THE NEW TEMPORAL PRIME DIRECTIVE: *ORTIZ* & THE DEATH OF POST-TRIAL APPEALS FROM PRE-TRIAL SUMMARY JUDGMENT DENIALS

INTRODUCTION

On January 24, 2011, a legal mandate was issued that now prohibits federal practitioners from reaching back in time and challenging certain pre-trial judgments once a trial has concluded.[1] In effect, federal trials are now afforded greater protection against procedural action that would otherwise serve to circumvent a trial's entire timeline. While easily mistaken for some new protocol in accordance with Starfleet's temporal prime directive,[2] this mandate emanates instead from the U.S. Supreme Court's recent decision in *Ortiz v. Jordan*, ruling that a party may not appeal an order denying summary judgment "after a full trial on the merits."[3]

Prior to the Court's ruling, *Ortiz* had been on the legal community's radar for some time. This was due in part to the unique nature of Petitioner's counsel (young up-and-coming solo appellate practitioner David E. Mills), the events surrounding Petitioner's filing for certiorari, and the remarkableness of the Court's subsequent granting of the petition.[4] Yet, despite the incredible circumstances leading to its review by the U.S. Supreme Court, *Ortiz* will most likely be remembered for its impact on appeals from summary judgment denials, a procedural matter that had split at least eight federal circuit courts on two separate sub-issues.[5]

This Note explores *Ortiz*'s impact in three sections. Part I outlines *Ortiz*'s relevant procedural history in order to provide a context for the Court's ruling regarding Respondents' failure to preserve properly their qualified immunity defense for appellate review. Part II examines the basic function, purpose, and policy behind motions for summary judgment, followed by an analysis concerning some of the nuances that accompany interlocutory appeals from court orders denying summary

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1 Ortiz v. Jordan, 131 S. Ct. 884, 887 (2011).

2 *See* MICHAEL OKUDA & DENISE OKUDA, THE STAR TREK ENCYCLOPEDIA: A REFERENCE GUIDE TO THE FUTURE 502 (1999) (stating that the temporal prime directive is a mandate prohibiting the interference of the past or future by time travelers).

3 *Ortiz*, 131 S. Ct. at 888–89.

4 *See generally* Mark Curriden, *The Long Shot*, A.B.A. J., Nov. 2010, at 52; ABAJournal, *Profile: David Mills, Solo Practitioner*, YOUTUBE (Oct. 19, 2010), http://www.youtube.com/watch?v=MtfF6S1-0IQ (exploring the nature of Mr. Mills's career path and explaining how Mr. Mills was retained as Petitioner's counsel).

5 *See* discussion *infra* Parts II.D., III.B.

judgment. Part III concludes by explaining *Ortiz*'s impact on federal practitioners: first, pointing to specific procedural steps that lawyers must now take in order to preserve arguments emanating from summary judgment motions if interlocutory appeals from the denial of such motions are not otherwise available, and second, discussing how some circuits have stretched the holding in *Ortiz*.

I. *ORTIZ V. JORDAN*: RELEVANT PROCEDURAL HISTORY

On October 8, 1998,[6] Petitioner Michelle Ortiz brought a civil action in the United States District Court for the Southern District of Ohio[7] raising "claims for damages against superintending prison officers"[8] who failed to provide reasonable protection from sexual assault by a male corrections officer[9] during Ortiz's sentence as an inmate at the Ohio Reformatory for Women.[10] Respondents Paula Jordan and Rebecca Bright, the "[p]rincipal defendants in the suit,"[11] filed a motion for summary judgment with the district court on March 2, 2001,[12] raising pleas of qualified immunity.[13] On March 29, 2002,[14] finding that the qualified immunity defense raised by Respondents "turned on material facts genuinely in dispute," the district court issued an order denying summary judgment.[15] Appropriately,[16] Respondents did not seek immediate appellate review through interlocutory appeal.[17] Instead, the case proceeded to a jury trial on September 12, 2005.[18] Following the conclusion of Petitioner's case-in-chief, Respondents moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure ("Rule") 50(a)[19] on September 14, 2005.[20] While Respondents' motion was ultimately denied, the short yet belabored exchange between the district

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6 Trial Brief of Defendants Bright and Jordan at 1, Ortiz v. Voinovich, 211 F. Supp. 2d 917 (S.D. Ohio 2002) (No. C-2-98-1031).

7 Ortiz v. Jordan, 316 F. App'x 449, 450 (6th Cir. 2009).

8 *Ortiz*, 131 S. Ct. at 888.

9 *See* Petition for Writ of Certiorari at 2–3, *Ortiz*, 131 S. Ct. 884 (No. 09-737).

10 *Ortiz*, 131 S. Ct. at 888.

11 *Id.*

12 Ortiz v. Voinovich, 211 F. Supp. 2d 917, 920–21 (S.D. Ohio 2002).

13 *Ortiz*, 131 S. Ct. at 888.

14 Petition for Writ of Certiorari, *supra* note 9, at 3.

15 *Ortiz*, 131 S. Ct. at 888.

16 *See id.* at 891.

17 Petition for Writ of Certiorari, *supra* note 9, at 3.

18 Final Brief of Defendants-Appellants at 15, Ortiz v. Jordan, 316 F. App'x 449 (6th Cir. 2009) (No. 06-3627).

19 *Ortiz*, 131 S. Ct. at 890.

20 Joint Appendix at 3, *Ortiz*, 131 S. Ct. 884 (No. 09-737).

court and Respondents' trial counsel concerning this motion captures, in retrospect, the suit's overall fitful vibe. Indeed, after "years of pre-trial proceedings"[21] and with at least five more years of litigation before review by the U.S. Supreme Court,[22] the text from the trial transcript accompanying Respondents' first Rule 50(a) motion is perhaps indicative of the suit's entire frustrated existence. (In the following exchange, the transcript identifies Ms. Reese as Respondents' trial counsel.)

> THE COURT: Here is what happened, Ms. Reese.
>
> And, again, this is a Rule 50. So, I am not -- it is not whether you can disbelieve something, that's not the point. The point is, Ms. Bright testified that people are put in segregation for violating prison rules. Ms. Bright further testified --
>
> MS. REESE: That's not the only reason.
>
> THE COURT: If you will let the Court finish?
>
> MS. REESE: I'm sorry, Your Honor. I apologize.
>
> THE COURT: I am just the one making the decision here. Forgive me for interrupting.
>
> . . . .
>
> MS. REESE: Your Honor, simply to protect my own record here --
>
> THE COURT: The record is protected. Once you made your motion and once you set forth your bases, your record is protected.
>
> MS. REESE: But the Court interrupted me in setting forth my bases.
>
> THE COURT: No. Ms. Reese, I have to make decisions based upon the record before me. You gave your argument. I heard your argument. I asked you questions. You answered them.
>
> MS. REESE: And Your Honor, you did not let me finish. You interrupted my argument, and I have a few -- a couple of more sentences that I would like to have in there in case this is reviewed.
>
> THE COURT: Ms. Reese, please make your couple of more sentences.
>
> . . . .
>
> THE COURT: Is there an affirmative duty for the plaintiff to undertake security measures herself?
>
> MS. REESE: When she -- according to Ms. Jordan, she was not told the name of the officer.
>
> THE COURT: That wasn't my question. That wasn't my question. Is there an affirmative duty for Ms. Ortiz to protect herself under the law? As a matter of law?
>
> MS. REESE: Your Honor, as a matter of fact, you would do anything possible -- \ [sic]

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[21] Petition for Writ of Certiorari, *supra* note 9, at 3.

[22] *See Ortiz*, 131 S. Ct. at 884 (noting that the Supreme Court heard oral arguments in November 2010); Petition for Writ of Certiorari, *supra* note 9, at 3 (noting that the trial occurred in September 2005).

> THE COURT: I didn't ask you that, Ms. Reese. I asked you as a matter of law, does she have an affirmative duty to protect herself in a prison institution? Yes or no?
>
> MS. REESE: Yes.
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> . . . .
>
> THE COURT: I find that a reasonable juror could believe that there was retaliation involved. . . .
>
> . . . .
>
> MS. REESE: Your Honor, may I be heard in two sentences?
>
> THE COURT: No, because I am not finished.
>
> MS. REESE: I'm sorry.
>
> THE COURT: . . . . [Y]our motion is denied.
>
> MS. REESE: Your Honor, you have made several misstatements in your characterization here. And if you would give me an opportunity to correct them?
>
> THE COURT: No, no. This is not moot court. If I have made misstatements or if you disagree with my rationale, then the record is clear as to what the true facts were and your record is preserved because you presented -- I allowed you to finish -- you presented the arguments that you wanted to present, and this motion is concluded.
>
> Now, are you ready to proceed with your case-in-chief?
>
> MS. REESE: Yes, we are, Your Honor.
>
> THE COURT: Bring in the jury.[23]

Respondents renewed their motion for judgment as a matter of law at the end of their case-in-chief, but the court again denied Respondents' motion.[24]

After four days of deliberation, the jury found Respondents Jordan and Bright liable, awarding Petitioner Ortiz "$250,000 in compensatory damages and $100,000 in punitive damages against Jordan; . . . [and] $25,000 in compensatory damages and $250,000 in punitive damages against Bright."[25] In accordance with the jury's verdicts, the district court entered judgment in Petitioner's favor[26] on September 20, 2005.[27] Respondents "did not contest the jury's liability finding by renewing, under Rule 50(b), their request for judgment as a matter of law,"[28] but instead appealed the district court's "2002 pre-trial order denying summary judgment" to the United States Court of Appeals for the Sixth Circuit.[29]

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[23] Joint Appendix, *supra* note 20, at 6, 8–10, 14–16.

[24] *Ortiz*, 131 S. Ct. at 890–91.

[25] Petition for Writ of Certiorari, *supra* note 9, at 3.

[26] *Id.*

[27] Final Brief of Defendants-Appellants, *supra* note 18, at 1.

[28] *Ortiz*, 131 S. Ct. at 890–91.

[29] Petition for Writ of Certiorari, *supra* note 9, at 4.

The Sixth Circuit, believing it had appellate jurisdiction to hear the case,[30] concluded that the district court should have granted Respondents' motion for summary judgment and, in accordance with this conclusion, "'reverse[d] the denial of qualified immunity to both Bright and Jordan'"[31] on March 12, 2009.[32] Petitioner Ortiz "filed a timely petition for rehearing and rehearing *en banc* on July 21, 2009," and both were subsequently denied.[33] Following the Sixth Circuit's denial for rehearing, Petitioner was forced to seek new counsel, a search that would bring Petitioner dangerously close to the deadline for appealing to the U.S. Supreme Court.[34] Upon retaining Mills as willing counsel, Petitioner "had four hours to get the petition for an extension [of time to file a petition for certiorari] prepared and to the post office."[35] Ten days later, on October 19, 2009, Justice Stevens granted the extension.[36] Petitioner submitted a timely petition for writ of certiorari to the Court by December 18, 2009.[37] The following is a description of what occurred approximately four months later:

> On the morning of April 26, [2010], Mills sat down at his computer and logged on to the Supreme Court's website. There were about 170 cases up for consideration. All but two were denied. He took a deep breath, picked up the phone and called his client. "I have very, very good news," he told Ortiz, who started crying immediately. "We are in at the Supreme Court."[38]

Such is the procedural history that led to *Ortiz*'s review by the U.S. Supreme Court, and in the Court's own words, certiorari was specifically granted "to resolve the conflict among the Circuits as to whether a party may appeal a denial of summary judgment after a district court has conducted a full trial on the merits."[39] In order to appreciate the full impact of the Court's ruling with respect to the pre-*Ortiz* circuit split, the following section provides a review of the fundamental nature behind summary judgment motions and the requisite methods for appealing the denials of such motions.

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30 *See* Ortiz v. Jordan, 316 F. App'x 449, 453 (6th Cir. 2009).

31 *Ortiz*, 131 S. Ct. at 891 (quoting *Ortiz*, 316 F. App'x at 455).

32 *Ortiz*, 316 F. App'x at 449.

33 Petition for Writ of Certiorari, *supra* note 9, at 1, 4.

34 *See* Curriden, *supra* note 4, at 56–57; *see also Corrections*, A.B.A. J., Dec. 2010, at 7 (explaining that the November issue "mistakenly stated that David Mills called potential client Michelle Ortiz. She called him after another attorney approached Mills about her case.").

35 Curriden, *supra* note 4, at 56–57.

36 Petition for Writ of Certiorari, *supra* note 9, at 1; Curriden, *supra* note 4, at 57.

37 *See* Petition for Writ of Certiorari, *supra* note 9, at 1.

38 Curriden, *supra* note 4, at 58.

39 Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011).

II. SUMMARY JUDGMENT

A. Essence, Purpose, and Policy

Summary judgment takes the form of a pre-trial motion under Rule 56, which provides in part that parties to an action may seek an entry of judgment in their favor by the trial court as to "each claim or defense—or the part of each claim or defense"—raised.[40] When a party moves for summary judgment, she is challenging the opposing party's ability to procure a satisfactory showing that some "genuine dispute as to any material fact"[41] exists for what may otherwise constitute a legally sufficient claim. Thus, summary judgment "distinguishes the merely formal existence of a dispute as framed in the pleadings from the actual substantive existence of a controversy requiring trial."[42] A motion for summary judgment forces the non-moving party "to come forward with at least one sworn averment of fact essential to that opponent's claims or defenses, before the time-consuming process of litigation will continue."[43] As the Third Circuit has stated, summary judgment is "essentially 'put up or shut up' time for the non-moving party."[44] The non-moving party must present facts, not assertions, in order to rebut a motion for summary judgment.[45]

The challenge asserted by a Rule 56 motion for summary judgment, and the burden it places on the non-moving party, serves to "isolate, and then terminate, claims and defenses that are factually unsupported."[46] Unlike other rules of civil procedure, many of which are instituted primarily for regulating the litigation process, Rule 56 motions for summary judgment are made in order to "resolve cases or significant segments of cases."[47] The Rule empowers a moving party to seek a dispositive decision[48] by the trial judge in order to eliminate claims or defenses that are found to be truly undisputed, potentially forgoing the

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[40] FED. R. CIV. P. 56(a); *see also* 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.02[1] (3d ed. 2011) ("A summary judgment is a judgment entered without a trial or specific fact finding by the court.").

[41] FED. R. CIV. P. 56(a).

[42] MOORE ET AL., *supra* note 40.

[43] STEVEN BAICKER-MCKEE ET AL., FEDERAL CIVIL RULES HANDBOOK 2010, at 1063 (2009).

[44] Berckeley Inv. Grp., Ltd. v. Colkitt, 455 F.3d 195, 201 (3d Cir. 2006).

[45] *Id.*

[46] BAICKER-MCKEE ET AL., *supra* note 43.

[47] MOORE ET AL., *supra* note 40.

[48] *Id.*

need for a trial altogether.[49] Echoing this sentiment, the Second Circuit has asserted that "[o]n a motion for summary judgment the court must pierce through the pleadings and their adroit craftsmanship to get at the substance of the claim."[50] Likewise, the First Circuit has asserted that "[i]n operation, summary judgment's role is to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required."[51] Thus, a motion for summary judgment pursuant to Rule 56 functions as a procedural check by balancing the relative ease of raising claims or defenses with an opportunity to evaluate their substantive merit before proceeding to trial.[52] Similarly, summary judgment functions as a tool for the prudent management of judicial time and resources,[53] a function that renders it favorable for efficiency and docket clearing.[54]

B. Summary Judgment Distinguished

Contrasting Rule 56 with other procedural rules that serve a similar purpose or that render the same effect if granted helps to distinguish the true nature of summary judgment while placing it in context of the overall litigation process.

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[49] *See* 1 JAMES WM. MOORE & KEVIN SHIREY, MOORE'S FEDERAL RULES PAMPHLET § 56.3[1] (2010).

[50] United Nat'l Ins. Co. v. Tunnel, Inc., 988 F.2d 351, 354 (2d Cir. 1993).

[51] Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794 (1st Cir. 1992).

[52] Raynor v. Richardson-Merrell, Inc., 643 F. Supp. 238, 245 (D.D.C. 1986) ("[S]ummary judgment is given significant procedural strength, and is raised as a bulwark against claims based on speculation and inference. Litigants are provided a panoply of pre-trial procedures, intended to uncover evidence and streamline the presentation of a case to the jury. Summary judgment is a necessary complement to the liberal rules of pleading and discovery available in federal court.").

[53] Prof'l Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 222 (5th Cir. 1986) ("As Judge William W. Schwarzer has pointed out, 'Summary adjudication of claims or defenses is one of the means for implementing the fundamental policy of the Federal Rules stated in Rule 1: to secure the just, speedy and inexpensive determination of every action.'" (internal quotation marks omitted) (quoting William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 465 (1984))).

[54] Gonzalez v. Torres, 915 F. Supp. 511, 515 (D.P.R. 1996) ("The device allows courts and litigants to avoid full-blown trials in unwinnable cases, thus conserving the parties' time and money and permitting courts to husband scarce judicial resources." (quoting McCarthy v. Nw. Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995))); Gray v. Laws, 915 F. Supp. 762, 763 (E.D.N.C. 1994) ("[T]he purpose of summary judgment motion is to avoid the expense and time of an unnecessary trial . . . ."); Edward Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment*, 22 U.C. DAVIS L. REV. 93, 94 (1988) ("Today's courts, facing more complex cases and an increasing caseload, are simply more receptive to docket clearing devices such as summary judgment."); William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*: *A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 445 (1992).

A motion for summary judgment pursuant to Rule 56 is distinct from a motion for dismissal pursuant to Rule 12(b)(6), a motion for judgment on the pleadings pursuant to Rule 12(c), and a motion for judgment as a matter of law pursuant to Rule 50. Parties who move for a dismissal pursuant to Rule 12(b)(6) or a judgment on the pleadings pursuant to Rule 12(c) seek a judgment against the *legal sufficiency* of "the averments of law and fact" raised by the opposing party.[55] In order to reach a ruling on such motions, a trial judge will generally examine "only the allegations contained in the pleadings."[56] A motion for summary judgment pursuant to Rule 56 is distinguishable in that it "permits the district judge to consult not only the pleadings, but also any affidavits, discovery, and other evidence to determine whether any true factual dispute exists between the parties."[57]

There is, however, a certain amount of potential interplay between these rules insofar as motions pursuant to Rule 12(b)(6) and Rule 12(c) "will be converted into a Rule 56 motion for summary judgment if the court considers matters outside the pleadings in ruling on the motion."[58] Likewise, a motion for directed verdict pursuant to Rule 50, while possessing an even stronger similarity to Rule 56 than either Rule 12(b)(6) or Rule 12(c), is distinguishable from summary judgment. In practice, Rule 56 is mirrored by Rule 50: "The prerequisites for and effects of summary judgments are much the same as judgments as a matter of law, entered under Rule 50 (the federal equivalent of a 'directed verdict')."[59] Indeed, "Both motions test for whether, on the evidence then before the court, a reasonable jury could return a verdict in the non-moving party's favor. Both motions, if granted, will result in a 'judgment' in the movant's favor."[60] Rule 50's mirrored effect of Rule 56 occurs, however, in a particularized temporal context.[61]

A motion for summary judgment pursuant to Rule 56 is pre-trial in nature, supported by "pleadings, discovery, affidavits, and other 'cold' evidence."[62] In contrast, a motion for directed verdict pursuant to Rule 50 is made once a trial has commenced, "after the close of the plaintiff's case (and, possibly, the defendant's case), with the trial judge having listened

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55 BAICKER-MCKEE ET AL., *supra* note 43, at 1060.

56 *Id.*

57 *Id.*

58 *Id.* at 1061.

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

to a full, live evidentiary presentation."[63] Thus, Rule 56 motions for summary judgment challenge the need for a trial before a trial ever begins, whereas Rule 50 motions for judgment as a matter of law "challenge whether there is any need for the trial—then underway—to reach the jury deliberation stage."[64]

Yet, despite this difference, the Court majority in *Ortiz* established that a stronger interface between Rule 56 and Rule 50 exists at the macro-procedural level, especially when it comes to appealing the denial of a Rule 56 motion.[65] Indeed, Justice Ginsburg's statements during oral arguments concerning the sub-categorical interrelationship between Rule 50(a) (governing initial motions for directed verdict) and Rule 50(b) (governing renewed motions for directed verdict) was prophetic of the Court's ruling in *Ortiz* with respect to sufficiently preserving a Rule 56 summary judgment denial for appeal.[66] Justice Ginsburg emphasized that "every first year Procedure student learns 50(a), 50(b) go together, and there is an historic reason why you must back up a 50(a) motion with a 50(b) motion."[67] Part II.D. explains and develops the importance of this relationship in the context of appealing summary judgment denials.[68] But first, it is helpful to address some of the fundamental principles behind summary judgment appeals.

C. A Focused Look at the Fundamentals of Appealing Summary Judgment

An order by the district court granting summary judgment as to all pending claims in an action is considered final, representing the "complete disposition of the case" at the district court level.[69] The U.S. Supreme Court has explained that a final judgment is one, "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[70] Once a final judgment has been entered by the district court, appellate jurisdiction is triggered under federal law.[71] Thus, when summary judgment results in a final judgment, the order by the district court is usually subject to immediate appeal.[72] Conversely,

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63 *Id.*

64 *Id.*

65 *See* discussion *infra* Part III.

66 Transcript of Oral Argument at 34–36, Ortiz v. Jordan, 131 S. Ct. 884 (2011) (No. 09-737); *Ortiz*, 131 S. Ct. at 890–92.

67 Transcript of Oral Argument, *supra* note 66, at 34.

68 *See* discussion *infra* Parts II.D., III.

69 MOORE ET AL., *supra* note 40, at § 56.130[1].

70 Catlin v. United States, 324 U.S. 229, 233 (1945).

71 28 U.S.C. § 1291 (2006) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .").

72 BAICKER-MCKEE ET AL., *supra* note 43, at 1081.

an order denying a motion for summary judgment is not ordinarily considered final, but instead assumes an interlocutory status.[73] The denial order is, by its nature, "interim" to the proceedings such that it fails to provide "a final resolution of the whole controversy."[74] For this reason, denial of summary judgment normally does not permit "immediate appellate review."[75]

However, there are some exceptions that allow a party to appeal a denial of summary judgment despite its interlocutory status.[76] Appropriately, such an appeal is known as an interlocutory appeal, "[a]n appeal that occurs before the trial court's final ruling on the entire case."[77] In *Johnson v. Jones* (arguably the Court's greatest lodestar concerning the nature and procedural relevance of interlocutory appeals), it was emphasized that, because appellate jurisdiction rests on final decisions from district courts, interlocutory appeals "are the exception, not the rule."[78] Given the Court's analysis in *Johnson*, it has been observed,

> The most frequent bases for permitting interlocutory appeal are (1) the collateral order doctrine; (2) directed entry of final judgment as to fewer than all claims or parties; (3) review of summary judgment granting injunctive relief; (4) discretionary certification of controlling and doubtful questions of law to facilitate efficient resolution of the case; and (5) mandamus.[79]

Generally, an interlocutory appeal involves either "legal points necessary to the determination of the case," or "collateral orders that are wholly separate from the merits of the action."[80] The collateral order doctrine comes into play with respect to the latter category of interlocutory appeals because "[t]o qualify as a collateral order, a decision must: (i) 'conclusively determine the disputed question'; (ii) 'resolve an important issue completely separate from the merits of the action'; and (iii) 'be effectively unreviewable on appeal from a final

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[73] *See id.*

[74] BLACK'S LAW DICTIONARY 889 (9th ed. 2009).

[75] MOORE ET AL., *supra* note 40, at § 56.130[3][a]; Johnson v. Jones, 515 U.S. 304, 313 (1995) ("[T]he District Court's determination that the summary judgment record in this case raised a genuine issue of fact concerning petitioner's involvement in the alleged beating of respondent was not a 'final decision' within the meaning of the relevant statute.").

[76] MOORE ET AL., *supra* note 40, at § 56.130[3][a].

[77] BLACK'S LAW DICTIONARY 113 (9th ed. 2009).

[78] 515 U.S. 304, 309 (1995).

[79] 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.41[2][b] (3d ed. 2002).

[80] BLACK'S LAW DICTIONARY 113 (9th ed. 2009).

judgment.'"[81] When the district court issues an interlocutory order conclusively resolving "an important question that is completely separate from the merits of the case," the collateral order doctrine will permit an interlocutory appeal of the order if the resolved question "cannot be adequately reviewed after entry of final judgment."[82] Thus, an interlocutory order is treated as "final" under the collateral order doctrine, and becomes "immediately appealable . . . even though the district court may have entered [the interlocutory order] before (perhaps long before) the case has ended."[83]

The Court has expressly recognized that a denial of summary judgment is an interlocutory order that can qualify for immediate appeal under the collateral order doctrine if the denial resolves a question outside the merits of the action.[84] The question in *Johnson* that prompted an interlocutory appeal from the district court's denial of summary judgment emanated from a plea of qualified immunity.[85] This is the same defense that was raised by Respondents in *Ortiz*.[86] Qualified immunity serves as a form of "[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights."[87] The purpose behind the qualified immunity defense is to ensure that public officials can perform their duties with a certain amount of impunity in light of circumstantial exigencies and honest mistakes. For example, the respondent in *Johnson* brought suit after police officers forcibly arrested and unintentionally injured him upon the mistaken belief that he was inappropriately drunk when, in fact, he was suffering from an insulin seizure.[88] The officers, entitled to raise a qualified immunity defense, moved for summary judgment.[89] While the officers in *Johnson* ultimately lost to the respondent given the nature of the denial order they were attempting to appeal[90] (a certain caveat to the qualified immunity defense that will be discussed shortly), qualified immunity will protect the actions of a public official unless, in committing the

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81 Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375 (1987) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

82 MOORE ET AL., *supra* note 40, at § 56.130[4][a].

83 Johnson v. Jones, 515 U.S. 304, 310 (1995) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

84 *Id.* at 311.

85 *Id.* at 307.

86 Ortiz v. Jordan, 131 S. Ct. 884, 888 (2011).

87 BLACK'S LAW DICTIONARY 818 (9th ed. 2009).

88 *Johnson*, 515 U.S. at 307.

89 *See id.*

90 *See id.* at 313.

actions in question, the officer violated "'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[91]

Qualified immunity serves not only to protect public officials from a certain amount of civil liability, but also to protect public officials from having to stand trial.[92] In *Johnson*, the Court observed that this separate but "important purpose" behind qualified immunity "would come too late to vindicate" if appealed following a full trial.[93] Thus, the motivating interests behind qualified immunity warrant a plea's immediate review as a truly collateral matter when the plea is resolved by a denial of summary judgment. To a certain extent, this reasoning can be seen as an inverted reflection of why summary judgment exists in the first place. Granting summary judgment preserves judicial time and resources by forgoing unnecessary litigation.[94] Granting immediate appeal for the denial of a qualified immunity defense can potentially accomplish the same thing by forgoing the need to hear an additional issue at trial or, if the defense was erroneously rejected, by forgoing the need to even have a trial. Yet, in order for these objectives to hold true (as opposed to wasting the appellate court's time with an issue that may well return after a full trial on the merits[95]), a certain caveat must accompany a successful appeal from a district court's summary judgment denial based on qualified immunity. As explained below, it is this caveat that guarantees a true separation from the merits of the action.

In order to be reviewed on interlocutory appeal, the rejected qualified immunity defense must present a "'purely legal issue.'"[96] The *Johnson* Court explained that despite the difficulty in determining whether qualified immunity issues are "completely separate from the merits of the action" in question, "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is *conceptually distinct* from the merits of the plaintiff's claim that his rights have been violated."[97] Requiring that an immunity appeal present

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[91] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[92] *Johnson*, 515 U.S. at 312 (citing Mitchell v. Forsyth, 472 U.S. 511, 525–27 (1985)).

[93] *Id.*

[94] *See* discussion *supra* Part II.A.

[95] *Johnson*, 515 U.S. at 316–17 (explaining that an interlocutory appeal of this kind may result in "unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision").

[96] Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011) (quoting *Johnson*, 515 U.S. at 313).

[97] *Johnson*, 515 U.S. at 312 (citing *Mitchell*, 472 U.S. at 527–28).

only a purely legal issue in order to receive immediate review ensures that there will be a true separation from the merits of an action. This is possible because the very nature of the qualified immunity defense is supposed to take the focus away from the merits of the suit and place it on the specific actions of the defendant as against the alleged rights of the plaintiff. The only question to be determined is whether the conduct, for which a defendant seeks immunity, "violated clearly established law" or, stated another way, "whether the law clearly proscribed the actions the defendant claims he took."[98] For this reason, the Court articulated its holding in *Johnson* by stating that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."[99]

To clarify further, the figures located in Appendix A represent three different conceptual approaches to the type of interlocutory appeal at issue. The first (Figure 1.1) provides a simplified taxonomical approach, outlining the nature of a qualified immunity appeal from generalness to specificity. The second (Figure 1.2) provides a procedural approach, depicting the temporal progression of a qualified immunity appeal from a defendant's motion for summary judgment to review by an appellate court. The third (Figure 1.3) provides a syllogistic approach, articulating the necessary rule-based conditions that follow a successful qualified immunity appeal in light of a summary judgment denial.

*D. The Pre-*Ortiz *Circuit Split*

There can be no doubt that immediate appeal from an interlocutory order is inherently advantageous, especially when it comes to qualified immunity. Yet, despite the advantages of immediate appeal, a question remains: Can a party wait until the completion of a full trial on the merits to appeal a court's order denying summary judgment based on qualified immunity? Even then, another and perhaps more important question remains: Can a party appeal a court's order denying summary judgment based on qualified immunity after a full trial on the merits if interlocutory appeal was unavailable due to the inability to preserve a purely legal issue for review? Prior to *Ortiz*, the federal circuit courts were at odds concerning these questions (and recent decisions by some of the circuits may serve to perpetuate this legacy).[100]

Analysis conducted by Petitioner's counsel in *Ortiz* reveals that there were at least two major "independent splits" among the circuits

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[98] *Mitchell*, 472 U.S. at 528.

[99] *Johnson*, 515 U.S. at 319–20.

[100] *See* discussion *infra* Part III.B.

"regarding the conditions, if any, under which a party may appeal the denial of summary judgment after trial."[101] First, the circuits were divided as to whether post-trial summary judgment appeals were permissible "if the party raise[d] a question of law."[102] Second, the circuits were divided as to whether post-trial summary judgment appeals were permissible if, "even when raising a question of law," a party "chose not to immediately appeal the denial of summary judgment."[103]

Under the first major split, Petitioner's counsel identified "[a]t least three circuits (the Sixth, Seventh, and Ninth)," that endorsed a "'legal-question' exception" to a general policy prohibiting post-trial summary judgment appeals.[104] It was similarly observed that the Fifth Circuit had "implied approval of the exception."[105] The justification for permitting this legal-question exception rested on the assertion that "it would be unfair to allow a judgment to stand where the appellant can show that the district court erroneously denied summary judgment as a matter of law."[106] On the other side of the legal-question exception split, Petitioner's counsel identified the Fourth and Eighth Circuits as having "held that there is no such exception for questions of law."[107] Likewise, it was observed that the Eleventh Circuit "appears to reject the exception."[108] Reasoning that any deviation from the general prohibition against post-trial appeals from summary judgment denials would undermine the purpose behind other procedural rules, these circuits considered the legal-question exception to be an unjustified way of circumventing motions for judgments as a matter of law pursuant to Rules 50(a) and 50(b).[109]

Ideally, if it becomes impossible to commence an interlocutory appeal from a denial of summary judgment, a party will raise summary judgment arguments in the form of a motion for judgment as a matter of law under Rule 50(a) "before the case reaches the jury."[110] The moving

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[101] Petition for Writ of Certiorari, *supra* note 9, at 4 (citing Larson v. Benediktsson, 152 P.3d 1159, 1166–68 (Alaska 2007)).

[102] *Id.*

[103] *Id.* at 4–5.

[104] *Id.* at 10.

[105] *Id.*

[106] *Id.* at 11.

[107] *Id.* at 11–12 (citing EEOC v. Sw. Bell Tel., L.P., 550 F.3d 704, 708 (8th Cir. 2008); Varghese v. Honeywell Int'l, Inc., 424 F.3d 411, 422 (4th Cir. 2005)).

[108] *Id.* at 12 (citing Lind v. United Parcel Serv., Inc., 254 F.3d 1281, 1286 (11th Cir. 2001)).

[109] *Id.* (citing Eaddy v. Yancey, 317 F.3d 914, 916 (8th Cir. 2003)).

[110] *Id.* at 7–8 (citing FED. R. CIV. P. 50(a)).

party "may further preserve those arguments" by renewing the motion for judgment as a matter of law (after an entry of judgment) under Rule 50(b).[111] Accordingly, if these motions under Rules 50(a) and 50(b) are denied, the moving party may then appeal.[112] Procedurally, this means that the appellant "does not appeal the district court's order denying summary judgment in its favor; rather, it asserts that the district court relied on the same erroneous reasoning to deny its summary judgment motion as it used to deny its motion for judgment as a matter of law."[113] As counsel for the Petitioner in *Ortiz* noted, this reflects the principle that, at the end of the day, "the trial supersedes the summary-judgment proceedings."[114]

In light of this principle, circuits refusing to recognize the legal-question exception further reasoned that it would be inappropriate to "reward litigants who fail, either inadvertently or intentionally, to exercise their rights under the Federal Rules of Civil Procedure."[115] Additionally, these circuits countered the fairness argument raised by their sister circuits by explaining that "overturning verdicts in this context is unfair to the party who obtained the verdict after a full trial."[116]

Under the second major split, Petitioner's counsel identified the Ninth and Fourth Circuits as unwilling to review legal questions raised in a post-trial appeal from summary judgment denial "where the appellant could have raised the issue before trial in an interlocutory appeal but failed to do so."[117] The rationale for refusing to accept summary judgment appeals under such circumstances rests on two conceptual prongs: the principle of acting on one's procedural prerogative and the nature of procedural timing.[118] Specifically, the Ninth Circuit not only declared that there is "even less reason to permit a post-trial appeal of a pretrial denial of qualified immunity" given that "a denial of a motion for qualified immunity as a matter of law is appealable as of right on an interlocutory basis," but similarly reasoned that a post-trial

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[111] *Id.* at 8 (citing FED. R. CIV. P. 50(b)).

[112] *Id.*

[113] First United Pentecostal Church v. GuideOne Specialty Mut. Ins. Co., 189 F. App'x 852, 855 n.6 (11th Cir. 2006).

[114] Petition for Writ of Certiorari, *supra* note 9, at 8 (citing Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co., 19 F.3d 431, 434 (8th Cir. 1994)).

[115] Eaddy v. Yancey, 317 F.3d 914, 916 (8th Cir. 2003).

[116] Petition for Writ of Certiorari, *supra* note 9, at 12–13 (citing Larson v. Benediktsson, 152 P.3d 1159, 1167 (Alaska 2007)).

[117] *Id.* at 13 (citing Price v. Kramer, 200 F.3d 1237, 1243–44 (9th Cir. 2000)).

[118] *Price*, 200 F.3d at 1244; *see also* Petition for Writ of Certiorari, *supra* note 9, at 14.

realization that the defendant "should have been immune from suit at the time of the pretrial order is long past due and unreviewable on . . . appeal."[119] In contrast, the Sixth, Seventh, Eighth, and Tenth Circuits allowed post-trial appeals from summary judgment denials under circumstances where such appeals could have qualified for interlocutory review.[120] The rationale offered for permitting post-trial appeals under such circumstances consisted of the general explanation that "the qualified-immunity question is reviewable because parties can wait to appeal 'nonmoot interlocutory rulings.'"[121]

Before addressing *Ortiz*'s impact on these circuit splits, two important considerations must be noted concerning the analysis conducted by Petitioner's counsel. First, Petitioner's counsel includes the Eighth Circuit in the group of circuits rejecting the legal-question exception as well as in the group of circuits allowing post-trial appeals that could have been raised before trial.[122] At first glance, this categorization of the Eighth Circuit seems contradictory. Indeed, how can a circuit maintain a general policy prohibiting post-trial summary judgment appeals and yet permit post-trial appeals by parties who chose not to pursue an interlocutory appeal? However, given the precedent cited by Petitioner's counsel, it would appear that the Eighth Circuit, although having generally rejected the legal-question exception, made a very particular exception to hear post-trial appeals from summary judgment denials that could have been raised before trial on the basis of qualified immunity and on that basis alone.[123]

Second, Petitioner's counsel argues that the Sixth Circuit, in its review of *Ortiz*, followed the Eighth Circuit's particularized approach to post-trial appeals because the Sixth Circuit acknowledged "Jordan and Bright's failure to bring an interlocutory appeal" while "reversing the

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[119] *Price*, 200 F.3d at 1244.

[120] Ortiz v. Jordan, 316 F. App'x 449, 453 (6th Cir. 2009); Medina v. Bruning, 56 F. App'x 454, 455 (10th Cir. 2003); Pearson v. Ramos, 237 F.3d 881, 883 (7th Cir. 2001); Goff v. Bise, 173 F.3d 1068, 1072 (8th Cir. 1999).

[121] Petition for Writ of Certiorari, *supra* note 9, at 15 (quoting *Pearson*, 237 F.3d at 883).

[122] *Id.* at 11–12, 15.

[123] *Compare Goff*, 173 F.3d at 1072 ("Normally this Court will not review the denial of a motion for summary judgment after a trial on the merits. However, a district court's denial of summary judgment based on qualified immunity is an exception, and is reviewable after a trial on the merits." (internal citations omitted)), *with* Eaddy v. Yancey, 317 F.3d 914, 916 (8th Cir. 2003) ("Even a cursory review of precedent in this Circuit reveals that we do not review a denial of a summary judgment motion after a full trial on the merits."). The Eighth Circuit's assertion in *Eaddy* was made without any contrary reference or citation to *Goff*, a case decided prior to *Eaddy*. There is nothing to suggest that *Eaddy* expressly overruled *Goff*'s exceptional treatment of qualified immunity.

trial verdict based on qualified-immunity arguments not appealed before trial."[124] However, it should be noted that the U.S. Supreme Court found it "unsurprising" that Jordan and Bright refrained from seeking immediate appeal prior to trial given the Court's precedent in *Johnson*.[125] This statement by the Court suggests that any attempt on the part of Jordan and Bright to have engaged in an interlocutory appeal would have proven futile, which is quite different from asserting that Jordan and Bright were entitled to, but chose not to take, an interlocutory appeal. Indeed, that the interlocutory appeal would have proven futile is only strengthened by the fact that the Court acknowledged that the district court's summary judgment denial of qualified immunity turned on an issue of material fact genuinely in dispute. [126] While it is possible that the Sixth Circuit was mistaken as to the nature of the district court's summary judgment dismissal,[127] this is a far cry from being able to legitimately include the Sixth Circuit in a category of circuits that, prior to *Ortiz*, expressly permitted post-trial appeals from summary judgment denials under circumstances where such appeals could have qualified for interlocutory review. When reviewing *Ortiz* on appeal, the Sixth Circuit did not expressly indicate whether this was truly its practice.[128]

The three figures located in Appendix B depict the two major splits that existed among the federal circuit courts concerning post-trial appeals from summary judgment denials as identified by Petitioner's counsel in *Ortiz*.[129] The first (Figure 2.1) reflects the split among circuits as to whether appeal was permissible if a party raised a legal question. The second (Figure 2.2) reflects the split among circuits as to whether appeal was permissible if a party chose not to pursue an interlocutory appeal. The third (Figure 2.3) combines data from the first two figures into a chart.

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[124] Petition for Writ of Certiorari, *supra* note 9, at 15.

[125] Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011).

[126] *Id.* at 888 (citing Ortiz v. Voinovich, 211 F. Supp. 2d 917, 923–30 (S.D. Ohio 2002)).

[127] Ortiz v. Jordan, 316 F. App'x 449, 452 (6th Cir. 2009) (stating that the district court denied summary judgment on the Eighth Amendment and due process claims).

[128] *See generally id.* Nowhere does the Circuit emphatically say whether it was its policy to permit post-trial appeals from summary judgment denials under circumstances where such appeals could have qualified for interlocutory review.

[129] Petition for Writ of Certiorari, *supra* note 9, at 10–15.

III. *ORTIZ* & THE DEATH OF POST-TRIAL APPEALS FROM SUMMARY JUDGMENT DENIALS: CONSEQUENCES AND LESSONS

Notwithstanding analysis to the contrary,[130] the Court's holding in *Ortiz* resolved both sub-issue splits among the federal circuits by eliminating the possibility to engage in any post-trial appeals from summary judgment denials whatsoever.[131] Federal practitioners should not only be aware of the consequences that follow in the wake of the Court's unqualified holding, but should also note that a few circuit courts have reinterpreted the Court's holding as being limited in nature.

A. You Snooze, You Lose: The Impact of Ortiz *on the Federal Practitioner*

As a consequence of the *Ortiz* holding, federal practitioners should take careful note of two accompanying principles outlined by the Court in its critique of the procedural actions taken by Respondents Jordan and Bright. First, it is crucial that a party file an appealable interlocutory order in a timely fashion. The Court observed that, "even had instant appellate review been open to [Jordan and Bright], the time to seek that review expired well in advance of trial."[132] This language reflects, at least in part, the motivating rationale behind those circuit courts that have traditionally refused to hear post-trial appeals from summary judgment denials where the party chose not to take advantage of an interlocutory appeal.[133] *Ortiz* makes it perfectly clear that, regardless of circuit jurisdiction, a party now has but a single opportunity to take advantage of an interlocutory appeal once summary judgment has been denied. If a party fails to make a timely interlocutory appeal from a denial of summary judgment, then the opportunity to appeal from the denial will be lost.

Second, parties should, at the very least, avail themselves of Rule 50(b) by seeking an entry, "postverdict, of judgment for the verdict loser if the court finds that the evidence was legally insufficient to sustain the verdict."[134] The Court quoted Respondents' own acknowledgment that "questions going to the sufficiency of the evidence are *not* preserved for appellate review by a summary judgment motion alone," but such

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[130] *See* discussion *supra* Part III.B.

[131] *See* Ortiz v. Jordan, 131 S. Ct. 884, 888–89, 893 (2011).

[132] *Id.* at 891; FED. R. APP. P. 4(a)(1)(A) (establishing that notice of appeal must generally be filed "with the district clerk within 30 days after the judgment or order appealed from is entered").

[133] Price v. Kramer, 200 F.3d 1237, 1244 (9th Cir. 2000).

[134] *Ortiz*, 131 S. Ct. at 891–92.

challenges "must be renewed post-trial under Rule 50."[135] Of course, Jordan and Bright were not operating under the assumption that sufficiency of the evidence was what was at stake, but instead insisted that "[a] qualified immunity plea raising an issue of a 'purely legal nature,' . . . is preserved for appeal by an unsuccessful motion for summary judgment, and need not be brought up again under Rule 50(b)."[136] The Court, however, found that Respondents' claims of qualified immunity "hardly present[ed] 'purely legal' issues capable of resolution 'with reference only to undisputed facts.'"[137]

Hypothetically, had the qualified immunity defenses asserted by Jordan and Bright presented "neat abstract issues of law," they would have been entitled to interlocutory appeal immediately following the district court's denial of summary judgment.[138] Instead, the Court concluded that, "[t]o the extent that [Jordan and Bright] urge Ortiz has not proved her case, they were, by their own account, obliged to raise that sufficiency-of-the-evidence issue by postverdict motion for judgment as a matter of law under Rule 50(b)."[139] As a result of having failed to do this, "The Court of Appeals . . . had no warrant to upset the jury's decision on the officials' liability."[140] The crux of the problem, procedurally, had to do with the unfulfilled, yet necessary, interplay between Rule 50(a) and Rule 50(b).[141]

> Jordan and Bright sought judgment as a matter of law, pursuant to Rule 50(a), both at the close of Ortiz's evidence and at the close of their own presentation. But they did not contest the jury's liability finding [against them] by renewing, under Rule 50(b), their request for judgment as a matter of law.[142]

The Court's observation highlights the importance of Justice Ginsburg's prophetic comment from oral arguments concerning the relationship between Rule 50(a) and Rule 50(b).[143] If interlocutory appeal for a qualified immunity defense is not available, the essence of a defendant's argument for summary judgment can only make it to appellate review if

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[135] Brief of Respondents at 11, *Ortiz*, 131 S. Ct. 884 (No. 09-737) (internal quotation marks omitted).

[136] *Ortiz*, 131 S. Ct. at 892 (quoting Brief of Respondents at 11–12, *Ortiz*, 131 S. Ct. 884 (No. 09-737)).

[137] *Id.*

[138] *Id.* at 893 (citing Johnson v. Jones, 515 U.S. 304, 317 (1995)).

[139] *Id.*

[140] *Id.*

[141] *See id.* at 891–92 (citing Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 405 (2006)). *But see id.* at 894–95 (Thomas, J., concurring) (concurring with the opinion yet finding it unnecessary to address the Rule 50 issue either in whole or in part).

[142] *Id.* at 890–91.

[143] *See* discussion *supra* Part II.B.

it is enshrined within the substance of a Rule 50(a) motion for judgment as a matter of law; but if a defendant's Rule 50(a) motion is denied and the defendant is ultimately found to be liable, the motion must be renewed pursuant to Rule 50(b) in order to preserve the contested liability finding for appellate review.[144] According to the Court, failure to accompany a Rule 50(a) motion (if denied) with a subsequent Rule 50(b) motion is fatal.[145]

B. But Are All Post-trial Appeals from Pre-trial Summary Judgment Denials Truly Dead?

Yet, despite the majority opinion's unqualified holding against post-trial appeals from pre-trial summary judgment denials,[146] a number of authorities have seen fit to carve out an exception to *Ortiz*'s rule. Thus far, at least three federal circuit courts[147] and one treatise[148] expressly posit that *Ortiz* does not preclude post-trial appeals from pre-trial summary judgment denials that raise purely legal issues of law. Support for this exception is based on dicta emanating from the Court's refusal to address an argument raised by Respondents due to the argument's irrelevance.[149]

In *Ortiz*, Respondents argued that "[a] qualified immunity plea raising an issue of a 'purely legal nature,' . . . is preserved for appeal by an unsuccessful motion for summary judgment, and need not be brought up again under Rule 50(b)."[150] They reasoned that "[u]nlike an 'evidence sufficiency' claim that necessarily 'hinge[s] on the facts adduced at trial,' . . . a purely legal issue can be resolved 'with reference only to undisputed facts.'"[151] The Court declared that it "need not address this argument, for the officials' claims of qualified immunity hardly present 'purely legal' issues capable of resolution 'with reference only to undisputed facts.'"[152]

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144 *See Ortiz*, 131 S. Ct. at 890–92; Petition for Writ of Certiorari, *supra* note 9, at 7–8 (citing FED. R. CIV. P. 50(a), (b)).

145 *See Ortiz*, 131 S. Ct. at 890–92.

146 *Id.* at 888–89.

147 Fireman's Fund Ins. Co. v. N. Pac. Ins. Co., Nos. 10-35414, 10-35814, 10-35908, slip op. at 3 (9th Cir. Aug. 11, 2011); Doherty v. City of Maryville, No. 09-5217, slip op. at 8–9 (6th Cir. June 13, 2011); Copar Pumice Co. v. Morris, 639 F.3d 1025, 1031 (10th Cir. 2011).

148 MOORE ET AL., *supra* note 40, at § 56.130[3][c][II].

149 *See Ortiz*, 131 S. Ct. at 892.

150 Brief of Respondents, *supra* note 135, at 11–12.

151 *Ortiz*, 131 S. Ct. at 892 (quoting Brief of Respondents, *supra* note 135, at 16).

152 *Id.*

Based on this express refusal to address Respondents' argument, it is alleged that the Court purposefully reserved from holding on "whether a qualified immunity plea that raises a purely legal issue is preserved for appeal after final judgment by an unsuccessful motion for summary judgment and need not be raised in a postverdict Rule 50(b) motion."[153] Thus, under this reasoning, *Ortiz* does not stand as a total bar against post-trial appeals from pre-trial summary judgment denials because "the Court stopped short of announcing a categorical rule."[154] Likewise, because a denial of summary judgment concerning purely legal issues is immediately appealable, the alleged exception also raises the ancillary issue of "whether the availability of an interlocutory appeal not taken could bar a later appeal from the final judgment."[155]

While it is certainly possible to read such an exception into the majority's holding, it cannot be reconciled with the opinion in its entirety. For this reason, it appears that those authorities claiming an exception to *Ortiz*'s rule have erred. Such an accusation is not made lightly. Indeed, one must tread carefully when challenging the analysis of federal circuit courts and well-respected treatises. Nonetheless, a charitable and contextual reading of *Ortiz* precludes any such exception to its general rule. At best, the analysis used to justify the posited exception is misguided; at worst, it is woefully cursory.

Four aspects concerning the majority's opinion preclude an exception to *Ortiz*'s rule. First, the Court enumerated the issue presented in *Ortiz* without qualification. "We granted review to decide a threshold question on which the Circuits are split: May a party . . . appeal an order denying summary judgment after a full trial on the merits?"[156] This was done not only once, but twice. "We granted certiorari to resolve the conflict among the Circuits as to whether a party may appeal a denial of summary judgment after a district court has conducted a full trial on the merits."[157] On neither occasion did the majority distinguish *between* the kinds of issues that can be raised by pre-trial summary judgment denials.[158] Likewise, the Court enumerated its holding without qualification: "Our answer is no."[159]

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[153] 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 205.08[2] (3d ed. 2011).

[154] Copar Pumice Co. v. Morris, 639 F.3d 1025, 1031 (10th Cir. 2011).

[155] MOORE ET AL., *supra* note 40, at § 56.130[3][c][II].

[156] *Ortiz*, 131 S. Ct. at 888–89 (citation omitted).

[157] *Id.* at 891.

[158] *Id.* at 888–89, 891.

[159] *Id.* at 889.

The scope of the Court's holding and the issue it addressed in *Ortiz* make it extremely difficult, if not impossible, to reconcile the opinion with the alleged exception. First, if a party may no longer appeal an order denying summary judgment after a full trial on the merits (a prohibition against an entire genus of appeals), then one is necessarily precluded from appealing denials of summary judgment that raise purely legal issues (a species of appeal under the prohibited genus). Furthermore, common sense demands that one look to the authoritative weight of the Court's broad holding in *Ortiz* as necessarily overshadowing the mere dicta from which the alleged exception is said to emanate.[160]

Second, the majority opinion prevented the possibility of any special exception to its rule in *Ortiz* when it observed that, "even had instant appellate review been open to [Respondents], the time to seek that review expired well in advance of trial."[161] This is significant because only pre-trial denials of summary judgment motions that raise purely legal issues can be immediately appealed.[162] Thus, the Court strongly suggested, if not actually indicated, that Respondents would have still been precluded from post-trial appeal even if they had raised purely legal issues in their summary judgment motion because the timeframe in which they could have appealed before trial had expired.

This mirrors the strict "you snooze you lose" policy advocated by the concurring opinion.[163] When the majority opinion's statement about the expiration of Respondents' failure to appeal timely (based on their hypothetical ability to have done so) is juxtaposed with the Court's later refusal to address Respondents' argument concerning purely legal issues, it is evident that the refusal is justified, at least in part, because the Court had already concluded that a party must timely appeal if they have the ability to do so.[164] Accordingly, the Court's decision in *Ortiz* provides only two means for a party to appeal a denial of summary judgment. If a party has an immediate right to appeal, they should do so,

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[160] *See* MOORE ET AL., *supra* note 40, at § 56.130[3][c][II] (acknowledging that the alleged exception emanates from dicta).

[161] *Ortiz*, 131 S. Ct. at 891.

[162] *Id.* at 891 (citing Johnson v. Jones, 515 U.S. 304, 313 (1995)).

[163] *Id.* at 894 (Thomas, J., concurring).

[164] *Compare id.* at 891 (majority opinion) (explaining that it is not surprising Respondents did not seek immediate appeal after their summary judgment motion was denied in light of the Court's ruling in *Johnson*, thus recognizing that Respondents' motion did not present purely legal issues so as to warrant immediate appeal), *with id.* at 892 (refusing to address Respondents' argument concerning purely legal issues raised by summary judgment motions because the Court had already established that Respondents did not, in fact, raise such issues when they moved for summary judgment before trial).

and within the permitted timeframe.[165] If no such right exists, then it is necessary to preserve summary judgment arguments through Rule 50 motions.[166] No other alternative exists under the Court's opinion.

Third, while at least one of the authorities that look to the legal-issue exception in *Ortiz* charitably acknowledges the factors in *Ortiz* that clearly preclude the possibility of any such exception to its rule,[167] none of these authorities have yet analyzed, much less mentioned, the exact nature of the federal circuit split the Court was seeking to resolve in *Ortiz*.[168] Indeed, the Court made no secret as to what it was trying to accomplish.

The nature of the "conflict among the Circuits"[169] that the Court sought to resolve was described in a footnote, contrasting circuit cases that prohibited post-trial appeals from those that permitted such appeals.[170] The Court's characterization of the cases did not distinguish between post-trial appeals based on the kinds of issues that could be raised.[171] Additionally, the cited cases themselves either refused to distinguish on the basis of appeals raising purely legal issues, or they created a categorical exception for appeals raising qualified immunity defenses without mentioning whether the nature of the issues raised were either legal or factual.[172]

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[165] *See id.* at 891 ("Moreover, even had instant appellate review been open to them, the time to seek that review expired well in advance of trial.").

[166] *See id.* at 893 ("[T]he qualified immunity defenses asserted by Jordan and Bright do not present 'neat abstract issues of law.' To the extent that the officials urge Ortiz has not proved her case, they were, by their own account, obliged to raise that sufficiency-of-the-evidence issue by postverdict motion for judgment as a matter of law under Rule 50(b)." (citations omitted)).

[167] Copar Pumice Co. v. Morris, 639 F.3d 1025, 1031 (10th Cir. 2011) ("Some language in *Ortiz* appears to undermine *Haberman* [*v. Hartford Insurance Group*, 443 F.3d 1257 (10th Cir. 2006)]. As to direct review of the denial of summary judgment, the Court noted that 'the time to seek that review expired well in advance of trial.' The Court further cited its repeated holdings that 'an appellate court is powerless to review the sufficiency of the evidence after trial' absent a Rule 50(b) motion." (citations omitted)).

[168] *See* Fireman's Fund Ins. Co. v. N. Pac. Ins. Co., Nos. 10-35414, 10-35814, 10-35908, slip op. at 3 (9th Cir. Aug. 11, 2011) (failing to mention that *Ortiz* set out to resolve the circuit conflict); Doherty v. City of Maryville, No. 09-5217, slip op. at 6–9 (6th Cir. June 13, 2011) (failing to mention the Court's goal to resolve the circuit split through its *Ortiz* decision); *Copar Pumice*, 639 F.3d at 1031 (quoting *Ortiz* concerning its objective to resolve the conflict among the circuits, but failing to discuss the nature of the circuit split); MOORE ET AL., *supra* note 40, at § 56.130[3][c][II] (discussing the circuit split concerning the legal issue question, but failing to account for the Court's approach and understanding of the circuit split).

[169] *Ortiz*, 131 S. Ct. at 891.

[170] *Id.* at 889 n.1.

[171] *Id.*

[172] *See infra* text accompanying notes 173–184.

In the first case cited by the Court,[173] the Fifth Circuit "declin[ed] to review [a] denial of summary judgment after trial"[174] and refused to make special exceptions for appeals raising purely legal issues because doing so would be unnecessary and overly burdensome.[175] The second case cited by the Court was issued by the Ninth Circuit,[176] and, having held that there was "no exception where summary judgment rejected [an] assertion of qualified immunity,"[177] addressed the legal-issue question in context of timely appeal. According to this case, immediate appeal of a qualified immunity defense is only possible if a summary judgment motion raises abstract issues of law.[178] A party is afforded a specific timeframe to make such an immediate appeal. If an appeal is not made within the afforded timeframe, then the party forfeits their ability to make such an appeal.[179]

The third[180] and fourth[181] cases cited by the majority opinion both held that a "denial of summary judgment based on qualified immunity [is] reviewable after [a] trial on the merits."[182] However, neither decision justified this exception on the basis of whether an appeal raises issues of law or fact. The Eighth Circuit granted an exception without regard to whether the party could have, but failed to, raise an immediate appeal,[183] whereas the Sixth Circuit decision appears to have simply made a blanket exception for qualified immunity defenses.[184]

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[173] Black v. J.I. Case Co., 22 F.3d 568 (5th Cir. 1994).

[174] *Ortiz*, 131 S. Ct. at 889 n.1.

[175] *See Black*, 22 F.3d at 571 n.5.

[176] Price v. Kramer, 200 F.3d 1237 (9th Cir. 2000).

[177] *Ortiz,* 131 S. Ct. at 889 n.1.

[178] *Price*, 200 F.3d at 1244 ("Of course, 'determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case . . . [S]ummary judgment determinations are appealable when they resolve a dispute concerning an 'abstract issue of law' relating to qualified immunity.'" (omission and alteration in original) (citing Behrens v. Pelletier, 516 U.S. 299, 313 (1996))).

[179] *Id.* ("In the present case, the defendants did not avail themselves of their right to an interlocutory appeal of the pre-trial ruling, if indeed they had one. Having failed to take whatever timely opportunity existed, they now ask us to review the pre-trial qualified immunity order as though the subsequent trial and jury verdict had never transpired. Notably, during oral argument, defense counsel could not provide the court with a reason for their not having filed such an interlocutory appeal, aside from the fact that the time for doing so eventually elapsed. The defendants' complaint to us now—that in retrospect the officers should have been immune from suit at the time of the pretrial order—is long past due and unreviewable on this appeal.").

[180] Goff v. Bise, 173 F.3d 1068 (8th Cir. 1999).

[181] Ortiz v. Jordan, 316 F. App'x 449 (6th Cir. 2009).

[182] *Ortiz*, 131 S. Ct. at 889 n.1.

[183] *Goff*, 173 F.3d at 1072.

[184] *Ortiz*, 316 F. App'x at 453.

In resolving the circuit split, the Court clearly sided with those circuits that refused to allow any post-trial appeal from pre-trial summary judgment denials.[185] By citing the first two circuit cases that refused to make any exception for such appeals, the Court provided a context for the nature of its holding. Thus, the Court left no exception to its general rule when it announced its holding because the Court resolved the circuit split in favor of those circuits that supported a total bar against post-trial appeals from pre-trial summary judgment denials.

Fourth, it appears that the circuit court relied upon by Respondents in support of their "purely-legal-issues" argument now acknowledges *Ortiz* to be a total bar against all post-trial appeals from pre-trial summary judgment denials. In their brief, Respondents asserted that "[t]he Seventh Circuit has held repeatedly that '[d]efenses are not extinguished merely because presented and denied at the summary judgment stage. If the plaintiff goes on to win, the defendant can reassert the defense on appeal.'"[186] The Court referenced this section of Respondents' brief before refusing to address their argument.[187] Following the Court's decision in *Ortiz*, however, the Seventh Circuit has handed down at least two opinions that appear to recognize no exception to *Ortiz*'s holding.

First, in *Rubin v. Islamic Republic of Iran*, the Seventh Circuit distinguished the holding in *Ortiz* from a party's attempt to resurrect a summary judgment appeal before trial.[188] In distinguishing *Ortiz*, the Seventh Circuit acknowledged that *Ortiz* only provides two avenues for defendants who seek to appeal an immunity summary judgment denial: immediate interlocutory appeal or a Rule 50(b) motion.[189] Shortly after its decision in *Rubin*, the Seventh Circuit reemphasized the nature of *Ortiz*'s holding in *Elusta v. Rubio*.[190] In that case, the Seventh Circuit summarily rejected a party's attempt to appeal his summary judgment denial after a full trial on the merits.[191] Without addressing the legal or factual nature of the issues raised by the party's summary judgment

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185 *See Ortiz*, 131 S. Ct. at 888–89.

186 Brief of Respondents, *supra* note 135, at 11 (second alteration in original) (quoting Rekhi v. Wildwood Indus., 61 F.3d 1313, 1318 (7th Cir. 1995)).

187 *Ortiz,* 131 S. Ct. at 892.

188 637 F.3d 783, 792 n.9 (7th Cir. 2011).

189 *Id.* ("The Court held in *Ortiz* that the failure to take an immediate appeal of the denial of immunity on summary judgment precludes review of that order following a trial on the merits; to obtain review of an immunity claim in that situation, the defendant must preserve it at trial in a motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure.").

190 418 F. App'x 552, 554–55 (7th Cir. 2011).

191 *Id.* at 554.

claim, the Seventh Circuit reasoned that it was precluded from reviewing the merits of the summary judgment appeal due to the Court's holding in *Ortiz*.[192] Thus, the Seventh Circuit, once acknowledging the right to appeal a summary judgment denial after a full trial on the merits,[193] now appears to interpret *Ortiz* as a total bar against such conduct.[194] Likewise, at least one scholarly article may be said to join in the Seventh Circuit's apparent interpretation of *Ortiz*.[195]

Taken together, these considerations make it highly improbable that the Court created a special exception to its rule in *Ortiz* by refusing to address Respondents' argument concerning summary judgment motions that raise purely legal issues. It is not difficult to see why the Court refused to address the argument when Respondents acted appropriately in not seeking immediate appeal after denial of their summary judgment motion.[196] In light of *Johnson*, it is clear that the Respondents were not raising purely legal issues,[197] but only contested on appeal that they had raised purely legal issues so as to have been entitled to immediate appeal.[198] It is probable that the Court refused to address Respondents' argument because it spawned from the inherent inconsistency between Respondents' actions and their appellate pleadings. Thus, the Court was not seeking to reserve judgment on the specific category of summary judgment motions that raise purely legal issues; instead, the Court was refusing to waste time by responding to a meritless argument.

CONCLUSION

The Court's ruling in *Ortiz* is perhaps best in keeping with the ultimate purpose behind summary judgment. Despite the evolving difference in treatment that surrounded interlocutory appeals from summary judgment denials prior to *Ortiz*, the Court's blanket prohibition against appealing an order denying summary judgment after a full trial on the merits reemphasizes the overall notion that interlocutory appeals "are the exception, not the rule."[199] In a world where justice and judicial efficiency must walk hand-in-hand, the

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[192] *Id.* at 553–54.

[193] Rekhi v. Wildwood Indus., 61 F.3d 1313, 1318 (7th Cir. 1995).

[194] *Rubin*, 637 F.3d at 792 n.9; *Elusta*, 418 F. App'x at 553–54.

[195] *See* Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1692 (2011).

[196] Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011).

[197] *Id.* at 891–92.

[198] *See id.* at 892.

[199] Johnson v. Jones, 515 U.S. 304, 309 (1995).

Court's new holding *promised* reinvigorating support for a continued and happy marriage between these two objectives.

Yet, from a practical standpoint, any attempt to salvage the true intent and effect of the Court's holding in *Ortiz* may already be moot. Federal practitioners in the Sixth, Ninth, and Tenth Circuits are now entitled to appeal pre-trial summary judgment denials raising purely legal issues of law after a full trial on the merits, and they can probably do so without having to jump through the extra hoop of making the appropriate number of Rule 50 motions emphasized by the *Ortiz* decision.[200] It is perhaps a sad irony that the Court's attempt to provide a categorical resolution has so quickly transformed into the genesis of what will likely result in another circuit split.

Paul S. Morin[201]

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[200] Fireman's Fund Ins. Co. v. N. Pac. Ins. Co., Nos. 10-35414, 10-35814, 10-35908, slip op. at 3 (9th Cir. Aug. 11, 2011); Doherty v. City of Maryville, No. 09-5217, slip op. at 9 (6th Cir. June 13, 2011); Copar Pumice Co. v. Morris, 639 F.3d 1025, 1031 (10th Cir. 2011). By arguing for an exception to the Court's holding with respect to summary judgment motions that raise purely legal issues, these authorities are essentially claiming that Rule 50 motions are not necessary in order to preserve a denial of summary judgment for post-trial appeal.

[201] The Author expresses his thanks to colleague Andrew J. Hull for his suggestions and encouragement, Professor William E. Magee for his research assistance, the staff of the Norfolk Law Library for providing access to their collection, the members of the *Regent University Law Review* for their hard work, and especially the Author's parents, Phillip and Christine Morin, for their unceasing love, commitment, and support.

APPENDIX A

Figure (1.1)

Taxonomical Approach: Interlocutory Appeal Genus-Species Conceptual Model

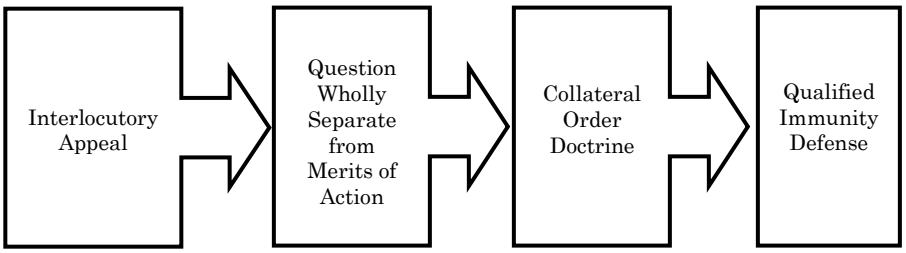


Figure (1.2)

Procedural Approach: Interlocutory Appeal Temporal Progression Model

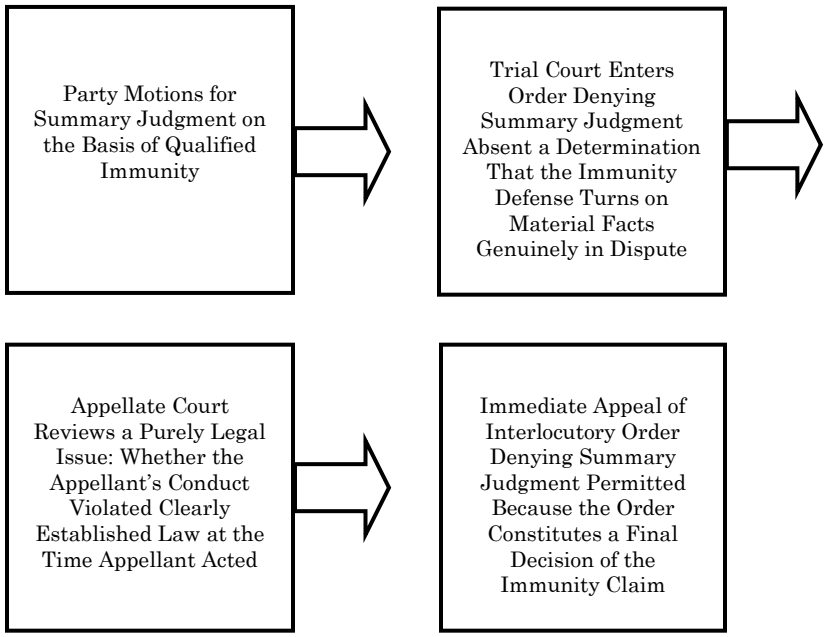
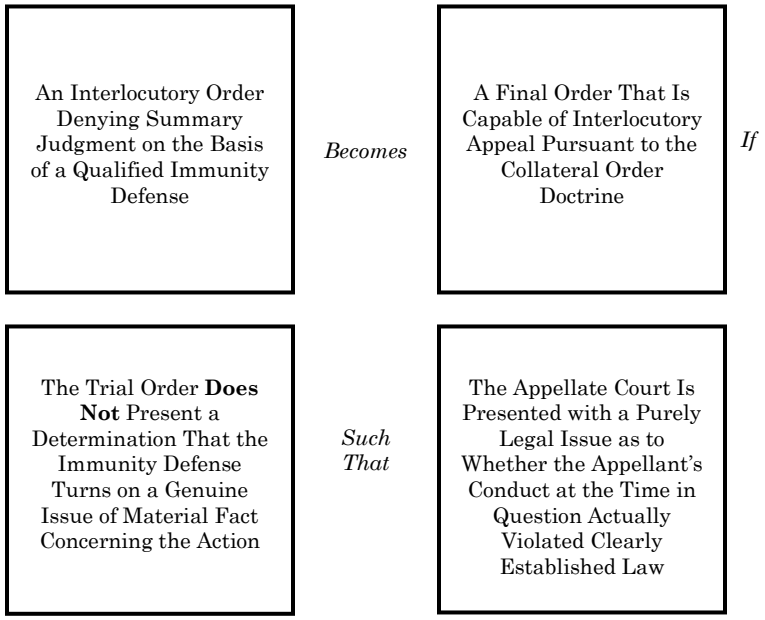


Figure (1.3)

Syllogistic Approach: Interlocutory Appeal Rule Model



APPENDIX B

Figure (2.1)

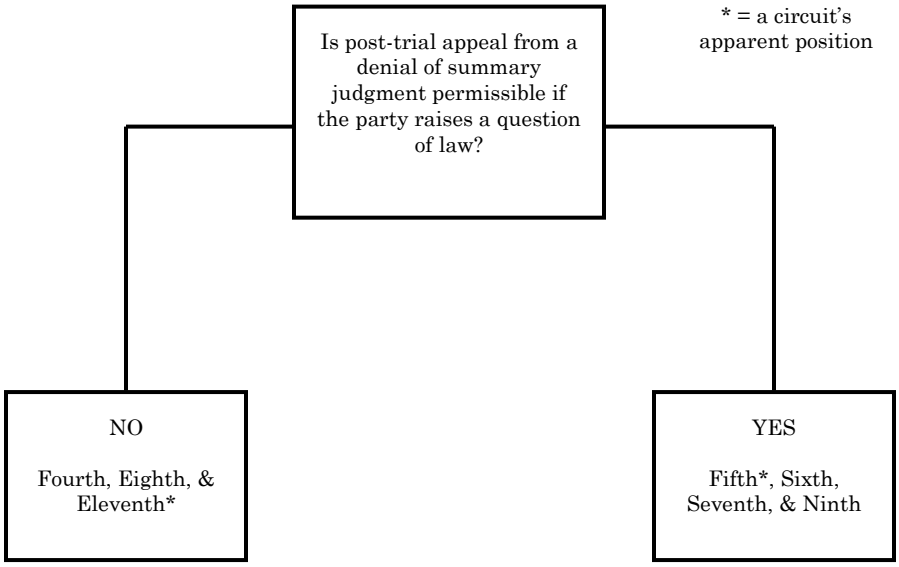


Figure (2.2)

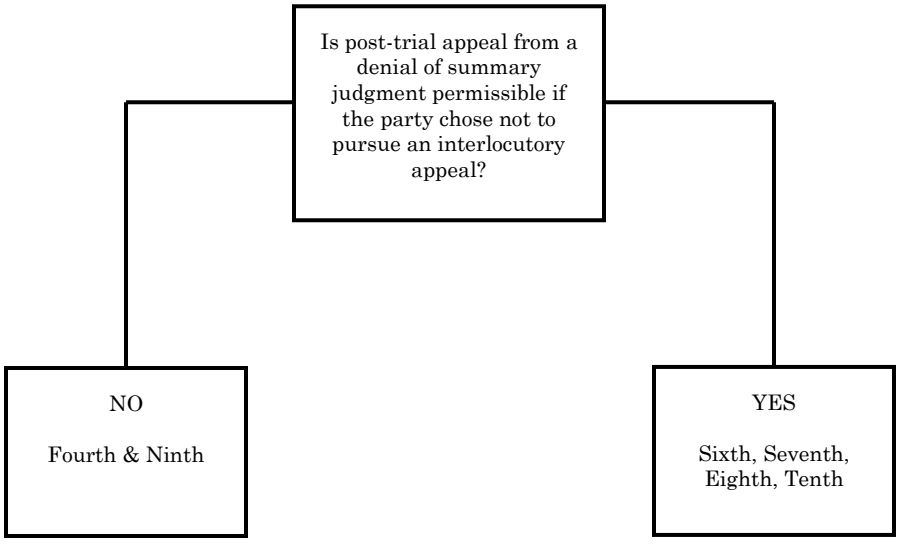


Figure (2.3)

Circuits	Post-trial Appeal from Denial of Summary Judgment: Legal Question Exception	Post-trial Appeal from Denial of Summary Judgment: Chose Not to Pursue Interlocutory Appeal	Post-trial Appeal from Denial of Summary Judgment Never Available
Fourth	No	No	Yes
Fifth	Yes*	-	No
Sixth	Yes	Yes	No
Seventh	Yes	Yes	No
Eighth	No	Yes	No
Ninth	Yes	No	No
Tenth	-	Yes	No
Eleventh	No*	-	-