

CASE COMMENTS

Civil Procedure—Sufficiency of Evidence Not Reviewable in Absence of Post-Verdict Judgment as a Matter of Law or New Trial Motion—*Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006)

The Federal Rules of Civil Procedure were enacted in 1938 to “secure the just, speedy, and inexpensive determination of every action.”¹ The Federal Rules provide three avenues for challenging the sufficiency of a party’s evidence presented at trial: a Rule 50(a) pre-verdict motion for judgment as a matter of law (JMOL), a Rule 50(b) post-verdict renewed motion for JMOL, and a Rule 59 motion for a new trial.² In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*,³ the United States Supreme Court considered whether a party may challenge the sufficiency of evidence on appeal where the party lost on a pre-verdict motion for JMOL, but neither renewed that motion nor moved for a new trial after the verdict.⁴ The Court held that a party’s failure to make either post-verdict motion in the district court precluded appellate review of the sufficiency of the evidence.⁵

In early 2000, Swift-Eckrich, Inc., doing business as ConAgra Refrigerated Foods (ConAgra), issued a general warning to its competitors that it intended to enforce its rights under U.S. Patent No. 5,952,027 (‘027 Patent).⁶ The patent, which the U.S. Patent Office issued in 1999, was for “A Method for Browning

1. FED. R. CIV. P. 1 (setting forth scope and purpose of rules); *see also* Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., 10 F.R.D. 39, 40-41 (S.D.N.Y. 1950) (explaining Rules intended to bring about simplicity and brevity); Alexander Holtzoff, *Practice Under the Federal Rules of Civil Procedure*, 20 B.U. L. REV. 179, 181-82 (1940) [hereinafter Holtzoff, *Practice*] (detailing enactment of Federal Rules and describing purposes of rules). The Federal Rules were based on English civil practice (also referred to as common-law pleading), the federal equity rules of 1912, and code pleading, a somewhat complex practice used in many states at the time of the enactment of the Federal Rules. *See* Holtzoff *Practice, supra*, at 182 (describing sources of Federal Rules). The Rules were very successful in achieving their intended objectives. *See* Alexander Holtzoff, *Two Years’ Experience Under the Federal Rules of Civil Procedure*, 21 B.U. L. REV. 33, 33 (1941) [hereinafter Holtzoff, *Experience*] (praising Rules for attaining uniformity, simplifying procedure, and expediting determination of controversies).

2. *See* 2 JAMES W. MOORE ET AL., MOORE’S MANUAL: FEDERAL PRACTICE AND PROCEDURE § 22.71[1] (2007) (comparing motion for JMOL with motion for new trial).

3. 546 U.S. 394 (2006).

4. *Id.* at 396 (determining whether court may review sufficiency of evidence on appeal).

5. *Id.* at 404-05 (holding failure to comply with Rule 50(b) waives sufficiency-of-evidence challenge).

6. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1344-45 (Fed. Cir. 2004), *rev’d*, 546 U.S. 394 (2006). ConAgra sent another set of letters to its direct competitors later that year. *Id.* at 1345. Both rounds of letters included a copy of the ‘027 Patent. *Id.* at 1344-45.

Precooked Whole Muscle Meat Products.”⁷ Upon discovering that it invented the process several years earlier, Unitherm brought a lawsuit against ConAgra in the Western District of Oklahoma.⁸ Unitherm alleged that ConAgra committed fraud on the Patent and Trademark Office by procuring the ‘027 Patent and violated § 2 of the Sherman Act by attempting to enforce the patent.⁹

Before the court submitted the case to the jury, ConAgra filed a Rule 50(a) motion for JMOL based on legal insufficiency of the evidence, but the court denied the motion.¹⁰ The jury returned a verdict for Unitherm, but ConAgra did not renew its motion for JMOL under Rule 50(b) or move for a new trial under Rule 59.¹¹ On appeal, the Federal Circuit agreed with ConAgra’s position that, despite these omissions, a new trial based on insufficiency of the evidence was proper.¹² The court vacated the jury’s judgment for Unitherm and remanded for a new trial.¹³ The Supreme Court reversed, holding that a court of appeals may not review the legal sufficiency of evidence where the party requesting relief made a pre-verdict motion for JMOL, but did not renew

7. 546 U.S. at 397. Jennie-O Foods, Inc. (Jennie-O), a division of Hormel and direct competitor of ConAgra, received one of the letters, and upon conducting an investigation, determined that the browning process it previously purchased from Unitherm Food Systems, Inc. (Unitherm) was the same as the ‘027 Patent process. *Id.*

8. *Id.* Jennie-O joined in the lawsuit, but the court dismissed its claim for lack of antitrust standing. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1347 (Fed. Cir. 2004), *rev’d*, 546 U.S. 394 (2006).

9. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1345 (Fed. Cir. 2004), *rev’d*, 546 U.S. 394 (2006). The Sherman Act provides that any person monopolizing “any part of a trade or commerce” is guilty of a felony. 15 U.S.C. § 2 (2000). This claim was based on *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), in which the Supreme Court outlined the elements necessary to prove a § 2 violation. *See* 546 U.S. at 397-98 (describing Unitherm’s *Walker Process* claim); *see also* *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174 (1965) (explaining enforcement of fraudulently procured patent violates Sherman Act if all necessary elements present).

10. 546 U.S. at 398 (detailing procedural history leading to appeal).

11. *Id.* (describing ConAgra’s procedural omissions). Although ConAgra filed a post-verdict motion for a new trial on the issue of antitrust damages, this was inadequate to preserve its motion for new trial based on insufficient evidence. *Id.* at 398 n.2.

12. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1365 & n.7 (Fed. Cir. 2004) (holding Unitherm did not provide evidence capable of sustaining finding on antitrust liability), *rev’d*, 546 U.S. 394 (2006). The court concluded that this issue was adequately preserved because it was raised in ConAgra’s Rule 50(a) pre-verdict motion for JMOL. *Id.* at 1365 n.7 (holding party may challenge sufficiency of evidence on appeal despite lack of post-verdict motion). The court acknowledged that, under Federal Circuit law, it would have held otherwise. *Id.* (explaining Federal Circuit requires Rule 50(b) motion at trial to preserve sufficiency of evidence challenge); *see also* *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 859-62 (Fed. Cir. 1991) (holding failure to make post-verdict motion precludes appellate review of sufficiency of evidence). The court, however, applied Tenth Circuit law because the antitrust issues on appeal did not implicate patent law. *See* *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1365 n.7 (Fed. Cir. 2004), *rev’d*, 546 U.S. 394 (2006); *see also* *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1106 (Fed. Cir. 2003) (holding that unless precise issue pertains to patent law, Federal Circuit applies regional circuit law).

13. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1367 (Fed. Cir. 2004), *rev’d*, 546 U.S. 394 (2006).

that motion or move for a new trial after the verdict.¹⁴

Under the Federal Rules of Civil Procedure, a movant may challenge the sufficiency of the non-movant's presented evidence by filing a Rule 50(a) motion for JMOL, a Rule 50(b) motion for JMOL, or a Rule 59 motion for new trial.¹⁵ A Rule 50(a) motion for JMOL challenges the sufficiency of evidence before the court submits the case to the jury.¹⁶ A movant making a Rule 50(b) renewed motion for JMOL—formerly called a motion for judgment notwithstanding the verdict (JNOV)—requests that the district court enter judgment in her favor even though the jury returned a verdict for the non-movant.¹⁷ A district court will generally grant a new trial under Rule 59 if the verdict is against the clear weight of the evidence, the damages are excessive, the trial was unfair, or the court made erroneous evidentiary rulings.¹⁸

A movant may not make a Rule 50(b) post-verdict motion for JMOL unless she made a Rule 50(a) pre-verdict motion for JMOL on the same grounds.¹⁹ If a movant files a pre-verdict motion but fails to renew it post-verdict, the appellate court cannot enter judgment in the movant's favor.²⁰ The Tenth

14. 546 U.S. at 404-05 (reasoning sufficiency-of-evidence challenge not preserved on appeal). The Supreme Court subsequently denied rehearing of the case. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 547 U.S. 1036 (2006), *reh'g denied* 546 U.S. 394 (2006).

15. See 2 MOORE ET AL., *supra* note 2, at § 22.71[1] (describing differences between JMOL and new trial motions).

16. See 9 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 50.60[1] (3d ed. 1997 & Supp. 2007) (outlining circumstances under which JMOL is appropriate). This rule was intended to expedite litigation and prevent unnecessary retrials. See *id.* at § 50.02[2] (explaining purposes of Rule 50(a)).

17. See 9 MOORE ET AL., *supra* note 16, at § 50.03 (explaining change in terminology); Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 895-96 (2002) (summarizing law regarding JMOL).

18. See 12 MOORE ET AL., *supra* note 16, at § 59.13[1] (outlining grounds for new trials); Pamela J. Stevens, *Controlling the Civil Jury: Towards a Functional Model of Justification*, 76 KY. L.J. 81, 128 (1987) (discussing history of new trial motions).

19. See *Cruz v. Local Union No. 3 of Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1155 (2d Cir. 1994) (holding pre-verdict JMOL motion precondition to post-verdict JMOL motion); *Keisling v. SER-Jobs For Progress, Inc.*, 19 F.3d 755, 758-59 (1st Cir. 1994) (explaining Rule 50(a) JMOL motion required to renew JMOL); 9 MOORE ET AL., *supra* note 16, at § 50.40[1] (discussing prerequisites to Rule 50(b) motions). Formerly, parties were required to make a pre-verdict motion for JMOL at the close of all evidence. See Connie Alt, Note, *Preservation of Judgment N.O.V. Motion Under Rule 50(b): Renewal of Directed Verdict Motion*, 70 IOWA L. REV. 269, 269 (1984) (describing procedural requirements for Rule 50(b) motions). However, this rule was recently changed. See FED. R. CIV. P. 50(a) (allowing filing of Rule 50(a) motions any time before submission of case to jury).

20. See *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 271 (5th Cir. 1998) (limiting available relief); *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1315 (5th Cir. 1995) (explaining appellate court cannot enter judgment for party failing to make post-verdict motion); *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 861-62 (Fed. Cir. 1991) (reasoning post-verdict motion requirement assists appellate review and "stands in harmony" with Rule 50(b)); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2537 (2007) (summarizing when and how parties may renew JMOL motions). The *Biodex* court focused on three Supreme Court cases decided approximately fifty-five years ago known as "The Trilogy"—*Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948), and *Johnson v. New York, New Haven, and Hartford Railroad Co.*, 344 U.S. 48 (1952)—for the basis of its reasoning. See *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 854-55 & n.2 (Fed.

Circuit, however, has held that a new trial may be ordered in such circumstances.²¹ In addition, under the plain error doctrine, an appellate court may review an unpreserved claim when refusing to do so would result in a miscarriage of justice.²²

In *Neely v. Martin K. Eby Construction Co.*,²³ the Supreme Court held that courts of appeals have the power to direct entry of JMOL for a verdict loser where there is insufficient evidence as a matter of law to support the jury's verdict.²⁴ The Court concluded that the exercise of this power is consistent with the Seventh Amendment, 28 U.S.C. § 2106, and Rule 50.²⁵ The Court

Cir. 1991) (holding, based on *The Trilogy*, that post-verdict motion required). In *Cone*, the Court held that a party's failure to renew a motion for JMOL precluded the appellate court from directing the district court to enter judgment for that party. See *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 218 (1947) (refusing to consider claim for new trial by petitioner who failed to file Rule 50(b) motion). In *Globe*, the Court ruled that an appellate court is without the power to order entry of final judgment for a verdict loser who failed to renew her JMOL motion in the district court. See *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 572-75 (1948) (emphasizing importance of trial judge's "feel of the case"). Similarly, in *Johnson*, the Court concluded that in the absence of a post-verdict JMOL motion, neither the trial judge nor the appellate court may enter judgment in the moving party's favor. See *Johnson v. New York, New Haven, and Hartford R.R. Co.*, 344 U.S. 48, 54 (1952) (holding movant only entitled to new trial).

21. See *Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 950-51 (10th Cir. 2004) (concluding party may challenge sufficiency of evidence on appeal if it made Rule 50(a) motion); *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1246 (10th Cir. 1999) (holding party not barred from challenging sufficiency of evidence on appeal).

22. See *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (explaining prevention of manifest injustice may justify consideration of waived argument on appeal); *Stephenson v. Doe*, 332 F.3d 68, 76 (2d Cir. 2003) (holding court may consider motion for JMOL raised on appeal to prevent manifest injustice); *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 129 (2d Cir. 1999) (holding court may overlook failure to comply with Rule 50(b) where verdict lacks legal support); 19 MOORE ET AL., *supra* note 16, at § 205.05[3] (noting circuit court may review waived claim only for plain error); Alt, *supra* note 19, at 284 (explaining, absent post-verdict motion for JMOL, appellate review limited to whether plain error committed).

23. 386 U.S. 317 (1967).

24. See *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 330 (1967) (concluding appellate court's entry of JNOV not unconstitutional).

25. See *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967) (noting broad statutory grant of appellate jurisdiction to courts of appeals under § 2106). The Court reasoned that an appellate court's entry of JNOV does not interfere with the "province of the jury" any more so than a trial court's entry of JNOV. *Id.* at 322 (upholding practice under scrutiny of Seventh Amendment's right to jury trial). The Seventh Amendment prohibits federal appellate courts from reexamining jury findings. See *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (noting Seventh Amendment adopted to preserve and protect right to trial by jury); Debra L. Bassett, "I Lost at Trial—in the Court of Appeals!": *The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 HOUS. L. REV. 1129, 1136-39 (2001) (explaining constitutional guarantee provided by Seventh Amendment's reexamination clause); Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 298-313 (1989) (discussing constitutionality of new trials, JNOVs, and deference to trial judges regarding such issues). See generally Robert A. Ragazzo, *The Power of a Federal Appellate Court to Direct Entry of Judgment as a Matter of Law: Reflections on Weisgram v. Marley Co.*, 3 J. APP. PRAC. & PROCESS 107 (2001) (describing Supreme Court precedent delineating power of federal appellate courts to direct JMOL). Further, 28 U.S.C. § 2106 provides as follows:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may

later extended *Neely*, holding that courts of appeals have the power to direct entry of JMOL where expert testimony was inadmissible and thus unavailable to support the jury's verdict.²⁶ In both cases, however, the movant made a pre-verdict and post-verdict motion for JMOL.²⁷

In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, the Supreme Court considered whether a party who filed a Rule 50(a) motion for JMOL, but failed to renew that motion and failed to move for a new trial, may challenge the sufficiency of evidence on appeal.²⁸ Relying on the analyses in "The Trilogy," the Court reasoned that the decision whether to grant a new trial or enter judgment 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."²⁹ The Court also concluded that the plain language of Rule 50(b) supports its decision.³⁰ The Court held that the movant's failure to make either a post-verdict motion for JMOL or motion for new trial in the district court precluded review of the sufficiency of the evidence on appeal.³¹

Although the Court properly concluded that ConAgra's failure to make a Rule 50(b) motion precluded the *district court* from directing a verdict in favor of ConAgra, this does not necessarily imply that the courts of appeals are without power to review district court judgments or to order fair relief under the circumstances.³² Indeed, under 28 U.S.C. § 2106, Congress explicitly conferred this power upon the courts of appeals.³³ Furthermore, the majority's

remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106 (2006).

26. See *Weisgram v. Marley Co.*, 528 U.S. 440, 457 (2000) (concluding practice not violative of Seventh Amendment); see also 9A WRIGHT & MILLER, *supra* note 20, at § 2540 (discussing appellate review of renewed motions for JMOL); Ragazzo, *supra* note 25, at 111-17 (examining effect of *Weisgram*).

27. See *Weisgram v. Marley Co.*, 528 U.S. 440, 445 (2000) (explaining background of case); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 319 (1967) (setting forth facts of case).

28. See 546 U.S. at 396 (determining whether court may grant new trial based on legal insufficiency of evidence).

29. See *id.* at 401 (quoting *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947)) (concluding post-verdict motion required in district court).

30. See *id.* at 404-05 (reasoning appeals court powerless to grant new trial). When ruling on a Rule 50(b) motion, a district court may only order a new trial on the basis of issues raised in a pre-verdict Rule 50(a) motion. See FED. R. CIV. P. 50(b); 546 U.S. at 405 (describing availability of new trial relief). In addition, the Court reasoned that 28 U.S.C. § 2106 should not be interpreted to grant appellate courts broad power. See 546 U.S. at 402 n.4 (concluding Seventh Amendment limits appellate courts' power to review judgments).

31. See 546 U.S. at 407 (deciding court without power to review sufficiency of evidence).

32. See *id.* at 408 (Stevens, J., dissenting) (criticizing majority's holding). In addition, while the majority reasoned that the plain meaning of Rule 50(b) supported its holding, nothing in the language of Rule 50 requires a party to make a post-verdict motion under Rule 50(b) to preserve the right to challenge the sufficiency of evidence on appeal. See FED. R. CIV. P. 50(b); 546 U.S. at 408 (Stevens, J., dissenting) (noting Rule 50(b) not a limit on 28 U.S.C. § 2106's statutory grant of power to appellate courts).

33. See 546 U.S. at 407 (Stevens, J., dissenting) (noting courts have duty to obey statutory commands

reliance upon *Cone* and *Globe* is misguided because 28 U.S.C. § 2106 was enacted following these decisions.³⁴

Based upon *Cone*, *Globe*, and *Johnson*, the majority maintained that ConAgra's sufficiency-of-the-evidence challenge could not be considered because it was not preserved on appeal.³⁵ The Court, however, neglected to recognize that a litigant's failure to preserve an argument does not render an appellate court powerless to review that argument.³⁶ Courts of appeals, for example, may consider issues raised for the first time on appeal where doing so would prevent manifest injustice.³⁷ Thus, the majority's excessively formalistic holding precludes appellate courts from reviewing the substance of a case due to a mere procedural misstep in the trial court.³⁸

In addition, contrary to the majority's argument, the Seventh Amendment does not limit appellate courts' power to review judgments under 28 U.S.C. § 2106.³⁹ ConAgra prompted the automatic reservation of "legal questions" under Rule 50(b) by filing a Rule 50(a) motion, thus avoiding any Seventh Amendment problem.⁴⁰ Furthermore, under the circumstances in this case, the Seventh Amendment restricts appellate courts and district courts to the same degree.⁴¹

even in areas such as procedure); *Weisgram v. Marley Co.*, 528 U.S. 440, 450 (2000) (noting broad power of appellate courts under 28 U.S.C. § 2106); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322-330 (1967) (reasoning 28 U.S.C. § 2106 grants broad appellate jurisdiction); *Ragazzo*, *supra* note 25, at 128 (explaining courts of appeals have power to review district court judgments).

34. *See* 546 U.S. at 407-08 (Stevens, J., dissenting) (arguing Court's holding inconsistent with 28 U.S.C. § 2106). Justice Stevens notes that 28 U.S.C. § 2106 was enacted just months after these decisions, and it is still effective. *Id.* (explaining statute trumps limitations set forth in *Trilogy*).

35. *See id.* at 400-01 (majority opinion) (stressing importance of district court judge's first-hand knowledge of case).

36. *See id.* at 408 (Stevens, J., dissenting) (noting, absent statutory command, litigant's waiver does not preclude courts of appeals from reviewing argument).

37. *See id.* (arguing majority's analysis flawed); *see also* *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (explaining courts of appeals may consider waived arguments where doing so would prevent manifest injustice); *Stephenson v. Doe*, 332 F.3d 68, 76 (2d Cir. 2003) (concluding court may consider motion for JMOL raised on appeal to prevent manifest injustice); *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 129 (2d Cir. 1999) (holding court may overlook failure to comply with Rule 50(b) where verdict wholly without legal support); 19 MOORE ET AL., *supra* note 16, at § 205.05 (explaining circuit court may review waived claim for plain error); *Alt*, *supra* note 19, at 284 (noting, absent post-verdict motion for JMOL, appellate review limited to whether plain error committed).

38. *See* 546 U.S. at 407 (Stevens, J., dissenting) (favoring procedural leniency over binding waiver and noting liberal spirit of Federal Rules).

39. *See id.* at 408 (arguing Court's reasoning incorrect); *Weisgram v. Marley Co.*, 528 U.S. 440, 450 (2000) (noting review of judgments under 28 U.S.C. § 2106 not violative of Seventh Amendment); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321-22, 330 (1967) (concluding appellate court's entry of JNOV constitutional). *But see* *Bassett*, *supra* note 25, at 1164-65 (arguing *Neely* and *Weisgram* represent departures from prior Supreme Court jurisprudence).

40. *See* 546 U.S. at 408 (Stevens, J., dissenting) (explaining no Seventh Amendment problem where Rule 50(a) motion reserved legal questions); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 660-61 (1935) (holding Seventh Amendment not bar to federal court directing verdict on reserved question of law).

41. *See* 546 U.S. at 408 (Stevens, J., dissenting) (noting Seventh Amendment does not restrict appellate courts more than trial courts); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967) (holding "there is

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In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, the Court considered whether an appellate court may review the sufficiency of evidence on appeal where the moving party made a pre-verdict motion for JMOL, but neither renewed that motion nor moved for a new trial after the verdict. While the Court was correct in noting that a district court may not direct a verdict in a party's favor where that party did not make a proper post-verdict Rule 50(b) motion, the Court erred in holding that appellate courts are powerless to review the sufficiency of evidence supporting a district court judgment under these circumstances. Under 28 U.S.C. § 2106, Congress conferred upon courts of appeals the power to review or modify district court judgments, and the Seventh Amendment does not limit this power. Therefore, the Court's holding undermines Congress's intent and will preclude appellate courts from reviewing the substance of claims due to mere procedural technicalities.

Corey M. Dennis