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Federal Rule 50: Medium Rare Application? *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*

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Federal Rule 50: Medium Rare Application? *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*

I. INTRODUCTION

The year 2006 marked a historical year for the now seventy-year-old Federal Rule of Civil Procedure 50.[1] In addition to an overhaul of the statutory language, which, absent contrary congressional action, became codified December 1, 2006, the Supreme Court issued its landmark opinion in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*[2] In what seems to be a straightforward procedural dictate from the High Court, *Unitherm* has actually resulted in confusion among federal circuits anxious to follow its precedent.

II. FACTUAL BACKGROUND

The crux of the underlying dispute in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*[3] began as a patent infringement claim in which

1. FED. R. CIV. P. 50.
2. 126 S. Ct. 980 (2006).
3. 126 S. Ct. 980 (2006).

ConAgra, a subsidiary of Swift-Eckrich, Inc., sought to enforce its patent entitled "A Method for Browning Precooked Whole Muscle Meat Products," U.S. Patent No. 5,952,027 ("'027 patent").[4] After issuance of the patent, ConAgra issued a warning to competitors who sold equipment and processes pertaining to the same browning process, stating that it intended to "'aggressively protect all of [its] rights under the ['027] patent.'"[5] Although competitor Unitherm did not receive the warning, Jennie-O, another competitor using the same browning method, did receive the warning. Jennie-O had purchased its method—the same as ConAgra's—from Unitherm some years earlier, and Jennie-O began an investigation to determine its rights and responsibilities with respect to the '027 patent. Subsequently, Jennie-O determined that the '027 patent was likely invalid because Unitherm's president had invented the process described by ConAgra's patent six years before ConAgra filed the '027 patent application.[6]

After the discovery of the anticipatory browning process, Jennie-O and Unitherm jointly sued ConAgra in the Western District of Oklahoma seeking a declaratory judgment that the '027 patent was invalid.[7] In addition, Jennie-O and Unitherm also alleged that ConAgra had violated section 2 of the Sherman Act[8] by attempting to enforce a patent that had been obtained by defrauding the Patent and Trademark Office ("PTO").[9]

The district court held that the '027 patent was invalid based on Unitherm's prior public use and sale of the patented method. The district court also dismissed Jennie-O's antitrust claim due to a lack of standing but permitted Unitherm's Sherman Act claim to proceed.[10]

The case went to trial, and prior to its submission to the jury, ConAgra moved for a directed verdict under Federal Rule of Civil Procedure 50(a) based on the legal insufficiency of the evidence presented. The court denied the motion, and the jury returned a verdict for Unitherm. ConAgra did not renew its motion for judgment as a matter of law under Federal Rule 50(b), nor did it move for a new trial under Federal Rule 59.[11]

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4. *Id.* at 983.
5. *Id.* (alterations in original).
6. *Id.*
7. *Id.*
8. *See* 15 U.S.C. § 2 (2000 & Supp. 2004).
9. *Unitherm*, 126 S. Ct. at 983-84.
10. *Id.* at 984.
11. *Id.* Though ConAgra did file a motion after the verdict seeking a new trial on damages, that motion did not include review of the sufficiency of the evidence in the antitrust claim. *Id.* at 984 n.2. The Supreme Court held that such a motion for damage

ConAgra then appealed to the Federal Circuit, again asserting insufficiency of the evidence to sustain the antitrust jury verdict in favor of Unitherm.[12] Applying the law of the Tenth Circuit, the Federal Circuit relied on *Cummings v. General Motors Corp.*[13] and reviewed the sufficiency of the evidence claim, even though ConAgra had not renewed its motion postverdict as required by Rule 50(b).[14] Applying *Cummings,* the court held that the district court's review had been proper, though the only available relief it could have awarded ConAgra was a new trial.[15]

In its review of the sufficiency claim, the Federal Circuit concluded that although sufficient evidence existed to sustain the jury's verdict that ConAgra's patent had been obtained through fraud on the PTO, Unitherm "had failed to present evidence sufficient to support the remaining elements of its antitrust claim."[16] As a result, the court vacated the jury's judgment in favor of Unitherm and remanded for a new trial.[17] On application by Unitherm, the Supreme Court granted certiorari and reversed the Federal Circuit's grant of a new trial.[18]

III. LEGAL BACKGROUND

A. *Statutory Background*

Federal Rule of Civil Procedure 50[19] was originally enacted by Congress in 1937.[20] The first amendments of note to the debated provisions (subdivisions (a) and (b)) occurred in 1963. Those amendments clarified that "[a] motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence."[21] In addition, the time limit for making the postverdict motion for judgment notwithstanding the verdict ("j.n.o.v.") was set at "10 days after the entry of judgment, rather than 10 days after the reception of the verdict," in an attempt to

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review did not suffice for requesting review of the adverse verdict. *Id.*

12. *Id.* at 984.

13. 365 F.3d 944 (10th Cir. 2004).

14. *Unitherm*, 126 S. Ct. at 984.

15. *Id.* (citing *Cummings*, 365 F.3d at 950-51).

16. *Id.* Specifically, the Federal Circuit held that "'Unitherm failed to present any economic evidence capable of sustaining its asserted relevant antitrust market, and little to support any other aspect of its Section 2 claim.'" *Id.*

17. *Id.*

18. *Id.* at 984-85.

19. FED. R. CIV. P. 50.

20. *See* FED. R. CIV. P. 50 advisory committee's notes.

21. FED. R. CIV. P. 50 advisory committee's note (1963 amendment).

maintain consistency with the time limit for requesting a Rule 59(b) order for a new trial and a Rule 52(b) motion to amend findings by the court.[22]

The substance of the subdivisions at issue has remained largely unaltered since that time.[23] Thus, at the time of the *Unitherm* trial, the Supreme Court analyzed both the amended Rule 50 provisions in tandem with several of its earlier opinions interpreting the operation of subdivisions (a) and (b) on postverdict j.n.o.v. motions.[24]

B. Historically Significant Case Law

Promptly after its adoption, challenges to Federal Rule 50 arose in two landmark Supreme Court decisions. In the first, *Cone v. West Virginia Pulp & Paper Co.*,[25] the Supreme Court held that when the party seeking reversal of the judgment fails to move for j.n.o.v., "the appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand."[26]

Cone was an action for damages for trespass to real property. At the close of the evidence, the respondent moved for a directed verdict on the ground that the petitioner had failed to adduce sufficient evidence that he either owned or was in possession of the land at issue. The district court denied this motion, and the jury returned a verdict for the petitioner. The respondent then moved for a new trial on the basis of newly discovered evidence but failed to renew his preverdict motion by moving for a j.n.o.v. The district court also denied the motion requesting a new trial.[27]

On appeal, the Court of Appeals for the Fourth Circuit held that the admission of certain evidence was prejudicial error and, without this evidence, the petitioner had insufficient evidence to submit to the jury the issues of title and possession.[28] Even though there had been no postverdict motion for j.n.o.v., the circuit court reversed and directed that judgment be entered for the respondent, rather than remanding the

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22. *Id.*

23. *See* FED. R. CIV. P. 50 advisory committee's notes. Technical amendments were made in 1987 and 1993. *Id.* (1987 and 1993 amendments). Amendments in 1991 and 1995 sought to clarify the text of subdivisions (a) and (b) but had no effect on their application. FED. R. CIV. P. 50 advisory committee's notes (1991 and 1995 amendments).

24. *See generally* Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 126 S. Ct. 980 (2006).

25. 330 U.S. 212 (1947).

26. *Id.* at 217-18.

27. *Id.* at 213-14.

28. *Id.* at 214.

case to the district court for a new trial based on the newly discovered evidence.[29]

The Supreme Court granted certiorari and held that the party's failure to renew a Rule 50(b) motion postverdict precluded an appellate court from directing entry of an adverse judgment.[30] The Court explained that Rule 50(b) allows a trial judge the opportunity to order either a new trial or a j.n.o.v. because a trial judge "can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses."[31] Further, the rule allows a trial judge a "last chance to correct his own errors without delay, expense, or other hardships of an appeal."[32]

That same year, the Supreme Court heard a case with a similar legal issue in a slightly different procedural posture. In *Globe Liquor Co. v. San Roman,*[33] a breach of warranty action in the sale of certain liquors, each party moved for a directed verdict at the close of evidence. Unlike *Cone,* the petitioner's motion was granted, and a verdict and judgment were returned and entered in the petitioner's favor. The respondents moved for a new trial on the ground that there were contested issues of fact that should have been submitted to the jury, but they did not move for a judgment postverdict under Rule 50(b).[34]

The Seventh Circuit Court of Appeals set aside the judgment for the petitioner and remanded the case to the district court with instructions to enter judgment for the respondent.[35] Affirming *Cone,* the Supreme Court held that there was no pertinent procedural difference introduced by the fact that the petitioner had originally prevailed upon a directed verdict rather than a jury verdict.[36] Accordingly, the respondent's failure to assert a Rule 50(b) motion made the circuit court's remand and instruction improper.[37]

Four years later, in *Johnson v. New York, N.H., & H.R. Co.,*[38] the Supreme Court further defined the requirements of moving for a j.n.o.v. pursuant to Rule 50(b), emphasizing, in part, specificity in motion drafting.[39] In a wrongful death suit against a New York railroad

29. *Id.*
30. *Id.* at 215, 218.
31. *Id.* at 215-16.
32. *Id.* at 216.
33. 332 U.S. 571 (1948).
34. *Id.* at 572.
35. *Id.*
36. *Id.* at 573.
37. *Id.* at 574.
38. 344 U.S. 48 (1952).
39. *Id.* at 50.

company, the defendant railroad moved to dismiss the complaint and requested a directed verdict at the close of evidence. The trial court reserved its decision on the motion and submitted the case to the jury. A verdict in favor of the petitioner was rendered and subsequently entered. Within ten days, the railroad moved to have the verdict set aside on the ground that it was excessive and contrary to both the law and the evidence. The motion was subsequently denied; in the same ruling, the court also denied the reserved preverdict motions for dismissal and a directed verdict.[40]

The Second Circuit Court of Appeals reversed, holding that the motion for a directed verdict should have been granted. Both parties agreed that the reversal required the district court to enter judgment for the railroad notwithstanding the verdict, thus depriving the petitioner of a new trial. Accordingly, the court rendered judgment for the railroad even though the railroad had not made a postverdict motion requesting that relief.[41]

In its review of the case, the Supreme Court noted that "[a]lthough this respondent made several motions it did not as the rule requires move within ten days after verdict 'to have judgment entered in accordance with his (its) motion for a directed verdict.'"[42] The respondent's brief asserted that the motion to set aside the verdict was "'intended to be a motion for judgment in its favor or for a new trial' and that '[o]bviously respondent did not merely want the verdict to be set aside but wanted . . . a judgment in its favor or a new trial.'"[43] Rejecting this argument, the Court noted that the "defect in this argument is that respondent's motions cannot be measured by its unexpressed intention or wants."[44] Treating the motion as it was stated on its face—as one to set aside the verdict, rather than for a j.n.o.v. (i.e., one to turn the verdict-loser into the verdict-winner)—the Supreme Court emphasized that the requirement for a motion is "an essential part of the rule, firmly grounded in principles of fairness."[45] As a result, the Court held that the failure to file the proper Rule 50(b) motion deprived the appellate court of the power to order the entry of judgment.[46]

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40. *Id.* at 49.
41. *Id.* at 49-50.
42. *Id.* at 50.
43. *Id.* at 50-51.
44. *Id.* at 51.
45. *Id.* at 53.
46. *Id.* at 54.

While each of the prior cases seemed to interpret Rule 50 using largely the same analysis, the landscape of Rule 50 motions was changed substantially some years later by the Tenth Circuit Court of Appeals in *Cummings v. General Motors Corp.*[47] In *Cummings* injured motorists brought suit against General Motors ("GM") to recover for injuries they sustained in a GM vehicle that allegedly resulted from a defective seat belt system.[48] After the evidence was heard, both parties moved for judgment as a matter of law, and the district court denied both motions. The jury returned a verdict in favor of GM, but the plaintiffs did not make any motions following the verdict. Instead, the plaintiffs appealed, asserting that the court abused its discretion when handling specific discovery matters and that the court should have directed a verdict in their favor based on the evidence of liability.[49]

Noting that the plaintiffs had properly moved for a Rule 50(a) directed verdict (but only with regard to the defense of misuse and not with regard to GM's general liability), the Tenth Circuit rejected GM's argument that the plaintiffs had waived their right to a directed verdict by failing to renew their motion postverdict pursuant to Rule 50(b).[50] The court of appeals held that "[w]hile true in most circuits, under Tenth Circuit precedent, even where a party fails to make a post-verdict motion . . ., it is not barred from appealing the issue of sufficiency of the evidence" where a preverdict motion had been made.[51]

However, the court held that in the absence of a postverdict motion, relief was limited to the grant of a new trial.[52] Interpreting *Cone, Johnson,* and *Globe Liquor* as applying only to entry of an adverse judgment by the appellate court (in effect making the verdict-winner into the verdict-loser), the Tenth Circuit held that the grant of a new trial was a permissible remedy even though a timely Rule 50(b) motion had not been made.[53] Nonetheless, the court concluded that sufficient evidence existed for the matter to go to the jury and refused to grant a new trial.[54] While *Cummings* was binding authority in the Tenth

47. 365 F.3d 944 (2004).
48. *Id.* at 946.
49. *Id.* at 947-48.
50. *Id.* at 949-50.
51. *Id.* at 950.
52. *Id.* at 951.
53. *Id.*
54. *Id.* at 951-52. With respect to whether the district court should have granted the plaintiffs' motion for judgment as a matter of law as to the issue of GM's general liability, the Tenth Circuit observed that the standard of review for the sufficiency of the evidence on this issue was "plain error constituting a miscarriage of justice" because the plaintiffs' Rule 50(a) motion was "limited to the issue of GM's misuse defense." *Id.* at 951. The court

Circuit for two years, the Supreme Court's opinion in *Unitherm* represents an express abrogation of the Tenth Circuit's holding.[55]

IV. THE COURT'S RATIONALE

In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*,[56] Justice Thomas, writing for a 7-2 majority, began by noting that the purpose of Federal Rule 50[57] was to guide the procedural requirements for challenging the sufficiency of the evidence in a civil jury trial and established two times at which such a challenge may occur: "[1] prior to the submission of the case to the jury, and [2] after the verdict and entry of judgment."[58] Summarizing seminal cases in the history of Rule 50 jurisprudence, the majority reiterated the necessity of renewing a postverdict motion pursuant to Rule 50(b), as established in *Cone, Globe,* and *Johnson.*[59]

The Court explained that a postverdict 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.'"[60] Additionally, the "'requirement of a timely application for judgment after verdict . . . is . . . an essential part of the rule, firmly grounded in principles of fairness.'"[61]

First, the Court was not persuaded by respondent ConAgra's assertion that *Cone, Globe,* and *Johnson* were limited to whether an appellate court could enter judgment for the verdict-loser in the absence of a postverdict motion, and those cases did not prevent an appellate court from ordering a new trial.[62] Calling ConAgra's proposed distinction "immaterial," the majority emphasized the practicality of allowing the original district court judge to hear the initial motion and the equitable nature of such a bright-line procedural rule.[63] The Court emphasized its holding in *Johnson,* which affirmed *Cone* and *Globe Liquor,* and

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of appeals concluded that nothing in the record indicated "such a miscarriage of justice" and held that the district court did not commit plain error by submitting the plaintiffs' products liability claims to the jury. *Id.*

55. *Unitherm,* 126 S. Ct. at 988.
56. 126 S. Ct. 980 (2006).
57. FED. R. CIV. P. 50.
58. *Unitherm,* 126 S. Ct. at 985.
59. *Id.* at 985-86.
60. *Id.* (quoting Cone v. W. Va. Pulp & Paper Co., 330 U.S. 212, 216 (1947)).
61. *Id.* at 986 (quoting Johnson v. N.Y., N.H. & H.R. Co., 344 U.S. 48, 53 (1952)).
62. *Id.*
63. *Id.*

stated that "'in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict [Rule 50] forbids the trial judge or an appellate court to enter such judgment.'"[64] The Court further rejected this argument by noting that in *Cone, Globe,* and *Johnson,* the appellants moved for a new trial but "did not seek to establish their entitlement to a new trial solely on the basis of a denied Rule 50(a) motion."[65]

Next, the Court emphasized the asserted basis of the respondent's appeal—the district court's denial of the respondent's preverdict Rule 50(a) motion—as a factor in its holding.[66] Again relying on *Cone, Globe Liquor,* and *Johnson,* the Court emphasized that the respondent did not seek to "pursue on appeal the precise claim it raised in its Rule 50(a) motion before the District Court—namely, its entitlement to judgment as a matter of law," but instead sought a new trial based on the legal insufficiency of the evidence.[67] Emphasizing the text of Rule 50, which "provides that a district court may only order a new trial on the basis of issues raised in a preverdict Rule 50(a) motion when 'ruling on a renewed motion' under Rule 50(b)," the Court reasoned:

> [I]f as in *Cone, Globe Liquor,* and *Johnson,* a litigant that has failed to file a Rule 50(b) motion is foreclosed from seeking the relief it sought in its Rule 50(a) motion . . . then surely respondent is foreclosed from seeking a new trial, relief it did not and could not seek in its preverdict motion.[68]

Again viewing the text of the statute, the Court noted that the language of Rule 50(a)—"'the court *may* determine' that 'there is no legally sufficient evidentiary basis for a reasonable jury to find for [a] party on [a given] issue,' and '*may* grant a motion for judgment as a matter of law against that party . . .'"—supported the conclusion that on appeal the respondent could not challenge the sufficiency of the evidence based on the district court's denial of its Rule 50(a) motion.[69] Such a

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64. *Id.* at 986 n.4 (quoting *Johnson,* 344 U.S. at 50 (alteration in original)). Part of the Court's emphasis on *Johnson* countered the dissent's position that federal statute 28 U.S.C § 2106, enacted after *Cone* and *Globe Liquor,* allowed the appellate court wholesale review of the judgment without a Rule 50(b) renewal motion. *Id.* Noting that *Johnson* had been decided after enactment of § 2106, the majority foreclosed the possibility that it affected the procedural requirements of Rule 50(a) and (b). *Id.* The majority also expressed some concern that such a wholesale review would implicate the Seventh Amendment's right to a jury trial. *Id.*

65. *Id.* at 987.

66. *Id.*

67. *Id.* at 987-88.

68. *Id.* at 988.

69. *Id.* (alterations in original).

determination, the Court noted, was within the district court's discretion and promotes judicial economy by allowing the same judge to hear a postverdict motion.[70] Summing up a valuable lesson the Court concluded: "The only error here was counsel's failure to file a postverdict motion pursuant to Rule 50(b)."[71]

A. Justice Stevens's Dissent

Justice Stevens's dissent, which was joined by Justice Kennedy, took a more equitable view of the application of Rule 50. Noting that "[e]ven an expert will occasionally blunder," the dissenting opinion pointed to Congress's decision to "preserve[] the federal appeals courts' power to correct plain error, even though trial counsel's omission will ordinarily give rise to a binding waiver" under 28 U.S.C. § 2106.[72] Section 2106, in part, gives the "Supreme Court or any other court of appellate jurisdiction" the ability to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review . . . ."[73] The dissent noted that "[n]othing in Rule 50(b) limits this statutory grant of power to appellate courts; while a party's failure to make a Rule 50(b) motion precludes the *district court* from directing a verdict in that party's favor . . . ."[74] The dissent opined that arguments raised for the first time on appeal (and absent a Rule 50 motion) "may be entertained . . . if their consideration would prevent manifest injustice."[75]

In conclusion, the dissent emphasized that while *Cone* stands for the proposition that "it may be unfair or even an abuse of discretion for a court of appeals to direct a verdict in favor of a party that lost below" when a Rule 50(b) motion was not made or to order a new trial when a Rule 59 motion was not timely made, the courts of appeals do not "lack 'power' to review the sufficiency of the evidence and order appropriate relief under these circumstances."[76]

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70. *See id.* at 988-89.

71. *Id.* at 989. The Court was also not persuaded by the respondent's argument that it relied on the Tenth Circuit's opinion in *Cummings* when it failed to renew its motion pursuant to Rule 50(b). *Id.* at 989 n.6. The Court held, "[r]espondent cannot credibly maintain that it wanted the Court of Appeals to order a new trial as opposed to entering judgment." *Id.* Furthermore, because "respondent could not obtain the entry of judgment unless it complied with Rule 50(b)," respondent had "every incentive to comply with that Rule's requirements." *Id.*

72. *Id.* at 989 (Kennedy, J., dissenting); 28 U.S.C. § 2106 (2000).

73. *Unitherm*, 126 S. Ct. at 989-90 (Kennedy, J., dissenting) (quoting 28 U.S.C. § 2106).

74. *Id.* at 990.

75. *Id.*

76. *Id.*

V. IMPLICATIONS

While on its face *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*[77] seems to stand for the simple propositions of effective motion practice by counsel and a strict textualist interpretation of a Federal Rule, the Court's decision has created a bit of a procedural morass that federal courts eager to follow its holding must wade through. In the barely eight months since the Supreme Court issued its decisions, federal courts have grappled with defining the exact parameters set by *Unitherm* when assessing Rule 50(a) and (b) procedural questions.

For example, in May 2006, the United States Court of Appeals for the Seventh Circuit performed an in-depth examination of the *Unitherm* decision in *Fuesting v. Zimmer, Inc. II* ("*Fuesting II*").[78] Noting the "subtle tension between the ability of the appellate court to engage in harmless error analysis and the court's responsibility not to weigh the sufficiency of the evidence in the absence of a properly filed postverdict motion," the Seventh Circuit observed what is, perhaps, an inherent ambiguity in the Supreme Court's ruling.[79]

In *Fuesting II*, an injured patient sought to recover damages for strict products liability and negligence against an orthopaedic implant manufacturer. Before trial, Zimmer, Inc. ("Zimmer") moved in limine to exclude certain expert testimony, but the motion was denied.[80] At the end of the evidence, Zimmer moved for a judgment as a matter of law. The district court denied the motion, and the case was submitted to the jury. The jury returned a verdict in favor of Fuesting, and though the court granted an extension of time for Zimmer to file postverdict motions, Zimmer failed to renew its Rule 50(a) motion. Zimmer subsequently appealed, alleging it was entitled to a new trial because of the error in admitting the expert testimony and because of erroneous jury instructions.[81]

In *Fuesting v. Zimmer, Inc. I*, ("*Fuesting I*"),[82] decided before *Unitherm*, the Seventh Circuit Court of Appeals held that the expert testimony was scientifically unreliable and its admission was error.[83]

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77. 126 S. Ct. 980 (2006).

78. 448 F.3d 936 (7th Cir. 2006).

79. *Id.* at 939.

80. *Id.* at 937-38. Fuesting's experts offered opinions on Zimmer's causation of Fuesting's injuries, specifically that the air sterilization method used by Zimmer caused Fuesting's injuries. *Id.*

81. *Id.* at 938.

82. 421 F.3d 528 (7th Cir. 2005).

83. *Id.* at 536-37.

After viewing the remainder of the evidence, the court held that there was insufficient evidence to sustain the verdict in favor of Fuesting and reversed and remanded to the district court with instructions to enter judgment for Zimmer.[84] In the meantime, the Supreme Court decided *Unitherm*, which made the actions of the Seventh Circuit (by turning Zimmer, the verdict-loser, into the verdict-winner) improper.[85]

In rehearing *Fuesting II*, the Seventh Circuit considered what relief a court of appeals has the power to award "where there was prejudicial evidentiary error in the district court."[86] Because the Supreme Court indicated in *Unitherm* that "a court of appeals may not award judgment due to insufficiency of the evidence where no Rule 50(b) motion was filed after the verdict," the Seventh Circuit vacated its instruction to the district court to enter judgment for Zimmer.[87] Assessing its review of the admissibility of the expert testimony, the court concluded that "weighing the value of Fuesting's remaining evidence after excising [the expert's] testimony crossed the line into activity proscribed by *Unitherm*."[88] The court further noted that "*Unitherm* suggests that it will usually be inappropriate for a court of appeals to award judgment in the absence of a properly filed Rule 50(b) motion," but the Supreme Court's holding "does not foreclose the ability of the appellate court to order a new trial where evidence was improperly admitted."[89] As the Court in *Unitherm* specifically addressed the situation in which a litigant sought a new trial on the basis of insufficiency of the evidence, the Seventh Circuit emphasized that the "Court did not hold that a court of appeals may not award a new trial on the basis of an erroneous evidentiary decision."[90]

The Seventh Circuit reasoned that the potential for confusion exists because "*Unitherm* includes some strong language regarding the necessity of postverdict motions" that arguably limits "a party's ability to challenge any legal error where it failed to file a postverdict motion."[91] The Seventh Circuit further elaborated:

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84. *Id.* at 536-38.

85. *See Unitherm*, 126 S. Ct. at 988-89. Subsequently, Fuesting filed a petition for rehearing, and the Seventh Circuit stayed consideration of the petition because the Supreme Court had granted certiorari in *Unitherm*. *Fuesting II*, 448 F.3d at 937.

86. *Fuesting II*, 448 F.3d at 937.

87. *Id.* at 938.

88. *Id.* at 939.

89. *Id.*

90. *Id.*

91. *Id.* The Seventh Circuit points to the following sentence in *Unitherm*: "Accordingly, these outcomes merely underscore our holding today—a party is not entitled to pursue a new trial on appeal unless that party makes an appropriate postverdict motion in the

> The potential for confusion in the context of evidentiary challenges exists because, as discussed above, the prejudice analysis in appellate review of evidentiary decisions involves what might be considered an implicit weighing of the sufficiency of the evidence. An appellate court cannot truly determine whether an error was harmless without considering the force of other evidence presented to the jury.[92]

Despite this confusion, the Seventh Circuit held that the ability of a court of appeals to award a new trial "where there is prejudicial evidentiary error is well-established and undisturbed by *Unitherm*."[93] Reconciling *Unitherm* with Federal Rule of Evidence 103,[94] the court noted that "a party is not required to renew an objection to an evidentiary motion in order to preserve its right to appeal."[95] The court reasoned that "[h]ad the Supreme Court intended to create such a broad rule we presume the Court would have done so explicitly, addressing Rule 103 as well as . . . cases in which courts of appeals have awarded new trials purely on the basis of evidentiary errors."[96]

An equally significant implication of *Unitherm* and Rule 50 are the latest revisions to Rule 50(a) and (b), which became codified December 1, 2006. Intended to be a "stylistic" change only, the language of Rule 50(a) "has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules."[97] Additionally, when discussing textual changes to subdivision (b), the Advisory Committee notes explain:

> Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury.[98]

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district court." *Id.* (quoting *Unitherm*, 126 S. Ct. at 987-88).

92. *Id.* at 939-40.

93. *Id.* at 940.

94. FED. R. EVID. 103.

95. *Fuesting II*, 448 F.3d at 940; *see* FED. R. EVID. 103(a).

96. *Fuesting II*, 448 F.3d at 940.

97. FED. R. CIV. P. 50 advisory committee's note (2006 amendment).

98. *Id.*

These changes, however, do not seem to affect the Court's holdings in *Unitherm* and prior cases that require a postverdict motion pursuant to Rule 50(b) after a contrary verdict. These amended provisions tend to make more clear *what* must be included in such a follow-up motion, though the requirement for the motion still remains.

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