

# SCOTUS: Must “Purely Legal” Issues Rejected at Summary Judgment Be Re-Raised at Trial to Be Preserved for Appeal?

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On April 24, 2023, the U.S. Supreme Court heard [oral argument](#) in *Dupree v. Younger*, in which it delved into the question of whether a “purely legal” issue that was rejected at the summary judgment stage must be reasserted during trial and in a post-trial motion for the issue to be reviewable on appeal. The case stemmed from a federal civil rights action initiated by inmate Kevin Younger after he was allegedly assaulted by three prison guards at the direction of prison official Neil Dupree. Dupree moved for summary judgment on the basis that the action against him was barred for failure to exhaust administrative remedies. The district court denied the motion, ruling that an internal investigation concerning the assault satisfied the administrative exhaustion requirement. The district court noted that its ruling was not predicated on the resolution of any disputed facts. The case proceeded to a jury trial following which the jury returned a verdict against Dupree. In light of the district court’s ruling at the summary judgment stage, Dupree did not present the exhaustion defense to the jury. On appeal from the final judgment, Dupree sought review of the exhaustion issue but, based on its controlling precedent, the Fourth Circuit Court of Appeals declined to review the issue because Dupree did not reassert it during the trial or in a post-trial motion. In a majority of circuits, a purely legal issue rejected at summary judgment need not be reasserted during trial or in a post-trial motion to be preserved for appeal. But, in some other circuits, including the Fourth Circuit, the preservation requirements are more stringent, and a litigant must raise any issue — legal or factual — rejected at summary judgment during and after trial for the issue to be reviewable on appeal later. During oral argument, several Supreme Court justices seemingly agreed that some purely legal issues rejected at summary judgment should be reviewable on appeal even if they were not reasserted at and after trial. They noted that requiring a litigant to present such issues at trial would add unnecessary complexity to litigation, and because such issues do not turn on the sufficiency of the evidence, district judges are unlikely to change their minds on those previously

ruled-upon issues. But various justices ultimately expressed concern about whether this case involved such a question, as the exhaustion issue seemed to be intertwined with disputed issues of fact. Therefore, the case might be decided on the narrow ground that a purely legal issue rejected at summary judgment need not be reasserted at or after trial for the issue to be preserved for appeal, and the case might be remanded for the Fourth Circuit to determine whether such a purely legal question was, indeed, involved in this case. **Tips** Regardless of your circuit's position on whether "purely legal" issues rejected at summary judgment must be reasserted at and after trial to preserve them for appellate review, still consider reasserting those issues, as there still can be a question about whether the issue presents a mixed question of law and fact. It often is challenging to separate out whether a summary judgment motion is predicated on the law or the facts, so it might be better to be safe rather than sorry and preserve the summary judgment issue. And, after all, the district judge may change his or her mind upon hearing the argument in the context of trial.

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