

Waiver By Confusion: When There Is a Split of Authority, Do You Know Where Your Court Stands?

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Recognizing splits of authority and knowing where your court stands on the issue can be critical to avoid waiver. *Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754 (7th Cir. 2015), cert. denied, 84 USLW 3130 (U.S. 2016), illustrates the danger when there is a circuit court split. Lawson sued his former employer for breach of contract. The issue boiled down to contract interpretation. The district court denied the employer's motion for summary judgment, finding that the contract was ambiguous. The employer did not re-raise its legal argument by motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure or in a post-trial motion under Rule 50(b). On appeal, the employee argued that the employer had failed to properly preserve its legal challenge because the employer did not re-raise the issue in a Rule 50 motion. Fortunately for the employer, after acknowledging a circuit court split the court agreed with the majority of federal circuit courts, which hold that summary judgment losers are not required to renew purely legal arguments in a motion under Rule 50(a) or (b) in order to preserve the issue for appeal. The majority recognizes purely legal challenges as an exception to the general rule that after a full trial on the merits, the court of appeals cannot review summary judgment denials that were based on the sufficiency of evidence and that were not re-raised in a Rule 50 motion. The minority refuses to parse through a factual and legal dichotomy and holds that the failure to re-raise even a purely legal challenge in a Rule 50 motion waives the issue. **Preservation Issue:** Recognize splits of authority and know where your appellate court stands on the issue. **Tips:** Recognizing splits of authority and, equally important, knowing where your circuit court stands can be critical to preservation. Regarding the above split, obviously, if your circuit court is in the minority, filing a Rule 50 motion is required to preserve any error relating to the denial of your motion for summary judgment regardless of the basis for the motion. But what if your circuit court has not settled on a position? Trial counsel should be prepared to file a Rule 50 motion

renewing all summary judgment arguments to avoid potential waiver in the event the circuit court ultimately sides with the minority on this issue. Finally, even if your circuit court has sided with the majority, extra caution is warranted because it may be difficult to determine whether a summary judgment argument is purely legal, factual, or a combination of both. As such, prudent counsel would be well-advised in close calls to renew summary judgment grounds in a Rule 50 motion to preserve the issue for appeal.

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