rock Scapes, awarding both compensatory (\$156,959.58) and punitive damages (\$35,000). RVC has paid, and not appealed, the judgment.

{8} Shortly after entry of judgment, Rock Scapes filed a motion seeking an interest penalty award under Section 57-28-5(C) of the PPA and an award of pre- and post-judgment interest (Interest Penalty Motion). In this motion, Rock Scapes contended that, by its special verdict, the jury had determined that RVC had violated the PPA. Rock Scapes further argued that it was entitled to an interest penalty based on RVC's failure to pay it \$146,915.97. This figure was based on \$129,202.12 that Rock Scapes claimed it had not been paid pursuant to the Subcontract terms for the interior concrete work it had performed plus an additional amount of \$17,713.85 that it claimed it should have been paid on certain change orders.

{9} RVC contested the Interest Penalty Motion, arguing that under the PPA a general contractor does not owe an interest penalty unless the amount due to the subcontractor is undisputed and the general contractor has received payment for that amount from the owner. RVC contended the change orders were neither undisputed nor approved, the other amounts Rock Scapes claimed it was owed for its concrete work were disputed, and the jury in any event did not tie its damage award to a PPA violation.

{10} In its ruling on the Interest Penalty Motion, the district court noted that the terms of Section 57-28-5 were part of the Subcontract, the jury was given the text of Section 57-28-5 as part of the jury instructions, and the jury had found in its special verdict that RVC had breached the contract by failing to timely pay amounts owed to Rock Scapes. On this basis the district court concluded that "[t]he jury thus determined that the Prompt Pay Act was violated." The court then noted that Rock Scapes had identified in its motion as claimed PPA violations the change orders totaling \$17,713.85 and the failure to pay \$129,202.12 for the remaining balance of Rock Scapes' interior concrete work, which totaled \$146,915.97. The court determined, without discussion, that the \$146,915.97 amount "is subject to prejudgment interest under [Section] 57-28-5(C). Each individual item will need to be computed using the appropriate time periods."

{11} Pursuant to Section 57-28-5(C), the district court awarded Rock Scapes an 18% interest penalty on \$146,915.97. The court awarded, in the alternative to a PPA interest penalty, 6.5% pre-judgment interest, pursuant to NMSA 1978, Sections 56-8-3(A) (1983) and -4(B) (2004), and 15% post-judgment interest pursuant to Section 56-8-4(A)(2).

{12} Rock Scapes filed and RVC opposed another post-judgment motion seeking an award of attorney fees pursuant to Section 57-28-11 of the PPA (Attorney Fee Motion). After supplemental briefing that the district court requested, the court granted the motion and awarded Rock Scapes \$131,556.75 in attorney fees.

DISCUSSION

I. PPA Interest Penalty Award

A. Standard of Review

{13} The standard of review applicable to our consideration of the district court's PPA interest penalty award depends on the nature of RVC's challenge. To the extent RVC contends there are insufficient factual bases—whether in the form of the jury's special verdict findings or evidence presented during the trial—for the court's award, “we review the evidence in the light most favorable to support the trial court's findings, resolving all conflicts and indulging all permissible inferences in favor of the decision below.” *Jones v. Schoellkopf*, 2005-NMCA-124, ¶ 8, 138 N.M. 477, 122 P.3d 844. To the extent RVC contends the district court incorrectly interpreted the PPA or applied the statute to the facts, we apply a de novo standard of review. See *id.* (stating that claims of errors of law in the trial court's conclusions will be reviewed de novo); see also *State v. Reynolds*, 1995-NMSC-008, ¶ 4, 119 N.M. 383, 890 P.2d 1315 (stating that in reviewing a mixed question of law and fact, appellate court will review the facts using a substantial evidence standard and then review de novo the court's application of the law to the facts).

B. Prompt Payment Act

{14} Initially, we observe that, although unclear, the parties appear to assume that the PPA creates either a separate cause of action or a type of breach of contract claim that should be submitted to the jury as opposed to a remedy, similar to pre- or post-judgment interests, that the district court may award following a trial that determines an underlying right to payment. We need not address whether this assumption is correct; instead we frame our opinion within the confines of the parties' assumptions on appeal. See *State v. Isaac M.*, 2001-NMCA-088, ¶ 3, 131 N.M. 235, 34 P.3d 624 (stating that where both parties assume the applicability of certain statutes and concepts, “[w]e [may] assume, without deciding, that the parties are correct”). We note, however, that this Court previously has determined that a PPA claim need not be brought as a separate cause of action. See *J.R. Hale Contracting Co. v. Union Pac. R.R.*, 2008-NMCA-037, ¶ 88, 143 N.M. 574, 179 P.3d 579 (“[W]e are unpersuaded that [the plaintiff's] claim could be raised only in a separate, distinct [PPA] cause of action. Neither the statute nor [the] defendants' proffered cases require that holding.”).¹

{15} Section 57-28-5(C) of the PPA addresses payments that general contractors owe to subcontractors for work performed on construction projects. It provides:

If the contractor or subcontractor fails to pay the contractor's or subcontractor's subcontractor and suppliers by first-class mail or hand delivery within seven days of receipt of payment [from the owner, contractor, or subcontractor], the contractor or subcontractor shall pay interest to the subcontractors and suppliers beginning on the eighth day after payment was due, computed at one and one-half percent of the undisputed amount per month or fraction of a month until payment is issued.

This statutory provision establishes two key qualifications to a contractor's obligation to pay its subcontractor within seven days. First, the contractor itself must have received payment from the owner for the subcontractor's work in question. *Id.* Second, the amount claimed by the subcontractor must be "undisputed." *Id.* Although the term "undisputed" is not defined in the statute, we previously have determined that "undisputed" means "unchallenged, unquestioned." *Unified Contractor, Inc. v. Albuquerque Hous. Auth.*, 2017-NMCA-060, ¶¶ 71, 73, 400 P.3d 290.

{16} On appeal, the parties, citing to federal authority, agree that the contractor must dispute the claim in good faith. Given the parties' agreement, we will assume without deciding that for PPA purposes a payment claim is disputed only if a contractor questions or challenges the subcontractor's right to payment in good faith. See *Isaac M.*, 2001-NMCA-088, ¶ 3; see also *Unified Contractor, Inc.*, 2017-NMCA-060, ¶ 73 (observing that "raising a challenge or question as to an invoiced item limits a defendant's liability for statutory interest" under the PPA but not addressing whether such a challenge or question must be in good faith).

C. Analysis

{17} RVC makes several arguments challenging the district court's PPA interest penalty award: (1) the award is unsupported because the jury did not find a PPA violation; (2) even assuming the jury found a PPA violation, it is not possible to determine from that finding which claim or claims for payment were the basis for the finding; (3) in any event there is no evidence that the PPA was violated, because (a) APS had not paid RVC for the amounts Rock Scapes identifies as the basis for its PPA claim, and (b) RVC also disputed Rock Scapes' right to payment for those amounts.

1. RVC Failed to Preserve Whether PPA Claim Was Properly Submitted to the Jury

{18} In its post-trial ruling, the district court determined that the jury found that RVC violated the PPA. RVC argues on appeal that, because the jury was not expressly asked whether RVC violated the PPA, the district court erred in so ruling.

{19} RVC did not make this argument below. On the contrary, in closing arguments, both parties discussed the PPA and appear to have understood that the PPA claim was being submitted to the jury. And, in briefing Rock Scapes' post-trial motion, both parties appear to have understood, or at the very least assumed, that the special-verdict question that asked whether RVC breached the contract by not timely paying amounts owed to Rock Scapes was based on a claim that the PPA was violated. The district court in turn explained the relationship between the PPA claim and the untimely payment special-verdict question. In particular, the district court stated that "[t]he terms of [Section] 57-28-5 are part of the [S]ubcontract"—a finding not challenged by RVC. The district court went on to reason:

Submitted to the jury was the liability theory that there was a “breach of contract” by RVC in that “RVC failed to timely pay amounts owed to Rock Scapes.” Instruction No. 8. Provided to the jury was the text of [Section] 57-28-5. Instruction No. 26. By “Special Verdict Form,” the jury found that RVC breached the [S]ubcontract “by not timely paying amounts owed to Rock Scapes.” *The jury thus determined that the [PPA] was violated.*

(Emphasis added) (footnote omitted). In making these determinations, the district court was not presented with the argument RVC now advances on appeal—that a PPA claim was not properly submitted to the jury. Instead, RVC only argued that the jury’s damage award could not be attributed solely to the PPA claim and, as such, a PPA penalty was unwarranted.

{20} Thus, from the record we have before us, it appears all parties and the district court intended to submit the PPA claim to the jury through the submission of the special-verdict question that asked whether RVC breached the contract by not timely paying Rock Scapes. Although RVC now argues on appeal that the jury instructions and special verdict form were inadequate to present the PPA claim to the jury, RVC does not claim that it objected to the jury instructions or special verdict form. See Rule 1-051(I) NMRA (“For the preservation of any error in the charge, objection must be made to any instruction given . . . or, in case of a failure to instruct on any point of law, a correct instruction must be tendered, before retirement of the jury.”). Consequently, RVC cannot now complain of any such deficiencies. See *Ramos v. Rodriguez*, 1994-NMCA-110, ¶ 12, 118 N.M. 534, 882 P.2d 1047 (“Examination of the record indicates that the [defendant] failed to object to the omission of specific language from the special verdict form prior to submission of the case to the jury, and he cannot now be heard to complain of this omission on appeal.”). Moreover, the portions of the record that could enlighten our inquiry here—e.g., discussions, if any, about the jury instructions and verdict form—have not been designated by RVC on appeal. Given RVC’s failure to argue before the district court that the PPA claim was not properly submitted to the jury, RVC’s failure to object to the jury instructions and special verdict form, and RVC’s failure to designate necessary portions of the record for our review, we decline to address RVC’s assertions that the PPA claim was not properly submitted to the jury and the district erred in ruling to the contrary. See *Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 24, 314 P.3d 688 (“To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.” (internal quotation marks and citation omitted)); *Vill. of Angel Fire v. Bd. of Cty. Comm’rs of Colfax Cty.*, 2010-NMCA-038, ¶ 15, 148 N.M. 804, 242 P.3d 371 (explaining that we do not address issues that are not preserved in the district court); *Ramos*, 1994-NMCA-110, ¶ 12 (holding that failure to object to special verdict form precludes appellate review of the same); see also *State v. Wilson*, 1994-NMSC-009, ¶ 12, 116 N.M. 793, 867 P.2d 1175 (noting that an insufficient factual basis precludes appellate review).

2. The District Court Was Free to Determine the Amount of the PPA Penalty

{21} While it is true that the jury did not identify what portion of its damages award was for undisputed amounts RVC had received from APS, that does not mean—as RVC argues—that Rock Scapes cannot recover a PPA penalty.

{22} RVC is correct in pointing out that it is impossible to determine from the special verdict form *which amounts* RVC failed to timely pay Rock Scapes. The jury made only a general compensatory damage award, and the amount of that award, \$159,959.58, is neither the amount (\$163,406.71)² that Rock Scapes had asked the jury to award nor the amount (\$146,915.97) upon which Rock Scapes based its PPA interest penalty request. It is unclear from the record how the jury arrived at its damage figure. Moreover, Rock Scapes' damage request reflected all of its damages flowing from its four separate claimed contract breaches set forth in jury instruction no. 8, only one of which was the failure to timely pay amounts owed to Rock Scapes.³ It is simply not possible to determine from the jury's compensatory damage award which amounts the jury found were not timely paid. The jury was not asked specific questions about which amounts were undisputed and when each such undisputed amount was paid to RVC so that the district court could simply apply Section 57-28-5(C) using the jury's factual findings. And the jury was not instructed to calculate the PPA penalty and include that amount in its damages award.

{23} RVC contends that because the jury did not answer these questions, the PPA penalty should be denied. In this case, Rock Scapes filed a post-trial motion requesting, *inter alia*, that the district court determine the undisputed amounts that RVC owed for work Rock Scapes had performed and the dates of non-payment, and impose a penalty pursuant to Section 57-28-5(C). The district court adopted Rock Scapes' calculation, finding that the entire \$146,915.97 amount was undisputed and paid by APS, and imposed the PPA penalty on this amount. RVC attempts for the first time on appeal to characterize the verdict as a general verdict and, on this basis, argue that the district court should not have undertaken the PPA penalty calculation. The verdict in this case, however, was a special verdict, not a general verdict.⁴ Given this, the district court was permitted to determine the PPA penalty, pursuant to Rule 1-049(A) NMRA.⁵ Rule 1-049(A) provides:

The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. . . . If . . . the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted. . . . As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Thus, when an issue is omitted without objection in a special verdict submitted to the jury for determination, the parties waive their right to a jury on that issue and it properly may be decided by the district court. *See id.* We, accordingly, hold that Rule 1-049(A) authorized the district court to make a post-trial determination on the amount of the PPA penalty, provided it was supported by substantial evidence. *Id.*; *cf. Clovis Nat'l Bank v. Harmon*, 1984-NMSC-119, ¶¶ 1, 7, 102 N.M. 166, 692 P.2d 1315 (explaining that the

district court's findings of fact entered following non-jury trial would be upheld if supported by substantial evidence); *Herrera v. Roman Catholic Church*, 1991-NMCA-089, ¶ 14, 112 N.M. 717, 819 P.2d 264 ("Unless clearly erroneous or deficient, findings of the trial court will be construed so as to uphold a judgment rather than to reverse it."). The remaining question, therefore, is whether the record contains such evidence.

3. The District Court's PPA Penalty Award Is Supported in Part by Substantial Evidence

{24} The evidence at trial was as follows: First, a portion of the amount Rock Scapes claimed it was owed for the interior concrete work was included in a payment that RVC does not deny APS made. In particular, Rock Scapes submitted its last pay app on August 20, 2008. RVC included, in its September 10, 2008 global pay app no. 5, a portion of the amount Rock Scapes had requested, and on September 25, 2008, APS paid RVC that amount; while unclear from the records, the parties appear to agree that this amount was \$63,805.15. Thus, the first predicate requirement for imposing a PPA interest penalty, payment by the owner, was present with respect to this amount.

{25} RVC, however, contends that this amount was disputed. Specifically, RVC contends that, by the point in September that it received APS's payment, its dispute with Rock Scapes encompassed the latter's untimely completion of the concrete work, RVC's resulting termination of the Subcontract, expenses RVC incurred to engage a replacement concrete subcontractor, and RVC's remediation of cracked concrete. RVC maintains that, as permitted by the Subcontract, it had determined to withhold further payments pending resolution of the broader dispute. But this position was the subject of Rock Scapes' claim that RVC's termination of the Subcontract was simply a pretext to hire another subcontractor that would perform the concrete work at a lower cost. That theory formed the basis for Rock Scapes' punitive damages claim, which the jury accepted. RVC does not contend that the claim of fraudulent or malicious conduct that was the basis for Rock Scapes' punitive damages claim lacked factual support; it has not challenged, for example, the district court's denial of its motion to dismiss Rock Scapes' punitive damages claim made after Rock Scapes completed its case in chief. Given the jury's award of punitive damages and its corresponding rejection of RVC's bases for non-payment to Rock Scapes, we conclude substantial evidence supported a determination that any dispute over remitting to Rock Scapes the \$63,805.15 that RVC received from APS on or about September 25, 2008 was not in good faith. Therefore, the district court's award of a PPA interest penalty on \$63,805.15 was supported by the evidence.

{26} Second, Rock Scapes contends that APS paid RVC for the balance (\$129,202.12 - \$63,805.15 = \$65,406.87) of Rock Scapes' claim for interior concrete work pursuant to RVC's September 26, 2008 global pay app no. 6. Rock Scapes makes this contention based on the fact that RVC had certified as of that date that the interior concrete work was 100% complete, and APS paid RVC the full amount of that app on October 16, 2008. However, RVC argues that Rock Scapes' position is not supported by the evidence, and maintains that the interior concrete work reflected in its global pay

app. no. 6 was performed by the replacement concrete contractor as well as RVC itself. Thus, RVC urges, its certification is not an acknowledgement of Rock Scapes' work. On this point we agree with RVC. Rock Scapes points to nothing in the record that would establish that the amount—approximately \$74,000—shown in RVC's global pay app no. 6 for interior concrete work represents Rock Scapes' work as opposed to its replacement's or RVC's work. In particular, Rock Scapes has not directed us to any testimony by APS's architect or any other witness that the amounts shown in RVC's global pay app no. 6 for interior concrete work were attributable to Rock Scapes' efforts. Thus, the district court's award of a PPA interest penalty for the full amount of Rock Scapes' claim for payment for its interior concrete work, \$129,212.12, is unsupported by the evidence.

{27} Third, with respect to the change orders, RVC acknowledges that APS paid it \$4,279.29 in January 2009 for the wage-rate increase change order. There was substantial evidence to support a determination that RVC's failure to pay Rock Scapes this amount—for which there would be no justification for disputing—was not in good faith, and thus the district court properly could award a PPA interest penalty on the basis of this amount. In contrast, Rock Scapes conceded at trial that APS never approved and thus never paid any of the other change orders that were the basis for Rock Scapes' PPA interest penalty request. With respect to these other change order amounts, therefore, the district court erred in awarding an interest penalty to that extent.

{28} Thus, we affirm the district court's PPA interest penalty award based on RVC's failure to pay Rock Scapes \$63,805.15 within seven days following RVC's receipt of payment from APS on September 25, 2008, and \$4,279.29 within seven days following RVC's receipt of payment from APS in January 2009. We otherwise reverse the PPA interest penalty award, and will remand for recalculation of the award and for calculation of any pre- and post-judgment interest to which Rock Scapes may be entitled in lieu of the original PPA interest penalty award.

II. Pre-Judgment Interest

A. Rock Scapes' Motion

{29} In its Interest Penalty Motion, Rock Scapes also requested, in the alternative, an award of pre- and post-judgment interest under Sections 56-8-3(A) and -4(B) on the basis that RVC had taken unreasonable settlement positions prior to trial. RVC responded that Rock Scapes was not entitled to pre-judgment interest, because, due to discovery misconduct for which it had been sanctioned—it had not produced a daily project log—Rock Scapes was responsible for a three-year delay between August 2010 and August 2013 in trying the case. RVC argued further that, notwithstanding the jury's determination, its settlement position—it did not dispute that it had never made an offer that would have resulted in a net payment to Rock Scapes—was not unreasonable.

{30} The district court ruled that, because it would be duplicative of the PPA interest penalty award, no pre-judgment interest would be awarded pursuant to Section 56-8-3

or -4 unless Rock Scapes waived the PPA interest penalty. It then considered the two factors identified in Section 56-8-4(B): whether Rock Scapes was the cause of unreasonable delay and whether RVC previously had made a reasonable and timely settlement offer. It concluded that Rock Scapes' discovery misconduct and RVC's settlement position "essentially cancel[ed] each other out." After also considering the jury's findings on both parties' compensatory and punitive damage claims, "the relative conduct of the parties as the [c]ourt understands it," the impact of the events on the parties, and Rock Scapes' loss of the use of the money it ultimately was awarded, the court awarded 6.5% pre-judgment interest under both Section 56-8-3(A) and Section 56-8-4(B) on the amount of the jury award, \$10,043.61, not subject to the PPA penalty.⁶

B. Analysis

{31} The standard of review applicable to an award of pre-judgment interest is abuse of discretion. See *Garcia v. Mayer*, 1996-NMCA-061, ¶ 25, 122 N.M. 57, 920 P.2d 522. Section 56-8-3 provides: "The rate of interest, in the absence of a written contract fixing a different rate, shall be not more than fifteen percent annually in . . . cases [involving] money due by contract[.]" Section 56-8-3(A) constitutes an independent statutory basis for an award of pre-judgment interest. *State ex rel. Bob Davis Masonry, Inc. v. Safeco Ins. Co. of Am.*, 1994-NMSC-106, ¶ 5, 118 N.M. 558, 883 P.2d 144. Section 56-8-4(B) provides: "[T]he court in its discretion may allow interest of up to ten percent from the date the complaint is served upon the defendant after considering, among other things: (1) if the plaintiff was the cause of unreasonable delay in the adjudication of the plaintiff's claims; and (2) if the defendant had previously made a reasonable and timely offer of settlement to the plaintiff." Whereas an award of pre-judgment interest under Section 56-8-4(B) is discretionary, the award is as of right under Section 56-8-3. See *Gilmore v. Duderstadt*, 1998-NMCA-086, ¶¶ 38-39, 125 N.M. 330, 961 P.2d 175.

{32} RVC argues that Rock Scapes' discovery transgressions resulted in a three-year delay in bringing the case to trial and, further, prejudiced RVC's ability to present its case. It urges that the district court was required to consider the equities in awarding pre-judgment interest and that the only equitable way to address the consequences of Rock Scapes' misconduct was to bar it from recovering pre-judgment interest under both statutes for the three-year period between August 2010, when the trial was first postponed following discovery of Rock Scapes' failure to produce its project log, and August 2013 when the case was finally tried.

{33} The district court took the three-year delay into consideration in connection with its award under both statutes. The court balanced that delay against the other factor identified in Section 56-8-4(B): RVC's arguably unreasonable (and, at least in light of the jury's verdict, unrealistic) settlement position. The court considered other factors as well, including not only the jury's clear determination that RVC was responsible for the dispute but also Rock Scapes' loss of the use of the money it expected to earn under the Subcontract and its claim that such loss contributed to its bankruptcy. In denying RVC's motion for reconsideration of the pre-judgment interest award, the court also considered RVC's claim that it was prejudiced by the delay in obtaining discovery of the

daily project log. The court commented that having observed the jury's reaction to the log during the trial, RVC's inability to make use of it in trial preparation "was essentially a non-event" and therefore RVC's claim of prejudice was unsupported by evidence and "speculative."

{34} The district court's decision to award pre-judgment interest at a rate of 6.5% as opposed to some other rate reflected a balancing of all of these factors, based on its familiarity with the facts and procedural history of the case. Thus, the district court considered the equities, notwithstanding that it ultimately did not balance them in the manner RVC would have preferred. We cannot say that the court abused its discretion in that regard. See *Aspen Landscaping, Inc. v. Longford Homes of N.M., Inc.*, 2004-NMCA-063, ¶ 35, 135 N.M. 607, 92 P.3d 53 (affirming award of pre-judgment interest under Section 56-8-3(A)); *DeLisle v. Avallone*, 1994-NMCA-012, ¶¶ 30-33, 117 N.M. 602, 874 P.2d 1266 (affirming award of pre-judgment interest under Section 56-8-4(B)).²

III. Attorney Fee Award

A. Rock Scapes' Motion

{35} Within the time permitted by Rule 1-054(E)(2) NMRA following entry of judgment, Rock Scapes filed a motion requesting an award of attorney fees. Rock Scapes grounded its motion on Section 57-28-11 of the PPA, which provides: "In an action to enforce the provisions of the [PPA], the court may award court costs and reasonable attorney fees." Again relying on Rock Scapes' discovery misconduct, RVC urged the district court to deny any attorney fee award. Alternatively, RVC argued that Rock Scapes should recover only fees representing time spent pursuing the PPA claim as opposed to the broader breach of contract claims.

{36} In supplemental briefing ordered by the district court, Rock Scapes advanced, as an additional basis for awarding attorney fees, language from the Subcontract itself: "In any dispute arising out of or relating to this agreement, reasonable attorney[] fees and costs shall be included and added to the award for the benefit of the prevailing party[.]" Rock Scapes repeated its argument that the PPA and breach of contract claims were intertwined: "There could be no obligation to make a prompt payment in the absence of a contractual provision requiring payment." RVC objected to, as untimely, Rock Scapes' invocation of new grounds for an attorney fee award, and reiterated its argument that, because an award under the PPA is discretionary, the court could and should consider Rock Scapes' discovery misconduct.

{37} Ultimately, the district court awarded Rock Scapes the majority of the attorney fees that it sought. The court declined to rule on RVC's argument that Rock Scapes' invocation of the Subcontract as a source of attorney fees was untimely or, more generally, specify whether it would make the award pursuant to the PPA or the Subcontract: "Ultimately, it matters not. The [c]ourt is of the opinion that Rock Scapes is entitled to attorney fees. The question is how much." The court then concluded that "[e]ssentially everything in this case is interconnected and arising from Rock Scapes'

involvement in the construction [P]roject,” and therefore it would not require apportionment of attorney fees incurred pursuing the PPA claim versus the breach of contract claim. However, the court ruled that it would exclude from the award Rock Scapes’ counsel’s fees incurred between August 2010 and August 2013, and noted that Rock Scapes itself had excluded from its request fees incurred in connection with the discovery misconduct issue. The court ultimately awarded \$131,556.75 in attorney fees.

B. Analysis

{38} The standard of review applicable to an award of attorney fees is abuse of discretion. See *Gardner v. Gholson*, 1992-NMCA-122, ¶ 46, 114 N.M. 793, 845 P.2d 1247. RVC raises the same arguments on appeal that it did in the district court. In particular, RVC reiterates its segregation point that, even assuming Rock Scapes was entitled to some award pursuant to the PPA attorney fee provision, its failure to segregate the time its counsel spent on the PPA claim from its other claims operates to bar any award. RVC further argues that Rock Scapes waived any right to claim a fee award based on the Subcontract provision, given that it did not invoke the Subcontract in its initial fee application.

1. Segregation

{39} Where there is authority to award attorney fees for only some of the claims asserted by the party seeking the award, New Mexico precedent requires that party in its fee request to segregate those fees, i.e., identify which fees were incurred prosecuting the claim for which fees may be recovered and which were incurred for the other claim or claims. Alternatively, the party must show that prosecution of all of the claims was intertwined and, as a result, it is difficult or impossible to segregate the fees. See, e.g., *Dean v. Brizuela*, 2010-NMCA-076, ¶¶ 17-18, 148 N.M. 548, 238 P.3d 917. This Court has emphasized that, notwithstanding that some work may be intertwined, “the trial court should attempt to distinguish between the two types of work to the extent possible.” *Id.* ¶ 17 (quoting *Hinkle, Cox, Eaton, Coffield & Hensley v. Cadle Co. of Ohio, Inc.*, 1993-NMSC-010, ¶ 32, 115 N.M. 152, 848 P.2d 1079).

{40} As stated, Section 57-28-11 of the PPA authorizes an award of attorney fees incurred in an action to enforce the PPA. Rock Scapes did not attempt to segregate its fees incurred pursuing the PPA claim from the fees that were incurred pursuing its breach of contract claim. Instead, Rock Scapes argued that the claims were intertwined, in particular, that “[t]here could be no obligation to make a prompt payment in the absence of a contractual provision requiring payment.” The district court appears to have accepted this reasoning: “Essentially everything in this case is interconnected and arising from Rock Scapes’ involvement in the . . . [P]roject.” As a result, the district court awarded Rock Scapes all of its attorney fees with the exception of fees attributable to its discovery misconduct.

{41} The district court exercised its discretion in a manner inconsistent with Rock Scapes’—and the court’s—obligation to segregate its fees to the extent possible. We do

not believe this obligation was met simply by noting that every issue raised in the case arose from Rock Scapes' involvement in the Project. Rock Scapes incurred some portion of its attorney fees establishing its other three grounds for claiming breach of contract, defending against RVC's counterclaims for breach of contract and statutory violations, and establishing the fraudulent and malicious conduct that was the predicate for the punitive damage claim. Rock Scapes made no attempt to estimate or otherwise identify and segregate the amount of time its attorney devoted to these matters as opposed to proving RVC's failure to comply with the PPA. *Cf. J.R. Hale Contracting Co.*, 2008-NMCA-037, ¶ 95 (reversing award of attorney fees pursuant to the PPA and noting that "[the plaintiff] points us to nothing in the record indicating a basis on which the district court could conclude that all of [the plaintiff's] fees were attributable to the claim for retainage and [PPA] penalty").

{42} For this reason, we reverse the district court's attorney fee award pursuant to Section 57-28-11. However, because we are remanding this case to the district court on other grounds, the district court should reassess the attorney fee issue, including in its consideration the reduction in the amount of the PPA interest penalty award as discussed above. *See J.R. Hale Contracting Co.*, 2008-NMCA-037, ¶ 95.

2. Contract Right to Attorney Fees

{43} Rule 1-054(E)(2) provides that a motion for an award of attorney fees "must be filed and served no later than fifteen (15) days after entry of judgment; must specify the judgment and the statute or other grounds entitling the moving party to the award; and must state the amount sought and the basis for the amount claimed." The judgment in favor of Rock Scapes and against RVC was entered on November 4, 2013. Rock Scapes timely filed its Attorney Fee Motion on November 7, 2013. RVC argues that, because Rock Scapes failed to identify the Subcontract as a basis for its attorney fee request in its original application and did not do so until it filed its supplemental briefing regarding attorney fees on September 15, 2016, Rock Scapes waived that claim.

{44} Rock Scapes raised the Subcontract as an additional basis for the award of attorney fees in response to the district court's sua sponte order to permit supplemental briefing. In its order requesting supplemental briefing on the attorney fee issue, the district court focused on the need for Rock Scapes to provide itemized time sheets detailing its counsel's work on the case. It added that, "[w]ithin seven (7) days of providing the time sheets, Rock Scapes may file a brief making any additional arguments it may wish to make regarding attorney fees." It is unclear whether the district court intended to permit Rock Scapes to assert an entirely new basis for attorney fees—namely, the Subcontract—or whether the district court intended that the supplemental briefing be restricted to issues pertaining to the submission of Rock Scapes' counsel's time sheets.

{45} If, on the one hand, in ordering supplemental briefing the district court did not intend to permit Rock Scapes the opportunity to rely on the Subcontract as an additional ground for attorney fees, the court should not consider the Subcontract as a basis for

the award of attorney fees in the absence of a motion to amend the attorney fees application. In that case, Rule 1-006(B)(1) NMRA would govern any motion that Rock Scapes might file to amend its application to assert such a claim. *See id.* (“When an act may or must be done within a specified time, the court may, for cause shown, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect.”).

{46} On the other hand, if the district court’s intent was indeed to permit Rock Scapes the opportunity to rely on the Subcontract as an additional ground for attorney fees, the court on remand, should consider whether Rock Scapes was required to establish excusable neglect under Rule 1-006(B)(1) prior to raising this additional ground and, if so, whether excusable neglect has been established. While we recognize the district court’s inherent authority to order supplemental briefing in the resolution of motions before it, this inherent authority should be balanced against the deadlines set forth in our rules. In either event, if the district court concludes that Rock Scapes can rely on the Subcontract as a basis for the attorney fee award, the district court then should determine whether Rock Scapes can recover attorney fees pursuant to the Subcontract.

{47} The amount of attorney fees to which Rock Scapes is entitled pursuant to Section 57-28-11, including the subordinate question of segregation of fees, is academic if Rock Scapes is entitled to recover all of its attorney fees pursuant to the Subcontract. If the district court so rules on remand, that would obviate the need to address anew the amount of any fees recovered pursuant to Section 57-28-11.⁸

CONCLUSION

{48} We affirm the district court’s PPA interest penalty award pursuant to Section 57-28-5(C), to the extent it is based on RVC’s failure to pay Rock Scapes \$63,805.15 within seven days following RVC’s receipt of payment from APS on September 25, 2008, and \$4,279.29 within seven days following RVC’s receipt of payment from APS in January 2009. We otherwise reverse the PPA interest penalty award. We affirm the district court’s pre-judgment interest award pursuant to Sections 56-8-3(A) and -4(B). We vacate the district court’s attorney fee award.

{49} We remand this matter to the district court for further proceedings in accordance with this opinion, in particular, to: (1) recalculate the PPA interest penalty award and calculate any pre-judgment interest to which Rock Scapes may be entitled in lieu of the original PPA interest penalty award; and (2) consider whether Rock Scapes was permitted it to amend its attorney fee application to add the Subcontract’s attorney fee clause as an additional basis for an attorney fee award, and, in the alternative, reconsider its award of attorney fees pursuant to Section 57-28-11.

{50} IT IS SO ORDERED.

HENRY M. BOHNHOFF, Judge

WE CONCUR:

STEPHEN G. FRENCH, Judge

JENNIFER L. ATTREP, Judge

1Other jurisdictions take varying approaches to whether prompt payment acts create causes of action and whether prompt payment act claims must be presented to a judge or jury. *See, e.g., W & W Steel, LLC v. BSC Steel, Inc.*, 944 F. Supp. 2d 1066, 1080 (D. Kan. 2013) (holding that federal prompt payment act does not create a private cause of action in favor of unpaid subcontractors; a claim under the statute can be asserted only after the contractor's right to payment is established); *Cummins v. Atlas R.R. Constr. Co.*, 814 A.2d 742, 746 (Pa. Super. Ct. 2002) (under Pennsylvania prompt payment act, trial court determined whether to award interest penalty on basis of jury finding regarding the defendant's bad faith); *Billy Smith Enters. v. Hutchison Constr., Inc.*, 261 S.W.3d 370, 372-74 (Tex. App. 2008) (noting that claim for violation of Texas prompt payment act and award of interest penalty was submitted to jury).

2Rock Scapes presented evidence and claimed that its compensatory damages were \$129,202.12 for the unpaid balance of the contract price for the interior concrete work that it had performed before RVC terminated the Subcontract; \$16,501.13 for profit that it would have made had it been allowed to perform the exterior site concrete work; and \$17,703.46 for change orders that RVC improperly did not approve and pay.

3In jury instruction no. 8, Rock Scapes claimed RVC breached the Subcontract by (1) failing to timely pay amounts owed to Rock Scapes; (2) failing to follow statutory requirements for terminating subcontractors on public works projects; (3) failing to follow the contractual requirements for terminating Rock Scapes; and (4) terminating the Subcontract without good cause.

4In support of its contention that the jury's verdict in this case was a general verdict, RVC relies on *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090, 149 N.M. 1, 243 P.3d 440. In *Bustos*, the jury was asked only generally whether the defendant was liable under three theories of recovery. *Id.* ¶ 47. Without further analysis, this Court determined that the verdict form amounted to a general as opposed to a special verdict. *Id.* Here, in contrast, the jury was not asked simply whether RVC breached the Subcontract, but rather was asked four specific questions regarding the manner in which RVC breached the contract and, if so, if the breach caused damages, and the amount of Rock Scapes' compensatory and punitive damages. *Bustos* is therefore distinguishable, and we determine that the verdict form used in this case was a special verdict form. *See Dessauer v. Mem. Gen. Hosp.*, 1981-NMCA-051, ¶ 9, 96 N.M. 92, 628 P.2d 337 (noting that the defining characteristic of a special verdict is that it requires the

jury to answer fact questions that are determinative of liability as opposed to a general verdict in which the jury expresses its ultimate conclusion about liability).

[5](#)The district court did not identify the basis for its authority to decide the PPA penalty amount after the jury rendered its verdict. Given this, we may uphold the district court's decision if it was right for any reason. See *State v. Macias*, 2009-NMSC-028, ¶ 17, 146 N.M. 378, 210 P.3d 804 ("The trial record does not clearly reveal the trial court's specific reason for admitting the statements, but we may uphold the judge's decision if it was right for any reason."), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110; cf. *Farmers, Inc. v. Dal Mach. & Fabricating, Inc.*, 1990-NMSC-100, ¶ 8, 111 N.M. 6, 800 P.2d 1063 ("The presumption upon review favors the correctness of the trial court's actions. [The a]ppellant must affirmatively demonstrate its assertion of error."). Doing so is not unfair, given that RVC failed to preserve any error with respect to the jury instructions and verdict form and that no further factual development is necessary. See *Freeman v. Fairchild*, 2018-NMSC-023, ¶ 30, 416 P.3d 264 ("Under the right for any reason doctrine, an appellate court may affirm a district court ruling on a ground not relied upon by the district court if (1) reliance on the new ground would not be unfair to the appellant, and (2) there is substantial evidence to support the ground on which the appellate court relies." (alterations, internal quotation marks, and citation omitted)). Indeed, RVC has argued at length on appeal whether the district court's ruling was supported by substantial evidence.

[6](#)The court also awarded, contingent upon Rock Scapes' waiver of the post-judgment portion of the PPA interest penalty award, post-judgment interest pursuant to Section 56-8-4(A)(2) in the amount of 15% in view of the jury's finding that RVC acted maliciously or fraudulently. RVC has not appealed this portion of the district court's ruling, presumably because, RVC having paid the judgment, the issue is moot.

[7](#)Rock Scapes argues that the pre-judgment interest rate should be 15%. However, it did not cross-appeal and, therefore, we decline to consider this argument. See *Maloolf v. San Juan Cty. Valuation Protests Bd.*, 1992-NMCA-127, ¶ 26, 114 N.M. 755, 845 P.2d 849.

[8](#)Rock Scapes summarily urges, as an additional basis for upholding its attorney fee award and the PPA interest penalty award, that RVC violated Section 57-28-5(E) as well as (C) of the PPA. Rock Scapes never relied on or otherwise raised Section 57-28-5(E) below as a basis for an interest penalty or attorney fee award. We will not review an argument that is not adequately developed. See *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076. We therefore decline to consider this argument on appeal.