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

2 **THE STATE OF NEW MEXICO**
3 **FOR USE OF ROCK SCAPES OF**
4 **NEW MEXICO, INC.,**

5 **Plaintiff-Appellee,**

6 **v.**

No. 34,898

7 **RVC, INC.,**

8 **Defendant-Appellant,**

9 **and**

10 **WESTFIELD INSURANCE**
11 **COMPANY,**

12 **Defendants.**

13 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

14 **Carl J. Butkus, District Judge**

15 Gregory V. Pelton
16 Colorado Springs, CO

17 for Appellee

18 Lorenz Law
19 Alice T. Lorenz
20 Albuquerque, NM

1 Maestas & Suggett, P.C.

2 Paul Maestas

3 Albuquerque, NM

4 for Appellant

5 **MEMORANDUM OPINION**

6 **HANISEE, Judge.**

7 {1} Defendant-Appellant Rio Vista Construction (RVC) seeks to appeal from an
8 order awarding its subcontractor, State of New Mexico For Use of Rock Scapes
9 (Rock Scapes), penalty interest under the Prompt Payment Act, NMSA 1978, § 57-28-
10 5 (2007), as well as pre- and post-judgment interest. [DS 3] This Court issued a notice
11 proposing to dismiss for lack of a final order. In response, RVC has filed a timely
12 memorandum in opposition opposing this Court’s proposed disposition, which we
13 have duly considered. Because we remain unpersuaded that this matter is properly
14 before us, we dismiss the appeal.

15 {2} Our notice observed that even though the district court made a finding that
16 Rock Scapes intentionally provided false discovery responses, and stated that
17 sanctions were proper, it did not appear that the issue of sanctions against Rock
18 Scapes had been fully resolved. [CN 4] In light of the fact that RVC expressly
19 challenged the award of Prompt Pay Act penalty interest and pre-judgment interest
20 during the three-year period of delay that it claimed was attributable to Rock Scapes’

1 misconduct, we proposed that it would be premature for this Court to consider the
2 merits of RVC’s appeal without an order resolving the issue of sanctions against Rock
3 Scapes and the apportionment of Rock Scapes’ liability for any delay during this time
4 period. [CN 4–5] We therefore proposed that appellate review should await the entry
5 of a written order which, at a minimum, set forth the district court’s ruling on the issue
6 of sanctions. [CN 6]

7 {3} In response, RVC agrees that the district court has not yet entered an order on
8 RVC’s motion for sanctions. [MIO 2] RVC further states that “[t]he most logical way
9 to implement the district court’s decision to impose sanctions was to address it in the
10 context of Rock Scapes’ motion for prejudgment interest . . . because the delay
11 attributable to Rock Scapes’ misconduct was directly relevant to Rock Scapes’ request
12 for interest during the period in which its conduct prevented the case from moving
13 forward.” [MIO 3]

14 {4} RVC further explains that the issue of attorney fees remains outstanding, and
15 a hearing was held on this matter. On September 1, 2015, after the filing of the record
16 proper, the district court entered an “Initial Order Regarding Attorney Fees,” requiring
17 Rock Scapes’ attorney to provide additional support and allowing the parties
18 additional briefing. [MIO 5] RVC explains that the district court “has not yet decided
19 what role, if any, Rock Scapes’ misconduct might play in its decision” to award fees

1 under the Prompt Pay Act. [MIO 5]

2 {5} In its memorandum in opposition, RVC also invokes the doctrine of practical
3 finality. [MIO 5] To this end, RVC contends that once the district court entered a final
4 judgment, it could no longer address the motion for sanctions in a manner that would
5 affect the judgment itself. [MIO 2, 6] We disagree. Insofar as the district court retains
6 jurisdiction over the proceedings, it is at liberty to address the issue of sanctions by
7 amending its order or taking other appropriate action. *See generally Universal*
8 *Constructors, Inc. v. Fielder*, 1994-NMCA-112, ¶ 6, 118 N.M. 657, 884 P.2d 813
9 (observing that “an interlocutory order, by definition, is open for revision, and the
10 district court, upon further reflection or examination, [i]s at liberty to change it”
11 (internal quotation marks and citation omitted)).

12 {6} Finally, RVC acknowledges that “the fact that Rock Scapes’ misconduct might
13 be considered as part of the district court’s resolution of the fee request does give rise
14 to the possibility that its order on the remaining post-judgment motion could have an
15 impact on the proper remedy under RVC’s Issue C.” [MIO 8] RVC further
16 acknowledges that the existence of such a connection between the issues “likely
17 makes it most efficient for the appeals from the Prejudgment Interest Order and the
18 anticipated order on fees to be considered together, but it does not negate the practical
19 finality of the Prejudgment Interest Order.” [MIO 8] We disagree. The very nature of

1 one of the issues raised by RVC on appeal requires an examination of Rock Scapes’
2 misconduct, and the district court has not yet entered an order resolving this issue. To
3 the extent RVC asks this Court to suspend the finality of the Prejudgment Interest
4 Order until the district court has entered an order on Rock Scapes’ request for attorney
5 fees, and consolidate any appeal from that order with the instant appeal, [MIO 8–9]
6 we decline to do so, as that would run contrary to the principle of judicial efficiency.
7 Under the circumstances, we conclude that the underlying proceedings have not been
8 sufficiently concluded to permit the application of the doctrine of practical finality.
9 *See generally State v. Heinsen*, 2005-NMSC-035, ¶ 15, 138 N.M. 441, 121 P.3d 1040
10 (observing that “practical finality is the exception, rather than the rule” and the
11 doctrine is applied only “cautiously, in limited circumstances”); *and see, e.g., State*
12 *v. Candy L.*, 2003-NMCA-109, ¶ 6, 134 N.M. 213, 75 P.3d 429 (holding that an order
13 requiring restitution and contemplating the preparation of a restitution plan to be filed
14 with the district court was not final for purposes of appeal where no such plan had yet
15 been filed; the preparation and filing of a specific plan was not a ministerial act, but
16 rather a substantive determination; and ultimately, although the finality issue was
17 debatable, the Court elected to err on the side of avoiding piecemeal appeals and
18 enhancing judicial efficiency). In closing, we note that the parties may file an appeal
19 when all outstanding issues have been resolved by the district court.

1 {7} Accordingly, for the reasons stated above and in the notice of proposed
2 summary disposition, we conclude that the district court's order is not immediately
3 reviewable. The appeal is therefore summarily dismissed.

4 {8} **IT IS SO ORDERED.**

5
6

J. MILES HANISEE, Judge

7 **WE CONCUR:**

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9

MICHAEL D. BUSTAMANTE, Judge

10
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M. MONICA ZAMORA, Judge