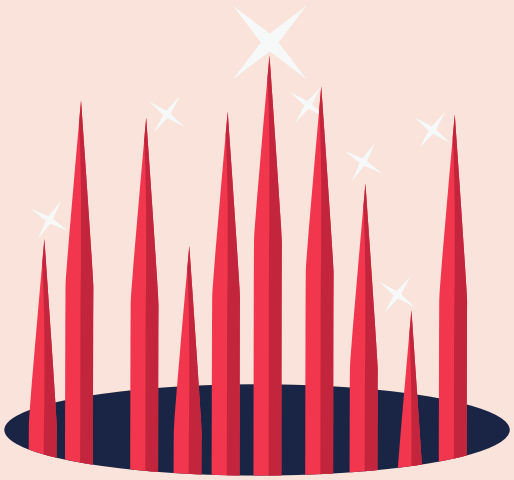
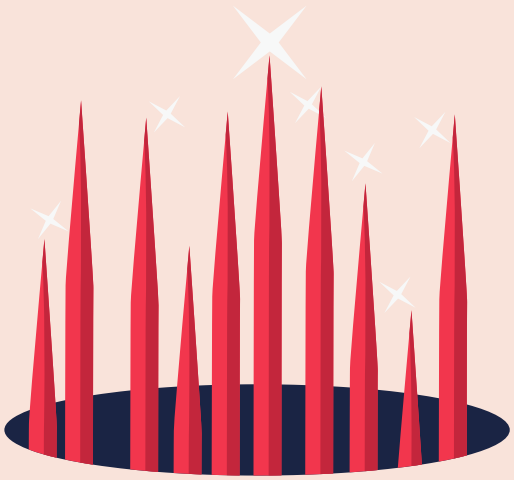
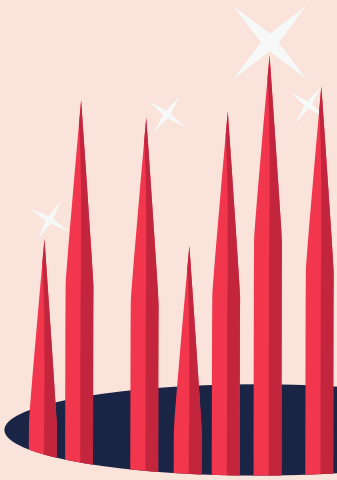
How (Not) to Mess Up an Appeal

Volume I

BY CHRISTOPHER M. JACKSON







This article is the first in a three-part series discussing common errors made in appellate cases and giving practical tips on how to avoid them. This installment focuses on mistakes made at the trial level.

Appellate law is a funny beast. At a high level, the process is straightforward: The appellant files a notice of appeal; the parties brief the substantive issues and, if it's scheduled, participate in oral argument; and eventually the court issues a written opinion. But things inevitably get tricky on the ground, and when things get tricky, mistakes happen. Some of these mistakes, such as writing a less-than-persuasive brief, may not doom the attorney's chance for success. But many appellate errors are jurisdictional or otherwise fatal to your cause. Indeed, the federal and regional reporters are replete with cases where litigants get tripped up on some seemingly hyper-technical rule—and lose their appeal as a result.

This article is the first in a series that will cover some of the more frequent appellate errors and offer tips on how to avoid them. This installment focuses on mistakes made at the trial court, and in particular, on some thorny issues relating to waiver and the final judgment rule.

Waiver

Trial lawyers are well aware of the doctrine of waiver: barring unusual circumstances, if a party doesn't raise an argument in the first instance at the trial court, that argument is waived on appeal in civil matters.[1] Technically, an argument might be *waived* or *forfeited*. Though the terms are "often used interchangeably by jurists and litigants," there is a distinction: "Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right."[2] But it is enough for our purposes to note that if a lawyer doesn't raise an issue with the trial court, the issue generally cannot be raised in the appeal. There are a number of scenarios that tend to trip up litigants. Here are a few of them.

Objecting to a Magistrate's Non-Dispositive Order

Within the federal system, magistrate judges are empowered to hear and decide non-dispositive issues referred to them by the presiding district judge.[3] Non-dispositive orders—orders that do not finally adjudicate any party's claim or defense—can cover a host of issues, including motions to compel, privilege disputes, motions to quash, and motions for a protective order. Under the Federal Rules of Civil Procedure, a party has just 14 days to lodge an objection to a non-dispositive order.[4] And as Rule 72 itself acknowledges, "A party may not assign as error a defect in the order not timely objected to."[5] Thus, the failure to make an objection within that two-week period waives any argument challenging the magistrate judge's order.[6] Notably, there is a circuit split about whether the failure to make an objection deprives the appellate court of jurisdiction to hear the issue entirely or if it is instead only subject to the non-jurisdictional firm waiver rule,[7] which ordinarily bars appellate review of both factual and legal questions unless "the interests of justice" dictate otherwise.[8] But even in the Tenth Circuit, which applies the firm waiver rule, a party doesn't have much hope in appealing such an order.[9] In practice, then, once the 14-day period expires, the magistrate's order cannot be challenged.

Rule 50 Motions

Another common error involves failing to file Rule 50 motions requesting judgment as a matter of law—and the differences between federal and Colorado state practice. In the federal system, a party can move for judgment as a matter of law after the other "party has been fully heard on an issue during a jury trial . . . ."[10] If the district court doesn't grant that motion, then the party can renew the motion within 28 days after entry of judgment.[11] Critically,

if a party doesn't file a Rule 50 motion, "an appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand."[12] Not only that, but without a Rule 50 motion, the district court is *also* unable to order a new trial.[13] Put another way, if a party doesn't file the motion, the jury's verdict is mostly insulated from review. This rule is intended to preserve the fairness and integrity of the judicial process: a Rule 50(b) motion "is necessary because 'determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.'"[14] At the same time, there is an exception to this rule—albeit only in some circuits, and possibly only for a limited time. Several circuit courts, including the Tenth, have held that a party can appeal "a purely legal question" raised in a summary judgment motion even if it failed to file a Rule 50 motion.[15] Still, the Tenth Circuit has "advised that out of an abundance of caution, and good trial practice, counsel should renew summary judgment grounds in a Rule 50 motion for judgment as a matter of law at the close of all the evidence, and again, if necessary, after the jury has returned a verdict . . . ."[16] Moreover, the US Supreme Court recently granted certiorari in a case to resolve this issue.[17] Depending on which way the Court rules, the exception might not be in place for long.

Colorado's state courts, in contrast, treat this type of motion a little bit differently. Motions for judgment notwithstanding the verdict are governed by CRCP 59, and one portion of that rule makes clear that the "[f]iling of a motion for post-trial relief shall not be a condition precedent to appeal or cross-appeal, nor shall filing of such motion limit the issues that may be raised on appeal."[18] Trial lawyers might breathe a sigh of relief after reading that language, but there are a couple of important caveats.

First, while Rule 59 provides that a post-trial motion isn't a condition precedent for appeal, a litigant still needs to preserve the issue and give the trial court an opportunity to rule. Moreover, the Colorado Supreme Court has said that "the propriety of a summary judgment denial is not appealable after a trial on the merits regardless of whether the denial is premised on a point of law or material issues of fact in controversy."[19] Thus, because filing a motion for summary judgment doesn't preserve an issue, as a practical matter, a party generally must "make a motion for a directed verdict or for a judgment notwithstanding the verdict" to preserve the argument for appeal.[20] Second, at least one Colorado Court of Appeals panel has held that filing a motion for a directed verdict under Rule 50 is necessary to preserve an argument if it was raised at the summary judgment stage. According to the appellate court, "[f]ailure to properly preserve an argument in a motion for directed verdict operates as an abandonment and waiver of an issue previously raised in a motion for summary judgment."[21]

> "While a litigant may be able to raise an issue just once and thread the needle when it comes to preservation, the safest course is to put the argument into the record both before and after the verdict."

What should a lawyer make of all these competing pronouncements? The best approach is to raise dispositive issues early and often—and in particular, to file *both* a Rule 50(a) and Rule 50(b) motion (in the federal system) or *both* a motion for a directed verdict and a motion for judgment notwithstanding the verdict (in the state system). While a litigant may be able to raise an issue just once and thread the needle when it comes to preservation, the safest course is to put the argument into the record both before and after the verdict.

Remittitur

Remittitur—a trial court order reducing an excessive jury award—has its own set of pitfalls. A motion for remittitur is usually brought as a Rule 59 motion.[22] But when a trial court grants the motion, it cannot simply order a reduction in the size of the verdict; it must give the plaintiff "the option of a new trial in lieu of remitting a portion of the jury's award."[23] That requirement stems from the constitutional right to a jury trial: "[T]he Seventh Amendment prohibits [a] court from substituting its judgment for that of the jury's regarding any issue of fact."[24] Thus, a plaintiff can either accept the reduction—and thereby waive its right to a jury trial—or try the case again in front of a new jury.[25] Retrying the same case (usually only as to the damages issues) might not sound like an attractive option, but plaintiffs need to think carefully before accepting a remittitur. There is a "longstanding rule" that a plaintiff "may not appeal from a remittitur order he has accepted"—even if the plaintiff thinks the court erred in ordering it.[26] Moreover, by accepting the remittitur, the plaintiff has waived the right to challenge not just the amount of the award, but perhaps more important, "*any matter* pertaining to the issues covered by the remittitur offer."[27] Thus, when a trial court grants the motion, it forces the plaintiff into a difficult choice: accept the reduction (in which case any legal challenge to that portion of the verdict is waived) or take the risk of retrying the case at least as to damages—usually in front of the same judge who ordered the original reduction.

The Final Judgment Rule

State and federal appellate courts subscribe to the so-called "final judgment" rule: generally speaking, an appellate court only has jurisdiction to review final judgments.[28] Once a lower court issues a final judgment, parties have a set time period to file a notice of appeal.[29] If a would-be appellant doesn't file the notice of appeal within that prescribed time period, the appellate court will almost certainly dismiss the appeal. In a civil case, the time for filing a notice of appeal is jurisdictional.[30] For a criminal appeal, the deadline isn't jurisdictional but is instead described as an "inflexible claim-processing rule."[31]

Calendaring the deadline to file the notice of appeal sounds simple enough. Litigants can consult the appellate rules that specify when the notice is due.[32] But while Fed. R. App. P. 4 and C.A.R. 4 define the time a party has for filing a notice of appeal, the deadline is pegged to the date that the final judgment issues.[33] As a result, a party must first know the date that the final judgment entered. And the answer to that question is often more complicated than it seems at first blush. Here are a few examples.

Attorney Fees

One of the most common issues that arises in this context involves attorney fees. Suppose the trial court enters a judgment as to liability and damages but hasn't yet resolved the question of whether (or how much) a party is entitled to recoup in attorney fees. Does that outstanding issue prevent the judgment from becoming final? The answer is unequivocally *no*. The federal system has long adopted a bright-line rule that, regardless of the basis of the claim for fees, the rule is the same.[34] For years, the answer in the state court system was unsettled, with the Colorado Supreme Court issuing arguably inconsistent opinions on the question. But the Court recently resolved that split of authority and clarified that, just as in federal courts, "[a] judgment on the merits is final for purposes of appeal notwithstanding an unresolved issue of attorney fees."[35] As a result, the deadline to file the notice of appeal begins to run even if the trial court hasn't issued an order about attorney fees.

> "State and federal appellate courts subscribe to the so-called 'final judgment' rule: generally speaking, an appellate court only has jurisdiction to review final judgments. Once a lower court issues a final judgment, parties have a set time period to file a notice of appeal."

Still, trial lawyers aren't out of the woods just yet. Even if a lawyer timely files a notice of appeal while the question of attorney fees remains pending, there's another potential trap. A lawyer who wishes to challenge any eventual award of attorney fees must file a *second* notice of appeal directed to that award. This issue came up in a recent Tenth Circuit decision, *United States ex rel. Sorenson v. Wadsworth Brothers Construction Co*. Sorenson, the plaintiff-appellant, lost below and timely filed a notice of appeal before the district court resolved the attorney fees issue.[36] The appellate court agreed that it should review Sorenson's challenge to the original judgment on the merits, but it ordered Sorenson to show cause why his appeal of the fee award "should not be dismissed for lack of jurisdiction because he failed to file a separate notice of appeal after the district court entered a final order setting the amount of fees."[37] In response, "Sorenson conceded that this court 'lacks jurisdiction with regard to the issue of attorney's fees,'" and the court dismissed that portion of the appeal for lack of jurisdiction.[38] Thus, lawyers need to remember to file a new notice of appeal to challenge any judgment or order issued after the first notice of appeal.

Post-Trial Motions

Post-trial motions can also pose jurisdictional problems. In both state and federal courts, the timely filing of certain post-trial motions—including motions for a new trial or for a judgment notwithstanding the verdict—tolls the time that a litigant has to file the notice of appeal.[39] Notably, while a *federal* Rule 60 motion has this effect on the notice-of-appeal deadline, a *Colorado* Rule 60 motion doesn't.[40] In general, if such a motion is filed, the deadline for the notice of appeal is tolled until the trial court rules.[41] But there are a few potential issues.

First, the tolling only applies to *timely* post-trial motions. That is, if a party files a post-trial motion past the deadline, then the motion doesn't toll the time to file the notice of appeal.[42] Moreover, unlike just about every deadline, trial courts do not have the authority to extend the time to file a post-trial motion: the federal and Colorado rules of civil procedure specifically limit the court's power in that regard.[43] As a result, a simple mis-calendaring of the deadline—or worse, an ineffective district court order purporting to extend the time to file a post-trial motion—can have disastrous consequences.

“Under CRCP 59, a timely post-trial motion is automatically denied if the district court doesn’t act on it within 63 days. If the motion is automatically denied under this provision, the time for filing a notice of appeal begins to run. Lawyers should therefore adopt a standard practice of calendaring this 63-day period to avoid inadvertently missing the deadline to file a notice of appeal.”

Second, suppose a lawyer files a notice of appeal after a final judgment has been entered but before the trial court rules on all timely post-trial motions. In that case, the Federal Rules provide that “the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.”[44] But if the district court later grants that pending post-trial motion and the appellant wishes to appeal that order *or the amended judgment*, then the party must file an amended notice of appeal by the deadline. That’s exactly what happened to the appellants in *Prager v. Campbell County Memorial Hospital*.[45] There, the Tenth Circuit held that the appellants’ “premature notice of appeal ripened once the district court ruled on the pending motion, giving us jurisdiction to review the orders specified in that notice.”[46] However, “because the [appellants] failed to file an amended notice of appeal once the district court disposed of the post-trial motion, we lack jurisdiction to consider their challenge to the district court’s denial of the motion as to Mr. Prager’s damages.”[47] Lawyers should remember that filing a notice of appeal early doesn’t always avoid jurisdictional defects.

Third and finally, a Colorado-specific rule warrants mention. Under CRCP 59, a timely post-trial motion is automatically denied if the district court doesn’t act on it within 63 days.[48] If the motion is automatically denied under this provision, the time for filing a notice of appeal begins to run.[49] Lawyers should therefore adopt a standard practice of calendaring this 63-day period to avoid inadvertently missing the deadline to file a notice of appeal.

Unserved Defendants

The last topic involving the final judgment rule is about unserved defendants. The issue arises when multiple defendants are named in a lawsuit but only some of them are served with a summons and complaint. If the parties who did enter an appearance litigate the case to a judgment, does the existence of an unserved defendant prevent that judgment from being final? The short answer is *maybe*. The Tenth Circuit recently took up this question in *Adams v. C3 Pipeline Construction Inc.*[50] The court surveyed some of its past decisions and articulated a series of rules that district courts must apply. First, “a district court’s failure to consider unserved defendants in an order and judgment ‘does not prevent’ the court’s decision from being final . . . .”[51] Second, “whether the judgment is final depends on the district court order’s ‘*substance* and *objective intent*’ . . . .”[52] And third, “the dismissal of served defendants is not final and appealable when the district court ‘makes clear’ it ‘expects’ further proceedings against unserved defendants.”[53] As if that weren’t complicated enough, the Tenth Circuit acknowledged a circuit split, noting that other circuits have adopted a bright-line rule that unserved defendants do not defeat finality.[54] In situations like this one, the best course of action is generally to file a notice of appeal after a judgment enters as to all parties who have participated in the case. Doing so avoids the possibility of the lawyer misapplying the rule in *Adams* and inadvertently blowing the notice-of-appeal deadline.

Conclusion

As noted in the introduction, the list of traps catalogued in this article is far from complete. But hopefully it gives the reader some sense of where the most common issues arise. The next two installments in this series will cover the notice of appeal itself and errors at the appellate court. CL

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NOTES

1. *E.g., Richison v. Ernest Grp.*, 634 F.3d 1123, 1127 (10th Cir. 2011); *Banning v. Prester*, 317 P.3d 1284, 1290 (Colo.App. 2012). In the civil context, if the waiver isn't jurisdictional, the Tenth Circuit will review only when a recognized exception applies, most notably in cases where "the interests of justice require review." *Sinclair Wyo. Co. v. A&B Builders, Ltd.*, 989 F.3d 747, 783 (10th Cir. 2021). Criminal convictions are subject to plain-error review. *E.g., United States v. Rosales-Miranda*, 755 F.3d 1253, 1257 (10th Cir. 2014).

2. *Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13, 17 n.1 (2017). *See also Forgette v. People*, 524 P.3d 1, 16 ¶ 28 (discussing waiver/forfeiture distinction).

3. 28 USC § 636(b)(1).

4. Fed. R. Civ. P. 72(a).

5. *Id.*

6. *Sinclair*, 989 F.3d at 782–83.

7. *See id.* at 783 and n.30 (holding that "the firm waiver rule applies when a party fails to object to a magistrate judge's non-dispositive ruling under Rule 72(a)" but noting that there is "a circuit split on this issue").

8. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

9. *Sinclair*, 989 F.3d at 783 (affirming the magistrate's order and noting the difficulty in prevailing under the firm waiver rule).

10. Fed. R. Civ. P. 50(a).

11. Fed. R. Civ. P. 50(b).

12. *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 218 (1947).

13. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 (2006) ("This Court's observations about the necessity of a post-verdict motion under Rule 50(b), and the benefits of the district court's input at that stage, apply with equal force whether a party is seeking judgment as a matter of law or simply a new trial.").

14. *Id.* at 401 (quoting *Cone*, 330 U.S. at 216).

15. *See Haberman v. Hartford Ins. Grp.*, 443 F.3d 1257, 1264 and n.5 (10th Cir. 2006); *Houskins v. Sheahan*, 549 F.3d 480, 488–89 (7th Cir. 2008); *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718–20 (7th Cir. 2003).

16. *Haberman*, 443 F.3d at 1264 n.5.

17. *Dupree v. Younger*, No. 22-210, 2023 U.S. LEXIS 399 (Jan. 13, 2023).

18. CRCP 59(b).

19. *Feiger, Collison & Kilmmer v. Jones*, 926 P.2d 1244, 1250 (Colo. 1996).

20. *Id.* at 1251. *See also W. Fire Truck, Inc. v. Emergency One, Inc.*, 134 P.3d 570, 577 (Colo. App. 2006) ("Because E-One only raised the economic loss rule issue in its motion for judgment on the pleadings and not in any subsequent motion, we conclude that E-One abandoned the issue, and therefore, it may not be reviewed on appeal.").

21. *Top Rail Ranch Ests., LLC v. Walker*, 327 P.3d 321, 330 (Colo.App. 2014).

22. *E.g., Hill v. J.B. Hunt Transp., Inc.*, 815 F.3d 651, 656 (10th Cir. 2016).

23. *Sloan v. State Farm Mut. Auto. Ins. Co.*, 360 F.3d 1220, 1225 (10th Cir. 2004).

24. *Id.*

25. *Id.*

26. *Utah Foam Prods. Co. v. Upjohn Co.*, 154 F.3d 1212, 1215 (10th Cir. 1998) (quoting *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 650 (1977)).

27. *Id.* at 1215–16 (emphasis added).

28. 28 USC § 1291; CRS § 13-4-102(1). *See also, e.g., Albright v. UNUM Life Ins. Co.*, 59 F.3d 1089, 1092 (10th Cir. 1995); *Harding Glass Co. v. Jones*, 640 P.2d 1123, 1125 and n.2 (Colo. 1982). Interlocutory appeals are beyond the scope of this article, but for a discussion on that topic, see Masciocchi and Van Bockern, "Civil Interlocutory Appeals in Colorado State Courts," 49 *Colo. Law.* 38 (Oct. 2020), https://cl.cobar.org/features/civil-interlocutory-appeals-in-colorado-state-courts; Glenn, "Civil Interlocutory Appeals in Federal Court," 50 *Colo. Law.* 30 (May 2021), https://cl.cobar.org/features/civil-interlocutory-appeals-in-federal-court.

29. Fed. R. App. P. 4(a)(1) (30 days for a civil appeal where United States isn't a party); Fed. R. App. P. 4(b)(1) (14 days for a criminal appeal); C.A.R. 4(a)(1) (49 days for a civil appeal); C.A.R. 4(b) (49 days for criminal appeal).

30. *Bowles v. Russell*, 551 U.S. 205, 206 (2007); *Grand Cnty. Custom Homebuilding, LLC v. Bell*, 149 P.3d 398, 400 (Colo. 2006).

31. *United States v. Randall*, 666 F.3d 1238, 1241 (10th Cir. 2011). *See also* C.A.R. 4(b)(3) (permitting court to extend the time to file a notice of appeal in a criminal case by not more than 35 days "[u]pon a showing of excusable neglect").

32. Fed. R. App. P. 4; C.A.R. 4.

33. *Id.*

34. *E.g., Budinich v. Becon Dickinson & Co.*, 486 U.S. 196, 202 (1988) ("This requires, we think, a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final."). *See also Ray Haluch Gravel Co. v. Cent. Pension Fund*, 571 U.S. 177, 186 (2014) ("The Court was aware of piecemeal litigation concerns in *Budinich*, but it still adopted a uniform rule that an unresolved issue of attorney's fees for the litigation does not prevent judgment on the merits from being final.").

35. *L.H.M. Corp., TCD v. Martinez*, 499 P.3d 1050, 1052 (Colo. 2021).

36. *United States ex rel. Sorenson v. Wadsworth Bros. Constr. Co.*, 48 F.4th 1146, 1150–51 (10th Cir. 2022).

37. *Id.* at 1150 n.1.

38. *Id.*

39. Fed. R. App. P. 4(a)(4) (covering certain motions under Rule 50(b), Rule 52(b), Rule 54, Rule 59, and Rule 60); C.A.R. 4(a)(3) (covering motions under Rule 59).

40. *Id.*

41. *Id.*

42. *E.g., United States v. Zook*, No. 22-1060, 2022 U.S. App. LEXIS 33514, at *3 (10th Cir. Dec. 6, 2022); *Williams v. Akers*, 837 F.3d 1075, 1077–78 (10th Cir. 2016).

43. Fed. R. Civ. P. 6(b)(2) ("A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)."); CRCP 6(b) (court "may not extend the time for taking any action under Rule 60(b) and may extend the time for taking any action under Rule 59 only as allowed by that rule").

44. Fed. R. App. P. 4(a)(4)(B)(i). *See also Bush v. Winker*, 892 P.3d 328, 330 (Colo.App. 1994) ("Absent circumstances not present here, this court is not precluded from reviewing an appeal merely because the notice of appeal was premature.").

45. *Prager v. Campbell Cnty. Mem'l Hosp.*, 731 F.3d 1046, 1060–61 (10th Cir. 2013).

46. *Id.*

47. *Id.*

48. CRCP 59(j).

49. *Id.*

50. *Adams v. C3 Pipeline Constr. Inc.*, 30 F.4th 943 (10th Cir. 2021).

51. *Id.* at 958.

52. *Id.*

53. *Id.* (citation omitted).

54. *Id.* at 958 n.4. *Compare De Tore v. Jersey City Pub. Emps. Union*, 615 F.2d 980, 982 n.2 (3d Cir. 1980) ("Although the district court has not entered an order dismissing these defendants, its orders concerning the other defendants are final and appealable because the unserved defendants never were made parties to this suit."); *Fed. Sav. & Loan Ins. Corp. v. Tullos-Pierremont*, 894 F.2d 1469, 1473 (5th Cir. 1990) ("[T]he unserved status of a defendant (who has not answered or otherwise appeared) is controlling for purposes of finality and we will not look behind this status to review the prospects for future adjudication involving the unserved defendant."); *Charles v. Atkinson*, 826 F.3d 841, 843 (5th Cir. 2016) ("[T]he failure to dispose of unserved, nonappearing defendants does not prevent a judgment from being final and appealable.") (quotation omitted); *Sampson v. Vill. Disc. Outlet*, No. 93-3296, 1994 U.S. App. LEXIS 35598, at *4 (7th Cir. Dec. 16, 1994) ("We now follow the majority of circuits that have considered this issue and hold that an order disposing of all claims except those claims against unserved defendants constitutes a final order under 28 U.S.C. § 1291 . . . ."); *Leonhard v. United States*, 633 F.2d 599, 608–09 (2d Cir. 1980) ("When, however, the action is dismissed as to all defendants who have been served and only unserved defendants 'remain,' the circumstances are materially different. Now there is no reason for Rule 54(b) to preclude the immediate and automatic entry of a final judgment . . . ."), *with Haley v. Simmons*, 529 F.2d 78, 79 (8th Cir. 1976) ("Since no dismissal as to the improperly served defendant-appellees appears in the record, we must assume that the district court retained jurisdiction for purposes of allowing further attempts to serve process. Accordingly, the rights and liabilities of all of the parties to the action have not yet been resolved.").