Interlocutory Appeals in Colorado State Courts

By Jesse Howard Witt, Esq.

Before his death in 2009, former CTLA president Daniel S. Hoffman left many legacies for the citizens of Colorado. One of his final acts was to propose a procedure for the Colorado Court of Appeals to hear interlocutory appeals of significant rulings in civil cases. In 2011, this became a reality, after the General Assembly enacted C.R.S. § 13-4-102.1 and the Colorado Supreme Court adopted C.A.R. 4.2. Thus far, the procedure has seen limited use, but practitioners should not overlook this remedy in appropriate situations.

History

The Colorado Court of Appeals, in its current form, was created under the constitutional authority of the General Assembly.[1] Before 2011, the court's enabling statutes gave the court jurisdiction over appeals from "final judgments" of the district courts and certain administrative agencies.[2] Other statutes expanded the court's jurisdiction to consider interlocutory appeals of a handful of particular rulings, such as orders denying motions to compel arbitration.[3] In general, however, the court could not exercise review until a case had reached its final judgment, defined as the ruling that "disposes of the entire litigation on its merits, leaving nothing for the court to do but execute the judgment."[4]

This framework provided few options for a party who received what appeared to be an erroneous interlocutory, or intermediate, ruling from a trial court. The party could petition for an original proceeding with the Colorado Supreme Court under C.A.R. 21, but the court has made clear that it will grant this remedy only in extraordinary circumstances, when no other form of appellate relief is adequate.[5] The party could ask the trial court to certify its order as final under C.R.C.P. 54(b), but this rule is limited to situations where the trial court has resolved an entire claim for relief.[6] For rulings that did not fit these narrow categories, there was only one other course of action: proceed to an expensive and inconvenient trial with the full knowledge that the appellate courts might vacate the verdict and require a retrial of the entire case in the future.

Consider, for example, if the Colorado Attorney General were to bring a consumer protection suit to disgorge profits that a defendant had wrongfully obtained from out-of-state consumers. The defendant argues that, as a matter of law, the Attorney General can only pursue damages on behalf of Colorado residents, but the trial court disagrees and allows the case to move forward. Before 2011, the defendants would not have been able to appeal this ruling until after a costly trial involving literally thousands of potential witnesses.[7] C.A.R. 21 was of little help, because the availability of a post-trial appeal meant that there was technically an adequate appellate remedy.[8] C.R.C.P. 54(b) certification was not possible either - even though a prompt appellate ruling on this purely legal issue would have been of immense help to the parties - the court of appeals lacked jurisdiction to decide this question of law, as the trial court's order had not resolved an entire claim for relief.[9]

Situations like this demanded an alternative. In a 2009 memorandum to the court of appeals, Hoffman and his colleague Anna K. Edgar discussed such a case and noted that

the "legal system is being crushed by the expense of discovery, trials and appeals. The only ones who can afford the system are the rich and the poor."[10] They suggested that one way to improve the efficiency would be to enact a state statute similar to 28 U.S.C. § 1292(b), which allows for interlocutory appeals when a case presents a controlling question of law in the federal courts. In the example above, such a procedure would allow the state court of appeals to decide the controlling legal question of whether the Attorney General had standing to recover damages on behalf of out-of-state consumers in advance, before the parties invested huge amounts of time and money obtaining a trial verdict that might eventually be vacated in a post-trial appeal.

To support their proposal, Hoffman and Edgar reviewed all of the decisions that the Colorado Court of Appeals had published in 2008 and determined that approximately fifteen out of 179 civil cases involved controlling questions of law that might have been helped by an early resolution via interlocutory appeal.[11] They also surveyed a handful of other appellate courts and found that those with discretion to hear interlocutory appeals typically receive only a modest number of requests for such relief each year, and that not all are accepted. Informal statistics from the Tenth Circuit indicated that litigants had made fifteen requests for interlocutory review between 2006 and 2008, and the court had accepted all but a few. During this same time period, the Tennessee Court of Appeals had accepted fifty-eight of 217 requests. Between October 2007 and October 2008, the Alabama Court of Appeals had accepted twelve of twenty-four requests. Clerks in Indiana reported that their court typically receives twenty to twenty-five requests for interlocutory appeals each year and accepts four or five.[12] These statistics suggested that allowing interlocutory appeals in Colorado was unlikely to result in an overwhelming or undue burden for the courts.

Although Hoffman did not live to see his idea reach fruition, the Colorado Supreme Court and the Colorado Court of Appeals approved the proposal and, in 2010, the General Assembly enacted the statutes necessary to expand the jurisdiction of the court of appeals to permit interlocutory appeals of controlling and unresolved questions of law in civil cases.[13] On January 13, 2011, C.A.R. 4.2 took effect and the procedure became available to litigants.

Requirements and procedure for interlocutory review in Colorado

Grounds for review

Practitioners considering filing an interlocutory appeal should first recognize that Rule 4.2 does not permit appeals from all trial court orders. District court judges need to be able to manage their dockets, and having an appellate panel scrutinize every ruling that emanates from a trial court would hinder judicial efficiency, not help it. The goal of C.A.R. 4.2 is thus not to provide immediate review of all trial court orders but rather to offer a remedy in the occasional case where an early ruling on an unsettled question of law might save substantial resources for the courts and litigants. This is reflected in the 2010 statutory amendments, which authorize interlocutory appeals only when the trial court certifies that immediate review of an order may promote a more orderly disposition or establish a final disposition of the litigation, and when the order involves a controlling and unresolved question of law.[14]

Rule 4.2 itself echoes this same language and states that these criteria are required grounds for an interlocutory appeal.[15] The Rule also clarifies that an unresolved question of law means "a question that has not been resolved by the Colorado Supreme Court or determined in a published decision of the Colorado Court of Appeals, or a question of federal law that has not been resolved by the United States Supreme Court."[16] The Appellate Rules Committee initially proposed that this definition appear only in a comment to the rule, but the final version shows that it was eventually incorporated into the text of the rule itself.[17] Practitioners should therefore be careful not to neglect this requirement in cases where the novelty of an issue may be disputed or unclear.

Steps for seeking review

If a practitioner believes that grounds for an interlocutory appeal exist, the first step is to determine whether this course of action would in fact be beneficial. Even if a trial court has ruled on an issue of first impression that materially affects disposition of the case, an interlocutory appeal may not be desirable in all cases due to potential delays, the cost of retaining appellate counsel, settlement considerations or other factors. Fortunately, Rule 4.2 specifically states that "Failure to seek or obtain interlocutory review shall not limit the scope of review upon an appeal from entry of the final judgment," so litigants should not feel that they must immediately appeal every adverse ruling or risk waiver; they could still assert the alleged error in a traditional appeal after final judgment.[18]

If an interlocutory appeal is desirable, the second step is to confer with other counsel in the case to determine whether they will oppose certification of the order in question. If all parties agree that an interlocutory appeal is proper, they should sign a stipulation and file it with the trial court.[19] Upon receiving the stipulation, the trial court

cannot refuse certification; Rule 4.2 states that the "trial court must forthwith certify the order."[20]

If the parties cannot agree on whether to certify the order, then their discussion satisfies the conferral required as a prerequisite for filing a trial court motion.[21] The party seeking to appeal may then file a motion requesting certification, which the trial court has discretion to grant or deny.[22] Denial of a disputed motion for certification is not appealable.[23]

The motion or stipulation must contain a statement that the party seeking the appeal is not using it for purposes of delay. It must be filed within fourteen days "after the date of the order to be appealed."[24] Notably, the fourteen-day deadline for seeking certification appears to be independent of the time that the party receives actual notice of the order, and litigators may have difficulty obtaining an enlargement of this time. As a threshold matter, any request for extension would present the logistical challenge of having to ask the appellate court to grant an enlargement of time before the appeal had actually been filed.[25] Even if the practitioner can overcome that obstacle, the courts may not be generous with the time to file a petition; the courts have been clear that C.A.R. 4's deadline for filing a post-trial notice of appeal is a jurisdictional issue that they can extend only under very limited circumstances.[26] Courts have interpreted compliance with Rule 4.2's fourteen-day deadlines to be jurisdictional, though, unlike Rule 4, the court of appeals does have authority to enlarge Rule 4.2's timelines if the appellant shows good cause.[27]

If the trial court certifies the order for appeal, the next step in the interlocutory appeal process is to file a petition in the court of appeals and pay the required docket fee.[28] This must be completed within fourteen days of the trial court's certification.[29] Advisory copies should be served on the trial court and all parties.[30]

When filing in paper format, an original and five copies should be submitted to the court of appeals.[31] Only one set of supporting documents should be provided initially; if the court grants the petition, then five copies of the supporting documents should be delivered at that time.[32]

Multiple copies are not required when filing electronically.[33] At the time of this writing, the LexisNexis File & Serve system does not list an interlocutory appeal petition among its menu of originating documents; the court clerk therefore recommends that practitioners select "Notice of Appeal (COA)" as the document type when they upload their petition, and then enter a note on the "Review & Submit" tab to advise the clerk that the petition is being filed under Rule 4.2.[34]

The petition itself should comply with C.A.R. 32's formatting requirements, including the use of fourteen-point, double-spaced text, and the inclusion of a certification that the petition complies with pertinent word limits and identifies the applicable standard of review.[35] Like an opening brief in a traditional appeal, the petition should not exceed thirty pages unless it contains no more than 9500 words.[36] As supporting documents, practitioners should include a set of those materials necessary "to permit adequate review," which may include the order being appealed, transcripts of any proceedings leading up to the order, and any documents or exhibits submitted in the trial court that are necessary for a complete understanding of the issues.[37]

For content, the petition must include the following items:

(i) The identities of all parties and their status in the proceeding below;

(ii) The order being appealed;

(iii) The reasons why immediate review may promote a more orderly disposition or establish a final disposition of the litigation and why the order involves a controlling and unresolved question of law;

(iv) The issues presented;

(v) The facts necessary to understand the issues presented;

(vi) Argument and points of authority explaining why the petition to appeal should be granted and why the relief requested should be granted; and

(vii) A list of supporting documents, or an explanation of why supporting documents are not available.[38]

Obviously, it falls to the practitioner to present these items in a logical and persuasive manner. When drafting a petition, one should be mindful that Rule 4.2 only provides for discretionary review; thus, even if grounds for interlocutory review are present, the court of appeals may still elect not to hear the case.[39] Paulie Brock, the court's Deputy Clerk, recently noted that this discretionary element is one area that litigants often seem to overlook.[40] Whereas appeal from a Rule 54(b) certification presents the relatively straightforward question of whether the order resolves an entire claim for relief, an interlocutory appeal under Rule 4.2 requires a more subjective determination of whether an appellate ruling will truly promote a more orderly disposition of the case.[41] If one ignores this threshold issue and jumps directly to the merits, the court may dismiss the appeal before it even begins.

Given this discretionary aspect, it is not surprising that the court's procedure for addressing interlocutory petitions tracks that of original proceedings in the supreme court. The party opposing the petition does not file a response before the court's determination of whether to grant or deny the petition (unless the court requests otherwise).[42] If the court grants the petition, the opposing party may file an answer brief at that time, and the petitioner may thereafter submit a reply.[43] Rule 4.2 does not provide specific timelines for when these should be filed; the rule instead states that the court will establish a briefing schedule when it grants the petition.[44] In a departure from the supreme court's original proceeding rules, however, the court of appeals does allow oral argument on interlocutory appeals.[45]

An additional step in pursuing an interlocutory appeal is to consider whether to request a stay of trial court proceedings. In some cases, the reasons for seeking prompt, interlocutory review may also justify an order halting activity in the trial court until the court of appeals decides whether to accept the appeal. Although filing a petition for interlocutory appeal does not automatically stay proceedings in the trial court, one can request a temporary stay in the trial or appellate court.[46] If the court of appeals does grant a petition for interlocutory review, it automatically stays the trial court proceedings from that point until final determination of the appeal.[47] These provisions are identical to those applicable to petitions for original proceedings in the supreme court.[48]

The final step in an interlocutory appeal is to consider whether to seek further review after the court of appeals issues its decision. Denial of a petition for interlocutory review is not subject to certiorari review, but Rule 4.2 does not restrict a party's ability to request an original proceeding with the supreme court. Although such proceedings are rare, the standards of C.A.R. 21 are somewhat more malleable than C.A.R. 4.2, and one can certainly imagine situations where the supreme court would grant review even when the court of appeals had concluded that an interlocutory appeal was not available.[49] Furthermore, if the court of appeals does permit an interlocutory appeal and render a decision on the merits, that decision is subject to certiorari review.[50] One may also petition for rehearing in the court of appeals.[51]

Early applications of Rule 4.2

Although Rule 4.2 has yet to see extensive use, one can draw some inferences from the first few rulings that the court of appeals has decided under its provisions.

According to the clerk, parties filed eighteen petitions for interlocutory appeal between January 2011 and April 2012.[52] Of these, the court granted only two.

Kowalchik v. Brohl

In *Kowalchik v. Brohl*, the court of appeals took the opportunity to issue a published decision devoted solely to whether to accept interlocutory review.[53] The court addressed the merits in a separate opinion several weeks later.[54] The case arose from a dispute over tax credits allegedly owed to individuals and entities that had donated conservation easements to preserve open space.[55] After the donors had transferred the credits to others, the Department of Revenue disallowed the credits.[56] When the donors sought judicial review of the Department's decision in the district court, the Department argued that the transferees were indispensable parties and moved to either dismiss the case or require their joinder.[57] The district court denied the Department's motion, and the Department sought an interlocutory appeal. The district court then certified four questions for review: (1) whether the transferees met the statutory definition of "taxpayer," (2) whether the transferees were liable for tax deficiencies, (3) whether the transferees were necessary parties, and (4) whether notices of the right to intervene must be personally served on the transferees.[58]

Considering the Department's petition for interlocutory appeal, the court first reviewed the requirements of C.R.S. § 13-4-102.1 and Rule 4.2. It summarized these authorities as permitting an interlocutory appeal when, in the court's discretion, "(1) immediate review may promote a more orderly disposition or establish a final disposition of the litigation, (2) the order from which the appeal is sought involves a controlling question of law and (3) that question of law is unresolved."[59] Applying these factors, the court noted that immediate review of the Department's appeal might promote a more orderly disposition of the case, insofar as it would determine whether numerous potential parties needed to be joined in ongoing litigation.[60] The appeal also involved controlling issues of law: the order in question, if reversed, could result in dismissal of the plaintiffs' complaint.[61] The court noted that its finding of a controlling issue of law was further supported by the fact that the challenged order presented "issues of widespread public interest," because there were numerous similar appeals pending, and because a prompt appellate ruling could provide useful guidance and avoid inconsistent verdicts.[62] The court also found that each of the four certified issues presented a question of

first impression in Colorado, and thus an unresolved question of law.[63] The court therefore granted the Department's petition for interlocutory review.

Perhaps the most noteworthy aspect of the court's decision in *Kowalchik* is its emphasis on the public's interest in a prompt appellate ruling. This echoes Supreme Court decisions finding a public importance requirement to be implicit in C.A.R. 49.[64] Though Rule 4.2, like Rule 49, makes no express mention of the public interest, the court seems inclined to treat this as an important factor in the determination of whether an interlocutory appeal presents a controlling question of law.[65]

Shaw Construction, LLC v. United Builder Services, Inc.

On the same day as it announced *Kowalchik*, the court also published its decision in *Shaw Construction, LLC v. United Builder Services, Inc*., a construction defect dispute.[66] In the underlying case, a homeowner association had sued a general contractor, and the general contractor had filed a third-party complaint against various subcontractors.[67] The district court dismissed the third-party claim after concluding, as a matter of first impression, that the applicable statute of repose period had started when the subcontractors' portion of the project was completed, not when the project as a whole reached completion, and that the third-party complaint was therefore untimely.[68] Writing for the majority of the appellate panel, Judge Webb concluded that the case presented a controlling and unresolved question of law concerning the interpretation of the statute of repose.[69] He further found that interlocutory review might promote a more orderly or final disposition of the litigation, because appellate reinstatement of the general contractor's claims before trial of the association's claims could increase the likelihood of settlement, whereas appellate reversal after final judgment could result in multiple trials and inconsistent verdicts.[70] The court therefore accepted the general contractor's petition.

Judge Jones dissented from the decision to accept the petition. He noted that federal courts interpreting 28 U.S.C. § 1292(b) have declined to accept interlocutory appeals of dismissed third-party claims that could be rendered moot by the resolution of the first-party case.[71] These courts have likewise rejected certification of orders dismissing third-party claims under Fed.R.Civ.P. 54(b), which is essentially identical to C.R.C.P. 54(b).[72] According to his rationale, immediate review of contingent third-party claims would not materially advance ultimate resolution of litigation, and any utility of an interlocutory appeal of contingent third-party claims was "simply outweighed by the strong judicial interest in avoiding piecemeal appeals."[73] Judge Jones also questioned whether the desire to promote settlement was a proper role for the court of appeals.[74]

In *Shaw Construction*, Judge Webb and Judge Jones presented divergent views of how to apply Rule 4.2, with the former advocating for a more active role for the appellate court in helping to end ongoing litigation swiftly. It remains to be seen how the other judges of the court of appeals will interpret the rule, though Judge Webb's majority opinion obviously defines the court's precedent at the moment.

Petition denied

Also instructive are several recently published decisions from the court denying petitions for interlocutory review. In the first case to consider Rule 4.2, *Adams v. Corrections Corp. of America*, the court considered claims by a group of indigent prison inmates against the prison's operator.[75] The district court denied the inmates' motion to require the operator to share copies of the deposition transcripts it had purchased, and the inmates petitioned for interlocutory review.[76] Although the district court determined that its order involved a controlling and unresolved question of law, the court of appeals denied the petition.[77] Judge Webb, writing for a unanimous panel this time, discussed analogous state and federal provisions for interlocutory appeals and noted that most jurisdictions only permit interlocutory review of discovery orders in rare circumstances.[178] If a discovery issue presents a true question of law, such as the availability of a corporation's attorney-client privilege in litigation against shareholders, then an interlocutory appeal may be appropriate.[79] If the discovery order merely suggests an abuse of discretion, however, then interlocutory review will generally be denied.[80] In *Adams*, the court concluded that whether indigent parties are entitled to obtain copies of their deposition transcripts was indeed an unresolved question of law, but it was not a "controlling" question that was pivotal in the litigation.[81] The court therefore denied the inmates' petition.

Notably, the court in *Adams* declined to adopt a "comprehensive definition of 'controlling'" as used in Rule 4.2.[82] This leaves substantial room for practitioners to argue whether the facts of any given case describe a controlling question of law. Foreshadowing the public interest issue of *Kowalchik*, the court suggested that an issue of "widespread public interest" could establish a controlling question of law, as could the existence of parallel litigation that an appellate ruling might help.[83] The

court also noted that Rule 4.2 was not meant to act as a substitute for C.A.R. 21 review, and that the supreme court had broad discretion to review discovery orders in such proceedings, regardless of whether a "controlling and unresolved question of law" was present.[84] In a special concurrence, Judge Terry emphasized that trial courts should be cognizant of all three of Rule 4.2's certification requirements.[85]

Several weeks later, the court announced its opinion in *Tomar Development, LLC v. Bent Tree, LLC*.[86] This case concerned a complex series of loans and subordination agreements, and the district court had certified an order deciding a question of first impression concerning lien priority. Although the order satisfied the requirement of an unresolved question of law, the record did not indicate that the question was controlling or that an interlocutory appeal would promote a more orderly disposition of the matter.[87] The court of appeals noted that the case involved "numerous claims, counterclaims, cross-claims and third-party claims," including claims unrelated to the certified order on appeal.[88] Because the district court would still need to consider these "myriad" issues regardless of the outcome of an interlocutory appeal, the court of appeals denied the petition.[89]

Shortly thereafter, the court denied another petition for interlocutory review in *Wahrman v. Golden West Realty, Inc.*[90] There, the trial court dismissed one of several claims against the defendant pursuant to the economic loss rule but allowed the plaintiff to proceed on alternate theories.[91] The court of appeals acknowledged that a post-trial reversal of this order could lead to a retrial, but it did not find this circumstance alone to be sufficient to establish that the order was "controlling" for purposes of Rule 4.2.[92] The court did suggest, however, that such an order might be reviewable under Rule 54(b); the court observed that "[s]ome overlap exists between C.R.C.P. 54(b) and C.A.R. 4.2, but C.A.R. 4.2 imposes additional restrictions."[93]

Given that Rule 4.2 is still in its infancy, practitioners should have wide latitude to try to persuade appellate judges why a particular order may be suitable for interlocutory review. Nonetheless, the court's early decisions seem to suggest the flavor of orders that the court of appeals is likely to review before entry of a final judgment. If a trial court decides a question of first impression that may substantially change the character of trial, such as the legal issues presented in *Kowalchik* and *Shaw Construction*, the court may be inclined to grant an interlocutory appeal. Specific factors militating in favor of interlocutory review include the existence of multiple pending lawsuits involving the same question and a widespread public interest in determining where Colorado stands on a particular issue.[94] By contrast, if an order merely suggests an abuse of discretion under existing law, or if an order only affects a portion of issues that will need to be decided at a trial regardless of any appellate ruling, then the court is less likely to accept a request for interlocutory review.[95]

Conclusion

In his memorandum to the court of appeals, Hoffman acknowledged that allowing interlocutory appeals would be "a very small step in addressing major legal system problems," though he emphasized that it would be a "step in the right direction."[96] The adoption of Rule 4.2 and recent decisions confirm that it indeed serves a narrow but important role in Colorado jurisprudence, and that trial lawyers should remain aware of the availability of interlocutory appeals in future cases. ▲▲▲

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Endnotes

[1] C.R.S. § 13-4-101 (2012); Colo. Const. art. VI, § 1.

[2] C.R.S. § 13-4-102.

[3] C.R.S. § 13-22-228.

[4] *Kempter v. Hurd*, 713 P.2d 1274, 1277 (Colo. 1986).

[5] *See, e.g., Cardenas v. Jerath*, 180 P.3d 415, 420 (Colo. 2008); *Stiger v. Dist. Ct.*, 535 P.2d 508, 510 (Colo. 1975).

[6] *Kempter*, 713 P.2d at 1278.

[7] This example comes from *State ex rel. Salazar v. Gen. Steel Domestic Sales, LLC*, 129 P.3d 1047 (Colo. App. 2005).

[8] *See Stiger*, 535 P.2d at 510.

[9] *General Steel*, 129 P.3d at 1050. Although the trial court did certify its ruling as a final order under C.R.C.P. 54(b), the court of appeals reversed this certification as improper, holding that the attorney general's request for damages on behalf of out-of-state consumers did not constitute a separate claim for relief.

[10] Memorandum from Hoffman to Davidson, C.J. (copy on file with author).

[11] *Id.*

[12] *Id.*

[13] 2010 Colo. Sess. Laws, H.B. 10-1394, *codified at* C.R.S. §§ 13-4-102 to -102.1.

[14] C.R.S. § 13-4-102.1(1).

[15] C.A.R. 4(b).

[16] *Id.*

[17] *Compare id. with* Draft Rule 4.2 provided with letter from Supreme Court Civil Rules Committee to Colorado Bar Association, Oct. 19, 2009 (copy on file with author).

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[18] C.A.R. 4.2(f).

[19] *Id.*

[20] C.A.R. 4.2(c).

[21] C.R.C.P. 121 § 1-15.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] C.A.R. 26(b) allows the appellate court to enlarge most time periods set by the Rules of Appellate Procedure, but it does not contain any provision allowing the trial court to do so. *See Collins v. Boulder Urban Renewal Auth.*, 684 P.2d 952, 954 (Colo. App. 1984); *cf.* Fed. R. App. P. 26(b). Likewise, while C.R.C.P. 6(b) allows the trial court to extend deadlines arising under the Rules of Civil Procedure, it does not permit the trial court to enlarge time periods set by C.A.R. 4.2 or other portions of the Colorado Appellate Rules. *Farm Deals, LLLP v. State*, 2012 COA 6 ¶ 14, ___ P.3d ___ (Colo. App., Jan. 5, 2012).

[26] *See, e.g., Hillen v. Colo. Comp. Ins. Auth.*, 883 P.2d 586, 587 (Colo. App. 1994).

[27] *Farm Deals*, 2012 COA 6 ¶¶ 18-19.

[28] C.A.R. 4.2(d).

[29] *Id.*

[30] C.A.R. 4.2(d)(3)(D).

[31] C.A.R. 4.2(d)(2).

[32] *Id.*

[33] *See* C.A.R. 30, which provides procedures for e-filing in the court of appeals.

[34] Telephone interview with Paulie Brock, Deputy Clerk, Colorado Court of Appeals (May 2, 2012).

[35] C.A.R. 4.2(d)(3)(A); *see also* C.A.R. 28; C.A.R. 32.

[36] C.A.R. 4.2(d)(6); C.A.R. 28(g).

[37] C.A.R. 4.2(d)(4).

[38] C.A.R. 4.2(d)(3)(B).

[39] *Wahrman v. Golden West Realty, Inc.*, 11 CA 2231, ___ P.3d ___ (Colo. App. Dec. 8, 2011).

[40] Brock interview, *supra* note 34.

[41] *Id.*; C.A.R. 4.2(b)(1).

[42] C.A.R. 4.2(d)(5); *compare* C.A.R. 21(h).

[43] C.A.R. 4.2(d)(6).

[44] *Id.*

[45] C.A.R. 4.2(d)(7); *compare* C.A.R. 21(*l*).

[46] C.A.R. 4.2(e).

[47] *Id.*

[48] *Compare id. with* C.A.R. 21(g).

[49] C.A.R. 4.2(g); *accord Adams v. Corrs. Corp. of Am.*, 264 P.3d 640, 646 (Colo. App. 2011).

[50] *Id.*

[51] C.A.R. 4.2(d)(8).

[52] Brock interview, *supra* note 34.

[53] *Shaw Constr., LLC v. United Builder Servs., Inc*., 2012 COA 24, __ P.3d __ (Colo. App. Feb. 2, 2012).

[54] *Kowalchik v. Brohl (Brohl II)*, 2012 COA 49, __ P.3d __ (Colo. App. Mar. 15, 2012).

[55] *Kowalchik v. Brohl (Brohl I)*, 2012 COA 25 ¶¶ 2-5 __ P.3d __ (February 2, 2012).

[56] *Id.* at ¶¶ 6-7.

[57] *Id.*.

[58] *Id.* at ¶¶ 8-9.

[59] *Id.* at ¶ 13.

[60] *Id.* at ¶ 16.

[61] *Id.* at ¶ 15.

[62] *Id.*, at ¶ 15.

[63] *Id.* at ¶ 14.

[64] *See*, *e.g.*, *Conrad v. City of Thornton*, 553 P.2d 822, 824 (Colo. 1976).

[65] *Brohl I*, 2012 COA 25 ¶ 15; *see also Adams v. Corrs. Corp. of Am.*, 264 P.3d 640, 646 (Colo. App. 2011).

[66] *Brohl I*, 2012 COA 25 (Colo. App. Feb. 2, 2012).

[67] *Shaw Constr., LLC v. United Builder Servs*., Inc., 2012 COA 24 ¶ 1, __ P.3d __ (Colo. App. Feb. 2, 2012).

[68] *Id.* at ¶ 6.

[69] *Id.* at ¶ 9.

[70] *Id.* at ¶¶ 10-12.

[71] *Id.* at ¶ 55 (Jones, J., dissenting), *citing Allegheny Airlines, Inc. v. LeMay*, 448 F.2d 1341, 1342-43 (7th Cir. 1971).

[72] *Shaw Constr.*, 2012 COA 24 ¶ 55; *see also Allegheny Airlines*, 448 F.2d at 1342-43.

[73] *Shaw Constr.*, 2012 COA 24 ¶ 56.

[74] *Id.* at ¶ 57.

[75] *Adams*, 264 P.3d at 642.

[76] *Id.* at 643.

[77] *Id.*

[78] *Id.* at 644.

[79] *Id.*, *citing Kimberly-Clark Worldwide, Inc. v. First Qual. Baby Prods., LLC*, 407 Fed. Appx. 431, 431 (Fed. Cir. 2011).

[80] *Id.*, *citing Garner v. Wolfinbarger*, 430 F.2d 1093, 1097 (5th Cir. 1970).

[81] *Adams*, 264 P.3d at 645 & n. 7.

[82] *Id.* at 646.

[83] *Id.* at nn. 10-11.

[84] *Id.* at 646.

[85] *Id.* at 647 (Terry, J., concurring).

[86] *Tomar Development, LLC v. Bent Tree, LLC* 264 P.3d 651, 652 (Colo. App. 2011).

[87] *Id.* at 653.

[88] *Id.*

[89] *Id.* at 653-54.

[90] *Wahrman v. Golden West Realty, Inc.*, ___ P.3d ___, (Colo. App. Dec. 8, 2011).

[91] *Id*.

[92] *Id.*

[93] *Id.* at n.1.

[94] *See, e.g., Kowalchik v. Brohl (Brohl I)*, 2012 COA 25 ¶¶ 11-12, __ P.3d __ (February 2, 2012); *Shaw Constr., LLC v. United Builder Servs., Inc*., 2012 COA 24, ¶ 15 __ P.3d __ (Colo. App. Feb. 2, 2012).

[95] *See*, *e.g.*, *Adams v. Corrs. Corp. of Am.*, 264 P.3d 640, 644 (Colo. App. 2011); *Wahrman*, ___ P.3d ___.

[96] Hoffman Memorandum, *supra* note 10.