No. _____

In The
Supreme Court of the United States

FREDRIC N. ESHELMAN,

Petitioner,

v.

PUMA BIOTECHNOLOGY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Following a five-day trial, a jury found that Puma Biotechnology defamed Dr. Fredric Eshelman by falsely accusing him of committing fraud. The jury awarded Dr. Eshelman $15.85 million in compensatory damages and $6.5 million in punitive damages. Puma appealed, raising classic sufficiency of the evidence arguments, namely, that the question of damages "never should have made it to the jury" because there was no "proof of harm whatsoever." A panel of the Fourth Circuit agreed, holding that "there is no evidence whatsoever of actual harm sufficient to support the damages award." App.15.

Puma's sufficiency of the evidence arguments never should have been considered on appeal in the first place because Puma did not move for judgment as a matter of law in the district court either during trial (under Rule 50(a)) or after the verdict was returned (under Rule 50(b)). The Fourth Circuit's decision flouts this Court's holding in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006), that a defendant's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence." The decision below also conflicts with the decisions of several other circuits holding that *Unitherm* applies with full force to sufficiency of the evidence challenges to damage awards. The question presented is:

Under *Unitherm* and the Federal Rules, can a defendant who did not file a Rule 50 motion for judgment as a matter of law in the district court nonetheless raise a sufficiency of the evidence challenge to damages on appeal?

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Petitioner Dr. Fredric N. Eshelman was the plaintiff in the district court and the appellee/cross-appellant in the Fourth Circuit.

Respondent Puma Biotechnology, Inc. was the defendant in the district court and appellant/cross-appellee in the Fourth Circuit.

Pursuant to Rule 14.1(b)(iii), Petitioner is aware of one "directly related" case in state or federal courts: *Puma Biotechnology, Inc. v. Hedrick Gardner Kincheloe & Garofalo LLP.*, No. 20-CVS-12456 (N.C. Super. Ct. Mecklenburg Cty.) (Puma's legal malpractice lawsuit against its trial counsel, arguing Puma was prejudiced and injured by counsel's failure to file Rule 50 motions).

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INTRODUCTION

In the decision below, the Fourth Circuit threw out a reasoned jury verdict and a thorough, 44-page district court decision upholding that verdict, based on defaulted arguments that never should have been considered on appeal in the first place. Certiorari is warranted to review the Fourth Circuit's significant misinterpretation of this Court's precedents, resolve a clear and entrenched circuit split, and restore uniformity to this important area of the law.

Following a five-day trial in the U.S. District Court for the Eastern District of North Carolina, a jury unanimously found that Puma Biotechnology defamed Dr. Fredric Eshelman and awarded him $15.85 million in compensatory damages and $6.5 million in punitive damages. The evidence showed that Puma published to a global audience and to industry insiders false and defamatory accusations that Dr. Eshelman was replaced as CEO of the clinical research company he founded after being involved in clinical trial fraud. At no point in the district court proceedings did Puma move for judgment as a matter of law under Rule 50 on the ground that the evidence was insufficient to support an award of damages.

Puma nonetheless appealed to the Fourth Circuit on classic sufficiency of the evidence grounds, arguing that there was no "proof of harm whatsoever" and that Dr. Eshelman "introduced no evidence of actual harm to his reputation or emotional wellbeing." Puma C.A.4 Br. 18, 48-49. Under this Court's clear precedent, an appeal on those grounds should have been a non-starter because a defendant's "failure to comply with [FRCP] 50 forecloses its

challenge to the sufficiency of the evidence" on appeal. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006).

The Fourth Circuit nonetheless held that Puma could maintain its sufficiency of the evidence appeal because it had challenged the damage award as excessive in a motion for a new trial under Rule 59. But that holding is wrong on its own terms and conflicts with the decisions of multiple other circuits. Those other circuit courts have correctly recognized that *Unitherm*'s holding applies with full force in the context of sufficiency of the evidence challenges to damage awards. In direct conflict with the Fourth Circuit's reasoning, other circuit courts have also recognized that, although filing a Rule 59 motion can generally preserve the arguments raised therein for appeal, the "one exception" to that rule involves sufficiency of the evidence challenges, which—under *Unitherm*—must be raised through a Rule 50 motion in the trial court to be preserved for appeal. *Pediatrix Screening, Inc. v. TeleChem Int'l, Inc.*, 602 F.3d 541, 546-47 (3d Cir. 2010).

Certiorari is warranted not only to address this tension among the circuits but also considering the importance of this issue. This Court has repeatedly emphasized the sanctity of the jury's constitutionally protected role as the finder of fact responsible for weighing the evidence and assessing credibility. Simply put, the right to a jury trial is "'so fundamental and sacred to the citizen'" that it must be "'jealously guarded by the courts.'" *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 352 (1979) (citation omitted). Yet the decision below eliminates an important

procedural check on a litigant's ability to take an issue away from the jury by allowing a defaulted sufficiency of the evidence challenge to proceed on appeal notwithstanding a blatant failure to comply with Rule 50 and *Unitherm*.

Worse still, the decision below eliminated that critical procedural check in the context of a defamation case—an area of law in which courts have already demonstrated an unusual tendency to undermine jury verdicts. *See Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting from denial of certiorari) (lamenting that "because this Court's jurisprudence has been understood to invite appellate courts to engage in the unusual practice of revisiting a jury's factual determinations *de novo*, it appears just 1 of every 3 jury awards now survives appeal"); Elena Kagan, *A Libel Story:* Sullivan *Then and Now (reviewing Anthony Lewis, Make No Law: The* Sullivan *Case and the First Amendment (1991))*, 18 Law & Social Inquiry 197, 205 (1993) (The "obvious dark side" of current defamation jurisprudence is that it "allows grievous reputational injury to occur without monetary compensation or any other effective remedy."); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 875 (2000) (citing empirical studies and concluding that "the practical effect" of the constitutional and common law of defamation has "ma[d]e it almost impossible for any plaintiff to succeed in a defamation action"). Moreover, the Fourth Circuit's decision eliminates those procedural safeguards in an area of law in which "[t]he assessment of damages is particularly within the

province of the jury." *Blumenfeld v. Stuppi*, 921 F.2d 116, 118 (7th Cir. 1990); *Cantu v. Flanigan*, 705 F. Supp. 2d 220, 227 (E.D.N.Y. 2010) ("Jurors are uniquely positioned to assess the evidence presented at trial and assign a monetary value to the plaintiff's non-economic damages"; affirming $150 million non-economic defamation damages award). The petition should be granted.

OPINIONS BELOW

The Fourth Circuit's panel opinion is published at 2 F. 4th 276 and reproduced at App.1-19. The Fourth Circuit's order denying rehearing is reproduced at App.86-87. The district court's order denying Puma's Rule 59 motion is reproduced at App.20-85.

JURISDICTION

The Fourth Circuit issued its judgment on June 23, 2021, and denied rehearing on July 20, 2021. App.86-87. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 50 of the Federal Rules of Civil Procedure is reproduced in the Appendix at App.88-90.

STATEMENT OF THE CASE

A. Puma Defames Dr. Fredric Eshelman to a Global Audience in a Permanently Accessible Investor Presentation.

1. This case arises from Puma's publication of defamatory statements falsely accusing Dr. Eshelman of being replaced as CEO of the clinical research company he founded after being involved in clinical trial fraud. JA634-36, JA659.[1] Specifically, it arises from Puma's permanent publication of a defamatory presentation to a global audience, including shareholders and industry analysts, targeting Dr. Eshelman because he proposed adding independent directors to Puma's board after Puma committed securities fraud. JA757, JA759-60, JA771-73. Puma's retaliatory presentation levied among the most damaging accusations possible against Dr. Eshelman, claiming that a man who dedicated his life to ensuring ethical clinical research in the pharmaceutical industry was, himself, involved in clinical trial fraud. JA759-60, JA771-773, JA1635-36. The accusations are false. Dr. Eshelman and his company, Pharmaceutical Product Development ("PPD"), were the victims of a fraud committed by others—and the FDA recognized that PPD's whistleblowing resulted in the real perpetrator's criminal conviction. JA1309. But Puma intentionally and maliciously twisted the facts to punish

[1] "JA" refers to the Joint Appendix in the Fourth Circuit. "DE" refers to docket entries in the district court.

Dr. Eshelman—a Puma shareholder—for daring to question Puma's mismanagement.

2. Dr. Eshelman, a septuagenarian, has spent more than 40 years in the pharmaceutical industry, developing and commercializing medicines, monitoring clinical drug trials, and investing in new pharmaceuticals. JA753.

Born and raised in rural North Carolina, Dr. Eshelman ultimately obtained his Pharm.D. and began working for leading pharmaceutical companies developing medicines and serving in management. JA1546, JA1728, JA1742. In 1985, Dr. Eshelman founded PPD as a one-person start-up and eventually grew it into a successful contract research organization that runs clinical drug trials. JA753; DE 430 at 39. Dr. Eshelman was PPD's CEO from 1990-2009 and was promoted to Chairman of its board in 2009, a position he held until the company was sold in 2011. JA753. After also serving as the founding Board Chairman of Furiex Pharmaceuticals from 2009 until its 2014 sale, he founded Eshelman Ventures, which invests in nascent healthcare and pharmaceutical companies. JA753, JA1315, JA1728. He has served on the boards of numerous companies, earning a national reputation for "car[ing] more about shareholders getting a good return on their investment than ... about management remaining entrenched and in charge of [a] company." JA806, JA1728.

Dr. Eshelman developed a stellar, wide-ranging reputation, dedicating his life to the industry and quickly becoming known as a man of great integrity and ethics. JA1293-94, JA1297, JA1312-13.

The strength of Dr. Eshelman's reputation paid dividends, enabling him to expand his businesses, including growing PPD from a one-man start-up into a company with over $2 billion in revenue. JA1305; DE 430 at 39. Indeed, Dr. Eshelman earned such an impeccable reputation that Puma itself hired PPD to work on the clinical trial for its flagship drug. JA767. Dr. Eshelman is also a devoted philanthropist, giving over $140 million to charity—including $100 million to UNC's pharmacy school that bears his name. JA206; JA629; DE 430 at 159. By all accounts, before Puma's defamation, Dr. Eshelman's reputation was "extraordinary." App.68.

3. Puma is a publicly traded, for-profit biopharmaceutical corporation founded by Alan Auerbach. Auerbach previously founded Cougar Biotechnology, Inc. and grew and sold it for $1 billion. JA110-11. Demonstrating the value of reputation in the industry, Auerbach marshaled his then-stellar reputation to command sky-high compensation as Puma's President, CEO, and Board Chairman, JA1351-65, and from 2010-2018 alone received compensation valued at over $125 million, JA752.

Puma's single product was the cancer drug neratinib. JA752. In July 2014, Auerbach publicly claimed—while withholding supposedly corroborating data—that neratinib's disease-free survival rates were "in line" with an already-FDA-approved cancer drug. JA754. Puma's stock price immediately quadrupled, making Auerbach an "[o]vernight [b]illionaire," and Dr. Eshelman invested nearly $9 million in Puma. *Id.* Shortly after, Puma's claims were revealed to be false, and Puma's stock price

plummeted. JA754-55; JA1602. Auerbach's false statements resulted in a federal securities fraud verdict that Puma has estimated will result in up to $51.4 million liability.[2]

4. Troubled by Puma's mismanagement, Dr. Eshelman sent Puma a "books and records" request. JA757. Puma denied his request, and Auerbach reacted by telling his lawyers to "[t]ell [Eshelman] to go [f***] himself" and threatening to murder Dr. Eshelman with a tire-iron. JA608, JA1378. Increasingly concerned, Dr. Eshelman filed a Preliminary Consent Statement with the SEC, proposing that Puma's shareholders elect four independent directors to Puma's five-person board. JA757. Auerbach responded by vowing revenge and threatening that he was "going to F [Eshelman] up." JA757, JA796. Two days before drafting Puma's defamatory Investor Presentation, Auerbach reiterated, to industry analysts, that "Im [*sic*] just getting warmed up. I'm gonna f*** this Eshelman guy up. Bad." JA1690.

Auerbach made good on his threat. In December 2015, Puma mailed a "Consent Revocation Statement" to its shareholders across the country and around the globe, urging them to reject Dr. Eshelman's proposal and directing them, via weblink/URL in an "IMPORTANT NOTICE," to

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[2] *See Hsu v. Puma Biotechnology, Inc.*, No. 8:15-cv-865 (C.D. Cal.); Puma Biotechnology, Inc., Quarterly Report (Form 10-Q) at 42 (Aug. 5, 2021) https://www.sec.gov/ix?doc=/Archives/edgar/data/1401667/000156459021041634/pbyi-10q_20210630.htm.

Puma's website where Puma published its defamatory Presentation. JA151. Puma's defamatory Presentation falsely accused Dr. Eshelman of being replaced as CEO of PPD after being involved in clinical trial fraud. JA759-60, JA771-773, JA1635-34. But, in reality, PPD had been the victim of fraud, which it discovered and blew the whistle on during a trial of another company's drug. JA764-65, JA783-85, JA790, JA1309.

Puma published its defamatory Presentation to the largest possible audience. JA799-800. Puma published its Presentation in multiple places on its website where it was viewed repeatedly, including by people at institutional investors, banks, and brokerage firms, and was viewed hundreds of times by people around the world, from the United States to Germany to China to Japan and many places in between. JA771-72; PX-255. Puma also filed the Presentation with the SEC, and it is thus permanently accessible on the SEC's website—it cannot be removed or deleted. JA771. And Puma sent the Presentation directly to industry insiders, including at Vanguard Investments, JA772, and the Bank of America analysts to whom Auerbach promised he would "f*** up this Eshelman guy," with the added note that Dr. Eshelman "was involved in a clinical trial fraud.... Now you know why he [w]as fired as CEO of PPD." JA1404, JA1690, JA1696.

B. Proceedings Before the District Court.

1. In February 2016, Dr. Eshelman sued Puma for defamation. JA40-93. Puma unsuccessfully moved to dismiss, DE 20, filed counterclaims—which

the court dismissed—and took an interlocutory appeal to the Fourth Circuit—which that court summarily dismissed. JA323-32; JA381-82; JA398-99; JA401-13. Following discovery, the parties cross-moved for summary judgment. The district court denied Puma's motion and granted Dr. Eshelman's motion in part, holding that Puma's statements were libelous *per se* and "of and concerning" Dr. Eshelman. JA600-26. The case proceeded to trial on the questions of falsity, actual malice, and damages.

2. The parties stipulated to a lengthy recitation of the facts about the events leading to Puma's publication of the false and defamatory Presentation. At trial, in addition to those stipulated facts, jurors heard "overwhelming" and "compelling" evidence of every factor that jurors must consider when determining presumed damages under North Carolina law. App.72-74; DE 386 at 21-22 (jury instructions). Examples are many:

- "The evidence showed that Eshleman built an extraordinary reputation over a 40-year period," JA1546, as a "leader in the [pharmaceutical] industry," JA1297, and that "[t]o be accused of fraud" went "to the heart of [his] career." JA1314.

- In the world in which Dr. Eshelman does business, having a "reputation as a person of integrity" is "everything." JA1304.

- Dr. Eshelman had uniquely monetized his reputation. JA1297, JA1305, JA1728-29.

- Notwithstanding his plans to retire, Dr. Eshelman, despite being a septuagenarian, "ha[s]n't retired" and instead "work[s] ... harder than [he] did before" to "demonstrate to people ... [Puma's defamation is] not true." JA1314-15.

- Puma's defamation caused Dr. Eshelman "stress," "anxiety," and "anguish," including because it affected him and "[his] family, in terms of a good name." JA1315.

- Puma's defamation hurt Dr. Eshelman's ability to pursue his businesses and charitable ventures because people "[a]re not going to do [business] with a fraudster." *Id.*

- Puma's Presentation was "very compelling," JA1718, and a sophisticated investor testified that he "would 'absolutely not' support" in "business someone who had been involved in fraud." JA772, JA1294.

- Puma directed shareholders to its defamatory statements, emailed them to investment professionals, and published them to global audiences in multiple locations, including a permanent, online, government-sanctioned forum—the SEC database—that is regularly consulted and relied upon by businesspeople doing diligence, that "can easily be reviewed, re-published, and called up in electronic searches," and that will continue to damage

Dr. Eshelman into the future. JA771-72, JA800-01, JA1404, JA1690-95.

- Puma's CEO—the author of the defamatory statements—refused to retract the defamation and expressed zero remorse for his actions, testifying that "[w]e have nothing to be sorry for." JA1462-63.

3. At no point during the trial did Puma move for judgment as a matter of law under Rule 50(a)—a motion that would have allowed it to challenge the sufficiency of the evidence on damages.

The case was submitted to the jury, which, after deliberating for over eleven hours, unanimously found that Puma defamed Dr. Eshelman and awarded him $15.85 million in compensatory damages and $6.5 million in punitive damages. Once again, Puma did not move for judgment as a matter of law under Rule 50(b) on the ground that the evidence was insufficient to support the damages awards. Instead, Puma moved only under Rule 59 for remittitur, or, in the alternative, a new trial.

4. The district court (Dever, J.) denied Puma's Rule 59 motion in a 44-page opinion. With regard to Puma's challenge to the size of the damages awards, the court explained that "the very unique facts of this case, including the 146 stipulations and the extensive trial record" were more than sufficient to sustain the jury's damages awards. App.68. The district court "recite[d] the 146 stipulated facts" that the jury received because they "provide necessary background information and help to explain the jury's verdict" and

discussed in detail the evidence in the trial record. App.32-64.

Among other things, the court explained based on its first-hand observations that "Eshelman presented compelling evidence of the reprehensibility of Puma's motives and conduct, the likelihood of serious harm to Eshelman, Puma's awareness of the probable consequence of its actions, [and] the duration of Puma's conduct," in addition to the "overwhelming evidence that Puma's statements were false" and "compelling evidence that Puma acted with actual malice." App.72-74. Emphasizing the importance of evaluating the evidence as it was presented in the courtroom, the district court specifically cited Puma's CEO's "disastrous" testimony and admonished that "[y]ou needed to see it to understand it completely." App.72-73.

The district court, after setting forth the types of evidence that juries may consider under North Carolina law when determining damages, explained that Puma failed to "cit[e] any persuasive factor to support its argument" against the jury's damages awards. App.67. Ultimately, the district court concluded:

> The jury deliberated for over eleven hours before determining liability and the amount of Eshelman's [] damages, and Puma does not raise a persuasive argument to set aside the jury's verdict. In fact, this court could not locate a single case applying North Carolina law in which a trial court remitted a jury's award of presumed damages or a North

> Carolina appellate court reduced such an award. Accordingly, in light of the stipulations, the evidence produced at trial, the credibility of the witnesses, and North Carolina law, the court declines to set aside the jury's [] damages award[s].

App.69.

C. Puma Sues Its Trial Counsel for Malpractice.

At the same time Puma pursued an appeal to the Fourth Circuit (*see infra*), Puma sued its trial counsel for legal malpractice. Specifically, the day after briefing closed in its appeal, Puma sued its trial counsel, alleging that counsel were negligent for failing to "make a motion for judgment as a matter of law under [FRCP 50]." Eshelman Notice of Suppl. Auth. [C.A.4 Dkt. 46] (Complaint ¶¶ 29, 43(e), *Puma Biotechnology, Inc. v. Hedrick Gardner Kincheloe & Garofalo LLP*, No. 20-CVS-12456 (N.C. Super. Ct. Mecklenburg Cty. Sept. 17, 2020)). Puma alleged that its trial counsel's actions in failing to make a Rule 50 motion were highly prejudicial because they "caused Puma to lose the Eshelman defamation case and caused the entry of a Judgment for excessive damages against Puma." *Id.* ¶ 45. Puma itself thus recognized that counsel's decision not to file a Rule 50 motion resulted in significant adverse consequences for its defense.

D. Proceedings on Appeal.

1. Because the evidence of Puma's misconduct was so extensive, Puma's appeal, remarkably, did not

challenge the sufficiency of the evidence supporting Puma's "actual malice"—the heightened standard of fault that "has evolved from a high bar to recovery into an effective immunity from liability" for defamation-defendants. *Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting from denial of certiorari).

Instead, Puma's appeal launched a broadside attack on the jury's considered verdict and the district court's thorough opinion refusing to set it aside. Although Puma did not file a Rule 50 motion before the district court (either during trial or post-verdict), Puma nonetheless attempted to challenge the sufficiency of the evidence of damages on appeal, arguing that the case "never should have made it to the jury" because there was no "proof of harm whatsoever." Puma C.A.4 Br. 4, 18. According to Puma, "Eshelman presented no evidence at trial of any harm, and the evidence affirmatively rebutted the notion that he suffered any." *Id.* at 20.

Under the guise of an appeal of the denial of its Rule 59 motion, Puma pressed classic sufficiency of the evidence arguments to the Fourth Circuit throughout its briefing, repeatedly arguing that "Eshelman presented *no evidence* of harm at trial, and any presumption of harm was firmly rebutted by evidence that he continued to enjoy a favorable reputation and a host of business opportunities even after the allegedly defamatory statements were made." Puma C.A.4 Reply Br. 36 (emphasis added).[3]

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[3] *See also, e.g.*, Puma C.A.4 Br. 18 (arguing that there was no "proof of harm whatsoever"); *id.* at 48-49 ("[Eshelman]

In so doing, Puma focused on its contention that there was no evidence that Dr. Eshelman suffered *pecuniary* harm—even though no such proof is required for presumed damages under North Carolina law and this Court's precedent.[4] Puma ignored all other cognizable evidence and defamation damages it had agreed that the court and jury must consider, DE 436 at 5-6 (Puma Mem. in Supp. of Rule 59 Mot. (citing Restatement (First) of Torts § 621 cmts. b-c (2018)))—and invited the Fourth Circuit to do the same.

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introduced *no evidence* of actual harm to his reputation or emotional wellbeing"; "[i]ndeed, the evidence showed the exact opposite—that Eshelman's reputation remained fully intact." (emphasis added)).

[4] *E.g.*, *Flake v. Greensboro News Co.*, 195 S.E. 55, 59 (N.C. 1938) ("The law presumes that general damages actually, proximately, and necessarily result from an unauthorized publication which is libelous *per se* and they are not required to be proved by evidence since they arise by inference of law, and are allowed whenever the immediate tendency of the publication is to impair plaintiff's reputation, although no actual pecuniary loss has in fact resulted."); *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405, 408 (N.C. 1984) ("[N]o proof is required as to any resulting injury"'; damages are "'not required to be proved by evidence.'" (quoting *Flake*, 195 S.E. at 59)); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred."); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) ("[P]roof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted[.]" (citation omitted)).

2. The Fourth Circuit fully affirmed the jury's finding that Puma had defamed Dr. Eshelman but vacated the jury's damages awards without even offering Dr. Eshelman a remittitur. App.11-19.

The court began by rejecting, in a footnote, Dr. Eshelman's argument that, under *Unitherm*, Puma waived its sufficiency of the evidence challenge to the jury's damages awards by failing to move for judgment as a matter of law under Rule 50. App.11 n.2. In so doing, the court disregarded this Court's holding in *Unitherm* that a party's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence," 546 U.S. at 404, and the holdings of no fewer than eight other federal circuits that have applied *Unitherm*'s holding to foreclose sufficiency-of-the-evidence challenges to damages awards when a party fails to file a Rule 50 motion before the district court.

The Fourth Circuit then accepted Puma's argument on the merits, echoing the sufficiency of the evidence arguments in Puma's briefing. According to the court, Dr. Eshelman "provide[d] *no support*" for his claimed damages and "there is *no evidence* justifying" the damages award, including "*no evidence whatsoever* of actual harm." App.12, 15 (emphasis added). By contrast, according to the court, "Puma presented evidence that ... Eshelman's reputation remained both commendable and intact after the [defamatory] publication." App.13.

Notwithstanding the abuse-of-discretion standard of review mandated by the Seventh

Amendment,[5] the Fourth Circuit, in "find[ing] no evidence to support" the jury's damages awards, App.17, did not discuss or even cite the district court's 44-page opinion denying Puma's motion for remittitur or, in the alternative, a new trial and upholding the jury's damages awards. The Fourth Circuit did not acknowledge, much less discuss, the district court's admonition about "the very unique facts of this case," including Puma's CEO's testimony that was so "disastrous" that "[y]ou needed to see it to understand it completely." App.68, 72. And the Fourth Circuit entirely ignored the fact that "[t]rial judges have the 'unique opportunity to consider the evidence in the living courtroom context,' while appellate judges see only the 'cold paper record.'" *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996) (citation omitted).

Moreover, although the court paid lip service to North Carolina law that "'presumes that general damages actually, proximately, and necessarily result' from defamation *per se*," App.13 (quoting *Flake v. Greensboro News*, 195 S.E. 55, 59 (N.C. 1938)), it repeatedly cited its (incorrect) belief that Dr. Eshelman presented "no evidence whatsoever of actual harm" in vacating the jury's damages awards. *E.g.*, App.12-15. And although North Carolina law provides that "the size of the award, standing alone"

[5] *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279-80 & nn.25-26 (1989).

is not evidence that a damages award is improper,[6] the court "start[ed] with the observation that the jury's [damages] award ... is exceptionally large," and made that observation outcome-determinative. App.12.

3. After the Fourth Circuit denied Dr. Eshelman's petition for rehearing and motion to stay the mandate pending decision on this then-forthcoming petition for certiorari, Dr. Eshelman made an Emergency Application to Chief Justice Roberts, as Circuit Justice, to stay the Fourth Circuit's mandate. *See Eshelman v. Puma Biotechnology, Inc.*, No. 21A14. On August 4, 2021, Chief Justice Roberts entered an order granting a stay of the Fourth Circuit's mandate and calling for a response from Puma. Ultimately, the Chief Justice vacated that order and denied Dr. Eshelman's Application.

[6] *Finch v. Covil Corp.*, 972 F.3d 507, 516 (4th Cir. 2020) (citing North Carolina caselaw).

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari to Address Whether a Party Waives a Sufficiency of the Evidence Challenge to a Damages Award if It Fails to Raise that Issue in a Rule 50 Motion at Trial.

A. Rule 50 is unquestionably available when a party argues that the evidence is insufficient to support a damages award.

Rule 50 provides that "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may … resolve the issue against the party" and grant that party judgment as a matter of law. Fed. R. Civ. P. 50(a). A party may move for judgment as a matter of law at any time before the case is submitted to the jury, *id.*, and may then renew its motion after a verdict is returned, Fed. R. Civ. P. 50(b).

In considering whether to grant a Rule 50 motion, a court must "review all of the evidence in the record, drawing all reasonable inferences in favor of the non-moving party," and "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000) (citation omitted). Critically, the court may not "make credibility determinations or weigh the evidence," as these are "'jury functions, not those of a judge.'" *Id.* at 150 (citation omitted); *see also Flowers v. S. Reg'l*

Physician Servs., Inc., 247 F.3d 229, 235 (5th Cir. 2001) ("[J]udgment as a matter of law should not be granted unless the facts and inferences point 'so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion.'").

A Rule 50 motion is unquestionably available when a defendant believes that the plaintiff has failed to offer sufficient evidence that it is entitled to damages or is entitled only to nominal damages. For example, in *Akouri v. State of Florida Department of Transportation*, 408 F.3d 1338 (11th Cir. 2005), the jury found that the defendant discriminated against the plaintiff in a promotion decision and awarded $700,000 in compensatory damages. The defendant moved for judgment as a matter of law on damages under Rule 50 both at the close of evidence and after the verdict was returned, arguing that the plaintiff "failed to adduce any evidence to support the jury's damages award." *Id.* at 1342. The district court agreed and "reduced [the plaintiff's] award to $1.00 in nominal damages on the basis that [plaintiff] failed to prove any actual damages—either monetary or non-monetary." *Id.* The Eleventh Circuit affirmed, explaining that "[a] review of the record reveals that [plaintiff] made no attempt to describe any kind of harm, mental, emotional, or otherwise, arising from the discrimination." *Id.* at 1345.

Similar cases abound in which a defendant moves for judgment as a matter of law under Rule 50 on the ground that the evidence is insufficient to support any damages (or only nominal damages). *See, e.g.*, *Neb. Plastics v. Holland Colors Americas, Inc.*,

408 F.3d 410, 417 (8th Cir. 2005) (defendant moved for JMOL on damages under Rule 50 and district court granted motion, holding that "there was not sufficient evidence from which the jury could have calculated [plaintiff's] future damages with reasonable certainty"); *Tercero v. Tex. Southmost Coll. Dist.*, 989 F.3d 291, 296 (5th Cir. 2021) (district court granted Rule 50(b) motion and held that plaintiff was entitled to only $1 of nominal damages because "there was an absence of sufficient evidence showing that [plaintiff's] injuries were caused by the due-process violation"; Fifth Circuit affirmed); *Alston v. King*, 231 F.3d 383, 385-86 (7th Cir. 2000) (defendant moved for judgment as a matter of law on the ground that the evidence was insufficient to support more than nominal damages). There is accordingly no question that a defendant who believes the evidence is insufficient to support a damages award may raise that issue both during trial under Rule 50(a) and after a verdict is returned under Rule 50(b).

B. Challenges to the sufficiency of the evidence are waived on appeal if not raised in a properly filed Rule 50 motion.

Although a party need not file any motions for judgment as a matter of law under Rule 50, it *must* do so if it intends to later appeal the judgment based on insufficiency of the evidence grounds. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006). In *Unitherm*, the defendant failed to make a post-trial motion for judgment as a matter of law under Rule 50(b) but the Federal Circuit nonetheless allowed the defendant to litigate a sufficiency-of-the-

evidence challenge on appeal. *See Unitherm*, 546 U.S. at 398-99.

This Court reversed, holding in no uncertain terms that a party's "failure to comply with [FRCP] 50 *forecloses its challenge to the sufficiency of the evidence*." *Id.* at 404 (emphasis added). That holding was grounded in the text of Rule 50, which "sets forth the procedural requirements for challenging the sufficiency of the evidence in a civil jury trial" and requires any such challenge to be raised at "two stages … prior to submission of the case to the jury, and after the verdict and entry of judgment." *Id.* at 399. The Court also explained that the "'requirement of a timely application for judgment after verdict is not an idle motion'" because "'principles of fairness'" dictate that the trial judge who saw the evidence first-hand should be given an opportunity to determine the sufficiency of the evidence in the first instance. *Id.* at 401 (citation omitted).

The Court further emphasized that its holding in *Unitherm* applies "with equal force whether a party is seeking judgment as a matter of law or simply a new trial." *Id.* at 402; *see also id.* (holding it "immaterial" whether party is seeking new trial or judgment as a matter of law based on insufficiency of the evidence); *id.* at 404 (Court's holding applies when a party "seeks a *new trial* based on the legal insufficiency of the evidence" but did not file proper motions under Rule 50). In short, "since [defendant] failed to renew its pre-verdict motion as specified in Rule 50(b), there was no basis for review of [defendant's] sufficiency of

the evidence challenge in the Court of Appeals." *Id.* at 407.[7]

C. The decision below conflicts with the decisions of multiple other circuits that properly apply *Unitherm* to sufficiency of the evidence challenges to damages awards.

This Court's intervention is warranted because the Fourth Circuit's decision conflicts with the decisions of multiple other circuits that have found sufficiency of the evidence challenges to damage awards foreclosed by *Unitherm* where the party failed to file proper motions under Rule 50 at trial. *See* S. Ct. R. 10(a) (certiorari warranted if a court of appeals "has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter").

For example, in *Gleason v. Norwest Mortgage, Inc.*, 253 F. App'x 198, 202 (3d Cir. 2007), the defendant argued that "the evidence presented at trial was insufficient as a matter of law for the jury to find that Norwest suffered any loss because the supposedly lost value to Gleason was based on lost profits that were not reasonably certain to materialize." That is *virtually identical* to what Puma

[7] The 7-2 majority in *Unitherm* also expressly rejected the dissent's suggestion that "courts of appeals [may] consider the sufficiency of the evidence underlying a civil jury verdict notwithstanding a party's failure to comply with Rule 50" as "foreclosed by authority of this Court." *Unitherm*, 546 U.S. at 402 n.4.

argued on appeal here—namely, that Dr. Eshelman "presented no evidence at trial of any harm, and the evidence affirmatively rebutted the notion that he suffered any." *E.g.*, Puma C.A.4 Opening Br. 20.

While the Fourth Circuit allowed Puma's waived arguments to be considered on the merits, the Third Circuit correctly found similar arguments to be barred by *Unitherm*. "For a party to challenge on appeal the sufficiency of the evidence to support a jury's finding, that party must have first made an appropriate post-verdict motion under [Rule] 50(b)." *Gleason*, 253 F. App'x at 202. A court "will not consider [the defendant's] challenge to the sufficiency of the evidence" on appeal where that party "filed no such post-verdict motion" under Rule 50(b). *Id.* Under that reasoning, Puma's sufficiency of the evidence appeal would have been a non-starter if this case had arisen in the Third Circuit.

Similarly, in *RFF Family Partnership, LP v. Ross*, 814 F.3d 520, 536-37 (1st Cir. 2016), the plaintiff argued on appeal that it was entitled to at least a certain level of damages as a matter of law because "there was no evidence before the jury that would allow the jury to return a verdict of less than $866,000 in damages." But the plaintiff had failed to advance any similar argument in the Rule 50 motions it filed at trial, and the court accordingly held that "[t]his argument has not been adequately preserved for appeal." *Id.* at 536.

The Eleventh Circuit's decision in *Rosenberg v. DVI Receivables XIV, LLC*, 818 F.3d 1283 (11th Cir. 2016), also underscores that a party may not evade the requirements of Rule 50 and *Unitherm* by

recharacterizing a defaulted sufficiency of the evidence challenge as another type of argument. After failing to renew its challenge to emotional distress damages through a post-trial Rule 50(b) motion, the defendant in *Rosenberg* attempted to re-cast its argument as an assertion that the damage award violated Eleventh Circuit precedent. But the court rejected that maneuver, explaining that "*[r]egardless of how the defendants attempt to characterize their claim*, we think it is clear that they seek to challenge the sufficiency of the evidence at trial." *Id.* at 1292 (emphasis added); *see also Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 804 (7th Cir. 2016) (holding that "[t]o the extent" the party "framed" its arguments on appeal "as a challenge to the sufficiency of the evidence," that argument was "waived" because "the City failed to make a proper motion under [Rule 50]"). These cases are clear that the court must focus on substance over form in determining whether a defendant is impermissibly seeking to appeal on sufficiency of the evidence grounds that were not properly raised below through a Rule 50 motion.

Here, too, it was crystal clear that Puma's appeal fundamentally sought to challenge the sufficiency of the evidence in support of *any* damage award. *See supra* 14-16; *infra* 28-29. Puma's failure to properly raise that issue through a Rule 50 motion would have thus been "fatal to the defendants' argument on appeal" if they had sought to appeal on those grounds in the Eleventh Circuit, *Rosenberg*, 818 F.3d at 1292, or the other circuits that correctly interpret and apply *Unitherm*.

Several other circuits have likewise held that a defendant cannot argue on appeal that the plaintiff "did not offer sufficient evidence of damages" where that defendant "did not [make] its sufficiency of the evidence claim in a Rule 50 [] motion." *Crew Tile Distrib., Inc. v. Porcelanosa L.A., Inc.*, 763 F. App'x 787, 800 (10th Cir. 2019); *see also Noyes v. Kelly Servs., Inc.*, 349 F. App'x 185, 188 (9th Cir. 2009) (party that did not file a Rule 50 motion cannot "challenge[] the sufficiency of the evidence to support the amount of compensatory damages"); *OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*, 841 F.3d 669, 680 (5th Cir. 2016) (party cannot dispute sufficiency of the evidence in support of lost profits award on appeal where not "properly raised in a Rule 50(b) motion"); *Bennett v. Nucor Corp.*, 656 F.3d 802, 813 (8th Cir. 2011) (defendant cannot argue on appeal that "there was insufficient evidence to support the jury's award of punitive damages" where it did not raise that argument below through Rule 50 motion).

By contrast, the Sixth Circuit and Federal Circuit have agreed with the Fourth Circuit that a party may raise a sufficiency of the evidence argument through some alternative means (such as a motion for a new trial) even if it failed to file a Rule 50 motion. The Sixth Circuit has held that "[a] court may grant a new trial if the jury's verdict could not 'reasonably ... have been reached' based on the evidence presented at trial—*even if the moving party never asked for judgment as a matter of law*." *Peterson v. W. TN Expediting, Inc.*, 856 F. App'x 31, 33 n.1 (6th Cir. 2021) (emphasis added). And the Federal Circuit has likewise held (applying Second Circuit law) that a

court may "order a new trial" even if "no motion for JMOL was made under Rule 50(a)." *Medisim Ltd. v. BestMed, LLC*, 758 F.3d 1352, 1359 (Fed. Cir. 2014).

D. Puma's filing of a Rule 59 motion does not excuse its failure to file a Rule 50 motion because it challenges the sufficiency of the evidence on damages.

The Fourth Circuit brushed this entire issue aside in a footnote, asserting that *Unitherm*'s waiver rule "applies to challenges to the sufficiency of the evidence, not to Rule 59 motions alleging an excessive damages verdict." App.11 n.10. Puma, too, has argued that its failure to file a Rule 50 motion was harmless or irrelevant because it separately moved for a new trial under Rule 59. *See* Puma C.A.4 Response/Reply Br. 30 ("Puma clearly challenged the damages awards as excessive under Rule 59(e), not Rule 50, in the district court."). But that reasoning is flawed on several levels, and there is zero authority for the proposition that filing a Rule 59 motion can salvage a waived sufficiency of the evidence challenge.

At the outset, the Fourth Circuit's reasoning misconstrues the arguments that Puma raised both on appeal and in its Rule 59 motion below. Although styled as an appeal from the denial of a motion for a new trial, there is no question that Puma was raising classic sufficiency of the evidence arguments on appeal. Puma's core argument was that the damage award was "unsupported by *any evidence* of actual real-life harm to Eshelman or his reputation." Puma C.A.4 Br. 45 (emphasis added); *see also id.* at 47 (arguing there was "(non-existent) evidence of

damages presented at trial"); *id.* at 48 (Eshelman purportedly "introduced no evidence of actual harm to his reputation or emotional wellbeing"); *id.* ("[Eshelman] could not point to a single damaged business relationship or lost opportunity as a result of the publication of the presentation."); *id.* ("Other than his friend Kenneth Lee, Eshelman was unaware of anyone in the business community or elsewhere who had actually read the presentation."); *id.* at 49 ("Eshelman's reputation remained fully intact.").

Those arguments did not in any way turn on the *specific* damages award returned by the jury; they instead asserted that Eshelman should be entitled to *nothing* other than nominal damages, full stop. These are precisely the types of arguments that could—and should—have been raised via a Rule 50(a) motion during trial and renewed under Rule 50(b) after the verdict was returned. *See supra* Section I.A (collecting cases). There is no doubt that Puma could have made these motions—because these are the same arguments Puma made (unsuccessfully) to the jury in its closing arguments, urging the jury to reject any damages award, or, at most, award nominal damages. DE 431 (Mar. 13, 2019 Trial Tr. 244-46). Since Puma failed to raise its sufficiency of the evidence arguments "as specified in Rule 50(b), there was no basis for review of [Puma's] sufficiency of the evidence challenge in the Court of Appeals." *Unitherm*, 546 U.S. at 407.

In all events, the text of Rule 50 itself contemplates that parties may file *both* a Rule 50 motion and a Rule 59 motion. Rule 50(b) specifically provides that a party may move for judgment as a

matter of law "and may include an alternative or joint request for a new trial under Rule 59." Fed. R. Civ. P. 50(b). In such circumstances, Rule 50(c) directs the court to first rule on the motion under Rule 50 but also to issue a conditional ruling on the Rule 59 motion to ensure those issues are preserved and properly presented for appellate review.

It should hardly come as a surprise, then, that a party may need to file motions under *both* Rule 50 *and* Rule 59 depending on the types of arguments it is raising. As one observer has explained, Rule 50 motions raising sufficiency of the evidence and Rule 59 motions requesting a new trial based on excessiveness or the weight of the evidence "are often raised together and ideally should be." Steven Alan Childress, *Revolving Trapdoors: Preserving Sufficiency Review of the Civil Jury After* Unitherm, 26 Rev. Litig. 239, 244 (2007); *see also Crew Tile Distrib.*, 763 F. App'x at 800 n.6 (noting that party can combine Rule 50 and Rule 59 motion to preserve issues for appeal). Indeed, in both *Gleason* and *OneBeacon*, the defendants *did* file Rule 59 motions in the trial court but that did not prevent the waiver of their sufficiency of the evidence challenges to the damage awards because they had failed to make the proper motions below under Rule 50. *See Gleason*, 253 F. App'x at 202-03 (defendant allowed to appeal from denial of Rule 59 motion but not from waived sufficiency of the evidence claim); *OneBeacon*, 841 F.3d at 675, 680 (challenge to lost profits damage award barred for lack of Rule 50 motion notwithstanding party's separate Rule 59 motion).

The Third Circuit, moreover, has expressly held that—under *Unitherm*—a party *must* file a Rule 50 motion to preserve its sufficiency of the evidence challenge even if it files a separate Rule 59 motion. *See Pediatrix Screening, Inc. v. TeleChem Int'l, Inc.*, 602 F.3d 541, 545-47 (3d Cir. 2010). The court explained that, as a general matter, issues preserved in a Rule 59 motion may be pursued on appeal regardless of whether the party filed a Rule 50 motion. But the court emphasized that the "one exception" to that rule is when a party seeks to appeal based on "insufficiency of the evidence." *Id.* at 547 & n.10; *see also Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 397 n.2 (6th Cir. 2008) (explaining that *Unitherm* requires Rule 50 motions to be properly filed to preserve "question[s] going to the sufficiency of the evidence"); *Crowley v. Epicept Corp.*, 883 F.3d 739, 751 (9th Cir. 2018) (holding that, under *Unitherm*, "a post-verdict motion under Rule 50(b) is an *absolute prerequisite* to any appeal based on insufficiency of the evidence" (emphasis added)). That reasoning is exactly correct under *Unitherm*—but is irreconcilable with the Fourth Circuit's suggestion that filing a Rule 59 motion can salvage a defaulted sufficiency of the evidence argument that was not properly raised in a Rule 50 motion at trial.

II. This Court's Intervention Is Imperative to Preserve the Constitutionally Protected Role of the Jury, Especially in Cases Involving Intangible Damages.

The Seventh Amendment protects "the right of trial by jury" and provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the

United States, than according to the rules of the common law." U.S. Const. amend. VII. Consistent with that foundational guarantee, this Court has held that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Rule 50 relief is an extraordinary remedy because it involves the court either declining to submit an issue to the jury at all (under Rule 50(a)) or overriding the jury's determination after seeing all the evidence (under Rule 50(b)). It is thus imperative for courts to ensure scrupulous compliance with all procedural requirements when a party seeks—as Puma does here—to take an issue away from the jury based on alleged insufficiency of the evidence. Simply put, the right to a jury trial is "'so fundamental and sacred to the citizen'" that it must be "'jealously guarded by the courts.'" *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 352 (1979) (citation omitted).

Concerns about preserving the constitutionally protected role of the jury are heightened in cases like this one that involve intangible damages such as harm to a person's reputation—cases in which the jury is uniquely suited to determine a just award after seeing the evidence and witnesses first-hand. As this Court has recognized, "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted." *Dun & Bradstreet, Inc. v.*

Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985); *see also Flake v. Greensboro News Co.*, 195 S.E. 55, 59 (N.C. 1938) (damages allowed in defamation *per se* cases "whenever the immediate tendency of the publication is to impair plaintiff's reputation, although no actual pecuniary loss has in fact resulted"). Similar concerns arise in cases (also like this case) involving psychological harm or emotional distress; courts must be "deferential to the fact finder because the harm is subjective and evaluating it depends considerably on the demeanor of the witnesses." *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 476 (11th Cir. 1999) (citation omitted); *see also Marable v. Walker*, 704 F.2d 1219, 1220-21 (11th Cir. 1983) (plaintiff's testimony that he was embarrassed and humiliated by defendant's conduct was sufficient to support compensatory damages award).

Multiple Justices of this Court have noted that defamation-plaintiffs already face numerous obstacles to recovery, many of which are questionable as a matter of first principles. *See Berisha v. Lawson*, 141 S. Ct. 2424, 2424-25 (2021) (Thomas, J., dissenting from denial of certiorari) (questioning constitutional basis for "actual malice" requirement); *id.* at 2428-29 (Gorsuch, J., dissenting) (same). And, even for those few plaintiffs—like Dr. Eshelman—who make it to a jury and win damages at trial, "nearly one out of five today will have their awards eliminated in post-trial motions practice." *Id.* at 2428. Any verdict that makes it all the way through the trial court (again like Dr. Eshelman's) is then "still likely to be reversed on appeal." *Id.* Ultimately, "it appears just 1 out of every 3 jury awards now survives appeal." *Id.*

In short, notwithstanding the profound harms to a person's reputation that can result from the publication of false statements—and notwithstanding the jury's unique competence in identifying and assessing damages for those falsehoods—defamation-plaintiffs like Dr. Eshelman continue to face numerous obstacles to their ultimate recovery. The decision below provides yet another means for a defendant to evade accountability for its wrongdoing.

Moreover, the Fourth Circuit's decision results in a significant injustice for Dr. Eshelman. This case has been pending since early 2016. Notwithstanding the affirmed findings that Puma defamed Dr. Eshelman and acted with actual malice, Dr. Eshelman—a septuagenarian who is eager to put this matter behind him once and for all—will now be forced to start from square one on damages. Indeed, the Fourth Circuit's opinion is especially problematic because the court held the damage award to be unsupported by the evidence but gave no guidance about what amount of damages it believed *would* be permissible. The parties will thus be relegated to potentially years of additional litigation with no guidance to ensure that any subsequent damage award will pass muster under the Fourth Circuit's insufficiently deferential standard of review.

* * *

This Court should grant certiorari to ensure full compliance with *Unitherm* and prevent defendants from nullifying a jury's damage award based on defaulted sufficiency-of-the-evidence arguments that never should have been considered on appeal in the first place.

CONCLUSION

The Court should grant the petition for certiorari.

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