THE PUZZLING APPEAL OF SUMMARY JUDGMENT DENIALS: WHEN ARE SUCH DENIALS REVIEWABLE?

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ABSTRACT

An important aspect of summary judgment law is now in great disorder. The intermediate federal courts of appeals are split both internally and among themselves on the circumstances, if any, under which denials of summary judgment should be appealable after trial and final judgment, and a Supreme Court opinion that addressed the issues only in dicta made matters worse. The Court's approach was off-the-cuff, its thought process superficial and in some respects flatly in error, and its dicta seriously misguided, with the result that the intermediate federal courts of appeals were left in a quandary over whether to follow the dicta. An additional layer of splits among the circuits resulted. This Article describes the circuit splits, analyzes the Court's opinion in Ortiz v. Jordan*, examines how the courts of appeals have handled the issues since* Ortiz *and, most importantly, addresses the issues so unsatisfactorily treated in* Ortiz*.*

The introduction to the Article explains the importance of the Article to anyone concerned with the workings of our court systems, because it raises significant issues about the appealability of harmful error, the circumstances under which interlocutory rulings are and are not "merged" in a judgment, and the relationship between interlocutory and post-judgment appeals. It raises important questions about the circumstances under which lower federal courts should, and should not, honor Supreme Court dicta. The

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Introduction also enumerates the multiple insights and contributions that the Article makes.

In its analysis section, the Article argues why interlocutory appeals of summary judgment denials should not be made more freely available, to reduce the occasions for post-judgment review. It argues that when pre-judgment appeals of denials of summary judgment are available, those appeals both are and should be permissive, rather than mandatory. Most significantly, it argues that regardless of whether interlocutory appeals of summary judgment are available, post-trial, post-judgment appeals of the denials should be allowed when the denials were based on conclusions of law, rather than on the existence of genuine issues of material fact. In so arguing, I disagree with the position taken in dicta by the Supreme Court in Ortiz*.*

The analysis section is multi-faceted. It debunks the allegedly problematic nature of relying on a law/fact distinction to distinguish differently based summary judgment denials; undermines the view that adequate alternative remedies exist, with particular focus on Federal Rule of Civil Procedure 50; rejects the argument that post-judgment appeals of law-based summary judgment denials will come as an unfair surprise to the successful litigant in the trial court; considers whether the system should require litigants to offer trial judges an opportunity to reconsider their summary judgment denials and how that might best be done; shows the error of the views that the interlocutory nature of summary judgment denials constitutes a reason to deny post-judgment appeal and that it is necessary to preclude post-judgment appeals of law-based summary judgment denials to avoid greater injustice; and establishes that the fear of wasted trials is not an adequate reason to reject such appeals. The Article also calls for rejection of Supreme Court dicta that is not well-reasoned. The Article recommends what it takes to be the appropriate approach and concludes.

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INTRODUCTION

It is common knowledge that summary judgment practice is a significant feature of civil litigation. An important aspect of summary judgment law is now in great disorder. The intermediate federal courts of appeals are split both internally and among themselves on the circumstances, if any, under which denials of summary judgment should be appealable after trial and final judgment. And a Supreme Court decision—rendered in a case, *Ortiz v. Jordan*,[1] in which the Court granted certiorari in order to resolve the circuit split—only made matters worse. The Court discovered that the case did not actually pose the issue that the Court thought it posed—whether a party may appeal an order denying summary judgment after a district court has conducted a full trial on the merits and entered final judgment *when the summary judgment motion presented a question of law and the trial court's resolution of that question was the basis of its denial of summary judgment*[2]—but the Court went ahead and opined, in dicta, on how that issue should be resolved.[3] Unfortunately, the Court's approach was off-the-cuff, its thought process superficial and in some respects flatly in error, and its dicta seriously misguided, with the result that the intermediate federal courts of appeals were left in a quandary over whether to follow the dicta. An additional layer of splits among the circuits resulted. Few legal scholars have made a foray into this morass. In this Article, I make that foray and illuminate what I believe is the correct answer to the question.

The fact that the Court granted certiorari in *Ortiz* speaks to the importance of the issues addressed in this Article. The failure of *Ortiz* to resolve the issue and end the circuit split suggests that the Court may revisit it. Indeed, the Court may want to stop in its tracks the additional circuit split that the circuits' varying interpretations of

1. 131 S. Ct. 884 (2011).
2. *See id.* at 892.
3. *See id.* at 892-93.

Ortiz have created. But this Article is important not only to appellate practitioners, the parties they represent, and the courts that have to decide whether to permit appeals from summary judgment denials. It is important to anyone concerned with the workings of our court systems because it raises important issues about the appealability of harmful error, the circumstances under which interlocutory rulings are and are not "merged" in a judgment, and the relationship between interlocutory and post-judgment appeals. This Article also raises important questions about the circumstances under which lower federal courts should, and should not, honor Supreme Court dicta.

The insights and contributions made by this Article include:

(1) the light it sheds on the actual state of the law, molded by the federal appellate courts, governing the circumstances under which denials of summary judgment are appealable after final judgment. It similarly sheds light on how the Court's decision in *Ortiz* has influenced and confused federal appellate court decisions made since *Ortiz* was handed down;

(2) its identification of errors in the reasoning of the Supreme Court in *Ortiz*. The Article brings to bear knowledge concerning the circumstances under which denials of summary judgment are immediately appealable and when they are not so appealable to demonstrate the error of the Court's conclusion that the time to seek review of a denial of summary judgment expires long before entry of final judgment. The Article shows why that conclusion was wrong if the summary judgment denial was not immediately appealable and wrong even if the denial was immediately appealable. In so doing, the Article educates its readers about the policies that underlie the final judgment rule and the policies that undergird the exceptions to that rule, and explains that even when appeals of summary judgment are allowed prior to judgment, those interlocutory appeals are not and should not be mandatory;

(3) its arguments against making interlocutory appeals of summary judgment denials more freely available; and

(4) its evaluation of the arguments for rejecting post-trial, post-judgment appeals of summary judgment denials. The Article explains why it is not problematic for courts to distinguish summary judgment denials based on determinations of law from denials based on the existence of genuine issues of material fact. It informs the reader why the fact that summary judgment denials are interlocutory is no reason to deny post-judgment appeals and why justice will be served, not thwarted, by permitting post-judgment appeals of summary judgment denials that were based upon rulings of law. It

establishes that fear of wasted trials is not a good reason to deny post-judgment appeals of summary judgment denials that were based upon rulings of law. It demonstrates that litigants lack adequate alternative remedies, contrary to the views of courts that have thought that either interlocutory appeals or appeals from denials of post-trial motions for judgment as a matter of law, based on insufficiency of the evidence, are satisfactory alternatives to post-judgment appeals from summary judgment denials. It also makes clear why the winners in the trial court have no good argument for unfair surprise when summary judgment denials are appealed post-judgment. And it shows how the denial of post-judgment appeals of summary judgment denials that were grounded in rulings of law is aberrant in light of the post-judgment appealability of denials of other motions.

The Article also is noteworthy for its invitation to courts to think through whether they should require parties who lost on summary judgment based on a legal ruling to preserve the error in ways that courts have not routinely required, for its suggestions of behaviors that courts might require of parties to preserve the error, and finally, for its call for rejection of Supreme Court dicta that is not well-reasoned.

I am not a fan of motions for summary judgment. While in theory it makes sense to have a mechanism for resolving cases without trial when there are no genuine issues of material fact and the cases can be decided as a matter of law. But in practice, motions for summary judgment have become a tool for increasing the work demanded by litigation and the expense of litigation, often for no good reason and to the detriment particularly of plaintiffs, who disproportionately are the targets of such motions.[4] Nonetheless, I

4. A number of published articles report on empirical research about summary judgment motions, but they often do not provide data on the numbers or percentages of summary judgment motions that are denied, or on the numbers or percentages of motions against, rather than by, plaintiffs—much less on the numbers or percentages of motions denied by virtue of findings of genuine issues of material facts as opposed to holdings of law. Two available studies are JOE CECIL & GEORGE CORT, FED. JUDICIAL CTR., INITIAL REPORT ON SUMMARY JUDGMENT PRACTICE ACROSS DISTRICTS WITH VARIATIONS IN LOCAL RULES (2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/$file/insumjre.pdf, and THEODORE EISENBERG & CHARLOTTE LANVERS, SUMMARY JUDGMENT RATES OVER TIME, ACROSS CASE CATEGORIES, AND ACROSS DISTRICTS: AN EMPIRICAL STUDY OF THREE LARGE FEDERAL DISTRICTS (2008), *available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1107&context=lsrp_papers.

write here in support of the post-trial, post-judgment appealability of denials of summary judgment, in limited circumstances. So long as we have summary judgment, we should allow appeals of denials, as well as grants, of such judgments, just as we allow appeals of other orders that may constitute harmful error. Such review will not delay trial or increase the cost of trial. And although it may slightly increase the costs of appeal, that disadvantage will be outweighed by the value of error correction on issues of law.

In this Article, I briefly describe the pre-*Ortiz* circuit splits, analyze *Ortiz*, examine how the courts of appeals have handled the issue since *Ortiz*, and address the several issues with which the Supreme Court did not grapple in *Ortiz*, although the Court spoke to some of them in cursory fashion. The Article recommends what it takes to be the appropriate approach and concludes.

I. BACKGROUND AND THE PRE-*ORTIZ* CIRCUIT SPLIT

A. The Limited Immediate Appealability of Summary Judgment Denials

As a preliminary matter, it is helpful to distinguish reviewability from appealability.

> "'[R]eviewability' . . . refers to whether a trial judge's [or other decision maker's] action can be scrutinized by an appellate court at any time. . . . [A]ppealability assumes that the trial judge's action is reviewable[;] . . .

The Federal Judicial Center study, which was based on data from fiscal 2006, found that one or more summary judgment motions is filed in 17% of cases, that the motions are granted in whole or in part in 62–65% of the cases in which they are filed, and that defendants file summary judgment motions about three times as frequently as plaintiffs do. CECIL & CORT, *supra*, at 2-4, 7.

A great compendium of criticisms of summary judgment as it is implemented in the federal courts is Hon. Mark W. Bennett, *Essay: From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685 (2013). For additional cogent criticisms of summary judgment, see, for example, John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 551 (2007) (arguing that summary judgment discourages settlement, costs more than it saves, and creates a pro-defendant bias); D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273, 274-75 (2010) (arguing that summary judgment motion practice is neither simple, abbreviated nor inexpensive but instead is complex, protracted and expensive, tedious and very time-consuming for parties and judges, and thus is an impediment to the Federal Rules' goals of just, speedy, and inexpensive determinations).

> the question is whether it can be reviewed immediately or whether review must await final resolution of the entire case in the trial court."[5]

Ordinarily, when a court denies a motion for summary judgment, the denial is not immediately appealable, even if the movant sought to have the court dispose of the entire case.[6] Whether the motion was for partial summary judgment or for judgment determining the entire case, a denial of summary judgment ordinarily does not constitute a final decision within the meaning of 28 U.S.C. § 1291.[7] It merely results in the case proceeding. Hence, the denial is not immediately appealable unless it satisfies a common law or statutory exception to the final judgment rule.

On occasion, a denial of summary judgment may be appealable under 28 U.S.C. § 1292(a) as effectively denying an injunction.[8] And

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5. DANIEL J. MEADOR, THOMAS E. BAKER & JOAN E. STEINMAN, APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 48 (2d ed. 2006).

6. *Ortiz*, 131 S. Ct. at 891.

7. *Id.*; *accord* Hearring v. Sliwowski, 712 F.3d 275, 279 (6th Cir. 2013); 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914.28 (2d ed. 1992). The rule that "a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes." Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981). "It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial." *Id.* "Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that that individual plays in our judicial system." *Id.* In addition, the rule is in accordance with the sensible policy of "[avoiding] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." Cobbledick v. United States, 309 U.S. 323, 325 (1940). "The rule also serves the important purpose of promoting efficient judicial administration." *Firestone*, 449 U.S. at 374 (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974)).

8. 28 U.S.C. § 1292(a) provides in pertinent part:

> [T]he courts of appeals shall have jurisdiction of appeals from:
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> > (1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292(a) (2012); *see also* Or. Natural Res. Council, Inc. v. Kantor, 99 F.3d 334, 337-38 (9th Cir. 1996) (reviewing grant and denial of summary judgment where order effectively denied injunctive relief, threatened serious consequences, and could not be effectively challenged other than by immediate appeal).

By contrast, a denial of summary judgment itself is not an interlocutory order refusing an injunction within the meaning of 28 U.S.C. § 1292(a) where it

on occasion a court may authorize an appeal of a denial of summary judgment under 28 U.S.C. § 1292(b).[9] Summary judgment denials also can be reviewed pursuant to the doctrine of pendent appellate jurisdiction in connection with 28 U.S.C. § 1292(a) or (b) appeals, or in conjunction with pre-judgment appeals available under the collateral order doctrine.[10] But summary judgment denials ordinarily will not be appealable pursuant to Federal Rule of Civil Procedure 54(b)[11] because they do not constitute final judgments.[12] Mandamus

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decides only that the case should go to trial because of genuine issues of material fact and does not result in irreparable harm if not immediately reviewed. Switz. Cheese Ass'n v. E. Horne's Mkt., Inc., 385 U.S. 23, 23-25 (1966) (Where plaintiff moved for summary judgment granting a permanent injunction and awarding damages, the district court denied the motion because of genuine issues of material fact, and the intermediate court of appeals dismissed the appeal for want of jurisdiction, the Supreme Court affirmed the decision that the order was not an interlocutory order refusing an injunction within the meaning of 28 U.S.C. § 1292(a), reasoning that "denial of a motion for a summary judgment because of unresolved issues of fact does not settle . . . anything about the merits of the claim. It . . . decides only . . . that the case should go to trial. Orders that in no way touch on the merits . . . are not . . . 'interlocutory' within the meaning of § 1292(a) (1).").

9. 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided*, *however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (2012). *See, e.g.*, Rural Water Dist. No. 4 v. City of Eudora, 720 F.3d 1269, 1278-79 (10th Cir. 2013) (reviewing denial of summary judgment certified by district court under 28 U.S.C. § 1292(b)); Saleh v. Titan Corp., 580 F.3d 1, 4 (D.C. Cir. 2009) (same); McGow v. McCurry, 412 F.3d 1207, 1213 (11th Cir. 2005) (same).

10. *See, e.g.*, Walczyk v. Rio, 496 F.3d 139, 153 (2d Cir. 2007) (exercising pendent jurisdiction over the denial of summary judgment on an unlawful search claim because the denial was inextricably intertwined with the question of defendants' entitlement to qualified immunity); NationsBank Corp. v. Herman, 174 F.3d 424, 427 (4th Cir. 1999) (exercising appellate jurisdiction over a summary judgment denial that was "'intimately bound up with'" the grant of a preliminary injunction (quoting Fran Welch Real Estate Sales, Inc. v. Seabrook Island Co., 809 F.2d 1030, 1032 (4th Cir. 1987))). As to collateral order appeals, see *infra* text accompanying notes 25-26.

11. Federal Rule of Civil Procedure 54(b) provides in pertinent part:

directing a district court judge to grant a motion for summary judgment rarely would be appropriate. To obtain mandamus, "'[t]he party seeking the writ'" typically has to show: (1) that it "'has no other adequate means, such as a direct appeal, to obtain the relief [it] desires'"; (2) that "'petitioner will be damaged or prejudiced in a way [that is] not correctable on appeal'"; (3) that the challenged "'order is clearly erroneous as a matter of law'"; (4) embodies "'an oft-repeated error, or manifests a persistent disregard of the [procedural] rules'"; or (5) that the "'order raises new and important problems, or issues of law of first impression.'"[13] There must be a usurpation of judicial power or a clear abuse of discretion.[14] These

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> (b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

FED. R. CIV. P. 54(b). While a denial of summary judgment could not itself give rise to a Rule 54(b) certification, if a district court certified a final judgment under Rule 54(b) and a party had moved for summary judgment on a claim embraced by the certification, the denial of summary judgment could be viewed as merged in that judgment, and hence appealable with it. *See, e.g.*, Searcy v. City of Dayton, 38 F.3d 282, 288-89 (6th Cir. 1994) (hearing a Rule 54(b) appeal and considering the correctness of a denial of summary judgment that was raised on cross-appeal from a grant of summary judgment).

12. *See supra* text accompanying note 7; *see also* Marshall v. Grand Trunk W. R.R., 850 F. Supp. 2d 686, 709 (W.D. Mich. 2011) (noting that a plaintiff's motion for summary judgment on liability, granted in part and denied in part, was not a final and immediately appealable order).

13. Douglas v. U.S. Dist. Court, 495 F.3d 1062, 1065-66 (9th Cir. 2007) (quoting Bauman v. U.S. Dist. Court, 557 F.2d 650, 654-55 (9th Cir. 1977)); *see also In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1184 (10th Cir. 2006). *See generally* 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE §§ 3934-3934.1 (3d ed. 2012) (concerning the courts of appeals' practice as to supervisory and advisory mandamus).

14. *See, e.g.*, Will v. United States, 389 U.S. 90, 95, 104 (1967) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943)) (quoting De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945)) (citing Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953)) ("The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' . . . While the courts have never

requirements seldom would be met where a summary judgment motion has been denied because the injured party remains able to win at trial and typically suffers no collateral irreparable harm. Additionally, to the extent that denials of summary judgment are in the district court's discretion[15]—and that discretion is such that courts of appeals seldom find abuse[16]—mandamus to require a

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confined themselves to an arbitrary and technical definition of 'jurisdiction,' . . . only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy. . . . Its office is . . . to confine the lower court to the sphere of its discretionary power."), *quoted with approval in* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988); Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). The statutory basis for mandamus jurisdiction is 28 U.S.C. § 1651, which simply states, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2012).

15. There is some uncertainty as to whether and to what extent federal district courts have discretion to deny summary judgment. Federal Rule of Civil Procedure 56(a) states, "The court *shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and [that] the movant is entitled to judgment of a matter of law." FED. R. CIV. P. 56(a) (emphasis added). Thus, read literally, the Rule appears not to provide discretion to deny summary judgment when the Rule's requirements are met. However, historically courts have had some such discretion. *Compare* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (observing that courts may deny summary judgment when they have reason to believe that the better course would be to proceed to trial), *and* Kennedy v. Silas Mason Co., 334 U.S. 249, 256-57 (1948) (vacating lower court's entry of summary judgment and remanding for amplification of the record despite acknowledgment that the district court may have been justified in granting summary judgment, noting that a summary judgment record—because it is not as thorough as the trial record could be—may present a treacherous basis for deciding issues of "far-flung" importance), *with* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (holding that "the plain language of Rule 56(c) mandates the entry of summary judgment" when its requirements are met). *See generally* 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2728 (1998) (speaking in support of the notion that, in most situations in which the moving party seems to have carried its burden under Rule 56, the court has discretion to deny the motion, for various reasons). The amendments to Rule 56 generally are viewed as not having altered the courts' discretion. *See* FED. R. CIV. P. 56 advisory committee's note on 2007 amendments ("These changes are intended to be stylistic only.").

16. *See, e.g.*, Univ. of Rochester v. G.D. Searle & Co., 358 F.3d 916, 920, 930 (Fed. Cir. 2004) (stating that "'when a district court *denies* summary judgment,'" an appellate court "'review[s] that decision with considerable deference to the [district] court' and 'will not disturb the [district] court's denial . . . unless [the appellate court] find[s] that the [district] court has indeed abused its discretion'" and affirming grant of summary judgment and denial of cross-motion for summary

district court to enter summary judgment will be rare. Moreover, mandamus is supposed to be available only as to orders that could not be effectively appealed after final judgment.[17] Although courts often rejected post-judgment appeals of summary judgment denials, they did so not because post-judgment reversal would be ineffective to vindicate the substantive rights of the complaining party, but for other reasons, which we will explore below.[18] Since post-judgment review ordinarily can adequately vindicate the appellant's rights, mandamus will not be appropriate. In many cases, no later interlocutory rulings will provide a pre-judgment opportunity to appeal the denial of summary judgment.[19] Thus, in most cases, the

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judgment (quoting SunTiger, Inc. v. Scientific Research Funding Grp., 189 F.3d 1327, 1333 (Fed. Cir. 1999))).

17. *See, e.g.*, *In re* City of Springfield, 818 F.2d 565, 568-69 (7th Cir. 1987) (finding that the city's ability to obtain relief by eventual appeal doomed its request for mandamus); *In re* Lane, 801 F.2d 1040, 1042 (8th Cir. 1986) (stating that mandamus is limited to prevent litigants from obtaining review of orders that otherwise could not be appealed until after final judgment).

18. *See infra* text accompanying notes 152-80, 220, 232, and 240-64.

19. In many cases, no later interlocutory ruling will be immediately appealable under statutory or common law exceptions to the final judgment rule. Even if some later interlocutory ruling were immediately appealable under such an exception, the denial of summary judgment would become appealable only if it happened to fall within the narrow limits of the pendent appellate jurisdiction doctrine. That doctrine permits a court of appeals to decide an issue—including the propriety of a denial of summary judgment that is not itself immediately appealable—when it is inextricably intertwined with the court's decision of an issue that is properly presented on an interlocutory appeal and when review of the former decision is necessary to ensure meaningful review of the latter, but—thus far—only in those circumstances. *See* Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 50-51 (1995); Iqbal v. Hasty, 490 F.3d 143, 177 (2d Cir. 2007), *rev'd sub nom*. Ashcroft v. Iqbal, 556 U.S. 662, 673-75 (2009) (holding that the sufficiency of a complaint was inextricably intertwined with and directly implicated by defendants' qualified immunity defense and that whether a motion to dismiss for insufficient pleading should be granted or denied poses more of an abstract legal question than a fact-based legal question and resolving it requires an appellate court to consider only the allegations—not a vast pretrial record—which is within an appellate court's core competence); Skehan v. Vill. of Mamaroneck, 465 F.3d 96, 104-05 (2d Cir. 2006) (upholding pendent party appellate jurisdiction and reversing denial of municipality's summary judgment motion where the appellate court overturned rejection of individual defendants' claim to qualified immunity and that ruling necessarily foreclosed a finding of municipal liability). *But see* Pedraza v. Shell Oil Co., 942 F.2d 48, 54-55 (1st Cir. 1991) (declining to exercise pendent appellate jurisdiction over cross-appeal by defendant of the denial of its motion for summary judgment after final judgment via dismissal on preemption grounds). *See generally* Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction*

first opportunity to appeal a denial of summary judgment will arise after final judgment.

Federal courts of appeals often have permitted appeals of summary judgment denials when those denials were raised in cross-appeals after final judgment.[20] These situations may constitute instances of pendent appellate jurisdiction.[21] Typically, appeals courts permit appeals of summary judgment denials when the court is reviewing the grant of an opposing motion for summary judgment on the same claim.[22] This is appropriate when the cross-motions are mirror-images of one another so that the parties agree on the material facts that are not genuinely in dispute and disagree only about which of the parties is entitled to judgment under the law. If the cross-motions were not mirror-images but rather were based on different views of which facts are material, differences of opinion as to whether those facts are genuinely in dispute, and different propositions of law, there would be no reason that the mere fortuity of a cross-motion should justify an appeals court in reviewing a denial of summary judgment that it otherwise would not review.[23]

Before and After Swint, 49 HASTINGS L.J. 1337 (1998); Stephen I. Vladeck, *Pendent Appellate Bootstrapping*, 16 GREEN BAG 2D 199 (2013).

20. *See, e.g.*, Fidelity Co-Operative Bank v. Nova Casualty Co., 726 F.3d 31 (1st Cir. 2013) (stating that, where cross-motions for summary judgment were made, the court of appeals must decide whether either party deserved judgment as a matter of law); Hoechst Celanese Corp. v. BP Chems. Ltd., 78 F.3d 1575, 1584 (Fed. Cir. 1996) (assuming jurisdiction over plaintiff's cross-appeal as a matter of pendent appellate jurisdiction and citing the extent to which review of the appealable orders would involve consideration of factors relevant to the otherwise non-appealable order).

21. *See supra* note 19.

22. *See, e.g.*, Price Trucking Corp. v. Norampac Indus., Inc., 748 F.3d 75 (2d Cir. 2014) (reversing the grant of partial summary judgment to the plaintiff and ordering the grant of summary judgment in favor of the defendant, which had cross-moved for summary judgment); EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1110 (10th Cir. 2013) (recognizing appellate jurisdiction to review the denial of a motion for summary judgment when it is presented in tandem with a grant of summary judgment); Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc., 648 F.3d 452, 459 (6th Cir. 2011) (same); Stilwell v. Am. Gen. Life Ins. Co., 555 F.3d 572, 576 (7th Cir. 2009) (holding that, upon grant of a motion for summary judgment, denial of a cross-motion may be appealed because it is merged in the final judgment).

23. *See* George v. Morris, 736 F.3d 829, 839-40 (9th Cir. 2013) (holding that the court of appeals lacked jurisdiction over plaintiff's cross-appeal of the district court's grant of summary judgment to defendant deputies where her cross-appeal involved different facts and legal standards than those germane to the deputies' interlocutory appeal from the denial of summary judgment to them, based on qualified immunity, on a different one of plaintiff's claims); Rearden LLC v.

Appeals courts nonetheless often state unqualifiedly that they have jurisdiction to review the denial of a summary judgment motion where a cross-motion for summary judgment has been granted.[24] That generalization could lead them into error.

By contrast to the picture sketched above of summary judgment denials that are not immediately appealable, when a motion for summary judgment is based on a defendant's absolute or qualified immunity from suit, denial of the motion may be appealable under the collateral order doctrine.[25] The basic rules are that an immediate appeal from the denial is available when the appeal presents a "purely legal issue," such as what the clearly established law was at the time of defendant's challenged actions, but that an immediate interlocutory appeal is *not* available when the denial of summary judgment rested on the district judge's conclusion that factual issues, genuinely in dispute, precluded summary judgment.[26]

Rearden Commerce, Inc., 683 F.3d 1190, 1202 (9th Cir. 2012) (invoking the proposition that an appeals court "'may review both the grant of [a summary judgment] motion and the *corresponding* denial of the opponent's motion'" (quoting Redevelopment Agency of Stockton v. BNSF Ry. Co., 643 F.3d 668, 672 (9th Cir. 2011))) (emphasis added).

24. *See, e.g.*, HIP Heightened Independence & Progress, Inc. v. Port Auth. of N.Y. & N.J., 693 F.3d 345, 351 n.1 (3d Cir. 2012).

25. Behrens v. Pelletier, 516 U.S. 299, 306-07 (1996) (holding that an officer could immediately appeal the denial of his summary judgment motion to the extent that it turned on issues of law, despite his prior appeal of the denial of his motion to dismiss for failure to state a claim, and notwithstanding that other claims, as to which qualified immunity was not a defense, would require defendant to submit to discovery and to trial); Mitchell v. Forsyth, 472 U.S. 511, 527, 529 (1985) (upholding appeal of a denial of summary judgment, sought on the basis of qualified immunity, reasoning in part that such a denial finally and conclusively disposes of the claim of a right not to stand trial, resolves an issue—the availability of an immunity from suit—that is "conceptually distinct from the merits of the plaintiff's claim," and determines a matter that is too important to be denied effective review and that is not effectively reviewable after final judgment).

26. Johnson v. Jones, 515 U.S. 304, 313 (1995) (holding that a denial of summary judgment predicated on the existence of a genuine issue of material fact is not immediately appealable); *Mitchell*, 472 U.S. at 530 (holding that the denial of a claim to qualified immunity "is an appealable final decision within the meaning of 28 U.S.C. § 1291," to the degree that the qualified immunity claim turns on an issue of law); Campos v. Van Ness, 711 F.3d 243, 245 (1st Cir. 2013) (noting that court of appeals has "jurisdiction to entertain an interlocutory appeal from a denial of summary judgment on qualified immunity grounds 'only if the material facts are taken as undisputed and the issue on appeal is one of law'" (quoting Mlodzinski v. Lewis, 648 F.3d 24, 27 (1st Cir. 2011))).

Ordinarily, if a court denies a motion for summary judgment sought by a defendant based on absolute or qualified immunity from suit, that defendant will want to appeal the denial immediately, so as to avoid further burdens and financial and psychological costs of litigation in the district court. However, if the defendant fails to take the immediate appeal, or if that appeal is rejected on non-merits grounds such as untimeliness, the defendant will want to appeal the denial of summary judgment after final judgment against him. One of the central questions addressed by this Article is whether a defendant may at that point appeal the summary judgment denial.

Similarly, if a motion for summary judgment, sought by either party, is denied and that denial is immediately appealable by virtue of § 1292(a), a § 1292(b) certification, pendent appellate jurisdiction, or the grant of a petition for mandamus, the injured party ordinarily will take the immediate appeal. In these instances, the losing party on the motion typically will be the litigant who sought permission to appeal, if permission is necessary. Having sought and received that permission, or having sought (or argued for denial of) a preliminary injunction that the district court ruled upon in a decision with which the denial of summary judgment was closely bound-up,[27] it would be

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For an order to fall within the collateral order doctrine, it must be conclusive on the matter it addresses, resolve questions that are too independent of the merits to need to be deferred, be too important to be denied review, and involve rights that will be lost if immediate review is not afforded. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545-46 (1949). To regard denials of summary judgment based on genuine issues of material fact as falling within the collateral order doctrine would entail abandoning that doctrine's requirement that the subject of the order be separate from the merits. The overlap between the merits and the question whether there are genuine issues of material fact as to the merits is too great for allowance of an immediate appeal to make sense. *Johnson*, 515 U.S. at 316. The Court also has emphasized that trial courts have greater expertise than appellate courts in determining whether a genuine issue of material fact has been presented, and that it would take an appellate court substantial time to review a decision that genuine issues of material fact preclude summary judgment, in concluding that it would not be a wise use of appellate resources to permit interlocutory appeals of summary judgment denials that were based on the presence of genuine issues of material fact. *Id.* at 316-17.

27. By contrast, the Supreme Court has permitted the *winning* party on a claim to ask the district court to direct entry of a final judgment as to that claim and to expressly determine that there is no just reason for delay of an appeal under Rule 54(b). *See* Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 9-13 (1980) (involving Curtiss-Wright who was granted summary judgment on a claim and sought Rule 54(b) certification; in considering the propriety of the certification, the Court made no mention of the fact that it was the winner on the claim that had

unusual for the litigant not to immediately proceed with the appeal. However, if, for some reason, an available immediate appeal was not taken pursuant to 1292(a), (b), pendent appellate jurisdiction, or mandamus, questions arise whether, post-judgment, the losing litigant can appeal the denial of its summary judgment motion. This Article will address whether defendants who fail to take an available pre-judgment appeal of a summary judgment denial waive the right to appeal the denial after trial and final judgment. It also will address whether defendants who did not waive the right to appeal the denial after trial and final judgment, including those who had no opportunity to take a pre-judgment appeal, may do so after trial and final judgment. A circuit split exists especially as to the latter issue.

Prior to *Ortiz v. Jordan*, all federal appeals courts held that, as a general rule, they would not entertain post-trial, post-judgment appeals of summary judgment denials.[28] But many made a legal question exception, the scope of which is discussed in Section B below.

B. The Pre-*Ortiz* Circuit Splits

Prior to *Ortiz*, some federal courts of appeals took a hard line against post-judgment review of summary judgment denials. Some courts and commentators found the Fourth, Fifth, and Eleventh Circuits to be in this camp.[29] The First and Federal Circuits were not as emphatic, but leaned toward the same unyielding position.[30] Close

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obtained the certification). In that circumstance, it is possible that the party who lost on the claim in question might prefer to wait until later to take the appeal, but courts have held that the appeal must be taken within thirty days after a Rule 54(b) certification, or the appeal will be too late and therefore outside the appellate court's jurisdiction. Taylor v. Cont'l Grp. Change in Control Severance Pay Plan, 933 F.2d 1227, 1231 n.2 (3d Cir. 1991) (citing FED. R. APP. P. 4(a)); Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1549 (11th Cir. 1986).

28. *E.g.*, Cravens v. Smith, 610 F.3d 1019, 1025-27 (8th Cir. 2010) (stating that the Eighth Circuit would not review a district court's denial of summary judgment, after trial on the merits, and that the proper redress was through appeal of the denials of subsequent motions for judgment as a matter of law; pursuant to those principles, refusing to review a summary judgment denial). The court limited its review to issues that plaintiff raised in its motion for a new trial. *Id.* at 1027.

29. Feld v. Feld, 688 F.3d 779, 781-83 (D.C. Cir. 2012) (lining up the circuits somewhat differently); *see, e.g.*, Jesse Leigh Jenike-Godshalk, Comment, *Appealed Denials and Denied Appeals: Finding a Middle Ground in the Appellate Review of Denials of Summary Judgment Following a Full Trial on the Merits*, 78 U. CIN .L. REV. 1595, 1608, 1610 (2010).

30. *See Feld*, 688 F.3d at 782.

examination of the case law from these circuits indicates that their stances were not so absolute, however.

The seminal case in the Fourth Circuit is *Chesapeake Paper Products Co. v. Stone & Webster Engineering Corp*.[31] Although *Chesapeake* is not very notable on its facts,[32] it is notable for its reasoning in rejecting appeals of summary judgment denials that are filed after full trial and entry of judgment. This Article examines and challenges that reasoning in a later section.[33] For the present, note that while the Fourth Circuit often refused to entertain post-judgment appeals of summary judgment denials,[34] even it addressed such appeals when the district court granted the winning party's

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31. 51 F.3d 1229 (4th Cir. 1995).

32. In *Chesapeake*, the district court denied the motion by Stone & Webster (S & W) for partial summary judgment in a breach of contract action, where S & W asked the court to rule as a matter of law that the rights and liabilities of the parties were governed by an amended engineering contract rather than by an amended purchase order. *Id.* at 1230. The district judge denied the motion because of ambiguities in the documentation that presented "'genuine issues of material fact'" regarding the contract's formation, terms, and proper interpretation. *Id.* at 1233 (quoting J.A. at 302). At trial, the jury considered both the same and additional evidence, and ruled for plaintiff. *Id.* Defendant appealed, arguing *inter alia* error in the denial of its motion for summary judgment. *Id.* at 1234. S & W sought to distinguish cases that had disallowed appeals from denials of summary judgment motions, on the ground that they involved motions seeking dismissal of entire cases, whereas S & W's motion sought only partial summary judgment, via a determination of what documents governed the parties' rights and obligations. *Id.* at 1235. It argued that "summary judgment denials of . . . discrete legal issues are and should be reviewable after trial, especially because such issues cannot support a judgment as a matter of law dismissing the opponent's entire claim." *Id.* The Fourth Circuit rejected S & W's characterization of this case as involving a summary judgment denial that raised a discrete legal issue rather than as involving a holding that the case presented genuine issues of material fact, but it addressed and rejected the principle for which S & W argued as well. *Id.*

33. *See infra* text accompanying notes 152-53, 155, 162-65, 172, 177, text following notes 174, 178, and notes 208, 211-12.

34. *See, e.g.*, Rhoads v. FDIC, 257 F.3d 373, 380-81 & n.5 (4th Cir. 2001) (refusing to review denial of summary judgment after trial and judgment on a claim that defendant unlawfully interfered with plaintiff's exercise of her FMLA rights, where plaintiff argued that she established as a matter of law that she suffered from an FMLA-qualifying condition); Benner v. Nationwide Mut. Ins. Co., 93 F.3d 1228, 1233 (4th Cir. 1996) (declining to review a pre-trial denial of summary judgment after trial and judgment as to an insurance policy, the household exclusion of which plaintiff argued was void as a matter of law); BellSouth Telesensor v. Info. Sys. & Networks Corp., No. 92-2355, 1995 U.S. App. LEXIS 24802, at *30-31 (4th Cir. Sept. 5, 1995) (refusing to review allegation that denial of summary judgment was erroneous after trial because there was no genuine issue of material fact when the decision on the motion was made).

corresponding motion for summary judgment,[35] and in non-precedential decisions.[36]

The Fifth Circuit, the second reputed hard-liner, produced an even more mixed set of precedents. The most carefully reasoned Fifth Circuit decision, *Black v. J.I. Case Co.*, rejected post-judgment appeals from summary judgment denials when judgment followed a trial on the merits.[37] The Fifth Circuit was careful to say, however, that *Black* in no way undermined the Circuit's decisions reviewing summary judgment denials "where the district court granted the opposing party's summary judgment motion."[38] Moreover, in *Becker v. Tidewater, Inc.*, the court held review of the district court's legal conclusions in denying summary judgment to be appropriate where the case had been tried to the judge, in a bench trial.[39] It noted that other circuits hold a denial of summary judgment to be appealable after trial on the merits when the district court's ruling depends on the decision of an issue of law and that Rule 50 motions are not required following a bench trial.[40] In its view, the fact that *Becker*

35. *Benner*, 93 F.3d at 1232-33 (reviewing the denial of plaintiff's motion for summary judgment regarding an umbrella insurance policy, where the district court had granted Nationwide's corresponding summary judgment motion, relying on *Chesapeake*'s limitation of its holding not to apply to such situations).

36. *See, e.g.*, Hedgepeth v. Parker's Landing Prop. Owners Ass'n, 388 F. App'x 242, 245 (4th Cir. 2010). The district court had denied Hedgepeth's motion for summary judgment, concluding that there were no issues of material fact, but ruling against him on the law as to the easement he claimed. *Id.* On appeal, he raised the issue on which he had lost in the denial of his summary judgment motion. *Id.* The Fourth Circuit's opinion indicates that, at oral argument, Hedgepeth waived a particular argument in support of the easement that he claimed and embraced another. *Id.* The court considered the latter only, in light of Hedgepeth's waiver of the former, but it nowhere indicated that it would not consider the easement issue because the alleged error in deciding it had come in the denial of plaintiff's motion for summary judgment. *Id.* at 245-46.

37. 22 F.3d 568, 570-71 (5th Cir. 1994) (re-affirming prior Fifth Circuit decisions).

38. *Id.* at 570 n.3 (citing Ranger Ins. Co. v. Estate of Mijne, 991 F.2d 240, 241 (5th Cir. 1993)) (reversing denial of summary judgment in conjunction with review of a district court's grant of summary judgment, noting that because the underlying facts were stipulated, only questions of law remained). More recent Fifth Circuit decisions have continued to allow post-judgment appeals from summary judgment denials that were paired with the grant of a cross-motion for summary judgment. *E.g.*, Parkans Int'l LLC v. Zurich Ins. Co., 299 F.3d 514, 516 (5th Cir. 2002).

39. 586 F.3d 358, 365 n.4 (5th Cir. 2009).

40. *Id.* at 365-66 n.4. Indeed, they are not allowed. Federal Rule of Civil Procedure 50 applies only to jury trials. FED. R. CIV. P. 50. In bench trials, "the court must find the facts specially and state its conclusions of law separately." FED. R.

involved a bench trial, rather than a trial to a jury, distinguished it from *Black*, and the precedents from other circuits that were contrary to *Black* gave the court reason to look for bases for distinguishing *Black*.[41]

In *Davidson v. Veneman*, after final judgment, a Fifth Circuit panel reviewed a denial of summary judgment seeking an award of interest, and affirmed.[42] It did not discuss the propriety of reviewing that order. And in *Empire Fire & Marine Insurance Co. v. Brantley Trucking, Inc.*, the Fifth Circuit, while purporting to follow the rule against allowing post-judgment appeals from summary judgment denials, faced a situation in which the district court, in its final judgment, "denied Empire's motion for summary judgment, finding as a matter of law that no exclusion in Empire's [insurance] policy precluded primary coverage for the truck accident" that was the basis of the underlying suit.[43] Because the summary judgment was "in" the final judgment, review of the latter entailed review of the former.[44] Later, we will return to the question whether summary judgment denials aren't always merged in the final judgment.[45] For the moment, the point is that these cases illustrate that the Fifth Circuit's position appears to have softened.

The Eleventh Circuit, the third reportedly hard-line circuit, did not take an unyielding position against post-trial, post-judgment appeals of earlier denials of summary judgment motions. The court reviewed denials of motions for summary judgment, after final judgment, when it reviewed grants of cross-motions for summary judgment.[46] In addition, in *Griffith v. General Motors Corp.*, the

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CIV. P. 52(a)(1). Although Rule 52(a)(3) provides that a district "court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56," FED. R. CIV. P. 52(a)(3), Rule 56(a) directs district courts to "state on the record the reasons for granting or denying the motion," FED. R. CIV. P. 56(a). When a court concludes that genuine issues of material fact are present, it does not go on to make findings on those genuine issues; it leaves them to the jury. *See* FED. R. CIV. P. 56(a). If a court concludes that no genuine issues of material fact are present, it will make findings and decide the issues of law presented in the course of "stat[ing] on the record the reasons for granting or denying the motion." *Id.*

41. *Becker*, 586 F.3d at 365-66 n.4.

42. 317 F.3d 503, 505, 508, 510 (5th Cir. 2003).

43. 220 F.3d 679, 680 (5th Cir. 2000).

44. *Id.*

45. *See infra* text accompanying notes 241-46.

46. *See, e.g.*, Chavez v. Mercantil Commercebank, N.A., 701 F.3d 896, 904 (11th Cir. 2012) (reversing order granting summary judgment to the bank and denying summary judgment to Chavez); Equity Inv. Partners, LP v. Lenz, 594 F.3d

Eleventh Circuit entertained General Motors' cross-appeal of the denial of its motion for summary judgment on a claim that the seatbelt system was defective in the Silverado model[47] where it heard that appeal, not in conjunction with an appeal from the grant of a cross-motion for summary judgment, but in conjunction with plaintiff's appeal from a jury verdict against her on the defective seatbelt claim.[48] Thus, the court reviewed the denial of a summary judgment motion on appeal following a full trial and judgment.[49]

When the First Circuit took a hard stand against post-trial, post-judgment appeals of summary judgment denials, it did so (at least in recent years) in contexts in which the appellate court found that fact

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1338, 1345 (11th Cir. 2010) (reversing the grant and affirming the denial of motions for summary judgment, both on the basis of genuine issues of material fact).

47. 303 F.3d 1276, 1278, 1284 (11th Cir. 2002).

48. *Id.* at 1278.

49. Earlier, in *Holley v. Northrop Worldwide Aircraft Services, Inc.*, the court had made the point that "a party may not rely on the undeveloped state of the facts at the time he moves for summary judgment to undermine a fully-developed set of trial facts." 835 F.2d 1375, 1378 (11th Cir. 1988). The court's position was that

> the party whose motion for summary judgment was denied may not appeal [denial of] the motion if the party admits that: (a) by trial[,] the evidence produced by the opposing party was sufficient to be presented to the jury; or (b) by trial[,] the evidence had been supplemented or changed in some manner favorable to the party who opposed summary judgment.

Id. at 1377-78. In *Holley*, the moving party had conceded that, by trial, the evidence was sufficient to go to the jury. *Id.* at 1377. As one commentator has explained,

> [t]his reasoning would support a legal issue exception. If the denial of summary judgment was based on a legal issue, then a party could argue that the issue was for the judge to decide, and there was nothing to submit to the jury. A party could also potentially argue that any factual developments would not affect the determination of the legal issue.

Jenike-Godshalk, *supra* note 29, at 1604-05 n.57. While sometimes rejecting the distinction, other circuits, like the commentator, acknowledged that *Holley*'s reasoning supports the distinction, for appeals purposes, between law-based and fact-based summary judgment denials. *See* Black v. J.I. Case Co., 22 F.3d 568, 571 n.5 (5th Cir. 1994) (finding that the reasoning in *Holley* supported that distinction); Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, 1235 & n.8 (4th Cir. 1995) (same). But in *Lind v. United Parcel Service, Inc.*, the court, announcing broad dicta, stated that a pretrial denial of a summary judgment motion was not reviewable on appeal following a full trial and judgment. 254 F.3d 1281, 1286 (11th Cir. 2001). The court found that the *Holley* rule had been extended beyond the conditions *Holley* stated, and that the circuit had in effect adopted the rule against all post-trial review of summary judgment denials, even though the extension of *Holley* had come in cases where the sufficiency of the evidence was at issue. *Id.* at 1283-84. The *Griffith* case, discussed in the text, reflects a retreat from *Lind*'s position. *Griffith*, 303 F.3d at 1278, 1284.

issues precluded summary judgment so that the "challenge [fell] under the general prohibition against reviewing summary judgment denials after a full trial and final judgment on the merits."[50] The denials would not have been appealable even if the First Circuit recognized an exception for appeals of denials that were predicated on legal determinations. In *Commercial Union Insurance Co. v. Pesante*, the court entertained a post-judgment appeal of a summary judgment denial where, after the denial, the parties filed a Joint Motion for Entry of Final Judgment in favor of Pesante, which judgment the district court then entered.[51] The court noted that although it does

> "not have jurisdiction over denials of summary judgment motions . . . where a genuine issue of material fact remains in dispute[,]" . . . [h]ere . . . there were no longer any factual matters to be resolved at a trial . . . . It is from this final judgment, based on undisputed facts, that Commercial Union appeals, and we therefore have jurisdiction.[52]

On the merits, the court reversed the judgment and directed entry of judgment for Commercial Union.[53] Such a position exemplifies accepting post-judgment appeals from summary judgment denials when they pose only issues of law—although here there had been no trial.

In the 1980s, the Federal Circuit said that a denial of summary judgment is not reviewable on appeal from the final judgment entered after trial, but—like the First Circuit—it took this position in cases in which summary judgment was denied based on the existence of triable issues of fact.[54] But in 1999, 2009, and 2013, it concluded

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50. *See, e.g.*, Ji v. Bose Corp., 626 F.3d 116, 128 n.11 (1st Cir. 2010); Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 92 (1st Cir. 2003) (refusing a post-trial, post-judgment appeal of a summary judgment denial where the arguments rested on alleged inadmissibility of evidence and failure to offer sufficient evidence to go to trial, noting that the facts elicited at trial often are probative of defendants' entitlement to qualified immunity).

51. 459 F.3d 34, 36 (1st Cir. 2006).

52. *Id.* at 36-37 (quoting Rivera-Jiménez v. Pierluisi, 362 F.3d 87, 93 (1st Cir. 2004)). The First Circuit also considered the appeal from a denial of summary judgment in conjunction with considering the appeal from a grant of summary judgment. *See, e.g.*, P.R. Am. Ins. Co. v. Rivera-Vázquez, 603 F.3d 125, 132-34 (1st Cir. 2010) (vacating both orders because of errors and inconsistencies in the district court's approach to the motions); *see also* Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys., 173 F.3d 46, 50 (1st Cir. 1999) (reversing and granting summary judgment to the loser below on appeals after cross-motions for summary judgment).

53. *Commercial Union*, 459 F.3d at 38-39.

54. *See, e.g.*, Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1567, 1573 (Fed. Cir. 1986) (refusing to review, after trial and judgment, a denial of summary

differently, in holdings and in dicta, stating 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.[55] It may be that, after final judgment at trial, the Federal Circuit will review a summary judgment denial, but only if the regional circuit from which a case came would do so.[56]

The Eighth Circuit has been inconsistent. It sometimes has rejected the distinction between summary judgments denied by dint of genuine issues of material fact and those denied on legal grounds, in deciding whether the denials were appealable after trial on the merits.[57] In other cases, it has held that when the denial was based on

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judgment that had been based on the trial court's finding of genuine factual disputes as to plaintiff's second claim); Senza-Gel Corp. v. Seiffhart, 803 F.2d 661, 669 (Fed. Cir. 1986) (declining, after trial and judgment, to review denial of summary judgment where the district court had recognized several issues of fact that had to be determined before defendant could be held liable for a tying arrangement in violation of the antitrust laws).

55. Revolution Eyewear, Inc. v. Aspex Eyewear, Inc., 563 F.3d 1358, 1366 n.2 (Fed. Cir. 2009) (dicta); United Techs. Corp. v. Chromalloy Gas Turbine Corp., 189 F.3d 1338, 1344 (Fed. Cir. 1999) (relying on the principle stated in the text in reviewing and reversing, on appeal after a bench trial and final judgment, the denial of United's motion for summary judgment, which was sought on the basis of res judicata). The court did, however, first examine whether United preserved its res judicata defense for appeal. *United Techs. Corp.*, 189 F.3d at 1344. It stated that "[a] party may preserve an issue for appeal by renewing the issue at trial or by including it in memoranda of law or proposed conclusions of law." *Id.* "From the record below, [it found] that United renewed the res judicata issue during the [] bench trial and in its proposed conclusions of law submitted to the court after the trial," so it reached the res judicata issue. *Id.*

56. *See* Taurus IP, LLC v. DaimlerChrysler Corp., 726 F.3d 1306, 1340 (Fed. Cir. 2013) (looking to Seventh Circuit law in concluding that, after trial and judgment, a denial of summary judgment could be appealed if the motion involved a purely legal question and factual disputes that went to trial did not affect the resolution of that legal question).

57. Metro. Life Ins. Co. v. Golden Triangle, 121 F.3d 351, 355 & n.7 (8th Cir. 1997) (finding the distinction problematic and without merit in light of the absence of a requirement that a district court delineate why it denied summary judgment and the potential difficulty an appellate court would face in making that determination, the argument that "'all summary judgments are rulings of law,'" concern that such an approach might benefit only litigants who fail to utilize Federal Rule of Civil Procedure 50 and 28 U.S.C. § 1292(b), and concern that such a distinction might deter the exercise of discretion to deny summary judgment (quoting Black v. J.I. Case Co., 22 F.3d 568, 571 n.5 (5th Cir 1994))). Since December 1, 2010, however, Federal Rule of Civil Procedure 56 has required district courts to explain their summary judgment rulings. FED. R. CIV. P. 56(a). The

a purely legal question, the decision was appealable after final judgment.[58] Post-*Ortiz*, it held a denial of summary judgment not to be appealable after final judgment, regardless of the grounds of the denial, but in doing so it relied solely on the principle that the earliest circuit opinion should be followed when conflicting panel opinions have come to exist.[59] The earliest opinion of the court had rejected post-trial appeals of summary judgment denials regardless of the grounds on which summary judgment had been denied.[60]

The Second Circuit has ruled against post-trial, post-judgment review of summary judgment denials, based in part on judicial economy. It has expressed fears that, if review routinely were available, district courts would be wary of denying summary judgment and of wasting their resources trying cases to judgments that later would be overturned on the basis of an erroneous denial of summary judgment. For this reason and others, in the leading case of *Pahuta v. Massey-Ferguson, Inc.*, the Second Circuit determined that it generally would not review denials of summary judgment.[61] But *Pahuta* reached this decision where the motion had been denied because of genuine issues of material fact and where denial of a Rule 50 motion confirmed that trial had been necessary.[62] The court observed that review would not spare the parties the burden of trial; that it made no sense to reverse a judgment on a verdict where the trial evidence was sufficient even if, at the summary judgment stage, the available evidence had not been sufficient; and that greater injustice would be done by depriving a party of a jury verdict than by failing to reverse an erroneous summary judgment denial.[63]

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other concerns expressed in *Metropolitan Life* are addressed later in this Article. *See infra* text accompanying notes 152-62, 177-219, 263-65.

58. White Consol. Indus., Inc. v. McGill Mfg. Co., 165 F.3d 1185, 1189-92 (8th Cir. 1999) (addressing argument after trial and judgment that district court erred in denying motion for partial summary judgment where the denial was based on a purely legal question, here a question of contract interpretation), *acknowledged in* Hertz v. Woodbury Cnty., 566 F.3d 775, 780 (8th Cir. 2009); *cf.* Bakker v. McKinnon, 152 F.3d 1007, 1010-12 (8th Cir. 1998) (purporting to follow the general rule after a bench trial against permitting post-trial, post-judgment review of a denial of summary judgment but addressing the very legal issues that plaintiff raised in her rejected summary judgment motion).

59. *See* Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011).

60. Lopez v. Tyson Foods, Inc., 690 F.3d 869, 875 (8th Cir. 2012).

61. 170 F.3d 125, 129-30 (2d Cir. 1999).

62. *Id.* at 131.

63. *Id.* at 130-32. Cases following *Pahuta* include *Rivenburgh v. CSX Transportation*, 280 F. App'x 61, 63 (2d Cir. 2008); *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 199 (2d Cir. 2004); *Hermès International v. Lederer de Paris Fifth*

However, *Pahuta* cited, approvingly, a case in which the Second Circuit had held that summary judgment denials can be appealed once final judgment has been entered if there was no intervening trial on the merits,[64] and left open the possibility of making exceptions to the norm.[65] In a later case, *Schaefer v. State Insurance Fund*,[66] the Second Circuit declared that the rule that "'where summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed,' . . . *does not apply* where the district court's error was purely one of law."[67]

In the remaining circuits, the trend also has been toward allowing post-judgment appeals of summary judgment denials that rested on errors of law. The Third Circuit exemplifies this trend. In *Pennbarr Corp. v. Insurance Co. of North America* (INA), it ordered the jury verdict in favor of plaintiff Remington and the district court's award to Remington to be vacated, and reversed the order of the district court denying INA's motion for summary judgment.[68] It did so on the basis of its holding that, as a matter of law, Remington could not recover the losses it claimed under its business interruption insurance policy.[69] The Third Circuit also has found jurisdiction to review summary judgment denials upon cross-appeals of summary judgment grants and denials.[70]

Avenue, Inc., 219 F.3d 104, 109 (2d Cir. 2000); *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224, 229 n.2, 232 (2d Cir. 2000).

64. *Pahuta*, 170 F.3d at 131-32 (citing United States v. 228 Whites Hill Road, 916 F.2d 808, 811 (2d Cir. 1990)).

65. *Id.* at 132.

66. 207 F.3d 139 (2d Cir. 2000).

67. *Id.* at 142 (emphasis added) (quoting McPherson v. Kelsey, 125 F.3d 989, 995 (6th Cir. 1997)).

68. 976 F.2d 145, 155 (3d Cir. 1992).

69. *Id.* at 149, 151.

70. *See, e.g.*, HIP Heightened Independence & Progress, Inc. v. Port Auth. of N.Y. & N.J, 693 F.3d 345, 351 & n.1 (3d Cir. 2012) (exercising appellate jurisdiction to review denial of a summary judgment motion where a cross-motion for summary judgment had been granted); Sacred Heart Med. Ctr. v. Sullivan, 958 F.2d 537, 543 (3d Cir. 1992) (reviewing rulings on cross-motions for summary judgment and remanding for entry of summary judgment in favor of appellant); *see also* Pediatrix Screening, Inc. v. Telechem Int'l, Inc., 602 F.3d 541, 545-48 (3d Cir. 2010) (permitting plaintiff to appeal the defendant's recovery on a counterclaim on the ground that it was barred by a legal defense, where the legal argument was clearly set forth in plaintiff's Rule 12(b)(6) motion, defendant "was not ambushed by Pediatrix's post-trial argument . . . nor confronted by the re[-]animation of a lifeless corpse" and, the court concluded, "'[i]t would be unfair to . . . penalize [a party] for failing to jump up and down or labor an objection' that had already been

The Sixth Circuit has recognized an exception to the general rule against allowing a post-trial appeal of the denial of a summary judgment motion where the denial involved a question of law, rather than being based upon the presence of issues of material fact.[71] The court reasoned that the interests underlying the general rule are not implicated when the denial is based on a question of law.[72] It may not apply this exception, however, when a disputed factual question is inextricably tied to the legal issue.[73]

The Seventh Circuit has sent conflicting signals. It recognized an exception to the general rule disfavoring post-trial review of summary judgment denials in cases where the plaintiff–movant notified the district court of its intention to abandon claims at trial if summary judgment as to those claims were denied, for then the denial "had the effect of ending any consideration of the claim[s]" in question in the district court.[74] The Seventh Circuit even suggested a general receptivity to post-trial review of summary judgment denials

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preserved for appeal" (quoting Bohler-Uddeholm Am., Inc. v. Ellwood Grp., 247 F.3d 79, 109 (3d Cir. 2001))). *See generally* 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2818 (3d ed. 2012) ("The settled rule in federal courts . . . is that a party may assert on appeal any question that has been properly raised in the trial court. Parties are not required to make a motion for a new trial challenging the supposed errors as a prerequisite to appeal.").

71. United States *ex rel*. A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc., 400 F.3d 428, 441 (6th Cir. 2005) (reviewing denial of summary judgment that was based upon a determination that certain matters were immaterial, an issue that did not require the resolution of any disputed facts).

72. Paschal v. Flagstar Bank, FSB, 295 F.3d 565, 571-72 (6th Cir. 2002) (permitting post-trial, post-judgment review of a denial of summary judgment based upon a legal issue—tolling of the statute of limitations—that did not require the resolution of any disputed facts); McPherson v. Kelsey, 125 F.3d 989, 995 (6th Cir. 1997) (after post-trial entry of judgment as a matter of law against defendant Sowle on an unreasonable search and seizure claim, reversing denial of summary judgment for Sowle on that claim, based upon qualified immunity, emphasizing that the error was purely one of law and that no injustice flows from such a reversal that is comparable to the injustice that would flow if a jury verdict were reversed after summary judgment were denied based on a perceived issue of fact); *cf.* Kennedy v. City of Cincinnati, 483 F. App'x 110, 111-12 (6th Cir. 2012) (denying appellate review of the order denying plaintiff's motion for summary judgment after entry of judgment on a jury verdict on the ground that there existed genuine issues of material fact).

73. Barber v. Louisville & Jefferson Cnty. Metro. Sewer Dist., 295 F. App'x 786, 789-90 (6th Cir. 2008).

74. EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 353 n.55 (7th Cir. 1988).

that were based on legal rulings.[75] The court subsequently took the position, however, that "[a]bsent an extraordinary circumstance such as the one encountered in *Sears, Roebuck*,[76] [it would] not review the denial of a motion for summary judgment once the district court . . . conducted a full trial on the merits."[77] Still, it is clear from the context that, in taking this position, the court had in mind situations in which summary judgment was denied on the basis of genuine issues of material fact.[78] When an occasion arose to review post-judgment a denial of summary judgment that posed an issue of law, unmixed with disputed issues of fact, the court proceeded to do the review and reverse the district court.[79]

The Ninth Circuit recognizes that a denial of summary judgment is not properly before the court of appeals after judgment predicated on a jury trial where the trial court found genuine issues

75. *See* Trs. of Ind. Univ. v. Aetna Cas. & Sur. Co., 920 F.2d 429, 433 (7th Cir. 1990) (explaining that "the district court's refusal to rule on the applicability of" a "warranty, as a matter of law, because it substantially affected the issues that were tried and upon which judgment was entered, was an interlocutory decision that can be challenged in this appeal from the final judgment").

76. *See supra* text accompanying note 74.

77. Watson v. Amedco Steel, Inc., 29 F.3d 274, 278 (7th Cir. 1994).

78. *See id.*

79. Grun v. Pneumo Abex Corp., 163 F.3d 411, 419, 425 (7th Cir. 1998) (rejecting the contention that the court lacked jurisdiction to review the denial of summary judgment, even after a dismissal for want of prosecution, noting that the proper appeal of a final judgment brings up all issues resolved by the trial court, and directing summary judgment for Grun on his breach of contract claim); *see also* Tuohey v. Chi. Park Dist., 148 F.3d 735, 736, 739 & n.5 (7th Cir. 1998) (involving an appeal by an employee who argued "that the district court should have entered judgment as a matter of law in her favor based on the findings of the [employer's] human rights officer," noting that Tuohey's motion was styled a motion for summary judgment, and concluding that the bindingness of the officer's report was "a potentially dispositive legal question that [was] not rendered moot by . . . trial," and that the court of appeals could consider on appeal the district court's decision to deny preclusive effect to the report); Rekhi v. Wildwood Indus., Inc., 61 F.3d 1313, 1318 (7th Cir. 1995) (noting that "the principle that an order denying summary judgment is rendered moot by trial . . . is intended for cases in which the basis for the denial was that the party opposing the motion had presented enough evidence to go to trial" and holding that defendant's res judicata defense was "not extinguished merely because [it was] presented and denied at the summary judgment stage"; when plaintiff went on to win, the defendant could reassert the res judicata defense on appeal).

of material fact.[80] In a passage that numerous circuits later quoted, the Ninth Circuit stated in *Locricchio v. Legal Services Corp.*:

> [T]he party moving for summary judgment suffers an injustice if his motion is improperly denied. This is true even if the jury decides in his favor. The injustice arguably is greater when the verdict goes against him. 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*.[81]

At the same time, on several occasions the Ninth Circuit has agreed to address, after final judgment, whether denial of an earlier motion for summary judgment was erroneous where the denial was based on an alleged error of law.[82] To review the decision of a legal issue posed by a summary judgment motion, it has said, is very different from "engag[ing] in the 'pointless academic exercise'" of deciding whether a factual issue was disputed after it has been decided.[83]

The Tenth Circuit follows the principles adopted by the Ninth Circuit as to the usual case of summary judgments denied because of genuine issues of material fact, adding language that courts elsewhere found attractive. It noted that parties should not be permitted to use summary judgment motions as a "bomb" that could be set early in the litigation and then detonate, to the surprise of the

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80. JJCO, Inc. v. Isuzu Motors Am., Inc., 492 F. App'x 715, 718 (9th Cir. 2012) (citing Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1359 (9th Cir. 1987)).

81. 833 F.2d at 1359 (emphasis added).

82. *See, e.g.*, Banuelos v. Constr. Laborers' Trust Funds, 382 F.3d 897, 902, 904-05 (9th Cir. 2004) (taking the position that the general rule—against reviewing summary judgment denials after trial on the merits—"does not apply to those denials of summary judgment motions where the district court made an error of law that, if not made, would have required the district court to grant the motion," reversing the denial of summary judgment and vacating the judgment that the district court had entered because "the district court erred [in] concluding [that] it could hear evidence that was not in the administrative record" and, had it considered only evidence within that record, it would have had to grant plaintiff's summary judgment motion); *accord* Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236 (9th Cir. 2014) (reviewing denial of summary judgment after trial and judgment because the appeal challenged the district court's ruling on a question of law); Pavon v. Swift Transp. Co., 192 F.3d 902, 906 (9th Cir. 1999) (post-jury trial and judgment, reviewing the denial of summary judgment sought on the basis of claim preclusion, noting that the preclusion question was a question of law, and reasoning that, 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 trial, the appellate court should review that decision).

83. *Pavon*, 192 F.3d at 906 (quoting Lum v. City & Cnty. of Honolulu, 963 F.2d 1167, 1170 (9th Cir. 1992)).

opposing party, on appeal from final judgment.[84] But in 1994, in *Ruyle v. Continental Oil Co.*, the Tenth Circuit adopted the exception, allowing post-trial, post-judgment appeals of denials of summary judgment based upon legal conclusions rather than upon genuine issues of material fact, and held that the legal issues would be preserved for appeal and that a Rule 50 motion for judgment as a matter of law—which it found inapt—would not be needed to raise the legal issues.[85] After jury trial and judgment, the D.C. Circuit too has reviewed denials of summary judgment that raised questions of law.[86]

The foregoing survey indicates significant support in the intermediate federal appellate courts for post-trial, post-judgment review of summary judgment denials *when* the issue presented is a question of law and not a question of whether the trial court was correct to allow the case to proceed because it found disputed issues of material fact on the record that existed at the time of a summary judgment motion and its decision. The Supreme Court perceived the circuits to have divided,[87] and granted certiorari in *Ortiz v. Jordan* to

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84. Whalen v. Unit Rig, Inc., 974 F.2d. 1248, 1251 (10th Cir. 1992) (quoting Holley v. Northrop Worldwide Aircraft Servs., Inc., 835 F.2d 1375, 1377 (11th Cir. 1988)).

85. 44 F.3d 837, 841 (10th Cir. 1994).

86. Kropinski v. World Plan Exec. Council-US, 853 F.2d 948, 950-51, 957 (D.C. Cir. 1988) (reviewing denial in part of defendants' motion for summary judgment on all claims, asserting that the facts alleged by Kropinski failed to state a cause of action for fraud, negligence, or intentional tort, and that the claims were barred by the District's three-year statute of limitations, and concluding that the district court erred in allowing one negligence claim and certain aspects of the fraud claim to go to trial).

87. There are so many cases concerning the post-judgment appealability of summary judgment denials that it is difficult to confidently characterize the positions of the circuits. While my best efforts to characterize the positions of the circuits are reflected in the preceding text, other commentators have come to somewhat different conclusions. For example, one author, writing in 2011, found that the Fourth, Eighth, and Eleventh Circuits made no legal-question exception to their refusal to entertain post-trial appeals from summary judgment denials, while the Fifth, Sixth, Seventh, and Ninth Circuits did make such an exception. Paul S. Morin, Note, *The New Temporal Prime Directive:* Ortiz *& the Death of Post-trial Appeals from Pre-trial Summary Judgment Denials*, 24 REGENT U. L. REV. 205, 218 (2012). He did not comment on the position of the other circuits in this regard. *Id.* Another commentator, writing in 2010, placed the Second, Eighth, Tenth, and Federal Circuits, in addition to the circuits mentioned above, in the camp accepting the legal-question exception. Jenike-Godshalk, *supra* note 29, at 1604 & n.56, 1605, 1606 & n.65, 1607. *See generally*, John R. Spade, Comment, Feld v. Feld*: The Federal Circuit Split over Post-Trial Appeals from Pre-Trial Summary Judgment Denials Asserting Purely Legal Issues*, 37 AM J. TRIAL ADVOC. 447 (2013)

resolve the question whether a party may "appeal an order denying summary judgment . . . after a district court has conducted a full trial on the merits."[88]

II. *ORTIZ*

In *Ortiz*, a former inmate brought a 42 U.S.C. § 1983 suit against prison officials, alleging that she had been twice sexually assaulted by a prison guard when she was incarcerated, and that prison officials had failed to protect her against the second assault and instead had retaliated against her for reporting the incident, by placing her, "shackled and handcuffed, in[to] solitary confinement[,] in a cell without adequate heat, clothing, bedding, or blankets," in violation of her Eighth and Fourteenth Amendment rights.[89] The principal defendants, Jordan and Bright, a case manager at Ortiz's living unit and a prison investigator, moved for summary judgment on the basis of qualified immunity, arguing that they should be shielded from suit because their conduct did not violate clearly established statutory or constitutional rights of which they, as reasonable persons, should have known.[90] The trial judge denied the motion, concluding that there were genuine issues of material fact upon which both plaintiff's claim and defendants' claim to qualified immunity depended.[91] Neither defendant appealed the district judge's denial of summary judgment.[92]

(surveying the law and reaching some of the same conclusions as this Article reaches).

The Petition for Writ of Certiorari in *Ortiz v. Jordan* argued that the circuits are divided, with some recognizing a "legal question" exception to the general rule that denials of summary judgment may not be appealed after a full trial on the merits, and others rejecting such an exception to the general rule, and that the circuits were further divided, with some allowing post-trial appeals that could have been raised before trial, and others rejecting such appeals. Petition for Writ of Certiorari at 2, 10-15, Ortiz v. Jordan, 131 S. Ct. 884 (2011) (No. 09-737). Respondents minimized the circuit splits, arguing in part that only the Fourth Circuit was plainly opposed to post-trial appeals of summary judgment denials, and that no clear split existed as to the second alleged circuit split. Brief in Opposition to Petition for Writ of Certiorari at 17, 20, *Ortiz*, 131 S. Ct. 884 (No. 09-737).

88. 131 S. Ct. 884, 888-89, 891 (2011).
89. *Id.* at 888.
90. *Id.*
91. *See id.*
92. *Id.* at 890.

The jury returned verdicts against both defendants.[93] The trial court entered judgment in accordance with the jury's verdict.[94] On appeal, Jordan and Bright argued both that the district court erred in failing to grant them summary judgment based on their qualified immunity defense and that the verdict was against the weight of the evidence.[95] While the Court of Appeals for the Sixth Circuit recognized[96] that appeals courts "'normally do not review the denial of a summary judgment motion after a trial on the merits,'" it found that "'denial . . . based on qualified immunity is an exception to this rule.'"[97] Appraising the evidence *de novo*, the Sixth Circuit reversed the judgment on the jury verdict, holding that qualified immunity shielded both defendants from Ortiz's suit.[98]

The Supreme Court granted certiorari to decide the circuit-splitting question, "May a party . . . appeal an order denying summary judgment after a full trial on the merits?"[99] The Court immediately answered with an unqualified "no."[100]

The Court reasoned that an order denying summary judgment

> retains its interlocutory character as simply a step along the route to final judgment. Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion. . . . The plea [of qualified immunity] remains available to the defending officials at trial; but at that stage, the defense must be evaluated in light of the character and quality of the evidence received in court[, not by reference to the summary judgment record]. . . . After trial, if defendants continue to urge qualified immunity, the decisive question, ordinarily, is whether the evidence favoring the party seeking relief is legally sufficient to overcome the defense.[101]

The Court went on to say that, in the instant case, although the Sixth Circuit purported to review the district judge's denial of the prison officials' pre-trial summary judgment motion, it actually relied in part on evidence presented only at trial.[102] Thus, the appeals court erred in characterizing its review as review of the summary judgment

93. *Id.* at 888.
94. *Id.* at 891.
95. *Id.*
96. This was the Supreme Court's characterization. *Id.* at 888.
97. *Id.* (quoting Ortiz v. Jordan, 316 F. App'x 449, 453 (6th Cir. 2009)).
98. *See id.* at 891.
99. *Id.* at 888-89.
100. *Id.* at 889.
101. *Id.* (citation omitted).
102. *Id.*

denial.[103] The more important (and correlative) infirmity in its decision, however, was rooted in the court of appeals' lack of authority to review the district judge's appraisal of the trial evidence where defendants had not contested the jury's finding of liability by renewing their motion for judgment as a matter of law, under Rule 50(b), after the jury reached its decision.[104] Nor did defendants request a new trial under Rule 59, as Rule 50(b) contemplates that litigants may do.[105]

In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, the Court had held that, absent a post-verdict Rule 50(b) motion for judgment as a matter of law or, alternatively, for a new trial, based on the insufficiency of the evidence, an appellate court lacks power to review the sufficiency of the evidence at trial.[106] The Court in *Ortiz* held that, to the extent the defendant officials argued that Ortiz had not proven her case on the facts, they were raising a sufficiency-of-the-evidence challenge, but were precluded from doing so by *Unitherm* in view of their failure to make a post-verdict Rule 50 motion.[107] In other words, when summary judgment is sought on the basis of qualified immunity, but is denied based on the presence of genuine issues of material fact, rather than by dint of conclusions of

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103. *Id.*

104. *Id.* Federal Rule of Civil Procedure 50 provides in relevant part that:

> (a) Judgment as a Matter of Law.
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> . . . .
>
> (2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.
>
> (b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:
>
> (1) allow judgment on the verdict, if the jury returned a verdict;
>
> (2) order a new trial; or
>
> (3) direct the entry of judgment as a matter of law.

FED. R. CIV. P. 50(a), (b).

105. *Ortiz*, 131 S. Ct. at 891; FED. R. CIV. P. 50(b).

106. 546 U.S. 394, 400-01 (2006).

107. *Ortiz*, 131 S. Ct. at 891-93.

law, that denial is not appealable after final judgment because it is the trial court record that matters after final judgment, not what the factual record was back at the time the summary judgment motion was made.[108] At trial, whether there are genuine issues of material fact is to be determined upon a motion for judgment as a matter of law, and the proper way to raise issues of evidentiary insufficiency in cases that go all the way to verdict is by a post-verdict Rule 50 motion.[109] Absent such a motion, the losing party waives the issue.[110] In this aspect, the *Ortiz* Court merely applied its decision in *Unitherm*.[111]

The three justices who concurred in the judgment in *Ortiz* (Justices Thomas, Scalia, and Kennedy) criticized the majority for reaching the Rule 50 point.[112] They would have left it to be considered on remand, in part because, in their view, the court of appeals "saw itself as reviewing the interlocutory order denying summary judgment," notwithstanding the court's alleged consideration of the trial record, and in part because the Rule 50 issues were not addressed by the court of appeals and were not even raised until defendants' responsive brief in the Supreme Court.[113] As to the reviewability of denials of motions for summary judgment, the concurring Justices noted (as had the majority)—but erroneously, all the same—that the time for filing an appeal *of an immediately appealable denial of summary judgment*[114] usually will have run by the conclusion of trial, as a notice of appeal generally must be filed within thirty days after entry of the order.[115] Thus, they viewed the appeal of the denial of summary judgment as time-barred and, therefore, beyond the court of appeals' jurisdiction.[116] The concurring Justices would have reversed the judgment on that ground alone.[117]

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108. *Id.* at 889.

109. *Unitherm*, 546 U.S. at 400-06.

110. *Id.*

111. *Ortiz*, 131 S. Ct. at 891-93.

112. *Id.* at 893-94 (Thomas, J., concurring).

113. *Id.* at 894-95.

114. *See supra* text accompanying notes 6-10, 13-26.

115. *See* FED. R. APP. P. 4(a)(1); 28 U.S.C. § 2107(a) (2012) ("Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.").

116. Bowles v. Russell, 551 U.S. 205, 206-07 (2007) (noting that the Court had "long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature" and "hold[ing] that petitioner's untimely notice [of appeal]—even though filed in reliance upon a [d]istrict [c]ourt's order—deprived

With respect to the portion of the Court's opinion having to do with post-judgment review of a summary judgment denial, several matters should be noted. First and most importantly, the Court here declined to address the question that it perceived had split the circuits, the question that had prompted the Court to grant certiorari, namely, whether a party may appeal an order denying summary judgment after a district court has conducted a full trial on the merits and entered final judgment *when the summary judgment motion presented a question of law and the trial court's resolution of that question was the basis of its denial of summary judgment*.[118] The Court would not have granted certiorari intending merely to hold that in this case the denial of summary judgment rested on genuine issues of material fact and that, in that circumstance, the denial was not reviewable after trial on the merits, leading to a final judgment. Even prior to *Ortiz*, the courts of appeals all had agreed that a post-trial appeal of the denial of a summary judgment motion should be rejected in such circumstances, at least when it was not presented in a cross-appeal. Yet, that is all the Court decided.[119]

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the [c]ourt of [a]ppeals of jurisdiction"); *accord* Hohn v. United States, 524 U.S. 236, 247 (1998); Torres v. Oakland Scavenger Co., 487 U.S. 312, 314-15 (1988); Browder v. Dir., Dep't of Corr., 434 U.S. 257, 264 (1978); *see also* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3901 (2d ed. 1992) ("The rule is well settled that failure to file a timely notice of appeal defeats the jurisdiction of a court of appeals.").

117. *Ortiz*, 131 S. Ct. at 894 (Thomas, J., concurring).

118. *See id.* at 889, 891 (majority opinion).

119. One student author has taken the position that *Ortiz* held "unqualified[ly] . . . against post-trial appeals from . . . summary judgment denials," and that reading it to permit exceptions "cannot be reconciled with the opinion in its entirety." Morin, *supra* note 87, at 224-25. It is true that the Court broadly stated both the issue on which it granted certiorari—whether a party may "appeal an order denying summary judgment after a full trial on the merits"—and its purported answer, offering an unqualified "no." *Ortiz*, 131 S. Ct. at 888-89. But those words do not render the unqualified "no" the holding of the case. The holding of a case must reflect the issue actually decided. A holding "involves a determination of a matter of law that is pivotal to a judicial decision," as contrasted with *obiter dicta*, "tangential comments" or "non-dispositive remarks[, typically] in a majority opinion." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 405, 607 (2d ed. 1995); *see also* BLACK'S LAW DICTIONARY 1177 (9th ed. 2009) (defining obiter dictum as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)"). In *Ortiz*, the Court explicitly did not decide whether, after final judgment, a losing litigant could appeal a denial of summary judgment that raised only questions of law; it decided instead that here "the officials' claims of qualified immunity" did *not* "present 'purely legal' issues capable of resolution 'with reference only to undisputed facts,'" and that—in that

Second, *Ortiz*'s observation that the time to seek review of the summary judgment denial expired well in advance of final judgment is incorrect for two reasons. As noted earlier, an interlocutory appeal of a denial of summary judgment to a defendant who has invoked immunity from suit is available only with respect to questions of law, not with respect to district court determinations that genuine issues of material fact preclude summary judgment.[120] The fact that Jordan and Bright did not seek immediately to appeal the denial of their summary judgment motion was unsurprising in light of the grounding of that denial in the trial court's conclusion that genuine issues of material fact precluded summary judgment.[121] Thus, a federal court of appeals would have rejected an effort by the *Ortiz* defendants to take an interlocutory appeal of the denial of their motion for summary judgment under the collateral order doctrine. The first occasion for them to appeal that ruling was after final judgment.

Moreover, even when an interlocutory appeal of a denial of an immunity-based motion for summary judgment would be proper, the federal courts generally do not require such an appeal to be taken within thirty days of the entry of that order.[122] The appeal is permissive, not mandatory, and the party injured by the denial does not waive its right to appeal the denial after final judgment by failing to bring an interlocutory appeal.[123] Although a defendant who fails to

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circumstance—the denial of summary judgment was not appealable after trial on the merits. 131 S. Ct. at 892 (quoting Brief of Respondents at 11, 16, *Ortiz*, 131 S. Ct. 884 (No. 09-737)). Thus, its holding is correspondingly limited. It is the broad and unqualified language that is dicta, rather than the other way around.

120. *See supra* text accompanying notes 25-26.

121. *See* Johnson v. Jones, 515 U.S. 304, 313 (1995). While defendants argued that, in challenging the denial of their summary judgment motion, they were raising a purely legal question, the Supreme Court found otherwise. *See supra* note 119. This case turned, not on a dispute about the substance or clarity of pre-existing law—which was not in controversy in this case—but on controverted facts:

> Was Jordan adequately informed, after the first assault, of the identity of the assailant, and of Ortiz's fear of a further assault? What, if anything, could Jordan have done to distance Ortiz from the assailant, thereby insulating her against a second assault? Did Bright place and retain Ortiz in solitary confinement as a retaliatory measure or as a control needed to safeguard the integrity of the investigation?

Id. at 892-93 (citations omitted). This was why the Court concluded that it did not need to address the question of whether, after trial and final judgment, a losing litigant could appeal a denial of summary judgment that raised only questions of law. *Id.* at 892. That question was not presented.

122. *See infra* text accompanying notes 141-149.

123. *See infra* text accompanying notes 141-149.

immediately appeal the rejection of his claim to qualified immunity from suit loses some of the benefits of that immunity, he or she may appeal after final judgment the decision or decisions in which the rejection was manifested.[124] *A fortiori*, the time to appeal cannot have expired on an appeal that was not even permissible.

We will return below to issues including the timeliness of a post-judgment appeal of a denial of summary judgment. Before considering that issue among others, we briefly examine the courts of appeals' decisions in the wake of *Ortiz* to see how it affected them.

III. COURTS OF APPEALS' DECISIONS IN THE WAKE OF *ORTIZ*

In the wake of *Ortiz*, some federal appellate courts have refused to afford post-judgment review to denials of motions for summary judgment, ostensibly regardless of the basis for the denial, that is, regardless of whether summary judgment was denied because the district judge found genuine issues of material fact or because the district judge held that the moving party was not entitled to judgment as a matter of law. They have cited *Ortiz* as unqualifiedly answering that, after a full trial on the merits, a party may not appeal an order denying summary judgment. Often, however, their reading and application of *Ortiz* came in cases in which the appellant was asking the court to review whether the evidence submitted before trial was sufficient to withstand a summary judgment motion.[125] In other words, a number of federal intermediate appellate courts have applied *Ortiz* when the question was *not* whether the court could, after trial and judgment, address a legal issue that the denied

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124. *See infra* text accompanying notes 141-149.

125. *E.g.*, Function Media, L.L.C. v. Google Inc., 708 F.3d 1310, 1322 (Fed. Cir. 2013) (finding no error in the denial of summary judgment and, adding that "[t]o the extent that [the appellant] attempts to couch as a claim construction issue the denial of summary judgment of infringement, . . . 'a denial of summary judgment is not properly reviewable on an appeal from the final judgment entered after trial'" (quoting Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986))); Pensacola Motor Sales Inc. v. E. Shore Toyota, LLC, 684 F.3d 1211, 1219-20, 1226 (11th Cir. 2012) (citing *Ortiz* and holding that, after trial on the merits, defendant could not appeal an order denying summary judgment, but reviewing denials of Rule 50 motions for judgment as a matter of law based on the sufficiency of the evidence (citing *Ortiz*, 131 S. Ct. at 888-89)); A.D. v. Markgraf, 636 F.3d 555, 559 (9th Cir. 2011) (refusing to review denial of a motion for summary judgment based upon qualified immunity since then there was a jury verdict adverse to the defendant, but reviewing and reversing the district court's denial of defendant's Rule 50 motions, which also were predicated on qualified immunity (citing *Ortiz*, 131 S. Ct. at 888-89)).

summary judgment motion had posed and that the trial court had answered in its ruling on the summary judgment motion.

Other federal appellate courts have continued to distinguish between denials based on genuine issues of material fact and denials based on legal conclusions. In *Copar Pumice Co. v. Morris*, for instance, the Tenth Circuit said in dicta—as it would have said before *Ortiz*—that a denial of summary judgment based on a pure legal question is appealable after final judgment, but it held—as it would have held before *Ortiz*—that where summary judgment, sought on the basis of qualified immunity in a § 1983 action, was denied because of material factual disputes, defendants' withdrawal of their post-judgment motion for judgment as a matter of law rendered their qualified immunity argument one that the appeals court could not hear.[126] The court recognized that some language in *Ortiz* appeared to undermine Tenth Circuit precedents that held a denial of summary judgment based on the decision of a purely legal question to be appealable after final judgment,[127] but it found that the Supreme Court had not announced a categorical rule, and had not addressed the correctness of decisions such as those the Tenth Circuit had reached, because the facts of *Ortiz* had not presented purely legal issues.[128]

Ortiz has engendered some confusion, however. In *Nolfi v. Ohio Kentucky Oil Corp.*, the Sixth Circuit said, on the one hand, that *Ortiz* overturned the circuit's "prior rule permitting some summary judgment appeals after a jury trial"—permitting appeals

126. 639 F.3d 1025, 1030-31 (10th Cir. 2011).

127. *Id.* at 1031.

128. *See id.* (citing *Ortiz*, 131 S. Ct. at 892); *see also* Plascenia v. Taylor, 514 F. App'x 711 (10th Cir. 2013) (holding that an exception allowing post-judgment appeal of summary judgment denials, based on legal holdings, survived *Ortiz*); Kennedy v. City of Cincinnati, 483 F. App'x 110, 111-12 (6th Cir. 2012) (dismissing, for lack of jurisdiction, a post-judgment appeal from denial of plaintiff's motion for summary judgment in a § 1983 action, concluding that Kennedy's appeal was not of a purely legal nature, that the district court had denied summary judgment on the ground that disputed questions of fact remained; concluding that *Ortiz* precluded "inquiry into whether the evidence presented" in connection with the summary judgment motion merited judgment as a matter of law, once a case proceeded to trial, and that this case required just such an inquiry); Owatonna Clinic–Mayo Health Sys. v. Med. Protective Co., 639 F.3d 806, 810 (8th Cir. 2011) (viewing *Ortiz* as having punted on the issue whether a denial of summary judgment based on a purely legal question is appealable after final judgment, and finding it unnecessary to resolve in this case, where it found that "Medical Protective's real complaint [was] *not* that the district court erred in denying its motion for summary judgment") (emphasis added).

where the ruling was based on questions of law and a determination that there were no disputed facts—and held that a party may not appeal an order denying summary judgment after a full trial on the merits.[129] At the same time, the Sixth Circuit concluded that it could and would consider the purely legal issue, raised by defendant on summary judgment, whether plaintiffs' loss-causation theory was actionable under § 10(b) of the Securities Exchange Act of 1934,[130] because *Ortiz* left open the possibility that cases "'involv[ing] . . . [only] disputes about the substance and clarity of pre-existing law' may still be considered."[131] But then what aspect of prior Sixth Circuit precedent did *Ortiz* overrule? "Because most of defendants' summary judgment appeal [was] based on the evidence presented prior to trial," the court concluded that *Ortiz* precluded it from reviewing the summary judgment denial "in large part."[132] It would seem that, while this statement is accurate, pre-existing Sixth Circuit precedent also would have precluded the circuit from reviewing the denial of summary judgment insofar as it rested on factual matters.

In other instances since *Ortiz*, federal appellate courts have refused to afford post-judgment review to denials of motions for summary judgment where those denials were based on the district judge's conclusion that the moving party was not entitled to judgment as a matter of law but where, in the appellate court's view, the losing party preserved the legal issue by making a Rule 50(a) motion for judgment as a matter of law before the case was submitted to the jury and a Rule 50(b) motion after verdict.[133] In such circumstances, the court purported to reach the question of law upon which the denial of summary judgment turned, but reached it through review of the Rule 50 decisions, rather than through review of the summary judgment denial per se.

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129. 675 F.3d 538, 544-45 (6th Cir. 2012).

130. 15 U.S.C. § 78j(b) (2006).

131. *Nolfi*, 675 F.3d at 545 (quoting *Ortiz*, 131 S. Ct. at 892).

132. *Id.*

133. *E.g.*, Black v. J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994) (stating that when a motion for summary judgment has been denied, the movant should seek recourse through a Rule 50 motion for judgment as a matter of law, and reviewing denial of motion for directed verdict); *see also* Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1251 (10th Cir. 1992) (disallowing post-trial appeal from denial of summary judgment based on existence of genuine issues of material fact, but reviewing denial of motions for directed verdict and judgment notwithstanding the verdict).

IV. ANALYSIS

A. Should Interlocutory Appeals of Summary Judgment Denials Be More Freely Available to Reduce the Occasions for Post-Judgment Review?

Because of the uncertainty surrounding the availability of post-trial, post-judgment appeals of summary judgment denials and the Supreme Court's opposition to them, it is worth considering whether *interlocutory* appeals of summary judgment denials should be more freely available.

Efforts to make interlocutory appeals of summary judgment denials more freely available—at least in particular categories of cases—have been made, sometimes successfully, in federal courts and in state courts.[134] Consider the incentives created by liberal allowance of interlocutory appeal of summary judgment denials, however. Provisions that authorize interlocutory appeals of summary judgment denials may deter plaintiffs from suing, in the authorizing court systems, on claims that fall within the authorizing statute, if the plaintiffs have the choice of suing in a court system that does not

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134. For example, under Texas' Civil Practice and Remedies Code, as amended in 1993, the losing party may appeal an interlocutory order that

> denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media . . . arising under the . . . First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73 [of the Texas Civil Practice & Remedies Code].

TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(6) (West 2013). However, if the denial of the summary judgment is affirmed, the court of appeals must order the appealing media defendant to pay all costs and reasonable attorneys' fees for the appeal. *Id.* § 51.015. *See generally* Thomas J. Williams, *Media Law: Interlocutory Appeal*, 67 TEX. B.J. 760 (2004). In the federal system, Section 1803 of Title 50 gives the courts of appeals jurisdiction over appeals from interlocutory orders granting or denying a motion to dismiss or for summary judgment in civil actions brought under the Foreign Intelligence Surveillance Act of 1978. *See* 50 U.S.C. § 1803(a)(1) (2012). The Act creates a private right of action for money damages, including punitive damages, for a person who has been subjected to electronic surveillance without statutory authority or about whom information obtained by electronic surveillance has been disclosed or used knowing, or having reason to know, that the information was obtained through electronic surveillance without statutory authority. *Id.* § 1810. Any person who committed the violation may be sued. *Id.* However, it is a defense that the defendant was a law enforcement or investigative officer engaged in official duties, if the "surveillance was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction." *Id.* § 1809(b).

allow such interlocutory appeals.[135] This suggests that expanding the availability of interlocutory appeals of summary judgment denials in federal court could deter plaintiffs from suing in federal court because defendants could delay the progress of plaintiffs' suits and increase the costs of those suits by bringing interlocutory appeals of denials of defendants' summary judgment motions, although plaintiffs too would enjoy the ability to bring such an interlocutory appeal if their motions for summary judgment were denied. The ability to delay litigation with such appeals might even encourage more defendants to file unmeritorious motions for summary judgment, further burdening the litigants and the trial courts. Presumably, we do not want to deter plaintiffs' filings in federal court, at least when plaintiffs' claims arise under federal law.

Such authorizing provisions in state courts, when there is no comparable provision in federal courts, also may deter removals, whereas, if federal courts were to offer similarly liberal interlocutory appeals of summary judgment denials, defendants would not lose this procedural advantage if they removed. We may not want to encourage removals, particularly of cases asserting no federal question claims, however. While federal policy on interlocutory appeals of summary judgment denials should not be greatly affected by the reduction in deterrence of removal that a shift in federal policy might create, this is a factor that marginally weighs against liberally permitting interlocutory appeals of summary judgment denials in federal court.

Further, we should be cognizant that the potential for an interlocutory appeal from the denial of a defendant's motion for summary judgment gives defendants added leverage in settling cases in which such interlocutory appeals may be taken. While one might say the same for plaintiffs who are potential appellants on summary judgment denials, in reality defendants are more likely to be movants for summary judgment as their burden often is lower than plaintiffs' burden on a motion for summary judgment,[136] and defendants often

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135. *See* Williams, *supra* note 134, at 760. A discussion of forum shopping between state and federal court may bring to mind the question whether the doctrines of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), or *Hanna v. Plumer*, 380 U.S. 460 (1965), are relevant. The questions whether and when federal court rulings are reviewable and appealable are procedural matters that are governed by Federal Rules of Civil and Appellate Procedure and by federal common law, and are not influenced by state procedural rules on analogous matters.

136. Defendants who move for summary judgment ordinarily have to show that a reasonable jury *could* find for them in order to shift to the plaintiff a burden of

are better able to withstand the costs of interlocutory appeal and frequently are benefited, rather than disadvantaged, by the delay that such appeals impose. Additionally, the possibility that a denial of a summary judgment motion will be reversed by the appellate court on interlocutory appeal will assist a defendant to settle a case on favorable terms.[137]

The above factors, taken together with the federal system's general preference for post-judgment appeals,[138] and its provision for interlocutory appeals only when there are strong reasons for departing from the norm—as evidenced by the narrow circumstances in which 28 U.S.C. § 1292(a) and (b),[139] Federal Rules of Civil Procedure 23(f) and 54(b)[140] appeals, pendent appellate jurisdiction,

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going forward with evidence. This position is associated with Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 749 (1974), and is the majority rule, although some commentators have argued for either more onerous or less onerous burdens. *Compare* David P. Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 76-79 (1978) (proposing that a motion for summary judgment, without more, should put an opposing party with the burden of proof at trial to the burden of producing evidence sufficient to sustain a verdict in his favor), *with* Jeffrey W. Stempel & Steven S. Gensler, *Chapter 56: Summary Judgment*, *in* 11 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 56.40[1][b] (3d ed. 2014) (proposing that a moving party without the burden of proof at trial should have to show that a reasonable jury would have to find for him, to shift to the non-movant a burden of coming forward with evidence sufficient to sustain a verdict in his favor). A defendant who moves for summary judgment on the basis of an affirmative defense has the burden of proof with respect to that defense; however, such a defendant has to show that a reasonable jury *would have to* find for him, in order to shift to the plaintiff a burden of going forward with evidence. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322, 337-38 (1986) (outlining, in both the majority and dissenting opinions, the standard to be applied to determine whether a movant for summary judgment has met his initial burden); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (holding that the court must take into account the magnitude of the burden of proof at trial, when applying the standards for summary judgment).

137. *See* Williams, *supra* note 134, at 761.

138. *See supra* note 7.

139. For pertinent parts of the text of 28 U.S.C. §§ 1292(a)(1) and 1292(b), see *supra* notes 8-9. Subsections (a)(2) and (3) of section 1292(a) respectively afford appellate jurisdiction over "[i]nterlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes" of receiverships, and interlocutory decrees "determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." 28 U.S.C. § 1292(a)(2)-(3) (2012).

140. Federal Rule of Civil Procedure 23(f) provides:

> APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the

and mandamus are permitted[141]—argue persuasively against liberal allowance of interlocutory appeals of summary judgment denials. Liberally allowing such interlocutory appeals would create far greater problems than it would solve.

B. Are Pre-Judgment Appeals of Denials of Summary Judgment Mandatory or Permissive? Should Such Appeals Be Mandatory or Permissive?

As discussed earlier, most interlocutory orders are not immediately appealable; their review has to wait until the entry of final judgment.[142] In the federal courts, the law generally is that immediate appeals of orders entered prior to final judgment—when interlocutory appeals are permitted—are merely permissive.[143] That permissive, but not mandatory, nature characterizes appeals that can be taken pursuant to §§ 1292(a) and (b), collateral order appeals, Rule 23(f) appeals, pendent appellate jurisdiction appeals, and petitions for mandamus.[144] Appeals from denials of summary

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> order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

FED. R. CIV. P. 23(f).

Federal Rule of Civil Procedure 54(b) provides:

> JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When an action presents more than one claim for relief–whether as a claim, counterclaim, crossclaim, or third-party claim–or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

FED. R. CIV. P. 54(b).

141. *See supra* text accompanying notes 10, 14-17.

142. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (holding that a party ordinarily must raise all claims of error in a single appeal following final judgment on the merits); *see supra* note 7.

143. Habitat Educ. Ctr. v. U.S. Forest Serv., 607 F.3d 453, 456 (7th Cir. 2010).

144. *E.g.*, *id.* (declaring that "[e]ven when an interlocutory order is immediately appealable, the party adversely affected . . . can wait and challenge it later, on appeal from the final judgment, provided . . . that the order hasn't become moot," citing earlier Seventh Circuit precedent permitting post-final judgment appeal of an injunction bond that was immediately appealable when entered). *See generally* 15A WRIGHT, MILLER & COOPER, *supra* note 116, § 3905.1 ("The

judgment where the motions were predicated on assertions of absolute or qualified immunity similarly are permissive.[145] The sole exception is appeals under Rule 54(b). Rule 54(b) appeals are treated differently because the purpose of that Rule is to both enable and, if

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prohibition against immediate appeal of most pretrial and trial orders established by the final judgment rule is offset by the rule that once appeal is taken from a truly final judgment that ends the litigation, earlier rulings generally can be reviewed. . . . These costs [of maintaining the final judgment rule] would be aggravated if the opportunity for review on appeal from the ultimate final judgment were subject to forfeiture on the ground that some interlocutory event could have been appealed as if a final judgment under one or another of the expansive interpretations placed on the final judgment requirement."); George C. Pratt, *Interlocutory Orders*, *in* 19 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 203.10[7][a] (3d ed. 2014) (discussing non-obligatory nature of appeals under 28 U.S.C. § 1292(a)); *Id.* § 203.10[1][a] (addressing the interlocutory appeal of preliminary injunction rulings).

145. Spalding v. Mason, 161 U.S. 375, 381 (1896) (holding that despite the failure to take an interlocutory cross-appeal of principles upon which an accounting was to be done, the earlier order was appealable upon appeal from final judgment, when the entire record was brought up for review); Stewart v. Beach, 701 F.3d 1322, 1329 (10th Cir. 2012) (noting that to the extent a denial of summary judgment based upon qualified immunity turned on the purely legal question of whether a constitutional right was clearly established, it remained appealable after final judgment despite the litigant's foregone right to take an immediate appeal of the order under the collateral order doctrine); Ernst v. Child & Youth Servs., 108 F.3d 486, 493 (3d Cir. 1997) (applying the usual rule that interlocutory appeal is permissive to denials of summary judgment sought on immunity grounds); Kiser v. Garrett, 67 F.3d 1166, 1169 (5th Cir. 1995) ("Qualified immunity is not waived when a defendant fails to take an interlocutory appeal and, instead, subjects himself to discovery and trial. It would be anomalous to conclude that a defendant waives a qualified immunity defense by dismissing as moot an interlocutory appeal that the defendant was not required to take in the first place.") (citation omitted); Kurowski v. Krajewski, 848 F.2d 767, 772-73 (7th Cir. 1988) ("Until a judgment is rendered 'final' by entry of a separate document[,] . . . no one need appeal. An appeal from an interlocutory order is not one from a final judgment, even if by virtue of *Cohen* it is from a final decision. Interlocutory orders therefore may be stored up and raised at the end of the case. . . . This makes sense. The privilege to take an interlocutory appeal exists for the appellant's protection. Such appeals come at great cost to the judicial system because they may prolong litigation and require appellate courts to cope with each case more than once. Most interlocutory appeals end in affirmance (thus entail wasted motion), . . . If the aggrieved party is content to swallow his losses and proceed with the case . . . no interest of either the judicial system or the adverse party is served by treating the whole subject as forfeit. That would simply induce public officials to file more interlocutory appeals. We therefore hold that a public official may raise questions of immunity on appeal from a final judgment, even though he bypassed an opportunity to take an interlocutory appeal.") (citations omitted); McIntosh v. Weinberger, 810 F.2d 1411, 1431 n.7 (8th Cir. 1987) (noting that the interest in protecting public officials from monetary liability for official acts survives trial).

a party requests Rule 54(b) certification, to force immediate appeal for the purpose of reaching final resolution of a separable portion of a case.[146]

The Seventh Circuit briefly sought to protect the deadlines applicable to interlocutory appeals by holding the right to appeal *prior* to final judgment to be waived if a litigant failed to take advantage of the first opportunity to take an interlocutory appeal raising a particular issue,[147] but it quickly backed off that position where the successive appeals were from different orders.[148] And the Sixth Circuit has taken the position that a litigant waives the right to post-judgment appeal of an order for which an interlocutory appeal was available.[149] But for all of the reasons presented in Section IV.A and other reasons, this is a distinctly minority view that "'would lead to a blizzard of protective appeals[,] . . . lead to pointless forfeitures'" and "'turn the policy against piecemeal appeals on its

146. *E.g.*, Ysais v. Richardson, 603 F.3d 1175, 1178-79 (10th Cir. 2010) (dismissing appeal as untimely in part, noting that appeal from an order that is certified under Rule 54(b) must be taken within thirty days of entry of the certification); Weinman v. Fid. Capital Appreciation Fund (*In re* Integra Realty Res., Inc.), 262 F.3d 1089, 1107 (10th Cir. 2001) ("[C]ertification of an order under Rule 54(b) ordinarily starts the clock running for purposes of filing notice of appeal."). *See generally* 15A WRIGHT, MILLER & COOPER, *supra* note 116, § 3905.1.

147. Fairley v. Fermaint, 471 F.3d 826, 827-28 (7th Cir.) (holding that the court lacked jurisdiction to hear an interlocutory appeal of the denial of summary judgment when defendants did not appeal the denial of their Rule 12(b)(6) motion to dismiss based on qualified immunity *and* their motion for summary judgment was its functional equivalent, the court seeing this as an attempt to circumvent the time limits on the filing of an appeal), *aff'd*, 482 F.3d 897 (7th Cir. 2006). In his dissent, Judge Posner reasoned in part that a defendant who "strikes out in discovery" should not be "denied an appellate determination as to whether the case should have been dismissed." *Id.* at 832 (Posner, J., dissenting).

148. Fairley v. Fermaint, 482 F.3d 897, 901 (7th Cir. 2006) ("[A] public official may appeal from an order conclusively denying a motion (based on qualified immunity) seeking summary judgment, [regardless of whether] the official has appealed from an order denying a motion to dismiss the complaint, and [regardless of whether] the motion for summary judgment rests on new legal or factual arguments. But once a conclusive resolution has been reached at either stage, a renewed motion for the same relief, or a belated request for reconsideration, does not reopen the time for appeal.").

149. Kennedy v. City of Cleveland, 797 F.2d 297, 300 (6th Cir. 1986) (holding that interlocutory appeals based on qualified immunity are waived if not taken immediately); *cf.* Sales v. Grant, 224 F.3d 293, 296-97 (4th Cir. 2000) (holding defendants' claim of qualified immunity waived after they failed to press that claim until the case was remanded after a prior appeal).

head.'"[150] Thus, on the occasions when interlocutory appeals of denials of summary judgment are permitted, those appeals should be permissive, rather than mandatory, as the federal intermediate appellate courts nearly unanimously hold. Interlocutory appeals impose so many undesirable effects that we should not go beyond authorizing them to seriously penalizing litigants who fail to take advantage of the opportunity. Sufficient incentives already exist for litigants, such as officials whose motions for summary judgment predicated on qualified immunity were denied, to immediately appeal those denials.

Despite the inclination of lower federal courts to follow Supreme Court dicta,[151] any dicta in *Ortiz* indicating that interlocutory appeals of summary judgment denials are mandatory are unworthy of being followed.

C. When Interlocutory Appeals of Summary Judgment Denials Are Not Available, or When They Are Available but Are Permissive and Not Taken, Should Their Post-Judgment (Sometimes Post-Trial) Appeals Be Allowed?

The questions posed in this Section overlap with the questions addressed in Section IV.B, but I address them from different angles here.

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150. *Ernst*, 108 F.3d at 493 (quoting Exch. Nat'l Bank v. Daniels, 763 F.2d 286, 290 (7th Cir. 1985)) (quoting Hunter v. Dep't of Air Force Agency, 846 F.2d 1314, 1316 (11th Cir. 1988)).

151. United States v. Quinn, 728 F.3d 243, 256 (3d Cir. 2013) (opining that appellate courts that dismiss Supreme Court dicta "'frustrate the evenhanded administration of justice'" (quoting McDonald v. Master Fin., Inc. (*In re* McDonald), 205 F.3d 606, 613 (3d Cir. 2000))); Zivotofsky v. Sec'y of State, 725 F.3d 197, 212 (D.C. Cir. 2013) (stating that lower courts generally must treat carefully considered dicta of the Supreme Court as authoritative); United States. v. Orona, 724 F.3d 1297, 1311 (10th Cir. 2013) (stating that the court was "'bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta [was] recent and not enfeebled by later statements'" (quoting United States v. Serawop, 505 F.3d 1112, 1122 (10th Cir. 2007))); Managed Pharmacy Care v. Sebelius, 716 F.3d 1235, 1246 (9th Cir. 2013) (stating that considered dicta from the Supreme Court foreshadows what the Court may hold).

1. *The Allegedly Problematic Nature of Relying on a Law/Fact Distinction*

In *Chesapeake Paper Products Co. v. Stone & Webster Engineering Corp.*, the Fourth Circuit rejected post-trial, post-judgment appeals of summary judgment denials for a number of related reasons.[152] It found the position that a court should review such denials when the appellant asserted legal error but not when appellant asserted factual error to be "problematic because all summary judgment decisions are legal decisions in that they do not rest on disputed facts."[153] But, while it is true that any *grant* of summary judgment is predicated on a conclusion that there are no genuine issues of material fact (as well as on the conclusion that the movant is entitled to judgment as a matter of law), it is *not* true that *denials* of summary judgment necessarily "do not rest on disputed facts"; indeed, many—probably most—denials of summary judgment are predicated on the court finding genuine issues of material fact, that is, issues on which reasonable finders of fact could disagree. While one can call that a "legal decision," it reflects application of law (the summary judgment standard) to the facts before the court, and it rests precisely on the finding of disputed facts. So, the argument that the appealability of summary judgment denials should not rest on a law/fact distinction because "all summary judgment decisions are legal decisions in that they do not rest on disputed facts" is misleading, inaccurate, and unpersuasive.[154]

The Fourth Circuit also rejected the law/fact dichotomy based on the observation that it

> would require this Court to engage in the dubious undertaking of determining the bases on which summary judgment is denied and whether those bases are 'legal' or 'factual.' The Federal Rules of Civil Procedure do not require such a dichotomy in summary judgment denials, and we decline to . . . [oblige] district courts . . . to anticipate parties' arguments on appeal by bifurcating the legal standards and factual conclusions supporting their decisions denying summary judgment.[155]

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152. 51 F.3d 1229, 1235 (4th Cir. 1995).

153. *Id.*

154. *Id.*; *see also* Ahrenholz v. Bd. of Trs., 219 F.3d 674, 677 (7th Cir. 2000) ("'[Q]uestion of law' means an abstract legal issue rather than an issue of whether summary judgment should be granted.").

155. *Chesapeake*, 51 F.3d at 1235 (citations omitted) (citing Black v. J.I. Case Co., 22 F.3d 568, 571 n.5 (5th Cir. 1994)).

But things have changed. Since the 2010 amendments to Rule 56, the Federal Rules *do* instruct federal district courts to "state on the record the reasons for granting or denying the motion,"[156] the Judicial Conference of the United States and the Supreme Court having decided that it is not too much to ask a district court to explain whether it is denying a summary judgment motion because it has found genuine issues of material fact or because it has concluded that, although the material facts are undisputed, the moving party is not entitled to judgment under the law. The district court need not anticipate the parties' arguments on appeal to make clear the basis or bases for its decision. If a district court fails to adequately explain its analysis, the court of appeals can remand, directing the district court to provide appropriate analysis.[157]

In addition, the task of determining the bases on which summary judgment was denied and whether those bases are "legal" or "factual" is no longer "dubious," if it ever was. Since at least the Supreme Court's decision in *Johnson v. Jones*, in 1995, courts of appeals have had to decide whether a summary judgment denial was based on the court's conclusion that genuine issues of material fact precluded summary judgment or on the court's legal conclusions concerning whether, given the undisputed facts, defendant was immune from suit.[158] *Johnson* required this determination because

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156. FED. R. CIV. P. 56(a). The 2010 amendments were effective December 1, 2010. The Advisory Committee Notes to the 2010 amendments add:

> Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. . . . The form and detail of the statement of reasons are left to the court's discretion. The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

FED. R. CIV. P. 56 advisory committee's note on 2010 amendments.

157. *See, e.g.*, Robbins v. Becker, 715 F.3d 691, 694-95 (8th Cir. 2013) (remanding for district court to give more detailed consideration and explanation of its denial of defendant officers' motion for summary judgment, based on qualified immunity).

158. 515 U.S. 304, 319 (1995) ("When faced with an argument that the district court mistakenly identified clearly established law, the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason. Knowing that this is 'extremely helpful to a reviewing court,' district courts presumably will often state those facts. But, if they do not, [and] . . . a court of appeals [has] to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed[,] . . . this circumstance does not make a critical difference to our result, for a rule that occasionally requires a detailed evidence-based review of the record is still . . . more manageable than the

the Supreme Court there held that only in the latter circumstance is an interlocutory appeal of the denial available under the collateral order doctrine.[159] In fact, the Supreme Court in *Johnson* explicitly rejected the argument that the line that the Court was requiring courts of appeals to draw would be "unworkable" and overly difficult.[160] In addition, courts of appeals routinely categorize issues as questions of fact, questions of law, or mixed questions of fact and law for purposes of determining the appropriate standard of review. Federal courts of appeals have had plenty of practice in making these "law" vs. "fact" distinctions,[161] and the Fourth Circuit overstates the difficulty of making the distinction. For example, it had no difficulty at all in concluding in *Chesapeake* that although S & W portrayed its motion as having sought partial summary judgment on a discrete legal issue, its motion sought resolution of conflicting factual inferences, and denial of the motion rested on the trial court's finding of genuine issues of material fact.[162]

The Fourth Circuit is correct that reviewing a denial of summary judgment after trial is inappropriate *when* the denial was based on the presence of disputed fact issues and that it is

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rule that . . . would make that task, not the exception, but the rule. We note, too, that our holding here has been the law in several Circuits for some time. Yet, petitioners have not pointed to concrete examples of the unmanageability they fear." (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.6 (1987))).

159. *See supra* note 26.

160. 515 U.S. at 318.

161. I should acknowledge that the analysis done to determine whether a court is dealing with a question of fact, a question of law, or a mixed question varies between the context of deciding the appropriate standard of review and the context of deciding reviewability. As noted in Jenike-Godshalk, *supra* note 29, at 1622, "While all [summary judgment] motions may be questions of law for purposes of determining the standard of review, only some of these motions are subject to the legal issue exception." The difference is that, for standard of review purposes, an appellate court (arguably) is in as good a position as the trial court to determine whether there are genuine issues of material fact, based on a paper record, and is in as good or better a position to determine whether a party is entitled to judgment as a matter of law—thus, it makes sense for the court of appeals to review de novo—as it reviews questions of law—the district court's ruling on a motion for summary judgment. But, in the context of deciding, post-trial and judgment, whether to review a summary judgment denial, the court of appeals has to determine something different, namely whether the denial of summary judgment was (or should have been) based on a finding of genuine issues of material fact or relied on a determination of law or an exercise of discretion. But the analysis is different because the focus is different, not because the nature of questions of law, questions of fact, and mixed questions changes.

162. Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, 1235 (4th Cir. 1995).

appropriate to view the factual base on which the motion was decided as superseded by the evidence adduced at trial.[163] Further, I subscribe to the Fourth Circuit's conclusion that "'[i]t makes no sense whatever to reverse a judgment on the verdict where the trial evidence was sufficient merely because at summary judgment it was not.'"[164] However, I do *not* agree that "[r]eviewing the district court's decision after a full trial is also problematic because in denying a summary judgment motion, the district court 'does not settle or even tentatively decide anything about the merits of the claim'; its denial 'decides only one thing—that the case should go to trial.'"[165] If a court denies summary judgment *based on its view of the law*—such as its interpretation of a statute or constitutional provision—rather than based on the existence of genuine issues of material fact, the district court does settle something about the merits of the claim; the denial does decide more than that the case should go to trial. Indeed, it is making law of the case, which the parties may be permitted to challenge in the district court only on limited grounds, and to which that court may well adhere.[166] There are good reasons to permit post-

163. *See* Jimenez v. City of Chicago, 732 F.3d 710, 718 (7th Cir. 2013) (noting that trial supersedes the record at summary judgment). I also can agree that "a judgment after a full trial is superior to a pretrial decision because the factfinder's verdict depends on credibility assessments that a pretrial paper record simply cannot allow," *Chesapeake*, 51 F.3d at 1236, although I do not believe it is accurate to describe the pretrial record and the trial testimony as "identical" in that circumstance, even if the records are very similar.

164. *Id.* (quoting Black v. J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994)). I do not agree with Professor Shannon that, in this circumstance, the fact that plaintiff won at trial is "somewhat beside the point" because the question is not which party ought to prevail but to determine whether, at the time the motion was filed or decided, there was a genuine issue of material fact that would warrant trial. Bradley Scott Shannon, *Why Denials of Summary Judgment Should Be Appealable*, 80 TENN. L. REV. 45, 63 (2012). For the reasons given by a number of courts and other reasons offered by commentators who have criticized summary judgment, I see no reason to prefer a retroactive grant of summary judgment to the result of a full trial when the focus of each was the facts. Nor do I agree that there is so little meaningful distinction between questions of law and questions of fact, *id.* at 64 n.76, that we should not differently treat denials of summary judgment based upon legal holdings than denials based on a finding of genuine issues of material fact, for purposes of appealability after trial and final judgment.

165. *Chesapeake*, 51 F.3d at 1236 (quoting Switz. Cheese Ass'n v. E. Horne's Mkt., Inc., 385 U.S. 23, 25 (1966)).

166. *See, e.g.*, HK Sys., Inc. v. Eaton Corp., 553 F.3d 1086, 1089 (7th Cir. 2009) ("The doctrine of law of the case counsels against a judge's changing an earlier ruling that he made in the same case[.] . . . The doctrine . . . [has been] applied to a motion to reconsider a summary judgment ruling[.] . . . [I]n revisiting the issue of causation after the trial[, the judge] was not depriving HK of the benefit

trial, post-judgment review of a denial of summary judgment when the question posed is a question of law and the issue presented on appeal has not been mooted.[167]

Does it ever happen that an unmixed (a "pure") legal issue was presented by the summary judgment motion? The answer is "yes." When a court is, for example, interpreting a statute on the occasion of a motion for summary judgment, a pure legal issue is presented by the motion for summary judgment.[168] Beyond such situations, the answer depends in part on how one defines a pure, as opposed to a mixed, question of law. Usage varies. For example, the Supreme Court has defined mixed questions as those "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard."[169] But Judge Schwarzer and others have countered that

> [w]hen the facts material to the application of a pure rule of law are undisputed, the application is a matter of law for the court, requiring no trial [as in summary judgment]. . . . When the application of a rule of law depends on the resolution of disputed historical facts, however, it becomes a mixed question of law and fact.[170]

When courts decide or review decisions of motions for summary judgment, they sometimes say that the question posed is a pure question of law, and they sometimes say that the question posed is a mixed question of law and fact. But, when a party moves for summary judgment, however the courts characterize the question, they are answering whether the undisputed facts meet the relevant legal standard and therefore whether the moving party is entitled to

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of any of the evidence presented at the trial, because that evidence did not bear on the judge's decision. He had denied summary judgment on the basis of his reading of the indemnification clause, and in reconsidering the denial after the trial he continued to treat the meaning of the clause as a pure issue of law, unrelated to anything that had gone on at the trial.").

167. *See infra* text accompanying notes 176-80, 210, 219, 222-23, 231, 255-61.

168. Courts held summary judgment motions to pose pure issues of law in the cases discussed *supra* text accompanying notes 43, 51-52, 55, and 58, and in notes 68-70, 79, 82, and 86.

169. Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

170. WILLIAM W. SCHWARZER, ALAN HIRSCH & DAVID J. BARRANS, THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS: A MONOGRAPH ON RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE, FED. JUDICIAL CTR. 14-23, 57-58 (1991), *reprinted in* 139 F.R.D. 441, 455-62, 487 (1992), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule56.pdf/$file/rule56.pdf.

judgment as a matter of law.[171] This question differs from whether there are genuine issues of material fact.

Next, recall the language of *Switzerland Cheese Ass'n v. East Horne's Market, Inc.*—to the effect that the denial of a summary judgment motion settles nothing about the merits—emphasized by the Fourth Circuit in *Chesapeake*.[172] Despite the Supreme Court origins of the internally quoted language, the language needs to be understood when seen without ellipses and in context. In *Switzerland Cheese*, the Court said that "the denial of a motion for a summary judgment *because of unresolved issues of fact* does not settle or even tentatively decide anything about the merits of the claim."[173] It was explaining why a denial of summary judgment to the plaintiffs, in a case in which plaintiffs moved for a permanent injunction—but not a preliminary injunction—was not immediately appealable under 28 U.S.C. § 1292(a)(1), which permits the immediate appeal of denials of injunctions.[174] The Court's words and its position do not support the use to which the Fourth Circuit put them in *Chesapeake*. Indeed, a decision rejecting an *interlocutory* appeal of a denial of summary judgment may say little, if anything, about whether that same denial should be appealable after final judgment.

True, the same circumstance that renders a denial of summary judgment, sought on the basis of qualified immunity, not to be *immediately* appealable—that is, the denial's grounding in the presence of genuine issues of material fact, rather than conclusions of law—also may appropriately render the denial of summary judgment non-appealable after final judgment. When the issue is allowance of an interlocutory appeal, the reasons for denying immediate appeal of a summary judgment denial based on genuine

171. In litigation, many issues are mixed questions of law and fact. If the issue sought to be appealed post-judgment (in review of a summary judgment denial) really is a mixed question rather than a pure legal question, the resolution that was based on application of the law to the undisputed facts presented at the summary judgment stage may have been mooted by development of a fuller record at trial. However, when an unmixed legal issue was presented by the summary judgment motion or when the facts and law remain unchanged between the decision of the summary judgment motion and the decision by the trier of fact, the issue presented by the summary judgment motion has not been mooted, and the correctness of the decision of that issue should be addressed on appeal from the denial of the summary judgment motion, after final judgment.

172. *See* Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, 1236 (4th Cir. 1995) (quoting Switz. Cheese Ass'n v. E. Horne's Mkt., Inc., 385 U.S. 23, 25 (1966)).

173. 385 U.S. at 25 (emphasis added).

174. *Id.* at 23-25; 28 U.S.C. § 1292(a)(1) (2012).

issues of material fact include delay, non-compliance with the collateral order doctrine, the greater experience of trial courts in dealing with the issue, the inordinate burden upon the appellate court, and the similarity of the issue to the merits issue that the court may later decide on a more complete record. When the issue is the post-judgment reviewability of a denial of summary judgment, the reasons for denying review of a summary judgment denial based on genuine issues of material fact include the possible mooting of the earlier issue and the greater unfairness of reversing a jury verdict than reversing a denial of summary judgment that was based on the judge's belief that genuine issues of material fact precluded such a judgment on the pre-trial record. Conversely, one of the prerequisites for a denial of summary judgment being immediately appealable—that is, its grounding in a determination of law separate from the conclusion that no genuine issues of material fact were presented[175]—also is a prerequisite for post-judgment appeal of the denial. In the former instance, the reasons lie in the relatively low burden on the appellate court and its presumed greater expertise (than the trial court) in deciding questions of law, in tandem with the other policies that allow an interlocutory appeal, given satisfaction of the collateral order doctrine or a statutory basis for immediate appeal. In the latter instance (of post-trial, post-judgment appeal), the relatively low burden on the appellate court and the court's presumed greater expertise in deciding questions of law join with the policies that support the final judgment rule, including postponing appeal until district court processing of a case has been completed, to argue for post-judgment review of law-based summary judgment denials.

The most important points from this Section include the following. Courts are accustomed to distinguishing denials of summary judgment based on conclusions of law from denials based on findings of the existence of genuine issues of material fact, and the distinction is not so difficult to make that the difficulty should lead courts to refuse to review law-based summary judgment denials, after trial and final judgment. Summary judgment denials that are based on the trial court's view of the law do settle something about

175. There are other prerequisites under the collateral order doctrine. *See supra* note 26; Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545-46 (1949). It is not every denial of summary judgment based on a legal determination that is immediately appealable. *See* Johnson v. Jones, 515 U.S. 304, 313 (1995); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); Campos v. Van Ness, 711 F.3d 243, 245 (1st Cir. 2013).

the merits of the case and create law of the case. Whatever subtleties there may be in characterizing issues as questions of law or mixed questions of law and fact, when an unmixed legal issue was presented by the summary judgment motion or when the facts and law remain unchanged between the decision of the summary judgment motion and the decision by the trier of fact, the issue presented by the summary judgment motion has not been mooted, and the correctness of the decision of that legal issue should be addressed, after final judgment, on appeal from the denial of the summary judgment motion. These are not situations in which the propriety of the summary judgment motion is a moot point because of subsequent development of the factual record at trial.

2. *The Availability of Adequate Alternative Remedies*

A number of circuits rationalized their refusal to entertain post-trial, post-judgment appeals from denials of motions for summary judgment by asserting that the proper remedy for an erroneous denial of summary judgment was either interlocutory appeal or a Rule 50 motion for judgment as a matter of law.[176]

The Fourth Circuit in *Chesapeake* said that the most important reason for refusing to differentiate summary judgment decisions based on decisions of law from those based on the determination that there exist genuine issues of material fact is that:

> [A] party that believes the district court committed legal or factual error in denying summary judgment has adequate remedies other than seeking review of the denial after a full trial. First, a party may move for judgment

176. *See, e.g.*, Lind v. United Parcel Serv., Inc., 254 F.3d 1281, 1285 (11th Cir. 2001) (opining that a party who believes the district court committed legal or factual error in denying summary judgment has adequate remedies in interlocutory appeal or a motion for judgment as a matter of law); Pahuta v. Massey-Ferguson, Inc., 170 F.3d 125, 132 (2d Cir. 1999) (observing that "[i]f a party wishes to appeal a denial of a motion for summary judgment, . . . the party may petition for the right to file an interlocutory appeal [under] 28 U.S.C. § 1292(b); or . . . file [motions] pursuant to Rule 50 for judgment as a matter of law and appeal the district court's denial of [those motions]"); *Chesapeake*, 51 F.3d at 1237 (same as *Lind*); Watson v. Amedco Steel, Inc., 29 F.3d 274, 279 (7th Cir. 1994) (stating that when a motion for summary judgment has been denied, the movant should seek recourse through a Rule 50 motion for judgment as a matter of law); Black v. J.I. Case Co., 22 F.3d 568, 571-72 (5th Cir. 1994) (similar to *Watson*); Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1251 (10th Cir. 1992) (similar to *Watson*); Lum v. City & Cnty. of Honolulu, 963 F.2d 1167, 1169-70 (9th Cir. 1992) (concluding that the appropriate way to obtain review of the denial of a summary judgment motion is through interlocutory appeal under 28 U.S.C. § 1292(b)).

> as a matter of law under Fed.R.Civ.P. 50 and then seek appellate review of the motions if they are denied. . . . [A] party may appropriately move for judgment as a matter of law on discrete legal issues . . . because a party may seek such judgments with respect to issues that are not wholly dispositive of a claim or defense. Reviewing a Rule 50 determination is preferable to reviewing a summary judgment decision because the Rule 50 decision is based on the complete trial record and not the incomplete pretrial record available at summary judgment.
>
> Second, a party that believes the district court committed error in denying summary judgment may move the court to certify the denial for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) . . . although the district court may choose not to certify its decision for interlocutory appeal and the appellate court may choose not to consider the appeal.[177]

We first should ask whether and why it should matter that (or whether) a party who believes the district court committed legal or factual error in denying summary judgment has adequate remedies other than seeking review of the denial after a full trial. Discussion earlier in this Article already has established that interlocutory appeal of summary judgment denials is available primarily in the limited category of cases in which such denials are based on rejections of qualified or absolute immunity defenses.[178] To the extent the position espoused by the Fourth Circuit in *Chesapeake* suggests that interlocutory appeal would be preferable, it turns on its head our system's normal preference for post-judgment appeals. That would be undesirable.

In further response, the fact that a party who believes that the district court committed error in denying summary judgment may move the court to certify the denial for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is of little relevance. A party may refrain from seeking certification under § 1292(b) because it recognizes that the requirements of that statute are not satisfied.[179] Indeed, federal courts have been notoriously grudging in authorizing appeals under § 1292(b).[180] More importantly, the requirements of § 1292(b) relate

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177. *Chesapeake*, 51 F.3d at 1236-37 (citation omitted). *See generally* Morin, *supra* note 87, at 227 (arguing that if a party lacks a right to immediately appeal a denial of her summary judgment motion, she must "preserve summary judgment arguments through Rule 50 motions").

178. *See supra* Part I.

179. *See supra* note 9.

180. Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 71 F. Supp. 2d 139, 161 (E.D.N.Y. 1999) ("Over the past decade, there have been slightly more than 40,000 appeals heard by the court of appeals for the Second Circuit from final judgments. During that same period, only 138 interlocutory orders were certified under section 1292(b) for appeal, of which the court of appeals agreed to hear only

in large part to the propriety of an interlocutory appeal and not to the propriety of a later appeal. In any event, the effort to obtain a § 1292(b) certification never has been mandatory. A party does not waive its right to appeal an alleged error after final judgment by virtue of having chosen not to seek § 1292(b) certification; there is no obligation to seek § 1292(b) certification and no penalty for not doing so.[181] Thus, the ability to seek a § 1292(b) interlocutory appeal has little, if any, bearing on whether a party is or ought to be able to appeal, after trial and final judgment, what he alleges is a legally erroneous denial of summary judgment.

The first point—that "a party [who] believes the district court committed legal or factual error in denying summary judgment . . . may move for judgment as a matter of law under Fed.R.Civ.P. 50 and then seek appellate review of the motions if they are denied"[182]—needs closer examination.

If the alleged error was in finding genuine issues of material fact, precluding summary judgment, I again agree that "that train has left the station," and the Rule 50 motion, which is directed at the trial record, is the appropriate means to challenge the sufficiency of the evidence. But if the alleged error in the denial of summary judgment is an error of law, why should a Rule 50 motion and appeal of its denial be the required grist for the appeal?

To consider on what occasions or in what situations Rule 50 motions should be required, it is useful first to ask:

93.") (citation omitted). *See generally* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1193 (1990) (noting that "commentators generally discount [§ 1292(b)'s] effectiveness as a safety valve for interlocutory appeals, since it has been historically utilized infrequently"); Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 266 (2001) ("District court certification is rare."). The reasons include the widespread belief "'that [§] 1292(b) is to be used sparingly, in exceptional [big] cases,'" district judges' reluctance to invite reversal, and district judges' very broad discretion to deny § 1292(b) certification. *See generally* Mackenzie M. Horton, Comment, *Mandamus, Stop in the Name of Discretion: The Judicial "Myth" of the District Court's Absolute and Unreviewable Discretion in Section 1292(b) Certification*, 64 BAYLOR L. REV. 976, 980-81 (2012) (quoting 15B WRIGHT, MILLER & COOPER, *supra* note 7, § 3929).

181. *See In re* Trans Union Corp. Privacy Litig., 741 F.3d 811, 817 (7th Cir. 2014) ("An appeal from a final judgment encompasses review of earlier interlocutory rulings—even those that could have been the subject of an interlocutory appeal—so long as the issues decided in those rulings have not become moot."); *see supra* note 144.

182. *Chesapeake*, 51 F.3d at 1236.

a. How Do Summary Judgment Motions and Rule 50 Motions Compare?

The Supreme Court has said that the standard for granting summary judgment is essentially the same as the standard for granting a Rule 50(a) motion.[183] However, a summary judgment motion is made before trial and is based on the case record as it exists at the time the motion is made.[184] The movant argues, based on that record, that there are no genuine issues of material fact to be decided and that the movant is entitled to judgment as a matter of law. No "genuine" issue of material fact, in this context, means that there are no material issues as to which reasonable jurors could disagree.[185] A Rule 50(a) motion is made, in a jury trial, when the party against whom judgment is sought has rested its case; the motion is based on the trial record to that point.[186] The movant argues that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [non-moving] party on [a particular] issue" and that the court should resolve that issue against the non-moving party and grant a motion for judgment as a matter of law against the non-moving party because, under the law, an identified claim or defense cannot be maintained without a finding on that issue favorable to the non-moving party.[187]

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183. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000) ("[T]he standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, [so] that 'the inquiry under each is the same.'" (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986))); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) ("[The] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)." (quoting *Anderson*, 477 U.S. at 250)); *Anderson*, 477 U.S. at 250-53 (same).

184. *See* FED. R. CIV. P. 56.

185. *Anderson*, 477 U.S. at 248, 252 (a genuine issue of material fact exists if a reasonable jury could enter a verdict for the non-moving party); Gordon v. FedEx Freight, Inc., 674 F.3d 769, 773 (7th Cir. 2012) ("[T]he nonmoving party must establish some genuine issue for trial such that a reasonable jury could return a verdict in her favor."); Chapter 7 Tr. v. Gate Gourmet, Inc., 683 F.3d 1249, 1254 (11th Cir. 2012) ("A genuine issue of material fact exists when 'a reasonable jury could return a verdict for the nonmoving party.'" (quoting Dixon v. Hallmark Cos., 627 F.3d 849, 854 (11th Cir. 2010))).

186. In a non-jury trial, the most comparable rule is Rule 52(c), which provides in part that "[i]f a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." FED. R. CIV. P. 52(c).

187. FED. R. CIV. P. 50(a).

Rule 50 thus focuses exclusively on the circumstances in which a reasonable jury would not have a legally sufficient evidentiary basis to find for the non-moving party on one or more issues, and explicitly ties the conclusion that one party is entitled to judgment to the absence of sufficient evidence to allow victory for the other side. It corresponds to that portion of Rule 56 that focuses on whether genuine issues of material fact are posed.

Under Rule 56, once the court decides that genuine issues of material fact are not posed, the court must inquire whether the moving party is entitled to judgment as a matter of law.[188] The latter question seems to be somewhat less tethered to the question whether there are genuine issues of material fact than is the judgment-as-a-matter-of-law issue raised by a Rule 50 motion,[189] though there is some disagreement about this, which is explored below.[190]

The potential difference between the two issues (of evidentiary sufficiency and entitlement to judgment as a matter of law) may be illuminated in this way: The summary judgment requirements of the absence of genuine issues of material fact and entitlement to judgment as a matter of law suggest that these are two separate phenomena. And the possibility that there could be no genuine issues of material fact and yet one could lose on the law bolsters the separateness of the two.

However, one can get a judgment "as a matter of law" only when there are no genuine issues of material fact, so the absence of a genuine dispute as to a material fact is necessary but not sufficient for entitlement to judgment as a matter of law. Thus, the state of the record inevitably comes into play when a party makes a summary judgment motion and also when a party makes a mid- or post-trial motion for judgment as a matter of law. The relevance of the record is among the reasons courts sometimes have said that a Rule 50 motion has to be made, and its denial appealed, if a litigant wants the appeals court to reach the question whether judgment as a matter of law was wrongly denied to a litigant.[191] However, when the question

188. FED. R. CIV. P. 56(a).

189. The Rule 56 inquiry seems to be more similar than the Rule 50 inquiry to the question posed by a Rule 12(b)(6) motion. In the 12(b)(6) context, the court takes the factual allegations—though, under *Twombly* and *Iqbal*, not the conclusions—to be true, and asks whether the claimant has stated a claim upon which relief can be granted. *See* Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007).

190. *See infra* text accompanying notes 192-211.

191. *See supra* note 176.

that would be posed after trial is no different from the question that was posed by the motion for summary judgment, it is not evident why a redundant motion should be necessary. Even more importantly, in some circumstances, the propriety of a Rule 50 motion would be questionable, as explained below.[192]

b. Are Rule 50 Motions Appropriate for Questions Other than the Sufficiency of the Evidence?

Federal Rule of Civil Procedure 50(a) states, in pertinent part:

> Judgment as a Matter of Law.
>
> (1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> (A) resolve the issue against the party; and
>
> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
>
> (2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.[193]

The primary, if not the sole, purpose of Rule 50 clearly is to authorize judgment as a matter of law when the evidence is insufficient to support a verdict for the party against whom the motion is made.[194] Some courts and commentators have argued that

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192. *See infra* text accompanying notes 194-211.

193. FED. R. CIV. P. 50(a).

194. *See, e.g.*, Martin H. Redish, *Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling*, *in* 9 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE (3d ed. 2014) § 50.05 ("Judgment as a matter of law is appropriate when there is an absence of evidence on an issue or claim essential to a nonmoving party's cause of action or defense or, if the movant bears the initial burden of production, the evidence in favor of the movant is so overwhelming that reasonable persons could not arrive at a contrary verdict.") (footnotes and cross-references omitted); *id.* § 50.06 ("[T]he[] fundamental purpose [of Rule 50 motions] is to determine whether . . . there is sufficient evidence for a reasonable jury to find for a nonmovant without the burden of production."); *id.* § 50.60 ("[J]udgment as a matter of law is proper if there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmovant under controlling law. . . . [J]udgment as a matter of law must be granted when, under governing law, there can be but one reasonable conclusion as to the verdict."); 9B CHARLES ALAN WRIGHT & ARTHUR R.

the purpose of Rule 50 goes beyond this and that a Rule 50 motion properly may be the vehicle to seek and receive judgment as a matter of law based on purely legal issues that are unrelated to the sufficiency of evidence at trial.[195]

There is limited case law support for this proposition in actual holdings, however. In *Neely v. Martin K. Eby Construction Co.*, the Supreme Court said:

> There are . . . situations where the defendant's grounds for setting aside the jury's verdict raise questions of subject matter jurisdiction or dispositive issues of law which, if resolved in defendant's favor, must necessarily terminate the litigation. The court of appeals may hold in an employer's suit against a union, for example, that the case is within the exclusive jurisdiction of the National Labor Relations Board, or in a libel suit, that the defendant was absolutely privileged to publish the disputed statement. In such situations, and others like them, there can be no reason whatsoever to prevent the court of appeals from ordering dismissal of the action or the entry of judgment for the defendant.
>
> On the other hand, where the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated.[196]

This was dicta.[197] Lower courts generally take the position that they need to heed well-considered dicta of the Supreme Court,[198] but one may question whether the Court's indication that Rule 50 is the (or

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MILLER, FEDERAL PRACTICE AND PROCEDURE § 2521 (Rule 50 "allows the court to remove from the jury's consideration cases or issues when the facts are sufficiently clear that the law requires a particular result. . . . It is . . . a device to save the time and trouble involved in a lengthy jury determination when there is a clear insufficiency of evidence on one side of the case or the other. . . . [A] Rule 50(b) motion is merely a renewal of the preverdict motion . . . .").

195. *See* Redish, *supra* note 194, § 50.05 ("[W]hen appropriate, judgment as a matter of law may be granted on purely legal issues unrelated to the sufficiency of evidence at trial.").

196. 386 U.S. 317, 327 (1967).

197. In *Neely*, the plaintiff had won a verdict that survived defendant's motion for judgment n.o.v. *Id.* at 328. "J.n.o.v." or judgment "n.o.v" is an abbreviation for judgment *non obstante verdicto*, that is, judgment notwithstanding the verdict. It was the post-judgment equivalent of a directed verdict. Both are now referred to by the Federal Rules of Civil Procedure as judgments as a matter of law. FED. R. CIV. P. 50(a) advisory committee's note (1991); BLACK'S LAW DICTIONARY 847 (7th ed. 1999). In the court of appeals, the issue was the sufficiency of the evidence, not a discrete legal question, so the Supreme Court's remarks were uttered in circumstances in which the Court had no reason to focus on the propriety of using Rule 50 to resolve legal questions separate from the sufficiency of the evidence. *Neely*, 386 U.S. at 328-29.

198. *See supra* text accompanying note 151.

even *an*) appropriate vehicle for seeking reversal when dispositive issues of law could end a litigation was well-considered.

Materials in the Advisory Committee Notes to Rule 50 support a narrower interpretation of the Rule. The 1991 Advisory Committee Notes state:

> The revision authorizes the court to perform its duty to enter judgment as a matter of law at any time during the trial, *as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case*.
>
> . . . .
>
> Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered. *The purpose* of this requirement *is to assure the responding party an opportunity to cure any deficiency in that party's proof* that may have been overlooked until called to the party's attention by a late motion for judgment.
>
> . . . .
>
> The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve *the purpose* of the requirement that the motion be made before the case *is* submitted to the jury, so *that the responding party may seek to correct any overlooked deficiencies in the proof.*
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> . . . .
>
> In ruling on such a motion [a motion under Rule 50(b)], *the court should disregard any jury determination for which there is no legally sufficient evidentiary basis* enabling a reasonable jury to make it. *The court may then decide such issues as a matter of law and enter judgment if all other material issues have been decided by the jury on the basis of legally sufficient evidence, or by the court as a matter of law*.[199]

The comment that "[t]he revision of this subdivision aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment,"[200] arguably suggests a broader mission for Rule 50. But the Advisory Committee Notes' elaboration that

> [*t*]*he expressed standard makes clear that action taken under the rule* is a performance of the court's duty to assure enforcement of the controlling law and *is not an intrusion on any responsibility for factual*

199. FED. R. CIV. P. 50 advisory committee's note (1991) (emphasis added).
200. *Id.*

> *determinations conferred on the jury* by the Seventh Amendment or any other provision of federal law[201]

suggests that the focus remains on entry of judgment as a matter of law only when such a judgment would not intrude on the jury's prerogatives. The single invocation of responsibility to assure the fidelity of its judgment to the controlling law should not be taken to vastly expand the role of the courts under Rule 50.

The language in Rule 50(b) that when the judgment as a matter of law motion is not granted, the court submits the action to the jury "'subject to a later determination of the legal questions raised by the motion'"[202] is consistent with the narrow interpretation too, for if the legal questions raised by the motion go only to whether the evidence was sufficient to go to the jury—and the argument that the evidence was not sufficient is what is to be renewed after trial—then nothing in Rule 50(b) supports the proposition that a Rule 50 motion properly may be the vehicle to seek and receive judgment as a matter of law based on purely legal issues, unrelated to the sufficiency of evidence at trial.

Nor would the issues that the Supreme Court in *Neely* suggested could be handled under Rule 50 be unreachable under this plain-meaning interpretation of Rule 50. The parties or the court sua sponte could raise the objection of lack of subject-matter jurisdiction under Federal Rule 12 at any time.[203] The affirmative defensive of privilege could not be raised for the first time after trial, but the bar to raising it would derive from a failure to raise it in a timely fashion. Affirmative defenses are supposed to be raised in the answer to the complaint[204] and typically are waived if not timely asserted. If a defendant timely raised the affirmative defense of privilege and the trial court erroneously rejected it on a motion for judgment on the pleadings or a motion for summary judgment, that ruling should be appealable, after final judgment. But only if the disposition of the affirmative defense depended on the resolution of fact issues would a Rule 50 motion, directed at an unsupported adverse disposition of the privilege issue, be appropriate.

There is some broad language in the Supreme Court's opinion in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.* that may

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201. *Id.* (emphasis added).

202. *See* K & T Enters., Inc. v. Zurich Ins. Co., 97 F.3d 171, 175 (6th Cir. 1996) (quoting FED. R. CIV. P. 50(b)).

203. *See* FED. R. CIV. P. 12(h)(3).

204. *See* FED. R. CIV. P. 8(c).

appear to cut against my position. The Court there said that it had concluded that "'[i]n the absence of . . . a [Rule 50(b)] motion' an 'appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.'"[205] However, the cases that the Court cited do not support this broad a position. In both of them, the focus was on the power of the court of appeals when no Rule 50(b) motion had been filed, *and the issue was the sufficiency of the evidence*.[206] In the Court's view, a post-verdict motion was necessary because "'[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the 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.'"[207] This reasoning is inapt when the focus is an alleged error of law that undergirded denial of a motion for summary judgment.[208]

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205. 546 U.S. 394, 400-01 (2006) (quoting Cone v. W. Va. Pulp & Paper Co., 330 U.S. 212, 218 (1947)).

206. In *Cone*, the Supreme Court reversed the court of appeals' order directing entry of judgment for respondent despite the fact that respondent had made no motion for judgment notwithstanding the verdict. 330 U.S. at 217-18. The Court concluded that a party's failure to file a Rule 50(b) motion deprived the appellate court of power to order the entry of judgment in favor of that party where there were issues concerning the sufficiency of the evidence. *Id.* at 214-15. Whether a new trial should have been granted or a judgment entered under Rule 50(b) called, in the first instance, for the judgment of the judge who saw and heard the witnesses; therefore, the case should have been remanded for a new trial. *Id.* at 216.

207. *Unitherm*, 546 U.S. at 401 (quoting *Cone*, 330 U.S. at 216).

208. In a few of the intermediate appellate court cases cited for the propriety of using Rule 50 to decide legal issues separate from the sufficiency of the evidence, it may be that that conclusion was not mere dicta. But even those cases do not stand for the proposition that, on appeal from the final judgment, a party cannot rely on the denial of his motion for summary judgment. *See, e.g.*, K & T Enters., Inc. v. Zurich Ins. Co., 97 F.3d 171, 174 (6th Cir. 1996) (holding that "where an appellant made a Rule 56 motion . . . that was denied, ma[de] those same arguments in a Rule 50(a) motion at the close of the evidence that was also denied, lost in front of a jury, then renewed its arguments in a rejected Rule 50(b) motion after the entry of judgment, we will review only the denial of the Rule 50(b) motion"); *accord* Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, 1236 (4th Cir. 1995). But this is not to say that the appellant who made only a Rule 56 motion (and not a Rule 50 motion) could not, after trial and judgment, appeal the denial of his summary judgment motion. Moreover, the *Chesapeake* and *K & T* rationale for reviewing only the denial of the Rule 50(b) motion was that that decision was based on the complete trial record, rather than the incomplete record available at summary judgment. *See Chesapeake*, 51 F.3d at 1236; *K & T Enters.*, 97 F.3d at 174. But if the question posed is an abstract legal issue, not a mixed question

Under 28 U.S.C. § 2106:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.[209]

While this statutory power must be exercised consistently with the Federal Rules,[210] it does not appear that anything in the Federal Rules precludes federal appellate courts from reversing a judgment and directing entry of summary judgment to a party who was erroneously denied it by virtue of an error of law by the district court judge who ruled on the summary judgment motion.

If the foregoing analysis is correct, Rule 50 motions are not appropriate for questions other than the sufficiency of the evidence. When summary judgment motions were denied, not on the basis of the existence of genuine issues of material fact but on the basis of holdings of law, Rule 50 motions cannot properly substitute for the summary judgment motions. In that circumstance, review of Rule 50 motion denials should not be preferred to review of summary judgment motion denials.[211] The *review* of a Rule 50 motion denial,

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that depends in part on the factual record, the completeness of the trial record should not matter.

209. 28 U.S.C. § 2106 (2012).

210. *Unitherm*, 546 U.S. at 402.

211. *See* Feld v. Feld, 688 F.3d 779, 782-83 (D.C. Cir. 2012) (rejecting the position that appellant had to make a Rule 50 motion in order to preserve for appeal a purely legal question—"whether D.C. law permits a condominium owner to use force to exclude another from the building's common areas"—that she raised in her unsuccessful motion for summary judgment, and upholding appellate jurisdiction over the issue); Wilson v. Union Pac. R.R., 56 F.3d 1226, 1229 (10th Cir. 1995) ("Where 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."); *cf. Chesapeake*, 51 F.3d at 1235-36 (in dicta, requiring a Rule 50 motion to preserve a legal issue first raised in a motion for summary judgment, but the court was declining to review a denial of a motion for partial summary judgment that had been based on the existence of genuine issues of material fact); *see also* Ahrenholz v. Bd. of Trs., 219 F.3d 674, 675-77 (7th Cir. 2000) ("'[Q]uestion of law' as used in section 1292(b) has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine rather than to [the question] whether the party opposing summary judgment has raised a genuine issue of material fact. . . . We think [the framers of section 1292(b)] used 'question of law' . . . as referring to a 'pure' question of law rather than merely to an issue that might be free from a factual contest. . . . '[Q]uestion of law' means an abstract legal issue rather than an

like the Rule 50 motion itself, would focus on the sufficiency of the evidentiary basis to find for the non-moving party on one or more issues, rather than on the legal issue that is posed when there are no genuine issues of material fact.

c. Even If Rule 50 Motions Are Appropriate for Questions Other than the Sufficiency of the Evidence, Do Law-of-the-Case Principles and Policies Argue Against Requiring Rule 50 Motions as a Prerequisite to Appeal?

Even if one rejects the preceding analysis and believes that Rule 50 motions have a function that is as encompassing as that of summary judgment motions,[212] why should we require parties whose motions for summary judgment were denied to raise the same legal arguments via Rule 50 motions? What good reason is there to impose the procedural burden of requiring a party to raise again the same legal points that it made in its summary judgment motion?[213]

This Article already has adverted to both the general rule in the federal system that litigants do not need to repeat their legal arguments in varying guises and the possibility that revival of an issue through Rule 50 motions could be disdained under the law-of-the-case doctrine or the policies that underlie that doctrine. I expand on those points here.

The better rule is that a litigant should not need to preserve legal arguments that it made in its motion for summary judgment by filing Rule 50 motions that reiterate the point. In general we do not require parties to repeatedly raise points that they have made, and that the court has ruled upon, earlier in a litigation.[214] Indeed, we

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issue of whether summary judgment should be granted." (quoting 28 U.S.C. § 1292(b) (2012))).

212. *Chesapeake*, 51 F.3d at 1236 ("[A] party may appropriately move for judgment as a matter of law on discrete legal issues . . . because a party may seek such judgments with respect to issues that are not wholly dispositive of a claim or defense."); *see* FED. R. CIV. P. 50 advisory committee's note (1993).

213. *Cf.* Devlin v. Scardelletti, 536 U.S. 1, 14 (2002) (holding that Rule 23 class members who have objected to a proposed settlement of the class action should not be burdened with the requirement that they formally intervene in the suit before they may appeal rulings rejecting their objections).

214. *E.g.*, Sneed v. Shinseki, 737 F.3d 719, 724-25 n.6 (Fed. Cir. 2013) (stating that "preserving an argument for appeal . . . 'requires that the lower court [have been] fairly put on notice [of] the substance of the issue'" (quoting Nelson v. Adams USA, Inc., 529 U.S. 460, 469 (2000))); Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 233-34 (1st Cir. 2013) (holding that grant of a motion to dismiss for failure to state a claim was preserved for appeal where plaintiff raised issues and

discourage parties from repeatedly raising the same legal issues. We do so, in part, through the doctrine of "law of the case."[215] In general, that doctrine precludes the re-litigation of issues within the context of a single case, once they have been decided.[216] Although federal trial courts have unquestioned power to reconsider their earlier rulings, under this doctrine federal trial courts typically will not reconsider a prior ruling unless "controlling law has been changed[,] . . . relevant evidence is newly available," reconsideration is "necessary to correct a clear error and to prevent manifest injustice," or other exceptional circumstances are present.[217] Thus, it would be inconsistent with the law-of-the-case doctrine to demand that litigants who lost on a legal point made in support of their

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arguments in opposition to the motion to dismiss that she now made on appeal); Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty., 708 F.3d 1109, 1119 (9th Cir. 2013) (vacating dismissal of amended complaint, without leave to amend, holding in part that where the district court had rejected the association's implied contract theory in its dismissal of the original complaint, the association's failure to raise the same argument again in its amended complaint or after filing its amended complaint did not waive its right to argue on appeal the error of that rejection); Morton v. Progressive N. Ins. Co., 498 F. App'x 835, 840 (10th Cir. 2012) (explaining that to preserve an issue for appeal, an insured was not required to renew his objection to the admission of statements in a deposition, where the district court already had definitely ruled on admissibility in ruling on a motion in limine).

215. *See* HK Sys., Inc. v. Eaton Corp., 553 F.3d 1086, 1089 (7th Cir. 2009) (explaining that "[t]he doctrine of law of the case counsels against a judge's changing an earlier ruling that he made in the same case").

216. *See, e.g.*, Pepper v. United States, 131 S. Ct. 1229, 1250 (2011) (stating that a decision of law should govern in subsequent stages of a case); Cobell v. Salazar, 679 F.3d 909, 916-17 (D.C. Cir. 2012) ("Under the law-of-the-case doctrine, 'the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*.'" (quoting LaShawn A. v. Barry, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc))); United States v. Watts, 934 F. Supp. 2d 451, 463 (E.D.N.Y. 2013) (noting that the law-of-the-case doctrine is driven by considerations of fairness, judicial economy, and the interest in finality (citing United States v. Carr, 557 F.3d 93, 102 (2d Cir. 2009))).

217. *See generally* Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 597-613 (1987); Allan D. Vestal, *Law of the Case: Single-Suit Preclusion*, 1967 UTAH L. REV. 1, 1-4 (1967). *See, e.g.*, Benjamin v. Dep't of Pub. Welfare, 701 F.3d 938, 949 (3d Cir. 2012) (applying the principle that "[w]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case," absent extraordinary circumstances); Winston v. Pearson, 683 F.3d 489, 498 (4th Cir. 2012) (stating that the court's prior legal conclusions in the case were subject to challenge only if controlling authority had since made a contrary decision applicable to the issue, or other extraordinary circumstances were present).

motion for summary judgment raise that legal argument again in a Rule 50 motion for judgment as a matter of law.[218]

If the factual basis to which principles of law have been applied has changed between the motion for summary judgment and the end of trial and *if* the question posed is a mixed question of law and fact, then the issue is not identical and the law-of-the-case doctrine will not apply. But if the material factual base to which principles of law have been applied has *not* changed or the case presents a pure question of law that remains unchanged, then the law-of-the-case doctrine should caution the court against revisiting its earlier decision; and holdings of law that undergird the denial of a summary judgment motion *should* be reviewable after final judgment, without a redundant Rule 50 motion being required.[219]

If some courts have been misguided in requiring a party who wanted to appeal the denial of his summary judgment motion to revive the underlying issue through a Rule 50 motion, perhaps the

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218. Some circuits hold that the law-of-the-case doctrine does not apply prior to final judgment, so that trial courts are freer to reconsider prior interlocutory rulings than the law-of-the-case doctrine indicates. *See* Rimbert v. Eli Lilly & Co., 647 F.3d 1247, 1251-52 (10th Cir. 2011), *quoted with approval in* Stewart v. Beach, 701 F.3d 1322, 1328-29 (10th Cir. 2012) (declining to hold a second judge constrained by the law-of-the-case doctrine when he was asked to reconsider a prior judge's denial of qualified immunity); *cf.* U.S. EEOC v. Global Horizons, Inc., 904 F. Supp. 2d 1074, 1091-92 (D. Haw. 2012) (recognizing both the applicability of the law-of-the-case doctrine to interlocutory rulings, and the broad discretion to reconsider pre-trial rulings, and in this case changing its statute of limitations ruling). Even so, while we may *permit* parties to seek reconsideration of prior interlocutory orders, including denials of summary judgment, that is not to say that we do or should *require* parties to do so. *Accord* Shannon, *supra* note 164, at 55 ("Though compliance with Rule 50 seems to have everything to do with the appealability of a *verdict*, it is not entirely clear—at least as a normative matter—why this procedure has anything to do with the appealability of an earlier denial of summary judgment. The appealability of pretrial matters generally is not precluded by the failure to comply with Rule 50 . . . .").

219. *See* EEOC v. Serv. Temps Inc., 679 F.3d 323, 331 (5th Cir. 2012) ("[T]he district court twice rejected [defendant's] attempts to argue that the EEOC had not conciliated in good faith," as a basis for denying summary judgment to defendant. The court so ruled on the ground that defendant's answer to the complaint failed to raise the issue, as required by Federal Rule of Civil Procedure 9(c), because a failure to conciliate in good faith is a non-jurisdictional condition precedent, which must be pleaded with particularity in the answer. After an adverse final judgment after trial, defendant argued that the district court erred in requiring the lack of good faith conciliation efforts to have been raised in the answer, and in deeming the defense waived.). The Fifth Circuit addressed this legal issue, which stemmed from the summary judgment ruling. *Id.* There was no discussion of defendant's need to have reprised the issue at trial by a Rule 50 motion or otherwise.

courts chose the wrong vehicle, but there is merit to their insistence on the aggrieved party doing something more than failing with its summary judgment motion. Some courts have argued that reviving the issue in some manner would help to avoid surprise to the appellee, could give the trial court an opportunity to revisit its earlier ruling, and therefore should be necessary to preserve the error for appeal. Let us examine these rationales.

3. *Unfair Surprise*

What of the argument that if a would-be appellant does not have to file a Rule 50 motion or take some other action in the trial court, late in its proceedings, that revives the legal issue presented by the earlier denied summary judgment motion, raising that issue on appeal creates unfair surprise to the party who succeeded in having the summary judgment motion denied and allows the denial of summary judgment to act like a bomb, planted early, that can explode after jury trial and final judgment, blowing up and nullifying those proceedings?[220]

I don't know why raising on appeal the legal rulings made in support of the denial of a motion for summary judgment should come as any more of a surprise to the prevailing party than raising on appeal any other adverse legal rulings that culminated in the adverse final judgment. Nor do I see any unfairness to the prevailing party in having to defend its judgment against contentions that a ruling on the law, on which the denial of summary judgment was predicated, was erroneous and harmed the losing party.[221] Any prejudicial error in the proceedings below can nullify the judgment, whether that error was made in rulings on pleadings, rulings on discovery, or rulings at trial.

Summary judgment denials are no more "bombs" that should be prohibited from sinking a judgment than are dismissals that "strike a vital blow to a substantial part" of complaints and require the plaintiff to resort to a legal theory on which it is more difficult to recover than the position taken in the initial complaint[222] or discovery

220. "Summary judgment was not intended to be a bomb planted within the litigation in its early stages and exploded on appeal." Holley v. Northrop Worldwide Aircraft Servs., Inc., 835 F.2d 1375, 1377 (11th Cir. 1988).

221. *See* Davis v. TXO Prod. Corp., 929 F.2d 1515, 1517 (10th Cir. 1991).

222. In at least the Tenth and Fifth Circuits, "while the pleader who amends or pleads over, waives his objections to the ruling of the court on indefiniteness, incompleteness or insufficiency, . . . he does not waive his exception to the ruling which strikes 'a vital blow to a substantial part' of his cause of action." *Id.* (quoting

orders that deprive a litigant of discovery that could alter the outcome of the case or orders that reject proposed jury instructions or objections to contemplated jury instructions.

In all of these instances, our system permits appeal of the orders in question, notwithstanding that, in some of the instances, those orders were entered very early in the litigation.[223] We do not require the litigants to repeatedly make the same points in order to preserve them for appeal. In the same way, our system seemingly should not require the litigant who unsuccessfully moved for summary judgment to make his same legal arguments in the district court in different garb, especially by way of Rule 50 motions for judgment as a matter of law, which this Article has shown to be inappropriate.

The making of summary judgment motions and the writing of memoranda in support of and in opposition to such motions is a lengthy, onerous, and expensive process.[224] The parties typically put a great deal of time and effort into advocating for and against summary judgment motions. Given this reality, it is not as though the legal points made in connection with a summary judgment motion "fly under the radar" and might bite an unsuspecting adversary after final judgment. Nor will the motion for summary judgment likely have been made and briefed so long before a case went to trial and judgment that opposing counsel will have forgotten about it. Decision of any motion for summary judgment that is filed unreasonably early is likely to have been postponed until the respondent on the motion had a reasonable opportunity to obtain affidavits and to take discovery to enable it to respond to the motion.[225] I see no reason why a party who has made, and lost on, a

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Blazer v. Black, 196 F.2d 139, 143-44 (10th Cir. 1952)); Williams v. Wynne, 533 F.3d 360, 365 (5th Cir. 2008) (holding that "appellant did not waive his Title VII claim by filing an amended complaint that failed to replead the claim already rejected by the district court").

223. *See* Shannon, *supra* note 164, at 66 ("[I]t is unclear how a motion for summary judgment is more of a 'bomb' than any other appealable pretrial motion."). If anything makes it a "bomb," it is the uncertainty in the law as to whether and under what circumstances points made in summary judgment motions can be raised on appeal after final judgment, rather than anything inherent in such motions.

224. *See supra* note 4.

225. *See* FED. R. CIV. P. 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.").

motion for summary judgment should be viewed as having "slept" on his rights by virtue of not reiterating his legal position at trial, nor why an opponent should be seen as having reasonably relied to his detriment on the moving party's failure to reiterate at trial the legal position he took in his summary judgment motion.[226] Thus, the unfair surprise and "bomb" arguments seem grossly exaggerated, if not fanciful. Nor is it obvious how any such surprise would be prejudicial. When the notice of appeal indicates that the appellant is appealing the denial of his motion for summary judgment, the appellee has ample means and opportunity to respond to that argument in his answer brief and on oral argument, if any.

Compare the federal courts' handling of erroneous denials of motions to dismiss for failure to state a claim on which relief can be granted. When summary judgment motions are denied on the grounds that a case presents issues of fact that are genuinely disputed and need to be tried, those decisions are superseded (mooted, overtaken, rendered irrelevant) by the evidence produced at trial, so as to make the relevant question after trial whether the evidence presented at trial was such that a reasonable fact finder could find for a particular party. We no longer care about the summary judgment record. Similarly, some motions for failure to state a claim on which relief can be granted are denied on the ground that the allegations are sufficient (they are sufficiently specific, sufficiently non-conclusory, or the like)—and, if the cases proceed to trial, those decisions on the pleadings are rendered unimportant first by the final pre-trial order that supersedes the pleadings[227] and then by the evidence produced at trial, so as to make the relevant question after trial whether the trial evidence was such that the plaintiff proved a claim upon which relief could be granted. We no longer care about the complaint itself.[228] In

226. *But see infra* text accompanying notes 237-38 with respect to particular acts or omissions through which the party who lost on its summary judgment motion might waive or fail to preserve the error for appeal.

227. FED. R. CIV. P. 16(d) (providing in part that pretrial orders "control the course of the action," unless modified). In support of the proposition that the final pretrial order supersedes the pleadings, see, for example, *Case v. Abrams*, 352 F.2d 193, 195 (10th Cir. 1965); *In-Sink-Erator Manufacturing. Co. v. Waste King Corp.*, 346 F.2d 248, 251 (7th Cir. 1965); *Basista v. Weir*, 340 F.2d 74, 85 (3d Cir. 1965).

228. FED. R. CIV. P. 15(b)(2) ("A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue."); *see* ClearOne Commc'ns, Inc. v. Biamp Sys., 653 F.3d 1163, 1171-74 (10th Cir. 2011) (refusing, after jury trial and final judgment, to review the pre-trial denial of a motion to dismiss for failure to state a claim on which relief can be granted, and

that instance, courts typically do not permit the losing party to appeal on the ground that the trial court erred in denying the Rule 12(b)(6) motion; instead, the losing party must appeal on the ground that the evidence was insufficient to support the verdict. That's what Rule 50 is for.

By contrast, other motions for failure to state a claim on which relief can be granted are denied on the ground that the governing law recognizes the cause of action that the claimant has pleaded (with sufficient specificity and concreteness). In that circumstance, if the case proceeds to trial and if the defending party loses at trial—the plaintiff having proved what she pled—may defendant appeal, arguing that the trial court erred in denying his Rule 12(b)(6) motion, or must he revive and recast his legal position by moving under Rule 50 for judgment as a matter of law and then appealing the denial of that motion, if the district court denies it?

The answer is that denial of the motion to dismiss for failure to state a claim *can* be reviewed on the appeal following final judgment.[229] The Wright & Miller treatise takes the position that

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announcing that appeal instead had to challenge the sufficiency of the claim through a motion for judgment as a matter of law, where defendant's motion for judgment as a matter of law asserted different arguments than defendant had made in its Rule 12(b)(6) motion). The court found it unnecessary to decide whether to recognize an exception for post-trial appeals from denials of Rule 12(b)(6) motions that were based on the resolution of purely legal questions, observing that in the case at bar the denial was based largely on the district court's conclusion that additional factual development was necessary before the court could confidently rule on whether plaintiff had a viable claim. *ClearOne Commc'ns*, 653 F.3d at 1172-73. The court relied on the Fifth Circuit for the propositions that, after trial, denial of a Rule 12(b)(6) motion becomes moot; the sufficiency of the allegations is irrelevant, once parties have put on their proofs; and

> "[t]he arguments for not considering an appeal from a denial of a Rule 12(b)(6) dismissal after a trial on the merits are stronger than those for not considering a refusal to dismiss under [Rule] 56, given the ease with which a plaintiff may amend a complaint after judgment . . . to conform to the evidence."

Id. at 1172 (quoting Bennett v. Pippin, 74 F.3d 578, 585 (5th Cir. 1996)).

229. *See id.* at 1172-73 (recognizing the possibility that a purely legal question could survive for review after trial, but refusing to review the sufficiency of the complaint after trial, because the case did not present such a question); United States v. Cambio Exacto, S.A., 166 F.3d 522, 529 (2d Cir. 1999) (after reversing a dismissal for lack of standing, the court refused to review the denial of a motion to dismiss for lack of probable cause to initiate a forfeiture and the denial of a motion for summary judgment, but it observed that there was no need for it to exercise pendant appellate jurisdiction and hear those issues on the interlocutory appeal because the appeal from the final judgment that was yet to come would permit review of those decisions); *see also* Fletcher v. Washington & Lee Univ., 706 F.2d

> the question whether a complaint states a claim may be superseded by later events. Failure to plead adequately a claim that in fact is proved at trial should not warrant reversal. [But] . . . if the problem is not deficient pleading but reliance on [what defendant contends is] an erroneous legal theory[, while t]here is much to be said for requiring that the legal question be renewed at trial . . . *if the [defendant's] legal theory is rejected by a definitive ruling at the pleading stage, renewal should not be required, not even if the defendant fails to request instructions embodying the rejected theory and to object to denial of the request*.[230]

Summary judgment has similarly interrelated but distinct aspects that should provoke differing responses with respect to reviewability. One function is to provide an occasion for a court to determine whether there are fact issues that need to be tried. Another is to provide an occasion for a court to determine whether one of the parties is entitled to judgment as a matter of law. When denial of a summary judgment motion is based on a finding that there are fact issues that need to be tried, that determination is not reviewable after

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475, 478 (4th Cir. 1983) (reviewing refusal to dismiss for failure to state a claim after reversing dismissal under Federal Rule of Civil Procedure 19). By the same token, grants of dismissals for failure to state a claim can be reviewed after final judgment. P. Stolz Family P'ship L.P. v. Daum, 355 F.3d 92, 96 (2d Cir. 2004) (permitting the plaintiff to appeal, after final judgment, the dismissal of one count of its first amended complaint, concluding that no valid purpose would be served by a formalistic requirement that the dismissed claim be repleaded in subsequent amended complaints to secure the right to review on appeal); Herdrich v. Pegram, 154 F.3d 362, 367-68 (7th Cir. 1998) (permitting plaintiff to appeal, after final judgment, the grant of a motion to dismiss one count of the complaint, the rest proceeding to trial; noting that "an order which is not a final judgment when entered becomes final or appealable upon the entry of a final judgment[;] . . . appeal of this judgment renews all issues previously pleaded and resolved by the trial court"), *rev'd on other grounds*, 530 U.S. 211 (2000).

230. 15A WRIGHT, MILLER & COOPER, *supra* note 116, § 3905.1 (emphasis added). The language omitted from the quotation at the second ellipsis is "by argument, request for jury instructions, or a challenge to the sufficiency of the evidence under the proper legal theory." *Id.*; *see id.* § 3914.1 ("Denial of a motion to dismiss for failure to state a claim often will be reviewable on appeal from a final judgment. But review may be denied if at trial adequate evidence is presented to support the judgment on a legally sufficient theory."); *see also* Milton I. Shadur, *Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing*, *in* 2 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE §12.34[6A] (3d ed. 2014) ("When a motion to dismiss for failure to state a claim is denied, . . . any appeal must await final judgment in the case."). MOORE'S notes that the Fifth and Tenth Circuits "have held that after a plaintiff has prevailed at trial on a particular claim, the defendant may not raise on appeal the pretrial denial of the motion to dismiss on that claim." *Id.* But, in those situations, the denial had become moot by virtue of the proofs. *Id.* That would not be true in the situations that the text is discussing.

final judgment because, by then, the investment in trial has been made and cannot be undone, and it makes sense for the presumptively more complete trial record to take precedence over the presumptively less complete record that existed when the motion for summary judgment was considered. The situation fits the Supreme Court's description of denials of summary judgment as not being conclusive of any claim.[231] But, just as a denial of a Rule 12(b)(6) motion based on the court's rejection of the legal theory on which the motion to dismiss was predicated should be appealable after trial and final judgment, a party who has lost on his summary judgment motion, based on a legal ruling rather than (or other than) on the existence of genuine issues of material fact, should be able to appeal the denial of his Rule 56 motion without having to revive and re-cast his legal position by moving under Rule 50 for judgment as a matter of law (or otherwise) and then appealing the denial of that motion.

What of the notion that the trial judge should be given an opportunity to reconsider and that we therefore should require additional litigant action to preserve the alleged error?

4. *Should We Require Trial Judges to Be Given an Opportunity to Reconsider Their Summary Judgment Denials, and, to That End, Require Additional Litigant Action to Preserve the Alleged Error?*

It has been proposed that, in fairness to the district court judge, the party whose summary judgment motion was denied should have to re-raise the legal issue at trial, as a prerequisite to being able to appeal the summary judgment denial on the appeal from final judgment.[232] But why? We do not normally require a party to file a motion for reconsideration as a prerequisite to appealing from a prior adverse ruling. If there is a reason to impose this burden on potential appellants with respect to summary judgment denials but not on losers on other issues, I have not seen it articulated.

Although parties have to properly preserve alleged errors in order to raise them on appeal, when a court rules against a party who has made a motion, the alleged error in the ruling on the motion

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231. Switz. Cheese Ass'n v. E. Horne's Mkt., Inc., 385 U.S. 23, 25 (1966); *see also* Elam v. Kan. City S. Ry., 465 F. App'x 369, 370 (5th Cir. 2012) (noting that the district court's denial of summary judgment to defendant was "not conclusive of any claim" and that the railroad's defenses could be addressed in the trial court).

232. *See* Jenike-Godshalk, *supra* note 29, at 1618-19 & n.124.

normally is regarded as properly preserved.[233] A number of courts have held in particular that an issue raised in a motion for summary judgment but not reasserted in a motion for directed verdict nevertheless is preserved for consideration on appeal.[234]

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233. FED. R. CIV. P. 46 ("A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection."); *see, e.g.*, E. Mountain Platform Tennis, Inc. v. Sherwin-Williams Co., 40 F.3d 492, 497 (1st Cir. 1994) (declaring that "all rulings of law subsumed within [Rule 50 motions] are subject to review on appeal from the judgment"); Imperial Ins., Inc. v. Emp'rs Liab. Assurance Corp., 442 F.2d 1197, 1201 (D.C. Cir. 1970) (discussing an action on an employee's fidelity policy where the insurer failed to object to a jury instruction regarding waiver of time specified in the policy for proof of loss and holding that the insurer adequately preserved for review its position on waiver, since at an early stage of the proceedings there had been a "full exchange between court and counsel at which [the insurer's] position had been rejected"); United States v. Barndollar & Crosbie, Inc., 166 F.2d 793, 796 (10th Cir. 1948) (acknowledging that the taking of formal exceptions to rulings or orders of the court is unnecessary and holding that "to preserve a question for review on appeal, a litigant [must] make known to the court the action he desires taken, or his objection to the action taken and his . . . grounds therefor").

234. Paschal v. Flagstar Bank, FSB, 295 F.3d 565, 572 (6th Cir. 2002) (holding that appellant, which raised a statute of limitations defense in its summary judgment motion but failed to raise the issue when it moved for judgment as a matter of law after the jury rendered its verdict, did not waive appellate review of the rejection of the statute of limitations defense, as the legal issue raised in appellant's motion for summary judgment did not require the resolution of any disputed facts); Bottineau Farmers Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064, 1073 (8th Cir. 1992) (stating that "WCC raised the constitutional issue [concerning tolling of the statute of limitations] in its motion for summary judgment and did not have to specifically reassert the constitutional issue in its subsequent motions for directed verdict or for JNOV in order to preserve that issue for consideration on appeal"); Grubb v. FDIC, 868 F.2d 1151, 1160 (10th Cir. 1989) (reasoning that an issue raised in a motion for summary judgment but not in a motion for directed verdict was properly before the court on appeal; having attacked plaintiff's standing in a summary judgment motion, "First National [did] not waive that issue by its later defense to the underlying merits," and where "the question of standing under Rule 10b-5 rest[ed] on undisputed facts and thus present[ed] a legal question addressed to the court rather than the jury," Rule 50(b) did not prevent the FDIC from raising the purely legal issue on appeal); Scola v. Boat Frances R., Inc., 546 F.2d 459, 460 (1st Cir. 1976) (holding where the issue whether a judgment was binding under the Full Faith and Credit Clause of the Constitution had been raised in a summary judgment motion, and defendant did object to the denial of its motion, the court held that, if this motion should have been granted, "defendant did not, after its denial, lose its rights by defending itself on the merits"; it did not need to move for a directed verdict and judgment n.o.v. or object to the charge to the jury to preserve the point for appeal).

As we have seen, the courts that imposed a duty on would-be appellants to do something, subsequent to the summary judgment denial, to preserve for appeal the error of that ruling typically have required the future appellant to file a Rule 50 motion.[235] This Article has argued that Rule 50 is ill-fit for the task when summary judgment was denied based on the trial court's holding as to the law and that it has been erroneous for courts to make the filing of a Rule 50 motion, reiterating appellant's legal argument, a prerequisite to appeal of the alleged legal error. But (at least in part) because courts chose this device, they have not given much thought to alternative ways in which the legal error in summary judgment denials might be preserved or to whether any further step at all should be required. Requiring a motion for reconsideration would be aberrant.[236] Requiring a motion for a new trial would make no sense because the appellant does not want a new trial; he wants to be held entitled to win as a matter of law.

It seems to me that, in some circumstances, a consistent failure to object to the admission of evidence that would be irrelevant on the appellant's theory of the case, as marshaled in its summary judgment motion and memoranda in support, might support a holding that the appellant had waived or not "preserved" the error. A failure to offer evidence in support of the summary judgment movant's theory of the case also could be damaging.[237] Similarly, a failure to object to jury

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235. *E.g.*, Norton v. Ga. Pac. Corp., No. 93-2019, 1994 U.S. App. LEXIS 10891, at *2 (8th Cir. filed May 18, 1994) (holding that Norton did not preserve for appeal the alleged error in denying its motion for summary judgment because it did not move for judgment as a matter of law or for a new trial).

236. But making such a motion sometimes may be a good idea. *See* HK Sys., Inc. v. Eaton Corp., 553 F.3d 1086, 1088-89 (7th Cir. 2009). A party having moved for reconsideration of its motion for summary judgment, which the district court initially denied, and the district court then having granted the motion on reconsideration, the Seventh Circuit affirmed, approving the exercise of discretion to reconsider the summary judgment denial and, reaching the merits, noting that:

> the justification for refusing [to hear an appeal from the denial of a summary judgment motion] fails when the motion is denied because of a ruling on a pure question of law rather than on the adequacy of the evidence presented in opposition to the motion. For then if the ruling was erroneous and the motion should have been granted regardless of the evidence, the trial is an irrelevance. And that is this case.

Id. at 1089 (citation omitted).

237. *See* Gomez v. MasTec N. Am., Inc., 284 F. App'x 517, 519 (9th Cir. 2008) ("MasTec assert[ed that] the district court erred in denying its motion for summary judgment on the ground that Gomez's claim . . . was barred by the Statute of Frauds. Because MasTec did not introduce facts on this issue at trial, MasTec waived the issue.").

instructions that were inconsistent with the theory of the summary judgment motion and memoranda in support or a failure to propose jury instructions that were consistent with and would apply the theory of the summary judgment motion and supporting memoranda might warrant a holding that the appellant had waived or not "preserved" the error.[238] On the other hand, such litigant conduct could be held unnecessary in light of earlier rejection of appellants' legal theory. At a minimum, appellate courts should *not* bar appeals from law-based summary judgment denials on such grounds as these until the appeals courts have given litigants advance warning of the acts and omissions that may constitute waiver or failure to preserve—so that such appellants do not become the ones with just complaints of "unfair surprise." As of now, little law indicates what, if anything (other than making a Rule 50 motion), a litigant must do to preserve for appeal the allegedly erroneous denial of law-based summary judgment denials.

Why else have courts refused to allow post-trial, post-judgment review of motions for summary judgment?

5. *Is the "Interlocutory" Nature of Such Denials Any Reason to Deny Post-Judgment Appeal?*

Ortiz recited that an order denying summary judgment "retains its interlocutory character as simply a step along the route to final judgment."[239] The fact that denials of summary judgments are "interlocutory" merely suggests why they ordinarily are not *immediately* appealable. The Court seemed to suggest that interlocutory orders remain unreviewable after final judgment.[240] But

238. *See, e.g.*, Trs. of Ind. Univ. v. Aetna Cas. & Sur. Co., 920 F.2d 429, 433 & n.5 (7th Cir. 1990) (explaining that "the district court's refusal to rule on the applicability of [a] warranty as a matter of law, because it substantially affected the issues that were tried and upon which judgment was entered, was an interlocutory decision that can be challenged in this appeal from the final judgment"; noting that "nowhere in its challenges to several of the . . . jury instructions [did] I.U. establish that it preserved [the] issues [raised by its summary judgment motion] by objecting to the [jury] instructions when they were proposed or by proffering an alternate version," but that Aetna failed to raise any such waiver, and so waived that objection), *abrogated by* Watson v. Amedco Steel, Inc., 29 F.3d 274, 278 (7th Cir. 1994).

239. Ortiz v. Jordan, 131 S. Ct. 884, 889 (2011).

240. It is ironic that the Court, in its broad dicta in *Ortiz*, manifested hostility toward post-trial, post-judgment appellate review of legal issues posed by summary judgment motions when the Court has afforded the intermediate federal courts of appeals great latitude to address, after judgment, legal issues that were not raised in

that is contrary to the general principle that, after final judgment, interlocutory orders that merge in the judgment do become appealable.[241] "[U]nder the merger rule, prior interlocutory orders . . . 'merge with the final judgment in a case, and the interlocutory orders (to the extent that they affect the final judgment) may be reviewed on appeal from the final order,'"[242] so long as the appellant did not lead the court into the alleged error and the issue has not become moot.

The view that denial of a motion for summary judgment is not appealable after final judgment appears to be based on the assumption that a denial of summary judgment is not merged in the final judgment.[243] But, to the degree the ruling on the motion decides issues of law that go to the merits, that ruling *should* be regarded as merged in the judgment. Rulings on issues of law manifested in the grant or denial of a motion to dismiss for failure to state a claim on which relief can be granted and legal rulings inherent in the grant or denial of a Rule 50 motion for judgment as a matter of law are regarded as merged in the judgment.[244] There is no reason rulings on

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the trial court at all and were raised for the first time on appeal. *See, e.g.*, Hormel v. Helvering, 312 U.S. 552, 557 (1941) ("There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below."). *See generally* Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1549-57 (2012).

241. *See supra* text accompanying note 5 (regarding the distinction between reviewable and appealable).

242. Cycle Chem, Inc. v. Jackson, 465 F. App'x 104, 107 (3d Cir. 2012) (quoting Pineda v. Ford Motor Co., 520 F.3d 237, 243 (3d Cir. 2008)); Munoz v. Small Bus. Admin., 644 F.2d 1361, 1364 (9th Cir. 1981) (stating that an "appeal from the final judgment draws in question all earlier non-final orders and all rulings which produced the judgment"), *quoted in* Pittman v. Avish P'ship, 525 F. App'x 591, 592 (9th Cir. 2013).

243. *See* Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 716 (5th Cir. 1968).

244. *See, e.g.*, United Fire & Casualty Co. v. Titan Contractors Serv., Inc., (8th Cir. 2014) (reasoning that because the denial of summary judgment merges into the final order granting summary judgment to a different party, a court may review both orders and, if appropriate, direct the entry of summary judgment in favor of the appellant); Stilwell v. Am. Gen. Life. Ins. Co., 555 F.3d 572, 576 (7th Cir. 2009) (holding that upon grant of a motion for summary judgment, denial of a cross-motion may be appealed because it is merged in the final judgment); Pub. Citizen v. U.S. Dist. Court, 486 F.3d 1342, 1345 (D.C. Cir. 2007) (reviewing denial of summary judgment where order disposed of all issues before the district court); Jarrett v. Epperly, 896 F.2d 1013, 1016 n.1 (6th Cir. 1990) ("[D]ecisions in this circuit generally state that interlocutory orders merge into the final judgment and

issues of law that are manifested in the (grant or) denial of motions for summary judgment should not also be so regarded, and many cases say that they are merged.[245] Although other cases take the contrary view,[246] it is not clear why they do so. The notion may have derived from situations in which the summary judgment denial was based on the existence of genuine issues of material facts and in which the denial therefore was mooted by the subsequent trial. Later courts may have unthinkingly parroted the non-merger language in situations in which it was inapt.

Insofar as the ruling on a motion for summary judgment decides only that genuine issues of material fact need to be tried, it does not matter whether it is regarded as merged in the judgment; for

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may be presented on appeal of that final judgment."); Grubb v. FDIC, 868 F.2d 1151, 1160 (10th Cir. 1989) ("This appeal from the judgment . . . permits First National . . . to challenge all prior nonfinal orders, including the order denying summary judgment . . . ."); Podberesky v. Kirwan, 38 F.3d 147, 157 (4th Cir. 1994) (reversing denial of summary judgment to plaintiff and grant of summary judgment to defendant, as all claims had been disposed of); *Tabacalera Severiano Jorge*, 392 F.2d at 716 (reversing denial of summary judgment where there was no material issue of fact and plaintiff was entitled to judgment under the law). *See generally* Stempel & Gensler, *supra* note 136, § 56.130[3][c] (discussing post-verdict review of summary judgments, and circuits' differing positions); *see also* 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2715 ("[T]he denial of a Rule 56 motion is an interlocutory order from which no appeal is available until the entry of judgment following the trial on the merits. At that time, the party who unsuccessfully sought summary judgment may argue that the trial court's denial of the Rule 56 motion was erroneous."); 15A WRIGHT, MILLER & COOPER, *supra* note 116, § 3914.10 ("If no appeal is taken from the first order that might be appealed, the same immunity issue . . . is subject to review on appeal from the final judgment.").

A number of cases do recite that an order denying summary judgment typically does not merge into the final judgment. *E.g.*, Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 92 (1st Cir. 2003) ("'[A]n order denying summary judgment typically does not merge into the final judgment and therefore is not an independently appealable event if the case thereafter proceeds to trial.'" (quoting Iacobucci v. Boulter, 193 F.3d 14, 22 (1st Cir. 1999))); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 & n.14 (Fed. Cir. 1986) (indicating that when a denial of summary judgment "decided nothing but a need for trial and trial has occurred, the general and better view is against review of summary judgment denials on appeal from a final judgment entered after trial"). However, the cases rarely, if ever, defend the proposition that a summary judgment denial typically does not merge into the final judgment. The notion may have its source in—and should be limited to—situations in which the denial was based upon the trial court's conclusion that genuine issues of material fact needed to be tried. In those situations, it makes sense to regard the ruling on the motion to have been overtaken by subsequent events, and for insufficiency of the evidence to be tested by Rule 50 motions.

245. *See supra* notes 11, 22, 244.

246. *See supra* note 244.

other reasons, those rulings should not be appealable after trial. Once evidence is presented at trial, any challenge made to the sufficiency of the evidence when a motion for summary judgment was filed is moot; that question is overtaken (mooted) by the trial. The accuracy of the prediction as to whether the "evidence [at trial] will be sufficient to support a verdict in favor of the nonmov[ing party]"[247] (or, if one does not like that formulation, the determination that genuine issues of material fact were presented)[248] becomes irrelevant because "the full record developed in court supersedes the record existing at the time of the summary judgment motion."[249] These are the reasons why denials of summary judgment based on the existence of genuine issues of material fact should not be appealable after trial.

An order denying partial or complete summary judgment based on a holding of law—other than a conclusion that summary judgment should be denied because of genuine issues of material fact—*should* be appealable after final judgment, *unless* the order has become moot[250] or some procedural prerequisite to appealing the order has not been satisfied. If the summary judgment denial was previously appealable, the question would arise whether failure to raise the issue on an earlier appeal waived the right to appeal. But that question has been answered negatively.[251] Moreover, the notice of appeal from the final judgment should bring up the summary judgment denial for review. Because appeal from the denial of summary judgment will be timely so long as the appeal from the

247. Stempel & Gensler, *supra* note 136, § 56.130[3][c][i].

248. Shannon, *supra* note 164, at 64-65 ("[D]enial of a motion for summary judgment, though, is not supposed to be based on a prediction that the evidence at trial will be sufficient to support a verdict in favor of the nonmoving party. Rather, it is supposed to be a determination, based on the record at summary judgment, that there is a genuine dispute as to a material fact.").

249. Ortiz v. Jordan, 131 S. Ct. 884, 889 (2011); *see also* Feld v. Feld, 688 F.3d 779, 782 (D.C. Cir. 2012); Stempel & Gensler, *supra* note 136, § 56.130[3][c][i] ("Once the trial has taken place, the focus of the court of appeals is appropriately on the evidence actually admitted, not on the earlier summary judgment record.").

250. As previously explained, trial—in and of itself—will not have mooted the legal issue.

251. Habitat Educ. Ctr. v. U.S. Forest Serv., 607 F.3d 453, 456 (7th Cir. 2010) ("Even when an interlocutory order is immediately appealable, the party adversely affected . . . can wait and challenge it later, on appeal from the final judgment, provided . . . that the order hasn't become moot . . . ."), adhered to in In re Trans Union Corp. Privacy Litig., 741 F.3d 811 (7th Cir. 2014) (citing 15A WRIGHT, MILLER & COOPER, *supra* note 116, § 3911).

final judgment is timely, there will be no need for any tolling of the time to appeal to have occurred under Federal Rule of Appellate Procedure 4(a)(4)(A) and (B),[252] notwithstanding the Supreme Court's indication in *Ortiz* that the time to appeal the summary judgment denial in that case had long since run.[253]

6. *Is the Goal of Avoiding Greater Injustice Thwarted by Permitting Post-Judgment Appeals?*

Proponents of the view that denials of summary judgment should not be appealable after final judgment often have reasoned that a full trial on the merits ordinarily should lead to a more just result and that permitting review of the denial of summary judgment could lead to the absurd result that one who has sustained his position after trial nevertheless might be denied his judgment on appeal. "'To deny review seems to be unjust. But to grant it . . . [and reverse] would be [more] unjust to the party that was victorious . . . after the evidence was more completely presented,'" where witnesses were cross-examined and the trier of fact could assess live witnesses' credibility.[254]

In some circumstances, this argument is very compelling. It provides persuasive reasons for courts of appeals not to review denials of summary judgment that were predicated on the existence of genuine issues of material facts.[255] It is not at all compelling, however, when the denial of summary judgment was based on a holding and application of the law to undisputed facts that match, in all material respects, those presented at trial. In that instance, there is no reason to believe that the trial on the merits led to a more just result, and permitting review of the denial of summary judgment

252. FED. R. APP. P. 4(a)(4)(A)-(B) (providing that if a party timely files, in the district court, any of a number of listed motions, the time to file an appeal runs from the entry of the order disposing of the last such motion).

253. *See Ortiz*, 131 S. Ct. at 894.

254. Morgan v. Am. Univ., 534 A.2d 323, 326 (D.C. 1987) (quoting Evans v. Jensen, 655 P.2d 454, 458 (Idaho Ct. App. 1982)), *cited in* Jianbin Wei, *Reviewability of Denial of Motions for Summary Judgment on Appeal from Final Judgment*, 52 J. MO. B. 20, 22 & nn.32, 35 (1996); *see also* Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1359 (9th Cir. 1987).

255. I have conceded that if the evidence at trial establishes materially different facts than those upon which the determination of law was made at the summary judgment stage and if the determination at summary judgment was of a mixed question of law and fact, then the denial of summary judgment should be regarded as mooted and review of the denial should be refused.

would not lead to an absurd result even if he who sustained his position at trial were denied his judgment on appeal. To grant review to the summary judgment denial and to reverse the judgment would not be unjust to the party that was victorious after all the evidence was in, for the appellate court would be deciding that, under the law, the prevailing party below was not entitled to win; indeed, if the court were to reverse, it would be deciding that his adversary had been entitled to win, as a matter of law, on his motion for summary judgment.[256] Thus, summary judgment denials based on errors of law should be appealable after final judgment, in the interest of justice.

Federal Rule of Civil Procedure 56(a) provides in part that "[t]he court *shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[257] Denial of post-judgment review to pre-trial denials of summary judgment "would inhibit effective and consistent appellate court scrutiny of trial court compliance with pre-trial procedure."[258] Even acknowledging district courts' discretion to deny summary judgment in some circumstances,[259] it remains true that if erroneous denials were not subject to appellate review, effective appellate court scrutiny of trial courts' compliance with their duties under Rule 56 would be greatly inhibited.[260] As a result, prevailing parties would receive the benefit of rulings that may have been wrong.[261]

It also should be noted the reasoning that relies on doing greater justice[262] should have no influence at all when a judgment

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256. As stated by Wei, *supra* note 254, at 23, "[a] party's entitlement to a jury trial and ultimately to a favorable jury verdict . . . depends on his making a triable case at the stage of motion for summary judgment."

257. FED. R. CIV. P. 56(a) (emphasis added).

258. Balson v. Dodds, 405 N.E.2d 293, 295 (Ohio 1980), *quoted in* Wei, *supra* note 254, at 22; *accord* Chemetall GMBH v. ZR Energy, Inc., 320 F.3d 714, 720 (7th Cir. 2003) (explicitly excusing the failure to move for JMOL and, post-trial and judgment, reviewing the challenge to a summary judgment denial that was based on a purported legal error); Ruyle v. Cont'l Oil Co., 44 F.3d 837, 841 (10th Cir. 1994) (same).

259. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (observing that courts may deny summary judgment when they have reason to believe that the better course would be to proceed to trial); Kennedy v. Silas Mason Co., 334 U.S. 249, 257 (1948) (vacating the lower court's entry of summary judgment despite acknowledgment that the district court may have been justified in granting summary judgment).

260. *See* Wei, *supra* note 254, at 22.

261. *See id.* at 23.

262. *See supra* text accompanying notes 63, 71, 81.

should be reversed on other grounds, such as reversal based on errors that are independent of the ruling on the summary judgment motion. Review of the summary judgment denial then might prevent a re-trial.

7. *Is Fear of Wasted Trials an Adequate Reason to Reject Post-Judgment Review of Summary Judgment Denials Based on Holdings of Law?*

The Second Circuit in particular has expressed the concern that if post-trial, post-judgment review of summary judgment denials were available, district courts would be wary of denying summary judgments because they would fear wasting their resources by trying cases to judgments that might be overturned on the basis of erroneous denial of a summary judgment motion.[263] I agree that this would be undesirable. I do not want courts to be wary of denying summary judgment; I believe that too many summary judgment motions are granted. The concern about wasting parties' and judicial resources on unnecessary trials is understandable and especially valid in a time of crowded dockets, terribly expensive litigation, and inadequate allocation of resources to the federal judiciary. However, I am not proposing post-trial, post-judgment review of summary judgment denials that were based on district court findings of genuine issues of material fact. I am proposing post-judgment review of only those summary judgment denials that were grounded in errors of law. Although empirical data apparently does not exist to back-up my impression, I believe that denials based on errors of law are far out-numbered by denials based on genuine issues of material fact.[264] Because district courts will recognize that most summary judgment denials are based on the presence of genuine issues of material fact, fear of possible appellate review will not make the

263. *See supra* text accompanying note 63. Compare the concern expressed by the Fifth Circuit that post-trial, post-judgment review of summary judgment denials would undermine district courts' discretion to deny summary judgment. Black v. J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994). A related concern is that fear of the post-trial reversal of a denial of summary judgment would lead district courts to grant summary judgment motions, to allow an immediate post-final judgment appeal and prevent a potentially wasted trial, despite the courts' discretion *not* to do so "'in a case where there is reason to believe that the better course would be to proceed to a full trial.'" *Id.* (quoting *Anderson*, 477 U.S. at 255).

264. It seems likely that most summary judgment denials are based on the existence of genuine issues of material fact, since a genuine controversy about the operative facts is so common in cases that go to litigation.

courts wary of denying most summary judgment motions and proceeding to trial. Also, when alleged errors of law are at issue, federal trial judges can use 28 U.S.C. § 1292(b) to certify the questions of law for immediate appeal, if the judges truly are concerned about the correctness of their resolutions of those questions and if immediate appeal would materially advance the ultimate termination of the litigations.[265] In that way, federal trial court judges can seek to avoid the investment in what might prove to be unnecessary trials. Finally, if a trial judge truly did make a prejudicial error of law in denying summary judgment, that circumstance warrants reversal, even if party and judicial resources were wasted as a result of the error.

V. A RECOMMENDED APPROACH

The current state of the law leaves litigants uncertain as to what, if anything, they must do to preserve for appeal issues that were raised in their summary judgment motions, and under what circumstances, if any, they may raise the denial of their motion for summary judgment on appeal after final judgment is issued. By the same token, uncertainty clouds the issues and arguments that prospective appellees may have to respond to—or seek to fight off as unreviewable—after final judgment. The uncertainty may affect a district court's decision as to whether to embrace various ways by which it might facilitate interlocutory appeals of issues raised by summary judgment motions that it denied[266] and leaves federal courts of appeals struggling with the proper handling of post-judgment appeals of summary judgment denials.

As the analysis in this Article indicates, I propose that, after final judgment, denials of summary judgment that were predicated on legal holdings (and not on the existence of genuine issues of material fact) be appealable as part of the appeal from the final judgment, assuming that mootness doctrines (having nothing to do with the mere fact of trial) have not made the issue moot. Rule 50 motions are inapt and no other mechanism has gained acceptance as a vehicle for re-asserting the questions of law upon which summary judgment rulings may have rested. Indeed, it is questionable whether a litigant should need to make any additional motion or take any addition action to preserve for appeal an error in a denial of summary

265. *See* 28 U.S.C. § 1292(b) (2012).
266. *See* Jenike-Godshalk, *supra* note 29, at 1596.

judgment that was based upon a holding of law. In light of this background, before barring such appeals, the courts should make clear which actions or omissions in the trial court will warrant a holding that an appellant has waived or failed to preserve for appeal the erroneous denial of summary judgment that the appellant seeks to argue .

Permitting appeal of summary judgment denials after final judgment is issued will not add a substantial amount of work to the federal courts of appeals. Denials based on errors of law probably represent a small subset of summary judgment denials, and many within that subset will have been addressed on interlocutory appeals from summary judgment denials based on refusal to recognize qualified or absolute immunity. Moreover, by definition, appeals of summary judgment denials alleging errors of law address questions of law, rather than questions that require a time-consuming review of the trial record. Permitting such appeals without new prerequisites may even expedite litigation, both in the trial courts and on appeal, by rendering it unnecessary for parties to make additional motions to get an interlocutory appeal or to preserve an error for review.[267]

As previously noted, the Supreme Court has rejected the notion that providing different appellate treatment to summary judgment denials based on whether they are grounded in legal determinations or genuine issues of material fact is "unworkable."[268]

Of course, it is a good idea for district court judges to clearly identify the grounds of their summary judgment denials, as they now must do.[269] However, it is a bad idea to require appellate courts to "adopt a discrete list of the legal issues that, if presented in a motion for summary judgment, may be appealed following a full trial on the merits," as one commentator proposed.[270] The legal issues on which a motion for summary judgment may turn may not be anticipated, and there is no good reason why the reviewability of legal errors and

267. *See id.* at 1613-14. If a party is unsure whether the denial of summary judgment he suffered will fall within the rule argued for in this Article, he still may take protective steps in the trial court. If he does, while that will reduce the potential savings, it will not increase protective steps relative to what parties already are doing. *Cf. id.* at 1614 (expressing concern about the legal-issue exception having the potential to increase the cost of litigation where it is uncertain whether a summary judgment denial was based on a pure legal issue).

268. Johnson v. Jones, 515 U.S. 304, 318-19 (1995).

269. *See* Jenike-Godshalk, *supra* note 29, at 1627-28 (arguing for the clear disclosure by justices of the basis for their denials of summary judgment, although Rule 56 already has since been changed to achieve this).

270. *Id.* at 1625.

their appealability after final judgment should depend on whether a court or anyone else anticipated that a particular legal issue might arise.

VI. CONCLUSION

For all of the reasons argued above, this Article proposes that intermediate federal appeals courts should entertain post-trial, post-judgment appeals from summary judgment denials based on legal determinations of issues that a party raised in the district court, that have not been mooted, that were not waived, and that are subsumed within or "merged" in the final judgment. There is no good reason why courts of appeals should not hear them. Indeed, the refusal to do so is highly aberrant and unjust in light of all the other pretrial rulings—including motions to dismiss for failure to state a claim on which relief can be granted, motions for judgment on the pleadings, and Rule 50 motions for judgment as a matter of law—that courts routinely entertain on appeal from final judgments. The post-judgment appealability of summary judgment denials need remain a puzzle no longer.