Supreme Court to Resolve Circuit Split on Preservation Requirements

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AUTHOR'S NOTE:

On May 25, 2023, the Supreme Court, Justice Barrett, issued its opinion in *Dupree v. Younger*, No. 22-210, 2023 WL 3632755 (U.S. May 25, 2023), in which it unanimously holds: "A post-trial motion under Rule 50 is not required to preserve for appellate review a purely legal issue resolved at summary judgment." It therefore vacated the Fourth Circuit's judgment to the contrary and resolved the longstanding circuit split in favor of the Second, Third, Sixth, Seventh, Ninth, Tenth, D.C., and Federal Circuits, which all permitted appeals of summary judgment denials on legal issues without any Rule 50 motion. The Supreme Court remanded the matter to the Fourth Circuit to decide in the first instance whether the issue Dupree raised in his appeal was purely legal and therefore reviewable under the court's holding.

Imagine this scenario: Representing your client, the defendant, you file a motion for summary judgment based on an affirmative defense. You lose on purely legal grounds, the district court determining—on the basis of undisputed facts—that the defense is not available. The case then proceeds to trial. To avoid the district court's ire, you do not reraise, at trial, the affirmative defense that the court has already rejected. Why would you? The relevant facts remain wholly undisputed, and the law is the same. The jury finds for the plaintiff. You file the requisite motions for judgment as a matter of law under Rule 50 to preserve arguments related to the sufficiency of the evidence. Given the page limits and that the district court's prior ruling on the affirmative defense presented only legal issues divorced from the evidence adduced at trial, you do not mention that affirmative defense in the Rule 50 motions. Did you preserve that legal issue for appeal? The Fifth Circuit says "no."[1] So do the First and the Fourth Circuits.[2] The Second, Third, Sixth, Seventh, Ninth, Tenth, D.C., and Federal Circuits disagree.[3] In the Eighth Circuit, it depends.[4] Now, in *Dupree v. Younger*, the Supreme Court is primed to weigh in.[5]

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[1] *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017).

[2] *Ji v. Bose Corp.*, 626 F.3d 116, 127–28 (1st Cir. 2010); *Younger v. Dupree*, No. 21-6423, 2022 WL 738610, at *2 (4th Cir. 2022).

[3] *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *Pennbarr Corp. v. Ins. Co. of N. Am.*, 976 F.2d 145, 146 149–55 (3d Cir. 1992); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997); *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 719–20 (7th Cir. 2003); *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 906 (9th Cir. 1999); *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 841–42 (10th Cir. 1994); *Feld v. Feld*, 688 F.3d 779, 783 (D.C. Cir. 2012); *United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1344 (Fed. Cir. 1999).

[4] *See N.Y. Marine & Gen. Ins. Co. v. Cont'l Cement Co.*, 761 F.3d 830, 838–39 (8th Cir. 2014) (permitting appeals from summary judgment denials "involving preliminary issues" but not those "involving the merits of a claim" where the issue is not reraised in a post-trial motion).

[5] *See Dupree v. Younger*, 143 S. Ct. 645 (2023) (granting certiorari). The Supreme Court addressed a similar issue in *Ortiz v. Jordan*, 562 U.S. 180 (2011), but left open the precise question presented in *Dupree*. 562 U.S. at 190.

In *Dupree*, under circumstances analogous to the above, the Fourth Circuit declined to review the district court's summary judgment denying defendant-appellant Neil Dupree's exhaustion defense.[6] Prison guards attacked plaintiff-appellee Kevin Younger, who was at the time a pretrial detainee at a Maryland state prison where Dupree served as intelligence lieutenant.[7] Younger alleged (and the jury found) that Dupree directed the attack.[8] In response to Younger's suit under 42 U.S.C. § 1983 against Dupree and others allegedly involved in the attack, Dupree asserted that Younger had failed to exhaust his administrative remedies, as required under the Prison Litigation Reform Act.[9] He filed a motion for summary judgment on his administrative exhaustion defense.[10] It was undisputed that, although Younger commenced an administrative process, he did not fully exhaust his administrative remedies.[11] It was similarly undisputed that an internal investigation related to the same incident was underway.[12] Applicable regulations provide for dismissal of a prisoner's administrative process when an internal investigation regarding the same is underway.[13] Thus, the district court ruled that the administrative process was unavailable to Younger such that he sufficiently satisfied administrative exhaustion requirements as a matter of law under binding precedent.[14] The case proceeded to trial, and the jury returned a verdict in favor of Younger.[15] Dupree did not reraise his administrative exhaustion affirmative defense in any Rule 50 motion.[16] He appealed the judgment.[17] On appeal, the Fourth Circuit refused to reach the merits of Dupree's exhaustion defense because he sought review of a summary judgment denial on a legal issue that was not reraised in a Rule 50 motion.[18]

The Supreme Court granted Dupree's writ petition[19] to determine "[w]hether to preserve the issue for appellate review a party must reassert in a post-trial motion a purely legal issue rejected at summary judgment."[20] Of course, Dupree argues that it does not. According to Dupree, the general rule is that interlocutory orders merge into the final judgment and a party's appeal of that final judgment permits appellate review of those interlocutory orders.[21] This general rule applies to summary judgment denials on purely legal issues—i.e., issues the court resolves with reference only to undisputed facts.[22] An exception applies, however, to orders denying summary judgment based on evidentiary sufficiency, such as where a judge determines that sufficient evidence supports a claim or defense to create a "genuine" factual dispute precluding summary

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[6] 2022 WL 738610, at *2.
[7] *Id.* at *1.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Younger v. Green*, No. RDB-16-3269, 2019 WL 6918491, at *7 (D. Md. Dec. 19, 2019).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Dupree*, 2022 WL 738610, at *1.
[16] *Id.* at *2.
[17] *Id.* at *1.
[18] *Id.* at *3.
[19] *Dupree*, 143 S. Ct. at 645.
[20] Brief of Petitioner at (i), *Dupree v. Younger*, 143 S. Ct. 645 (2023) (No. 22-210) (listing "Question Presented"); Brief of Respondent at (I), *Dupree v. Younger*, 143 S. Ct. 645 (2023) (No. 22-210) (listing "Question Presented").
[21] Brief of Petitioner at 13, *Dupree v. Younger*, 143 S. Ct. 645 (2023) (No. 22-210).
[22] *Id.* at 14–15.

judgment.[23] In such cases, the judge holds only that the case should proceed to trial, and the factfinder's subsequent verdict moots the summary judgment order.[24] If, at trial, a party wishes to challenge the sufficiency of the evidence before the jury to support a verdict, the party must file Rule 50 motions during and after trial.[25] Any subsequent appeal focuses not on the summary judgment denial finding genuine factual disputes but, instead, upon the district court's assessment of the sufficiency of the evidence adduced at trial in ruling on the Rule 50 motion.[26] Various amici—a group of notable professors of procedure and a public policy "think tank" representing an organization of defense counsel—join in Dupree's approach.[27]

Respondent Younger—like the First, Fourth, Fifth, and (sometimes) Eighth Circuits—would require Rule 50 motions to preserve appellate review of summary judgment denials with respect to purely legal issues. Younger argues that only "final decisions" are subject to appeal;[28] thus, because summary judgment denials are *not* final decisions, they are not subject to appeal.[29] Interlocutory summary judgment denials are "a well-recognized exception to the merger rule," because they do not conclusively resolve the merits of a claim or defense and, instead, merely "decide" "that the case should go to trial."[30] The combined effect of these rules is that when a district court denies summary judgment on a defense, the defendant must continue to pursue that defense at trial and via Rule 50 motions.[31] Otherwise, according to Younger, "no final decision adjudicating the defense exists and the defense is forfeited."[32]

Younger's reasoning rests on the notion that summary judgment denials never "conclusively" resolve a claim or defense and merely permit them to proceed to trial. But this reasoning ignores reality. Practically speaking, some orders denying summary judgment very much foreclose further presentation of the claim or defense at trial—in particular, orders denying summary judgment on legal grounds. Take, for example, the district court's order in *Dupree*. Relevant here, it concludes:

> The Court need not resolve disputes concerning Younger's adherence to the [administrative] process because the [internal] investigation satisfied his obligation to subject his claims to administrative exhaustion. In this case, there is no dispute that the[re was an internal] investigation concerning Younger's assault. Had Younger filed an [administrative process] within the allotted time period, it would

[23] *Id.* at 14.
[24] *Id.*
[25] *See id.*
[26] *See id.*
[27] *See generally* Brief for Law Professors Joan Steinman, Richard Freer, Nancy Marder, Mark Rosen, Michael Solimine, and Adam Zimmerman as *Amici Curiae* in Support of Petitioner, *Dupree v. Younger*, 143 S. Ct. 645 (2023) (No. 22-210); Brief of the DRI Center for Law and Public Policy as *Amicus Curiae* in Support of Petitioner, *Dupree v. Younger*, 143 S. Ct. 645 (2023) (No. 22-210).
[28] This rule follows from 28 U.S.C. § 1291, which states the jurisdiction of the federal courts of appeals as follows: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." 28 U.S.C. § 1291.
[29] Brief of Respondent at 15, *Dupree v. Younger*, 143 S. Ct. 645 (2023) (No. 22-210).
[30] *Id.* at 28.
[31] *Id.* at 16.
[32] *Id.*

> have been subject to dismissal pursuant to [applicable regulation]. The mere fact that Younger *potentially* could have skirted around this rule by advancing his claims up the chain of review is of no great moment. Such a procedural mechanism is not truly "available" in any meaningful sense and Younger was not required to pursue it. Accordingly, Younger has satisfied his administrative exhaustion requirements and the PLRA does not bar his claims.[33]

These are not the words of a judge who thinks Dupree's administrative exhaustion defense should "go to trial." The material facts are undisputed, and this judge has determined that the law, as applied to those undisputed facts, precludes any administrative exhaustion defense. There is nothing to be gained from proving up undisputed facts at trial and rehashing in Rule 50 motions the legal arguments rejected at summary judgment.

To be sure, a rule permitting appeal from a summary judgment denial on a legal issue would yield negative externalities. First, it can be difficult to distinguish between issues of law and fact. Circuit courts would undoubtedly burn resources in determining whether a supposedly legal issue appealed from a summary judgment denial is instead a factual one, the review of which is precluded absent Rule 50 motions. Yet, courts of appeals regularly conduct this inquiry already and are well-equipped to undertake it, here. Second, and more importantly, where appellate review of the legal issue leads to reversal, piecemeal litigation (or even increased retrials) may result. Reversal of a summary judgment denial on an affirmative defense would not necessarily mean the defendant was entitled to judgment as a matter of law. Such reversal could make previously irrelevant factual disputes become material. And those disputes would need to be resolved upon remand with a trial on that defense. The defendant would then effectively obtain a retrial on remand, even though he did not move for one in compliance with the Rules.

Requiring the defendant who loses an affirmative defense on a legal issue at summary judgment to make a proffer at trial and reraise it in Rule 50 motions would avoid the foregoing problems. But at what cost? As Dupree quite forcefully argues:

> . . . Mr. Younger's cure is orders of magnitude worse than the supposed disease. To even trigger further trial proceedings, a purely legal error at summary judgment would need to be appealed, reversed on appeal, *and* remanded because material factual disputes remain. Seeking to avoid that result in some small fraction of cases, Mr. Younger would require parties in *every* case to introduce and argue over *all* the evidence conceivably relevant to claims and defenses, including claims and defenses that have already been squarely foreclosed as a matter of law. Mr. Younger thus "prevents piecemeal litigation," in the worst way possible: by jamming *all* possible litigation into the first trial—even litigation over claims and defenses that are concededly futile.[34]

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[33] *Younger*, 2019 WL 6918491, at *7 (emphasis in original) (denying Dupree's motion for summary judgment on his administrative exhaustion defense).

[34] Reply Brief of Petitioner at 18-19, *Dupree v. Younger*, 143 S. Ct. 645 (2023) (No. 22-210) (citations omitted) (emphasis in original).

The justices now have an opportunity to simplify preservation procedures. They should take it. Indeed, if their questioning at oral argument is any indication, many seem ready to hold that discrete legal issues decided in summary judgment denials may be reviewed on appeal, even if not pressed at trial or via Rule 50 motions.[35]

Nevertheless, no matter what happens on high, little is likely to change in practice. Prudent attorneys will continue to reraise in Rule 50 motions any legal issue lost via summary judgment denial, lest the court of appeals disagree that the issue is purely legal. And, to the extent budget allows, they will involve appellate counsel at the trial level to avoid any other pitfalls in the preservation of error analysis.

[35] *See, e.g.*, Transcript of Oral Argument at 13-15, 31-32, 45-48, 56-58, *Dupree v. Younger*, 143 S. Ct. 645 (No. 22-210) (questioning by Associate Justice Ketanji Brown Jackson suggesting a desire to permit review on appeal of legal issues lost at summary judgment without Rule 50 motions); *id.* at 38-39 (questioning by Chief Justice John G. Roberts suggesting the same); *id.* at 41 (questioning by Associate Justice Samuel A. Alito, Jr. suggesting the same); *id.* at 42-45 (questioning by Associate Justice Sonia Sotomayor suggesting the same); *id.* at 54-55 (questioning by Associate Justice Elena Kagan suggesting the same); *id.* at 49-52 (questioning by Associate Justice Neil M. Gorsuch suggesting he could be in favor of holding that some legal issues lost at summary judgment are preserved for appeal without further action but allowing the court below to determine whether this case presents such a legal issue); *id.* at 24-26, 52-53 (questioning by Associate Justice Amy Coney Barrett suggesting the same). *But see, e.g.*, *id.* at 6-8 (questioning by Associate Justice Clarence Thomas suggesting he is in favor of a rule requiring a proffer at trial and Rule 50 motions to preserve for appeal a legal issue lost at summary judgment); *id.* at 8-13, 16-19, 27, 29 (questioning by Associate Justice Neil M. Gorsuch suggesting the same).