Defining the Appellate Universe: Does FRCP 52(b) Impose a Duty on Litigants?

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INTRODUCTION: LIGHTNING BUGS, FERRETS, AND ISSUE *Y*

The difference between the almost right word and the right word is . . . the difference between the lightning bug and the lightning.
—Mark Twain[1]

Judges are not ferrets.
—*Linrud v Linrud*[2]

The quotations above highlight a central tension in the law: care and thoroughness versus preservation of resources.[3] One aspect of this tension is revealed by a circuit split related to the Federal Rules, in particular the question of whether Rule 52(b) imposes a duty on litigants to preserve an issue for appeal or risk waiving[4] it. Rule 52(b) provides that "[o]n a party's motion . . . after entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly."[5] The rule permits a party to file a motion for findings after the judgment; whether it *requires* such a motion in order to preserve certain issues for appeal is open to debate.

In creating a record adequate for purposes of appellate review, both litigants and judges bear burdens. Litigants must, through their actions in the trial court, put the trial judge on notice that a given issue needs to be addressed (thus preserving the issue). In turn, judges in non-

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1 Mark Twain, *Reply to the Editor of* The Art of Authorship, in Tom Quirk, ed, *Mark Twain: Tales, Speeches, Essays, and Sketches* 359, 360 (Penguin 1994).

2 552 NW2d 342, 345 (ND 1996).

3 See *Scalea v Scalea's Airport Service, Inc*, 833 F2d 500, 502–03 (3d Cir 1987) (per curiam) (remanding a case to the trial court where the lower court's opinion spoke only in generalities about the claims raised by one party in a contract dispute); *Colorado River Water Conservation District v United States*, 424 US 800, 817–21 (1976) (discussing judicial economy as a reason for avoiding duplicative litigation in state and federal courts).

4 "Forfeiting" is the more accurate term. See *United States v Charles*, 476 F3d 492, 495 (7th Cir 2007) ("Waiver requires intentional relinquishment of a known right, whereas forfeiture is the result of an unintentional relinquishment of the right."). However, courts that discuss issue preservation most often refer to waiver, and so does this Comment.

5 FRCP 52(b). The Rule is discussed in greater detail in Part I.C.

jury trials must make factual findings and conclusions of law.[6] Where a judge fails to do this adequately—for example, if the court makes conflicting factual findings,[7] or if a trial court makes its findings in a conclusory manner[8]—an appellate court may remand the case.

Now imagine the following scenario: a trial judge is faced with Issues *X*, *Y*, and *Z* at trial. The judge is arguably[9] required to make findings on all these issues but fails to mention Issue *Y* in the court's opinion. Then the appellant fails to alert the trial court to the omission using Rule 52(b). Is the issue waived on appeal, or should the case be remanded for findings on Issue *Y*? That question is the basis of a circuit split.

Answering the question requires resort both to the Federal Rules and to an independent body of federal common law[10] that deals with preserving issues for appeal and places burdens on litigants and judges.[11] Importantly, determining the mix of duties that a system imposes on judges and litigants is a question distinct from determining the source of authority for imposing the duties in the first place. Where courts have held that a failure to file a Rule 52(b) motion waives an issue, they have not made a convincing case that Rule 52(b) is such a source.

This Comment proceeds in three parts. Part I provides an overview of the relevant Federal Rules, as well as the common law background on preserving issues for appellate review. Part II analyzes the holdings and rationales of the circuit courts' decisions related to Rule 52(b). A common feature of these cases is that the courts provide almost no legal analysis to support the positions they take. Part III seeks to fill the analytical vacuum, relying primarily on traditional tools of statutory interpretation to conclude that a reading of Rule 52(b) as mandatory is unsound. Although defenders of a mandatory interpretation of Rule 52(b) may argue that their interpretation leads to a more

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6 Under the Federal Rules, a judge in a nonjury trial "shall find the facts specially and state separately its conclusions of law. . . . Requests for findings are not necessary for purposes of review." FRCP 52(a). The Rule applies to cases tried without a jury as well as cases tried with an advisory jury. See id.

7 See *Cerros v Steel Technologies, Inc*, 398 F3d 944, 949–50 (7th Cir 2005).

8 See *Scalea*, 833 F2d at 502–03.

9 See notes 28–37 and accompanying text.

10 While *Erie Railroad Co v Tompkins*, 304 US 64, 78 (1938), held that there is no *general* federal common law, this has not prevented judges from crafting "what Judge Friendly has termed 'specialized federal common law' to govern a broad range of areas." Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv L Rev 1128, 1167 (1986).

11 The generally applicable common law rule is that a party may argue on appeal only those issues raised at trial. See *Yee v City of Escondido*, 503 US 519, 533 (1992). See also Robert J. Martineau, *Modern Appellate Practice: Federal and State Civil Appeals* § 3.1 at 34 (Lawyers Cooperative 1983). At the same time, this is an area in which reviewing courts have discretion. See *Singleton v Wulff*, 428 US 106, 121 (1976).

efficient allocation of resources, this is an empirical question the answer to which is far from clear. Indeed, because of that "stalemate of empirical intuitions,"[12] courts should be hesitant to call into doubt the interpretation of Rule 52(b) reached using the traditional tools.

I. BACKGROUND: HOW COURTS (AND THE FEDERAL RULES) REQUIRE PARTIES TO PRESERVE ISSUES WHILE PROMOTING TRIAL COURT CARE

Courts use common law doctrines on issue preservation as well as the Federal Rules to determine if an issue has been preserved for appeal. Although the common law and the federal rules represent distinct sources of authority, they are related: the philosophy of the common law is "embodied in the Federal Rules."[13] Indeed, two aspects of the common law doctrine on issue preservation are notably evident in the rules: parties must play a role in preserving errors, and judges must be thorough in their consideration of issues.

Common law practices on issue preservation have deep, historic roots, antedating the Federal Rules by centuries. Given the history, Part III argues that the drafters of Rule 52(b) most likely did not intend an ambiguous provision to work a substantial change on common law practice—at least not without comment in the Advisory Committee Notes.

A. Creating the Record and Waiving Issues at Common Law

Where parties at common law in England did not take affirmative steps to ensure that an issue was part of the record, the issue was waived. After judgment was entered in a case, an aggrieved party could file a writ of error.[14] When the writ was sent to the higher court,[15] the

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12 Adrian Vermeule, *Judging under Uncertainty* 153–54 (Harvard 2006) (describing a "stalemate of empirical intuitions" as occurring whenever the dispositive questions are empirical and "no empirical answers are currently available").

13 See *Pfeifer v Jones & Laughlin Steel Corporation*, 678 F2d 453, 457 n 1 (3d Cir 1982).

14 See W.S. Holdsworth, 1 *A History of English Law* 215–18 (Little, Brown 3d ed 1922). The writ of error was the precursor to the present day appeal, although it was not a true "appeal" in the modern sense. See id at 213. Instead, the writ was a new action initiated against the trial judge in a higher court. See Edson R. Sunderland, *Improvement of Appellate Procedure*, 26 Iowa L Rev 3, 7 (1940).

15 See Richard H. Field, et al, *Civil Procedure: Materials for a Basic Course* 1437 (Foundation 8th ed 2003). This court was, at least in the thirteenth and fourteenth centuries, almost always the King's Bench; courts that could review decisions of the King's Bench developed subsequently. See Holdsworth, 1 *A History of English Law* at 222 (cited in note 14).

record on review included only minimal information about the case.[16] To expand the record, a party could supplement the writ of error with a bill of exceptions, which allowed a party to object to the "direction[s] of the judge trying the cause" on legal issues or issues related to the admission of evidence.[17] The bill of exceptions both required and permitted parties to play a major role in creating the record for appeal.[18] Because the record itself contained so little information, if an error occurred at trial and there were no bill of exceptions, then a host of errors could not be reviewed.[19]

The common law rules were designed to promote care by trial judges because a judgment could fall for *any* error.[20] The requirement in Rule 52(a) that judges make factual findings and legal conclusions is analogous, although the modern rules are more forgiving to judges.[21] Still, requiring parties to help create the record on appeal reflected the "English instinct for judicial administration," which "has always recognized that the trial ... [is] the primary field of court operation."[22] That instinct crossed the Atlantic.

B. Creating the Record and Waiving Issues in American Courts

American courts inherited and preserved the practice of limiting appellate review only to those issues that were raised at trial.[23] Moreover, like the English courts, the Supreme Court recognized in *McLish v Roff*[24] the desirability of resolving cases efficiently. In order to fulfill this "object and policy" of the judicial system,[25] the record on appeal must be sufficiently developed to avoid unnecessary remands.[26] Federal

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16 Joseph H. Koffler and Alison Reppy, *Common Law Pleading* 599 (West 1969) (noting that the record included the original writ and the Sheriff's return, pleadings, the verdict, and the judgment).

17 John William Smith, *An Elementary View of the Proceedings in an Action at Law* 163–64 (Adamant Media 2006).

18 See Field, *Civil Procedure* at 1437 (cited in note 15).

19 See Koffler and Reppy, *Common Law Pleading* at 599–600 (cited in note 16) (noting the limited avenues for appellate review prior to 1285); J.W. Baker, *An Introduction to English Legal History* 136–38 (Butterworths 4th ed 2002).

20 See Holdsworth, 1 *A History of English Law* at 223 (cited in note 14).

21 See note 45 and accompanying text.

22 Sunderland, 26 Iowa L Rev at 4 (cited in note 14).

23 Id at 10. The English common law decisions involving writs of error are widely recognized as having strongly influenced appellate practice in the United States. See, for example, Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L J 539, 546 (1932). See also Judiciary Act of 1789 § 25, 1 Stat 85–86 (providing for appeal to the Supreme Court via writs of error).

24 141 US 661, 665–66 (1891).

25 Id.

26 See *Bailey v International Brotherhood of Boilermakers*, 175 F3d 526, 530 (7th Cir 1999); *Telecommunications, Inc v CIR*, 104 F3d 1229, 1232 (10th Cir 1997).

common law in America allocates much of the responsibility for developing the record to the parties—where a party fails to raise an argument effectively in the trial court, that argument is waived on appeal.[27] The modern common law rules do not put burdens on trial court judges; rather, they tell appellate court judges whether a party did enough to pursue an issue in the trial court such that the appellate court can consider that issue or argument. That is, the common law rules center on whether an appellate court can decide an issue, *not* whether the trial court was required to do so.

In rationalizing the disposition of burdens, American courts today go beyond the judicial economy argument advanced in *McLish*. One rationale for imposing the burden on parties is that it results in superior case outcomes.[28] As the Supreme Court noted in *Singleton v Wulff*,[29] parties need to play a role in developing the record before judgment passes on their claims[30] because this participation is more likely to produce the "proper resolution" of the issues.[31] Another idea relates to fairness—permitting a party to litigate an issue at the appellate stage where the opposing side did not have notice below robs the opponent of the opportunity to develop favorable facts and deploy persuasive arguments.[32]

Although the general rules on issue preservation reflect the idea that the trial is the primary forum in which parties should resolve disputes, the application of the rules in a given case may depend on the facts and the jurisdiction. As to the latter, the Court stated in *Singleton* that determining when an issue has been preserved should be "left primarily to the discretion of the courts of appeals."[33] As to the former, the case law shows that making a determination on whether an issue has been preserved may be fact specific.[34] For example, several courts have stated that an argument that is merely hinted at and not addressed by the trial court is not preserved for purposes of appeal.[35] Even if a party's ar-

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27 See *Wisconsin v Mitchell*, 508 US 476, 482 n 2 (1993); *Yee v Escondido*, 503 US 519, 533 (1992); *Tele-Communications, Inc*, 104 F3d at 1232–34 (delineating rationales for the general rule and describing the rule's contours within the Tenth Circuit).

28 *Bailey*, 175 F3d at 529–30.

29 428 US 106 (1976).

30 See id at 120.

31 Id at 121.

32 See, for example, *Atlanta Professional Firefighters Union, Local 134 v City of Atlanta*, 920 F2d 800, 806 (11th Cir 1991). See also *Singleton*, 428 US at 120.

33 428 US at 121.

34 See *Tele-Communications, Inc*, 104 F3d at 1233.

35 See *Harrell v United States*, 443 F3d 1231, 1233 (10th Cir 2006) (holding that vague references to an issue are insufficient for preservation on appeal); *Schneider v Local 103 IBEW Health Plan*, 442 F3d 1, 3 (1st Cir 2006) (holding that an issue raised in a perfunctory manner was

gument is vague, however, an appellate court might conclude that the issue has been preserved so long as the trial court addressed the argument.[36] This conclusion may be more likely where the appeals court need not remand the case or engage in additional factfinding to decide the merits of the argument.[37] Indeed, deciding matters in these instances allows appellate courts to resolve cases efficiently, sometimes sparing parties the unnecessary expense and delay of additional legal proceedings.

C. The Federal Rules of Civil Procedure

In addition to the common law rules on issue preservation, the Federal Rules place burdens on litigants and judges. The basic concept is that the federal rules allocate burdens to litigants (who make objections) and to judges (who make findings of fact and law). Rule 52(a) requires judges in nonjury trials to make findings of fact and conclusions of law. The rule serves at least two important purposes: it informs appellate courts about the basis for the trial court's decision, and it ensures reasoned decisionmaking by trial courts.[38] The next paragraph, Rule 52(b), lacks a clear interpretation. The Rule permits a party to file a motion for findings after the judgment; two circuit courts of appeals have held that, in order to preserve an issue, the rule in some instances *requires* a party to file a 52(b) motion.[39]

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not preserved); *New York Life Insurance Co v Brown*, 84 F3d 137, 142 n 4 (5th Cir 1996) (stating that when a party does not press an argument at trial but only "intimates" it, the issue is waived for purposes of appellate review).

36 See *Salge v Edna Independent School District*, 411 F3d 178, 184 n 2 (5th Cir 2005).

37 See *Bailey*, 175 F3d at 530.

38 See *TEC Engineering Corp v Budget Molders Supply, Inc*, 82 F3d 542, 545 (1st Cir 1996) (discussing the importance of creating a record adequate for review); *United States v Merz*, 376 US 192, 199 (1964) (discussing the importance of reasoned decisionmaking). See also Charles Alan Wright and Arthur R. Miller, 9A *Federal Practice and Procedure* § 2571 at 219–22 (West 2008) (noting additional purposes courts have identified including "to make definite precisely what is being decided by the case in order to apply the doctrines of estoppel and res judicata").

39 There is an additional rule on issue preservation that courts use, Rule 46, whose language and structure are contrasted with Rule 52 in Part III.A. Rule 46 requires parties to object to the actions of the trial court in order to preserve an issue for appeal. The Rule states:

> A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

FRCP 46. The plain language of the rule puts the burden on parties to preserve issues through their real-time objections, letting the trial court know the party's preferred course. A party must raise an objection pursuant to Rule 46 so as to "give the judge a fair chance to avoid error." *Kasper v Saint Mary of Nazareth Hospital*, 135 F3d 1170, 1176 (7th Cir 1998).

Rule 46 applies to rulings such as the formulation of issues for trial, see *Porterco, Inc v Igloo Products Corp*, 955 F2d 1164, 1173 (8th Cir 1992), arguments made by opposing counsel, see *Wal-*

1. Rule 52(a).

Rule 52(a) places certain burdens on judges. "[In all nonjury trials], the court must find the facts specially and state its conclusions of law separately."[40] Because requests for findings are not necessary for purposes of review, the rule is "self-executing." That is, regardless of what the parties do, judges are required to state their findings of fact and conclusions of law.[41] These requirements, in turn, promote care by the trial judge.[42] "Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper."[43]

By requiring judges to make factual findings and legal conclusions, Rule 52(a) makes meaningful appellate review possible through issue preservation.[44] This parallels the English common law, although the modern rule is considerably more forgiving.[45] When a trial judge does not sufficiently explain the basis for a ruling, the appellate court may remand the case to the district court. Appellate courts may do this when the lower court fails to address one of the arguments made by a party,[46] when the court fails to make one or more factual findings that make up a legal test,[47] or when the findings the court does provide are conclusory.[48]

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dorf v Shuta, 142 F3d 601, 629 (3d Cir 1998), and the appropriateness of jury instructions, see *Sucher Packing Co v Manufacturers Casualty Insurance Co*, 245 F2d 513, 519 (6th Cir 1957).

The importance of Rule 46 for purposes of this Comment consists of both what the rule does substantively and how the rule's interpretation and language can be compared with Rules 52(a) and 52(b). This idea is discussed in greater detail in Part III.A.

40 FRCP 52(a).

41 See *Abatie v Alta Health and Life Insurance Co*, 458 F3d 955, 973 (9th Cir 2006); *Berguido v Eastern Air Lines, Inc*, 369 F2d 874, 877 (3d Cir 1966).

42 See *United States v Forness*, 125 F2d 928, 942 (2d Cir 1942).

43 Id. See also *OCI Wyoming LP v PacifiCorp*, 479 F3d 1199, 1204 (10th Cir 2007) (stating that remand is appropriate where "too little detail" requires the appellate court "to guess at why the district court reached its conclusion").

44 See *Chaplaincy of Full Gospel Churches v England*, 454 F3d 290, 304–05 (DC Cir 2006).

45 The Advisory Committee Notes make clear that the judge must make only "brief, definite, pertinent findings and conclusions upon the contested matters" without overelaboration. See FRCP 52(a), Advisory Committee Note to the 1946 Amendments.

46 See, for example, *Supermercados Econo, Inc v Integrand Assurance Co*, 375 F3d 1, 3–5 (1st Cir 2004) (remanding where a district court failed to make findings on one of the two claims raised by the appellant); *In re Fordu*, 201 F3d 693, 710 (6th Cir 1999) (remanding a case where the bankruptcy court dismissed without discussion two of a trustee's causes of action); *Lipman v Arlington Seating Co*, 192 F2d 93, 96 (7th Cir 1951) (remanding a case where the district court failed to address in its opinion a defense that was brought to the attention of the court during oral argument).

47 See, for example, *Natural Organics, Inc v Nutraceutical Corp*, 426 F3d 576, 580 (2d Cir 2005). But see *Glaverbel Societe Anonyme v Northlake Marketing and Supply, Inc*, 45 F3d 1550, 1555–56 (Fed Cir 1995) (holding that a failure by the lower court to make findings on the obviousness of a patent pursuant to factors announced by the Supreme Court did not warrant remand).

2. Rule 52(b).

Rule 52(b) does not contain mandatory language similar to that found in Rule 52(a). The Rule provides that "[o]n a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly."[49] It does not say whether filing the motion is mandatory for purposes of preserving an issue. As explored in Part III.A, perhaps the maxim that differences in language are presumed to be intentional[50] can be applied to argue that filing a motion is mandatory for preserving issues. Alternatively, the absence of mandatory language could mean that the rule does not require anything of parties. Indeed, writing nearly twenty years ago, the chief judge of the Court of Appeals for the Federal Circuit bemoaned what he perceived as the permissive nature of the rule: "In so many instances ... the district court could, with relative ease, have supplied missing findings in response to a [Rule 52(b) motion].... Currently, there is no requirement that either party give the district court that opportunity."[51]

Whether that assumption is correct has become the subject of a circuit split. The split challenges the conclusion reached in one treatise that federal courts "have not gone out of their way to extend [the] application" of Rule 52.[52]

II. THE RULE 52(B) CIRCUIT SPLIT: MUST PARTIES FILE A 52(B) MOTION TO PRESERVE AN ISSUE?

The Eighth and Federal Circuits have held that, at least in some circumstances, failure to file a Rule 52(b) motion can prevent a party from obtaining review of that issue on appeal.[53] These "Rule 52(b) Waiver Courts" focus on the duties of parties in preserving issues for appeal, although the courts do not describe when this interpretation of Rule 52(b) would alter a trial court judge's burden under Rule 52(a). The First and Second Circuits have refused to make Rule 52(b) into a some-

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48 See, for example, *PacifiCorp*, 479 F3d at 1204. Trial courts, however, need not make detailed findings on every issue that is in the case.

49 FRCP 52(b).

50 See *Sosa v Alvarez-Machain*, 542 US 692, 712 n 9 (2004).

51 Howard T. Markey, *Real-world Rules: Easing the Life of Litigation*, 62 St John's L Rev 421, 424–25 (1988).

52 See Wright and Miller, 9A *Federal Practice and Procedure* § 2581 at 350 (cited in note 38).

53 See *Glaverbel Societe Anonyme v Northlake Marketing and Supply, Inc*, 45 F3d 1550, 1555–56 (Fed Cir 1995) (suggesting that a party may not complain about incomplete findings on appeal, at least when such findings were not "essential to resolution of the issue"); *Miller v Bittner*, 985 F2d 935, 940 (8th Cir 1993); *Herschler v Foodscience Corp*, 1995 WL 490283, *1 (Fed Cir).

times-mandatory motion, instead centering their analyses on the always-mandatory requirements imposed on trial court judges by Rule 52(a).[54] On the whole, the opinions speak past one another and offer very little interpretation of the meaning of Rule 52(b).

A. One Interpretation: A Party Waives an Issue When It Fails to File a Rule 52(b) Motion

1. Court of Appeals for the Eighth Circuit: A Sanctions Story.

In *Miller v Bittner*,[55] the defendant sought sanctions against the plaintiff under FRCP 11(c) for filing a claim that the plaintiff at least should have known was frivolous.[56] The trial court denied the sanctions and the defendant appealed to the Eighth Circuit. The defendant argued on appeal that the trial court failed to rule on one of the issues he had raised in his sanctions motion.[57] The plaintiff's lawyers, however, noted that the defendant had not filed a Rule 52(b) motion with the trial court. That fact proved dispositive:

> We need not consider whether it was error to fail to address the [issue] because we hold that the [defendant], by failing to raise this proposition in the trial court, deprived the trial judge of an opportunity to address the alleged error and make further findings. Therefore, the alleged error may not be raised on appeal.[58]

The court's reasoning was not very clear, however. The court quoted a large portion of Wright and Miller's treatise on the Federal Rules. But that excerpt merely described Rule 46, which puts burdens on parties to make contemporaneous objections, and Rule 52(a), which places burdens on judges.[59] The quoted text did not explain when judges have an independent duty to make factual findings and reach legal conclusions; neither did the court.

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54 See *Natural Organics v Nutraceutical Corp*, 426 F3d 576 (2d Cir 2005); *Supermercados Econo, Inc v Integrand Assurance Co*, 375 F3d 1 (1st Cir 2004).

55 985 F2d 935 (8th Cir 1993).

56 Id at 937–38. The facts are not entirely clear, but it appears that the reason the argument would have been frivolous relates to the fact that Bittner had successfully litigated the previous case.

57 Id at 940.

58 Id.

59 See *Miller*, 985 F2d at 940. That part of the treatise, quoted in the opinion, only noted that Rule 46 is the background rule, applicable whenever Rule 52 is not. Rule 46, of course, deals with objections to actions that the trial court takes, rather than its omissions. See note 39. Were this not the case, it would swallow up Rule 52(a) in its entirety.

Nearly all of the court's remaining analysis was relegated to a string cite in a footnote, listing eleven cases that "support[ed] the foregoing analysis."[60] Of the eleven cases, only a few even tacitly supported the court's conclusion.[61] Others dealt with factual settings that were quite different from those presented in *Miller*.[62] For example, one cited case was off point; it dealt with an issue that was waived on appeal because it was "[not made] in the complaint, no findings of fact were sought by the plaintiff, and no objection [was] raised below to the court's failure to make the relevant inquiry."[63] That court did not cite Rule 52(b) at all.[64] Moreover, the facts of *Miller* provided a signal difference: the defendant *had* presented the issue to the trial court in a motion.[65]

2. Court of Appeals for the Federal Circuit: Rule 52(b) and legal tests.

The Federal Circuit has suggested that, at a minimum, an appellate court will be more likely to hold that an issue is waived if a party fails to file a Rule 52(b) motion. In *Glaverbel Societe Anonyme v Northlake Marketing and Supply, Inc*,[66] the district court judge mentioned the right legal test to decide the case.[67] Citing Rule 52(b), the court stated that "[w]hen a party remains silent after full trial and decision and then com-

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60 See id at 940 n 1.

61 See, for example, *Porterco, Inc v Igloo Products Corp*, 955 F2d 1164, 1173 (8th Cir 1992) (refusing to consider a trial judge's failure to make a legal determination as required under Texas law, where the legal question was instead submitted to a jury and the appellant failed to raise an objection under FRCP 46).

62 See, for example, *Jones v Collier*, 762 F2d 71, 72 (8th Cir 1985) (citing Rule 46 and holding that an appellant waived his right to object to admission of evidence where he waived the objection by testifying about the very information he hoped to keep out of the trial); *Brookhaven Landscape v J.F. Barton Contracting*, 676 F2d 516, 523 (11th Cir 1982) (citing Rule 46 in a case dealing with failure to make a contemporaneous objection to the admission of evidence).

63 *George R. Whitten, Jr., Inc v Paddock Pool Builders, Inc*, 508 F2d 547, 558 n 17 (5th Cir 1956).

64 Rather, the opinion was a common law waiver decision of the type discussed in Part I.C.

65 See 985 F2d at 937. The court similarly misread other cases. The strongest language on Rule 52(b) appearing in any of the cited cases comes from *Evans v Suntreat Growers & Shippers, Inc*, 531 F2d 568 (Temp Emer Ct App 1976). Responding to the appellant's complaint regarding one of the district court's findings, the court in that case agreed with the statement that "if a party is not willing to give a trial judge the benefit of suggested findings and conclusions, he is not in the best of positions to complain that the findings made and conclusions stated are incomplete." Id at 570. The problem with citing *Suntreat Growers* is that the appellant in that case was complaining about the *specificity* of one of the findings made, not the failure to make a finding altogether. So the appellant was still able to attack the lower court's finding, but the appropriate standard was the familiar "clearly erroneous" standard that is typically applied to appellate review of findings of fact. See id.

66 45 F3d 1550 (Fed Cir 1995).

67 See id at 1556.

plains about incomplete findings, the appellate tribunal should ascertain whether any absent findings not only were essential to the resolution of the issue, but were not made by the trial judge."[68] Nonetheless, the court failed to make findings on each of the factors that makes up the test.

The court did not attempt to square its interpretation of Rule 52(b) with the text of Rule 52(a), which puts the burden on judges to state findings of fact and conclusions of law.[69] Nor did it note that the relevant legal test required findings by the trial court judge on each of the factors.[70]

B. Another Interpretation: A Party Does *Not* Waive Issues by Failing to File a Rule 52(b) Motion

Two other circuits considering the meaning of Rule 52(b) reject the argument that a Rule 52(b) motion is mandatory. Unlike the courts on the other side of the split, these courts emphasize the role of Rule 52(a), which requires judges to make findings of fact and conclusions of law.

1. Court of Appeals for the First Circuit: Rule 52(b) and contested issues.

In *Supermercados Econo, Inc v Integrand Assurance Co*,[71] the district court failed to make findings on one of the plaintiff's theories of recovery.[72] The theory had been mentioned in a pretrial order of contested issues, had been brought up several times at trial, and had been the subject of testimony elicited in the trial.[73]

Whereas the Eighth and Federal Circuits do not mention Rule 52(a) in their respective analyses, the *Econo* court began its analysis with a description of the mandates of Rule 52(a). The court noted that the rule is designed to promote care by the trial court and create a record sufficient for appellate review.[74] Given that the plaintiff had done enough with

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68 Id at 1555.

69 In another opinion decided the same year, the Federal Circuit suggested that a party who filed a Rule 52(b) motion waived any issues not in the Rule 52(b) motion. See *Herschler*, 1995 WL 490283 at *1. The court refused to consider two arguments that had not been considered by the district court, although raised below, because the defendant had filed a Rule 52(b) motion on a different issue. See id at *1. In a dissent, Judge Helen Nies argued that the case should be remanded and that she could "find no legal basis for holding that [the defendant] waived" the issues not raised in the Rule 52(b) motion. See id.

70 See *Graham v John Deere Co*, 383 US 1, 17 (1966); *Panduit Corp v Dennison Manufacturing Co*, 810 F2d 1561, 1598 (Fed Cir 1987).

71 375 F3d 1 (1st Cir 2004).

72 Id at 2–3.

73 Id at 4.

74 Id at 3, citing *TEC Engineering Corp v Budget Molders Supply Inc*, 82 F3d 542, 545 (1st Cir 1996).

his theory of recovery to make it a "contested matter,"[75] remand was appropriate because "the absence of any subsidiary findings of fact or conclusions of law renders it virtually impossible for [the appellate court] to do anything but speculate as to the basis of the district court's ruling."[76]

The defense argued that the failure to file a Rule 52(b) motion effected a waiver of the issue. Acknowledging that "counsel might have avoided the unnecessary expense and delay" by filing such a motion, the court nonetheless concluded that "failure to file [a Rule 52(b)] motion in the district court does not preclude appeal."[77] In reaching its conclusion, the court did not explore the relationship between Rules 52(a) and 52(b).

2. Court of Appeals for the Second Circuit: Rule 52(b) and legal tests.

In the Second Circuit, a district court judge is required to consider eight factors in claims for trade dress infringement. In *Natural Organics, Inc v Nutraceutical Corp*,[78] the district court judge failed to consider each factor in ruling against the plaintiff.[79] The Second Circuit reasoned that the failure of the district court to consider each of the relevant legal factors necessitated a remand: "[I]t is incumbent upon the district court judge to engage in a deliberate review of each factor, and, if a factor is inapplicable to a case, to explain why."[80] The court, in a footnote, rejected the argument that parties should be required to file a Rule 52(b) motion before Rule 52(a) is given full effect. Although one of the judges on the panel would have endorsed such a rule because it would ease burdens on district courts that would face remands (and be required to make factual findings on stale memories), the other two judges on the panel did not support this rule because they feared district court judges would be burdened with a deluge of Rule 52(b) motions.[81] The reasoning offered by the panel was primarily prudential, however; the court did not discuss the best interpretation of the Rule based on prior case law or on customary tools of statutory interpretation.

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75 *Supermarcados*, 375 F3d at 4.

76 Id.

77 Id.

78 426 F3d 576 (2d Cir 2005).

79 Id at 578.

80 Id at 579.

81 See id at 579 n 1.

III. STATUTORY INTERPRETATION AND APPEALING UNDER UNCERTAINTY

Rule 52(b) should not be read to impose an issue-preserving duty on litigants beyond that required by the common law rules that courts have applied. Traditional methods of statutory interpretation discredit the argument that a motion under Rule 52(b) is a mandatory motion. Moreover, the concerns about efficiency that undergird a defense of the Rule 52(b) Waiver Courts' arguments are largely speculative and thus fail to provide a cogent basis for questioning the conclusion reached using the traditional methods. In fact, there are reasons to believe that the Rule 52(b) Waiver Courts have made the law in their respective circuits less clear, driving up costs for both litigants and judges.

A. Traditional Tools of Statutory Interpretation Suggest That Rule 52(b) Does Not Impose a Duty

As noted in the Introduction, the question of how to allocate burdens in a system of issue preservation is distinct from the question of whether Rule 52(b) is a source of authority for allocating those burdens. One of the more vexatious aspects of the holdings in the Rule 52(b) Waiver Courts' opinions is the sparse support for the idea that Rule 52(b) imposes duties on litigants. Likewise, courts that reject this "mandatory" reading of Rule 52(b) have not adequately articulated why that reading should be rejected.

Traditional tools of statutory interpretation suggest that Rule 52(b) should not bear a mandatory construction. These tools provide a legitimate method for determining a rule's meaning: courts often and increasingly interpret federal rules of procedure in light of their plain meaning,[82] or by resort to other customary methods of statutory interpretation, including structure and legislative history.[83]

There is a consensus starting point for applying those tools. It is axiomatic that courts should start with the text in an effort to divine its meaning: "[C]ourts must presume that a legislature says in a statute

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[82] See, for example, *Business Guides, Inc v Chromatic Communications Enterprises, Inc*, 498 US 533, 540 (1989); *Celotex Corp v Catrett*, 477 US 317, 322–23 (1986); *Delta Airlines, Inc v August*, 450 US 346, 356–57 (1981). See also Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 Geo Wash L Rev 52, 88 n 197 (2007).

[83] See, for example, *Yousuf v Samantar*, 451 F3d 248, 255 (DC Cir 2006) (interpreting a rule of civil procedure based on the structure of the rules as a whole); *United States v Hochevar*, 214 F3d 342, 343 (2d Cir 2000) (per curiam) (discussing previous versions of a federal rule of appellate procedure, as well as the Advisory Committee Notes, in support of the court's interpretation).

what it means and means in a statute what it says there."[84] When the text is unclear, courts commonly use canons of construction, look to the structure of the statutory scheme, and examine the legislative history of a provision.[85] This Part follows each step and concludes that none supports a mandatory reading of Rule 52(b): the plain language of the provision is indeterminate, and the structure and history of the Rule suggest that Rule 52(b) should not be read to impose a duty on litigants.

1. The language of Rule 52(b) in isolation.

The plain language of Rule 52(b) does not reveal whether the provision imposes a duty on litigants. The rule states that a *court* may amend its findings or make additional findings "[o]n a party's motion."[86] What the court does is permissive—may—and what the party must do is simply unstated. Looking at the provision in isolation, it is hardly helpful to apply the maxim that differences in language are presumed to be intentional. The argument would be that, because what judges do under the rule is permissive ("may"), the omission of similar permissive language (describing what parties do under the rule) makes filing a Rule 52(b) motion mandatory.

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84 *Connecticut National Bank v Germain*, 503 US 249, 253–54 (1992). For a particularly vivid expression of the idea, see *Sturges v Crowninshield*, 17 US (4 Wheat) 122, 203 (1819) (explaining that in order to ignore the plain meaning of a provision, the case "must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application"). See also Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum L Rev 527, 535 (1947) ("Though we may not end with the words in construing a disputed statute, one certainly begins there."). For one of many articles that note pitfalls, legal fictions, and general shortcomings of statutory interpretation, see generally, Max Radin, *Statutory Interpretation*, 43 Harv L Rev 863 (1930).

To be sure, there may be great disagreement about when the meaning is not plain and about the tools of statutory interpretation that ought be brought to bear on a given question. See generally Caleb Nelson, *What Is Textualism?*, 91 Va L Rev 347 (2005). But there is widespread agreement that determining intent is generally the goal of the interpreter and that text is the starting point. See id at 347–48 (noting that even "judges whom we think of as textualists construct their sense of objective meaning from what the evidence that they are willing to consider tells them about the subjective intent of the enacting legislature").

85 See, for a recent example, *Tellabs, Inc v Makor Issues & Rights, Ltd*, 127 S Ct 2499, 2509 (2007) (citing Congress's "inten[tion] to strengthen existing pleading requirements" as evidenced by the report of a House-Senate conference committee). New Textualism, an interpretive approach that finds an exponent in Justice Antonin Scalia, questions reliance on legislative history on pragmatic and constitutional grounds. See William N. Eskridge, Philip P. Frickey, and Elizabeth Garrett, *Legislation and Statutory Interpretation* 235–36 (Foundation 2d ed 2006). Justice Scalia's views have many supporters but have not been adopted by a majority of the Court.

86 FRCP 52(b).

Attempting to make the argument provides a fine illustration of the maxim's logical limits.[87] Conceptually the limitation is similar to one of the limitations of the *inclusio unius* canon.[88] Consider a mother who tells her son that he may not choke his sister; it is not sensible to infer that he can punch his sister instead.[89] Drawing a reasonable inference would require a background rule against which the parent's commands were operating. For example, if a parent tells a child that she can have "one cookie and one brownie," there is a strong argument that the child is not allowed to have a candy bar, "because the instruction reflects a background rule of 'no sweets unless authorized.'"[90]

Relating these examples to Rule 52(b), it is unreasonable to draw the inference that Rule 52(b) is either mandatory or permissive because there is no identifiable background rule—some rules contain mandatory language and others contain permissive language.[91] All one can divine from the language of Rule 52(b) in isolation is that once a party files a motion under Rule 52(b), a judge may, but need not, make additional findings and amend the judgment accordingly.

2. A holistic approach to Rule 52(b).

Another canon of construction, the "whole act rule," looks at the meaning of words and provisions within the structure of their statute.[92] It is deployed against the background assumption that lawmaking does not occur within a textual vacuum; courts should "not look merely to a particular clause" but examine the entire statute to effectuate the will of the drafters.[93] The reason is simple: "A provision that may seem ambiguous in isolation is often clarified by the remainder of the

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87 See, for example, *United States v Vonn*, 535 US 55, 66 (2002).

88 The canon *inclusio unius est exclusion alterius* means "[t]he inclusion of one thing suggests the exclusion of all others." William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U Chi L Rev 671, 674 (1999). See *United States v Vonn*, 535 US 55, 66 (2002).

89 See Eskridge, Frickey, and Garrett, *Legislation and Statutory Interpretation* at 263–64 (cited in note 85) (providing similar examples of reasonable and unreasonable inferences in invoking the *inclusio unius* canon).

90 Id.

91 In some instances, a court *still* must ascertain for itself that it has subject matter jurisdiction, even where a party's actions are permissive, such as the filing of a motion to dismiss for lack of subject matter jurisdiction. See FRCP 12(b)(1). See also *Capron v Van Noorden*, 6 US (2 Cranch) 126, 127 (1804) ("Here it was the duty of the Court to see that they had jurisdiction, for the consent of the parties could not give it.").

92 See, for example, *West Virginia University Hospitals, Inc v Casey*, 499 US 83, 99–102 (1991) (describing the scope of an attorneys' fees provision in 42 USC § 1988 by reference to other parts of the US Code).

93 *Kokoszka v Belford*, 417 US 642, 650 (1974).

statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear."[94]

To determine whether Rule 52(b) is a mandatory motion, the whole act canon of construction requires consideration of related rules on issue preservation. Three rules are relevant to the analysis; each reveals that the drafters of the Federal Rules knew how to make language mandatory when they wanted to do so.

The first rule that an interpreter might look to is Rule 46. The Rule is deployed in making contemporaneous objections to actions taken (or untaken) by the trial judge. Rule 46 states how a party should alert a court to perceived errors: "When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection."[95] The final sentence implies a duty by negative implication: "Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made."[96] The implication is that a party *will* be prejudiced by its failure to raise an objection if there is an opportunity.[97]

An interpreter examining the structure of the federal rules would also look to Rule 51. The rule deals with charging instructions in jury trials, and its language makes plain what a party must do in order to challenge the validity of the instructions on appeal: "A party who objects to an instruction or the failure to give an instruction *must* do so on the record, stating distinctly the matter objected to and the grounds for the objection."[98] Like Rule 46, the rule provides unambiguous guidance to litigants.

Finally, resort to structure shows that Rule 52(a) is similarly clear in laying out the mandatory duties of judges: they "*must* find the facts specially and state [their] conclusions of law separately."[99] The use of

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94 *United Savings Association of Texas v Timbers of Inwood Forest Associates, Ltd*, 484 US 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor.").

95 FRCP 46. For a discussion of Rule 46, see note 39.

96 FRCP 46.

97 Of course, this is another version of the *inclusio unius* canon, but the inference here is more neatly drawn. This inference requires knowledge of the earlier version of the Rule, which referenced the common law rules on objections. Prior to the 2007 Amendment, the informal objections referred to in the rule were contrasted with the "purposes for which an exception has heretofore been necessary." FRCP 46 (2006). The contrast makes clear that the Rule is incorporating a common law background rule—in which bills of exceptions *were* necessary to preserve an issue—as discussed in Part I.B. Rudimentary logic also shows why. Let O = Opportunity to object; P = Prejudice; ¬ = Not. The construction of the relevant language in Rule 46 can be represented as: ¬O → ¬P. The contrapositive of this construction is: P → O. So if a party has been prejudiced under Rule 46, then the party had an opportunity to object.

98 FRCP 51(c)(1) (emphasis added).

99 FRCP 52(a)(1) (emphasis added).

the word "must" indicates that the duty imposed on the judge is mandatory; these are not merely words of entreaty.[100] The provision does not require the parties to do anything, stating that a party "may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings."[101]

In short, an examination of the Federal Rules reveals that its drafters knew how to make actions mandatory when they wanted to do so. Therefore, in the context of a *holistic* approach, it seems appropriate to apply the canon that when drafters use different words in different places, those differences are presumed to be intentional.[102] Rules 51 and 52(a) contain mandatory language, and Rule 46 leaves no doubt about when and how a party must make an objection. In contrast, Rule 52(b) neither contains mandatory language nor leads to necessary inferences.

> [W]hen it is clear that Congress knew how to specify [mandatory language] when it wanted to, [a contrary reading] runs afoul of the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.[103]

The structural point merits further discussion, particularly inasmuch as holistic interpretation can ensure that an interpretation of one provision does not do violence to another provision. Indeed, the Court has stated that, in interpreting federal rules of procedure, courts should pay particular attention to the structure of the rules, not merely the different language in various provisions.[104] The structure of the Federal Rules supports a nonmandatory interpretation of Rule 52(b). A reading of Rule 52(b) that imposed a duty on parties to point out errors or risk waiving those issues on appeal would neuter the "shall" language in paragraph (a) pertaining to duties of trial judges. If a party's failure to object to the lack of findings rendered the issue unreviewable, then the judge would not have to find the facts and the law in all cases, but only those in which parties pointed out the error to the trial court judge. Put another way, requiring parties to file Rule 52(b) motions, in

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100 See, for example, *Zadvydas v Davis*, 533 US 678, 697–97 (2001) (contrasting "may" with "must").

101 FRCP 52(a)(5).

102 See *Sosa v Alvarez-Machain*, 542 US 692, 712 n 9 (2004).

103 Id.

104 See *Tome v United States*, 513 US 150, 160–61 (1995) (plurality opinion) (discussing the Federal Rules of Evidence).

order to preserve an issue that the judge was required to rule on, would at least partially swallow up Rule 52(a).

In contrast, a nonmandatory interpretation of Rule 52(b) gives full effect to Rule 52(a); at the same time it preserves an important role for Rule 52(b). This Comment began with a hypothetical about three issues on which a trial judge was *arguably* required to make findings. However, because trial judges are required to make factual findings and legal conclusions only on issues that were raised by parties, Rule 52(b) can function as a safety valve—a way to avoid waiving an issue on appeal. That is to say, the nonmandatory interpretation of Rule 52(b) still allows Rule 52(a) to operate with full force while also allowing parties to ensure that they have preserved an issue (such that a trial court's failure to make a finding could necessitate a remand under Rule 52(a)). Reading the two provisions *in pari materia* in this way, rather than in inevitable conflict, allows both rules to be given full effect.

More generally, a holistic approach to interpreting the Federal Rules may tell us more about the "intent of the drafters" than is the case when the approach is applied to statutes. One criticism of the whole act rule is that it assumes "a single-minded and omniscient legislature which is strongly at odds with actual legislative practice, where terms are inserted willy-nilly into the law."[105] In contrast, the Federal Rules are not drafted by 535 representatives, their staffs, executive agencies, or other actors who influence the legislative process.[106] The process for drafting the Federal Rules arguably allows for higher quality deliberation and evinces a concern for the structure of the Rules,[107] a fact that can be observed in the Advisory Committee Notes.[108]

3. Advisory Committee silence.

There is not a single note by the Advisory Committee about Rule 52(b), which stands in contrast to the extensive discussion of Rule 52(a). If Rule 52(b) imposed a duty on parties to raise an issue or risk waiving it, that interpretation likely would have been mentioned in

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105 Eskridge, Frickey, and Garrett, *Legislation and Statutory Interpretation* at 271 (cited in note 85).

106 See Antonin Scalia, *Common-law Courts in a Civil-law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in Amy Gutmann, ed, *A Matter of Interpretation* 3, 32 (Princeton 1997).

107 See Lori A. Johnson, *Creating Rules for Federal Courts: Administrative Prerogative of Legislative Policymaking*, 24 Just Sys J 23 (2003).

108 See *Tome*, 513 US at 160–61. See also Mary Ann Glendon, *Comment*, in Gutman, ed, *A Matter of Interpretation* 95, 99–100 (cited in note 106) (noting that "comprehensive, coherent, and self-contained texts" more readily lend themselves to interpretation based on structure).

the Advisory Committee Notes, particularly given that the language of the Rule is not explicit and the common law history on issue preservation is well established. The Court has lent credence to similar reasoning in rejecting interpretations of rules of practice that would have silently altered the common law: "Where the [Federal Rules of Evidence] did depart from their common-law antecedents, in general the Committee said so."[109] More basically, the silence in the legislative history is analogous to the "barking dog" canon of statutory construction,[110] which takes its name from the Sherlock Holmes mystery *Silver Blaze*,[111] and which advises courts to consider drafting history, or lack thereof, to evaluate whether "new statutory language was [ ] meant to have a broader effect on established statutory policies."[112]

Justice Antonin Scalia, among others, has been sharply critical of the canon: "Statutes are the law though sleeping dogs lie."[113] Even though he has been critical of reading into legislative silence, he has emphasized an idea that amounts to an interpretive bedfellow. In *Whitman v American Trucking Associations, Inc*,[114] Justice Scalia, writing for a majority, rejected the EPA's arguments about what factors the EPA was permitted to consider in making certain rules under the Clean Air Act. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[115]

The conclusion that Rule 52(b) was not intended to alter substantially the duties imposed on judges under Rule 52(a) is supported on similar grounds. The language of Rule 52(b) is vague and the mandatory reading of the Rule would substantially alter common law practice. Moreover, the rationale for resorting to the silence in the Advisory Committee Notes is stronger than in the context of enacted sta-

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109 See *Tome*, 513 US at 160–61.

110 See *Chisom v Roemer*, 501 US 380, 396 (1991) (rejecting one construction of a statute "because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history"). See also *Allapattah Services, Inc v Exxon Corp*, 362 F3d 739, 756 (11th Cir 2004) ("Under the Barking Dog Canon, general language in a statute should not be interpreted as applying to a specific, particularly controversial situation if there is no recognition whatsoever in the statute's text or legislative history that it would have had such an effect.").

111 See generally Sir Arthur Conan Doyle, *Silver Blaze*, in *The Adventures of Sherlock Holmes and the Memoirs of Sherlock Holmes* 277 (Penguin 2001).

112 Eskridge, Frickey, and Garrett, *Legislation and Statutory Interpretation* at 314 (cited in note 85).

113 See *Chisom*, 501 US at 406 (Scalia dissenting).

114 531 US 457 (2001).

115 Id at 468.

tutes: the advisory committees for various rules of procedure work to ensure that the Rules are internally consistent and clear.[116] Moreover, the language of Rule 46 makes plain both the extent to which the Rule is operating against the common law backdrop and the extent to which the Rule is inconsistent with its common law antecedents.[117] Given these characteristics of the Advisory Committee, as well as the history and body of law related to issue preservation, it seems all the more unlikely that the drafters of the Federal Rules would have used the mousy (and indeterminate) Rule 52(b) to substantially alter an extensive body of common law on issue preservation.

B. There Is No Basis for Abandoning Traditional Interpretive Techniques Based on Efficiency Concerns

Part III.A strongly counsels against reading Rule 52(b) as a sometimes-mandatory motion. There is a logical concern, however, that reading Rule 52(b) as a permissive rule could impose unnecessary costs on trial courts, appellate courts, and parties. Courts that have offered an interpretation of Rule 52(b) have stated or implied that efficiency concerns informed their interpretations of the Rule.[118] Moreover, as an approach, defending a mandatory reading of Rule 52(b) on efficiency grounds is not without merit, as the Supreme Court has stated that "[t]he Federal Rules of Civil Procedure are to be construed to secure the just, speedy, and inexpensive determination of every action,"[119] and Rule 52(b)'s meaning is not plain.[120] Nonetheless, the efficiency gains[121]

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116 See, for example, FRCP 44.1, Advisory Committee Notes on Adoption (describing the interaction of the rule with Rule 8(a) and providing a sentence-by-sentence analysis of the Rule).

117 See notes 95–97 and accompanying text. Notably, unlike Rule 52(b), courts in myriad opinions have recognized that Rule 46 codified common law practices. See, for example, *Neu v Grant*, 548 F2d 281, 286–87 (10th Cir 1977); *Johnston v Reily*, 160 F2d 249, 250 (DC Cir 1947), citing *Noonan v Caledonia Gold Mining Co*, 121 US 393 (1887).

118 See *Miller*, 985 F2d at 941; *Natural Organics*, 426 F3d at 579 n 1.

119 See *Bankers Trust Co v Mallis*, 435 US 381, 386–87 (1978), quoting FRCP 1. See also *Nelson v Adams USA, Inc*, 529 US 460, 465 (2000) (linking the concept of efficiency with due process and citing FRCP 1 for the proposition that elements of due process are embodied in the federal rules); *Torres v Oakland Scavenger Co*, 487 US 312, 319 (1988) (Scalia concurring).

Of course, construing the Rules so as to secure efficient outcomes should not be an unlimited license for courts to rewrite the Rules, and the Supreme Court has cautioned that the interpretive endeavor should not be transformed into an effort to amend the Rules by judicial fiat: "[O]ur task is not to decide what the rule should be, but rather to determine what it is." *Business Guides*, 498 US at 548–49.

120 See notes 86–91 and accompanying text.

121 The directive in Rule 1 to secure outcomes that are speedy and inexpensive speaks to efficiency concerns. The command to interpret the rules so as to bring about justice, however, does not necessarily speak to efficiency concerns, at least absent a normative vision that imports

that the Rule 52(b) Waiver Courts foresee are speculative, and indeed there are sound reasons to think that they would fail to materialize. This is not to say that the Rule 52(b) Waiver Courts are wrong; it is to say that there is no compelling reason to think that they are right. Given this "stalemate of empirical intuitions," there is no reason to abandon the analysis in Part III.A.

To be sure, there is an argument that interpreting Rule 52(b) as a sometimes-mandatory motion would increase efficiency.[122] Under this interpretation, parties could avoid costly relitigation of issues that were argued (but not passed upon) in the lower court. Likewise, lower courts would presumably be in a better position to consider matters in a Rule 52(b) motion immediately after the trial than on remand months or years later.[123] Moreover, a sometimes-mandatory reading could harness the comparative advantages held by various legal actors. Parties are probably in the best position to know what arguments they have made[124] and nearly always will be in the best position to know which issues are most important to them. At the same time, judges are in the best position to make required legal findings. Law is their core competency, rather than the facts of any given case.[125] Moreover, in other contexts, courts have proven capable of crafting judicial rules based on

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notions of efficiency into a conception of justice. This is plausible, but to the extent that Rule 1 captures ideas about justice that are broader than efficiency concerns, and, so long as those broader notions of justice are in conflict with (or temper) efficiency-based arguments, then this undermines the extent to which courts should rely on efficiency rationales. In any event, because the extent to which the interpretation of the Rule 52(b) Waiver Courts increases efficiency is far from clear, this Comment need not explore the deeply contentious questions of the extent to which efficiency concerns should give way to concerns about justice.

122 The ability to make informed estimates as to the probabilities of legal outcomes allows parties to choose their battles, at trial and on appeal. See Steven Shavell, *Foundations of Economic Analysis of Law* 463 (Harvard 2006) (noting that besides error correction, the appeals process harmonizes the law and amplifies the law through new interpretations, although other systems could serve these functions).

123 See *Natural Organics*, 426 F3d at 579 n 1. See also Administrative Office of the US Courts, *Judicial Business of the United States Courts: 2007 Annual Report of the Director* ("*Judicial Business*") 107, table B-4 (2007), online at http://www.uscourts.gov/judbus2007/JudicialBusinespdfversion.pdf (visited Aug 29, 2008) (reporting the passage of twenty-eight months from district court decision to final disposition in the court of appeals).

124 Consider *United States v Gomez*, 446 US 635, 639–40 (1980) (reasoning that a plaintiff in a § 1983 action was not required to state in his pleadings that the public official had acted in bad faith in part because the information was "peculiarly within the knowledge and control of the defendant"). This idea, as applied to Rule 52(b), rests on the commonsense notion that a party who makes a filing with a court will be most familiar with its content.

125 This reading might lead one to favor the outcome in *Miller*, dealing with an argument made in a motion, but question the outcome in *Glaverbel*, dealing with a required legal finding.

the comparative advantages of legal actors, even if the determinations were more easily made.[126]

These arguments founder—at least for purposes of interpreting the federal rules—not because they are wrong, but because they rest on unverifiable empirical assumptions and may be difficult to implement as a practical matter.

First, consider the open empirical questions about how actors would actually respond to a sometimes-mandatory reading of Rule 52(b). There are sound reasons to think that such a reading would unnecessarily drive up costs for litigants while leading judges to underinvest their resources. Inasmuch as divvying up the duties proves difficult, making Rule 52(b) sometimes mandatory may increase a party's costs at the trial stage because parties will face new incentives to file a Rule 52(b) motion or risk waiving the issue for purposes of appeal. That is, parties might react to a sometimes-mandatory reading of Rule 52(b) by combing the trial record in search of an argument made to the judge but unaddressed in the court's decision. In contrast, trial court judges might underinvest, failing to address issues that the parties litigated. And although parties might invoke Rule 52(b) as a backstop, they may lack the resources to search the trial record for aspects of the case that the trial court judge should have addressed,[127] which means a sometimes-mandatory rule could, on balance, deliver less bang for taxpayers' dollars—and trial judges would enjoy little incentive to evince care and thoroughness.[128]

A second concern is that, as a practical matter, it would be difficult to decide when to make Rule 52(b) into a sometimes-mandatory motion. The language of Rule 52 or adjacent rules offers no guidance on when to place the burden on the complaining party or on the judge. Moreover, it may not always be clear whether parties or judges sit in the best position to bear a given burden, and the analysis could be subject to a variety of variables, such as the size of the factual record, the complexity of the legal issue, the sophistication of the parties, or

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126 See *Gomez*, 446 US at 639–40; *United States v Denver and Rio Grande Railroad Co*, 191 US 84, 91–92 (1903). See also note 129.

127 Compare Administrative Office of the US Courts, *Judicial Business* at 163–68, table C-3B (cited in note 123) (reporting roughly 240,000 civil cases decided in the district courts in 2007), with id at 90–94 B-1A (reporting roughly 30,000 civil cases appealed in 2007).

128 Again, the point is that the answers to the empirical questions are speculative. It may be that judges expend too many resources and that a Pareto superior move (for judges and litigants) would reduce the thoroughness with which judges consider cases in exchange for speedy resolution. The answer is not obvious.

even the particular competencies of the court or trial court judge.[129] For example, it is not obvious whether a trial judge in a given district will be in a better informational position with respect to patent law than certain parties who frequently litigate patent claims before the Federal Circuit. Inasmuch as the lines will be difficult to draw, both litigants and judges might face incentives to overspend.[130]

In any event, the broader point remains: the possibility that the Rule 52(b) Waiver Courts might increase the efficient administration of justice rests largely on speculation, and it seems just as likely that their reading would lead to inefficient use of resources by both litigants and judges. Indeed, the early indications suggest the Rule 52(b) Waiver Courts have made the law less clear within their circuits, providing incentives for legal actors to expend resources in a wasteful manner.[131]

CONCLUSION

This Comment fills a void in the discussion over the meaning of Rule 52(b) of the Federal Rules, lately the subject of a circuit split. Those courts that have considered whether Rule 52(b) imposes a duty on litigants, on both sides of the circuit split, have failed to deploy persuasive arguments about the meaning of the Rule. Employing traditional tools of statutory interpretation in interpreting the federal rules, an increasingly common practice by the Court, reveals that Rule 52(b) should not be interpreted as a sometimes-mandatory motion.

The Rule 52(b) Waiver Courts aggressively—and erroneously, as this Comment argues—interpreted a rule of civil procedure that probably was not intended to supplant hundreds of years of appellate prac-

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129 In contrast, focusing on the comparative advantage of the parties in the context of pleading burdens may be a more easily administered approach. First, pleading burdens deal only with one of two parties. See notes 124–26 and accompanying text. In contrast, Rule 52(b) adds a third actor—the judge. Second, pleading burdens typically deal with information that is obviously in the control of one party, for example the state of mind of one of the parties. See id. In contrast, the text accompanying this note questions whether it will always or even often be clear whether a judge or party stands in the best position to carry a burden precisely because it is unclear which actors possess the best information. And a case-by-case determination will encourage *all* actors to overspend because the risks of waiving an issue can be catastrophic.

130 Indeed, judges could be encouraged to expend additional resources deciding issues that might otherwise have been deemed forfeited. Consider, for example, *Rivera-Torres v Ortiz Velez*, 341 F3d 86, 102 (1st Cir 2003) (explaining that claims "forfeited through [the] error or neglect" of one of the parties are reviewed only for plain error). Not only would this consume trial court judges' time and energy, it would reduce the likelihood that resolution could be had in a "speedy" manner. See note 119. See also FRCP 1. If this picture were correct, a sometimes-mandatory reading would be worse than an always-mandatory reading.

131 See *Proportion-Air, Inc v Buzmatics, Inc*, 1995 WL 360549, *2 (Fed Cir). See also *Golden Blount, Inc v Robert H. Peterson Co*, 365 F3d 1054, 1060 (Fed Cir 2004).

tice. Moreover, whether their rule or another rule would produce efficient outcomes is far from clear. Indeed, the failure of the Rule 52(b) Waiver Courts to provide any indication about whether Rule 52(a) or Rule 52(b) will govern in a given factual setting seems to have, within those circuits, undermined what Karl Llewellyn referred to as the "reckonability" of both trial and appellate practice.[132] Because the Rule 52(b) Waiver Courts do not attempt to harmonize their interpretive approach with common law practices on issue preservation, it is possible to obtain, *within the same circuit*, one result using the Rule 52(b) analysis and a different result based on judge-made law. When a would-be appellant cannot tell if an issue at trial was preserved for appeal, there is a higher likelihood that the wrong choice will be made, imposing unnecessary costs.[133] The Rule 52(b) Waiver Courts do not provide a coherent framework to guide legal actors in making that choice.

The irony is obvious: one reason to prefer codification to judge-made law is that an enacted rule can make the law clearer by specifying precisely what that law requires. Yet when judges and litigants intermittently rely on a statutory command that does not actually exist, they inject into the law the very confusion whose potential the codifiers had hoped to avoid. To return to Mark Twain,[134] what is true for words in general is also true for words in the law: the difference between the almost right legal rule and the right legal rule is the difference between the lightning bug and the lightning.

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132 See Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 17 (Little, Brown 1960).

133 See Shavell, *Foundations of Economic Analysis of Law* at 461 (cited in note 122).

134 See note 1.