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POST-VERDICT MOTION PRACTICE AFTER *FUESTING V. ZIMMER*

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INTRODUCTION

Justice Frankfurter once called the Federal Rules of Civil Procedure “the product of the progress of centuries from the medieval court-room contest—a thinly disguised version of trial by combat—to modern litigation.”¹ Their purpose is to ensure a quick and efficient disposition of a lawsuit while placing all litigants on an equal playing field and promoting overall fairness.² For example, judicial efficiency can often be served by affording the trial court an opportunity to correct a case absent appeal.³ A court’s rules should certainly encourage attorneys to practice in a manner that best promotes judicial economy. However, compliance with these rules does not always require the “better practice.” Indeed, such a requirement may undermine the parallel goal of the rules to promote just results. After

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¹ *Johnson v. N.Y., N.H. & H.R. Co.*, 344 U.S. 48, 62 (1952) (Frankfurter, J., dissenting). The Federal Rules of Civil Procedure are promulgated by the U.S. Supreme Court pursuant to the Rules Enabling Act and are approved by Congress.

² *See* FED. R. CIV. P. 1 (noting that the rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action”).

³ *See infra* note 52.

all, the Federal Rules of Civil Procedure replaced the Field Code and common law pleadings primarily because of the formality and harshness of the latter two systems.

Recently, in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, the U.S. Supreme Court held that a verdict-losing litigant must file a post-verdict motion for judgment as a matter of law pursuant to Rule 50(b) in order for a court of appeals, based on the legal sufficiency of the evidence, to either enter judgment for that litigant or order a new trial.⁴ This requirement promotes judicial efficiency by allowing the trial court to correct a case, which should not be submitted to the jury because of the legal insufficiency of the evidence, without having the parties go through an appeal process that could lead to a new trial. However, according to the Seventh Circuit, harmless error review of a trial court's evidentiary ruling differs distinctly from review of the sufficiency of evidence, and, thus, is permitted even though an appellant did not move for judgment as a matter of law after the jury's verdict. While the "best practice" may be to require the post-verdict motion for the same reasons as in *Unitherm*, such a requirement is not necessary in light of Federal Rule of Evidence 103(a), which, according to the Seventh Circuit, "make[s] clear that a party is not required to renew an objection to an evidentiary motion in order to preserve its right to appeal."⁵

A review of Federal Rule of Civil Procedure 50 jurisprudence and of the purpose and meaning of Federal Rule of Evidence 103 reveals that the Seventh Circuit's decision in *Fuesting v. Zimmer*⁶ is correct. The purpose of this Note is to expand on the Seventh Circuit's reasoning in *Fuesting* in order to provide the attorneys practicing in federal courts with a detailed interpretation of *Unitherm*'s effect on an appellant's ability to seek a new trial on appeal based on a claim of evidentiary error.

⁴ 126 S.Ct. 980, 989 (2006).

⁵ *Id.* at 940 (reasoning that a "preserved claim of error on appeal is meaningless if the court of appeals, handcuffed by Rule 50, has no authority to award relief").

⁶ ("*Fuesting II*") 448 F.3d 936 (7th Cir. 2006).

Specifically, this Note will argue, as did the *Fuesting* panel, that satisfaction of Rule 103(a)'s conditions is sufficient, by itself, to give the court of appeals the power to grant a new trial where the trial court engaged in prejudicial error. In order to reach this conclusion, Part I first discusses the various court rules that are at play here—Federal Rules of Civil Procedure 50 and 59, and Federal Rule of Evidence 103. Next, Parts II and III relay the facts and reasoning of both the Supreme Court's decision in *Unitherm* and the Seventh Circuit's decision in *Fuesting*, respectively. Lastly, Part IV analyzes *Fuesting* in three ways: (a) by directly confronting a "subtle tension" recognized by the Seventh Circuit panel⁷ and demonstrating that an appellate court's lack of power, after *Unitherm*, to review the sufficiency of the evidence absent a post-verdict motion for judgment as a matter of law does not preclude the court from engaging in harmless error review; (b) by surveying the Supreme Court's jurisprudence extracting the appropriate procedures under Rule 50 and determining that the underlying policies of those decisions are not relevant to a situation in which a party seeks a new trial on appeal based upon evidentiary error; and (c) by contending that the Supreme Court, in amending Rule 103(a), implicitly determined that not affording the trial court an opportunity to correct its mistaken rulings does not preclude a party from seeking relief on appeal.

I. BACKGROUND – THE RULES

A. *Federal Rule of Civil Procedure 50*

The Supreme Court promulgated Rule 50 in order to speed up litigation and to prevent unnecessary retrials without sacrificing full and fair consideration of the issues raised by litigants.⁸ The rule does not alter the common law right of litigants to request that the trial

⁷ *Fuesting II*, 448 F.3d at 939.

⁸ See *Johnson v. N.Y., N.H. & H.R. Co.*, 344 U.S. 48, 56 (1952); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 250 (1940). For a more detailed review of the constitutionality of Rule 50, see 9A CHARLES ALAN WRIGHT ET. AL, *FEDERAL PRACTICE AND PROCEDURE* § 2522 (2d ed. 1995).

court reserve a question of law and take “verdicts subject to the ultimate ruling on the questions reserved.”⁹ Indeed, it still allows courts to remove issues from the jury’s consideration “when the facts are sufficiently clear that the law requires a particular result.”¹⁰ Rather, Rule 50 merely simplifies the process of raising and preserving this question of the sufficiency of the evidence, a legal question to be decided by the trial court.¹¹ Because this common law right to have courts reserve questions of law during jury trials has been interpreted by the Supreme Court to be consistent with the Seventh Amendment, Rule 50 does not run afoul of a party’s constitutional right to a trial by jury.¹²

Essentially, Rule 50 codifies the motion for a directed verdict and the motion for judgment notwithstanding the verdict.¹³ A litigant can now move for “judgment as a matter of law” at any time before submission of the case to the jury, but only after the other party has been fully heard on the issue.¹⁴ If the trial court finds that “there is no legally sufficient evidentiary basis for a reasonable jury to find for [the

⁹ *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 659 (1935).

¹⁰ 9A WRIGHT ET. AL., *supra* note 8, § 2521; *Weisgram v. Marley Co.*, 528 U.S. 440, 447 (2000).

¹¹ *See Montgomery Ward*, 311 U.S. at 250; 9A WRIGHT ET AL., *supra* note 8, § 2521.

¹² *See Redman*, 295 U.S. at 659. In a later case stating the constitutionality of Rule 50(b) specifically, the Supreme Court, while primarily holding that *Redman* controlled, also relied on 28 U.S.C. § 2106, which it considered “broad enough to include the power to direct entry of judgment [as a matter of law] on appeal.” *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967).

¹³ FED. R. CIV. P. 50. Indeed, the original version of the rule included these terms in its language. However, in 1991 the Supreme Court amended the rule to give both motions the common name of “motion for judgment as a matter of law.” The purposes of the change were to adopt names that better describe the role of the motions and to give both motions a common name because the same standard applies to both of them. *See id.*, Advisory Committee Note to 1991 Amendments. Throughout this paper, I periodically use the terms *directed verdict* and *judgment notwithstanding the verdict*, because they are still very much a part of the trial lawyer’s vocabulary.

¹⁴ *Id.* at 50(a)(2).

non-moving] party,” it may enter judgment for the movant on that issue.¹⁵ Or, in its discretion, the court may deny the motion and submit the issue to the jury.¹⁶ By so doing, the court is considered to have reserved its decision on this question of law until after the jurors return a verdict or reach impasse.¹⁷ At that point, the movant may renew its motion for judgment as a matter of law, and “may alternatively request a new trial or join a motion for a new trial under Rule 59.”¹⁸ If the party does so move, the trial court may rule one of three ways: it can enter judgment on the verdict, order a new trial, or set aside the jury’s verdict and enter judgment as a matter of law for the movant.¹⁹

B. Federal Rule of Civil Procedure 59

Rule 59 allows the trial court to grant a new trial for any of the reasons for which new trials have traditionally been granted in actions at law in U.S. courts.²⁰ Parties most commonly base their motions for a new trial on the verdict being against the weight of the evidence, the damages being excessive, or the trial court committing a prejudicial error of law.²¹ New trials are also granted because the trial was not fair in light of newly discovered evidence²² or the misconduct of jurors,

¹⁵ *Id.* at 50(a)(1).

¹⁶ *See id.*; *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 126 S.Ct. 980, 988–89 (2006).

¹⁷ FED. R. CIV. P. 50(b).

¹⁸ *Id.* Subsections (c) and (d) go into more detail regarding the procedure for when the two motions are made in the alternative. *See infra* Part IV(B).

¹⁹ FED. R. CIV. P. 50(a). Of course, this first option is not available if the jury does not return a verdict, as subsection (b)(2) points out.

²⁰ *Id.* at 59(a).

²¹ *See* 11 WRIGHT ET AL., *supra* note 8, § 2805; *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).

²² *See* 11 WRIGHT ET AL., *supra* note 8, §2808 (noting that the motion will only be granted if the new evidence is of facts existing at time of trial, new evidence is admissible and probably effective to change the result of the original trial, and movant is “excusably ignorant of the facts”); *see also* FED. R. CIV. P. 60(b)(2).

judges, or counsel.²³ Also, Rule 59 permits the trial court to order, on its own initiative, a new trial “for any reason that would justify granting one on a party’s motion.”²⁴ A U.S. district court has the power to weigh evidence and assess the credibility of witnesses, and it has discretion to grant a new trial if the verdict appears to the court to be against the weight of the evidence.²⁵

C. Federal Rule of Evidence 103

In 1975 the Supreme Court created and adopted the Federal Rules of Evidence “to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence.”²⁶ Rule 103(a) was not a groundbreaking pronouncement but rather stated the law as generally accepted at the time.²⁷ It prohibited a court of appeals from reversing a trial court’s ruling on the admissibility of evidence unless “a substantial right of the party is affected”²⁸ and unless the following is satisfied:

Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

Offer of Proof.—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

²³ See 11 WRIGHT ET AL., *supra* note 8, § 2809–10.

²⁴ FED. R. CIV. P. 59(d).

²⁵ See *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 540 (1958).

²⁶ FED. R. EVID. 102.

²⁷ See *id.* at 103, Advisory Committee Note for 1972 Proposed Rules.

²⁸ *Id.* at 103(a); see *infra* Part IV(A).

But, even if a party does not object to errors at trial, the district court may take notice of “plain errors” that affect the substantial rights of the party.²⁹

The most recent and interesting development in the rule came with the 2000 addition of the proviso at the end of subsection (a). It reads: “Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial,³⁰ a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”³¹ Before this amendment the courts of appeals took at least three different approaches in determining “whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim for error on appeal.”³² The approaches ranged from always requiring a renewal,³³ to distinguishing between objections to evidence and offers of proof,³⁴ to only requiring a renewal in certain situations.³⁵

It is clear from the language of the 2000 amendment that the Supreme Court has adopted the third approach and only requires a party to renew an objection or offer of proof when the trial court does not make a definitive ruling on the record.³⁶ However, although a definitive ruling preserves a party’s claim of error for appeal, an appellate court will only review that ruling “in light of the facts and

²⁹ FED. R. EVID. 103(d).

³⁰ This Note focuses on rulings before trial, because such a ruling was at issue in *Fuesting*.

³¹ *Id.* at 103(a). If the error was not adequately preserved at or before trial, a court of appeals cannot reverse the trial court unless the error was plain. *Id.* at 103(d).

³² *Id.*, Advisory Committee Note for 2000 Amendment.

³³ *See id.* (citing *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980)).

³⁴ *See* FED. R. EVID. 103, Advisory Committee Note for 2000 Amendment (citing *Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993)).

³⁵ *See* FED. R. EVID. 103, Advisory Committee Note for 2000 Amendment (citing *Rosenfeld v. Basquiat*, 78 F.3d 84 (2d. Cir. 1996)).

³⁶ *See* FED. R. EVID. 103(a).

circumstances before the trial court at the time of the ruling.”³⁷ An appellant cannot rely upon any facts that have materially changed since the advance ruling was made, unless it brings them to the attention of the district court in a renewed objection or offer of proof.³⁸

II. THE SUPREME COURT’S DECISION IN *UNITHERM FOOD SYSTEMS, INC. v. SWIFT-ECKRICH, INC.*

In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*³⁹ the U.S. Supreme Court added to its jurisprudence interpreting Federal Rule of Civil Procedure 50.

In 2000, Unitherm Food Systems sought a declaration from an Oklahoma federal court that ConAgra Food’s patent⁴⁰ on its process for browning precooked meats was invalid, and further “alleged that ConAgra had violated § 2 of the Sherman Act . . . by attempting to enforce a patent obtained by fraud on the Patent and Trademark Office.”⁴¹ After finding the patent invalid, the district court allowed the § 2 claim to proceed to trial.⁴² Prior to jury deliberations, ConAgra moved, pursuant to Federal Rule of Civil Procedure 50(a), for the court to direct a verdict in its favor due to the evidence being legally insufficient to support a verdict to the contrary.⁴³ After the court denied the motion, the jury decided in Unitherm’s favor, and ConAgra appealed the decision without either renewing its motion for judgment as a matter of law under Rule 50(b) or moving for a new trial under

³⁷ *Id.*, Advisory Committee Note for 2000 Amendment. (citing *Old Chief v. United States*, 519 U.S. 172, 183 n.6 (1997) (instructing reviewing courts to “evaluate the trial court’s decision from its perspective when it had to rule and not indulge in review by hindsight”).

³⁸ *See Old Chief*, 519 U.S. at 182.

³⁹ *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 126 S.Ct. 980 (2006).

⁴⁰ ConAgra Foods, Inc. is the parent company of Swift-Eckrich, Inc. and is referred to in this Note as the respondent in *Unitherm*.

⁴¹ *Id.* at 983–84.

⁴² *Id.* at 984.

⁴³ *Id.*

Rule 59.⁴⁴ On appeal, the Federal Circuit agreed with ConAgra that the evidence was insufficient to prove the legal elements of antitrust liability; so, it vacated the judgment and ordered a new trial.⁴⁵ The Supreme Court, however, determined that the Federal Circuit could not remand for a new trial because, without a post-verdict motion by ConAgra, it did not have the power to review the sufficiency of the evidence before the jury.⁴⁶ In other words, the court of appeals was powerless to act on appeal, so the jury verdict endured.⁴⁷

The Supreme Court justified its decision as consistent with the text and application of the Federal Rules of Civil Procedure, as recognizing judicial efficiency as a key policy concern, and, simply, as fair. The Court required the post-verdict motion, because determining whether to grant a new trial or enter a judgment as a matter of law “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.”⁴⁸ Furthermore, the denial of the pre-verdict motion for judgment as a matter of law cannot form the basis for review, because denial of that motion is not error, but rather an

⁴⁴ *Id.*

⁴⁵ *Id.* The Federal Circuit has previously held that the appellant’s failure to file a post-verdict motion in the district court precludes the appellate court from reviewing the sufficiency of the evidence. *See Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 862 (Fed. Cir. 1991). However, in *Unitherm*, it was bound to apply the regional circuit law—in this case, the Tenth Circuit—which allowed such review where the appellant did file a pre-verdict Rule 50(a) motion. *See Cummings v. General Motors Corp.*, 365 F.3d 944, 950–51 (10th Cir. 2004). Hence, in *Unitherm*, the Supreme Court settled an inter-circuit split on the issue of whether a court of appeals could grant judgment as a matter of law where the appellant had not filed a Rule 50(b) motion at the trial court level.

⁴⁶ *Unitherm*, 126 S.Ct. at 987. The Federal Circuit could only order a new trial on antitrust liability if ConAgra filed a Rule 59 motion after the verdict. Similarly, it could only enter judgment for ConAgra, if the food company had renewed its pre-verdict motion as specified in Rule 50(b).

⁴⁷ *See id.* at 989.

⁴⁸ *Id.* at 985–86 (quoting *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947)).

exercise of the trial court's discretion.⁴⁹ Rule 50(a) merely permits the district court to grant a motion for judgment as a matter of law if the court determines that "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the non-moving] party."⁵⁰ It does not require the court to grant the motion.⁵¹ Indeed, the Court suggested that it is usually more efficient for trial courts to submit the case to the jury.⁵² Lastly, the Court does not consider the filing of timely motions to be artificial requirements. Rather, they are essential parts of certain federal rules of procedure, "firmly grounded in principles of fairness."⁵³

As a result of the Supreme Court's opinion in *Unitherm*, if an appellant does not timely file a Rule 50(b) motion, a court of appeals will lack the power to determine whether the evidence evinced at trial was legally sufficient for a reasonable jury to find for the appellee.⁵⁴

⁴⁹ *Unitherm*, 126 S.Ct. at 988-89.

⁵⁰ FED. R. CIV. P. 50(a)(1).

⁵¹ *Unitherm*, 126 S.Ct. at 988.

⁵² *Id.* at 988-89. This point is illustrated by Professor Wright in his popular treatise on federal practice and procedure:

If judgment as a matter of law is granted and the appellate court holds that the evidence in fact was sufficient to go to the jury, an entire new trial must be had. If, on the other hand, the trial court submits the case to the jury, though it thinks the evidence insufficient, final determination of the case is expedited greatly. If the jury agrees with the court's appraisal of the evidence, and returns a verdict for the party who moved for judgment as a matter of law, the case is at an end. If the jury brings in a different verdict, the trial court can grant a renewed motion for judgment as a matter of law. Then if the appellate court holds that the trial court was in error in its appraisal of the evidence, it can reverse and order judgment on the verdict of the jury, without any need for a new trial. For this reason the appellate courts repeatedly have said that it usually is desirable to take a verdict, and then pass on the sufficiency of the evidence on a post-verdict motion.

9A WRIGHT ET AL., *supra* note 8, § 2533.

⁵³ *Unitherm*, 126 S.Ct. at 986 (quoting *Johnson v. N.Y., N.H. & H.R. Co.*, 344 U.S. 48, 53 (1952)).

⁵⁴ *See Unitherm*, 126 S.Ct. at 987. In dissent, Justice Stevens suggested that 28 U.S.C. § 2106 permitted the court of appeals to consider the sufficiency of the

Furthermore, if a Rule 59 motion is also not made, the court of appeals has no power to grant any relief to the appellant seeking a directed verdict or a new trial based on insufficiency of the evidence.⁵⁵

III. THE SEVENTH CIRCUIT'S DECISION IN FUESTING V. ZIMMER, INC.

In a case with the same procedural posture as *Unitherm* but where the appellant sought a new trial on appeal based on evidentiary error at trial and not insufficiency of the evidence, the U.S. Court of Appeals for the Seventh Circuit distinguished the Supreme Court's decision in *Unitherm* and remanded the case for a new trial.⁵⁶

In 2002, plaintiff Fuesting sued Zimmer, Inc. in an Illinois federal court for negligently manufacturing his prosthetic knee.⁵⁷ Before trial, Zimmer moved *in limine*, pursuant to Federal Rule of Evidence 702, to exclude the testimony of Fuesting's expert witness.⁵⁸ The trial court

evidence despite the appellant's failure to file the Rule 50(b) motion. *Id.* at 989–90 (Stevens, J., dissenting). § 2106 permits a federal appellate court to:

[A]ffirm, 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.

Although the Court has recognized the broad grant of authority in this statute, it has made clear that this authority must be exercised “consistent with the requirements of the Federal Rules of Civil Procedure as interpreted by [the] Court.” *Id.* at 986 (majority opinion); *see supra* note 19 and accompanying text.

⁵⁵ *See id.* at 988.

⁵⁶ *Fuesting v. Zimmer, Inc. (Fuesting II)*, 448 F.3d 936, 941–42 (7th Cir. 2006). Only one other court of appeals has considered the issue whether *Unitherm* requires a party to file a post-verdict motion in order to seek a new trial on appeal based on an erroneous evidentiary error by the trial court. The First Circuit agrees with the Seventh Circuit's assessment. *See Vazquez-Valentin v. Santiago-Diaz*, 459 F.3d 144, 146 n.2 (1st Cir. 2006) (*Unitherm* does not mean that a party has to file a post verdict motion in order to preserve an evidentiary objection on appeal.”). However, the First Circuit's treatment of the issue was dicta and, therefore, offered little analysis.

⁵⁷ *Fuesting II*, 448 F.3d at 937.

⁵⁸ *Id.*

denied the motion, and the expert testified at trial that Zimmer's air sterilization method led to the prosthesis's premature failure and, hence, Fuesting's injuries.⁵⁹ After the trial and before the court submitted the case to the jury, Zimmer moved for judgment as a matter of law under Rule 50(a).⁶⁰ The trial court denied the motion, and the jury later returned a verdict for Fuesting.⁶¹ After the verdict, Zimmer did not renew its motion for judgment as a matter of law nor move for a new trial.⁶² However, it did appeal, arguing for a new trial based on the trial court's prejudicial error in allowing plaintiff's expert to testify and based on the trial court's flawed jury instructions.⁶³

On appeal, the Seventh Circuit ruled, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁶⁴ and Rule 702, that the testimony of Fuesting's expert was scientifically unreliable and that the district court erred in allowing it to be offered at trial, thereby prejudicing the manufacturer's case.⁶⁵ Then, having assessed the remaining evidence as legally insufficient for a reasonable jury to find for the plaintiff, the Seventh Circuit reversed the jury's verdict and ordered the district court to enter judgment for Zimmer.⁶⁶ Subsequently, Fuesting petitioned for a rehearing, and the court of appeals stayed consideration of the petition until after the Supreme Court decided the *Unitherm* case.⁶⁷ In its opinion after the rehearing, the Seventh Circuit held that *Unitherm* clearly prohibited it from ordering judgment for Zimmer as a matter of law because awarding judgment involves a full

⁵⁹ *Id.* at 937–38.

⁶⁰ *Id.* at 938.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 509 U.S. 579 (1993). In *Daubert*, the Supreme Court developed the criteria by which expert testimony should be allowed under Federal Rule of Evidence 702.

⁶⁵ *Fuesting v. Zimmer, Inc. (Fuesting I)*, 421 F.3d 528, 536–37 (7th Cir. 2005), *rev'd in part on reh'g*, 448 F.3d 936 (7th Cir. 2006). While the substance of this evidentiary holding may be non-trivial to the development of *Daubert* jurisprudence, this Note is primarily concerned with the procedural posture of the case.

⁶⁶ *Fuesting I*, 421 F.3d at 437.

⁶⁷ *Fuesting II*, 448 F.3d at 937.

examination of the sufficiency of the evidence, which must be performed first by the trial court.⁶⁸ The court, nonetheless, remanded the case for a new trial based on the district court's prejudicially erroneous evidentiary ruling.⁶⁹ Referring to the situation as a "subtle tension," the Seventh Circuit panel reasoned that *Unitherm* did affect a reviewing court's ability to remand for a new trial based on the sufficiency of the evidence but did not affect its power to engage in harmless error analysis.⁷⁰ Indeed, the court admits that "determining whether an evidentiary error is harmless necessarily requires some weighing of the sufficiency of the evidence."⁷¹

However, it overcomes this hurdle by gathering the support of Federal Rule of Evidence 103, prior precedent, and the scholarship of influential commentators.⁷² First, says the court, the Federal Rules of Evidence explain that, once a party objects to the admission or exclusion of evidence, it is not required to renew the objection in order to preserve its right to appeal, providing the district court made a definitive ruling on the record.⁷³ A preserved claim of error on appeal, according to court, would be rendered meaningless if an appellate court could not review the error because it was "handcuffed" by Rule 50.⁷⁴ Secondly, the Seventh Circuit does not believe the Supreme Court would have established an expansive rule that makes a post-verdict motion a prerequisite to appeal without addressing the "the substantial body of cases in which courts of appeals have awarded new trials purely on the basis of evidentiary errors."⁷⁵ Lastly, the court invokes the expertise of Charles Wright and James Moore, who agree

⁶⁸ *Id.* at 939.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* (elaborating later that "[a]n appellate court cannot truly determine whether an error was harmless without considering the force of the other evidence presented to the jury").

⁷² *Id.* at 941.

⁷³ *Id.* at 940 (interpreting FED. R. EVID. 103(a)).

⁷⁴ *Id.*

⁷⁵ *Id.*

in their treatises on federal practice that courts of appeals can review properly preserved claims of error, even though the appellant had not filed a post-verdict motion in the trial court.⁷⁶

IV. ANALYSIS

At first glance, despite the Seventh Circuit's compelling reasons for granting a new trial, the panel's decision appears at odds with the broad language used by Justice Thomas in his majority opinion in *Unitherm*. For example, Justice Thomas states that the "Court's observations about the necessity of a postverdict motion under Rule 50(b), and the benefits of the district court's input at that stage, apply with equal force whether a party is seeking judgment as a matter of law or simply a new trial."⁷⁷ And later, after summarizing the relevant precedent used to support his view, he remarks that "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 district court."⁷⁸

However, this broad language can and should be limited by the remainder of the Court's opinion that focused entirely on Rule 50, which itself is concerned solely with directing verdicts and ordering new trials based on the legal sufficiency of the evidence before the jury. The Seventh Circuit in *Fuesting II* correctly distinguishes *Unitherm* on the fact that the defendant manufacturer's appeal requested a new trial based on the prejudicial effect of the trial court's erroneous evidentiary ruling and not on sufficiency of the evidence,

⁷⁶ *Id.* at 941. See 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 59.55 (3d ed. 2005) ("A motion for a new trial is not required to preserve properly made objections for appellate review, and is therefore not a prerequisite to an appeal from the judgment."); 11 WRIGHT ET AL., *supra* note 8, § 2818 ("[t]he settled rule in federal courts . . . is that a party may assert on appeal any question that has properly been 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.").

⁷⁷ *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 126 S.Ct. 980, 986 (2006).

⁷⁸ *Id.* at 987 (emphasis added).

the grounds on which ConAgra sought a new trial in *Unitherm*.⁷⁹ A court is not asked to consider the sufficiency of the evidence when engaging in harmless error review.⁸⁰ And, in light of the Supreme Court's amendment to Federal Rule of Evidence 103(a), affording the district court an opportunity to correct its erroneous evidentiary ruling is not as important to the judicial process as obtaining the court's input on whether the evidence is insufficient for a reasonable jury to find for one of the parties.⁸¹ Therefore, an appellant does not need to file a post-verdict motion for a new trial under Rule 59 in order to obtain relief on appeal.

A. Sufficiency of the Evidence as a Factor in Harmless Error Analysis

Unitherm clearly prohibits a court of appeals from evaluating the sufficiency of the evidence, absent a timely filed post-verdict motion.⁸² However, the Seventh Circuit in *Fuesting* never really explored the role that such an evaluation plays in a reviewing court's harmless error analysis. It expressed concern that its examination of whether error is harmless or prejudicial involves "what might be considered an implicit weighing of the sufficiency of the evidence," but it doesn't confront this problem directly.⁸³ Rather, the court downplays the issue as not too significant because the Federal Rules of Evidence and prior precedent clearly, in the court's view, create a well-established rule that a post-verdict motion is not required for a court of appeals to review a claim of evidentiary error.⁸⁴ In distinguishing the holding in *Unitherm* from the case before it, the Seventh Circuit

⁷⁹ See *Fuesting II*, 448 F.3d at 939.

⁸⁰ See *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963).

⁸¹ Compare FED. R. CIV. P. 103, Advisory Committee Note for 2000 Amendment, with *Marceaux v. Conoco, Inc.*, 124 F.3d 730, 734 (5th Cir. 1997).

⁸² *Unitherm*, 126 S.Ct. 980, 989 (2006).

⁸³ See *Fuesting II*, 448 F.3d at 939.

⁸⁴ See *id.* at 940 ("Nevertheless, the ability of the court of appeals to award a new trial where there is prejudicial evidentiary error is well-established and undisturbed by *Unitherm*." (emphasis added)).

implicitly asserts that review of sufficiency of the evidence and harmless error analysis are separate things, but it never says why.⁸⁵

Indeed, the two assessments are wholly distinct, and the Supreme Court has consistently reminded courts of this.⁸⁶ In determining in *Fahy v. Connecticut* whether a defendant convicted of painting swastikas on a synagogue was prejudiced by the erroneous admission of the unconstitutionally obtained can of black paint and paint brush, the Court clarified that it was “not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of.”⁸⁷ Rather, the Court focused on whether the exclusion of the evidence could have changed the outcome of the trial.⁸⁸

The harmless error rule represents a reaction by Congress to the past appellate practice of frequently reversing criminal convictions based on technical mistakes made at trial that had slight effect on the outcome of the trial.⁸⁹ Today, the statute states that on appeal “the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”⁹⁰ It is commonly understood that the error affects the substantial rights of a party at trial if it affects the outcome of the trial.⁹¹ The statute applies to both criminal and civil cases,⁹² and its

⁸⁵ See *id.* at 939.

⁸⁶ See *Bundy v. Florida*, 479 U.S. 894, 894 (1986), (Brennan, J., dissenting), *cert denied*; *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963); *Kotteakos v. United States*, 328 U.S. 750, 764–65 (1946).

⁸⁷ *Fahy*, 375 U.S. at 86.

⁸⁸ *Id.* at 95.

⁸⁹ See *Kotteakos*, 328 U.S. at 757–61 (“So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained.”); 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 17 (2d ed. 2006). The *Kotteakos* opinion offers a detailed account of the legislative history of the harmless error rule. 328 U.S. at 758–60.

⁹⁰ 28 U.S.C. § 2111 (2006).

⁹¹ See *U.S. v. Lane*, 474 U.S. 438, 455 (1986).

language has since been replicated in the Federal Rules of Criminal Procedure,⁹³ Civil Procedure,⁹⁴ and Evidence.⁹⁵

The harmless error rule is expressed in general terms, because an error's prejudicialness necessarily depends on the particular circumstances of the case.⁹⁶ Nevertheless, the Supreme Court has provided courts with some basic guidelines to follow when engaging in harmless error analysis.⁹⁷ First, in response to the appellate courts' previous propensity to "tower" above trials "as impregnable citadels of technicality," the Supreme Court views the harmless error rule as urging appellate courts to avoid applying the rules so rigidly when their infringement really does not affect the outcome of the trial.⁹⁸ Second, the reviewing court should scrutinize the error in relation to the entire record of the proceedings, because only then can it assess the error's effect on the trial.⁹⁹ Thirdly, the court must do this "tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations."¹⁰⁰ Indeed, reviewing courts must decide the harmlessness of error based on the unique circumstances of each case, because, for example, the jurors in one trial might place less emphasis on evidence than the jurors in a separate but similar trial

⁹² *But see Kotteakos*, 328 U.S. at 762 (acknowledging that the statute makes no distinction between civil and criminal cases, but not interpreting this as meaning the same criteria should always be applied to both kinds of cases).

⁹³ FED. R. CRIM. P. 52.

⁹⁴ FED. R. CIV. P. 61.

⁹⁵ FED. R. EVID. 103(a).

⁹⁶ *See Kotteakos*, 328 U.S. at 761 (describing the analysis as "transcending confinement by formula or precise rule" and as a matter "for experience to work out").

⁹⁷ *See* MUELLER & KIRKPATRICK, *supra* note 89, § 17 (extracting five general guidelines from *Kotteakos*).

⁹⁸ *See Kotteakos*, at 760–61 (quoting Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925)); MUELLER & KIRKPATRICK, *supra* note 89, at § 17. (advising that "the message is not to insist on applying the rules for their own sake, but rather to see them as tools that can help achieve a fair and just result").

⁹⁹ *See Kotteakos*, 328 U.S. at 762.

¹⁰⁰ *Id.*

would place on the same evidence.¹⁰¹ Nevertheless, some important factors can be derived from the decisions of the Supreme Court and courts of appeals.¹⁰² For example, the amount of interest the jury expressed in the evidence, the level of persuasiveness of the evidence, the presence of other evidence in the record that defuses the prejudicial quality of the erroneously admitted evidence, and the inclusion of a jury instruction that cures the prejudicial effect of the evidence are all factors that an appellate court should consider when engaging in harmless error review.¹⁰³ Appellate courts also consider the amount of persuasiveness of other evidence that addresses the same issue as does the improperly admitted evidence, in order to determine whether the latter was merely cumulative.¹⁰⁴

Lastly, the Supreme Court in *Kotteakos* stressed that the question is not whether, after removing the improper evidence from the record, there remains enough to support the result.¹⁰⁵ Rather, the proper focus is on the erroneously admitted evidence's impact upon the decision that was reached by a particular trier of fact.¹⁰⁶ A reviewing court's role in harmless error review is not to decide whether the jury's decision was correct.¹⁰⁷ However, sufficiency of the evidence undoubtedly could play a role in deciding an error's prejudicialness.¹⁰⁸

¹⁰¹ Harmless error review is considered so difficult because it requires a court to get into the minds of the jurors. "The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own." *Id.* at 764. This is not always easy to do when, to the appellate court's minds, the record leans in favor of one of the parties.

¹⁰² The factors relating to errors of admission sometimes vary from those relating to errors of exclusion. See Robert W. Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts*, 3 VILL. L. REV. 48, 53–59 (1957). This Note focuses on harmless error review pertaining to evidence that was admitted since the trial court in *Fuesting* erroneously admitted evidence.

¹⁰³ See Gibbs, *supra* note 102, 53–57.

¹⁰⁴ See MUELLER, *supra* note 89, at § 19.

¹⁰⁵ *Kotteakos*, 328 U.S. at 765.

¹⁰⁶ See *id.* at 764.

¹⁰⁷ *Id.* at 763.

¹⁰⁸ *Id.* at 764.

After all, if, absent the error, the evidence in the record would have been insufficient for the jury to decide otherwise, the appellant simply could not have been prejudiced.¹⁰⁹ Similarly, supposing the error never happened, if the evidence in the record would then have been insufficient, as a matter of law, for a reasonable jury to reach the same result, the appellant was undeniably prejudiced by the error.¹¹⁰ This is all very axiomatic. In fact, one could say that the sufficiency of the evidence analysis by itself answers the harmless inquiry in such situations.

On the other hand, courts worry much more over situations where a reasonable jury could have reached either the same or the opposite result, if the trial court did not err.¹¹¹ After all, harmless error review is concerned with the effect of the error on the decision of a *specific* jury,¹¹² whose members are indeed reasonable¹¹³ but which, of course, is not *any* reasonable jury. In theory, although an appellate court believes that the jury's decision, absent improperly admitted evidence, was nevertheless correct, it must still find prejudicial error and order a new trial if the record demonstrates that the same jury would have reached a contrary result after a trial in which that evidence was excluded.¹¹⁴ If the court affirmed in such a situation, it would be denying the losing party its constitutional right to a trial by jury.¹¹⁵ The court can only affirm here if the record shows that the jury's decision would not have been affected by the error.¹¹⁶

But the Supreme Court in *Unitherm* is concerned with stepping on the prerogative of the trial court to review the sufficiency of the evidence in the first instance given its "feel" for the case; not with the

¹⁰⁹ See Gibbs, *supra* note 102, at 61.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See *Kotteakos*, 328 U.S. at 764.

¹¹³ Or at least an appellate court assumes so on review. See *Goins v. United States*, 99 F.2d 147, 151 (4th Cir. 1938).

¹¹⁴ See *Kotteakos*, 328 U.S. at 764; Gibbs, *supra* note 102, at 62.

¹¹⁵ See Gibbs, *supra* note 102, at 62.

¹¹⁶ See *Kotteakos*, 328 U.S. at 765.

jury's role to decide questions of fact.¹¹⁷ Therefore, it does not invoke the more troubling question of the role of sufficiency of the evidence analysis in harmless error review, but rather the self-evident results described above.¹¹⁸ But this should not strip appellate courts of the power to engage in harmless error review when an appellant fails to file a Rule 50(b) motion, which necessarily means after *Unitherm* that the court cannot review the sufficiency of the evidence.¹¹⁹ Courts of appeal consider their appraisal of the sufficiency of the evidence not as dispositive of the prejudice question but only as one of the many factors upon which they base their conclusion.¹²⁰ So, even if *Unitherm* does dictate that appellate courts can no longer employ this factor in its harmless error analysis, the ability of the courts to engage in that analysis should not suffer. For there are a number of factors the court can use to determine whether the record shows that the jury might well have reacted differently if not for the trial court's error.¹²¹

B. Rule 50 Jurisprudence and the Power of the Courts of Appeal

Unitherm was the most recent decision in a long line of Supreme Court cases determining the applicable procedures required by Federal Rule of Civil Procedure 50 since its adoption in 1938.¹²² Two major concerns underlie most of these cases: the importance of (1) providing the trial court, which benefits from a first-hand understanding of the case, an opportunity to rule on whether to grant judgment as a matter

¹¹⁷ See *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 126 S.Ct. 980, 984 (2006).

¹¹⁸ See notes 109 & 110 and their accompanying text.

¹¹⁹ See *Unitherm*, 126 S.Ct. at 989.

¹²⁰ See Gibbs, *supra* note 102, at 61–63.

¹²¹ See *supra* notes 102–104 and their accompanying text.

¹²² *Unitherm*, 126 S.Ct. 980 (2006); *Weisgram v. Marley Co.*, 528 U.S. 440 (2000); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967); *Johnson v. N.Y., N.H. & H.R. Co.*, 344 U.S. 48 (1952); *Fountain v. Filson*, 336 U.S. 681 (1949); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948); *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212 (1947); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940); *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933).

of law or to order a new trial, and (2) protecting the judgment winner's rights when the judgment is set aside on appeal. These concerns, however, are not present in an appellate court's determination of whether a trial court's evidentiary error was prejudicial to the appellant.

In Rule 50 jurisprudence the motion on which the district court rules and the theories advanced by the movant determine the appellate court's power upon appeal.¹²³ For example, in *Montgomery Ward & Co. v. Duncan*, where the Supreme Court first determined the appropriate procedure under Rule 50(b), the Court held that the Eighth Circuit could not order the district court to enter judgment for the plaintiff where the district court granted the defendant's motion for judgment as a matter of law after the jury returned a verdict for the plaintiff.¹²⁴ In that case, after the verdict, the defendant had renewed his pre-verdict motion for directed verdict based on insufficiency of the evidence and, alternatively, moved for a new trial based on evidentiary error and excessive damages.¹²⁵ The district court found that the evidence was insufficient as a matter of law to prove negligence and directed a verdict for the defendant without considering the arguments advanced in support of the motion for a new trial.¹²⁶ Ultimately, the Supreme Court determined that the defendant was entitled to have the trial judge consider these arguments for a new trial, and accordingly remanded the case for a ruling on that motion.¹²⁷

Subsequently, the Supreme Court heard a number of cases in which it emphasized the importance of giving the verdict winner an opportunity to invoke the discretion of the trial judge to grant a new trial, and did not allow the court of appeals to enter judgment as a

¹²³ *Montgomery Ward*, 311 U.S. at 250–51

¹²⁴ 311 U.S. at 255.

¹²⁵ *Id.* at 245–46.

¹²⁶ *Id.* at 246.

¹²⁷ *Id.* at 252, 255; see WRIGHT ET. AL., *supra* note 8, § 2540, for the process on appeal when the trial court grants both the motion for judgment as a matter of law and the motion for a new trial, grants one and not the other, or grants neither of them.

matter of law for the verdict loser.¹²⁸ In *Cone v. West Virginia Pulp & Paper Co.* the verdict-losing defendant did not renew its Rule 50(a) motion after the verdict but did move for a new trial based on the trial court's error in admitting certain evidence.¹²⁹ After the trial court denied the Rule 59 motion, the Fourth Circuit reversed the judgment entered on the verdict¹³⁰ and ordered the district court to enter judgment for the defendant, because the evidence, excluding that prejudicially admitted by the trial court, was insufficient for a reasonable jury to find for the plaintiff.¹³¹ The Supreme Court subsequently reversed and remanded for a new trial, reasoning that, before a court of appeals can enter judgment as a matter of law for the verdict loser, the trial court must be given an opportunity to exercise its discretion—with the judge's first-hand view of the proceedings before him—to enter judgment as a matter of law or grant a new trial.¹³² According to the Court, the purpose of Rule 50 was furthered by affording the trial judge this “last chance to correct his own errors without delay, expense, or other hardships on appeal.”¹³³

Cases like *Cone* display the Supreme Court's concern with protecting the rights of a party whose jury verdict has been set aside on appeal and who may have legitimate grounds for a new trial—grounds which should be considered by the district court in the first instance because of its “feel” for the case on the whole.¹³⁴ However, the Court makes clear that this concern does not warrant “an ironclad

¹²⁸ See *Fountain v. Filson*, 336 U.S. 681 (1949); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948); *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212 (1947).

¹²⁹ *Cone*, 330 U.S. at 213.

¹³⁰ A district court's order denying or granting a motion for a new trial is not appealable, save in exceptional circumstances. The denial of the motion is reviewable, though, when the movant appeals the judgment entered on the verdict for errors of law committed at trial. See *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481–85 (1933).

¹³¹ *Cone*, 330 U.S. at 214.

¹³² *Id.* at 216.

¹³³ *Id.* (citing *Greer v. Carpenter*, 323 Mo. 878, 882 (1929)).

¹³⁴ See *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967).

rule that the court of appeals should never order dismissal or judgment for [the] defendant when the plaintiff's verdict has been set aside on appeal."¹³⁵ Rather, the court of appeals has the power to do take a number of actions when it determines that the trial court erroneously denied the verdict loser's Rule 50(b) motion for judgment as a matter of law. It may, at its discretion, "(1) order a new trial at the verdict winner's request or on its own motion,¹³⁶ (2) remand the case for the trial court to decide whether a new trial or entry of judgment for the defendant is warranted, or (3) direct the entry of judgment as a matter of law for the defendant."¹³⁷

Fuesting differs from *Montgomery Ward* and its progeny in one major respect: the court of appeals did not direct judgment for the defendant. The plaintiff whose verdict had been set aside on appeal was awarded a new trial at which proper rulings would be rendered.¹³⁸ Such a result remedies the prejudicial effect of the erroneously admitted evidence upon the defendant's case, without prejudicing the plaintiff's case, which at trial relied on that evidence. In fact, the ultimate outcome in *Fuesting* was the same as that in the cases, like *Cone*, where the appellant did not file a Rule 50(b) motion.¹³⁹ However, in those cases, the appellant did move the trial judge after the verdict for a new trial.¹⁴⁰ The Supreme Court in *Unitherm* places a lot of emphasis on this fact.¹⁴¹ For example in *Cone*, the Court did not

¹³⁵ *Id.* at 326.

¹³⁶ The appellee "may bring his grounds for new trial to the trial judge's attention when defendant first makes an *n.o.v.* motion, he may argue this question in his brief to the court of appeals, or he may in suitable situations seek rehearing from the court of appeals after his judgment has been reversed." *Id.* at 328–29.

¹³⁷ *Weisgram v. Marley Co.*, 528 U.S. 440, 451–52 (2000). For example, in *Neely*, the appellate court had the power to direct judgment for the verdict-losing defendant where the trial court had denied both the defendant's Rule 50(b) and Rule 59 motions. 386 U.S. at 319–21.

¹³⁸ See *Fuesting v. Zimmer (Fuesting II)*, 448 F.3d 936, 942 (7th Cir. 2006).

¹³⁹ See, e.g., *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 218 (1947).

¹⁴⁰ *Id.* at 213.

¹⁴¹ See *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 126 S.Ct. 980, 987 (2006).

allow the appellate court to enter judgment for the verdict loser because the district court was not given a chance through a Rule 50(b) motion to exercise its discretion to grant judgment as a matter of law or, alternatively, order a new trial.¹⁴² According to the Court, the trial court's "appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted."¹⁴³

The Supreme Court now reads *Cone* and the cases like it as leading to the conclusion that "a party is not entitled to pursue a new trial on appeal unless that party makes an appropriate postverdict motion in the district court."¹⁴⁴ But those cases are interpretations of Rule 50, not Rule 59. The Court would have ordered a new trial in *Cone* even if the appellants had not moved for one under Rule 59.¹⁴⁵ The trial court's "appraisal of the bona fides of the claims" is important in deciding whether to grant a new trial under a Rule 50(b) motion.¹⁴⁶ That is, it is important for the district court, after deciding that the evidence is legally insufficient to support the verdict, to choose in the first instance between entering judgment as a matter of law and ordering a new trial—a Rule 50(b) decision—not between ordering a new trial or entering judgment on the verdict—a Rule 59 decision.¹⁴⁷ Allowing the district court to decide in the former situation protects the party whose jury verdict was set aside on appeal.¹⁴⁸ There may be situations in which important considerations remain that entitle the verdict winner to a new trial.¹⁴⁹ A determination of whether these considerations exist depends on the intricacies of the case, which the

¹⁴² 330 U.S. at 215 (emphasizing that the trial court has "discretion to choose between the two alternatives" because "there are circumstances which might lead [it] to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice").

¹⁴³ *Id.* at 216.

¹⁴⁴ *Unitherm*, 126 S.Ct. at 987.

¹⁴⁵ *See* *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 323 (1967).

¹⁴⁶ *See* *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 215 (1947).

¹⁴⁷ *Cf. Unitherm*, 126 S.Ct. at 987–88.

¹⁴⁸ *See* *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).

¹⁴⁹ *See* *Neely*, 386 U.S. at 325.

trial court is intimately familiar with, and which, therefore, must first be passed upon by the trial court.¹⁵⁰ If it determines, in its discretion, that a new trial should be ordered, the verdict winner is protected without prejudicing the verdict loser. If it decides that a retrial is unnecessary and judgment should be entered for the verdict loser, the verdict winner can appeal this judgment, and the court of appeals can review the decision based on a full record and based on the parties' arguments that are focused on the appropriate issues.¹⁵¹

On the other hand, *Fuesting* was not concerned with protecting the verdict winner. Its verdict was not set aside on appeal pursuant to a Rule 50(b) motion based on insufficiency of the evidence; it was set aside because an improper ruling on evidence prejudiced the defendant's case. The Seventh Circuit's decision to order a new trial was necessary to protect the defendant. Indeed, the defendant in *Unitherm* was also allegedly prejudiced by a jury verdict that could not legally have been reached given the evidence presented at trial, but a sufficiency of the evidence determination must first be made by the trial court because of its feel for the case; the idea being that the record for appeal would be more complete and the parties more informed of the issues on appeal.¹⁵² The admissibility of evidence, on the other hand, is a pure question of law, with which the court of appeals must regularly and characteristically deal.¹⁵³ Indeed, in *Neely v. Martin K. Eby Construction Co.*, one of the Rule 50 cases that the Supreme Court cites in *Unitherm*, the Supreme Court this is "precisely the kind of issue that the losing defendant below may bring to the court of appeals without ever moving for a new trial in the district court."¹⁵⁴ Furthermore, the district court has already ruled on that question at or

¹⁵⁰ See *Cone*, 330 U.S. at 218.

¹⁵¹ See FED. R. CIV. P. 50(c). In its note on the 1962 Amendment, the Advisory Committee points out that "[e]ven if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment *n.o.v.* not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial."

¹⁵² See *Unitherm*, 126 S.Ct. at 985–86.

¹⁵³ See *Neely*, 386 U.S. at 327.

¹⁵⁴ *Id.*

before trial, thereby offsetting the need for it to reassert its ruling on a post-judgment motion.

C. Satisfying Rule 103 Alone Is Enough to Preserve Evidentiary Error for Appeal

If an appellant satisfies Rule 103(a)(2), a court of appeals has the power to review that party's claim of error and to order a new trial where the error affected the appellant's substantial rights.¹⁵⁵ This is the case even if the appellant did not move for a new trial after entry of the judgment pursuant to Rule 59.¹⁵⁶ *Unitherm* and its forerunners do not prohibit this result because the trial court's unique feel for the case does not give it any special advantage in dealing with evidentiary questions, and therefore the court could not add anything to the record that would benefit the reviewing court on appeal. Furthermore, the Advisory Committee Note on the 2000 amendment to Rule 103(a) implicitly shows that the Supreme Court does not consider giving the trial court an opportunity to correct its previous mistakes as important as allowing the court to rule on the legal sufficiency of the evidence before the jury.¹⁵⁷

By amending Rule 103(a) to its current language, the Supreme Court rejected the approach taken by some courts of appeals that all losing parties must renew an unsuccessful motion *in limine* in order to preserve a claim of error for appeal.¹⁵⁸ These courts often referred to,

¹⁵⁵ See FED. R. CIV. PRO. 103(a).

¹⁵⁶ See *Fuesting v. Zimmer (Fuesting II)*, 448 F.3d 936, 941–42 (7th Cir. 2006).

¹⁵⁷ Compare FED. R. CIV. P. 103, Advisory Committee Note for 2000 Amendment, with *Marceaux v. Conoco, Inc.*, 124 F.3d 730, 734 (5th Cir. 1997).

¹⁵⁸ See FED. R. CIV. PRO. 103, Advisory Committee Note for 2000 Amendment (citing *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980) for requiring such a requirement as opposed to the amendment, which only requires the losing party to renew its objection when the trial court does not make a definitive ruling on the record).

among other reasons for such a requirement,¹⁵⁹ the importance of giving “the trial judge an opportunity to reconsider his *in limine* ruling with the benefit of having been witness to the unfolding events at trial.”¹⁶⁰ But the amended Rule 103(a) recognizes that some motions *in limine* need not be renewed at trial because many pretrial evidentiary rulings involve pure questions of law that cannot be decided with any greater accuracy in the heat of trial.¹⁶¹ That is not to say, though, that a losing party never has an incentive to renew his pretrial objection for the sake of preserving his prospects for appeal. As the Supreme Court made clear in *Old Chief v. United States*, a definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling.¹⁶² Therefore, an appellant will want to renew its motion for a new trial based on an erroneous evidentiary ruling if the relevant facts and circumstances change materially after the advance ruling has been made.¹⁶³

In light of these considerations in crafting the amendment to Rule 103(a), it is unlikely that the Supreme Court intended that a post-judgment motion be a prerequisite to seeking a new trial on appeal based on a claim of a prejudicially erroneous evidentiary ruling, because the appellate process would gain very little from such a strict requirement. The only benefit is that such a rule affords the trial court an opportunity to correct the errors that he made previously, at or before trial.¹⁶⁴ If, given that opportunity, the judge reverses his prior prejudicial rulings, he would order a new trial, and an appeal would have been avoided. However, the potentially highly prejudicial

¹⁵⁹ Another popular reason is to discourage parties “from refraining from making an objection at trial in order to reserve an opportunity to assert reversible error on appeal.” *United States v. Roenigk*, 810 F.2d 809, 815 (8th Cir. 1987); see James J. Duane, *Appellate Review of in Limine Rulings*, 182 F.R.D. 666 (1999).

¹⁶⁰ Duane, *supra* note 159 (quoting *Marceaux v. Conoco, Inc.*, 124 F.3d 730, 734 (5th Cir. 1997)).

¹⁶¹ See Duane, *supra* note 159.

¹⁶² 519 U.S. 172 (1997).

¹⁶³ FED. R. EVID. 103, Advisory Committee Note for 2000 Amendment.

¹⁶⁴ See *Marceaux*, 124 F.3d at 734.

consequences of such a rigid procedural rule vastly outweigh this slight benefit. The resulting injustice of denying relief to the verdict loser is unacceptable where the evidentiary error by the trial court affected the outcome of the trial.

In a situation where the appellant has satisfied Rule 103(a), he has stated specific grounds for his objection and the judge has definitively ruled on the objection on the record.¹⁶⁵ Where the evidentiary objection does not draw anymore force from the specific context in which it is made at trial, the trial court's reasoning for ruling the way it did before trial will remain unchanged. Hence, a renewed objection would be unnecessary, and a motion for a new trial based on that same object would be similarly redundant. A reassertion of the trial court's pretrial ruling would add nothing of value to the record. In contrast, a Rule 59 motion is required when the appellant seeks a new trial on appeal based on excessive or inadequate damages, because the trial judge must be given an opportunity to exercise his discretion.¹⁶⁶ Unlike an evidentiary ruling, though, the trial judge cannot rule on the legal adequacy of damages until after the jury returns its verdict, so the necessity of a post-verdict motion is obvious.

As a result, the reviewing court can rule on the question of law on the basis of a complete record. It then can engage in a harmless error analysis.¹⁶⁷ If the court deems the error to have prejudiced the appellant and the appellant did not move after the verdict for judgment as a matter of law based on sufficiency of the evidence (excluding that erroneously admitted), the only possible relief the court could grant is a new trial. An initial determination by the trial court of whether to grant a new trial is completely unnecessary and does not aid the court of appeals in any way. The only appropriate response to a motion for a new trial where evidence that affected the outcome of a trial should not have been presented is to grant the motion. A denial by the trial court would be reversed under the most deferential standard of review.

¹⁶⁵ See FED. R. EVID. 103(a).

¹⁶⁶ See *Ryen v. Owens*, 446 F.2d 1333, 1334 (D.C. Cir. 1971); *Baker v. Dillon*, 389 F.2d 57 (5th Cir. 1968).

¹⁶⁷ See 28 U.S.C. 2111.

CONCLUSION

If presented with the opportunity, the U.S. Supreme Court should not extend *Unitherm Food Systems v. Swift-Eckrich* to require an appellant to file a post-verdict motion when it seeks a new trial on appeal based on the trial court's allegedly erroneous evidentiary ruling. The *Unitherm* decision should properly be restricted to those cases in which the verdict-loser requests that judgment be entered in its favor given the legal insufficiency of the evidence, because, as this Note has demonstrated, review of the sufficiency of the evidence and harmless error review are two distinct assessments. Furthermore, the Court's Rule 50 jurisprudence does not merely focus on the trial court's "feel" for the case but more specifically on how that first-hand experience places it in a unique position to decide whether to grant judgment as a matter of law or, in the alternative, a new trial. Rule 50 affords the trial court great discretion in deciding which of these orders better promotes justice given the unique circumstances of each case. In contrast, the appellant only appealing for a new trial based on trial court error does not deny the trial court an opportunity to exercise this discretion but merely presents a pure question of law, with which courts of appeal characteristically deal.

That is not to say that the judicial system does not benefit from such an appellant renewing its motion for judgment as a matter of law after the verdict and, in the alternative, requesting a new trial based on evidentiary error. Indeed, as the Seventh Circuit pointed at, this is the "better practice" that attorneys should follow, because it serves the purpose of Rule 50 by speeding litigation and preventing unnecessary retrials.¹⁶⁸ However, in circumstances like those in *Fuesting*, appellate courts should recognize that speedy litigation is a small sacrifice to ensure overall fairness to parties whose substantial rights were affected by the trial court's error.

¹⁶⁸ See *Fuesting v. Zimmer, Inc. (Fuesting II)*, 448 F.3d 936, 941 (7th Cir. 2006); see also *supra* note 52.