No. 16-903

IN THE

Supreme Court of the United States

ROBERT P. HILLMANN,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The petition shows that the circuits were split before this Court's ruling in *Ortiz v. Jordan*, 562 U.S. 180 (2011), and remain in disarray on the question presented: whether a circuit court lacks jurisdiction to decide if a case should have been tried, after a full trial on the merits, based on a question of law, in the absence of a Rule 50 motion. Respondent offers three reasons why this Court should deny review: (1) it is questionable whether the conflict in the circuit remains open after *Ortiz*, (2) the split is irrelevant because the conflict is not implicated; and (3) this is merely a state law claim that has no reach beyond petitioner's case.

Respondent's reasons are not persuasive. This Court should grant review.

I. The Circuits Remain Split After *Ortiz*.

Respondent does not seriously contest whether a split exists in the circuits because it asserts that "*if Ortiz* leaves open a question, it is only whether a Rule 50(b) motion is needed to preserve appellate review of a purely legal issue." BIO 23. Despite respondent's uncertainty, there is still a conflict in the circuits on the issue of whether a court of appeals *lacks jurisdiction* pursuant to 28 U.S.C. § 1291, to determine if a case should be tried, after a full trial on the merits, based on a legal question, in the absence of *a proper Rule 50 motion.*

Post *Ortiz*, the circuits remain split and internally conflicted on this issue. *See e.g.*, *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 824 (7th Cir. 2016)(court refused to review whether the case should have been tried

based on purely legal issues because the court held the "controversial exception for purely legal issues does not apply here."); *Lawson v. Sun Microsystems, Inc.,* 791 F.3d 754, 761-62 (7th Cir. 2015) (Rule 50 motions not necessary because the legal arguments have "no bearing on the sufficiency of the trial evidence"); *Blessey Marine Services v. Jeffboat L.L.C.,* 771 F.3d 894, 897-8 (5th Cir. 2014) (no jurisdiction to review whether case should have been tried based on purely legal conclusions unless "the party restated its objection in a Rule 50 motion"); *Feld v. Feld,* 688 F.3d 779, 781-82 (D.C. Cir. 2012) (circuit court has jurisdiction to hear legal arguments and Rule 50 motion is not necessary to preserve purely legal claim rejected at summary judgment); *Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, 875 (8th Cir. 2012)(no review of summary judgment because it is not a final judgment regardless of whether issue is purely legal, in absence of a proper Rule 50 motion).

A. The Split Is Implicated In This Case.

Respondent claims the split is not implicated because the Seventh Circuit simply granted its Rule 50(b) motion. BIO 22. Yet, the Seventh Circuit never stated this; instead the circuit court held the claim never should have been tried. To downplay this glaring point, respondent claims numerous reasons prove the circuit court simply granted its Rule 50(b) motion. Respondent's arguments are neither persuasive nor correct.

1. Respondent initially contends that the split is not implicated because the lower court simply granted its "renewed" Rule 50(a) motion pursuant to Rule 50(b). BIO 12. The City, however,

never denied that its Rule 50(a) motion did not match the Rule 50(b) motion, as indicated in the petition. Pet. 13, 16, 21, 23-4. A "post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.,* 546 U.S. 394, 398, n.1 (2006)(quotation omitted). Absent a proper Rule 50(a), (b) motion this Court has held "an appellate court is 'powerless' to review the sufficiency of the evidence after trial." *Ortiz*, 562 U.S. at 189. As noted in the petition, respondent's Rule 50(a) motion asserted that the evidence failed to show "*a decision-maker in the RIF*" had knowledge of petitioner's protected activities. Pet. 23-4. After the jury verdict, respondent's Rule 50(b) motion claimed the evidence was insufficient to support the verdict because this required proof of Sanchez's knowledge because he was the "final decision-maker. Pet. 13.

2. Respondent next suggests the split is not implicated because the circuit court did not mean summary judgment should have been entered because the City never argued it was entitled to summary judgment on appeal. BIO 21-2. While true, this does not further respondent's argument. If a court of appeals *lacks jurisdiction* over non-final orders, it is irrelevant if the court ruling was at the request of a party or *sua sponte*.

The City's argument also disregards that the circuit court unequivocally stated the claim *never should have been tried* because "[a]t a minimum this required proof that the *relevant decision-maker knew* about his workers' compensation claim." App. 2a-3a (emphasis added). The fact that respondent never argued on appeal it was entitled to summary judgment based on the sufficiency of evidence at the

pre-trial stage militates in favor of granting the petition, not denying it. This Court has held "[b]efore acting *sua sponte,* a court must accord the parties fair notice and an opportunity to present their positions." *Day v. McDonough*, 547 U.S. 198, 199 (2006); *see also* Pet. 21-2. This is particularly true because respondent admits it never argued at summary judgment that the evidence was insufficient to prove that the "relevant or final decision-maker" knew about Hillmann's workers' compensation claim.[1] *See* BIO 22.

3. Respondent next asserts the split is not implicated because the Seventh Circuit did not mean summary judgment should have been granted when it used the "imprecise" statement "*[n]either* of these claims should have been tried"; rather, the lower court simply meant judgment as a matter of law was required pursuant to Rule 50(b). BIO 22, 26. Certainly an appellate court is aware of the ordinary meaning of words. And any doubt regarding the "imprecise" meaning of the words *never should have been tried*, was clarified by the author of the opinion, during oral argument: "If the final decision-maker[2]

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[1] "Of course a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion … which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[2] Respondent never denied petitioner's claim that *no* Supreme Court of Illinois case requires proof of the "final or relevant" *decision-maker's* knowledge or intent, implicitly conceding petitioner is correct. Pet. 20. Respondent's claim that petitioner's counsel stated during oral argument Murphy was the "*final* decision-maker" is completely false. BIO 15. Moreover, when asked during oral argument about who was the "final decisionmaker", petitioner's counsel stated Illinois

didn't know, then there's no case and it should have been kicked on summary judgment." *See* Oral Argument 7th Cir. at 41:02-41:09, *Hillmann* (Nos. 14-3438 & 14-3494).

4. Respondent next claims the opinion "read as a whole" reveals the circuit court granted its Rule 50(b) motion. BIO 22, 25. The opposite is true.

Respondent concedes the Seventh Circuit held it was error for the first trial judge to grant the City's motion to bar city witnesses from testifying based on their assertion of the Fifth Amendment, while simultaneously granting the City's motion to bar an adverse inference or any reference to their invocation of privilege. BIO 33; *see also* R. 350 (Trial I at 663-64). Respondent further concedes the Seventh Circuit did *not* rule on the issue of whether the Fifth Amendment error warranted the second trial. Instead the circuit court held it *need not decide* whether this legal error was "serious enough to justify a new trial" because the circuit court determined the case never should have been tried or "submitted to one jury, let alone two." App. 2a, 11a, 13a.

In order for the Seventh Circuit to have ruled on the City's Rule 50(b) motion it logically dictated the circuit court had to initially conclude the error in the first trial regarding the Fifth Amendment was prejudicial, and warranted the second trial. But the Seventh Circuit disavowed any necessity to decide respondent's claim that this error was harmless. Contrary to respondent's assertion, the opinion

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law does not require proof of this. Oral Argument at 38:26-38:36.

"read as a whole" indicates the Seventh Circuit did not rule on any of the appellate issues raised on appeal because it had already determined the case should not have been tried and, therefore, it did not need to reach respondent's claimed error regarding the Rule 50(b) motion.

5. Respondent next attempts to downplay the Seventh Circuit's failure to state what standard of review applied on appeal by suggesting this Court should simply assume the circuit court applied the appropriate standard of review listed by the parties below. BIO 25-6. However, the opposite assumption is warranted.

As noted in the petition, the Seventh Circuit ignored *all* the circumstantial evidence the chief judge found strongly supported the jury verdict: a) key witnesses were repeatedly impeached, b) the stated reasons for eliminating Hillmann's position could be found to be pretext, c) denial of all liability and medical for petitioner's injury, even though the City's doctor determined the injury was work-related, d) denial of merit pay increases and failing to inform petitioner of the denials, but keeping all the alleged RIF decision-makers in the loop, e) demotions followed on the heels of petitioner's exercise of rights under the IWCA; and f) broadly disseminating to several departments, including the department where Murphy, Sullivan, Sanchez, and Hennessy worked, a defamatory memo suggesting petitioner's request for medical treatment was phony, even though the memo referenced the IWCA claim and that the city doctor determined the injury was work-related. *See* Pet. 23-33.

The Seventh Circuit's failure to address any of the trial evidence that the chief judge found strongly supported the jury's finding of retaliation demonstrates the circuit court did *not* make any determination on the City's Rule 50 motions[3] in the second trial. And the reason the Seventh Circuit ignored the above evidence the district court found strongly supported a finding of retaliation and failed to state what standard of review applied was the court concluded the case never should have been tried; which thereby allowed the court to circumvent any trial evidence contrary to its view. *See Lawson,* 791 F.3d at 761-62 (legal issues at summary judgment have "no bearing on the sufficiency of the trial evidence").

Thus, contrary to respondent's assertion, the petition presents the issue left open by *Ortiz* – does a court of appeals have *jurisdiction* to decide if summary judgment should have been entered, after a full trial on the merits, based on the legal question

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[3] The City never argued on appeal it was entitled to judgment pursuant to Rule 50(a). BIO 20; Pet. 23, n.3. Even if it had, this would be no basis to rule in respondent's favor. If the Seventh Circuit was implying alternatively that respondent's Rule 50(a) motion should have been granted, the lower court was simply wrong. The circuit court stated because *Sanchez was the final decision-maker* and no evidence suggested he knew petitioner exercised a protected right, the claim "should not have been submitted to one jury, let alone two." App. 13a. But respondent's motion pursuant to Rule 50(a) during both trials never mentioned the evidence was insufficient to submit to the jury because there was no proof that the "final decision-maker, Sanchez" knew petitioner exercised a protected right. Pet. 16; *see also* R. 352 (Trial I tr. 860). Similarly, respondent's Rule 50(a) motion in both trials never stated evidence of the final or relevant decision-maker's knowledge was necessary to prove causation. *Id.*

of the sufficiency of the evidence, in the absence of a proper Rule 50 motion.

B. The Question Presented Is Important.

Respondent contends this case is of no importance and does not warrant granting certiorari because it is just a jury verdict decided under state law. BIO 28-9. Rule 50 governs all motions for judgment as a matter of law, regarding civil jury verdicts, regardless of whether the verdict involved a state or federal claim. Indeed, Rule 50 cases often involve state law claims. *See e.g., Weisgram v. Marley Co.*, 528 U.S. 440, 447 (2000)(wrongful death action); *Blessey Marine Services*, 771 F.3d 894 (breach of contract and warranty); *Chesapeake Paper Prods. Co.,* 51 F.3d 1229 (4th Cir. 1995) (breach of contract).

Resolving this protracted split in the circuits is important to every appeal from a jury verdict in a civil case. As such, it is of paramount importance to attorneys and courts. Given that the circuits are deeply divided and internally conflicted on the issue, guidance from this Court is needed.

II. The Decision Below Is Wrong.

The district court was correct, the trial evidence strongly supported the jury's finding that the City retaliated against petitioner because he exercised his rights under the IWCA.

1. Respondent contends the evidence was insufficient to support the verdict because there was no proof of Sanchez's knowledge. This argument lacks all merit because that is not how the City tried the case. During the trial, John Sullivan, stated the RIF decision was a "management team" decision

made by the commissioner [Sanchez], the deputy commissioners and himself. Pet. 3, 9. In the City's Rule 50(a) motion and in its closing statements to the jury, the City argued petitioner had to establish that "*a RIF decisionmaker*" knew Hillmann exercised protected rights under the IWCA. Pet. 16. Brian Murphy, a deputy commissioner[4], was a member of the management team and participated in the RIF decision. As such, the jury was free to find "a RIF decision-maker" knew petitioner exercised protected rights under the IWCA because the defamatory phony memo discussed petitioner's workers' compensation claim; the memo also indicated the author spoke with Murphy. Pet. 31.

The district court noted this incendiary memo *strongly* supported the finding of retaliation. *Id*. And reasonable jurors could infer not just retaliatory motive from this memo, but also that the management team decision-makers in the Department were aware of the contents of this memo and the workers' compensation claim. *Id*. The Seventh Circuit's failure to even mention this memo clearly demonstrates the lower court did not review the sufficiency of the trial evidence. Respondent claims that speculation cannot replace probative facts. BIO 21. But reasonable inferences require "a measure of speculation and conjecture" by the jury. *Lavender v. Kurn*, 327 U.S. 645, 653 (1946).

2. Respondent contends the Seventh Amendment is not implicated when a circuit court finds insufficiency in the evidence and directs the verdict or enters judgment as matter of law and that

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[4] Respondent conceded on appeal the evidence supported a finding of Murphy's knowledge and animus. Pet. 3.

such a ruling "raises no cert. worthy issue." BIO 20-1. But it was only after the jury returned a verdict in petitioner's favor that respondent changed course and then claimed in the Rule 50(b) motion evidence of Sanchez's knowledge was required, because he was the final RIF decisionmaker. Despite the City's contention, the Seventh Amendment is implicated when a verdict is reversed on grounds that were not argued to the jury or included in the Rule 50(a) motion. A "post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." *Unitherm Food Systems, Inc.,* 546 U.S. at 398, n.1 (2006), quoting Amendments to Federal Rule of Civil Procedure, 134 F.R.D. 525, 687 (1991). The requirement that a Rule 50(b) motion must mirror the Rule 50(a) motion is grounded in fairness and to avoid any question arising under the Seventh Amendment. 134 F.R.D. at 686-7.

The Seventh Amendment is implicated because respondent never argued to the jury proof of Sanchez's or even the relevant decision-maker's knowledge was required to establish causation. *See Unitherm*, 546 U.S. at 398, n1; *see also* Pet. 16. Indeed, the City never even mentioned Sanchez's name in the closing. Respondent never objected to the jury instructions given, and never requested any instructions regarding the necessity of proving the final or relevant decision-maker's knowledge. R. 498 at 28-30. Vacating the jury verdict, as the case was tried, clearly implicates the Seventh Amendment.

Some circuit courts that have ruled on the split have noted an exception to the requirement that Rule 50 motions must match, and have not found a jurisdictional problem when the issue raised on appeal involves a pure question of law. Pet. 13-

21. Other circuits have held a court of appeals lacks jurisdiction to decide if the case should have been tried after a full trial on the merits, in the absence of a proper Rule 50 motion, because summary judgment is not a final order. Resolving this protracted split in the circuits and providing a definitive uniform rule will benefit attorneys and the lower courts, in an area of the law that affects every civil jury verdict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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