IN THE SUPREME COURT OF THE UNITED STATES

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UNITHERM FOOD SYSTEMS, INC., :

Petitioner, :

v. : No. 04-597

SWIFT-ECKRICH, INC., DBA :

CONAGRA REFRIGERATED FOODS. :

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Washington, D.C.

Wednesday, November 2, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

BURCK BAILEY, ESQ., Oklahoma City, Oklahoma; on behalf of the Petitioner.

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting the Petitioner.

ROBERT A. SCHROEDER, ESQ., Los Angeles, California; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

[10:02 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Unitherm Food Systems versus Swift-Eckrich.

Mr. Bailey.

ORAL ARGUMENT OF BURCK BAILEY

ON BEHALF OF PETITIONER

MR. BAILEY: Mr. Chief Justice, and may it please the Court:

In 1947, this Court stated, in Cone versus West Virginia Pulp & Paper Company, 330 U.S. at 216, quote, "Determination of whether a new trial should be granted, or a judgment entered under Rule 50(b), 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." That language was repeated verbatim the following year in Globe Liquor versus San Roman. And, in the year after that, both Cone and Globe Liquor were cited for the same proposition in Fountain versus Filson. And, in 1952, in Johnson versus New York Railway, this Court again reiterated the requirement -- is the word the Court used -- of submitting a post-verdict motion, or JNOV, to preserve sufficiency of the evidence for appellate review.

JUSTICE O'CONNOR: Now, was there a Rule 59

motion made here after the verdict?

MR. BAILEY: No, Your Honor. There was a motion for a remittitur --

JUSTICE O'CONNOR: Right.

MR. WOLFMAN: -- of damages.

JUSTICE O'CONNOR: Had a Rule 59 motion been made, would it preserve a sufficiency-of-the-evidence argument in connection with the motion for new trial?

MR. BAILEY: Not a sufficiency-of-the-evidence argument, Your Honor. And that -- this Court spoke to that in footnote 9 of the Weisgram opinion. But a Rule 59 motion contesting the weight of the evidence would have been appropriate. No such motion was filed.

Eight of the Circuit Courts of Appeals have held that in the absence of a post-verdict Rule 50(b) motion, the appellate court cannot review for sufficiency of the evidence. And that language is in black letter law in the standard treatises on Federal practice, in Moore's and in Wright & Miller, that it is absolutely required. Here --

JUSTICE STEVENS: Do any of those circuits allow an exception for plain error?

MR. BAILEY: Several of them do --

JUSTICE STEVENS: Yes.

MR. BAILEY: -- Your Honor. Some do not, but most, I think it would be accurate to say, do. And, Your

Honor, we feel that those cases are mistakenly decided, because the court's ruling on a 50(a) motion -- that is, a pre-verdict motion -- is always interlocutory. I mean, indeed, the trial court is encouraged to deny that motion, pending the jury verdict, because if the jury comes back, obviously, with a defendant's verdict, that's the end of the case. And if the Court, on the other hand, grants it, and the appellate court concludes that there was a jury question, then it has to go back for a whole new trial. So --

JUSTICE KENNEDY: Just while I have you, I'm -- just while I have you here -- it's not --

MR. BAILEY: Yes.

JUSTICE KENNEDY: -- probably, directly relevant to this case. On that one point, when I was in practice, it used to irritate me sometimes that the judge should grant the motion and then he'd just sit on it. But I see the wisdom for the rule now, and the judge reserving it, in the event the jury comes out the right -- the, quote, "right way," anyway. What if there's a very long trial? What if, after the plaintiff rests, there's a good grounds for granting the motion for judgment as a matter of law, the judge doesn't do it, and then there's a 3-month trial? Do the judges ever take that into account?

MR. BAILEY: Your --

JUSTICE KENNEDY: Three more months for the defense to --

MR. BAILEY: Yes. Your Honor, I think my answer to that is, not infrequently holes in the plaintiff's case are filled when the defendant's case is put on. That happens, as I say, rather frequently, through cross-examination and -- and it's just extremely iffy to say that won't occur. And, in any event, Your Honor, it raises the specter of this problem that we've just talked about, that that long trial that you -- that you envisioned in your hypothetical would have to -- if the appellate court finds that there is a jury question there --

JUSTICE KENNEDY: Yes.

MR. BAILEY: -- has to try it all over again. Not a -- not a very good consequence.

JUSTICE GINSBURG: On the issue that's before us now, I can understand why, if the, what we used to call, JNOV is not requested after the jury verdict, the appellate court could not then enter judgment -- direct the entry of judgment as a matter of law. But I don't see why it couldn't say, just as we would be reluctant to affirm a decision when there was no claim for relief, so, if there's insufficient evidence, we can remand for a new trial. But you would say that that is not possible

either.

MR. BAILEY: I would, Your Honor. That's not authorized. There's no way to ask for a new trial in a 50(a) motion. I mean, it doesn't provide for that. The trial is still going on. By definition, you can't seek a new trial until the trial is --

JUSTICE GINSBURG: But --

MR. BAILEY: -- concluded.

JUSTICE GINSBURG: -- you haven't asked for it, but the appellate court said, "We don't want to affirm a judgment when there was insufficient evidence, so we are going to" -- there was -- the judge was tipped off by the -- by the directed-verdict motion, that the -- who turned out to be -- the one who turned out to be the verdict loser thinks the evidence is insufficient. That's enough at least to say that the Court of Appeals could grant a new trial.

MR. BAILEY: Your Honor, it's our position that you can never ask for -- move for a new trial for -- on the ground that the evidence is against -- the weight --

JUSTICE GINSBURG: No, I'm not --

MR. BAILEY: -- of the evidence --

JUSTICE GINSBURG: -- talking about "against the weight," because a trial judge would rarely be -- if it -- if a trial judge said, "It's against the weight of the

evidence," it would go back for a new trial, and you couldn't raise that issue, at least not til you go through the whole second trial. But why isn't it like -- I think there are decisions that say there was a judgment, but the Court of Appeals determines there was never a claim for relief to begin with, even though a motion wasn't made to that effect. The idea of a court affirming a judgment that is without sufficient legal basis is troubling.

MR. BAILEY: Well, Your Honor, I -- my response to that is that these matters, pursuant to this Court's jurisprudence in Cone and Johnson and other cases, simply mandates that the trial court be asked to pass in the first instance on this issue of sufficiency of the evidence.

JUSTICE GINSBURG: But, it -- but it was asked by the -- by the pre-verdict motion. What -- the only thing that wasn't done is, it -- the request wasn't repeated after the verdict. I can see your point if there had never been a motion for directed verdict at the close of all of the evidence. But there was that. And so, all that we're missing is a repetition of the same words after the jury comes in.

MR. BAILEY: Well, Your Honor, the -- if I may, the standard of review is radically different. I mean, if motion for a JNOV is asked for and granted/denied, the

review is de novo. The issue about a new trial, under 59, is an abuse of discretion.

JUSTICE GINSBURG: Well, that's -- the new trial comes in, by the courts that have said this, only -- they'd say, "We would direct the entry of judgment for the verdict loser, but we're powerless to do that." And that is all wrapped up in the Seventh Amendment. So, the next best thing is, we grant a new trial.

MR. BAILEY: Well, that's certainly what the Tenth Circuit jurisprudence provides, Your Honor. And the Federal Circuit adopted that.

JUSTICE GINSBURG: Yes.

MR. BAILEY: And we think that that's totally at odds with this Court's rule in Cone and Johnson, that it is out of step with the law in eight Federal Circuits, that it simply is illogical to say, someone who never asked for a new trial -- Your Honor, if they had -- if ConAgra had sought a new trial on sufficiency of the evidence in Federal Circuit, presumably, the Federal Circuit said, "You didn't ask for that below. It's gone. It's waived. What's your next argument?" By not asking, they say, in effect, "Since you didn't ask for it, that's what we're going to give you." And that simply is, Your Honor --

JUSTICE GINSBURG: Well, couldn't one regard a

new trial as, sort of, subsumed under the request for judgment as a matter of law? That is, that's the larger thing, but at least a new trial. Don't let -- the judgment as a matter of law says, "Don't let this verdict stand." So, one could say, "We won't give you a judgment, but we will order a new trial."

MR. BAILEY: And, Your Honor, I -- my response is simply that those are two very different motions and call for two very different standards of review, and it cannot, I respectfully submit, logically be administered, when there's been no request for a new trial. There's no authority to request a new trial in a 50(a) motion. It leads to the kind of confusion that, I submit --

JUSTICE STEVENS: Would you refresh my recollection? In the cases you cited at the outset of your argument, where the judgments were reversed, am I wrong in thinking, in those cases, there was, in fact, a new trial afterwards?

MR. BAILEY: There -- Your Honor, they had moved for a new trial in those cases. That is, the defendant moved for a new trial. And that -- and this Court --

JUSTICE STEVENS: But the judgment of this Court was simply reverse, wasn't it?

MR. BAILEY: It was reverse.

JUSTICE STEVENS: There were --

MR. BAILEY: Of the appellate court --

JUSTICE STEVENS: Yes.

MR. WOLFMAN: -- of the Eighth Circuit. Yes, Your Honor, that's right. It was -- this Court simply reversed, in Cone and Johnson. Those cases went back for retrial. Yes.

JUSTICE GINSBURG: I don't understand your response to me about vastly different standards of review. I would think it would be harder for a verdict loser to get judgment as a matter of law than to get a new trial.

MR. BAILEY: At the trial or the appellate level, either one --

JUSTICE GINSBURG: Yes.

MR. BAILEY: -- Your Honor? Yes. Well, one would -- I quite agree.

JUSTICE GINSBURG: That's why --

MR. BAILEY: But --

JUSTICE GINSBURG: -- I'm suggesting --

MR. BAILEY: -- but the --

JUSTICE GINSBURG: -- that one is kind of a lesser included.

MR. BAILEY: Yes, Your Honor. And the response I have to make is that the reviewing court would determine the issue of new trial on an abuse-of-discretion standard, not on a de novo review of sufficiency of the evidence.

CHIEF JUSTICE ROBERTS: They go to different things, don't they? I mean, if you -- you get a new trial when there are -- you know, evidence is admitted that shouldn't have been admitted, or something like that. I mean, they're -- they're, sort of, different grounds. They're not overlapping, are they?

MR. BAILEY: They -- very different grounds most -- most commonly, Your Honor. That is, you can -- there can be completely sufficient evidence to support the jury winner's verdict --

CHIEF JUSTICE ROBERTS: Well --

MR. BAILEY: -- but the Court can still --

CHIEF JUSTICE ROBERTS: -- this is a --

MR. BAILEY: -- grant a new trial.

CHIEF JUSTICE ROBERTS: Right. I meant -- I'm not sure. I mean, is it a -- is insufficient evidence a typical ground for asking for a new trial?

MR. BAILEY: Well, not insufficient evidence, but the --

CHIEF JUSTICE ROBERTS: No.

MR. BAILEY: -- the verdict is against the weight of the evidence. That is the distinction that this Court pointed out in footnote 9 of Weisgram, that if you're talking about the weight of the evidence -- the verdict is against the weight of the evidence; very

subjective proposition, but that it is -- then you proceed under Rule 59.

JUSTICE SCALIA: And that determination of what was the weight of the evidence is typically left to the trial judge, rather than to the Court of Appeals. It would be --

MR. BAILEY: Well, you can --

JUSTICE SCALIA: -- somewhat novel for the Court of Appeals to be reviewing a trial judge on the basis of what it thought the weight of the evidence was. It's one thing to say, "If he's denied or granted a motion for a new trial on that basis, we'll look for abuse of discretion," but for the appellate court to do that de novo and assess the weight of the evidence, it seems, to me, quite unusual.

JUSTICE GINSBURG: That's --

MR. BAILEY: I --

JUSTICE GINSBURG: I don't think any appellate court has claimed that authority. We're talking about a new trial in lieu of J- -- a judgment as a matter of law. And the -- one of the whole rationales in Cone and Globe and all of the others were saying you should make the post-verdict motion -- is that then the trial judge would have the option. The trial judge might think, "Well, technically, you deserve JMOL, but maybe there was a

witness who was out to sea, so I want to exercise my discretion to grant a new trial." Those two are closely linked. I mean, lawyers usually, as a -- just a matter of -- just automatically ask for JNOV or, in the alternative, a new trial.

MR. BAILEY: Your Honor, I think it shows respect to the trial judge to require that the trial judge be required, in the first instance, to review this evidence that the trial judge saw, heard, and has the same opportunity, as this Court has observed in cases going back over a century, to see, just like the jurors saw, and provides a perspective on it that is available to the trial judge, alone.

JUSTICE SCALIA: Well --

MR. BAILEY: Your Honors, if --

JUSTICE SCALIA: -- it seems --

MR. BAILEY: -- I may, I'd --

JUSTICE SCALIA: -- it seems to me that if the Court of Appeals is going to grant a new trial, it must say one of two things. It must say either, number one, "There was not sufficient evidence to go to the jury, but the conclusion of that determination ought to be -- and, therefore, you know, the case is over"; but to say that and then say, "And, therefore, we give a new trial," it seems very strange. Or else, the Court of Appeals has to

say, you know, "The weight of the evidence was not in the plaintiff's favor." And if it says that, it's making the kind of a determination that I find unusual for a Court of Appeals.

MR. BAILEY: Yes, Your Honor. But circumventing the application to the trial judge --

JUSTICE GINSBURG: But --

MR. BAILEY: -- in the first instance --

JUSTICE GINSBURG: -- in fact, that's not what the Courts of Appeals have said. They have all said, "We would grant judgment as a matter of law, but we're powerless to do that under this case -- Court's case law. We think the evidence is insufficient, not that it's against the weight of the evidence. We think it's insufficient. If we had the power to do it, we would direct the entry of judgment. We can't do that, so we do the next best thing."

But in all of the -- including the Tenth Circuit, whose law is relevant here -- the Court of Appeals is saying, "We think the judgment -- there was insufficient evidence to support that judgment. And if we had the power, we would instruct the entry of judgment. We don't have that power."

MR. BAILEY: That's exactly what they said, Your Honor. And we say they had no authority to do that. In

the absence of taking it in the first instance before the trial court. May I reserve --

JUSTICE SCALIA: I suppose they could make the same -- if -- I mean, if that follows, they should be able to do the same thing when there has been no motion made, neither before nor after, right? They could say, "Well, there's no motion made. We really have no authority to reverse this judgment."

MR. BAILEY: That's --

JUSTICE SCALIA: "But" --

MR. BAILEY: -- that's certainly --

JUSTICE SCALIA: -- you know, "we certainly think there was not enough evidence, and, therefore, we grant a new trial." Does any court do that?

MR. BAILEY: I may have missed, Your Honor --

JUSTICE SCALIA: Where no motion has been made --

MR. BAILEY: Yes.

JUSTICE SCALIA: -- neither before the verdict nor after the verdict, does any appellate court say, "Since no motion was made, we have -- we have no power to reverse the judgment here, but our examination of the case indicates that there was really not sufficient evidence to go to the jury. And, therefore, we will do the lesser thing and grant a new trial"? Does any court of --

appellate court do that?

MR. BAILEY: Your Honor, I know of no case where an appellate court would do such a thing when there's no motion of any kind that's ever been made contesting the --

JUSTICE STEVENS: No, but the trial court could do that, pursuant to Rule 59(d), couldn't it?

MR. BAILEY: I'm sorry.

JUSTICE STEVENS: I say, the trial court could have done that pursuant to Rule 59(d) without a motion being filed.

MR. BAILEY: I quite agree, Your Honor. Yes.

CHIEF JUSTICE ROBERTS: Thank you --

MR. BAILEY: May I reserve the rest of my time?

CHIEF JUSTICE ROBERTS: Thank you, Mr. Bailey.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

FOR THE UNITED STATES, AS AMICUS CURIAE,

IN SUPPORT OF PETITIONER

MR. STEWART: Thank you, Mr. Chief Justice, and may it please the Court:

It's a well established principle of Federal appellate practice that the litigant must adequately preserve a claim in the trial court in order to raise it on appeal. The disputed issue in this case is whether a claim of insufficient evidence is adequately preserved for

appeal through the filing of a pre-verdict Rule 50(a) motion or whether a renewed post-verdict motion under Rule 50(b) must be filed, as well. The text of Rule 50, the practical considerations that underlie contemporaneous objection rules, and this Court's decisions construing Rule 50 all indicate that a post-verdict motion is necessary for adequate preservation of the claim.

CHIEF JUSTICE ROBERTS: I think it may be --

JUSTICE SCALIA: What is the usual practice with regard to the pre-verdict motions? Are -- is the initial one made at the close of the plaintiff's case --

MR. STEWART: It often is. It can be made --

JUSTICE SCALIA: -- and then renewed at the -- at the end of all of the evidence?

MR. STEWART: I think that's a very typical practice.

JUSTICE SCALIA: Yes.

MR. STEWART: It doesn't -- it doesn't have to be made at the close of the plaintiff case, but it can be made at any time after the opposing party has had an adequate opportunity to be heard. And so --

JUSTICE SCALIA: But they're really different things to be reviewed at those two times. I mean, at the end of all the evidence, there may be some matter that the defendant inadvertently puts in that makes up the

deficiency in the plaintiff's case. So, it's really a different motion, isn't it?

MR. STEWART: It is requesting the same sort of --

JUSTICE SCALIA: Of relief.

MR. STEWART: -- relief, but it -- different considerations would affect the trial judge's decision whether to grant the motion. And I think -- in a sense, this goes to Justice Kennedy's question -- that is, one of the reasons that, at least with respect to the motion that's filed at the conclusion of all the evidence, that these motions are almost uniformly not granted, the case is almost always submitted to the jury, because the thought is, very little is lost by submitting the case to the jury, because the suit has been tried already, and there may be substantial gains in efficiency from pursuing that course. I think if a motion was made at the conclusion of the plaintiff's case, and the judge thought it clearly had merit and thought that a substantial savings in cost and time would ensue from granting the motion, the trial judge could take that into account in deciding whether the motion should be granted or not. But I think -- I think it's important to look at the text of Rule 50. And it's reprinted, among other places, at page 57(a) of the appendix to the certiorari petition. And in

-- at the beginning of Rule 50(a)(1), it says, "If, during a trial by jury, a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against that party." Again, the word "may" is permissive.

So, while the judge may take into account potential savings in time and expense, the judge is never required to grant a Rule 50(a) motion, even if the judge is firmly persuaded that the evidence on the other side is insufficient.

And then, at the very bottom of the page, the first sentence of Rule 50(b) says, "If, for any reason, the Court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the Court is considered to have submitted the action to the jury, subject to the Court's later deciding the legal questions raised by the motion."

And the significance of that sentence is that it says, "No matter what stated rationale the District Court gives" -- whether the District Court simply says, "I'm reserving the motion," or says, "I'm denying it, because the evidence is, in my view, clearly sufficient" -- "whatever stated rationale the Court gives, the action will be treated as a reservation of the legal questions."

And I think one of the reasons that it would be inappropriate to allow appeal of a sufficiency claim without a renewed post-verdict motion is that in order to attain reversal on appeal, regardless of whether the remedy is entry of judgment or a new trial, the Court of Appeals has to be able to point to an erroneous ruling by the District Court. And the reservation of a ruling on the 50(a) motion, by its nature, can't be erroneous. That is, the judge is specifically authorized to submit the case to the jury --

JUSTICE STEVENS: But, Mr. Stewart, just let me clear up one thing of confusion. Is it not true that if the District judge denies the motion before submitting the case to the jury, within 10 days after the jury verdict, if no further motion is made, he would still -- the judge would still have authority to change his mind and grant the motion?

MR. STEWART: We don't believe that that's the case. That is, at this point, the rule has been amended so that the time for filing a post-verdict motion is 10 days after entry of judgment, rather than 10 days after verdict, as it used to be. But this Court said, in Johnson, that, in the absence of a renewed verdict post-- a renewed motion post-verdict, neither the District Court nor the Court of Appeals may order entry of judgment

in the favor of the verdict loser. And I think that the text of Rule 50(b) bears that out. If you look farther down that paragraph, on page 58(a), the rule says, "Submission of the case to the jury is to be treated -- or considered to be a reservation of the legal question." And then it said, "The movant may renew the request." And then that sentence says, "In ruling on a renewed motion, the Court may, if a verdict was returned, allow the judgment to stand or grant a new trial or order entry of judgment." And I think that phrase, "in ruling on a new -- renewed motion," is significant, because the only express authority that the District Court has, post-verdict, to grant judgment as a matter of law is that the court may do so in ruling on a renewed motion. The rule doesn't contemplate a situation --

JUSTICE STEVENS: So, you're saying that if the judge wants to do what I -- what I hypothesized, the judge should say to the losing party, "Renew your motion, and I'll grant it."

MR. STEWART: That's correct. And the judge could do that, either pre- or post-verdict. That is, pre-verdict, the judge could say, "I think your motion may very well have merit, but, in the interest of overall efficiency, I'm going to submit the case to the jury. But, in the event that the jury comes back against you, I

would encourage you to renew that motion." There's nothing wrong with the judge encouraging the litigant to file something like that, or signaling that the judge has doubts about the sufficiency of the evidence. But the rule makes the renewed post-verdict motion a prerequisite to entry of judgment as a matter of law, post-verdict. And it --

JUSTICE KENNEDY: Can you tell me, if we adopt your position, what should a trial court do if he, alternatively, would grant a new trial? Should he go ahead and make that determination? He grants judgment NOV. And then he really is thinking, "Well, I would have granted a new trial." Should he go ahead and cover himself against reversal by granting the new trial in the alternative, or --

MR. STEWART: He should. And, indeed, this Court, in -- as early as Montgomery Ward, have said that was the better practice, and that requirement has since been codified in what is now Rule 50(c), which says that if the Court grants the motion for judgment as -- the renewed motion for judgment as a matter of law, and there is also an alternative motion for a new trial, the judge should rule on that, as well, and should basically say, "In the event that my ruling on the JNOV -- or the JMOL" --

JUSTICE KENNEDY: "Shall." It does say "shall.

MR. STEWART: Yes, "shall."

JUSTICE KENNEDY: It says "shall." Thank you.

MR. STEWART: So, "In the event that my ruling on the sufficiency question is reversed on appeal, the Court of Appeals will know how I would have ruled on the new-trial motion, and the processing of the case can be expedited."

JUSTICE GINSBURG: It's a -- it's a conditional ruling on the new-trial motion.

MR. STEWART: That's correct.

JUSTICE GINSBURG: Because if it were a ruling on the new-trial motion, you would never get up to the Court of Appeals.

MR. STEWART: That's correct. But the Court -- this Court, in Montgomery Ward, noted that there may be inefficiencies if the District Court rules on the JNOV motion, but doesn't rule on the conditional motion for new trial, because if the JNOV -- if the ruling on the JNOV motion is reversed on appeal, then there's a need for remand for further proceedings, and it's inefficient.

But to return to the point about taking an appeal from a Rule 50(a) motion, I think it would put a District Court in an untenable position to say, "You can reserve ruling on the 50(a) motion, even if you think the

evidence is insufficient," and, indeed, it's usually the better practice to do so, but, if you do that, and the jury comes back against the movant, the movant can take an immediate appeal, and you can be reversed on the ground that your ruling on the Rule 50(a) motion was erroneous. There's simply no -- by its -- by the terms of the rule itself, the submission of the case to the jury, in the face of a Rule 50(a) motion, is considered to be a reservation of the sufficiency question.

JUSTICE SCALIA: Yes, well, I don't know that you have to read it that way. I mean, you can say that the -- when the -- when the rule says that it -- that it is deemed to have been reserved, it also implies that the question that was reserved is implicitly resolved when the court does not -- does, later, not act. It's an implicit denial. Why can't you read the rule that way?

MR. STEWART: I mean, conceivably you could have read the rule that way at the time of Johnson, but first we have this Court's decision in Johnson, which says the submission of a post-verdict Rule 50(b) motion is an essential prerequisite even for the District Court to act on the motion. And, therefore, if the motion is not renewed, the District Court is entitled to treat it as abandoned. And, second, the rule, in its current form, limits the authority of the District Court to enter a

judgment as a matter of law post-verdict to the situation where the court is ruling on a renewed motion. The rule doesn't contemplate a situation in which the motion is not renewed and yet the District Court purports to rule on the 50(a) motion that was left hanging by the submission of the case to the jury.

CHIEF JUSTICE ROBERTS: What about the plain-error question?

MR. STEWART: I think we would say, for some of the same reasons that Mr. Bailey has identified, that plain-error review would be inappropriate, because in order to have plain error, there has to be error. And if the gravamen of the appeal is that denial of the pre-verdict Rule 50(a) motion was plain error, it can't be right, because the pre-verdict -- the submission of the case to the jury is treated, as a matter of law, as a reservation of the legal questions, and it can't be plain error to reserve those questions for later decisions.

JUSTICE SCALIA: I'm not sure --

CHIEF JUSTICE ROBERTS: Thank you Mr. Stewart.

JUSTICE SCALIA: -- I understood. Sorry. Just -- I'm not sure I understood. Did you say that even when it's reserved, the judge cannot go back to the reserved motion and grant it unless the motion is renewed?

MR. STEWART: That's correct. That was -- that

was the fact in Johnson, that the District Court expressly reserved its ruling, and the court, nevertheless, held renewal as essential.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Stewart.

Mr. Schroeder.

ORAL ARGUMENT OF ROBERT A. SCHROEDER

ON BEHALF OF RESPONDENT

MR. SCHROEDER: Mr. Chief Justice, and may it please the Court:

Before getting to some of these questions that have been discussed this morning, I think it's helpful to ground ourselves a little bit in the fundamental decision made by the Federal Circuit that is not within this Court's grant of certiorari, and, therefore, is the foundation from which we proceed. And, rather succinctly, the Federal Circuit said, "Unitherm never presented any evidence that could possibly support critical factual elements of its claim. In particular, Unitherm failed to present any facts that could allow a reasonable jury to accept either its proposed market definition or its demonstration of antitrust injury."

Building on that foundation, Unitherm wants a judgment entered in its favor for $19 million for the injury that they have never proven. And, to get there, they have to accomplish each of three things. First --

JUSTICE GINSBURG: May I just stop you with that point? Because one of the things that Unitherm said about that argument -- which, as you prefaced, is not before us -- is, the Court of Appeals was looking to a truncated record to see whether there was sufficient evidence that, in fact, the record was much larger than the piece of it that the Federal Circuit examined, so that the Federal Circuit, when it says there was no evidence, was looking to the appendix that was before us, but that was not the whole picture.

MR. SCHROEDER: Your Honor, in the Federal Circuit, each party had the -- had the ability to put any part of the record, or the entire record, before the court, and, under the Federal Circuit's own rule, they were also entitled to go back to the District Court record, whether it was in the appendix or not. So, the entire record --

CHIEF JUSTICE ROBERTS: Well, but if they had been on --

MR. SCHROEDER: -- was --

CHIEF JUSTICE ROBERTS: -- if they had been on notice that insufficiency of the evidence was going to be an issue, they might have put more in the record about the sufficiency of the evidence.

MR. SCHROEDER: When the case was appealed to

the Federal Circuit, Your Honor, insufficiency of the evidence was presented as an issue at that time. And so, that was --

JUSTICE GINSBURG: But under this Federal Circuit's own law, it could not be, because there had not been the post-verdict motion.

MR. SCHROEDER: Well, that --

JUSTICE GINSBURG: The Federal Circuit is borrowing Tenth Circuit's law for this purpose, but the Tenth Circuit's law, as I understand it, has -- is the position that was just presented to us by Mr. Stewart. That is, if you don't make what used to be called the JNOV, even if you made the directed verdict, you can't raise the sufficiency on appeal.

MR. SCHROEDER: Well, Your Honor, going to the Federal Circuit, of course, the meaning of Rule 50 was in dispute. And it was certainly, at that point, ConAgra's position that the evidence was sufficient -- was insufficient, and that was the issue before --

JUSTICE GINSBURG: Isn't --

MR. SCHROEDER: -- the court.

JUSTICE GINSBURG: -- that the Federal Circuit's own rule? It -- it was, I thought, pretty clear what it told us in that footnote, that if we were ruling -- making the ruling -- the Federal Circuit law is, if you don't

make the 50(b) motion, you cannot get a reversal on appeal for insufficient evidence.

MR. SCHROEDER: That is the Federal Circuit rule in patent infringement cases. It was not the rule that the Federal Circuit would apply in this case, because the Federal Circuit would apply --

JUSTICE GINSBURG: Borrow --

MR. SCHROEDER: -- apply the rule of --

JUSTICE GINSBURG: -- the Tenth Circuit rule.

MR. SCHROEDER: Yes.

JUSTICE GINSBURG: Yes. But that's -- in respect to the Chief Justice's question, the -- Unitherm could have thought, "Well, the Federal Circuit is not going to deal with sufficiency; therefore, I don't have to beef up" --

MR. SCHROEDER: Well --

JUSTICE GINSBURG: -- "what I put in the appendix."

MR. SCHROEDER: -- certainly, they did have to deal with that, Your Honor, because one of the grounds for appeal was that there as no antitrust standing. So, this issue was before the Federal Circuit, no matter how you view the question. But I think in addition to that, certainly everyone knew, when this case went to the Federal Circuit, that it was ConAgra's position that Tenth

Circuit law applied, and that the evidence should be reviewed for its sufficiency --

JUSTICE STEVENS: Yes, but the -- the antitrust standing issue is not the same as the relevant market issue that was decided, is it?

MR. SCHROEDER: No, it's not, but it certainly is the same with respect to antitrust injury, and the Federal Circuit found there was no evidence of antitrust injury. So, there, the entire record should have been before the Federal Circuit. And, in fact, it was. And so, when they made the determination that there was no evidence of antitrust injury, they did that in the presence of a full record on that issue. There was no way that anyone could have thought that that issue was not before the --

JUSTICE SCALIA: Or as much of the record as the other side wanted to produce.

MR. SCHROEDER: Well, we have to assume they covered their bases, Your Honor, yes.

Now, let me talk a little bit about some of these issues that have come up.

First, with respect to the motion for a new trial, there was a motion for a new trial, under Rule 59, filed in this case. The grounds for that motion were not sufficiency of the evidence; but, under Rule 59, when a

motion is made for a new trial, on any grounds, it is before the District Court on all grounds.

JUSTICE GINSBURG: I'm looking at the motion that you made, which was not in the first instance for a new trial; it was for a remittitur. This is on page 34(a) of the joint appendix. And you made a motion, in the alternative, for a new trial on antitrust damages, not liability. So, I was really struck by the statement in your brief that you had, indeed, made a motion for a new trial. You made it a motion for a remittitur and, in the alternative, a new trial, limited to damages. You said nothing about a new trial on liability.

MR. SCHROEDER: That's correct, Your Honor. I'm merely pointing out that, under Rule 59, once a motion for a new trial is made, all issues relating to a new trial are before the court.

JUSTICE GINSBURG: A new trial on damages -- that's all you asked for -- not a new trial on liability.

MR. SCHROEDER: That's correct, Your Honor. But I certainly would refer the Court to the Cone case, which I think is very similar to this case, procedurally. In Cone, there was a Rule 59 motion. There was no Rule 50(b) -- excuse me, a Rule 50(a) motion, no Rule 50(b) motion. There was a motion for a new trial on the grounds of newly discovered evidence. Nevertheless, in the Cone case, the

Court remanded the case for further proceedings, and the -- and the court below considered the question. And, in the end -- the published opinions indicate, that case went back to the Fourth Circuit, and --

JUSTICE GINSBURG: It --

MR. SCHROEDER: -- in the end --

JUSTICE GINSBURG: -- it was -- the new trial request had to do with liability --

MR. SCHROEDER: Yes.

JUSTICE GINSBURG: -- whether it was for newly discovered evidence or something else. But you -- your motion was limited to damages. And I really don't think that you can get where you want to go from a motion that is limited to damages, when you didn't need to. You could have made a motion for a new trial on the whole case.

MR. SCHROEDER: Well, of course, Your Honor, if there were no proof of damages, the whole antitrust claim would fail. But I would also say that it seems to me that when a motion is made under Rule 50(a) for judgment as a matter of law, that certainly permits the District Court to grant a new trial, because it's a lesser remedy. And we see situations all the time --

CHIEF JUSTICE ROBERTS: Well, why -- it's -- why is that a lesser remedy? It's just different. I mean, remittitur is a lesser remedy, too, but you don't say,

"Well, if you've made a motion for a new trial, and then that falls by the wayside, you -- the court can do remittitur." The approach seems to be, "Something's wrong here, and we have to do something, so what is it that we can do?" And you look around, "Well, maybe we can give them a new trial, or maybe we can have a remittitur." But there are different motions for all these different things, and, if they haven't been made, they seem to be off the board.

MR. SCHROEDER: Well, certainly, Your Honor -- let's take another example. Suppose a litigant asks, as sanctions, that the case be dismissed. Well, the District Court certainly could say, "Well, you have a point, sanctions are in order. But I'm not going to dismiss the case, I'm going to give you something else." There are many situations like that, where a particular remedy --

CHIEF JUSTICE ROBERTS: But the problem there is still the same. Whatever it is that gave rise to the motion to dismiss as a sanction -- the misconduct by counsel -- you're still addressing that same problem. But a new trial addresses different issues than a judgment as a matter of law, and remittitur addresses different issues than a new trial.

MR. SCHROEDER: Well, it seems to me that it is the principal point of the trilogy that when a motion is

made for entry of judgment based on insufficiency of the evidence, that raises the question of whether there ought to be a new trial. That was the principal point discussed in the trilogy, that you really can't have one without the other.

JUSTICE GINSBURG: The principal point was that the Court of Appeals could not enter -- direct the entry of judgment as a matter of law if a 50(b) motion had not been made. That's what those three cases --

MR. SCHROEDER: That's --

JUSTICE GINSBURG: -- invoke.

MR. SCHROEDER: -- absolutely correct, Your Honor, the trilogy stands for that proposition. But in all three cases of the trilogy, even though there was no Rule 50(b) motion, those cases were all remanded. In no case was the verdict winner who had insufficient evidence allowed to prevail. They just remanded the cases. So, the Solicitor General relies on stare decisis, but he's asking the Court to do something radically different from what happened in any of those cases of the trilogy. They're asking that judgment be entered for the party that failed to --

JUSTICE O'CONNOR: Had Rule 59 motions been made in those cases?

MR. SCHROEDER: It's not clear from the record,

I don't believe, as to all of the cases, Your Honor, but certainly it is clear in the first case, the Cone case, that there was a motion for a new trial, but it was based on different grounds. It was based on newly discovered evidence.

JUSTICE BREYER: So far, you're halfway into your argument. I thought the basic question here was, first, whether a Court of Appeals, or anybody, can grant a J- -- what used to be called a JNOV without your making its -- whatever it's called now -- and without somebody making it a motion. And from your not opposing that, I guess the answer to the question is, of course not. Of course you have to make a motion. You have to make a motion for everything. The judge is not a genius. He can't -- is not a mindreader. And if you don't make a motion, you lose. Okay? Now, is there any argument against that?

MR. SCHROEDER: When you say "that," Your Honor, you mean with respect to the -- to the new trial or with respect --

JUSTICE BREYER: No, I -- I mean, I thought -- there are two parts to this. Question one is, Can you possibly get a judgment -- what used to be called a JNOV or a JMOL or whatever -- from the Court of Appeals, when you didn't make a motion for it, after the jury came in,

in the District Court?

MR. SCHROEDER: The --

JUSTICE BREYER: They say, "Of course you have to make a motion." And, so far, I've heard no response whatsoever to what I'd think is a fairly basic question in this case. And I'm assuming: of course you have to make a motion.

MR. SCHROEDER: Yes, Your Honor. I'm glad you raised that point, because it is the fundamental point of the case. Rule 50(a) provides that a motion for judgment as a matter of law can be made, and specifically says that the judge can grant that motion. And then the rule goes on to say that that motion is deemed to continue to be pending. There is nothing in Rule --

JUSTICE SOUTER: No, it doesn't say it -- it is deemed to continue to be pending. The issue is deemed to be reserved.

MR. SCHROEDER: Yes, Your Honor.

JUSTICE SOUTER: Which is a very different issue. In other words, it's not waived and over with at that point, but it says nothing whatsoever, in express terms, about pending motions.

MR. SCHROEDER: Oh, I agree, Your Honor. I paraphrased the rule. But the point is that the motion is still pending. In --

JUSTICE SOUTER: No, the issue is reserved. The motion has been ruled upon. The judge says, "No, I'm not going to grant this motion before submitting the issue to the jury." That's the end of the motion. The issue isn't over with, because it can be raised again after the verdict. Isn't that what the rule provides?

MR. SCHROEDER: That's certainly not the way I would read it, Your Honor, because in this case --

JUSTICE GINSBURG: How about a --

JUSTICE O'CONNOR: That's the way this Court has read it. That's the problem.

MR. SCHROEDER: I don't believe so, Your Honor, because if the Court -- if the rule says that the Rule 50(a) motion can be granted; conversely, it can be denied. If it can be granted or denied, those decisions are appealable under section 2106, which is the general provision that orders of the court can be appealed. I do not see anything in Rule 50 that says that denial of the 50(a) motion is not appealable. What Rule 50(b) does is --

JUSTICE GINSBURG: Well, it can't -- it can't be -- it would be interlocutory at that stage. It couldn't be raised until final judgment is entered.

MR. SCHROEDER: Well, Your Honor, I think that would be a most peculiar rule. Entering judgment in a

case is one of the most fundamental and important things that a court does.

JUSTICE GINSBURG: Yes, but you don't go up on appeal with a final judgment rule, a firm final judgment rule, as there is in the Federal system, from the denial or refusal to act on a 50(a) motion.

MR. SCHROEDER: Well --

JUSTICE GINSBURG: The trial isn't over. There is no judgment. You can't appeal til you have a final judgment.

MR. SCHROEDER: That's certainly correct, Your Honor, there can be no appeal without a final judgment. But what I'm saying is that an interpretation of Rule 50, as a whole, which says to the trial court judge that a judgment should be entered without resolving the question of whether there is sufficient evidence, and then take that up later, under Rule 50(b), isn't a very good way to proceed.

JUSTICE GINSBURG: Well, there is, you know -- I mean, this truly is a case where a page of history is worth much more than logic. The reason for that somewhat strange language is, at common law, it was thought, once the jury came in with a verdict, that was it, the judge had no power to overturn it, because of the Seventh Amendment's Reexamination Clause, "no fact tried by a

jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law." And the rule of common law that is embodied in this somewhat strange language in Rule 50 is that there could be a reserved question so that after the jury comes in with the verdict, the judge would be deciding the pre-verdict question by this post-verdict motion. I mean, there's -- none of this is in doubt, where this language in 50 comes from. It comes from a need to adjust to the Reexamination Clause of the Seventh Amendment. Isn't that so?

MR. SCHROEDER: Yes, that's all correct, Your Honor. But if there were no provision of the rule that reserved decision under 50(a), I would still say that the denial of the 50(a) motion should be appealable when the judgment is entered, because the -- all of the prior orders of the court merge into that judgment when it's entered.

JUSTICE GINSBURG: But you don't get it out of that language, because that language is there for the specific purposes of allowing a judge, after their verdict, to enter judgment NOV.

MR. SCHROEDER: Yes, Your Honor. It certainly is there for that purpose. But the rule doesn't mandate that the court -- that the case proceed by that route.

What I'm saying is that once the 50(a) motion is made and denied, the stage is set for an appeal pursuant to section 2106. The Rule 50(b) route is merely there to allow a litigant, who does not believe that the issue has been fully heard, briefed, considered by the court, to raise the issue again, but not to put us in the position where, in the normal course, the judge follows the usual procedure of submitting the case to the jury, because the jury may resolve the problem by deciding the case in favor of the party that should win on the evidence, but then, at that point, the judge merely has to enter -- has to enter judgment in order to trigger the 50(b) motion. That doesn't seem to be a good way to proceed, and I don't believe that's what's contemplated by the rule. And, in fact, it is a common practice among --

JUSTICE GINSBURG: He doesn't enter judgment to trigger the 50(b) motion. The 50(b) motion is made in between the verdict and the entry of judgment.

MR. SCHROEDER: Well, Your Honor, the rule says that it can be made up to 10 days --

JUSTICE GINSBURG: Right.

MR. SCHROEDER: -- after the entry of judgment. So, from the point of view of the District Court, if the court ever wants to get to the end, wants to put a time limit on this, the only way to do it is to enter judgment.

That forces the moving party to get a 50(b) motion --

JUSTICE GINSBURG: But I don't --

MR. SCHROEDER: -- on account of the defendant.

JUSTICE GINSBURG: -- I don't follow that, because you -- you know, I'm sure, that it's almost routine that -- yes, you have the 10 days, the extra 10 days, under the rules -- but isn't it almost routine, at a trial, that the verdict loser will say, "Judge, please give me JNOV, or, if not, a new trial"? They don't wait til after the judgment is made -- entered. They could. But it's just -- well, in the trials I've seen, it's almost by rote that lawyers who lose, where the jury comes in for the other side, will renew the judgment-as-a-matter-of-law motion and ask, in the alternative, for a new trial. Isn't that the common practice?

MR. SCHROEDER: Well, I think it's a common practice in those circuits which have indicated that a 50(b) motion is required to preserve all rights to appellate review. Whether or not it is the common practice in other circuits where that is not required, I'm not sure. Certainly --

JUSTICE GINSBURG: Well, it's not a question of what is required or what is permissive, but isn't it to the lawyer's advantage, to the client's advantage, to say to the judge, sooner rather than later, "Look don't enter

judgment. Give me -- give me judgment NOV or at least a new trial"?

MR. SCHROEDER: Well, Your Honor, this case may be a little different from some, in that the precise issue that was presented to the Federal Circuit, the failure of proof, was something that was identified very early in the case. And it was presented numerous times to the District Court by a way of a summary judgment motion, by way of the pretrial briefs. And the issue had not changed. And, in fact, when the 50(a) motion was made, at the end of the trial, the Court may have noticed that it was made in a rather peculiar way, an attorney attempting to persuade the court that that motion should be granted wouldn't begin the motion by saying, "For the record." But that's what happened here. It was known, at that point, that the judge had made up her mind as to this issue, and wasn't going to change it, and, in fact, declined, on several occasions, to even listen to argument on the point. So, the filing of a 50(b) motion would seem to be contrary to the generally accepted practice that attorneys are not --

JUSTICE O'CONNOR: Well, if -- should we disagree with you, Mr. Schroeder, on that, you seem to fall back, at the end of the day, on a plain-error notion. Is --

MR. SCHROEDER: Well --

JUSTICE O'CONNOR: -- that right?

MR. SCHROEDER: -- there are several things that we would fall back on, Your Honor. When you say "fall back," I assume that that means if the Court were not to follow the precedent of the trilogy --

JUSTICE O'CONNOR: If we don't agree with you on the --

MR. SCHROEDER: On the meaning of --

JUSTICE O'CONNOR: -- need for a --

MR. SCHROEDER: -- the trilogy.

JUSTICE O'CONNOR: -- 50(b) motion.

MR. SCHROEDER: Okay. Under those circumstances, there were two questions. One is, of course, plain error, and the other is retroactivity.

JUSTICE O'CONNOR: Have we ever said that plain error would preserve this, in the civil context?

MR. SCHROEDER: No, Your Honor. We have found no case, either way --

JUSTICE O'CONNOR: No, I --

MR. SCHROEDER: -- on that.

JUSTICE O'CONNOR: -- haven't either.

MR. SCHROEDER: It's -- there's no precedent that --

JUSTICE BREYER: But even if there were, how could this kind of error ever be plain?

MR. SCHROEDER: Well --

JUSTICE BREYER: Ever?

MR. SCHROEDER: Your Honor, I --

JUSTICE BREYER: If there's no evidence at all. You have a patent, and a patent is a monopoly. And so, what -- obviously, it monopolizes a market, it monopolizes the market of the patent. And you'd have to be a genius in antitrust law to know something's wrong with that argument. And so, how could it all be plain?

MR. SCHROEDER: Well, Your Honor, there was another claim in this case on which Unitherm did recover, which is not before this Court, which was a claim for --

JUSTICE BREYER: That has nothing to do with my question.

MR. SCHROEDER: Sure.

JUSTICE BREYER: You were saying that the mistake was that there was not sufficient evidence that there was injury of an antitrust kind, and that there was a market. So, I'm saying a person who knows a little, but not a lot, of antitrust law would think, "Obviously, there's a market here. There's the market covered by the patent."

MR. SCHROEDER: Well, there's not --

JUSTICE BREYER: Obviously, there's injury, because a patent allows you to raise the price. End of

the matter. Now, that's naive, but somebody who doesn't know antitrust law thoroughly couldn't possibly think that there is plain error here. What's the response to that?

MR. SCHROEDER: Well, I think, Your Honor, first of all, in determining plain error, it's necessary to put it in the context of this case, where that very issue had been raised repeatedly and had, in fact, been ruled on by the court in denying the summary judgment motion. So, we weren't dealing with someone who was naive in this respect. We were dealing with someone who had faced this precise issue, and the very closely related issue of antitrust standing, which focuses on antitrust injury. So, we got to this point in the trial. We had a great deal of history --

JUSTICE BREYER: What I'm worried about, to put all my cards on the table -- if we were to say there is even a possibility of plain error in this case, the plain-error exception in the rules would become a monster, wherein complex cases, people who hadn't made the proper motions would all be arguing plain error just as if they had.

MR. SCHROEDER: Well, certainly the plain-error argument is always, in a sense, available, Your Honor. But I do think this is an extreme case, and I think that's reflected by what the Federal Circuit said, that I read at

the beginning of my argument. But that's extremely strong.

CHIEF JUSTICE ROBERTS: It's an extreme case, because there's insufficient evidence?

MR. SCHROEDER: It's an extreme case for a number of reasons, and that's certainly one of them. There isn't just insufficient --

CHIEF JUSTICE ROBERTS: Well, it's --

MR. SCHROEDER: -- evidence, but --

CHIEF JUSTICE ROBERTS: -- not going to be plain error in every insufficient-evidence case.

MR. SCHROEDER: No, but in -- this is a -- an -- a case in which the insufficiency of the evidence was extremely apparent. These parties --

JUSTICE SOUTER: All right, let's assume it's extremely apparent. Isn't -- and assume, just for the sake of argument, that we have a simple case, not a complex case, so it's easy to see that, in fact, the evidence falls short. It's still the case that this Court has discouraged, or has certainly -- has either discouraged the granting of motions at the close of the plaintiff's case, or at the close of all the evidence -- in any event, has put its imprimatur on denying those motions, subject to renewal after verdict. How can we possibly find that there is plain error when a court does

exactly what we have encouraged them to do in order not to waste a lot of trial time and jury time? How could we ever find there is plain error, except with respect to the renewed motion after the verdict?

MR. SCHROEDER: Well, Your Honor, certainly where the motion has been made and has, in fact, been briefed, and has been considered by the court, and where you have a situation in which --

JUSTICE SOUTER: And we have said, "Don't grant it."

MR. SCHROEDER: I'm sorry, Your Honor?

JUSTICE SOUTER: And we have said, "Don't grant it."

MR. SCHROEDER: Well, Your Honor, I guess we'd go back to the proposition that -- I believe that the District Court could grant the 50(a) motion later; it did not have to wait for a 50(b) motion. And, in fact, it is a very common practice --

JUSTICE SOUTER: It could do that even after it had ruled upon it and had denied it?

MR. SCHROEDER: Well, certainly in situations where the Court simply enters judgment and doesn't deny the motion first, that would be true --

JUSTICE SOUTER: Well, I --

MR. SCHROEDER: -- would be true. But --

JUSTICE SOUTER: -- I --

MR. SCHROEDER: -- even here --

JUSTICE SOUTER: -- I will -- I will grant you that, were it not for our cases, textually, the argument you make is possible. But I don't see how you can make that argument without our overruling a lot of law.

MR. SCHROEDER: Well, Your Honor, I -- when it comes to "overruling a lot of law," I think that the fundamental fact here is that, in the trilogy, the case was always sent back for a new trial. Never was judgment entered in favor of the party that had failed to prove its case. So --

JUSTICE GINSBURG: Sent back to -- for a new trial because the Court of Appeals ordered a new trial, or sent back to the trial court for that court to decide as a matter of that court's discretion, whether to order --

MR. SCHROEDER: That's correct. Sent back --

JUSTICE GINSBURG: -- a new trial? The latter.

MR. SCHROEDER: -- to the District --

JUSTICE GINSBURG: But it --

MR. SCHROEDER: -- Court.

JUSTICE GINSBURG: -- it was not -- but, here, you're asking us to affirm something that a Court of Appeals did.

MR. SCHROEDER: Well, the -- the Court of

Appeals ruled that the case should go back to the District Court. We are asking this Court to affirm that and send the case back to the District Court, as a Federal Circuit ruled.

JUSTICE SCALIA: I'm not even sure your argument is so strong on the text, frankly. I don't know why 50(b) says -- it sets forth what can be done when the renewed motion is made. You can, if a verdict was returned, allow it to stand, order a new trial, direct entry of judgment. If no verdict was returned, order a new trial, direct -- Why does the rule only say, "In ruling on a renewed motion, the Court may"?

MR. SCHROEDER: Well, Your Honor.

JUSTICE SCALIA: Why wouldn't it say, "In ruling on a renewed motion or in acting upon the motion previously reserved," comma, "the Court may"?

MR. SCHROEDER: Well --

JUSTICE SCALIA: I mean, where --

MR. SCHROEDER: -- I --

JUSTICE SCALIA: -- and where does it get the power to do these things, in ruling on a motion previously reserved, if it's not set forth there?

MR. SCHROEDER: If you look at 50(a), Your Honor, it specifically says that the 50(a) motion can be granted. Now, that would be inconsistent with a view of

the rule that says that the only remedies available are set forth in section (b) and triggered by the renewal of the motion.

JUSTICE SCALIA: No, I'm talking about the only remedy available after the motion has been reserved, after --

MR. SCHROEDER: Well --

JUSTICE SCALIA: -- the court has declined to rule on it once.

MR. SCHROEDER: Well, if the motion is reserved, and the court has declined to rule on it, then the -- it would seem to me that it follows that the court can grant that motion.

JUSTICE SCALIA: And that's all.

MR. SCHROEDER: Well, it can also enter judgment, which constitutes another denial --

JUSTICE SCALIA: Can it order a new trial?

MR. SCHROEDER: Yes. Most certainly. Because --

JUSTICE SCALIA: Where does he get that power, under (a)?

MR. SCHROEDER: It is a --

JUSTICE SCALIA: Unless --

MR. SCHROEDER: It is a lesser remedy -- than the one requested, that was --

JUSTICE SCALIA: Oh, well, then it shouldn't have been set forth in (b). You didn't have to say it. You could have just said, you know, "Allow" --

MR. SCHROEDER: Well, Rule 50(a) doesn't literally say that the motion can be denied. It simply says that it can be granted. But I think we have to infer from that, that it can be denied. And I would equally infer that a lesser remedy is possible once the 50(a) motion is made. But I don't think it's possible to read the rule as saying that the only way these remedies are available is through a 50(b) motion, because that's inconsistent with the provision that the motion can be granted under 50(a).

The -- it, further, seems to me that if the -- if the motion is -- if decision on the motion is deemed to be had -- to have been deferred, then that motion is still before the court, even if the court has denied it. And the court can grant it later on --

JUSTICE SOUTER: Yes, but the --

MR. SCHROEDER: -- instead of interjecting --

JUSTICE SOUTER: -- rule doesn't deem it to have been deferred. A judge may, in fact, not rule on it, although he does not grant it. But the rule does not say that the motion is deemed to be deferred. The rule talks about the issue being reserved, which is a different

thing. And the issue may be reserved whether the judge rules on the motion or simply says, "I will take it under advisement and you can renew it after the verdict if you want to." Isn't that correct?

MR. SCHROEDER: Well, I would have stopped sooner, Your Honor. I would have said, "I will take it under advisement." That is really the essence of the rule, that the Court has this under advisement. And it is a very common --

JUSTICE SOUTER: Well, that may be, but it's still the case that the rule does not deem the -- this rule does not deem, in my terms, the ruling on the pre-verdict motion to have been deferred.

MR. SCHROEDER: Well, Your Honor, it is certainly a common practice that, while the --

JUSTICE SOUTER: I'm asking you about what this rule says. Did I just get the rule wrong?

MR. SCHROEDER: Well, Your Honor, I think that if ruling on that motion --

JUSTICE SOUTER: If you don't --

MR. SCHROEDER: -- had been inferred --

JUSTICE SOUTER: -- want to answer the question, just say so.

MR. SCHROEDER: No, I'm -- I'm very pleased to answer the question, Your Honor. I believe that the rule

permits the judge to decide the 50(a) motion at any time prior to entering judgment. And the judge can change his or her mind on that at any time, because the issue is still before the court.

JUSTICE SCALIA: Can a judge grant a new trial on a 50(a) motion?

MR. SCHROEDER: Yes, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

MR. SCHROEDER: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Bailey, you have 1 minute remaining.

REBUTTAL ARGUMENT OF BURCK BAILEY

ON BEHALF OF PETITIONER

MR. BAILEY: Thank you, Mr. Chief Justice.

JUSTICE SCALIA: Do you agree on the answer -- with the answer to the last question I asked? Can -- on a 50(a) motion, can a judge grant a new trial instead of granting judgment?

MR. BAILEY: No, Your Honor.

JUSTICE SCALIA: I didn't.

MR. BAILEY: The result ConAgra contends for here, may it please the Court, leads to some really bad results. It requires the rejection of longstanding precedent by this Court. It overrules the jurisprudence of eight circuits. It offends the special competency of

the trial court. It deprives the appellate court of the trial court's evaluation, an impartial evaluation of the sufficiency of the evidence, so the appellate court is left to sift through the record, an entire record, searching for points that have never been joined below. And it creates confusion, subjectivity, and differing legal standards nationwide.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Bailey.

The case is submitted.

[Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.]