

ORIGINAL

In the

Supreme Court of the United States

FRED N. WALKER,

PETITIONER

v.

ARMCO STEEL CORPORATION,

RESPONDENT

Number 78-1862

Washington, D. C.  
January 8, 1980

Pages 1 thru 31

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FRED N. WALKER, :

Petitioner :

v. : Number 78-1862

ARMCO STEEL CORPORATION, :

Respondent :

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January 8, 1980

The above-entitled matter came on for argument  
at 1:40 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM BRENNAN, Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DON MANNERS, ESQ.  
Oklahoma City, Oklahoma, on behalf of  
Petitioner.

JAY M. GALT, ESQ.  
Oklahoma City, Oklahoma, on behalf of Respondent.

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Oral Argument of:

DON MANNERS, Esq.,  
On behalf of Petitioner

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JAY M. GALT, Esq.  
On behalf of Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments this afternoon in Fred N. Walker against ARMCO Steel Corporation.

Mr. Manners, I think you may proceed now.

ORAL ARGUMENT OF DON MANNERS, ESQ.,

ON BEHALF OF THE PETITIONER FRED N. WALKER

MR. MANNERS: Mr. Chief Justice and Members of This Honorable Court:

Fred Walker was a carpenter, and on August 22, 1975, he was driving an ARMCO nail into a piece of wood and it shattered, putting out his eye.

He came to my firm and eventually we filed a suit on August 19, 1977, within the two-year statute of limitation in the Federal Court. And the summons were, what shall we say, lost? We thought the marshal had them and the marshal thought the Clerk had them. And we did a file review some 90 days later and we found them in our filing cabinet. We took them down there. I want to be square with you.

QUESTION: In your filing cabinet?

MR. MANNERS: Yes, sir. I can't find who -- no one will admit in the firm ever bringing them back but, anyway, we found them in an unmarked folder in the filing cabinet on a file review. That's how we found out they didn't get

to the marshal . In any event, the summons are taken to the marshal and ARMC0 is served some 104 days later.

Now, Oklahoma has a statute that they must be served within 60 days beyond the statute of limitation, part of their statute. It's a question of whether or not it is procedural or substantive, I guess. And, of course, under Rule 3, you don't have that problem.

Anyway, service was had and then the Ragan Case came like a falcon out of the skies and struck down our lawsuit, and here we are.

QUESTION: The Ragan Case was decided somewhat before your lawsuit, wasn't it?

MR. MANNERS: Yes, sir.

The Hanna Case is a group barn burner on our side, but it didn't overrule Ragan.

QUESTION: There are only nine of us up here too.

MR. MANNERS: Anyway, Judge Doyle of the Tenth Circuit, when he wrote his opinion, the last paragraph states, "The Supreme Court would perform a great service if it were to clear away the dilemma which exists as a result of the conflict between Ragan and Hanna."

He says, "We recognize that decisions are frequently allowed to die on the vine, so to speak. We also recognize under such instances death does not, as a practical matter, take place. If, however, Ragan was

intended to die a natural death, it failed to happen."

So what we are here -- I am attempting to persuade--

QUESTION: You come not to praise Ragan, but to bury it, I take it?

MR. MANNERS: I come to bury Ragan, if possible. Now, Chief Justice Warren in the Hanna Case wrote a spectacular decision, well-reasoned, well thought out. And Justice Harlan in his concurring--

QUESTION: And carefully saved Ragan.

MR. MANNERS: And carefully saved Ragan.

QUESTION: Well thought out.

MR. MANNERS: Well thought out; carefully saved Ragan.

But Justice Harlan stated in his concurring opinion that he thought Ragan was wrong. And you know, going back at the beginning, under 28 -- Section 2072, when they enacted the Rules, the Federal Rules, it said, "All laws in conflict with such Rules should be a little further force or effect unless, of course, they invade the substantive portion."

So, really what we are talking about is whether or not the Federal Rules of commencement of an action in service are procedural or substantive. You know, I am from Oklahoma and I don't like to say this. Basically

speaking, we've got an awful good State there, but I'm not much in favor of a service statute where your defendant can hide out for 61 days and you've lost your case. If you can't find him in 61 days or prove he's out of the State, you're just dead in the water down there.

I don't think it was intended that the Federal Rules for the Courts of all the Federal Courts here, I don't think it was intended that the 60-day--

QUESTION: I don't see why you put all that weight on distance. I think you have a very hard time trying to find somebody in Manhattan, and that's a lot smaller than Oklahoma City.

MR. MANNERS: We've got more brush down there in our country for them to hide in. This is not the first time I have run afoul of the 60-day deal. Sometimes you just can't find them, and you're dead. But in this case I feel particularly bad because Mr. Walker had an injury and somehow or other, like something dropping from the skies, I find the summons in the filing cabinet back in the office on a file review.

QUESTION: You wouldn't be arguing this to any Oklahoma Court, would you, that you didn't like the law the legislature had enacted?

MR. MANNERS: No, sir, because Oklahoma Courts are not covered by Rule 3.

QUESTION: This is a Federal question.

MR. MANNERS: A Federal question, right.

QUESTION: What is the principle you want us to adopt?

MR. MANNERS: I want you to adopt the principles illucidated in Hanna.

QUESTION: And what are those?

MR. MANNERS: Those are for uniformity, the Federal Rules should govern service. This case turns on Rule 4 l(d), which is where the statute requires that you thrust it directly in the hand of an executor and they left it with his wife. And the Court held that under the Federal Rules, the Rule having to do with service would apply.

QUESTION: What if the Federal Rules had no provision which was a counterpart to Oklahoma's provision here?

MR. MANNERS: What would I do? I would be defending a case of malpractice; that's what I would be doing, probably.

QUESTION: You say that there must be an affirmative Federal Rule of Civil Procedure covering this point?

MR. MANNERS: Without Federal Rule 3 and Federal Rule 4, I have no standing.

QUESTION: You don't urge us to go back to



Swift against Tyson, or the days of the Federal common law?

MR. MANNERS: No, sir. The Federal Rules set up for the maintenance and the handling of Federal cases in this country, I think should be controlling of cases filed in the Federal Courts. Now, I am embarrassed, and I should be that this matter happened at my law firm. But I think under the pure question of law that Fred Walker is entitled to relief. I think that the Federal Rules, Rule 3 should govern what commences an action.

The Federal Rule states it very succinctly. It says, it's told when the case is filed, under Federal Rule 3. Now, your Rule 4--

QUESTION: Does Federal Rule 3 say "told"?

MR. MANNERS: Let me get it exactly, Your Honor.

Rule 3, "A civil action is commenced by filing a complaint with the Court." That is what it says specifically.

Rule 4 puts the burden upon the Clerk. It says, "Upon filing of a complaint, the Clerk shall forthwith issue a summons and deliver it for service to the marshal or persons specially appointed to serve it.

QUESTION: What is there in the Rule though that says that the beginning of an action is just the filing of the complaint satisfies the State's statute of limitations? I mean, it may start the action, but does it say that?

MR. MANNERS: It says, "A civil action is commenced by filing a complaint with the Court."

QUESTION: I know a civil action is commenced, but what makes -- why is that -- would that necessarily -- what if a State law said just specifically that, and by the way, we mean what we say, just the starting of an action does not satisfy our statute of limitations.

MR. MANNERS: Your Honor--

QUESTION: It has to be some other event that happened before the statute of limitations is satisfied.

MR. MANNERS: Oklahoma State law does provide that an action is commenced by the filing of the petition, but it has an additional statute, two sections down, that says if you can't get service with due diligence within 60 days that you're just through.

QUESTION: What is there in Rule 3 to prevent the State from having such a provision? This is a matter of State law, a State statute of limitations law.

MR. MANNERS: Excuse me, Your Honor. There is nothing to prevent the State from having that law. My position is that under the Federal Rules, Fred Walker is entitled to the Federal Rule law, under Hanna, which goes into Erie. I am sure everybody is familiar -- I think

you were on the Court when Hanna was decided.

QUESTION: I understand. Ragan wasn't overruled.

MR. MANNERS: No, but a lot of people thought it was. I've got a beautiful Second Circuit opinion here.

QUESTION: Yes, I know.

MR. MANNERS: And Judge Doyle says he prefers the Federal Rules. Really, we're talking about making uniformity. Every citizen--

QUESTION: You don't have uniformity under substantive law in diversity cases.

MR. MANNERS: I don't believe that it's substantive, Your Honor.

QUESTION: I say you don't under the substantive law.

MR. MANNERS: No, sir.

QUESTION: What you want is the traditional, the Erie rule under substantive law but the Federal law on the procedural.

MR. MANNERS: That's correct, Your Honor.

QUESTION: What's the virtue of uniformity, as you put it, on the procedural side when basically you are dealing with practitioners in Oklahoma City or Tulsa who practice in both the Federal and State Courts?

MR. MANNERS: Well, it would make it a lot easier on the Circuit Courts, for one thing, because they would not

have the higgledy-piggledly mess of each State having a different set of semi or quasi substantive or procedural law. Procedural or substantive is a difficult question at best. But, if you file a case in Court, you ought to go by that Court's procedures. What commences an action, how service is made--

QUESTION: What if the statute of limitations in Oklahoma said that the statute of limitations will run until a complaint is served? Unless the complaint is served within the period, the case is over. Rule 3 wouldn't prevent that, would it?

MR. MANNERS: Well, Rule 4 did in the Hanna Case.

QUESTION: Why? No, it didn't. That isn't what the Court said there.

MR. MANNERS: Your Honor, they served the executor by leaving it with his wife. The State statute provides that you had to serve the executor in hand. And they held that the Federal Rules of Service circumvented the State Rule required that the executor be served in hand. There is very little difference between that and the Rule 3, of following the Federal Rules so far as filing the case commencing it and the service being sent out by the Clerk to the marshal and served.

Rule 4 gives the Clerk the duty--

QUESTION: But Hanna didn't say -- Hanna certainly

didn't say that if the State law required service to toll the statute, that just the filing of the complaint will toll the statute too. That isn't what Hanna held. It didn't say that at all. It said -- what you are suggesting to us is that that is what we should hold now.

MR. MANNERS: No, sir, I am saying if you extend the Hanna rule to cover Rule 3, like the Second Circuit thinks it should be--

QUESTION: Does the Second Circuit think it should be, or do they think that's what Hanna did?

MR. MANNERS: They think that Hanna overruled Ragan.

QUESTION: What's the virtue of uniformity on the procedural side if you're not going to have it on the substantive side?

MR. MANNERS: Well, I guess the virtue would be that under the Federal Rules and under the Federal system to make them the same. Each citizen and each State would have the same rights under the Federal law.

QUESTION: Well, that was the same justification that Justice Storey advanced for Swift against Tyson IN 1842, that the law does not lay down one rule in Athens and another rule in Rome; that the law should be uniform throughout the Federal Court System substantively. You don't agree with that, I take it?

MR. MANNERS: No, sir.

QUESTION: Why not?

MR. MANNERS: That's the way life is.

QUESTION: That's your answer to Brother Rehnquist's question whether or not you agree or don't agree, that is the law.

MR. MANNERS: Yes, sir.

QUESTION: That under Erie Railroad against Tompkins, Federal Courts and diversity actions are required to apply State substantive law. It is equally well-settled that, as a matter of procedure, and everybody agrees that it is a matter of procedure, then there is a uniform Federal law applied in diversity cases, in Federal Courts as well as all other cases in Federal Courts.

MR. MANNERS: Yes, sir.

QUESTION: Whether that's good or bad or philosophically supportable or not, you don't need to say. It is the law.

MR. MANNERS: Sir, I do feel very strongly that service of summons and the Rules about commencing an action are procedural.

QUESTION: Well, let's assume that Rule 3 does cover when an action is commenced for Federal purposes, and that there is nothing that the State can say that will change that, that if you file the complaint, the action is commenced, the State doesn't argue with you about that.

Your opponent doesn't have to worry about that. He will just say, however, that that just isn't enough to start to toll the statute of limitations. The State law says you have to do something else to give you 60 days.

They say our statute of limitations runs until you are served a complaint.

MR. MANNERS: No, sir, it says commenced upon filing a complaint, but you must obtain service within 60 days.

QUESTION: What was the statute of limitations in this case? You've got two years and 60 days. And you have got two years and 60 days to file the complaint, rather serve the complaint. If you don't serve it, you're out. Whether or not you have commenced the action.

MR. MANNERS: That's correct. The Federal Rules don't say that though. And I think we out to follow the Federal Rules in this case.

QUESTION: Let's go back a step. What was the purpose of the diversity provisions of the Constitution? That was just giving what was thought to be a neutral forum.

MR. MANNERS: Stop forum shopping.

QUESTION: Now, how does uniformity advance the idea of getting a neutral forum, one where citizens of another State were at least thought to have a better chance to get fair treatment in a Federal Court than a local court? How is that advanced, that concept advanced by

saying that the service or process must be uniform?

MR. MANNERS: It would advance, each person would know from whence they hailed that the same rules applied insofar as procedure in their courthouse in Milwaukee would apply so far as procedures are concerned in the courthouse in Oklahoma City.

QUESTION: Isn't it more than that, Mr. Manners? Isn't there also the point that you do have cases in the Federal Courts that are not diversity cases. And I presume there is some advantage in having the same rules apply in Federal trials, whether it raises a Federal question or a State law question or a mixture of both?

MR. MANNERS: Yes, sir.

QUESTION: And man cases are a mixture of both.

MR. MANNERS: Yes, sir.

QUESTION: Isn't there another question here? If your Federal Rules apply, as I understand them, the duty to effect prompt service is rested with the Clerk of the Court?

MR. MANNERS: Yes, sir.

QUESTION: Delivering the summons to the marshal.

How does the procedure work under Oklahoma law?

Is it your burden under Oklahoma law?

MR. MANNERS: You go up to the Clerk's office and you file it, and there is a big basket there, and they pitch



it in the big basket, and if you don't want it three or four days getting to the Sheriff, you say, "Let me have that" and you take it back and give it to the deputy.

QUESTION: Are you talking about the Federal Court or the State Court?

MR. MANNERS: State.

QUESTION: In the State Court, in other words, there is a responsibility of the plaintiff and his counsel to cause the marshal to be delivered -- to cause the summons to be delivered to the marshal?

MR. MANNERS: No, sir. They put it in a basket, but if there is a two or three delay getting it to the Sheriff, if you want it down to the Sheriff that day, then you ask them to give it to you and you walk down and give it to the Sheriff.

QUESTION: I see. But you have told us already that you never got around that far; you didn't get it into the basket.

MR. MANNERS: I thought we got it into the basket.

QUESTION: But you weren't in State Court.

MR. MANNERS: No, sir, I was in Federal Court.

QUESTION: In the Federal Court, it is not your to put it in the basket as I read the Rules.

MR. MANNERS: Rule 4 says it's not. It says the Clerk shall cause it to be served, to be given to the

marshal.

Now, I can't fathom, and don't understand what could have happened to those summons, because the case was filed and we kept calling the Clerk to ask if we have got service, and they would say no. And then we found them on a file review. It's terrible.

QUESTION: Somebody thought he was in the State Courts.

MR. MANNERS: Gentlemen, I think I have used a lot of my time. And, if you'll tolerate me a second, I think this is the highest -- the finest thing that has ever happened to me in the practice of law, being allowed to come up here. A judge, named Judge Mills when I was a beginning lawyer said you didn't have to use all your time. He said it reminded him of a picture of Lincoln. A little boy asked the teacher, said, "How long shall I make Lincoln's legs?" And she said, "Make them until they touch the ground."

So, unless there are further questions, I think my legs have touched the ground here.

QUESTION: Very well.

Mr. Galt, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAY M. GALT, ESQ.  
ON BEHALF OF RESPONDENT ARMCO STEEL  
CORPORATION.

MR. GALT: MR. Chief Justice, may it please the  
Court:

I am Jay M. Galt, from the Law Firm of  
Looney, Nichols, Johnson & Hayes, Oklahoma City, representing  
the Respondent ARMCO Steel Corporation, an Ohio corporation.

The facts of the case are much as outlined by  
Mr. Manners. However, I would like to point out to the  
Court that ARMCO Steel Corporation retains a National  
Service Corporation as its resident agent in the State of  
Oklahoma, whose office is located within four blocks of the  
Federal Courthouse. And when service was effected, 101 days  
after the statute of limitations had run, that was the very  
first notice, the first notice that ARMCO had received  
of any claim by Mr. Walker against ARMCO for injuries he  
allegedly sustained by reason of a defective nail.

The Petitioner in this case is a resident of the  
State of Oklahoma, took advantage of the diversity statute,  
and chose his forum in the Federal Court. The Petitioner  
admits that had he filed this case in the State District  
Court, and, in fact, it might have been an after thought  
that he filed it in the Federal Court, his initial pleading  
is denominated a petition rather than a complaint, and in our

State Court we would call our initial pleading a petition, he chose the Federal Court and has admitted that had he filed this in the State Court, and the same facts had existed, no service for 101 days, without question, his case would have been barred and dismissed.

But because he was fortuitous enough to file it in the Federal Court, we are now before this Honorable body today asking and questioning whether or not Ragan should prevail as the rule covering this case.

It is the position of the Respondent, obviously, that Ragan is good law and that if this Court were to reverse Ragan and hold that Hanna applied, and that the commencement of this action by filing with the Clerk tolled the statute of limitations.

QUESTION: How can we -- How is a Federal matter, when you say that for State law purposes, the statute of limitations is tolled?

MR. GALT: I don't think you can. What the Petitioner in this case is asking that you do is rule that by filing under Rule 3, that mere act tolled the statute of limitations, and --

QUESTION: And that the State is incompetent to require another step.

MR. GALT: That's correct. And we honestly don't agree with that. We think that Rule 3 does not apply. State

law applies, and the State law is very clear that if you file your action within the appropriate statute of limitations period, from the time that that statute runs, you then have 60 days to effect service. And there is a case Taylor v. Taylor that Judge Doyle cites that is out of our Court of Appeals, that says that the filing commences the action, but there is one step more required to effect jurisdiction of the State District Court, and that is service on the Defendant. And it sets that other step that the Petitioner in this case failed to take for reasons that he has been very honest with the Court about today. The important thing that I see in this case is that should this Court decide that Rule 3 commences an action to toll the limitations, what happens to the diversity defendant who has the same case filed in the State Court, the same facts being present, no service for 101 days, and then mistakenly that diversity defendant to obtain the benefits of the diversity rule removes his case to the Federal Court, files his motion to dismiss and finds that it will be overruled. Because had he stayed in the State Court, his motion to dismiss would have been sustained but because the Federal Court--

QUESTION: He had probably better get another lawyer if he does that.

MR. GALT: Well, I would think so.

QUESTION: He is just waiving a perfectly good

defense, but that is hardly a legal argument.

MR. GALT: I think it is because isn't the object of Erie and Tompkins to avoid forum shopping and to avoid inequitable--

QUESTION: There wouldn't be any need for forum shopping there. All he has to do is go in and get the case dismissed as a matter of State law.

MR. GALT: I agree, Your Honor.

QUESTION: And we have to presume people are going to act in their best interest, I would assume.

MR. GALT: Yes. Yes.

QUESTION: So far as you know, Counsel, is there any provision in the Federal Rules that sets a time limit on actual service on the part of the Defendant once the complaint is filed? Suppose this complaint or summons hadn't been filed for six years after the complaint had been filed in Court, would the Federal Rules have nonetheless have held it to be a good complaint?

MR. GALT: Mr. Justice Rehnquist, the procedure in that case would be that had the summons not been issued for six years, we had no similar statute, the Defendant would most likely file a motion under Rule 41 to have the case dismissed for lack of diligent prosecution. I believe that's the correct rule.

QUESTION: How would he ever know there was a

case if he hadn't been served?

MR. GALT: He would not know that there was a case until at some point in time, six years later--

QUESTION: I am sure he would say -- I assume he would say one of the functions of the pleadings is to give him notice.

MR. GALT: But he would never have that until he was served.

QUESTION: He can assemble his evidence and get ready to protect.

MR. GALT: That's correct, Mr. Chief Justice, but I thought Mr. Justice Rehnquist questioned what if the summons was not served for six years. We would not know, we would not know now that we had been sued if we had not finally been given a service.

QUESTION: Mr. Galt, can I ask you a question?

MR. GALT: Sure.

QUESTION: About the Oklahoma practice, because I have been a little confused. I thought I heard some argument to the effect that as a matter of Oklahoma law, this action was commenced, but then there just wasn't service within 60 days. That's not right, is it? The action was not commenced, as a matter of Oklahoma law, as I read the statute. It says it is commenced at the time the summons is served on him; isn't that right?

MR. GALT: That is what 120S97 says,

Mr. Justice Stevens, but the Taylor v. Taylor Case that is cited in the Tenth Circuit Opinion would indicate that Oklahoma would say that it was commenced when the petition was filed, or the complaint. But to toll the statute of limitations--

QUESTION: It was commenced at that time if service was made within 60 days?

MR. GALT: Yes.

Really, what I think Taylor says is the case is commenced, for the purpose of commencing, let's say, the word "commencing" means filing, the case was filed--

QUESTION: That's not what the statute says. The Oklahoma statute says, "shall be deemed commenced upon service of summons", as I read it.

MR. GALT: I agree with what Your Honor--

QUESTION: Isn't that the way it's construed in Oklahoma?

MR. GALT: The Taylor Case--

QUESTION: Is the Taylor Case a -- I don't recall--

MR. GALT: It is a State Case. It is really a State Court of Appeals case, but it seems to say that you file your case and that means commence with the connotation of the word "file", and then a second step is required in that Plaintiff must effect service to give the Court jurisdiction within 60 days.



QUESTION: The second step is required for what to have occurred, for the action to have been commenced?

MR. GALT: Yes, to give the Court jurisdiction to toll the statute of limitations.

QUESTION: What does the statute of limitations say?

MR. GALT: The statute of limitations says that there should be two years from the time the injury occurs to file the action.

QUESTION: To file the action or commence the action? Does it say "file", or what does it say?

MR. GALT: Your Honor, I can't--

QUESTION: Because I think that's rather important what the statute of limitations requires to toll the statute. If it required service of process, I wouldn't think there would be much of an argument. But if it says "commencement of an action", that's another matter.

MR. GALT: Our statute says you have two years for bringing a personal injury action.

QUESTION: Bringing it? What is the exact wording? I can't find it anywhere in any of the briefs or papers here.

MR. GALT: It has never come up. We have talked about 12 OS 97.

QUESTION: Well, why wouldn't it come up, because

that's the question. If the state said you only toll the statute of limitations by painting the State Capitol red, it wouldn't help you to commence the action in Federal Court.

MR. GALT: No.

QUESTION: And if it says, if the statute of limitations says the statute runs until you serve the complaining, is that what it says?

MR. GALT: No, no. I think it's best that we supply that to the Court.

QUESTION: Well, we've got it in the statute.

QUESTION: Counsel, does it help any, the District Court said an action is commenced in State Court when process issues, provided process is actually served within 60 days.

MR. GALT: I think that's 12 OS 97. That is correct.

QUESTION: I want to know what--

MR. GALT: That I can't answer, Your Honor.

It is the position of the Respondent that we believe that Ragan and Hanna, in the vernacular of our Diplomatic Corps, can peacefully co-exist. I think that Ragan looks to the State law to determine what it takes to toll the statute of limitations while Hanna is a service case dealing with what is necessary under the Federal Rules

to effect actual service of process.

QUESTION: What about page 3 of the Opinion of the Tenth Circuit, in the Petition for Writ of Certiorari? I think it is probably A-3, where it cites Oklahoma statute annotated Title 12, Section 97, "An action shall be deemed commenced within the meaning of this article", and then it goes on to say "intent to commence an action"; is that the--

MR. GALT: That is not--

QUESTION: That is not a statute of limitations.

MR. GALT: The Oklahoma Court has construed 97 to be an integral part of the actual statute that created the Plaintiff's right in this case.

QUESTION: Since we don't have the statute of limitations before us, assume for a moment it provides that it runs until -- I mean, an action must be commenced, what is your position as to the time, if ever, when the action against your client was commenced?

MR. GALT: The action against my client was not commenced until we were served with summons some 101 days after the statute of limitations had run--

QUESTION: Again, if you had been served, say 35 days after the complaint was filed, you would say the action was commenced on that 35th day; is that right?

MR. GALT: I would think for the purposes of

filing my answer that I would calculate from the 35th day.

QUESTION: In other words, your view is that the action is commenced upon the date of service. If that is true, I fail to see any relevance whatsoever to the 60-day provision in the Oklahoma statute. It is either commenced when the complaint is filed, which the Federal Rule provides, and you disagree with it -- so does Ragan -- or, alternatively, it is commenced upon service, or attempt to make service. You say it is the latter and your opponent says it's the former. So why do we have to look at the 60-day problem?

MR. GALT: Because our Legislature in whatever wisdom has said, "We are going to give you two years to file a lawsuit and you must effect service within 60 days from that date." And if you do not effect service within 26 months from the date of the injury--

QUESTION: All that means is that your statute of limitations, instead of being 24 months long is 26 months long, but you have still got to commence the action within the 26 months.

MR. GALT: That's correct.

QUESTION: It is commenced for your purposes being served. That is what you are arguing.

MR. GALT: That's correct.

QUESTION: On the other hand, if commenced in a

Federal lawsuit means filing the complaint, we don't have to worry about the 60 days either. I just don't see how the 60 days affects the case.

MR. GALT: Well, if this Court were to hold that the mere filing of the complaint tolled the statute of limitations, then we are going to have different results obtaining in the State Court and a Federal Court.

QUESTION: Mr. Galt, it is not a question of tolling the statute of limitations; the action would have been commenced within the statutory period, if that is an adequate commencement of the action. There is no question of tolling. The question is did they commence the action before the statute ran.

MR. GALT: I suppose the question is what does the word "commence" mean?

QUESTION: That is the issue.

MR. GALT: Yes. And Rule 3 does not say that Commencement --

QUESTION: Rule 3 is perfectly clear it says it is commenced when you file a complaint. But you just say it doesn't apply.

MR. GALT: That's correct.

QUESTION: If you say Rule 3 doesn't say that commencing an action stops the statute of limitations, or means that after that time, if it was filed within the statute of limitations, the statute of limitations has no

more applicability.

MR. GALT: I think that's what I am saying.

QUESTION: I am not sure, the question certainly wasn't too clear. What you are saying, as I understand it, is that the commencing of the action doesn't put the statute of limitations out of the picture under Rule 3, even though the action was commenced within the appropriate statutory period?

MR. GALT: That's correct.

QUESTION: I understood in your response to one of the questions where you said that for purposes of filing an answer, you would compute from the date of service. That doesn't really answer the question as to when the action is commenced for me.

MR. GALT: Well---

QUESTION: I can see where, for purposes of filing a responsive pleading, that you would compute from the date of service, as distinguished from the date of commencement of the action, if it relates back under Oklahoma practice. And somewhere in these briefs I have the impression, isn't there a State Court holding that it does relate back?

MR. GALT: I don't believe so, Mr. Justice Blackmun, but in doing the research and preparation for this argument, it appeared to me that the drafters of the Rule, when they looked at Rule 3, thought about putting a proviso in there

that filing the complaint would toll any statute of limitations problem. They thought better of it and did not include that.

Some of the writers have said that the word "commencement" is in the Rules to have a figure to calculate time from. The only thing I can relate to in answer to the question is that the Oklahoma statute says that the action is commenced when you are served and, for my purposes, as a trial lawyer, defense lawyer, when an action is commenced, it is commenced on me when I receive service, and that is when I start my preparation for a defense.

QUESTION: Conceivably, it might commence for one purpose under the statute of limitations and another purpose in terms of tolling your time, in determining your time to respond.

MR. GALT: Yes, sir.

QUESTION: On the matter of supplying this information, while it's true we have the statutes available, you are both Oklahoma lawyers, you submit whatever you wish to submit on it as promptly as possible.

QUESTION: That section is Section 95, two sections ahead of this.

MR. GALT: Yes, sir.

QUESTION: You perhaps can do that before you leave the building.

MR. GALT: Yes, sir, we will.

Thank you very much, Mr. Chief Justice.

Thank you for permitting me this opportunity.

QUESTION: Thank you, gentlemen, the case is submitted.

(Whereupon, at 2:18 o'clock p.m. the case was submitted.)

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