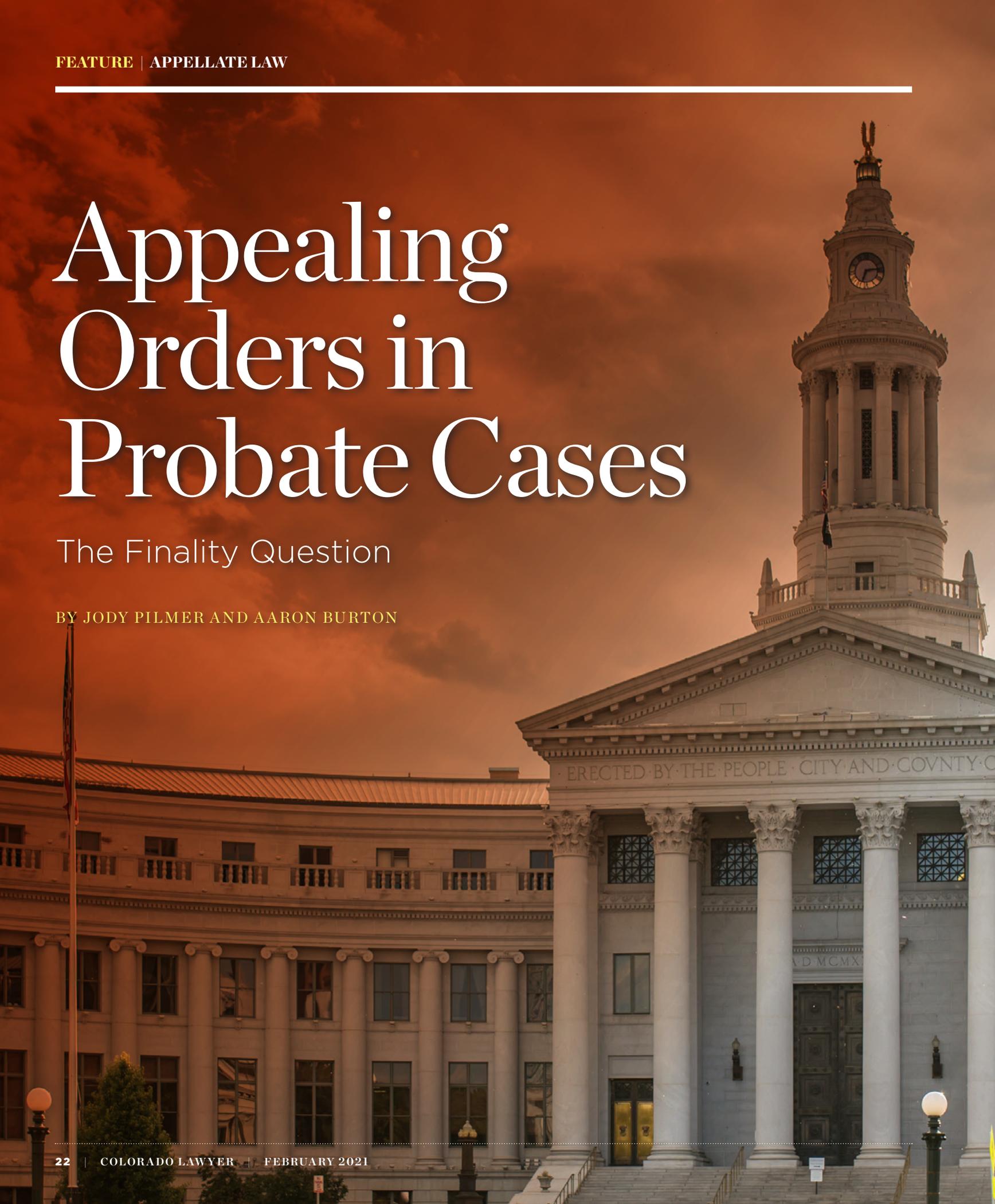


# Appealing Orders in Probate Cases

The Finality Question

BY JODY PILMER AND AARON BURTON



*Appealing an order of the probate court requires diligent analysis of whether and when the order is final. This article examines the case law framework for this scrutiny.*

**D**etermining whether a probate court order constitutes a final appealable order has been recognized and lamented as challenging.<sup>1</sup> Generally, under the rule of finality for civil cases, an order is final if it ends the action in which it is entered and leaves nothing further for the court to do to completely determine the rights of the parties to the proceeding.<sup>2</sup>

Probate cases, particularly those that involve conflict, are subject to complexities that have caused uncertainty in determining the finality of orders. This article discusses Colorado case law that provides guidance on determining the finality of probate orders.

#### ***Estate of Binford v. Gibson***

*Estate of Binford v. Gibson*<sup>3</sup> contributed uncertainty to the issue of order finality. This 1992 Colorado Court of Appeals decision stated that finality in probate cases was to be determined on a case-by-case basis, thus announcing a finality test for probate cases different from the above-stated commonly understood rule.<sup>4</sup> This “issue-based” test, which required the appellate court to determine whether a particular order completely resolved an issue, was not ideal, particularly because a trial court is generally in a better position than an appellate court to make this determination.

The *Binford* confusion has since been demystified, but what constitutes finality in a probate case continues to require diligent analysis. This is due to the unique procedural nature of the typical probate case, which usually begins with a request to admit a will to probate and appoint a personal representative to marshal and administer a decedent’s assets without the court’s supervision. That is the fundamental purpose of a probate matter. However, any number of separate “proceedings” can be initiated and pursued by claimants within a probate case while the estate’s administration is ongoing.<sup>5</sup> Thus, a probate case may comprise more than one separately initiated proceeding that is unrelated to other separately initiated proceedings and is separable from the administration of

the estate as a whole.<sup>6</sup> As a result, an order of the probate court may be final as to one proceeding, but leave other matters, including the final distribution and closing of the estate, outstanding.

#### ***Scott v. Scott***

What constitutes a final probate order can be a nail-biter for a practitioner trying to decide whether to file a notice of appeal, which must be filed with the Colorado Court of Appeals within 49 days of the entry of a final order.<sup>7</sup> Since 2006, probate practitioners have read and re-read the Colorado Supreme Court’s opinion in *Scott v. Scott* when confronted with a question as to a particular order’s finality.

In *Scott*, the Court resolved the perceived confusion and uncertainty regarding finality in probate cases by confirming that the *Binford* “issue-based” test for finality does not accord with Colorado precedent.<sup>8</sup> The Court in *Scott* intended to provide a more straightforward approach to the finality conundrum in probate cases, holding that the same rules of finality apply in probate cases as in other civil cases; thus, an order of the probate court is final if it ends the particular action in which it is entered and leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding.<sup>9</sup>

There was, however, a caveat. Given the above-described complexities, the Court recognized that the unsupervised administration of an estate in a probate case is different than most civil proceedings, and an appeal can become moot if a party delays filing it until the estate administration is complete. The Court addressed these probate idiosyncrasies by recognizing that a court sitting in probate is in a better position than the appellate court to evaluate the status of a “proceeding” and to determine whether a claim is ripe for review or there is a just reason to delay the appeal.<sup>10</sup> The Court thus gave probate courts a deferential nod and allowed them to manage judicial resources by “clearly delineating the scope of a proceeding, applying the same rules of finality as in other civil cases,

and incorporating C.R.C.P. 54(b),<sup>11</sup> which permits the probate court to allow the appeal of an otherwise unappealable order.

With this framework in place, the Court then defined “proceeding.” The rule that emerged from *Scott* is that the unsupervised administration of an estate may involve multiple “proceedings”; an initial petition outlines a set of claims and begins a proceeding, and subsequent pleadings relating to that set of claims are part of the same proceeding.<sup>12</sup> Again, an order is final and appealable only if it leaves nothing further for the court pronouncing it to do to completely determine the rights of the parties as to that proceeding.<sup>13</sup>

#### **The Fine Line**

Applying *Scott* seems simple enough, but in practice it can be vexing, depending on the circumstances. There may be a fine line between the filing of a premature notice of appeal and the waiver of a client’s appellate rights if the appeal deadline passes.

Normally, filing a notice of appeal divests the trial court of jurisdiction in favor of the appropriate appellate court.<sup>14</sup> The transfer of jurisdiction prevents modification of an order subject to an appeal and permits the appellate court to take on the task at hand: reviewing a trial court’s determination on the record in existence at the time it was made. On the other hand, if a final order is issued and a notice of appeal is not timely filed, the opportunity for review is gone forever.

Under such circumstances, it may be tempting for a lawyer to file a “protective” notice of appeal to preserve a client’s right when there is *any* question as to finality. But Colorado appellate courts expect, and a practitioner must be prepared to deliver, a diligent analysis before appealing an order in a probate case. The filing of a protective notice of appeal to preserve a client’s appellate rights should be a rare occurrence.<sup>15</sup> A cavalier approach could result in sanctions, for reasons articulated in *Chavez v. Chavez*.<sup>16</sup>

#### **Chavez v. Chavez**

The Colorado Court of Appeals recently applied *Scott* in *Chavez v. Chavez*. The Court provided

practitioners a unique opportunity to peek behind the curtain and gain valuable insight into how the Court views the issue of finality and the associated challenges faced by probate practitioners. *Chavez* is a gift to practitioners seeking guidance on whether and when to file an appeal, and appellate and probate prac-

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titioners should consider it required reading when considering options, especially after a client has received an unfavorable order while a probate matter is still pending.

The Court in *Chavez* used the premature filing of a notice of appeal as an opportunity to publish a decision that clarifies the Court’s procedure

for reviewing motions and screening appeals for jurisdictional defects. *Chavez* delivered a roadmap for analysis.

The probate matter in *Chavez* was a protective proceeding under the Colorado Uniform Guardianship and Protective Proceedings Act, CRS §§ 15-14-101 et seq., in which a conservator was appointed to administer a protected person’s estate. In addition to administering the conservatorship estate under the court’s jurisdiction, the conservator filed a petition on the protected person’s behalf against the protected person’s former agent, alleging claims including breach of fiduciary duty, theft, unjust enrichment, and surcharge damages in the nature of attorney fees under CRS § 15-10-504(2). The case thus exemplifies the dichotomous nature of probate cases, in that the primary initial purpose of the proceeding was the appointment of a fiduciary to administer a conservatorship estate but the conservator’s petition initiated a separate “proceeding” seeking specific relief against an agent.

After a jury found the agent liable for theft and breach of fiduciary duty and further found that he was unjustly enriched, the agent filed a notice of appeal. This notice was clearly premature because the trial court had not yet determined the issues of prejudgment interest and attorney fees *as damages*.<sup>17</sup> The notice was accompanied by a motion to determine jurisdiction through which the appellant requested that the Court of Appeals determine, as a threshold matter, whether the order being appealed was final.

Each of the above factors played a role in the opinion, but *Chavez* clearly delivered four fundamental messages that, if followed, will create efficiencies for litigants and courts.

#### **Avoid Premature Notices of Appeal**

The *Chavez* Court explicitly stated a self-evident maxim: When a notice of appeal is filed prematurely, resources are wasted by automatically triggered appellate procedural requirements and by uncertainty that is injected into the proceeding below.<sup>18</sup> In a probate case, that uncertainty can become exacerbated if separate proceedings are pending in the same matter and the trial court and parties are unsure of the trial court’s jurisdictional authority.

The uncertainty associated with a premature notice of appeal can cause delay of unpredictable length. The Court in *Chavez* outlined the Court's robust internal screening process for identifying and addressing jurisdictional defects, including lack of finality. However, this screening process does not happen overnight, and experience dictates that it can play out over months.

### **Scott is the Law**

*Chavez* was unequivocal that *Scott* governs finality. Each case has its unique attributes, but the purpose of *Scott* has always been to clarify the jurisdictional inquiry, not complicate it. A probate "proceeding" is either defined by the Probate Code or it is framed by a petition and all subsequent pleadings that relate to the claims set forth in the petition. An order that leaves nothing further for the court to do to completely determine the rights of the parties as to that proceeding is final.

For example, in *Chavez* the order the appellant wished to appeal would certainly have been an appealable final order if it had resolved prejudgment interest and the issue of attorney fees as damages. Despite the fact that the conservatorship proceeding as a whole was ongoing, there would have been nothing more for the court to do to fully adjudicate the conservator's claims against the protected person's former agent once damages and interest were awarded.

### **It is Counsel's Responsibility to Determine Finality**

The *Chavez* Court addressed the appellant's motion to determine jurisdiction by first describing the process for dealing with any motion filed in an appellate proceeding. The Court began by stating that motions practice in the Court of Appeals is "quite limited."<sup>19</sup> The Court then outlined various routes a motion for relief may take after being filed and the potential tension that could arise if, for example, the Court's merits division were to disagree with its motions division. In the opinion's closing paragraphs, the Court characterized a request to determine jurisdiction as advisory in nature and expressly disapproved of the practice.<sup>20</sup>

The message in this regard is clear. First, only rare cases will involve a genuine issue of

finality. In such cases, counsel may consider filing a protective notice of appeal as a useful litigation tool. But if this tool is used frivolously, groundlessly, or for an improper purpose,

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the Court of Appeals may consider imposing sanctions for misuse.<sup>21</sup>

Second, counsel is responsible for making a diligent and informed determination regarding finality before filing a notice of appeal. When

exceptional circumstances arise and after diligent inquiry counsel deems a protective notice of appeal appropriate, the uncertainty that led to such a filing must be brought to the Court of Appeals' attention within the notice itself.<sup>22</sup> Doing so helps ensure the efficiency of the Court's jurisdictional screening process. It may also alert the opposing litigant to a bona fide jurisdictional question, providing an opportunity for the filing of a prompt motion to dismiss that will ripen the issue to the benefit of all parties, the Court of Appeals, and the trial court, as discussed below.

### **Move to Dismiss a Premature Notice of Appeal**

The *Chavez* Court left little to the imagination about how opposing parties should address a premature notice of appeal: File a prompt motion to dismiss pursuant to C.A.R. 27.<sup>23</sup> It appears that the Court views the prompt filing of such a motion as an augmentation of its jurisdictional screening process. Moreover, if all counsel in a particular case are navigating the finality issue using the *Chavez* map, only good faith questions as to finality should end up being submitted for resolution.

### **Scott, Chavez, and CRCP 54(b)**

CRCP 54(b) permits a trial court to "direct the entry of a judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon the express direction for the entry of judgment."<sup>24</sup> Rule 54(b) may provide a more appropriate avenue for a lawyer who is genuinely baffled by the finality conundrum in a particular case, probate or otherwise. After all, the *Scott* Court spilled considerable ink establishing the rule's applicability to probate cases even though it did not apply to the facts at hand.<sup>25</sup> *Scott* instructed:

The probate court is in a better position than the appellate court to evaluate the status of a proceeding and to determine whether a claim is ripe for review or whether there is just reason to delay an appeal. As explained in greater detail in the succeeding sections, the probate court can better manage judicial resources by clearly delineating the

scope of a proceeding, applying the same rules of finality as in other civil cases, and incorporating C.R.C.P. 54(b).<sup>26</sup>

It stands to reason that when a legitimate question is posed about finality in a probate case, Colorado’s appellate courts prefer that counsel give the trial court an opportunity to weigh in through a Rule 54(b) motion.<sup>27</sup>

**Conclusion**

The issue of finality in some probate cases is understandably confounding. However, *Scott*, *Chavez*, and CRCP 54(b) provide a roadmap to guide counsel through a diligent analysis to reach the appropriate procedural decision in a given case. <sup>CL</sup>



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**NOTES**

1. See *In re Estate of Scott*, 151 P.3d 642, 644 (Colo.App. 2006) (“The supreme court in *Scott*, supra, noted the difficulties encountered by appellate courts in discerning whether an order of the probate court is a final, appealable order.”) (citing *Scott v. Scott*, 136 P.3d, 892, 896 (Colo. 2006)).
2. *Harding Glass Co. v. Jones*, 640 P.2d 1123, 1125 n.2 (Colo. 1982). Spoiler alert: the same standard applies in probate cases. *Scott*, 136 P.3d at 896; *Chavez v. Chavez*, 465 P.3d 133, 140 (Colo.App. 2020).
3. *Estate of Binford v. Gibson*, 839 P.2d 508 (Colo.App. 1992).
4. *Id.* at 510.
5. Colorado’s Probate Code and probate court jurisdiction cover much more territory than the administration of decedents’ estates. The Code provisions also provide the statutory scheme for administration of guardianship proceedings and conservatorship estates, and for the supervision and administration of various trust proceedings. All these matters are subject to the same complexities as the administration of a decedent’s estate, as each matter could encapsulate any number of separate proceedings.
6. See *Scott*, 136 P.3d at 896. See also *In re Estate of Sandstead*, 897 P.2d 883 (Colo. App. 1995) (one proceeding was initiated for construction of a will, and a second proceeding related to administration of decedent’s estate).
7. C.A.R. 4(a).
8. *Scott*, 136 P.3d at 896.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 896–97.
13. *Id.* at 896.
14. C.A.R. 3(a); *Chavez*, 465 P.3d at 138.
15. *Chavez*, 465 P.3d at 140.
16. *Id.* at 140–41.
17. *Id.* at 140.
18. *Id.* at 138.
19. *Id.* at 137.
20. *Id.* at 141–42.
21. *Id.* at 140–41.
22. *Id.*
23. *Id.* at 141.
24. CRCP 54(b).
25. *Scott*, 136 P.3d at 897–98.
26. *Id.* at 896.
27. For a comprehensive look at interlocutory appeals when there is no final order and no Rule 54(b) certification, see Masciocchi and Van Bockern, “Civil Interlocutory Appeals in Colorado State Courts,” 49 *Colo. Law.* 38 (Oct. 2020).

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