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REPORT

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PRESERVATION PROBLEMS: HOW TRIAL VENUE IMPACTS RULES FOR PRESERVING APPELLATE ISSUES



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Should you file a post-trial motion on an issue that you lost at the summary judgment stage? In some circuits, the familiar strategic considerations—such as whether to spend precious time and space pressing issues that the court already rejected—give way to a hard practical reality: the failure to raise the issue may waive it on appeal. What is

more, the law on preservation is shifting in other circuits that previously had not required renewed motions to preserve issues for appeal. A recent Fourth Circuit decision provides a stark reminder that trial lawyers should consider whether (and how) to preserve issues for appellate review—and to engage appellate specialists as early in the litigation process as feasible.

In Some Circuits, Issues Are Not Preserved Unless Renewed

The specific preservation issue in *Younger v. Dupree*, No. 21-6423, 2022 WL 738610 (4th Cir. Mar. 11, 2022) (unpublished) involved the exhaustion defense. The defendants argued that the plaintiff could not pursue a suit for damages because the plaintiff had not exhausted his available administrative remedies. The defendants moved for summary judgment on the issue, and the district court denied the motion. After a 10-day jury trial resulted in damages for the plaintiff, the defendants failed to re-raise the exhaustion defense in post-trial motions.

The Fourth Circuit dismissed the appeal, finding that the issue had not been preserved: “Under controlling precedent of

this Court, we ‘will not review, under any standard, the pretrial denial of a motion for summary judgment after a full trial and final judgment on the merits,’ when the issue rejected pretrial has not been pursued in the district court by way of a post-trial motion.” *Younger v. Dupree*, 2022 WL 738610 at *2 (quoting *Chesapeake Paper Prod. Co. v. Stone & Webster Eng’g Corp.*, 51 F.3d 1229, 1237 (4th Cir. 1995)). The bar “applies to appellate review of not only factual issues, but also purely legal ones.” *Id.* (citing *Varghese v. Honeywell Int’l*, 424 F.3d 411, 423 (4th Cir. 2005)). Thus, because the defendants had not raised the issue again in post-trial motions, they were precluded from raising the issue on appeal.

The Circuits Are Split On Preservation Requirements

The Fourth Circuit is not alone. It is aligned with the First and Fifth Circuits in holding that issues lost at the summary judgment stage are preserved only when re-raised in post-trial motions. See *Ji v. Bose Corp.*, 626 F.3d 116, 127 (1st Cir. 2010) (“[T]he denial of a motion for summary judgment is not reviewable after a full trial and final judgment on the merits.... [I]n order to preserve its challenge for appeal, a disappointed party must restate its objection in a motion for judgment as a matter of law.”); *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017) (“[W]e hold that following a jury trial on the merits, this court has jurisdiction to hear an appeal of the district court’s legal conclusions in denying summary judgment, but only if it is sufficiently preserved in a Rule 50 motion.”). The Eighth Circuit has reached a similar conclusion, although it recognizes exceptions, e.g., for “issues preliminary to the merits” such as choice of law determinations. See *N.Y. Marine & Gen. Ins. Co. v. Cont’l Cement Co., LLC*, 761 F.3d 830, 838-39 (8th Cir. 2014) (rejecting “any dichotomy between a summary judgment denied on factual grounds and one denied on legal grounds as both problematic and without merit”) (cleaned up).

In contrast, other Circuits to address the issue, such as the D.C. Circuit, have held that additional post-trial objections are “not required to preserve for appeal a purely legal claim rejected on summary judgment.” *Feld v. Feld*, 688 F.3d 779, 783 (D.C. Cir. 2012) (emphasis added). The Fourth Circuit in *Younger* described itself as “the minority view,” and acknowledged multiple circuits that follow the majority approach—not only the D.C. Circuit, but also the Second, Third, Sixth, Seventh, Ninth, Tenth, and Federal Circuits—on the question of whether purely legal issues are preserved without a post-trial motion. *See Younger*, 2022 WL 738610 at *3 & n.3.

The Circuits Are Shifting

But the legal landscape could be changing—shifting in favor of the minority view requiring renewed motions to preserve issues on appeal. For example, a recent panel of the Second Circuit, over a partial dissent, refused to “hear an appeal of a prior denied motion for summary judgment after a full trial on the merits” where the “party could have moved” for judgment as a matter of law (but did not). *Omega SA v. 375 Canal, LLC*, 984 F.3d 244, 252 (2d Cir. 2021). Judge Lohier, in dissent, noted the contradiction between this opinion and the Second Circuit’s prior leading case holding that such an objection is “not required to preserve a challenge to the district court’s denial of summary judgment following a trial if the denial is based on a question of law.” *Id.* at 261-62 (Lohier, J., dissenting) (citing *Rothstein v. Carriere*, 373 F.3d 275 (2d Cir. 2004)). Thus, preservation requirements in the Second Circuit are now uncertain, at best.

Appellants in the Federal Circuit might face a much more complicated landscape if regional circuit law controls preservation. In *Ericsson Inc. v. TCL Comm’n Tech. Holdings Ltd.*, 955 F.3d 1317, 1321 (Fed. Cir. 2020), the panel majority recognized, but did not resolve, the question of whether the Federal Circuit could consider an issue on appeal from the Eastern District of Texas if that issue would be deemed waived under Fifth Circuit law. The panel majority found no waiver under Fifth Circuit law and ruled, in the alternative, that even if the issue would be waived under Fifth Circuit precedent, the panel would exercise its discretion to “review the district court’s [patent] eligibility determination.” *See, e.g., id.* at 1322-24. Judge Newman dissented on the grounds that “[t]he Fifth Circuit is explicit that an ‘interlocutory order denying summary judgment is not to be reviewed,’ even after ‘full trial on the merits’ and even for ‘purely legal issues,’ unless ‘it is sufficiently preserved in a Rule 50 motion.’” *Ericsson*, 955 F.3d at 1332 (Newman, J., dissenting) (quoting *Feld*, 861 F.3d at 595-

96 & n.4 and *Puga v. RCX Sols., Inc.* 922 F.3d 285, 291 n.2 (5th Cir. 2019)).

Although Ericsson’s petition for certiorari was denied, *see* 141 S. Ct. 2624 (Mem) (May 17, 2021),¹ how future panels (or the en banc Federal Circuit) would address the issue is unclear. And for issues not touching on unique patent law considerations (as *Ericsson* did with patent eligibility) or in other areas of the Federal Circuit’s exclusive jurisdiction, *Ericsson* may be even less predictive. Patent practitioners (particularly in the Fifth Circuit, which includes Texas) should thus be doubly careful.

Trial Lawyers Should Consider Circuit Preservation Requirements

Trial lawyers should carefully consider whether to renew in post-trial motions issues lost at the summary judgment stage. In some jurisdictions, the failure to do so will mean abandoning such issues on appeal. As the circuit courts continue to shift on this question, keeping an eye on the preservation requirements for your jurisdiction have become a strategic necessity. Appellate specialists—or appellate teams—engaged at the summary judgment phase and through post-trial motions will not only help hone issues, but may also protect the case on appeal.

¹ Ericsson Inc. had petitioned the Supreme Court to resolve this circuit split. *See* Petition for Writ of Certiorari, *Ericsson Inc. v. TCL Comm’n Tech. Holdings, Ltd.*, No. 20-1130, 2021 WL 637238, *i (Feb. 2021).