

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: ALBERT J. FERENS, ET UX., Petitioners V. JOHN DEERE COMPANY,
aka DEERE & COMPANY

CASE NO: 88-1512

PLACE: WASHINGTON, D.C.

DATE: November 6, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 ALBERT J. FERENS, ET UX., :
4 Petitioners :
5 v. : No. 88-1512
6 JOHN DEERE COMPANY, aka DEERE :
7 & COMPANY :

8 -----x
9 Washington, D.C.

10 Monday, November 6, 1989

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 12:59 p.m.

14 APPEARANCES:

15 RICHARD B. TUCKER, III, ESQ., Pittsburgh, Pennsylvania; on
16 behalf of

17 the Petitioners:

18 DAVID P. HELWIG, ESQ., Pittsburgh, Pennsylvania; on behalf
19 of the

20 Respondent.
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1 QUESTION: The purpose of that filing was to get
2 the benefit of the Mississippi statute of limitations?

3 MR. TUCKER: There is no question about that, Your
4 Honor. The purpose of the filing in an appropriate forum
5 was to gain the advantage of the Mississippi statute of
6 limitations. The Respondents did not oppose either the
7 venue or the assertion of in personam jurisdiction over
8 them in the Southern District of Mississippi.

9 QUESTION: Well, how could they?

10 MR. TUCKER: On the contrary --

11 QUESTION: Was there any basis to do so?

12 MR. TUCKER: There was no basis to do so, Your
13 Honor. In fact, what they did in the case was file an
14 answer in which they admitted specific facts that
15 established the venue in the jurisdiction. They were
16 registered to do business in Mississippi, they maintained
17 a registered agent there, and they were in fact doing
18 business in Mississippi. It is clear, therefore, that
19 venue and jurisdiction were appropriate in the Southern
20 District of Mississippi.

21 QUESTION: Mr. Tucker, could the court sitting in
22 Mississippi have declined to grant or allow the transfer?

23 MR. TUCKER: It certainly could have, Your Honor.
24 And I think that is one of the important things that we
25 want to stress for this Court. It is not our argument in

1 this case that a plaintiff filing a motion under Section
2 1404 has an absolute right to a transfer. That is clearly
3 not our position. We may have a right to file a motion,
4 but the determination of whether or not that case is going
5 to be transferred is to be made by the district court
6 after weighing all of the various factors that are
7 appropriate for consideration under Section 1404.

8 In fact, in this very case, had the Respondents
9 filed some objection to the motion to transfer, it is
10 conceivable that the court in Mississippi would have
11 denied the motion. Had that happened, we would have had a
12 forum in which to try this case, because the Mississippi
13 forum was clearly appropriate. Instead, by asserting the
14 statute of limitations of Pennsylvania after the transfer
15 had occurred, the Respondents have essentially engaged in
16 the practice of using the transfer to defeat the state law
17 advantages accruing to the Plaintiff from its initial
18 selection of the forum, and Van Dusen proscribes that kind
19 of conduct.

20 QUESTION: The holding of Van Dusen I don't believe
21 is inconsistent with the result reached by the Third
22 Circuit here. Are you, you are saying some of the
23 language is --

24 MR. TUCKER: I am saying the reasoning in Van
25 Dusen, Your Honor. I am not -- it is not our position

1 that Van Dusen held that, in this particular case, the law
2 of Mississippi had to continue to apply. In fact, the
3 court specifically reserved judgment on that issue. We
4 are not claiming otherwise. But it is our belief that the
5 reasoning in Van Dusen is equally applicable in the
6 present case, and that therefore the law of Mississippi
7 should have continued to apply.

8 Now, the venue privilege that is accorded to a
9 plaintiff is well established in the law. The Judicial
10 Code of 1948 established venue rights for plaintiffs
11 seeking to bring suits in federal court. Section 1391(c)
12 of the Judicial Code -- of that provision, provides broad
13 latitude to plaintiffs seeking to bring suits against
14 defendant corporations. Not only is venue appropriate in
15 a district where all the plaintiffs reside, or in the
16 district where the cause of action arose, but venue is
17 also appropriate with respect to corporations in the
18 district where the corporation was incorporated, in any
19 district in which it is licensed to do business, and in
20 any district in which it is in fact doing business.

21 Implicit in the provision of broad venue rights to
22 a plaintiff is the recognition that a plaintiff can select
23 law in one of those forms that is more favorable than his
24 selection of another form in the applicable law. In Van
25 Dusen this Court recognized the propriety of the exercise

1 of the venue privilege and of the accrual of state law
2 advantages that arose because of such a selection.
3 Indeed, this Court specifically deemed those rights worthy
4 of protection against defendants who sought to use Section
5 1404 to defeat those rights. Now, there is nothing about
6 Section 1404 that indicates that it is any way intended to
7 defeat plaintiff's venue privilege and the accrual of
8 advantageous state law.

9 QUESTION: Your case would have more, perhaps, gut
10 appeal to it if you had kept your so-called venue
11 privilege in Mississippi and not transferred it back to
12 Pittsburgh, where the action -- or accident occurred.

13 MR. TUCKER: Well, Your Honor, what I am suggesting
14 though is that the applicable law selection is a result of
15 the initial selection of an appropriate venue forum.
16 That's implicit by the way that Section 1391 is phrased.
17 Section 1404, which provides for transfers, is not an
18 automatic right. It does not provide a plaintiff or a
19 defendant with a right to select a different forum and a
20 different set of laws that will be applicable to the case.
21 The law that should be applied in the case is that which
22 is applied as a result of the initial selection of the
23 forum. That is what the venue privilege establishes, that
24 we have a right to do so. And nothing in 1404 defeats
25 that right.

1 1404, if you view the specific express language,
2 contains nothing indicating that a transfer of venue
3 should result in a transfer of the applicable law.

4 QUESTION: Is it -- is it perfectly clear under
5 1404 that it is available to plaintiffs on the same terms
6 it is -- as it is to defendants?

7 MR. TUCKER: It's -- it does not specifically say
8 this statute is available to plaintiffs, but it talks it
9 for the convenience of parties, it does not limit it to
10 availability of defendants. And in fact, I think the vast
11 majority of cases that have addressed that issue have said
12 that it clearly is something that is available to
13 plaintiffs as well as to defendants. I don't really think
14 that there is any question about its availability.

15 QUESTION: And on the same terms substantially as
16 is to defendants?

17 MR. TUCKER: There is nothing in the language
18 indicating that its availability is on different terms. I
19 know that there is an amicus curiae brief that suggested
20 that the factors that might be considered in determining
21 whether or not to grant a motion made by a plaintiff are
22 different than those which might be considered in a
23 defendant-initiated motion, but that issue really isn't
24 before the Court, because in this case the motion was made
25 and the Respondent did not oppose it.

1 Section 1404's enunciated policy is to provide for
2 the convenience of the parties and witnesses in the
3 interest of justice. There is nothing in that enunciated
4 policy that indicates that it was intended to defeat a
5 plaintiff's venue privilege. Finally, in what meager
6 legislative history there is that deals with Section 1404,
7 there is nothing to suggest that it was intended to defeat
8 a plaintiff's venue privilege. Consequently --

9 QUESTION: Once the rule is adopted it wouldn't
10 defeat the venue privilege, would it? I mean, the
11 plaintiff would simply know that if -- that going in he
12 was going to have to make a choice between getting the law
13 of the place where he brought the suit or getting the more
14 convenient forum. I mean, it wouldn't be defeating
15 anything -- maybe in this one case it would, but once we
16 announce what the rule is, the plaintiff's expectations
17 will be very clear. He can either pick the law and live
18 with it in that forum, or he can pick the more convenient
19 forum and get the law with it.

20 MR. TUCKER: But I am not sure that you and I are
21 disagreeing, Justice Scalia. I am suggesting a rule that
22 says that the plaintiff pick the forum initially, and that
23 is his law. He then has a right to ask the district
24 court, considering factors of convenience and considering
25 convenience of the witnesses, factors of fairness, to

1 transfer that case. But that transfer, under Section
2 1404, is to have no effect on the applicable law. That's
3 the rule that we are suggesting the Court adopt in this
4 case, that it be a uniform rule, applicable regardless of
5 whether it is the plaintiff or the defendant that is
6 seeking to use 1404 to move the case from one court to
7 another court.

8 QUESTION: Well, that may be a sensible enough
9 rule, but all I am suggesting is that it doesn't seem to
10 me to be an accurate description to say we are taking
11 away, or we would be taking away, the plaintiff's, the
12 plaintiff's venue selection right if we held that if, on
13 his initiative, he wants to trade that for a more
14 convenient forum, he has to trade the law along with it.

15 MR. TUCKER: Well, what I --

16 QUESTION: It doesn't seem to me an unreasonable
17 rule.

18 MR. TUCKER: I think what we are talking about,
19 Your Honor, is not necessarily simply the right to select
20 the venue, because obviously by transferring a case you
21 are changing the venue. But what we are talking about is
22 what the court talked about in Van Dusen, and that's the
23 state law advantages that accrue as the result of the
24 selection of a particular forum. And in Van Dusen the
25 court indicated that there was nothing about Section 1404

1 which indicated that it should be used, or could be used,
2 to defeat those state law advantages.

3 QUESTION: But there it was a defeat. There you
4 couldn't have said well, the plaintiff was just put to a
5 trade. He was given the option of you stick with your
6 choice of law with the venue, or you can get a more
7 convenient forum but you will have to give up the choice
8 of law. He didn't have that choice, because it was the
9 defendant in that case who was trying to do him out of his
10 selection of law. He was perfectly happy to litigate
11 there, and the defendant was depriving him of it. All
12 that your opponent is proposing here is that your client
13 be put to his choice: pick your law or pick the
14 convenient forum, but don't try to have both. Isn't that
15 --

16 MR. TUCKER: I understand that, Your Honor, but I
17 am suggesting that in Van Dusen the Court's consideration
18 of 1404 led it to conclude that essentially 1404 has
19 nothing to do with the applicable law following a
20 transfer. This Court concluded in Van Dusen that 1404 was
21 nothing other than a judicial housekeeping measure, that
22 all it dealt with was the location of litigation, and all
23 it did was authorize a transfer from one court room to
24 another court room, that it should have no effect
25 whatsoever on the applicable law following that transfer.

1 QUESTION: If it is as clear as that, why would we
2 reserve the question, as we did explicitly?

3 MR. TUCKER: Because the question was not before
4 the Court, Your Honor, and I think it is wise for the
5 Court not to decide issues that are not before it. Just
6 like, in this case, --

7 QUESTION: Well, why is it even an issue?

8 MR. TUCKER: I am sorry, Your Honor?

9 QUESTION: You, you seem to concede that it is a
10 real issue.

11 MR. TUCKER: I seem to concede that what is a real
12 issue?

13 QUESTION: Whether Van Dusen applies to this case.

14 MR. TUCKER: Oh, I don't think -- Van Dusen does
15 not specifically apply to this case, because the Court
16 reserved judgment on that question. But I don't think any
17 implication can be drawn from the fact that judgment was
18 reserved on the issue that is before the Court now, as to
19 whether the Court would have decided that issue one way or
20 the other. The fact of the matter is the issue simply was
21 not before the Court in Van Dusen.

22 QUESTION: Well, you at least -- the Court at least
23 said it wasn't deciding the question.

24 MR. TUCKER: That is correct. It said it was not
25 deciding the question. All I am suggesting is that the

1 reasoning --

2 QUESTION: We usually don't reserve questions that
3 are foregone conclusions from the reasoning.

4 MR. TUCKER: But this Court generally, I don't
5 think, decides issues that aren't before it. And in the
6 case of Van Dusen what was before the Court was a
7 defendant-initiated transfer, not a plaintiff-initiated
8 transfer, and there was therefore no reason for the Court
9 to decide one way or the other. Just like in the present
10 case, the issue is not before the Court as to what happens
11 where the plaintiff has selected an improper initial
12 forum. That issue is not before the Court. It is not our
13 position, and we are not arguing here today that if the
14 plaintiff selects an improper initial forum, either
15 because of venue or jurisdictional grounds, that he still
16 is entitled to the applicable law of the transferor state.
17 And I would submit that --

18 QUESTION: You mean the law -- you mean the law
19 that the transferor state would have applied?

20 MR. TUCKER: The law that the transferor state
21 would have applied, yes, Your Honor. And I think any
22 opinion coming out of the Court today will reserve
23 judgment on that issue because it is not before the Court.
24 Just as the plaintiff-initiated transfer question was not
25 before the Court in Van Dusen.

1 I think there is nothing about a plaintiff-
2 initiated transfer which compels any different result than
3 that of a defendant-initiated transfer. If you look at
4 the express language in Section 1404 there is nothing that
5 suggests that its use by a plaintiff somehow turns it into
6 a devise to defeat the plaintiff's state law advantages
7 accruing from the exercise, or the proper exercise, of its
8 venue privilege. There is nothing in the enunciated
9 policy that suggests that, or in the legislative history
10 that suggests that anything about a plaintiff's use of the
11 section makes it different than a defendant's use. In
12 fact --

13 QUESTION: Does Van Dusen stand for the principle
14 that there is simply no connection between the convenience
15 of the forum and the applicable law?

16 MR. TUCKER: That would be our contention, Your
17 Honor. If 1404 deals only --

18 QUESTION: I think it can be read that way. I am
19 wondering -- it would seem as an intuitive matter that it
20 should be the other way around.

21 MR. TUCKER: Well, 1404 deals only with
22 consideration of convenience and fairness, not with
23 considerations of the applicable law. That's a result of
24 this Court's determination in Van Dusen that it is just a
25 judicial housekeeping measure. In fact, this Court only

1 last year described Section 1404 in the very same way in
2 the Stewart Organization case. Both the majority and the
3 dissenting opinions in those cases described 1404 as a
4 mere judicial housekeeping measure.

5 QUESTION: Yet there is something odd about this
6 case. You end up trying it in Pennsylvania, in the
7 district court in Pennsylvania, and Pennsylvania would
8 have said there is a two-year statute of limitations. Why
9 should you be able to avoid that result by going down to
10 Mississippi, where apparently nobody intended to try the
11 case, and filing down there?

12 MR. TUCKER: That is absolutely incorrect, Your
13 Honor. If the motion -- see, one of the problems with
14 this case is that the Respondents did not oppose the
15 motion. Therefore, everybody assumes that we
16 automatically had a right to come back to Pennsylvania, or
17 that, if they had opposed the motion successfully, we
18 would have abandoned the suit in Mississippi. That is not
19 correct. Mississippi was clearly a proper forum. This
20 case would have been tried in Mississippi --

21 QUESTION: But not the one which you preferred,
22 once you picked up your choice of law.

23 MR. TUCKER: Not the what that we preferred?

24 QUESTION: Yeah, I mean, it was you that moved to
25 transfer it back to Pennsylvania.

1 MR. TUCKER: It was us that moved to transfer it
2 back to Pennsylvania because obviously, given the
3 residence of the plaintiffs, it would be more convenient
4 for them to try the case in Pennsylvania.

5 QUESTION: So you, your first choice was the
6 preference as to statute of limitations, and then if you
7 could get the convenience you would get that?

8 MR. TUCKER: That is correct. We were not
9 guaranteed that we would be able to come back to
10 Pennsylvania however. Our first choice, and our duty as
11 counsel for the Petitioners in this case, was to file the
12 case in an appropriate and proper forum. And we did that.
13 Then, because it would be more convenient for them, we
14 filed a motion seeking to make the case more conveniently
15 tried by bringing it back to Pennsylvania. We never
16 contended that we had an absolute right to bring it back
17 to Pennsylvania. It was up to the district court in
18 Mississippi to weigh the various factors and decide
19 whether or not --

20 QUESTION: Yet -- yet what arguments could have
21 been made against your motion for transfer?

22 MR. TUCKER: Well, Your Honor, there has been a
23 brief submitted by amicus curiae in this case suggesting
24 that with respect to plaintiff-initiated motions to
25 transfer, there are numerous factors that should be

1 considered, whether there has been some change in the
2 plaintiff's situation. It suggests also that, because it
3 is the plaintiff that has made the original choice, that
4 the plaintiff's initial selection should generally govern,
5 unless the plaintiff can show, by a preponderance of
6 evidence or arguments, that the case should be
7 transferred.

8 QUESTION: But, sitting as a district judge in the
9 Southern District of Mississippi, you know, the witnesses
10 are in Pennsylvania, the accident occurred in
11 Pennsylvania. Certainly there are a lot of considerations
12 that would motivate that judge to grant the transfer, and
13 it seems to me very few to militate against it.

14 MR. TUCKER: Well, in a way we don't know what
15 militates against it because the Respondent didn't oppose
16 it. The Respondent didn't come in and say these are the
17 reasons we think this case shouldn't be transferred.

18 QUESTION: Well, isn't there an argument based on
19 the language of the statute that might militate against
20 it? The statute says that you may transfer it to any
21 other district or division where it might have been
22 brought. Now, technically it could have been brought and
23 then dismissed on statute of limitations grounds, but
24 there is a pretty good argument that it could not have
25 been maintained in the district in Pennsylvania.

1 MR. TUCKER: I think that issue, Your Honor, has
2 been resolved in the Van Dusen case, because one of the
3 questions there was what it means -- what that particular
4 phraseology means, where it might have been brought. And
5 if I recall correctly, the Court in Van Dusen says that
6 all that means is a jurisdiction or venue and -- a forum
7 where jurisdiction and venue are appropriate, even if it
8 may have resulted in less favorable law. I don't think
9 that there was any basis for denying a transfer to
10 Pennsylvania --

11 QUESTION: No, but it surely expresses the
12 suggestion from Congress that one of the things that the
13 transferring judge should consider is whether or not the
14 litigation could have gone forward in that case -- in that
15 state. And I would think the question, the questions
16 presented by this particular certiorari petition is quite
17 different from the question whether there might be a basis
18 for refusing a transfer. This judge might say well, you
19 picked this forum, I am going to hold you to your choice.
20 You couldn't have sued up in Pennsylvania.

21 MR. TUCKER: I agree. If I understand your
22 question correctly, I agree. We are not here to resolve
23 the question of whether or not that motion should have
24 been granted. The fact of the matter was it was granted.
25 The question that we are here to decide today is what law

1 is applicable. It is our position that this Court should
2 adopt a uniform law that says, and this is language, this
3 is basically taking language from the Stewart Organization
4 case, which admittedly was dictum, it was not the holding,
5 but in Stewart Organization this Court indicated that a
6 transfer pursuant to Section 1404 carries with it no
7 change in the applicable law. That should be the rule
8 this Court adopts in this case.

9 QUESTION: (Inaudible) it certainly changes what
10 the procedural rules are going to be.

11 MR. TUCKER: No, Your Honor, I submit that it does
12 not. This case should have been --

13 QUESTION: Why not?

14 MR. TUCKER: Because the case would have been tried
15 in the United States District Court for the Southern
16 District of Mississippi --

17 QUESTION: Yes.

18 MR. TUCKER: -- under the federal rules of civil
19 procedure --

20 QUESTION: Yes.

21 MR. TUCKER: Following the transfer it would have
22 still be tried under the United -- under the federal rules
23 of civil procedure --

24 QUESTION: Well, that may be so, but it would also
25 have been tried under the rules of that particular court.

1 You know, the federal rules don't have all the rules that
2 apply to trying a lawsuit.

3 MR. TUCKER: Well, there would have been -- you are
4 suggesting there would have been different procedural
5 rules that would have applied?

6 QUESTION: Yes. Different local rules.

7 MR. TUCKER: Exactly, Your Honor. The only
8 difference --

9 QUESTION: Don't tell -- don't say the rules don't
10 change with the transfer. They do.

11 MR. TUCKER: No -- there would have been, or there
12 could have been some minimal change in the application of
13 the local rules.

14 QUESTION: Yeah, but the -- yeah, but is the
15 statute of limitations deemed substantive or procedural?

16 MR. TUCKER: It depends on whether you are looking
17 at that for Erie purposes or for other purposes. For Erie
18 purposes it is considered substantive. It is outcome
19 determinative. Therefore, the southern -- case --

20 QUESTION: What about for transfer purposes?

21 MR. TUCKER: For transfer purposes I believe it
22 should be still be treated as substantive. It is part of
23 the Mississippi law that should have been applied and
24 continued to have been applied after the case was
25 transferred pursuant to a procedural statute providing for

1 such transfers at the convenience -- for the convenience
2 of the parties and in the interest of justice.

3 I would also like to address the Third Circuit's
4 opinion and the basis upon which the Third Circuit decided
5 this case. The Third Circuit's opinion apparently
6 reflects its feeling that this case constituted improper
7 forum shopping. That is clearly inaccurate in this case.
8 The Plaintiffs exercised their venue privilege properly.
9 They brought suit in an appropriate forum --

10 QUESTION: It was proper forum shopping, right?
11 Not improper forum shopping. I mean --

12 MR. TUCKER: It's the selection -- it's the
13 selection of a forum, that is right.

14 QUESTION: Right.

15 MR. TUCKER: It's proper forum -- there is nothing
16 improper about the initial selection of the forum --

17 QUESTION: Forum shopping. If indeed you have the
18 option, you say all forum shopping is okay.

19 MR. TUCKER: And the case -- and the Petitioners
20 cannot therefore be criticized in this case for bringing
21 suit in the Southern District of Mississippi. That was
22 clearly appropriate. That simply leaves the question of
23 whether or not transferring the case back to the Western
24 District of Pennsylvania constituted impermissible forum
25 shopping. Clearly --

1 QUESTION: (Inaudible) to do it, and you certainly
2 served your client well, but I wouldn't go around bragging
3 about a judicial system that allows that kind of thing to
4 determine how a case comes out.

5 MR. TUCKER: But it doesn't determine how this case
6 comes out, Your Honor. That is just the point. No matter
7 where this case was -- was tried, it should have been the
8 law of Mississippi was applicable and should have been
9 applied.

10 QUESTION: But the law of Mississippi had
11 absolutely no connection with the accident that happened
12 to your client, or the facts -- the only thing Mississippi
13 had to do with it was that John Deere did business there.

14 MR. TUCKER: Let me -- let me clarify that.
15 Mississippi choice of law --

16 QUESTION: Well, I didn't state it as I thought it
17 needed any clarification.

18 MR. TUCKER: Well --

19 QUESTION: Isn't -- isn't that the fact, that the
20 only connection between your client's case and Mississippi
21 was that John Deere did business in Mississippi?

22 MR. TUCKER: That is correct, Your Honor. But
23 that, in Sun Oil --

24 QUESTION: Wouldn't Mississippi have applied
25 Pennsylvania law?

1 MR. TUCKER: That is exactly correct. What we are
2 really talking about here is --

3 QUESTION: Not all of the laws --

4 MR. TUCKER: Choice of law.

5 QUESTION: Or Mississippi conflict law.

6 MR. TUCKER: Or choice, yes. Mississippi conflicts
7 law, Mississippi choice of law. And under Mississippi's
8 choice of law they would have applied their own statute,
9 but they would have applied the substantive law of the
10 Commonwealth of Pennsylvania, because that is where the
11 cause of action arose.

12 QUESTION: Could you do the same thing in Hawaii?

13 MR. TUCKER: I am sorry, Your Honor?

14 QUESTION: Could you have transferred it to Hawaii?

15 MR. TUCKER: Could we have transferred it to
16 Hawaii?

17 QUESTION: Yeah.

18 MR. TUCKER: Not in this particular case, Your
19 Honor, because I don't believe that venue or jurisdiction
20 would have been appropriate in Hawaii.

21 QUESTION: Well, doesn't John Deere do business
22 over there?

23 MR. TUCKER: That is a question to which I don't
24 know the answer, Your Honor.

25 QUESTION: Well, assuming John Deere did business

1 in Hawaii, could you transfer it? Is there any state that
2 you couldn't transfer it to?

3 MR. TUCKER: Well, right -- the basis of
4 transferring is the district court's determination of
5 factors of convenience to the parties and witnesses, and
6 the interest of justice. Not whether or not --

7 QUESTION: Well, what parties were in Mississippi?

8 MR. TUCKER: There were no parties in Mississippi,
9 Your Honor, that is why factors of convenience to the
10 parties in this case warranted transferring --

11 QUESTION: Well, how did it get to Mississippi?

12 MR. TUCKER: I am sorry, Your Honor?

13 QUESTION: How did it get to Mississippi if there
14 were no parties down there?

15 MR. TUCKER: Because the Plaintiffs properly
16 exercised the venue privilege.

17 QUESTION: I thought you said John Deere did
18 business down there.

19 MR. TUCKER: They do business down there.

20 QUESTION: Well, doesn't that make a party --

21 MR. TUCKER: John Deere was in Mississippi, that is
22 correct, Your Honor.

23 QUESTION: Doesn't that make it a party?

24 MR. TUCKER: Yes, it does. John Deere was an
25 appropriate -- was appropriately brought into this case in

1 the Southern District of Mississippi.

2 QUESTION: Of course the whole thing only arises,
3 really, because federal courts for Erie choice of law
4 purposes treat the statute of limitations as substantive,
5 whereas the Mississippi court, for its choice of law
6 purposes, treats the statute of limitations as procedural.

7 MR. TUCKER: That is correct.

8 QUESTION: And it is that difference that creates
9 this --

10 MR. TUCKER: That is correct.

11 QUESTION: -- unusual situation.

12 MR. TUCKER: Your Honor, we feel that it is
13 appropriate for this Court to adopt a rule limited to
14 where situations where venue and jurisdiction are proper
15 in the original forum, which provides that a transfer
16 under Section 1404 carries with it no change in the
17 applicable law, regardless of whether it is the plaintiff
18 or the defendant that makes the motion. And we believe
19 that the reasoning of this Court in Van Dusen supports
20 that position. And the considerations of the Section
21 1404, its purposes and its express language, also support
22 that conclusion.

23 If there are no further questions --

24 QUESTION: Mr. Tucker, I take it one result is, on
25 your theory, that the longest state statute of limitations

1 becomes the federal statute of limitations?

2 MR. TUCKER: No, Your Honor. I don't think that --

3 QUESTION: Whatever process is available.

4 MR. TUCKER: But in Sun Oil Company v. Wortman,
5 this Court has already said that that is appropriate if
6 the case is initiated in that particular state. That's
7 constitutional. That question is beyond any dispute.

8 QUESTION: I don't follow, but go ahead.

9 MR. TUCKER: If there are no other questions from
10 the Court I would like to reserve the remainder of my time
11 for rebuttal, Your Honor.

12 QUESTION: Very well, Mr. Tucker.

13 Mr. Helwig.

14 ORAL ARGUMENT OF DAVID P. HELWIG

15 ON BEHALF OF THE RESPONDENT

16 MR. HELWIG: Mr. Chief Justice, and may it please
17 the Court:

18 The facts upon which Petitioners' claim is based
19 have everything to do with Pennsylvania and nothing to do
20 with Mississippi. The only reason why any court would
21 have ever even considered that Mississippi's statute of
22 limitations should apply was that Petitioners apparently
23 intended to litigate their action there. By moving to
24 transfer the action to Pennsylvania, Petitioners have
25 abandoned Mississippi as a forum for choice of law

1 purposes, and by so doing have eliminated the only reason
2 which ever existed for applying Mississippi statute of
3 limitations.

4 QUESTION: Well, you say they have abandoned them
5 because that is the issue we have to decide, isn't it?

6 MR. HELWIG: Well, I think that is the issue that
7 has to be decided, but the reason I make that point is I
8 think the threshold inquiry is to ask why as a choice of
9 law matter does a court select one statute of limitations
10 or one choice of law rule over another choice of law rule.
11 With regard to statutes of limitation, it's simply the
12 general rule, or the basic principle to which both
13 Pennsylvania and Mississippi subscribe, is that they will
14 apply their own statute of limitations, or their own
15 choice of law rules selecting statutes of limitation, in a
16 case which is pending in that forum.

17 QUESTION: Well, of course, if it is pending in a
18 state court it would have been filed in the state court,
19 too. This is a peculiarly federal problem. It only
20 arises because federal courts sit in both jurisdictions.

21 MR. HELWIG: Right. And guarantee trust requires
22 that the district court apply whatever statute of
23 limitations that the state court in the state in which it
24 was sitting would have applied.

25 QUESTION: Well, it's a principle that states may

1 select the law which should apply, is it not?

2 MR. HELWIG: Absolutely, and that is what the court
3 held in Wortman.

4 QUESTION: And then you have to show, I suppose,
5 that there, in order to prevail, that there is some policy
6 implicit in 1404 that overrides that state choice,
7 whimsical as it may be in some instances.

8 MR. HELWIG: I am not suggesting that there -- and
9 in fact the court has held by its earlier grant of
10 certiorari in vacating the Third Circuit's prior judgment,
11 that Mississippi's choice of law rule is not to be
12 overthrown. And that is not what we are arguing about.
13 But in Wortman, the point isn't -- I think the crucial
14 point in Wortman is yes, the states are free to apply
15 whatever choice of law rules they choose to with regard to
16 statute of limitations. But, on the other hand, it
17 doesn't mean -- the court held that you don't federalize
18 the choice of law rules. You limit the application to a
19 particular state, neither due process nor full faith and
20 credit require the federal courts to invalidate a given
21 state's choice of law rule. And here the rule we are
22 really concerned with is Pennsylvania's choice of law
23 rule, because for all practical purposes that is where
24 Petitioners have chosen to litigate their claim, not
25 Mississippi.

1 QUESTION: You acknowledge the case would be
2 different if the defendant had moved for the transfer, is
3 that right?

4 MR. HELWIG: Absolutely, Van Dusen would --

5 QUESTION: What if -- the statute doesn't say
6 anything about plaintiffs or defendants. Supposing the
7 judge had ordered the transfer on the judge's own motion.
8 What rule would you apply then?

9 MR. HELWIG: I believe that, in light of Van Dusen
10 and in light of the applicable choice of law rules, that
11 you would apply the transferor forum's choice of law
12 rules, because the original forum is still --

13 QUESTION: What if the plaintiff --

14 MR. HELWIG: -- the forum which the plaintiff had
15 selected in which to litigate their claim.

16 QUESTION: So in that case you would treat that
17 like a defendant-initiated transfer. What if the
18 plaintiff went up to the judge after -- say you win this
19 case, the plaintiff went -- the plaintiff's lawyer to the
20 judge and said judge, I can't make a motion because if I
21 do the case will be dismissed when it is transferred, but
22 I think you should know that most of the witnesses live in
23 Pennsylvania and it just makes a lot more sense to have
24 the case tried up there. Maybe you'll want to ask the
25 defendant what their views are on a transfer. Would that

1 -- would that cause it to be a plaintiff-initiated
2 transfer if he didn't actually make a formal motion?

3 MR. HELWIG: I -- that raises a problem of getting
4 into subjective intent of the plaintiff, and I don't think
5 -- I think you really have to look to what happens on the
6 record.

7 QUESTION: So, you would limit it to the case where
8 the judge calls the parties in and says hey, this looks
9 kind of silly, we're trying a case in Mississippi when all
10 the witnesses and the parties are in Pennsylvania. Does
11 anybody object if I transfer the case? I have had that
12 happen in trials. And you would say that would be treated
13 like a defendant-initiated transfer? And if you do say
14 that, why should there be a different rule if the
15 plaintiff calls the same considerations to the attention
16 of the court?

17 MR. HELWIG: Well -

18 QUESTION: Why should that be a waiver of the right
19 to file in Mississippi, which you acknowledge he had?

20 MR. HELWIG: He had a right to file in Mississippi,
21 but as a practical matter, he's not pursuing his claim in
22 Mississippi when he, when he is the one who seeks the
23 transfer.

24 QUESTION: But he would if the motion were denied.
25 He would if the motion were denied, wouldn't he? And if

1 you prevail in all these cases they just won't make the
2 motion.

3 MR. HELWIG: Well, I think that would be the
4 desirable result of --

5 QUESTION: The desirable result then we would have
6 all these Pennsylvania lawsuits ought to be tried in
7 Mississippi.

8 MR. HELWIG: Well, I think the result as a
9 practical matter is that it will serve -- a ruling in
10 favor of Respondent will create a prophylactic rule that
11 basically discourages --

12 QUESTION: That's right, it will discourage these
13 motions.

14 MR. HELWIG: -- plaintiffs from even filing in
15 inconvenient forums, except in the situation where that is
16 there only forum as a practical matter because --

17 QUESTION: Which is this case.

18 MR. HELWIG: -- the statute of limitations.

19 QUESTION: (Inaudible) encourage them to comply
20 with the local statute of limitations.

21 MR. HELWIG: Well, it will also do that, Your
22 Honor.

23 QUESTION: Was it stipulated -- what if the two
24 parties just stipulate -- what if it is a joint motion?

25 MR. HELWIG: Well, if it is a joint motion I think,

1 again, that the plaintiff has eliminated the reason for
2 applying the original forum's statute of limitations,
3 namely the selection of that forum as the one in which to
4 go forward with the litigation. So I think wherever the
5 plaintiff abandons that forum, you eliminate the basic
6 choice of law principle that would support application of
7 that forum's statute of limitations.

8 QUESTION: Of course, we could -- we could get the
9 same good results that you want to achieve by following
10 the same rule that we follow in Van Dusen, but simply
11 saying that if -- if the result will be to have this
12 state's law applied in another forum where the -- where
13 the suit could not have been brought, don't allow the
14 transfer. I mean, that is another way to achieve the same
15 good results that you are after, couldn't we?

16 MR. HELWIG: That is another way to achieve the
17 same result.

18 QUESTION: Now, why is your way better?

19 MR. HELWIG: Well, you won't have -- I think my way
20 is better because you won't have the inconvenient forum,
21 the inconvenient filings in the first place, except in
22 instances where that is the only state where a statute of
23 limitations would allow the litigation to be pursued. But
24 you won't have --

25 QUESTION: No, I think the other result would

1 discourage them just as much. They know that if they file
2 it there they are going to have to try it there, and so --
3 and your system would do the same thing. If you file it
4 in Mississippi you are going to have to try it in
5 Mississippi. You can't try it anywhere else. It seems to
6 me you could achieve that result in two ways, either by
7 saying Mississippi law doesn't follow you back to
8 Pennsylvania, or by saying you simply can't get it back to
9 Pennsylvania, period.

10 MR. HELWIG: Well, the problem with that view of
11 not allowing it to go back to Pennsylvania is that that
12 result is not really conducive to the convenience of the
13 parties, the witnesses or the interests of justice to have
14 these lawsuits marooned down in the some inconvenient
15 forum.

16 QUESTION: You can't have it both ways.

17 MR. HELWIG: Well, I -- I think it is the
18 Petitioner who is the one wanting to have it both ways,
19 not the Respondent.

20 QUESTION: To the extent that this statute of
21 limitations is certainly welcomed by the Mississippi bar,
22 I suppose that the rule that you propose would keep all
23 suits in Mississippi, because no one would move for
24 transfer, and that would tend to perpetuate the rule.

25 MR. HELWIG: That is true. I was wondering whether

1 they might file an amicus brief in support of our
2 position, but that was not forthcoming. However, I'd like
3 to get to a point beyond statute --

4 QUESTION: Well, I take it Mississippi has since
5 amended its statute of limitations. It is now three
6 years?

7 MR. HELWIG: That is correct, Justice O'Connor,
8 effective July 1 of 1989.

9 QUESTION: And incidentally, on that point, if
10 Ferens had moved to Mississippi, I take it he could not
11 have had the Mississippi statute of limitations?

12 MR. HELWIG: Correct, as the --

13 QUESTION: Has anyone ever questioned the
14 constitutionality of that distinction based on moving?

15 MR. HELWIG: Well, I believe that it hasn't reached
16 this Court. I think in the Schreiber v. Allis-Chalmers
17 case that the, I think it was the Tenth Circuit, validated
18 the constitutionality. The Third Circuit questioned the
19 constitutionality of the Mississippi statute of
20 limitations across the board, but of course this Court
21 reversed that particular judgment by the Third Circuit.

22 Also, Justice Kennedy, you asked about did the --
23 did a change in law have any -- anything to do with
24 convenience. And I think Petitioners' counsel said it
25 should not. But in fact in Van Dusen I think the Court

1 expressly addressed that question, because in Van Dusen,
2 in ruling on the transfer motion, the district court said
3 it should make no difference whatsoever whether you have -
4 - a change in the applicable law. And I think that this
5 Court expressly stated that that was an incorrect mode of
6 analysis, so I wanted to address that point.

7 There was a lot of talk on discussion in
8 Petitioners' argument about the notion that Section
9 1404(a) has been described as a judicial housekeeping
10 measure, and I have the sense that Petitioner was
11 attempting to substitute labeling for analysis. Now, this
12 Court long ago in the context of the Erie jurisprudence
13 rejected labeling as a matter of determining the way a
14 particular case should be resolved. That is, labeling as
15 substantive or labeling as procedural can't take the place
16 of analysis. Certainly it is a judicial housekeeping
17 measure, and in this Court Van Dusen -- in Van Dusen this
18 Court held that it is a judicial housekeeping measure that
19 wasn't intended to destroy state choice of law advantages.
20 But equally, it is a judicial housekeeping measure that
21 wasn't intended to enlarge those state choice of law
22 advantages and affect federal law --

23 QUESTION: Well, how does this enlarge them? I
24 don't understand that. If the case is properly filed in
25 Mississippi, and you apply Mississippi rules which pick up

1 all of Pennsylvania law except the statute of limitations,
2 how does the transfer change that? How does that enlarge
3 the Plaintiffs' legal claim?

4 MR. HELWIG: It is something that Plaintiff could
5 never have had in Pennsylvania.

6 QUESTION: It couldn't have had it except for this
7 peculiar rule that you can sue in Mississippi and no place
8 else because they have a long statute of limitations and
9 they have this, they treat it as substantive -- or
10 procedural; I've stated it backwards. But that is the
11 peculiarity in the case. But once you say they have
12 gotten into Mississippi properly, how can you say they
13 have enlarged the rights they have in Mississippi by
14 transferring to Pennsylvania, which is a more convenient
15 place to try the lawsuit?

16 QUESTION: Including more convenient for you.

17 MR. HELWIG: Yes, it was -- we did not oppose the
18 motion. In fact, I think there were no valid grounds
19 under Section 1404(a) for opposition. I think it enlarges
20 the Petitioners' rights as a simple geographical matter.
21 Yes, it is a right that they could have had in Mississippi
22 (inaudible) anywhere else --

23 QUESTION: That's not a right, that is a matter of
24 convenience. That is convenience. The rights are
25 precisely the same. The convenience is much different.

1 The convenience for the judge, for you and for the
2 Plaintiff and for the witnesses. But that -- the rights
3 are exactly the same. The same testimony would go into
4 the record, the same documents will be introduced and the
5 same instructions will be given to the jury.

6 MR. HELWIG: But so far as the statute of
7 limitations is concerned, an exactly opposite result --

8 QUESTION: But that is not a function of the
9 transfer. That is because he could file in Mississippi.

10 QUESTION: Well, you are saying it should be a
11 function of the transfer.

12 QUESTION: That is right.

13 MR. HELWIG: I am saying that Section 1404(A), in
14 all likelihood when the Congress enacted it, they had no
15 intent so far as which forum's choice of law rules should
16 apply following transfer. And given --

17 QUESTION: Well, they intended, didn't they, to
18 adopt basically old doctrine of forum nonconvenience. And
19 under the old doctrine, if this -- if Mississippi is a
20 very inconvenient forum, they might transfer it to
21 Pennsylvania. But I don't think a judge would have
22 transferred it to Pennsylvania if the judgment said look,
23 as a result of this transfer they are going to have to
24 dismiss the action. Because it would throw one party out
25 of court.

1 MR. HELWIG: If the Defendant had made the transfer
2 it may have been granted on condition that the statute of
3 limitations be waived.

4 QUESTION: Correct.

5 MR. HELWIG: Defendant, however, did not make the
6 motion. That is the point of the statute.

7 QUESTION: No, but before the statute was passed
8 under the forum nonconvenience doctrine, it was simply a
9 motion to dismiss.

10 MR. HELWIG: Yes.

11 QUESTION: On the understanding it would be refiled
12 in another forum. And I am just suggesting, I don't think
13 the judge would have granted the motion if the price of
14 granting the motion was to terminate the lawsuit under
15 forum nonconvenience principles, which this statute was
16 basically intended to reenact.

17 QUESTION: You -- go ahead --

18 MR. HELWIG: Of course, under forum nonconvenience
19 you didn't have plaintiffs making motions to dismiss.
20 They could simply institute the action in another forum --

21 QUESTION: That is right.

22 MR. HELWIG: -- which forum would apply its own
23 choice of law rules, not those of whatever the original
24 forum had been.

25 QUESTION: That is correct.

1 MR. HELWIG: And that would be the effect --
2 generally as to choice of law rules in the case of a forum
3 nonconvenience dismissal on defendant's motion, would be
4 that in the second lawsuit the second forum's choice of
5 law rules would apply generally, not the original forum's.

6 QUESTION: Well, that means Van Dusen is wrong.

7 MR. HELWIG: Your Honor, I think there are
8 certainly arguments that can be made that Van Dusen was
9 incorrectly decided. But I do not think this Court needs
10 to hold that in order to affirm the Third Circuit's
11 judgment in favor of John Deere. In fact, --

12 QUESTION: No, but it needs to hold that to buy the
13 argument that you just made. I mean, it seems to me we
14 have crossed that bridge, that this thing tracks forum
15 nonconvenience. We -- we've crossed that bridge when we
16 decided Van Dusen the way we did. Because we decided in
17 Van Dusen that it does not produce the result that forum
18 nonconvenience dismissal would produce.

19 MR. HELWIG: That -- that has been decided, and I
20 am not taking a position that Van Dusen should be
21 overruled. It does -- I was in the course of just
22 attempting to respond to Justice Stevens' question.

23 But I want to make abundantly clear that it is not
24 our position that Van Dusen needs to be overruled. The
25 Third Circuit, I believe, relied on Van Dusen in rendering

1 a judgment in favor of John Deere Company in this case. I
2 -- if you read their opinion, they said it was
3 Petitioners' interpretation of Section 1404(a) that was
4 inconsistent with Van Dusen. The Court had good reason in
5 Van Dusen for reserving the question of what the effect
6 would be of a plaintiff-initiated transfer. It wasn't
7 just dealt with by ignoring the issue. The Court went out
8 and said there may be other considerations in the case of
9 a plaintiff-initiated transfer. And I think those other
10 considerations are readily apparent by the fact -- become
11 readily apparent under the facts of this case.

12 And I think Van Dusen's mode of analysis as far as
13 statutory construction actually, again, supports the Third
14 Circuit's judgment in favor of Respondent in this case.
15 That mode of analysis being in the absence of a
16 discernible legislative intent or congressional intent to
17 change law we are going to maintain the status quo. It is
18 a hands-off approach, but it should be a hands-off
19 approach no matter who seeks the transfer. And the hands-
20 off approach in the case of a defendant-initiated transfer
21 leaves one with the application of Pennsylvania's law.

22 QUESTION: And yet, you don't argue that if the
23 case had stayed in Mississippi, that it could not have
24 been tried there. You -- you agree that if the case had
25 stayed there, Mississippi's statute of limitations would

1 apply.

2 MR. HELWIG: I agree, and I am constrained to agree
3 by this Court's previous vacation of the Third Circuit's
4 prior order, and also by the Sun Oil holding.

5 QUESTION: Yes. Yes. Well, -- and yet you say it
6 shouldn't be tried up in Pennsylvania even though the same
7 substantive law would apply as would have applied in
8 Mississippi, and it would have been more convenient for
9 everybody, including less -- and more, and less expensive
10 for everybody to try it up there.

11 MR. HELWIG: The case belongs in Pennsylvania. I
12 don't think there is any question about that. That is
13 where it always belonged. The only reason it got into
14 Mississippi was that Petitioner slept on his rights, not
15 just more than two years, but actually more than three
16 years from the date of his injury --

17 QUESTION: And then had the temerity to take
18 advantage of one of our decisions.

19 (Laughter)

20 MR. HELWIG: I don't -- well, to attempt to take
21 advantage, Your Honor. I think that certainly Van Dusen
22 explicitly reserved the question. And I want to make it
23 clear that I am intending no criticism of Petitioners'
24 counsel. In fact, as I understand the matter, they did
25 not have this case --

1 QUESTION: So, you might have done it yourself.

2 MR. HELWIG: I think -- that is exactly the point I
3 think needs to be made, is that I think I would be
4 obligated at a minimum to advise a person who walked into
5 my office with a claim that was time barred under
6 Pennsylvania, that even if I didn't want to it for the for
7 whatever reason, that they had a right to pursue that
8 claim in Mississippi. Just as I think you would be
9 obligated to advise someone who, some other procedural --
10 some other choice of law rule that the forum considers to
11 be procedural, advise that person, hey, maybe you should
12 go to a state where the burden of proof is different or
13 the rule on presumption is different. I think that
14 professional duty extends to counsel with respect to all
15 these legal rules that many forums consider to be
16 procedural for choice of law purposes, but which Erie
17 requires their application because they so affect the
18 outcome of the case.

19 And I -- that raises, or that gets into the
20 possibility that I have raised. That if Petitioners'
21 interpretation of Section 1404(a) is adopted, the -- it's
22 an inducement to plaintiffs to attempt to capture this
23 wide variety of choice of law rules that are considered to
24 be procedural. It is not just a statute of limitations
25 situation, that presumptions, burden of proof, burden of

1 production, sufficiency of evidence and statute of frauds
2 are all considered by many forums to be procedural.

3 QUESTION: Yes, but in all except the statute of
4 limitations situation there is no deterrent to just filing
5 in the forum you want to stand up in. It is really only
6 the statute of limitations problem that would cause him to
7 file where he hopes he doesn't have to try the case.

8 MR. HELWIG: But by filing in an inconvenient forum
9 with favorable choice of law rules, the petitioner hopes
10 to capture those rules. And if he has an unrestricted --

11 QUESTION: And then transfer to the more convenient
12 forum. But I am saying these other favorable choice of
13 law rules, he would just go ahead and sue in Pennsylvania,
14 if it weren't for the statute of limitations problem.

15 MR. HELWIG: No, I think, you know --

16 QUESTION: There is no -- really no reason to go to
17 forum A and then hope the judge will transfer you to forum
18 B if you could have sued in forum B in the first place.

19 MR. HELWIG: There -- there wouldn't be as
20 compelling a reason, because obviously the statute of
21 limitations is dispositive of the claim. But rules such
22 as those on presumptions, burden of proof, et cetera, can
23 significantly out -- affect the outcome of a case. That
24 is why Erie requires that they be applied in diversity
25 actions. So there would be a reason to seek out those

1 rules, and I think the plaintiff --

2 QUESTION: Yes, but there is not a reason to seek
3 out an inconvenient forum if you want those rules. You
4 would want the rules that you would stick with.

5 MR. HELWIG: If that forum is the one that has the
6 rule --

7 QUESTION: Oh, I see what you are saying. I see
8 what you are saying.

9 MR. HELWIG: -- then you would seek it out. And I
10 think the plaintiff's bar in this country, consistent with
11 their obligations under the code of professional
12 responsibility, is highly diligent, highly organized. You
13 get a database, it would be a very simple matter to
14 catalogue all of these favorable choice of law rules which
15 the forums consider procedural --

16 QUESTION: But is it not true that even if you win
17 this case you would still have the obligation to use the
18 same database and pick the most -- the forum where you can
19 get all these favorable rules, and go ahead and sue there.
20 You would have to advise the client at least of the
21 possibility of suing in a forum comparable to Mississippi.

22 MR. HELWIG: Well, if we're -- if the judgment is
23 affirmed, then there wouldn't be any duty -- well, yes,
24 you could say you can do that, but you'll have to stay
25 there.

1 QUESTION: You may have to try the case there.

2 That is right.

3 MR. HELWIG: Unless defendant moves to transfer.

4 QUESTION: Yeah. Well, but Mr. Helwig, here is
5 what troubles me. I don't see any basis in the text of
6 the statute or anything else for saying that you --
7 federal court has to apply one law where the plaintiff
8 moves, another law where the defendant moves. I mean, we
9 would be making that up. There is just no basis in there
10 for that. There is a basis in the statute, however, for
11 meeting the problem that you are concerned about in a
12 different fashion.

13 That is, for simply saying if somebody has filed in
14 a forum that is an inconvenient forum, and if the affect
15 of transferring it is to send it to -- at his instance, is
16 to -- at his instance is to send it to a forum where he
17 would not have been able to win had he sued there, the
18 court should not allow the transfer. You have language
19 that permits that here, it says in the interest of justice
20 a district court may transfer. In other words, the
21 decision whether to transfer or not to transfer is very
22 much at the discretion of the court, by -- the text of the
23 statute. And I feel sort of free to follow my gut feeling
24 which, frankly, is somewhat like yours, that this seems
25 like a, you know, a legally permissible thing, but not the

1 kind of thing we ought to encourage.

2 So why -- why shouldn't I do it that way rather
3 than by saying yes, you can transfer, but the -- but the
4 law that applies is the law of the transferee forum.

5 MR. HELWIG: Well, the first answer to that
6 question is the issue which has been granted -- of which
7 review has been granted, is what happens when there is a
8 transfer, not whether or not transfer should be granted.

9 QUESTION: Well, I know that, but I want to know
10 what my options are. I mean, if I say there is another
11 more texturally permissible way of meeting all of your
12 objections, then I'm -- then I would find against you, I
13 hate to tell you.

14 MR. HELWIG: I think that the alternative view, as
15 a matter of common sense, would also create a desirable
16 prophylactic rule to discourage these kinds of filings,
17 which I really think do constitute the sort of
18 impermissible forum shopping that both Van Dusen and Erie
19 are concerned with. As a pro -- but as a matter of common
20 sense, I agree with you, that also would be a desirable
21 prophylactic rule. I do have some question, however,
22 whether there really is a basis in the statute for
23 treating plaintiff-initiated transfers differently from
24 defendant-initiated transfers as far as the standards to
25 be applied. I am not sure that I see that there, although

1 as a common sense way of dealing with the question, I
2 think it has much to commend it.

3 QUESTION: (Inaudible) justice, which --

4 MR. HELWIG: Well, there is -- I am not saying that
5 the question of choice of law couldn't be taken into
6 consideration under that heading, but I don't think it's
7 going to be entitled to dispositive weight because you do
8 have these other factors which, as in this particular
9 case, everything about the case is back in Pennsylvania.
10 So, it wouldn't -- the interest of justice approach
11 wouldn't necessarily compel the district court to deny the
12 transfer motion.

13 I really, unless there are no further questions, I
14 respectfully request the Court to affirm the Third
15 Circuit's judgment in favor of John Deere Company.

16 QUESTION: Thank you, Mr. Helwig.

17 Mr. Tucker, do you have rebuttal? You have two
18 minutes.

19 REBUTTAL ARGUMENT OF RICHARD B. TUCKER, III

20 ON BEHALF OF THE PETITIONERS

21 MR. TUCKER: Thank you, Your Honor.

22 There are just three points that I would like to
23 touch on very briefly. Justice Scalia's interest of
24 justice analysis, I think, results in this case in the
25 requirement that the Third Circuit's decision be reversed

1 and this case be remanded to the Western District of
2 Pennsylvania for trial. And if the Court adopts the
3 position, or at least the suggestion, that Justice Scalia
4 has indicated from his questioning, I think that that is
5 the appropriate outcome in this particular case.

6 I wanted to address something that Justice Stevens
7 was talking about, asking in terms of what enlargement of
8 rights is there from the transfer of the case from the
9 Southern District of Mississippi back to the Western
10 District of Pennsylvania. As Your Honor pointed out,
11 there is no enlargement of rights. There is only one
12 benefit to the Plaintiff in this particular case; it is
13 more convenient. And lo and behold, you look at Section
14 1404 and what does it say, for the convenience of the
15 parties. The transfer of the case was for the express
16 purposes set forth in the statute.

17 If you listen to the arguments that are being made
18 by the Respondents, they are all in favor of discouraging
19 plaintiffs from utilizing forums which would be properly
20 available for them under the venue statutes set forth in
21 the judicial code. How are they going to discourage that?
22 They are going to discourage it by making it inconvenient
23 and expensive for plaintiffs to try cases in those forums.

24 Again, I submit that any argument that fosters an
25 application of Section 1404 against the convenience is --

1 QUESTION: Thank you, Mr. Tucker, your time is
2 expired.

3 MR. TUCKER: Thank you, Your Honor.

4 CHIEF JUSTICE REHNQUIST: The case is submitted.

5 (Whereupon, at 1:55 p.m., the case in the above-
6 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-1512 - ALBERT J. FERENS, ET UX., Petitioners V. JOHN DEERE COMPANY, aka DEERE

& COMPANY

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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Lena M. May

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