OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SALVE REGINA COLLEGE, Petitioner

v. SHARON L. RUSSELL

CASE NO: 89-1629

PLACE: Washington, D.C.

DATE: November 27, 1990

PAGES: 1 - 52

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IN THE SUPREME COURT OF THE UNITED STATES

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SALVE REGINA COLLEGE, :

Petitioner :

v. : No. 89-1629

SHARON L. RUSSELL :

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Washington, D.C.

Tuesday, November 27, 1990

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

APPEARANCES:

STEVEN E. SNOW, ESQ., Providence, Rhode Island; on behalf of the Petitioner.

EDWARD T. HOGAN, ESQ., East Providence, Rhode Island; on behalf of the Respondent.

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PROCEEDINGS

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 89-1629, Salve Regina College v. Sharon Russell.

Mr. Snow.

ORAL ARGUMENT OF STEVEN E. SNOW

ON BEHALF OF THE PETITIONER

MR. SNOW: Thank you, Mr. Chief Justice, and may it please the Court:

We are here this afternoon on Salve Regina College's petition for certiorari to the First Circuit Court of Appeals. The college contends that the court of appeals erred when it failed to predict or attempt to analyze how the Rhode Island supreme court would likely rule on an unclear question of State law, in this case on which jurisdiction was based solely upon diversity of citizenship.

Instead the court of appeals deferred to the district court's largely unsupported prognostication that the Rhode Island supreme court would apply the commercial contract doctrine of substantial performance in the unique context of the relationship between a college and a student. QUESTION: Well, did the court say what its view would have been absent deference?

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MR. SNOW: No.

QUESTION: Did it say if we weren't, if we weren't giving deference, here's what we think the law means?

MR. SNOW: No, Your Honor, the court did not indicate which way they might rule absent deference. What they did indicate was that applying the traditional rule of deference, they said the decision of the district court was not reversible error. In other words, they said the decisions of the district court was a permissible rule of law. They didn't necessarily say it was the correct rule of law.

After a brief review of the facts, I would like to explain why we believe that every litigant is entitled to a full, considered, and impartial review, that there is no justification for being less thorough, for curtailing any part of an appellant's -- appellate rights or for a court of appeals to abrogate any part of its appellate responsibility simply because the law involved is State law rather than Federal law.

QUESTION: Do you think there's any -- would you be making the same argument if we had done the same thing?

MR. SNOW: No, Your Honor, I think that clearly this Court, because of judicial economy, must defer to the

lower courts when it comes to issues of local law.

QUESTION: Do you think the court of appeals are bound independently to interpret State statutes in, in diversity cases?

MR. SNOW: That's correct. That's our position.

The -- this case arose in a rather exotic factual context. The respondent matriculated to Salve Regina College as a freshman. During the freshman year she applied to become a candidate in the, in the college's department of nursing, a candidate for a nursing degree. She began her nursing studies as a sophomore.

Right from the first day of her nursing studies, when the faculty was explaining to students their expectations of students, the faculty privately advised the respondent that they felt that she could potentially have problems in the clinical portions of the curriculum in the future which -- the clinical portions would begin during the junior year -- because of a medical condition that she had. The respondent suffered from a rather severe addictive eating disorder which led to her being morbidly obese. She was at the time that she started her nursing studies more than twice the normal body weight for a person of her size and body build.

She was advised by the faculty right from the beginning that she had some time to try to address this

problem and they recommended that she seek treatment and do what she could to attempt to solve this problem before she started her clinical studies during her junior year.

Despite this advice the respondent did not seek treatment. In fact her condition became worse during the time that she was a student at the college. As the faculty predicted, in fact her size did become a problem during the clinical training. This culminated in the middle of her junior year when her senior clinical instructor gave her what amounted to a failing clinical evaluation, all for reasons that in some way or another related to her weight. As a result, and as a result of the college's longstanding policy that a failure in the clinical program would mean dismissal from the program in its entirety, the faculty met with the student and they came to an agreement. Because this was an unusual situation where the student's failure seemed to be related to her weight, the college agreed that they would enter into a formal agreement with the student under which the student was allowed to continue in the program on a probationary basis provided that she met certain requirements and the requirements were that she enter into a treatment program and that she lose a certain amount of weight prior to entering the senior year clinical aspects of the curriculum.

The record below reflects that although the student began complying with the terms of this agreement, after a short period of time, in fact, her compliance stopped and the end result was that just prior to the beginning of her senior it was very clear that not only did she not meet the terms of the agreement, she didn't come close to meeting the terms of the agreement. At that point she was told that she could not enter the senior year clinical aspects of the program.

The respondent responded in two ways. First, she transferred to another institution and sought medical and psychological treatment which culminated in her undergoing a rather radical surgical procedure which led to her losing some 50 percent of her overweightness, after which she did graduate and today is a nurse.

She also responded by filing a lawsuit against Salve Regina on a wide variety of Federal and State law claims, ranging from handicapped discrimination and alleged due process violations to intentional infliction of emotional distress. All of these claims, save and except a simple State law breach of contract claim, were dismissed either on summary judgment or were directed out at the close of the plaintiff's case in chief.

QUESTION: Mr. Snow, I think you can assume that the Court is familiar with the factual background of the

case and the procedural background of the case.

MR. SNOW: Thank you, Your Honor. The First Circuit applied this rule of deference, what it called a traditional rule of deference. This rule that the circuit applied is an important rule. It's important because it's applied to all diversity cases, which make up some 20 to 25 percent of the docket of the Federal district courts, some 15 percent of the docket of the court of appeals. But it applies to other cases as well. It applies to a whole variety of cases in which State law serves as the rule of decision for one reason or another.

It's also important because --

QUESTION: Does, does it apply in bankruptcy cases, do you know?

MR. SNOW: To some extent it would apply in a bankruptcy case where there's a question of property rights that's determined by State law. It would apply in a wide variety of contexts.

QUESTION: Is there any authority where deference is given to bankruptcy judges who have practiced in the jurisdiction or are most of the reported cases just referring to district judges?

MR. SNOW: I don't recall seeing any particular case that relates to bankruptcy judges. Of course, one could make an argument that this is --

QUESTION: I take it the principle would be the same?

MR. SNOW: Well, I think you could make an -- you could probably analogize a bankruptcy court somewhat more to an administrative agency which, which at least theoretically has a special expertise in that narrow area. That's not true when we're talking about State law in general.

We believe that the rule of deference not only is important but that it's ill-conceived. In fact, it's really an exception to the historic approach taken by this Court in which questions of law are reviewed de novo and questions of fact are reviewed for clear error. And questions that are, are subject to the sound discretion of the district court are reviewed for abuse of discretion.

QUESTION: Well, as a practical matter don't you think most of the circuits have for years pretty much gone along with the interpretation of State law given by the district judge who is often from that State and perhaps familiar with the State law? I think it's --

MR. SNOW: I would agree, Justice O'Connor, that it is true that the majority of courts of appeals have applied this rule of deference.

QUESTION: Uh-huh.

MR. SNOW: However, when they've done

so -- and -- the rule of deference started shortly after the Erie case was decided in 1938. I think it was first announced by the Eighth Circuit. There's never been any court of appeals that has given a considered analysis of why the rule of deference is applied. Rather, their citation to authority of this Court which I would suggest is inappropriate, since this Court is a court of limited jurisdiction designed to handle cases of --

QUESTION: Well, do you think it's just a common sense sort of a feeling that the district court judge may be more familiar with what the State law is than the circuit court judges generally, who may or may not come from that State?

MR. SNOW: I think that's correct. I think that's what the rule is based on, but I would submit that that's not a very sound rationale. While it is true that a district court judge may have some heightened familiarity with some aspects of State law, I would suggest that State law today is so complex that it's unreasonable to assume that any district judge or any practitioner has a meaningful level of expertise in all areas of State law that would outweigh the tremendous advantages I suggest that a court of appeals has in deciding questions of law.

QUESTION: Well, then you would suggest that

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because of this complexity of State law today, that a court of appeals, not just the First Circuit with four States in it, but a court of appeals like the Ninth Circuit with maybe 10 or 11 States in it should try to decide as an original matter questions from those 11 or 12 States.

MR. SNOW: Well, of course, I'm -- we're not suggesting deciding it necessarily as an original matter. What we're suggesting is is that they would review the decision of the district court. Not give it any particular deference, but certainly the district court's decision ought to be considered.

QUESTION: Ought it to be treated any differently than a district court's decision on a point of Federal law?

MR. SNOW: We believe not. We believe it ought to be the same.

QUESTION: No, no deference at all then?

MR. SNOW: No deference at all to a district court's decision.

QUESTION: Well, what if it's a tie?

MR. SNOW: Well, if it's a tie, then I -- it would be the same rule, I believe, if it was a question of Federal law.

QUESTION: Well, does it go -- what do you do,

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decide it yourself or do you flip a coin? Or do you get deferred to the district judge?

MR. SNOW: Well, I suppose if it's a tie, one, one possibility would be to certify the question to the highest court of the State, where you could get a definitive ruling of State law.

QUESTION: Do you have a certification procedure in this State, in Rhode Island?

MR. SNOW: Yes, there is. Yes, there is.

QUESTION: Mr. Snow, I sat on the court of appeals for a decade and I can remember in that court when we had a judge from outside the circuit sitting by designation and yet the court of appeals would defer to him on a matter of State law in the place where he was sitting by designation. It doesn't make any sense, does it?

MR. SNOW: The court of appeals would defer to the district court judge who was sitting on the court of appeals?

QUESTION: No, who was sitting by designation as a trial judge in a State where he did not come from.

MR. SNOW: I agree. That would make no sense.

QUESTION: I should ask your opponents that.

QUESTION: That's on the theory that the soil gives you the expertise, just, just being there on the

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spot.

(Laughter.)

MR. SNOW: I would suggest that not only is --

QUESTION: Of course, that's not exactly the typical case even. Most district judges are residenced where they sit, aren't they?

MR. SNOW: Most district judges are.

QUESTION: Yeah.

MR. SNOW: Of course, not all of them necessarily practice law in that jurisdiction. I mean, there are district judges who came up from the ranks of U.S. attorneys --

QUESTION: Well, most of them practiced law -- most of them practiced law in the jurisdiction where they sit.

MR. SNOW: Most of them did.

QUESTION: There are very few judges on the Illinois district courts who didn't practice, in fact, there are none who didn't practice in Illinois, same in Indiana, same in Wisconsin. I don't know any in my circuit who didn't practice in the district in which they sat.

MR. SNOW: But the question is --

QUESTION: But there are any number in the Ninth Circuit that practice exclusively in the criminal area and

not in the civil area at all, isn't that true?

MR. SNOW: That, that is also true.

QUESTION: Furthermore, the question is even if you practice law in that area -- I practiced law in Rhode Island for 15 years and I feel that I have a certain amount of familiarity with some aspects of State law. But compared with the advantages that a court of appeals has with respect to having a multijudge panel reviewing the case; you have the parties fully briefing the issues that the district court does not have; there is the luxury of time to some extent, and I'm not suggesting the court of appeals aren't very busy. But compared to what a district judge has to accomplish, since the district judge's job is primarily conducting trials and receiving evidence and deciding factual issues --

QUESTION: Well, just on that very point, you had mentioned earlier certification and here when Judge Selya had to explain why he was going to let this issue go to the jury, he made a long explanation of what he was going to do, did you ask to have the question certified then and would you propose that the district judge should interrupt the trial to certify the question?

MR. SNOW: We did not ask the district judge to certify the question at that time. In fact, the question came up only at the end of the case.

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QUESTION: If, if you had thought of it at that time, do you think it would have been prudent for him to interrupt the trial to take the time to certify to the Rhode Island supreme court?

MR. SNOW: I think it would not have been prudent in the context of a jury trial at that time; however, I think it might have been prudent for the court of appeals to have certified the question to the Rhode Island district court.

QUESTION: So the district judge kind of axed it as peril, is what it amounts to I guess.

MR. SNOW: I think if the issue had come up pretrial, then it very well could have been certified to the court of appeals. The way the issue came up -- neither of the parties raised this issue of substantial performance. It came up during argument on a motion for directed verdict and the court raised it sui sponte, suggesting that the trial judge had been a State court judge for a period of time and he stated that he felt that he had some intuitive feeling for how the Rhode Island supreme court might handle that issue and decided it at that time.

The parties really did not have much of a chance to research the issue thoroughly during the heat of trial, and frankly the court didn't have much of a chance to

consider the issue thoroughly. In contrast to a court of appeals who, after full briefing, could have the luxury of considering the -- that focused legal issue.

QUESTION: But he did raise it the day before he made his ruling, didn't he?

MR. SNOW: Yes, he did.

QUESTION: He raised it and then he announced it the next day.

MR. SNOW: That is correct.

QUESTION: Yes.

MR. SNOW: And we did -- and we did present the district court with the findings of our research, which was to the effect that no -- we could no court anywhere in the country, let alone Rhode Island, that applied the commercial contract doctrine of substantial performance to the academic relationship between the student and the college.

QUESTION: Don't, don't you think it's reasonable, Mr. Snow, for, for a court of appeals to say that a judge who is sitting in Rhode Island and who has practiced in Rhode Island may well have a feel for what the Rhode Island supreme court would do, that you can't -- that judges who have never practiced there can't get by just reading the decisions of that court?

MR. SNOW: I don't think so, Mr. Chief Justice.

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It seems to me that if we take that approach, we've come full circle with the Erie doctrine, we're back to Swift v. Tyson. We're looking -- as the respondent states in his brief -- we're engaged in fourth-dimensional reasoning to some transcendent principles of truth and justice. That sounds very much like a brooding omnipresence of general law hanging over the United States.

I think the essence of the Erie doctrine is that the law is determinable, State law is determinable and can be communicated by lawyers to judges, Federal judges no less than State judges, and appellate judges no less than district judges.

QUESTION: Even though those appellate judges were not from the State in question?

MR. SNOW: Even though those appellate judges were not from the State, but --

QUESTION: This is true in the panel you had, isn't it?

MR. SNOW: That is true. We did not have any Rhode Island judges on the appellate --

QUESTION: Judge Timbers is from New York.

MR. SNOW: I believe Connecticut.

QUESTION: No, he's on the Second Circuit.

MR. SNOW: He's on the Second Circuit. That's correct.

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In comparison with the district court, the main job of the court of appeals is deciding law expertly, which leads to our conclusion that the mere fact that a district court judge may have some heightened familiarity in general with State law is insignificant compared to the many institutional advantages that the court of appeals has.

The --

QUESTION: May I ask this question? Do you say that the court of appeals should give no weight at all to the district judges, absolutely de novo? Say it is a totally unresolved question. I had one of those when I was a circuit judge. There's absolutely no law in the point from the Illinois supreme court and we had to decide it. Should we just pay no attention to the district court's view or should we -- well, what do we do?

MR. SNOW: Well, I'm not suggesting you pay no attention to the district court's opinion.

QUESTION: Obviously you know what he did.

MR. SNOW: But I think that there is a difference between, between paying attention to the district court's view and reviewing what the district court said.

QUESTION: Well, you review it and you --

MR. SNOW: There's a difference between giving

it deference --

QUESTION: You read it as much -- read everything you can find and you say, well, neither the Illinois supreme court, nor the appellate court, nor an Illinois trial judge that I can find has ruled on the precise issue; there is no law one way or the other. We must decide it and the district judge said, well, I -- my hunch is here that I think probably they'd go this way. Should I give that any weight at all or should I just go ahead and flip my own coin?

MR. SNOW: I think you'd give that the weight that it would appear to deserve in the context of that particular case, but you do not decide in advance that you're going to give it any particular weight.

QUESTION: Would you give it as much deference as you would in a law general article written by a professor of a law school in that State who has been studying the thing for 20 years?

MR. SNOW: Certainly. I -- certainly, I think, you know, in this Court in the Commissioner v. Bosch case said that when there is no ruling by the highest court of a State, then you can look at a wide variety of materials. You can look at decisions from other courts. You can look at --

QUESTION: Well, say, say the courts -- the

intermediate courts of appeals in the State are split on the same subject -- on the same matter. It's just never been gotten up to the State supreme court, and law professors debate it and judge, a district judge has to decide it, has to decide what the supreme court of the State is going to do. Should you give him any weight at all?

MR. SNOW: I would suggest that you do not give any special particular weight to that. That if there is any special insight that that district court judge has in the way in which the State supreme court might rule, then the district court judge can put that into the opinion and that can be reviewed and argued as any other facet of the case would be, just as if the district court judge had some special insight in a matter of Federal law.

QUESTION: But what if you say -- you read -- the court of appeals reads law professors' articles, they read the opinions of the -- of the courts of appeals on the split, then they read the district judge. Can they say, well, his position seems like a very reasonable one? That's the end of it. Can't they just say that?

MR. SNOW: The court of appeals can certainly agree with him --

QUESTION: Yeah, but you don't agree -- well,

they say, we agree with him enough to say that it sounds reasonable, what he's saying sounds reasonable.

MR. SNOW: Well, I don't think the issue is whether or not it's reasonable. I think that if the court of appeals agrees with the district court's rationale, then of course they're going to affirm.

QUESTION: There's no rule required that the district judge be a member of that State court's bar.

MR. SNOW: Well, we're suggesting that the rule ought to be a de novo review. I --

QUESTION: So that if the district judge was a practicing lawyer in the State and the district judge next to him practiced law in California, there would be a different rule?

MR. SNOW: That would appear to be the case now. It does appear at least in the First Circuit that they only defer to a district court judge.

QUESTION: Well, what do want?

MR. SNOW: We're suggesting that the court of appeals should review de novo.

QUESTION: Should ignore where the man practiced law.

MR. SNOW: We believe that it's inappropriate --

QUESTION: I use the word ignore.

MR. SNOW: Well, we -- I would suggest, Justice

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Marshall --

QUESTION: Do you buy that? Do you buy that word?

MR. SNOW: No, I don't think ignore is the, is the correct word. I think that what we're suggesting is that they should not give any special deference to a district court judge. But to the extent that the district court judge comes forth with a rationale that makes sense and that the court of appeals agrees with and certainly the court of appeals is going to affirm.

QUESTION: To make sense is a big part of it. I mean comparing it to a law review article written by somebody is, is, you know -- in law review articles don't generally say, I think the law is this, because I'm from there. I mean they usually give reasons, right --

MR. SNOW: That's right.

QUESTION: -- and you evaluate what the author has to say on the basis of the reason he gives.

MR. SNOW: Yes. And I -- that's what we're suggesting, that if the -- that it's the reasoning that's important, not the judge's biography. We think it's a --

QUESTION: The Harvard Law Review doesn't say the supreme court is not clearly erroneous so that we should accept their judgment. Maybe they should.

(Laughter.)

QUESTION: What would you do with a district judge who not only practiced in the State but conducted the bar exam and -- for a refresher course for the bar for 20 years?

MR. SNOW: I wouldn't treat it any --

QUESTION: Wouldn't you assume that he knew a little bit more --

QUESTION: Especially about contracts?

QUESTION: -- on what was there?

MR. SNOW: I would assume that, that he probably does, but I think it's a dangerous practice for the courts of appeals to get into what is essentially judge rate; that we're going to defer to judge X because he has a great deal of experience in this area, but we're not going to defer to judge Y because he has less experience. Maybe that's why he just went on the bench.

QUESTION: But that's gone on for centuries. You know not in -- not in terms and not spoken in opinions, but you know they talk about the court of Queen's Bench in the 19th Century in an appeal from Judge Keckquick, but there's still other reasons for reversal.

(Laughter.)

So that goes on whether spoken or not.

MR. SNOW: Well, I would hope that our system of justice would at least strive for a certain degree of

intellectual honesty and if -- and I don't think the rule of deference -- in fact it is only used --

QUESTION: I have, I have to interrupt you. What is, what is intellectually dishonest by the court of appeals saying, Judge Selya says he's looked at substantial performance cases. He thinks they'd apply it in this area just like they did others -- the restatement applies. That's all we've got to go on and we'll accept it. What's intellectually dishonest about that?

MR. SNOW: Well, I don't think that's necessarily giving any deference. That's sounds to me that the court of appeals happens to be agreeing.

QUESTION: Well, that's what happened here. I'm talking about this very opinion.

MR. SNOW: Well, in this very opinion --

QUESTION: Judge Selya said, I looked -- I've looked at all the substantial performance cases I can find. I found two. They were construction cases, one was a construction case and one was something else. I've read the restatement. I think -- my hunch is the Rhode Island court would apply this law. Now, there's nothing intellectually dishonest. If anything, he's overtly candid.

MR. SNOW: Well, that's just -- but the court of appeals did not engage in that type of analysis at all.

QUESTION: They said in view of our rule of deference we'll, we'll follow what he had to say. They had nothing -- apparently you didn't call any Rhode Island law to their attention that he didn't have.

MR. SNOW: Well, well, I hope that we did, but --

QUESTION: Oh.

MR. SNOW: -- but I would agree that you could not tell that from the opinion. All, all we know from the opinion is that they deferred to the district court. But I think there's a very important thing that the opinion does say. They don't say that -- and it was Judge Lagueux -- Judge Selya handled the case who is now in the First Circuit. He handled the case at the summary judgment level.

QUESTION: But he didn't --

MR. SNOW: He, he did not handle the trial. It was Judge Lagueux.

There are many other negative effects, we contend, with respect to the rule of deference. It's vague and uncertain. It leads, therefore, to uneven appellate review. We also believe that the rule violates the Erie doctrine to the extent that a court of appeals is in a superior position to accurately predict what State law is. Then clearly Erie is violated by

deferring to the district court's decision.

I'd like to reserve the remaining time for rebuttal.

QUESTION: Did you mention the fact that it might be a cop-out for courts of appeals, too? It's an easy way, just defer. We don't have to bother with the case. Get on with the next one.

MR. SNOW: Well, I suppose that that may be true. I know --

QUESTION: Careful, counsel, cause several of us have done this, you know.

(Laughter.)

MR. SNOW: I know that respondent suggests that deference is simply a judicial shorthand when the court does not wish to write an opinion, but we would respectfully suggest that that's a degree of intellectual dishonesty. If in fact the court of appeals is really reviewing the matter de novo and is only using the rule of deference as a way to avoid writing opinions, we suggest that's not -- that's not the proper, not the proper rule.

QUESTION: Thank you, Mr. Snow. Mr. Hogan, we'll hear now from you.

ORAL ARGUMENT OF EDWARD T. HOGAN

ON BEHALF OF THE RESPONDENT

MR. HOGAN: Mr. Chief Justice, and may it please

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the Court:

In answer to Mr. Justice Blackmun, make it clear that the respondent disassociates itself completely with the thought that there is some intellectual honesty among circuit court judges. I -- to the contrary, I think circuit court judges do in fact give de novo reviews to every issue that comes before them and conscientiously exert their entire intellectual process to these problems and then make a resolution one way or another that the circuit or the district judge is either right or wrong. And if he's right, there isn't any point in our wasting our time in writing a long-winded opinion to simply gild the lily. If he's wrong, by golly, we'll reverse it and that's what they do.

QUESTION: And sometimes write a long-winded opinion.

MR. HOGAN: And sometimes write a long-winded opinion.

QUESTION: Why can't they -- if that's all they're doing, why don't they say, we affirm for the reasons stated by the district judge rather than we affirm because the district judge thinks that's the right answer. I mean, you know, those, those are two quite different formulations.

MR. HOGAN: In many instances, they do that, Mr.

Justice Scalia. They simply say that we affirm on the basis of the trial -- the trial judge's or the district judge's determination and the opinion given by him.

In this particular case, the trial judge's determination was a bench decision in the heat of trial and didn't have the long exposition that might take place if he had a day or two to consider what he would say off the bench. But we're dealing here not with any kind of constitutional issues. We're dealing only with how an appellate court reviews decisions in cases that are of precedential value only in the case before the court.

This is a diversity case. And diversity cases set no precedent whatsoever, because the very next day the State supreme court can rule to the contrary no matter how erudite and how deep thought -- well thought out the circuit court opinion may be. The fact is that the very next day, as said by Judge Brown of the Fifth Circuit back in 1963 when he said, this is not the last word, speaking of the circuit court opinions in diversity cases. He says, that's only the latest, and before the slug drops at a St. Louis linotype, then the writing Texas court may melt down the lead to so much drops. Such are the perils of diversity's jurisdiction.

Now that's exactly what we're dealing with.

QUESTION: I suppose you could say the same

thing in Federal questions, that the court of appeals -- who knows -- that they go through all of that labor and the very next day the Supreme Court of the United States may, may make it a dead letter, right?

MR. HOGAN: Only you can do that.

QUESTION: Well, so is that the distinction? It's only us --

MR. HOGAN: No.

QUESTION: -- versus only the Texas supreme court?

MR. HOGAN: Totally different question.

QUESTION: I mean the point is the same. It doesn't -- any court of appeals opinion is not forever. There's somebody who can overturn it.

MR. HOGAN: That --

QUESTION: I mean it's not worth doing.

MR. HOGAN: True to the extent that in the -- if it was a Federal issue, then of course you have an opportunity to review it and overrule any circuit court of appeals' decision involved with a Federal question.

On the other hand, when you deal with diversity cases, the lower court has had to make a prediction. He's dealing in a vacuum in a way. There's no determination by a State supreme court as to what the rule is. He, therefore, has to sort of divine or guess as best he can

what a supreme court would do at a later date.

Now, that is a prediction that really is nothing more than that -- just a guess, just his best estimate of what would happen. There is nothing that says that three circuit judges sitting in the quietude of their chambers make them any best -- any better guesstimers than he is. Not really, because again both the district judge and those circuit court judges can be overruled the very next day by the State supreme court. And those circuits sit within any number of jurisdictions, as few as four in our circuit and as many as eight or ten in other circuits.

QUESTION: Why did you bring this case in Federal court?

MR. HOGAN: Why the Federal court? There were several reasons. First, Your Honor, we met the diversity of citizenship test at the time and the fact of the matter is that the trial calendar in the Federal court in Providence was a more rapidly reached trial than what we in the State supreme court, the superior court -- our superior court in the State court has a crowded calendar of some 4 to 5 years to a trial and fortunately the Federal district judges in Providence are able to get their cases out within 12 to 18 months.

That was one of the really compelling reasons that we brought the case in the first instance. It

languished for a long time, because Judge Selya had the matter when he was a district judge and reserved decision on the motion for a summary judgment, and that took some period of time before that decision came down, and when he did come down with his decision, he said he would hold the case and try it himself when he could get off the circuit court long enough to hear it at the district court level.

And some year and a half went by while he tried to do that and ultimately he had to excuse himself. And that's why it ultimately was tried by a different judge. So the delay in the actual trial of the case was one that occurred because a Federal judge was trying to accommodate a calendar situation.

But had -- these cases set absolutely no precedent, and it seems to me that when you turn around and say to judges on circuit courts that are already overburdened, trying to find time to write opinions in cases that do set precedent, that when you agree with the district judge that he was right in his interpretation and his guess as to what a State supreme court would do, that if you require them to set down and write these long opinions proving 2 and 2 are 4 or reinventing the wheel, it seems to me you're putting an wholly burden, a wholly unnecessary burden --

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QUESTION: Well, why did this --

MR. HOGAN: -- upon those courts.

QUESTION: Why if it's just 2 and 2 make 5, what do we do?

MR. HOGAN: Well, that's a different problem. If, if in fact they determine that the district judge is wrong, I haven't yet seen a circuit court say, well, we think he's wrong, but we're going to reverse it because we don't want to take the time to write the opinion. I have seen many cases where they said we would normally give great deference or great weight of all the other expressions and other articulations of the deference rule.

But in this particular case, we have a firm conviction of error or the other things that they say and then they proceed to reverse the district court.

QUESTION: Well, why don't we just make up a rule that they don't have to write an opinion on matters of State law instead of making up a rule that they don't have to consider it. I mean, you know, if, if it's just a timesaving thing, wouldn't, wouldn't that be a better rule to make up?

MR. HOGAN: I'm not sure I understand your, your position.

QUESTION: Well, my point is I assume an appellate court is supposed to review the, the issues of

law that are, that are there in the case, but you're saying for this one issue of law, because it is so time-consuming, they don't have to review this issue of law. They just say, well, you know, if the district judge knows and it seems reasonable and may be wrong, but --

MR. HOGAN: I don't subscribe to the concept that the circuit court can say because it's a tough case we'll duck it, if that's what you're saying to me in other words. I think the obligation is upon the circuit court to review every case that comes before it and give each and every issue that's raised by the parties a fair hearing.

Now a fair or meaningful issue doesn't necessarily mean ipso facto that they give it a de novo opinion. I'm not at all certain, not being privy to what happens in circuit court judges' chambers, but I have a suspicion that when the circuit judges take these cases under advisement that they confer among themselves. They confer with their clerks, et cetera, and they arrive at some sort of a decision where they take into account all of the arguments that have been presented to them. They read the cases or have them read and consider those things and then come to a conclusion the district judge is thoroughly wrong. So and so, you write an opinion that shows where he's wrong and we'll do that.

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Or they could prove to the other effect, we think the district court is right. We don't have to go to a long-winded discussion. We simply use the judicial shorthand of our deference rule. We don't think he's unreasonable. We think his interpretation is a fair one.

QUESTION: So you're, so you're advocating to keep the deference rule because it doesn't really mean anything?

MR. HOGAN: I -- only as a method of shorthand. That's what I called it in my brief. It is a way for the court frankly to avoid the waste of time that comes of writing opinions that do nothing more than gild the lily where those opinions can mean nothing --

QUESTION: What, what --

MR. HOGAN: -- and the supreme court of the State thinks contrary within a matter of hours.

QUESTION: What, what should be the rule if there is more than one district in a single State? California has four different districts. Do you give a deference to each district judge even though the district judges may come to contrary conclusions as to the State law?

MR. HOGAN: You do, Mr. Justice Kennedy. And the reason I think that's clearly --

QUESTION: So the Ninth Circuit affirms in one

case, case, reverses in the other case even though the issue of law is identical just because the district judge has reached a different conclusion?

MR. HOGAN: That is a very possible situation. Some of the law writers indicate that to be true and I'm aware that that can happen. But on the other hand, I -- that's just part of the growing aspect of the law. I think they call it the living tree of the law and consequently, yes, it could happen that in the given vote -- jurisdiction you will have district -- different determinations of the same issue by different judges. And they might both be deferred to. That can happen. I can't deny that. I'm not trying to say it doesn't happen.

QUESTION: By the same court, by the same court, right? Both deferred to by the same court?

MR. HOGAN: By the same circuit court.

QUESTION: And yet they are only doing what you say and that is just saving themselves the problem of writing an opinion.

MR. HOGAN: Precisely. Because they are doing it --

QUESTION: Even though they come out different ways in both cases. I mean surely they must be doing something more than saving themselves the trouble of writing an opinion after they thoroughly or adequately

considered the matter.

MR. HOGAN: Well --

QUESTION: I mean you can't have it both ways. Either you think that they're really examining the matter and this word deference really doesn't mean anything or you think it does mean something, in which case you can reach different results that way.

MR. HOGAN: Well, I could conceive that if the same issue comes up the second time around and they have, let's say, deferred to a district court judge the first time around in a given fashion as in this case, let's say, that the district judge is correct. Then the same issue comes up on a second time around and they then conclude, well, by golly, maybe we weren't so right in the first time. Then they could sit down and write an opinion and say that we were wrong. They've done it before. There are other cases in the books that say, well, on second thought, second reflection, we think it contrary.

But those, the instances when that will happen are rare indeed and again it's a question of the exception trying to prove the rule and I think the fact is that in virtually all of these cases you deal with a situation where the circuit courts do in fact perform the duty that's encumbered upon them as circuit courts to give the parties a fair and meaningful review of the legal issues

involved. And I'm not about to say that the circuit courts don't do that. To the contrary I believe they do. And I don't think it's required in order to give a litigant a fair opportunity to have his legal position heard that it's required that they write these long opinions every time the issue comes up.

You know --

QUESTION: I take it in your State the court of appeals in diversity cases must not defer so much to district judges that lawyers think there's no use appealing a district judge's ruling.

MR. HOGAN: Well, of course --

QUESTION: I mean if they -- if, if there was, if there was too much deference to a district judge, you'd be wasting your money appealing a legal question.

MR. HOGAN: Let me, let me --

QUESTION: I take it that's not the case in your circuit?

MR. HOGAN: Let me answer in this fashion, Mr. Justice White. First of all, I think in the amicus brief it's clear that there are only about 1 or 2 percent of the cases that are heard in the First Circuit that deal with diversity of citizenship cases out of the State of Rhode Island. You realize that Rhode Island is a rather small territory.

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QUESTION: Well, I know but, but you don't need to look at the universal district of the whole circuit. How about lawyers practicing in Rhode Island? Do they feel that it's useless to appeal a question of law to the court of appeals?

MR. HOGAN: No, I don't, I don't feel that way. And I don't feel that most lawyers in Rhode Island feel that way. I think we are aware of the longstanding rule -- it has been all of the time I've ever practiced -- that the circuit courts would give substantial, great weight deference, all the other articulations of that deference rule to a district court determination of State law.

QUESTION: But you think that despite this maybe weak, weak or strong presumption, you think you could justify spending your client's money appealing a, a question of law to the circuit court?

MR. HOGAN: I'm in the process of doing one now to be heard next Tuesday --

QUESTION: Exactly.

MR. HOGAN: -- and I hope to succeed.

QUESTION: Yes.

MR. HOGAN: I don't know whether I will or not. We'll find out. I think it all boils down really to a question of this issue of, is a de novo review required in

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this type of a case? Certainly it's not required by the constitutional provision. It's not even required by statute or by rule of court. So it becomes a matter of whether, as a matter of sound administration of justice, the deferential rule makes sense in these particular cases.

The deferential rule is not --

QUESTION: Is that an appeal in your sense of the word when you use the word appeal but you give absolute deference to the crowd to it?

MR. HOGAN: Well, the deference rule doesn't require absolute deference.

QUESTION: Well, some people say it does.

MR. HOGAN: I, I don't know of a case that I've come upon that says the deferential rule, as I refer to it here --

QUESTION: Haven't you been arguing that you've been standing up there?

MR. HOGAN: What's that, sir?

QUESTION: Haven't you been arguing in this case that it means that there's no way to win?

MR. HOGAN: No, sir.

QUESTION: I thought that's what you were saying.

MR. HOGAN: No.

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QUESTION: You said, why write an opinion.

MR. HOGAN: No, that isn't -- I think you misunderstand my position.

QUESTION: I sure do.

MR. HOGAN: My position is not that I -- the court should not write an opinion just for the sake of not writing opinions. My position is as simple as this. When the circuit court reviews, as it does, fairly and completely the issue of what is before the court and concludes that the trial judge was correct or that his interpretation of the issue is reasonable and not error-prone, then --

QUESTION: Well, which is it? Which is it? Correct or reasonable? Which of the two? You can be reasonable and be wrong.

QUESTION: These are Justice Marshall's questions, I think.

MR. HOGAN: Either, either, Mr. -- either I think is appropriate. I, I believe that --

QUESTION: Well, why, why don't you return to Justice Marshall's question?

MR. HOGAN: I will. I -- now when they arrive at the conclusion that the trial justice is not in error, that his position is reasonable, how ever you want to say that, that they are not prepared to overturn them or

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reverse it, that in those circumstances, they do apply what I call the deferential rule. And they defer to him unless they conclude that he is thoroughly wrong or in error.

If they find him in error, they do not hesitate to write opinions. I've brief cites in numerous cases to that effect where the various circuits all have overturned district court decisions although giving voice to the deferential rule. So it isn't a question of deference and, therefore, it's conclusively presumed. Not so at all. This is not a question of conclusive deference, of being bound by --

QUESTION: Well, what about, what about, what if a, what if the court of appeals' panel sits there and they all agree that, that if, if we were deciding this in the first instance, we would think the laws -- the State statute should be construed in this manner, but the construction the district judge has given it is also a reasonable construction. But we would prefer the others in the original matter, but we think we'll just think the -- take the view of the district judge. Now, is, is that proper for the court of appeals to do or not?

MR. HOGAN: Mr. Justice White, until the Ninth Circuit came down with its opinion in the matter of McLinn back in 1984, I think it's fair to say that every circuit

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court of appeals throughout the country, if they were of that position would have said, well, why we think if it were a matter of first impression with us we would rule differently than the district judge. We don't think he's wrong. We don't think it's unreasonable. We will not substitute our judgment for his. We will defer and affirm. QUESTION: So that's -- is that sort of like deferring -- a Federal court deferring to an administrative agency's view of a statute?

MR. HOGAN: Well, not, not quite, because in the area of Federal jurisdiction, the issues are a little bit different and what can happen to the Federal case is a little different than what happens in the diversity case where the State law issues are involved. I -- in the Federal cases, the Federal courts require a degree of expertise that the State courts obviously don't get and contrary, I think that certain State courts acquire a better expertise with State law than perhaps Federal courts do, because they deal with different issues. When the district court is required to find, as he is in a diversity case, a State law, he's pretty much on his own unless there is a determination already ahead of him. If he is, he's bound by that.

But in the absence of any definitive ruling by the State supreme court, he has to divine what he thinks

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it is. He can be overruled by a trial judge of the State court. That isn't quite true when you do it with the Federal court deciding regulatory agencies' interpretations. QUESTION: Well, --

MR. HOGAN: There's nobody to overrule, I mean except the circuit court.

QUESTION: You say until a certain point if the, if the -- even if the court of appeals thought that they had the better view of the statute, if the district judge's view was within the realm of reasonableness, they would defer to him?

MR. HOGAN: On a diversity case in the --

QUESTION: On a diversity case. Now, you say up until a certain point, until the Ninth Circuit decided --

MR. HOGAN: Yes, and then when the Ninth Circuit came down with the McLinn case back in 1984 -- a sharply divided court, I think it was 6 to 5 -- they held there for the first time that I could I any case that said flatly that henceforth in this circuit all issues of State law will be decided de novo and on a plenary basis by this Court.

I -- and that is the first time I have found any case that espouses the rule that flatly and that broadly.

QUESTION: What is that citation you have there?

MR. HOGAN: It's the Mc -- McLinn.

QUESTION: I'll look, I'll look in your brief.

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MR. HOGAN: It's 739 Fed.2nd 1395, I can tell you that. I -- it's the case that really gives rise to this whole issue, because there for the first time circuit courts decide -- a circuit court decided that these State law issues would be resolved on a de novo basis with no deference whatsoever to a district court judge's ruling.

That threw the whole ball of wax up for grabs as to what is going to be the right rule to apply from here on. And I -- practically every circuit with the exception of I think the Third and conceivably -- might be some language out of a Sixth Circuit now that would be construed to be a de novo type of ruling cited by the amicus in this case. I'm -- all the other circuits, however, have continued to apply the deferential rule.

There are cases cited in my brief from various circuits, I think the First, Second, Fifth, Sixth, Seventh, Eighth, and Tenth that all postdate the McLinn case and apply the deferential rule even in face of the Ninth Circuit's decision in McLinn, who said that everything should be de novo.

QUESTION: Let me ask you the question I asked Mr. Snow. Suppose every Federal district judge in Rhode Island were disqualified -- wasn't graduated from college or something and Judge Duffy from the southern district of New York were assigned to sit as the trial judge. Do you

think the court of appeals of the First Circuit should defer to his interpretation of Rhode Island law?

MR. HOGAN: I most certainly do.

QUESTION: Why?

MR. HOGAN: Because he's just -- he's in as good a position frankly in my opinion to make a guess as to what the Rhode Island supreme court will do as are three judges in the circuit court in Boston, one of whom comes from Puerto Rico, one from New Hampshire, and one from Maine.

QUESTION: Well, what if there are --

QUESTION: Well, what one -- excuse me.

QUESTION: -- there are three judges, one from the southern district of New York?

MR. HOGAN: If five judges were out on the supreme court tomorrow, say those three are wrong. This is a totally different situation. We're not dealing with the Federal law where there's a hierarchy that you can follow neatly all the way up to this august bench. We are dealing with a situation where anywhere along the line the whole thing can be short-circuited by a State supreme court ruling not even having to be followed by trial judges in Rhode Island.

QUESTION: Yes, but it would have been nice had you been in State court and got a definitive ruling right

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away.

MR. HOGAN: Well --

QUESTION: On the other hand, your answer was a good one if the calendars were clogged up.

MR. HOGAN: We'd, we'd still be waiting for trial. So I really think that this boils down to a question of whether the trial judge is in a better position to make a determination than is a circuit court. And most of the law writers say that he is.

One of the telling points that was tried to be made by the circuit court of the Ninth Circuit in the McLinn case was that failing to give this type of full-blown, full-scale legal review to unsettled law questions would be an advocation of their authority and their position as such, and unfair to the litigants. Judge Schroeder in her dissent makes a clear point in refutation of that position, but one of the better comments that I've read about this whole issue comes from Judge Amentalot of the Eighth Circuit in the case of Arthur Young against Reeves, which I think has just been reversed by this Court recently under the name of Reeves against Ernst and Young. I -- but --

QUESTION: Do we have to give deference to the trial court?

MR. HOGAN: Do you, sir?

QUESTION: Yes, sir.

MR. HOGAN: I don't think you have to give deference. You have given deference.

QUESTION: I said, do we have to give deference to the trial court?

MR. HOGAN: I don't think you're required to give deference. You have in the past said that you do defer. The case of Hori, which was the Japanese emigrant case, Judge Powell in a footnote to his decision referred then to the fact that this Court has given deference to different district court judges' determinations of State law issues. In Bernhardt --

QUESTION: Did that say we have to?

MR. HOGAN: I, I answered your question I think --

QUESTION: Do we have to? Do you say we have to?

MR. HOGAN: I, I do, I do not say you have to give deference.

QUESTION: Would it be all right if we say in due deference to the trial court, we think that we're wrong? Would that be good enough?

MR. HOGAN: Well, well, it wouldn't make me happy in this particular case, if that's what you're asking me.

(Laughter.)

I think you have the power to say that and the legal right to say that. Would it be all right, it depends on how you say that to me.

QUESTION: Mr. Hogan, why should there, why should there be just one rule among the circuits other than a rule that a circuit court shouldn't just automatically rubber stamp what the district judge says? Why shouldn't one circuit be able to do -- to give, to give the normal deference as you would say and, and the Ninth Circuit follow its own rule?

MR. HOGAN: Well, applying it to myself and to this case, I have no problem with that. I'll accept the First Circuit rule and be happy with that --

QUESTION: Uh --

MR. HOGAN: -- but as a litigator and an advocate the result would please me greatly if you were to simply say, let there be diversity of opinion between the circuits so we don't care. Let the First Circuit stand on its own. I'll be glad to accept that. Whether that's good --

QUESTION: The First Circuit --

MR. HOGAN: -- as a example of the administration of justice, I leave to Your Honors.

QUESTION: The First Circuit may know about its

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district judges. The Ninth Circuit may know more about theirs.

MR. HOGAN: I won't dispute that either. If that's -- if it's comfortable with the Court that there be that dichotomy among the circuits, it's comfortable with me because we're all right on that position. But as a matter of administration, I don't know whether that's good, bad, or indifferent. That would strike me as not being very good, but --

QUESTION: Judges are from another circuit.

MR. HOGAN: What's that, sir?

QUESTION: Judge Timbers is from the First Circuit?

MR. HOGAN: Yes.

QUESTION: So you'd say that that applies to him, too?

MR. HOGAN: Well, he applied, he applied, he applied the rule of deference.

QUESTION: Deference.

MR. HOGAN: Yes, he applied the rule of deference. The Second Circuit still adheres to the rule of deference so I'd still be with him.

QUESTION: To the First Circuit?

MR. HOGAN: Well, he sat on the First Circuit by designation.

QUESTION: He not only sat, he wrote the opinion.

MR. HOGAN: He wrote the opinion.

QUESTION: And in the Ninth Circuit, he would be charged with knowing the law of Hawaii as law.

MR. HOGAN: And he probably dissented.

QUESTION: Huh? Would he?

MR. HOGAN: Just as any other circuit court judge will be charged with knowing within the First Circuit --

QUESTION: No, no.

MR. HOGAN: -- the law of Rhode Island because he's from Maine.

QUESTION: Is he charged with knowing all of the local law that the local circuit judges know?

MR. HOGAN: If he's going to sit in that circuit, I, I would think he'd have to. In any event it seems to me as I said earlier that I -- this comes down to the matter of plain common sense, and Judge Arnold said so. He said, you know, one can look at all the law books in print and still not have the same degree of reliable judgment on legal questions as a lawyer who has lived and practiced for years in a jurisdiction. There is such a thing as what Dean Pound called law in action as opposed to law in the books. Each State has its own distinct

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legal ethos which informs and qualifies how lawyers and judges understand what is written in the law books.

So when we defer to the opinions of district courts on the law of their State, we are not shirking our responsibilities. We are simply using common sense.

I think that concludes my arguments.

QUESTION: Very well, Mr. Hogan. Mr. Snow, do you have rebuttal?

REBUTTAL ARGUMENT OF STEVEN E. SNOW

ON BEHALF OF THE PETITIONER

MR. SNOW: Yes, Mr. Chief Justice, and may it please the Court:

My brother has suggested that there's no issue of constitutional law in this case and I respectfully differ to the extent that Erie does state a rule of constitutional law. I would suggest that the cases of this Court interpreting the Erie in fact mandate de novo review. In the Wichita royalty case, decided only a year after Erie, this Court ruled that a court of appeals is substituted for the State supreme court and must therefore interpret the law the same way as the State supreme court would have declared and applied it. I would suggest that that implies that de novo review is required.

Furthermore, in Palmer v. Hoffman, this Court -- and other cases -- this Court has ruled that

State law presumptions and burdens of proof control in a diversity case. I suggest that it's logical that if presumptions and burdens of proof apply at the trial level then they equally apply at the appellate level.

And in Hanna v. Plumer this Court ruled that it's unfair under Erie for the character or result to materially differ because the suit was brought in Federal court. I would suggest that under the rule of deference at the very least the character, if not the result of the case, does differ because the case was brought in Federal court.

Unless the Court has any further questions --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Snow. The case is submitted.

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

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