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Trial Lawyers Rejoice: Justices May Clarify Issue Preservation

By **Jeremy Christiansen** (January 24, 2023, 5:33 PM EST)


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Each term, the U.S. Supreme Court takes a number of cases that, while not likely to capture the attention of the public at large, nevertheless resolve important "lawyer's lawyer" issues.

On Jan. 13, the court granted certiorari in Dupree v. Younger[1] to resolve just such a question: "Whether to preserve the issue for appellate review a party must reassert in a post-trial motion a purely legal issue rejected at summary judgment."[2] Only a lawyer could get excited about such a question presented; but exciting it is!

As the respondent noted in the brief in opposition to certiorari, the Supreme Court has denied review "at least ten times" on this issue stretching all the way back to 1995.[3] But, at last, the justices have decided to take up this issue, which has divided the circuit courts and caused confusion and frustration for trial and appellate counsel for years.

This article will briefly explain the issue and the implications for the court's ruling depending on which position the justices ultimately take.

Background

Dupree's facts are straightforward. The petitioner, Neil Dupree, is a corrections officer who, along with other officials, was sued by the respondent, Kevin Younger, an inmate, under Title 42 of the U.S. Code, Section 1983.[4] As an affirmative defense, the petitioner pleaded that the respondent failed to exhaust all administrative remedies as required by statute.[5]

Following discovery, the petitioner moved for summary judgment on this defense, the U.S. District Court for the District of Maryland denied that defense on purely legal grounds, and the case proceeded to a jury trial.[6] The jury found for the respondent, and the petitioner did not raise the administrative exhaustion issue in any post-trial motions.[7]

On appeal, following long-standing controlling circuit precedent, the U.S. Court of Appeals for the Fourth Circuit rejected the petitioner's argument that he did not need to raise the issue in Rule 50(a) and (b) motions in order to preserve it for appeal.[8] And that is the case.

But the real background is not Dupree's facts, but the decades-old three-way circuit conflict on what to do in this common, if not difficult, situation.

A legal issue is identified by counsel. The argument is made at summary judgment and there are no material factual disputes. The judge rejects the argument. Now, evidence is about to come to a close at a jury trial.[9] The trial team and the client need to know: Do we have to include this argument again in our Rule 50 motions or will we waive the argument if we omit it?

And unfortunately, the answer is: It depends.

If you find yourself in the U.S. Court of Appeals for the Second, Third, Sixth, Seventh, Ninth, Tenth, D.C. or Federal Circuit, the answer is no.[10] For instance, in its 2012 Feld v. Feld decision, the U.S. Court of Appeals for the D.C. Circuit stated that a "Rule 50 motion is not required to preserve for appeal a purely legal claim rejected at summary judgment."[11]

If you find yourself in the U.S. Court of Appeals for the First, Fourth or Fifth Circuit, the answer is yes.[12] As stated by the U.S. Court of Appeals for the First Circuit in its 2010 decision in Ting Ji v. Bose Corp.: "[E]ven legal errors cannot be reviewed unless the challenging party restates its objection in a motion for [judgment as a matter of law]."[13]

And if you find yourself in the U.S. Court of Appeals for the Eighth Circuit, the answer is maybe. There, as articulated in the 2014 decision in New York Marine and General Insurance Co. v. Continental Cement Co. LLC, the court recognizes "a distinction between the denial of a summary judgment motion involving the merits of a claim and one involving preliminary issues, such as a statute of limitations, collateral estoppel, or standing," permitting review of only the latter.[14]

Analysis and Implications

In the day-to-day life of lawyers, few Supreme Court decisions will wind up really rocking the boat. But Dupree may well be an exception, and should be on the radar of any trial lawyers as well as appellate lawyers engaging in the increasingly common practice of embedding on trial teams, often for purposes of issue preservation.[15]

Given that the circuit conflict over this issue has persisted in the face of nearly a dozen failed cert petitions for decades, most trial and appellate lawyers have probably gotten used to the fact that the answer to this preservation question will depend on which jurisdiction the case is in. But that is about to change. And it will have a number of important implications depending on which way the justices rule.

Importance of Appellate Preservation Rules

First, it is worth reiterating how important appellate preservation rules are, and thus what the stakes are.

According to the Supreme Court's 2006 decision in Unitherm Food Systems Inc. v. Swift-Eckrich Inc., Rule 50 "sets for the procedural requirements for challenging the sufficiency of the evidence in a civil jury trial and establishes two stages for such challenges — prior to submission of the case to the jury [via Rule 50(a)], and after the verdict and entry of judgment [via Rule 50(b)]."[16]

As the court stated in Unitherm, Supreme Court case law "unequivocally establish[es] that the precise subject matter of a party's Rule 50(a) motion — namely, its entitlement to judgment as a matter of law — cannot be appealed unless that motion is renewed pursuant to Rule 50(b)."[17]

As succinctly stated by the U.S. Court of Appeals for the Eleventh Circuit in the 1986 National Industries Inc. v. Sharon Steel Corp. decision: "[T]he rule is a harsh one."[18]

As the Supreme Court reiterated in its 2011 decision in Ortiz v. Jordan, "we have repeatedly held [that] an appellate court is 'powerless' to review the sufficiency of the evidence after trial" in the absence of a proper Rule 50(a) and Rule 50(b) motion.[19]

Because of the consequences of failing to preserve, the justices' choice of approach is important. Entire appeals can be won or lost on the question of preservation of a key argument, and clarity is therefore king. "It depends" is not the kind of answer a client likely wants to hear on such a fundamental matter.

Benefits of Majority Approach

Second, there would be undeniable benefits if the justices opted for the majority approach, that is, holding that for a purely legal issue denied on summary judgment, a party need not reiterate that argument twice more in order to raise it on appeal.

To begin with, Rule 50 motions generally contain precious little room. There is no question that sufficiency-of-the-evidence arguments are subject to the harsh requirements of Rule 50, and so they have to be made. And, because of the unpredictability of how trials unfold — some evidence you expected to keep out comes in; and some evidence you expected to get in gets excluded — the possibility of freeing up space for such arguments on the merits of the case that develop in real time is no small matter.

Little is gained in the case by pro forma inclusion of arguments — sometimes only a few lines — merely for the sake of preservation when those arguments have been fully analyzed and rejected earlier, which is essentially all the minority position purports to require.[20]

Opting for the majority rule also brings the practice in line with how preservation works generally for similarly postured orders. For instance, the denial of a legal argument on a motion to dismiss generally need not be reraised to preserve it for appeal.[21]

And all of this is quite apart from the practical reality we all know: Trial judges, while understanding you have to make a record, get annoyed when they hear rejected arguments being repeated over and over, even when it is absolutely necessary to do so. No lawyer enjoys burning capital with the trial judge over what can seem like minutiae.

Drawbacks of Majority Approach

Third, the majority position is not without its potential drawbacks. As the respondent pointed out in opposition to certiorari,[22] the distinction between what is a "purely legal" and a "purely factual" basis of a denial of summary judgment is often unclear.

It is as unclear as, say, the distinction between "facial" and "as-applied" constitutional challenges,[23] or "legal," "factual," and "mixed questions of law and fact" when it comes to Rule 52(a)'s requirements of stating findings of fact separately from conclusions of law in judicial orders[24] or when it comes to standards of review.[25]

The point is, adopting the majority rule and holding that it applies only to purely legal questions may simply result in more contention over whether a summary judgment ruling is purely legal. Such concerns might be mitigated if district courts themselves strive for more clarity in their summary judgment orders, and it would be wise for the justices, if they take the majority approach, to provide some guidance in this regard.

Possible Outcome

Fourth, predictions are always precarious, but it seems likely that the justices will opt for either the majority or minority approaches — as both have benefits and drawbacks, but at least are clear — and will not go for the position used in the Eighth Circuit. Dividing up certain discrete issues as preliminary and others as concerning the merits within the category of "purely legal" is not only arbitrary, but seems like the option most calculated to spur meta-litigation instead of providing a generally predictable rule.

Clarifying Jurisdiction

Finally, the justices may also take the opportunity to clear up the nature of the Rule 50 requirements on appellate courts' power to review arguments. As noted above, the Supreme Court has long held, when talking about sufficiency of the evidence challenges, that appellate courts are "'powerless' to review the sufficiency of the evidence after trial" in the absence of a proper Rule 50(a) and Rule 50(b) motion.[26]

But some circuit courts, such as the U.S. Court of Appeals for the Fifth Circuit in its 2017 decision in Feld Motor Sports Inc. v. Traxxas LP and the D.C. Circuit in Feld have taken the term "powerless" to mean without jurisdiction to hear an appeal in the absence of the issue being "sufficiently preserved in a Rule 50 motion."[27]

This not only has implications for waiver and forfeiture, but appears to be in significant tension with the Supreme Court's unequivocal crusade to extirpate unnecessary uses of the term "jurisdictional" in favor of describing certain rules as "claims-processing rules," rules that "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[28]

Notably, Rule 50 never says the word "jurisdiction."[29] As the petitioner has pointed out,[30] the jurisdictional question for an appeal is usually about the finality of a judgment or order. If an order is final, the venerable merge rule kicks in, and all previous rulings that would otherwise be interlocutory for purposes of finality merge into the final judgment and the orders become reviewable on appeal.[31]

The question of the contents of the orders seems more about federal common law policies on preservation, and not about jurisdiction. But whichever approach the justices take, they may be tempted to weigh in on this sub-issue, particularly given that they have taken yet another case this term, Wilkins v. U.S., to decide whether particular rules in a federal statute are jurisdictional or claims-processing in nature.[32]

Conclusion

Whether the Supreme Court opts for the majority or minority rule, practitioners will want to take note. Dupree v. Younger is poised to provide much-needed clarity and uniformity on an area critical to general litigation success, and counsel will want to pay close attention to whichever path the court chooses to be the nationwide rule for appellate preservation.

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[1] No. 22-210.

[2] Pet. for a Writ of Cert. i, Dupree v. Younger, No. 22-210 (cert granted Jan. 13, 2023) ("Pet.).

[3] Br. in Opp. 12 n.2, Dupree v. Younger, No. 22-210 ("Opp.") (citing Ericsson Inc. v. TCL Commc'n Tech. Holdings Ltd., 955 F.3d 1317 (Fed. Cir. 2020), cert. denied, 141 S. Ct. 2624 (2021); Eon Corp. IP Holdings LLC v. Silver Spring Networks, Inc., 815 F.3d 1314 (Fed. Cir. 2016), cert. denied, 137 S. Ct. 640 (2017); Lawson v. Sun Microsystems, Inc., 791 F.3d 754 (7th Cir. 2015), cert. denied, 577 U.S. 1092 (2016); Caluori v. One World Techs., Inc., 555 F. App'x 995 (Fed. Cir. 2014), cert. denied, 574 U.S. 870 (2014); U.S. Fid. & Guar. Co. v. Lee Invs. LLC, 641 F.3d 1126 (9th Cir. 2011), cert. denied, 565 U.S. 1035 (2011); F.B.T. Prods., LLC v. Aftermath Recs., 621 F.3d 958 (9th Cir. 2010), cert. denied, 562 U.S. 1286 (2011); TVT Recs. v. Island Def Jam Music Grp., 412 F.3d 82 (2d Cir. 2005), cert. denied, 548 U.S. 904 (2006); Banuelos v. Constr. Laborers' Tr. Funds for S. Cal., 382 F.3d 897 (9th Cir. 2004), cert. denied, 545 U.S. 1127 (2005); Michael Found., Inc. v. Urantia Found., 61 F. App'x 538 (10th Cir. 2003), cert. denied, 540 U.S. 876 (2003); Ruyle v. Cont'l Oil Co., 44 F.3d 837 (10th Cir. 1994), cert. denied, 516 U.S. 906 (1995), reh'g denied, 516 U.S. 1004 (1995)).

[4] Younger v. Dupree, No. 21-6423, at 4 (4th Cir. 2022) (unpublished).

[5] Id.

[6] Id. at 4-5.

[7] Id. at 5.

[8] Id. at 5-9.

[9] Rule 50's framework applies only in jury trials. Compare Fed. R. Civ. P. 50, with id. 52(c).

[10] E.g., Stampf v. Long Island R.R. Co., 761 F.3d 192, 201 n.2 (2d Cir. 2014); Pennbarr Corp. v. Ins. Co. of N. Am., 976 F.2d 145, 149-55 (3d Cir.1992); McPherson v. Kelsey, 125 F.3d 989, 995 (6th Cir.1997); Chemetall GMBH v. ZR Energey, Inc., 320 F.3d 714, 719 (7th Cir. 2003); Pavon v. Swift Transp. Co., 192 F.3d 902, 906 (9th Cir.1999); Rose v. Uniroyal Goodrich Tire Co., 219 F.3d 1216, 1221 n. 3 (10th Cir.2000); Feld v. Feld, 688 F.3d 779, 783 (D.C. Cir. 2012); Ericsson Inc. v. TCL Comm. Tech. Holdings Ltd., 955 F.3d 1317, 1321 (Fed. Cir. 2020).

[11] Feld, 688 F.3d at 783.

[12] Ji v. Bose Corp., 626 F.3d 116 (1st Cir. 2010); Chesapeake Paper Prod. Co. v. Stone & Webster Engin. Corp., 51 F.3d 1229 (4th Cir. 1995); Feld Motor Sports, Inc. v. Traxxas, L.P., 861 F.3d 591, 596 (5th Cir. 2017).

[13] E.g., Ji, 626 F.3d at 127-28.

[14] New York Marine and Gen. Ins. Co. v. Continental Cement Co., LLC, 761 F.3d 830, 838 (8th Cir. 2014).

[15] See, e.g., Erin Coe, The Trial Team's New Secret Weapon? An Appellate Pro, Law360 June 10, 2019, https://www.law360.com/articles/1166261/the-trial-team-s-new-secret-weapon-an-appellate-pro.

[16] Unitherm Food Sys., Inc., v. Swift-Eckrich, Inc., 546 U.S. 394, 399 (2006).

[17] Id. at 404.

[18] E.g., EEOC v. Go Daddy Software, Inc., 581 F.3d 951, 961 (9th Cir. 2009); Nat'l Indus., Inc. v. Sharon Steel Corp., 781 F.2d 1545, 1549 (11th Cir. 1986).

[19] Ortiz v. Jordan, 131 S. Ct. 884, 892 (2011).

[20] Opp. 11, 13-14 (contending that any "prudent counsel" would take the time to include "a sentence or two" to preserve the issue in Rule 50 motions).

[21] E.g., Mealy v. City/Par. of E. Baton Rouge, 716 F. App'x 377, 378 (5th Cir. 2018) ("denial of a motion to dismiss" "will later 'merge' with the final judgment and become reviewable); Pan E. Expl. Co. v. Hufo Oils, 798 F.2d 837, 839 (5th Cir. 1986) (same).

[22] Opp. 11-12 (quoting Feld, 688 F.3d at 783 ("[D]etermining whether an issue is based in law or fact or some combination of the two is sometimes 'vexing.'").

[23] E.g., Citizens United v. FEC, 558 U.S. 310, 331 (2010) (acknowledging that "the distinction between facial and as-applied challenges is not so well defined").

[24] E.g., Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (calling the exercise "vexing").

[25] E.g., United States v. Craig, 808 F.3d 1249, 1255 (10th Cir. 2015) (noting that the distinction has historically "perplexed this Court").

[26] Ortiz, 131 S. Ct. at 892.

[27] E.g., Feld Motor Sports, 861 F.3d at 596; Feld, 688 F.3d at 783.

[28] E.g., Bendy Cty. Texas v. Davis, 139 S. Ct. 1843, 1849 (2019).

[29] Fed. R. Civ. P. 50.

[30] Reply Br. 4, Dupree v. Younger, No. 22-210.

[31] E.g., Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); Hall v. City of Los Angeles, 697 F.3d 1059, 1070 (9th Cir. 2012).

[32] Wilkins v. United States, No. 21-1164 (U.S.) (argued Nov. 30, 2022).