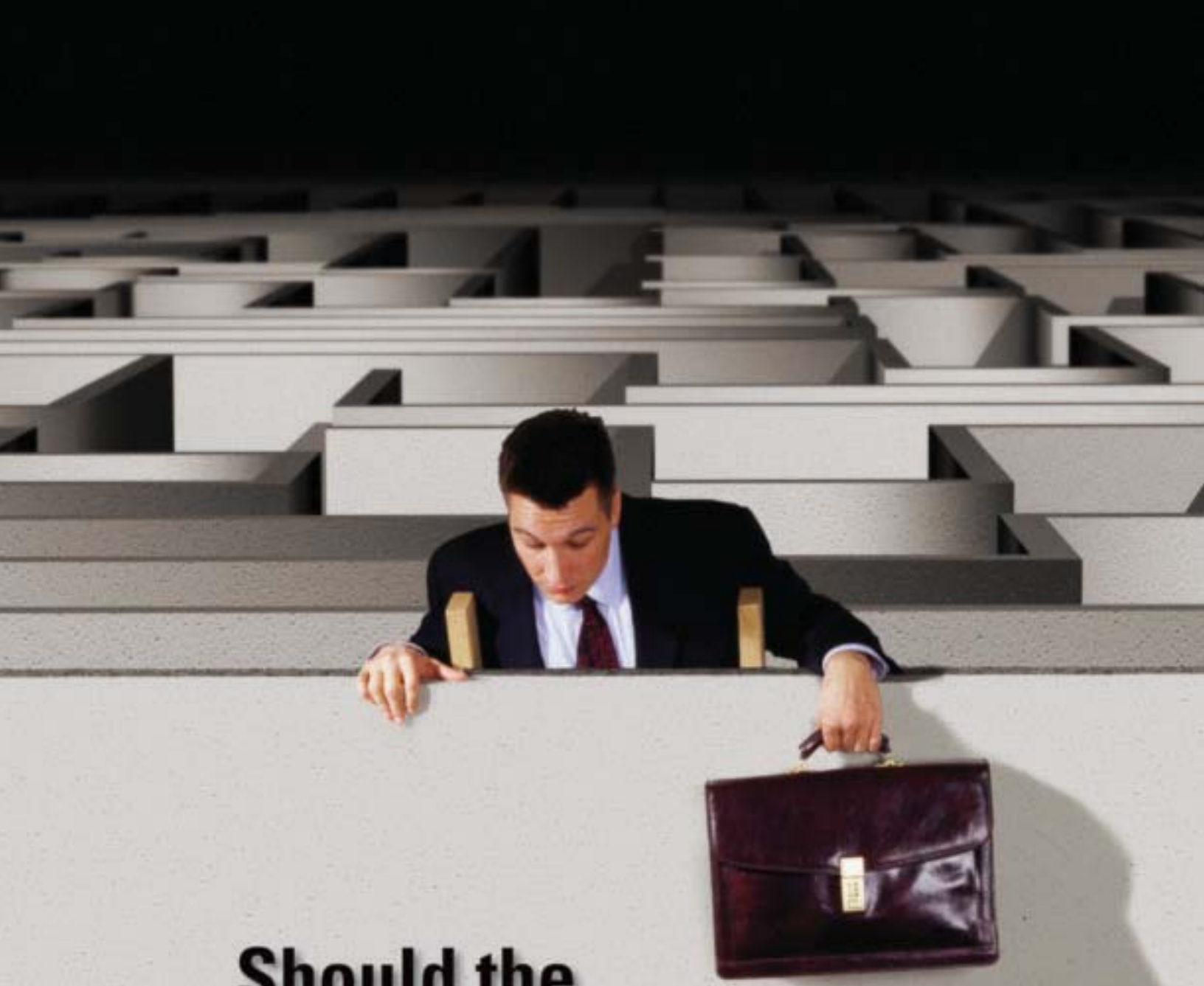

Should the Exception Be the Rule?

Advocating for Appellate Review of Summary Judgment Denials

By denying your motion for summary judgment on legal grounds, the district court has foreclosed your ability to offer at trial a legal argument, claim or defense to which you believe your client is entitled.

By Abbott Marie Jones

Suppose the federal district court has denied your motion for summary judgment, not because factual disputes exist but because of a legal determination that your client was not entitled to a judgment as a matter of law. The case proceeds to trial, but as a result of the summary judgment denial, the district court has overruled and removed from the case your client's challenge to personal jurisdiction, assertion of a statute of limitations defense, assertion of immunity, assertion of a presumption, in addition to arguments about interpretation of a contract and the interpretation of a statute. By denying your motion for summary judgment on legal grounds, the district court has foreclosed your ability to offer at trial a legal argument, claim or defense to which you believe your client is entitled. How can you, the prudent and zealous advocate, preserve the error and properly present it to the appellate court?

The Eleventh Circuit will not review a district court's denial of summary judgment following a full trial on the merits. While every circuit has accepted this same general rule, most circuits also have recognized an exception to the rule where the issue presented is a "pure question of law." The Eleventh Circuit has not adopted this exception and continues to decline review of all pre-trial summary judgment denials. Because the circuits have divergent procedures for accepting appeals from summary judgment denials following a full trial, the United States Supreme Court recently heard oral arguments in a case that asks the Court to determine whether and under what circumstances courts of appeals may review such summary judgment denials. The focus of this article will be the different approaches used by the circuits and the potential implications that could result from the Supreme Court's decision on the issue.

Purpose of Summary Judgment Practice

The summary judgment procedure is an integral part of the Federal Rules of Civil Procedure. Pursuant to Rule 56, a party may move for summary judgment as to all or part of a claim. On a motion for summary judgment, the district court must determine whether any genuine issues of material fact exist and, if not, whether the movant is entitled to judgment as a matter of law. According to the Advisory Committee Notes to the 1963 amendments "[t]he very mission of summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."

The U.S. Supreme Court has maintained that one of the principal purposes of the summary judgment procedure is to identify and eliminate claims or defenses that are not factually supported. In *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1), the Court averred that summary judgment is not a "disfavored procedural shortcut" but instead plays an important role in "'secur[ing] the just, speedy, and inexpensive determination of every action.'" Though summary judgment is intended to dispose of factually unsupported claims, district courts also have discretion to "deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

If the district court denies a summary judgment motion because genuine issues of material fact remain, or because the moving party is not entitled to judgment as a matter of law, or because there is reason to believe the better course is proceeding to trial, the case proceeds to a full trial on the merits. The question then becomes whether, and under what circumstances, the summary judgment

movant may appeal the pre-trial denial of summary judgment following trial.

Eleventh Circuit's Decision in Holley

The Eleventh Circuit first considered whether it would hear an appeal from a summary judgment denial following a full trial on the merits in *Holley v. Northrop Worldwide Aircraft Services, Inc*., 835 F.2d 1375, 1376-78 (11th Cir. 1988). In *Holley*, the defendant had moved for summary judgment as to the plaintiff's retaliatory discharge claim, but the district court denied the motion and the case proceeded to trial. Following the trial, the defendant asked the Eleventh Circuit to review the district court's denial of its pre-trial summary judgment motion.

The Eleventh Circuit observed that the summary judgment procedure was designed to decrease the time, effort, and costs associated with a full trial on the merits in cases where the trial process is not necessary. Relying on the purpose behind Rule 56, the Eleventh Circuit declared that a summary judgment determination "was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal." 835 F.2d at 1377. Though it invoked the broad rationale behind summary judgment practice to support its conclusion, the Court narrowed its holding to the specific circumstances presented in *Holley*:

> [W]e hold that the party whose motion for summary judgment was denied may not appeal the motion if the party admits that . . . by trial the evidence produced by the opposing party was sufficient to be presented to the jury . . . or . . . by trial the evidence had been supplemented or changed in some manner favorable to the party who opposed summary judgment.

Id. at 1377-78. The Eleventh Circuit, therefore, left open the possibility that it might review some pre-trial summary judgment denials under circumstances different from those presented in *Holley*.

Circuits Adopt Broad Rationale of Holley–The General Rule is Born

Rather than adopting only the narrow holding of *Holley*, all of the circuits to consider the issue since *Holley* have adopted a broad general rule based on the rationale articulated by the Eleventh Circuit in support of its holding. For example, the Fourth Circuit has characterized appellate review of pre-trial summary judgment denials as problematic, because those denials are based on incomplete records that are superseded by the evidence introduced at trial. *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp*., 51 F.3d 1229, 1236 (4th Cir. 1995). Even if the evidence presented at trial is identical, the Fourth Circuit views the jury's verdict as superior to the summary judgment denial, because the verdict is based upon credibility assessments and fact finding that the district court cannot engage in during summary judgment consideration.

Likewise, the Fifth Circuit has long held that "'[o]nce trial [begins], the summary judgment motions effectively became moot.'" *Black v. J.I. Case Co*., 22 F.3d 568, 570-71 (5th Cir. 1994) (quoting *Wells v. Hico ISD*, 736 F.2d 243, 251 n.9 (5th Cir. 1984)). In the Fifth Circuit, appellate review of pre-trial summary judgment denials is contrary to procedural order and justice, because such review "diminish[es] the discretion of the district court" to determine that, "even in the absence of a factual dispute," summary judgment should be denied "'where there is reason to believe that the better course would be to proceed to a full trial.'" *Id*. at 571 (quoting *Anderson*, 477 U.S. at 255).

The Seventh Circuit has observed that pre-trial summary judgment denials become essentially moot after a full trial on the merits, and has concluded that appellate review of those denials is generally inappropriate. The Court explained that a summary judgment denial "'decides one thing–that the case should go to trial; [that denial] does not settle or even tentatively decide anything about the merits of the claim.'" *Watson v. Amedco Steel, Inc*., 29 F.3d 274, 277 (7th Cir. 1994) (quoting *Switz. Cheese Ass'n v. Horne's Mkt., Inc*., 385 U.S. 23, 25 (1966)). The Seventh Circuit, therefore, will not "step back in time" to determine whether a different judgment may have been warranted on the factual record presented at summary judgment.

Considering the competing interests in justice, the Ninth Circuit has observed that "the party moving for summary judgment suffers an injustice if his motion is improperly denied. . . . However, we believe it would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial." *Locricchio v. Legal Servs. Corp*., 833 F.2d 1352, 1359 (9th Cir. 1987). In the Ninth Circuit, "[t]he appropriate forum to review the denial of a summary judgement [sic] motion is through interlocutory appeal under 28 U.S.C. § 1292(b)." *Lum v. City and County of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992).

Instead of citing interlocutory appeal as the appropriate vehicle for review as did the Ninth Circuit, the Tenth Circuit has taken the position that "even if summary judgment was erroneously denied, the proper redress would not be through appeal of that denial but through subsequent motions for judgment as a matter of law . . . and appellate review of those motions if they were denied." *Whalen v. Unit Rig, Inc*., 974 F.2d 1248, 1251 (10th Cir. 1992). In fact, "[f]ailure to renew a summary judgment argument – when denial was based on factual disputes – in a motion for judgment as a matter of law . . . is considered a waiver of the issue on appeal." *Wolfgang v. Mid-American Motorsports, Inc*., 111 F.3d 1515, 1521 (10th Cir. 1997).

The Federal Circuit also has adopted the general rule against appellate review of summary judgment denials. In *Glaros v. H.H. Robertson Co*., 797 F.2d 1564, 1567 (Fed. Cir. 1986), the Court noted that an order *granting* summary judgment, from which no immediate appeal lies, is merged into the final judgment of the court and is, therefore, reviewable on appeal. An order *denying* summary judgment, on the other hand, "is merely a judge's determination that genuine issues of material fact exist. It is not a judgment, and does not foreclose trial on the issues on which summary judgment was sought." *Glaros*, 797 F.2d at 1567.

Eleventh Circuit Expressly Adopts Broad General Rule

The Eleventh Circuit's own precedent supported the adoption of a narrower rule, or an exception to the general rule, that would allow for appellate review of pure legal determinations.

However, more than 10 years after its narrow holding in *Holley*, the Eleventh Circuit instead broadened its ruling to encapsulate the sweeping general rule adopted by the other circuits. In *Lind v. United Parcel Serv., Inc*., 254 F.3d 1281, 1282-84 (11th Cir. 2001), the plaintiff moved for summary judgment on her own retaliation claim, which motion the district court denied. Following a bench trial and the district court's determination that no retaliation had occurred, the plaintiff appealed the denial of her summary judgment motion and argued that the defendant had not presented sufficient evidence to withstand summary judgment.

The Eleventh Circuit reiterated the broad rationale it had set out initially in *Holley* as well as the similarly broad general rule adopted in other circuits. The Eleventh Circuit also cited its decision in *University of Florida v. KPB, Inc*., 89 F.3d 773, 775 (11th Cir. 1996), not to review the denial of summary judgment because the inquiry was "directed to the sufficiency of the evidence as presented at trial, which the record reveals to be competent support for the jury's verdict." Its decision in *KPB* coupled with the narrow holding in *Holley* seemingly invited a narrower prohibition against review–one that would only bar appeals from those summary judgment denials that are based upon the existence of remaining factual disputes. The Eleventh Circuit nevertheless announced in *Lind* that it would not review a denial of summary judgment after a trial on the merits under any circumstances.

To support its adoption of the broad general rule, the Eleventh Circuit observed that a party believing that the district court erroneously denied summary judgment has adequate remedies besides seeking appellate review of that denial. First, the party may seek an immediate interlocutory appeal. Alternatively, where a jury trial has occurred, the party may move for judgment as a matter of law under Rule 50, and if the Rule 50 motion is denied the party may seek appellate review of that denial.

The Eleventh Circuit stated that permitting post-trial review of a pre-trial denial of summary judgment would run afoul of the rules of procedure and undermine the district court's discretionary power to deny summary judgment in a case where the better course would be to proceed to a full trial. The court further explained that reviewing a pre-trial summary judgment denial on the basis of the incomplete record presented on summary judgment would be unjust in light of the fact that the record is more fully developed, and the jury is allowed to weigh credibility and resolve factual disputes during trial.

The Court also hearkened back to its observation in *Holley* that a summary judgment denial should not be a "bomb planted within the litigation at its early stages and exploded on appeal." Not wishing to give district courts any incentive to grant summary judgment in a close case to defuse the potential "bomb" of a denial's reversal following what would be a therefore superfluous trial, the Eleventh Circuit determined that it would not review any pre-trial denial of a summary judgment motion following a full trial on the merits. *Lind*, 254 F.3d at 1285-86. In adopting the broad rule against appellate review, the Eleventh Circuit fell in line with the general consensus among the circuits and unconditionally adopted the rationale it first relied upon in *Holley*.

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Most Circuits Read Holley as Supporting Exception to General Rule

None of the circuits that continue to follow only the sweeping prohibition against all appellate review of pre-trial summary judgment denials have adequately addressed the situation where summary judgment is denied not on the basis of remaining factual questions but on purely legal grounds. Pure legal questions rejected on summary judgment, such as challenges to personal jurisdiction, assertions of the statute of limitations or claim preclusion, assertions of immunity or presumptions, and interpretations of statutory or contractual language, do not proceed to trial. Rule 50 motions, which are designed to test the sufficiency of the evidence presented at trial, do not provide an ideal vehicle for preserving error where pure legal arguments have been rejected on summary judgment. The traditional justifications for declining review of summary judgment denials after trial do not apply in situations where the denial is based purely on a legal determination.

The majority of the circuits, therefore, have read the holding in *Holley* as inviting a narrow, but important, exception to the otherwise overly broad general rule. For example, the Ninth Circuit adopted the exception to the general rule after concluding that the justifications for the general rule do not support a prohibition against appellate review of pure legal errors. In *Pavon v. Swift Transp. Co*., 192 F.3d 902-07 (9th Cir. 1999), the Court considered whether to review a summary judgment denial where the district court had rejected the defendant's argument that the plaintiff's claims were precluded. Because the district court had determined on summary judgment that the claims were not precluded, the claims proceeded to trial. The defendant had no suitable way to raise the argument of preclusion during trial. The Ninth Circuit, therefore, succinctly announced,

> "While this court will often decline to engage in the 'pointless academic exercise' of reviewing a denial of summary judgment after a trial on the merits, *Lum v. City and County of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992), such a case is not presented here, because the question of claim

preclusion was not a disputed factual issue that went to the jury, but was a ruling by the district court on an issue of law."

Pavon, 192 F.3d at 906. Recently, the Ninth Circuit reaffirmed its acceptance of the exception to the rule against reviewing pre-trial summary judgment denials. Expressing the logic behind the exception, the court stated that "[i]f a district court denies a motion for summary judgment on the basis of a question of law that would have negated the need for a trial, this court should review that decision." *Banuelos v. Constr. Laborers' Trust Fund for S. Cal.*, 382 F.3d 897, 902-03 (9th Cir. 2004). If, on the other hand, the district court denies summary judgment on the basis of a factual dispute, those factual disputes are resolved during any subsequent trial and the Ninth Circuit will not examine whether a factual issue was disputed at summary judgment after it has been decided by a jury at trial.

For similar reasons, the Seventh Circuit also has adopted the exception to the general rule. In *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 716-18 (7th Cir. 2003), the defendant moved for summary judgment on the basis of the relevant contractual language, which the defendant argued precluded the plaintiff's breach of contract claim. The district court denied the motion for summary judgment, and the breach of contract claim proceeded to trial. The defendant appealed the summary judgment denial, and on appeal, the Seventh Circuit acknowledged that the general rule made sense in most circumstances, "because a denial of summary judgment is a prediction that the evidence will be sufficient to support a verdict in favor of the nonmovant." 320 F.3d at 718. However, the Seventh Circuit found that the traditional justifications for the rule against appellate review of pre-trial summary judgment denials are inapplicable when the denial of summary judgment was not based on the adequacy or inadequacy of the evidence. The Court, therefore, joined those circuits that have adopted the exception to the general rule against appellate review and concluded that review of pre-trial summary judgment denials is appropriate if the issues raised are purely legal, such as the interpretation of contractual language. The Seventh Circuit also discussed the Fourth Circuit's decision in *Chesapeake Paper*, where the Fourth Circuit explicitly rejected as problematic the distinction between factual issues and purely legal issues. While the Seventh Circuit agreed that, in some cases, it may be difficult to discern the basis for the district court's denial of summary judgment, the court nevertheless concluded that "if the legal question can be separated from the factual one, then we see no bar to reviewing the legal question notwithstanding the party's failure to raise it in a motion for judgment as a matter of law at trial." *Chemetall*, 320 F.3d at 719-20.

…when a party presents a pure legal question in a summary judgment motion and the district court denies the motion, the Tenth Circuit determined that the party need not make a Rule 50 motion to preserve the error.

Following the lead of the Seventh and Ninth Circuits, the Sixth Circuit recently adopted the exception to the broad general rule for pure questions of law. In *Barber v. Louisville & Jefferson County Metro. Sewer Dist.*, 295 Fed. App'x 786, 787-89 (6th Cir. 2008), the defendant had moved for summary judgment on the plaintiff's Whistleblower Act claim, but the district court denied the motion, finding that the plaintiff's speech need not be "protected speech" under the First Amendment to sustain a whistleblower claim. The whistleblower claim proceeded to trial, and the jury determined that the defendant had violated the Whistleblower Act by terminating the plaintiff in retaliation for statements the plaintiff had made. On appeal, the defendant cited as error the district court's statutory interpretation in the pre-trial summary judgment denial. The Sixth Circuit held, "'[W]here the denial of summary judgment was based on a question of law rather than the presence of material disputed facts, the interests underlying the rule [against appellate review of summary judgment denials] are not implicated.'" *Id.* at 789 (quoting *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 441 (6th Cir. 2005)). Nevertheless, the Sixth Circuit interprets the exception to the rule for pure legal questions narrowly so as not to run afoul of the carefully balanced rules of civil and appellate procedure.

Five years after the Tenth Circuit first announced that it generally would not review pre-trial denials of summary judgment motions, that Court also drew a distinction between denials based upon remaining factual disputes and denials based upon pure legal determinations: "By contrast, when the material facts are not in dispute and the denial of summary judgment is based on the interpretation of a purely legal question, such a decision is appealable after final judgment." *Wolfgang v. Mid-American Motorsports, Inc.*, 111 F.3d 1515, 1521 (10th Cir. 1997). Like the Ninth Circuit, the Tenth Circuit explained that its adoption of the broad general rule against appellate review had been based, at least in part, on the notion that subsequent Rule 50 motions preserve any error in the district court's determinations as to the sufficiency of the evidence. Like Rule 56 motions for summary judgment, Rule 50 motions for judgment as a matter of law are designed to test whether there is a legally sufficient evidentiary basis for the jury to find for the moving party. *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 841-42 (10th Cir. 1994). Thus, to preserve for appeal a challenge to the district court's determination that there was sufficient evidence to conduct a trial (in

other words, the denial of a summary judgment for remaining factual disputes), a party must raise the issue in a Rule 50 motion for judgment as a matter of law.

However, when a party presents a pure legal question in a summary judgment motion and the district court denies the motion, the Tenth Circuit determined that the party need not make a Rule 50 motion to preserve the error. In *Ruyle*, the defendant had presented on summary judgment a legal question regarding the preclusive effect of on order of the Oklahoma Corporation Commission. 44 F.3d 839-41. The Tenth Circuit, therefore, saw no reason to apply the broad general prohibition against appellate review of the summary judgment denial where the issue presented was a pure legal question, which a subsequent Rule 50 motion is not suited to preserve. *Id*. at 842-43.

Similarly, the Second Circuit has explained that, while appellate review generally should focus on the evidence admitted at trial rather than the earlier summary judgment record, that evidentiary focus has no bearing on challenges to the district court's legal conclusions. In *Rothstein v. Carriere*, 373 F.3d 275, 283-84 (2d Cir. 2004), the district court denied the defendant's motion for partial summary judgment in which the defendant had argued that the grand jury's indictment gave rise to a presumption of probable cause, an element of the plaintiff's malicious prosecution claim. By denying the motion for partial summary judgment, the district court "took the presumption out of the case entirely," so the defendant did not, and indeed was not obligated to, raise the issue in a Rule 50 motion at trial. 373 F.3d at 284. After trial, the defendant appealed the summary judgment denial, and the Second Circuit determined that "[w]here a motion for summary judgment based on an issue of law is denied, appellate review of the motion is proper even if the case proceeds to trial and the moving party fails to make a subsequent Rule 50 motion." 373 F.3d at 284 (internal quotation marks and citations omitted).

Falling in line with the majority of the circuits, the Federal Circuit also has adopted the exception to the general rule that an order denying a motion for summary judgment is non-final and non-appealable: "[T]here is the exception that '[a] denial of a motion for summary judgment may be appealed, even after a final judgment at trial, if the motion involved a purely legal question and the factual disputes resolved at trial do not affect the resolution of that legal question.'" *Revolution Eyewear, Inv. v. Aspex Eyewear, Inc*., 563 F.3d 1358, 1366 n.2 (Fed. Cir. 2009) (quoting *United Techs. Corp. v. Chromalloy Gas Turbine Corp*., 189 F.3d 1338, 1344 (Fed. Cir. 1999)).

Some Circuits Explicitly Reject Exception to Rule

While some circuits have seen the logic of allowing appellate review of pre-trial summary judgment denials based on pure legal determinations, others have expressly rejected that approach. As discussed above, the Fourth Circuit conceded in *Chesapeake Paper* that the Eleventh Circuit's narrow holding in *Holley* could be read as supporting what it called a "dichotomy approach" to appellate review of pre-trial summary judgment denials. 51 F.3d at 1235 & n.8. Despite that possible reading of *Holley*, the Fourth Circuit was persuaded more by the broad rationale cited by the *Holley* court in support of its admittedly narrow holding. The Fourth Circuit "decline[d] to create" what it characterized as a "new jurisprudence in which district courts would be obliged to anticipate parties' arguments on appeal by bifurcating the legal standards and factual conclusions supporting their decisions denying summary judgment." *Id*. at 1235.

The Fifth Circuit also rejects this so-called "dichotomy approach" that most circuits have adopted. In a footnote in *Black*, the Court addressed the Eleventh Circuit's decision in *Holley*, which the Fifth Circuit viewed as suggesting an exception to the general rule against appellate review of summary judgment denials. 22 F.3d at 571 n.5. The Fifth Circuit determined that creating an exception to the rule whereby denials based on purely legal grounds would be reviewable would be inappropriate, because such an approach would require appellate courts "to craft a new jurisprudence based on a series of dubious distinctions between law and fact. And, such an effort–added to the tasks of already overburdened courts of appeal–would benefit only those summary judgment movants who failed to properly move for judgment as a matter of law at the trial on the merits." *Id*.

Few Circuits Have Not Expressly Accepted or Rejected Either Approach

While most circuits have taken fairly strong stances on whether they will review any pre-trial summary judgment denials, the positions of some circuits remain unclear. For example, in an unpublished decision in *Robinson v. Garrett*, 966 F.2d 702, 1992 WL 132470, at *1 (D.C. Cir. May 8, 1992), the D.C. Circuit determined that, in light of the judgment entered following a full trial on the merits, it would not examine on appeal the argument that the district court erred in denying the pre-trial summary judgment motion. The court cited cases from the Sixth, Ninth, and Federal Circuits to support its conclusion. *Id*. (citing *Jarrett v. Epperly*, 896 F.2d 1013 (6th Cir. 1990); *Locricchio v. Legal Servs. Corp*., 833 F.2d 1352 (9th Cir. 1987); *Glaros v. H.H. Robertson Co*., 797 F.2d 1564 (Fed. Cir. 1986)). The cases cited by the D.C. Circuit stand for the proposition that pre-trial denials of summary judgment are not reviewable following a full trial on the merits. However, subsequent to the *Robinson* decision, the Sixth, Ninth, and Federal Circuits have adopted the exception to the general rule against reviewing summary judgment denials when the issues presented are pure legal questions. *See, e.g., Revolution Eyewear*, 563 F.3d at 1366 n.2; *Medshares*, 400 F.3d at 441; *Banuelos*, 382 F.3d at 897. Whether the D.C. Circuit will follow the lead of the Sixth, Ninth, and Federal Circuits and adopt the exception to the rule, or whether the D.C. Circuit will rest only on its prior adoption of the broad general rule is yet to be seen.

The Third Circuit, without expressly noting whether it condoned appellate review of pre-trial summary judgment denials, has entertained such appeals. For example, in *Pennbarr Corp. v. Insurance Co. of North America*, 976 F.2d 145, 149-55 (3d Cir. 1992), the Court reviewed a pre-trial summary judgment denial related to the legal issue of contract interpretation. The Third Circuit ultimately reversed the district court's denial of summary judgment, determining as a matter of law that the contract terms were not ambiguous and that the summary judgment should have been granted. Whether upon explicit examination of the propriety of reviewing pre-trial summary judgment denials

the Third Circuit would choose to follow the exception to the general rule, as it did implicitly in *Pennbarr*, remains to be seen.

Unlike the Third and D.C. circuits, which have not explicitly adopted any rule, the Eighth Circuit's jurisprudence on the issue is explicit and self-contradictory. Like the majority of the circuits, the Eighth Circuit has adopted the general rule against appellate review of pre-trial summary judgment denials: "A ruling by a district court denying summary judgment is interlocutory in nature and not appealable after a full trial on the merits." *Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co.*, 19 F.3d 431, 434 (8th Cir. 1994). The Eighth Circuit also rejected an appellant's argument in favor of the exception to the rule as problematic and without merit. *Metro. Life Ins. Co. v. Golden Triangle*, 121 F.3d 351, 354 (8th Cir. 1997).

Despite its initial rejection of the exception to the rule two years prior, the Eighth Circuit did review a pre-trial denial of summary judgment after a full trial on the merits in *White Consolidated Indus., Inc. v. McGill Mfg. Co.*, 165 F.3d 1185 (8th Cir. 1999). Following the Tenth Circuit's rationale in *Wolfgang*, the Eighth Circuit determined that "when the material facts are not in dispute and the denial of summary judgment is based on the interpretation of a purely legal question, such a decision is appealable after final judgment." *White*, 165 F.3d at 1190 (internal quotation marks omitted). Since its ruling in *White*, the Eighth Circuit seemingly has acknowledged that the law of that circuit is to allow post-trial review of a pre-trial denial of summary judgment only where the issues presented are purely legal questions, though it has not consistently applied either the general rule or the exception. *Hertz v. Woodbury County, Iowa*, 566 F.3d 775, 780 (8th Cir. 2009) ("[W]e have, in at least one instance, allowed a party to appeal a district court's denial of summary judgment after final judgment when there were no disputed material facts and 'the denial of summary judgment [was] based on the interpretation of a purely legal question.'" (quoting *White*, 165 F.3d at 1190)); *but see EEOC v. Sw. Bell Tel., L.P.,* 550 F.3d 704, 708 (8th Cir. 2008) (refusing to consider appeal of summary judgment denial where appellant argued that the district court erred as a matter of law).

Supreme Court Review of Issue–Should Exception be the Rule?

The United States Supreme Court granted the petition for a writ of certiorari in *Ortiz v. Jordan*, on April 26, 2010, and set oral argument of the case for November 1, 2010. That case asks the Court, among other things, to determine whether a court of appeals may review any denial of summary judgment following a full trial on the merits. As described above, some circuits, including the Eleventh, maintain that appellate review of any summary judgment denial is inappropriate and inconsistent with the rules of civil and appellate procedure. Other circuits, including the Sixth Circuit in *Ortiz*, have adopted an exception to the general rule that allows appellate review of pre-trial summary judgment denials for pure legal questions. Those circuits adopting the exception to the rule against appellate review have determined that the rationale that supports the general rule has no application in a situation where the summary judgment denial was based upon a purely legal inquiry. While it is hard to predict what the Supreme Court will decide, some basic principles undoubtedly will come into play as the Court endeavors to resolve this circuit split.

The logic behind the exception to the general rule makes sense in the abstract. If a district court makes a legal error in denying summary judgment and thereby essentially forecloses consideration of an argument during trial, the courts of appeals should be allowed to review those legal determinations after a trial on the remaining factual disputes. Such an appeal should lie regardless of whether the aggrieved party makes a Rule 50 motion on the issue at trial, because Rule 50 motions are designed to challenge the sufficiency of the evidence not the correctness of the district court's legal determinations.

The confusion arises, however, out of the practical application of the exception to the rule: what constitutes a "pure" legal question as opposed to just a legal question? All summary judgment determinations, as evidenced by the *de novo* standard of review utilized by the courts of appeals, are legal determinations. As the Supreme Court has explained, "[a]t the summary judgment stage . . . once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party . . . the reasonableness of [the respondent's] actions . . . is a pure question of law." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007) (reversing the Eleventh Circuit's decision that affirmed the district court's denial of summary judgment based upon qualified immunity). The distinction drawn by the circuits adopting the exception to the rule for summary judgment denials based on "pure" legal questions, then, rests upon a bit of a legal fiction. As such, the Supreme Court may choose to adopt the exception as the rule and allow appellate review of any pre-trial summary judgment denial, because any such denial is a legal determination subject to *de novo* review. *See Banuelos*, 382 F.3d at 902-03 ("If a district court denies a motion for summary judgment on the basis of a question of law that would have negated the need for a trial, this court should review that decision.").

On the other hand, the Supreme Court could agree with the minority of circuits that apply only the broad general rule that prohibits appellate review of any summary judgment denial. Only the First, Fourth, Fifth and Eleventh circuits have specifically rejected the exception in favor of applying only the broad general rule. In rejecting the exception, those circuits have relied upon the perception that the bases for summary judgment, and whether they can be categorized as purely legal, may be difficult to discern in some cases. Those circuits also rely upon the idea that appellate review of pre-trial summary judgment denials that are based on purely legal determinations emasculates the procedures set forth in Rule 50. As described above, however, Rule 50 motions are designed to test the sufficiency of the evidence, not the effectiveness of legal arguments. True, the adoption of an exception to the rule to allow for review of pure legal questions denied by pre-trial summary judgment motions may prove more challenging than a bright line rule against review of any summary judgment denials. The intellectual burden placed upon the courts of appeals by the exception surely is far outweighed by the benefits to the parties and the interests of justice. *See Adams v. United States*, 317 U.S. 269, 273 (1942) ("Procedural instruments are means for achieving the rational

ends of law."); *see also Moore v. Zant*, 885 F.2d 1497, 1506-07 (11th Cir. 1989) (noting, in a different context, two competing interests: society's interest in the finality of judgments and the litigants' interests in securing a full and fair opportunity for consideration of their rights).

The Supreme Court may side with the majority of the circuits and conclude that courts of appeals should review only those summary judgment denials that raise pure legal questions. The Second, Sixth, Seventh, Ninth, Tenth, and Federal circuits have adopted the exception to the general rule against appellate review of pre-trial summary judgment denials, finding that the rationale supporting the general rule does not apply where the issues presented are purely legal. Additionally, the Third Circuit has reviewed and reversed a pre-trial summary judgment denial where the issue presented was purely legal, though it did not explicitly adopt the exception to the rule in so reversing. Therefore, though the petitioner in *Ortiz* asks the Court to reject outright the exception to the rule for cases presenting pure legal questions, jurisprudence from the majority of the circuits is stacked against the *Ortiz* petitioner.

If it adopts the majority rule (which includes the exception to the general rule against appellate review of summary judgment denials), then the Supreme Court should also offer some guidance as to what kinds of summary judgment denials fall within the exception. The Supreme Court's prior decisions offer very few indications as to what "pure legal questions" rejected by a pre-trial summary judgment denial it may deem appropriate for appellate review. In many different substantive contexts, the Supreme Court has noted the difficulty of distinguishing between pure factual questions, pure legal questions, and so-called mixed questions involving both law and fact. In *Williams v. Taylor*, 529 U.S. 362, 385 (2000), the Court noted the "not insubstantial differences of opinion as to which issues of law fell into which category of question." *See also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990) ("The Court has long noted the difficulty of distinguishing between legal and factual issues."). The Court described "the proper characterization of a question as one of fact or law" as "sometimes slippery" in *Thompson v. Keohane*, 516 U.S. 99, 110-11 & n.10 (1995). The Court has also observed that "the appropriate methodology for distinguishing" pure questions of law, pure questions of fact, and mixed questions has been "to say the least, elusive" and "vexing." *Miller v. Fenton*, 474 U.S. 104, 113 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Suffice it to say that the Supreme Court "has yet to arrive at 'a rule or principle that will unerringly distinguish a factual finding from a legal conclusion.'" *Miller*, 474 U.S. at 113 (quoting *Pullman*, 456 U.S. at 288). The *Ortiz* case could provide the perfect opportunity for the Court to delineate what constitutes a "pure" legal determination. With guidance from the Court on that point, the exception, which allows for appellate review of pure legal determinations made in pre-trial summary judgment denials (which denials remove from the case the overruled legal arguments, claims, or defenses), should easily become the rule.

Until the Supreme Court either rejects the pure legal question exception or clearly articulates what types of pre-trial summary judgment denials are appealable following a trial, prudent counsel in any circuit would do well to preserve the issue in a Rule 50 motion.

Conclusion–How to Proceed in the Meantime

The Eleventh Circuit will not review any summary judgment denial following a full trial on the merits. The Eleventh Circuit's rule does not provide a suitable vehicle for preserving for review the district court's error in denying summary judgment, and removing certain legal issues from the case, such as personal jurisdiction, presumptions, statutes of limitations and contract or statutory interpretation. Until the Supreme Court's decision in *Ortiz*, counsel for unsuccessful litigants who desire appellate review in this Circuit have two options: (1) seek interlocutory review of the summary judgment denial, or (2) preserve the issue by filing the appropriate Rule 50 motions, which are appealable. In circuits that have adopted the pure legal question exception, it nevertheless may be difficult to discern the basis for the district court's denial of summary judgment, because what constitutes a "pure" legal question is unclear. This is not an ideal approach, but until the Supreme Court either rejects the pure legal question exception or clearly articulates what types of pre-trial summary judgment denials are appealable following a trial, prudent counsel in any circuit would do well to preserve the issue in a Rule 50 motion. ▲▼▲

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