OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CATERPILLAR, INC., V JAMES DAVID LEWIS

CASE NO: No. 95-1263

PLACE: Washington, D.C.

DATE: TUEDSAY, NOVEMBER 12, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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CATERPILLAR, INC., :

Petitioner :

v. : No. 95-1263

JAMES DAVID LEWIS :

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Washington, D.C.

Tuesday, November 12, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

KENNETH S. GELLER, ESQ., Washington, D.C.; on behalf of the Petitioner.

LEONARD J. STAYTON, ESQ., Inez, Kentucky; on behalf of the Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 95-1263, Caterpillar, Inc. v. James David Lewis.

Mr. Geller.

ORAL ARGUMENT OF KENNETH S. GELLER

ON BEHALF OF THE PETITIONER

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

The Sixth Circuit reversed the judgment of the district court in this case, not because of any error in the district court proceedings, and not because the district court lacked jurisdiction to try this case, but solely because the district -- the case was not within Federal diversity jurisdiction at the time that the case was removed from State court.

Because this ruling conflicts with prior decisions of this Court and makes no sense from the standpoint of judicial economy, we've asked the Court to grant review.

Now, the facts that are necessary to understand the legal issue are these.

The plaintiff, James Lewis, was injured while operating a bulldozer manufactured by Caterpillar and

serviced by Whayne Supply Company. He brought suit in Kentucky State court against Caterpillar and Whayne Supply alleging a number of tort claims.

Liberty Mutual Insurance Group which had paid Lewis worker's compensation benefits intervened as a plaintiff to protect its subrogation rights and brought virtually identical tort claims against Caterpillar and Whayne Supply.

Now, at the time the complaint was filed, the case was not removable to Federal court because both plaintiff Lewis and defendant Whayne Supply were citizens of Kentucky, so there wasn't complete diversity of citizenship.

Several months later, however, Caterpillar's counsel learned that Lewis had settled his claim with Whayne Supply, the non-diverse defendant, and Caterpillar thereupon removed the case to Federal court in Kentucky. Lewis moved to remand the case, making the single argument that the district court lacked subject matter jurisdiction. Lewis --

QUESTION: He was right at that point, was he not, because Whayne was still in the litigation. So, when the motion was made to remand to State court, there was not complete diversity --

MR. GELLER: Yes.

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QUESTION: -- and the case should have been remanded. Is that not correct?

MR. GELLER: That was obviously a disputed issue, but as the case comes to this Court, that's correct.

QUESTION: Well, I think we have to assume this, and he made a timely objection. He preserved his objection.

MR. GELLER: He made a motion to remand. That's correct.

QUESTION: Yes.

MR. GELLER: Yes, Justice O'Connor.

QUESTION: And I don't know if it's all that clear whether an interlocutory appeal would ever lie at that point, is it?

MR. GELLER: From the denial of the motion to remand? The Sixth Circuit and other circuits have allowed appeals in that circumstance. We don't rely heavily on that in this case, but there are many cases that have allowed appeals in that circumstance, including some cases in the Sixth Circuit that we cited in our brief. But it would be a discretionary --

QUESTION: But in any event, presumably having made the objection and motion in a timely fashion, it should be reserved for review on appeal.

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MR. GELLER: If the error had not been cured, I think there would be an argument that the issue should be reserved for appeal.

QUESTION: Well, but of course the claim is that there was prejudice here because of different rules on what evidence can come in and because of the non-unanimous jury in Kentucky and so forth.

MR. GELLER: Yes.

QUESTION: Do you think any of those procedural rules at the State level could ever amount to prejudice?

MR. GELLER: Well, if the error had been objected to and not cured, which is not our case, I think there is an argument that the issue might be reserved to be argued on appeal from a final judgment, and if the error is consequential, could lead to a reversal. That is not this case.

QUESTION: Well, but we take the case in the posture that there was an error when it wasn't --

MR. GELLER: Well, the error --

QUESTION: -- sent to State court.

MR. GELLER: The error, Justice O'Connor, was simply in removing at a time when there wasn't diversity jurisdiction.

QUESTION: Right.

MR. GELLER: It's just like this Court's case,

as I hope to discuss in a few minutes, of Finn where the identical error occurred, and yet the Court said, as I'll explain, that the rule is even though that error may have occurred, if jurisdiction exists at the time of judgment in the district court, that's not -- there's no ground to reverse on appeal.

QUESTION: But, Mr. Geller, is it not true this case has an unusual feature? If I understand the facts correctly, you removed very close to the 1-year limit for removal in a diversity case, and if you had waited until Whayne was dismissed, at the point at which you had complete diversity, it would have been too late for you to remove. So, but for the removal, the wrongful removal when there was not complete diversity, you never could have gotten into the Federal court.

MR. GELLER: Well, that's true, but there are a number of responses. To begin with, Justice Ginsburg, we did remove prior to the 1-year period. There's no dispute about it.

QUESTION: Yes, but there was no diversity then.

MR. GELLER: Well, I understand that. There may be a separate question, one the -- once the case is in Federal court whether it should have been remanded for lack of diversity, but there's no dispute that the 1-year period was satisfied.

QUESTION: Yes.

MR. GELLER: And secondly, that objection was never made in the district court.

QUESTION: The objection that was made was that there was not complete diversity.

MR. GELLER: That was the only objection.

QUESTION: That was a well-taken objection and you recognized that --

MR. GELLER: Yes.

QUESTION: -- you must accept that --

MR. GELLER: Yes.

QUESTION: -- for purposes of posture we're in.

MR. GELLER: Yes.

QUESTION: My point is imply that if you had waited until Whayne was dismissed from the action, it would have been too late for you to remove. Is that not correct?

MR. GELLER: That is true. That is true.

QUESTION: One other point I was glad to hear you say in your argument is that you were not relying on the failure to take an interlocutory appeal --

MR. GELLER: Well, we're not --

QUESTION: -- from the refusal to remand.

MR. GELLER: We're not arguing a waiver in that sense. We're not arguing that the Lewis' case would any

-- be any better today if he had tried to take an interlocutory appeal and 1292(b) certification had not been granted.

What we do say, what a number of lower courts have said, is that these are the sorts of errors that should be resolved prior to trial. He had the opportunity. He had one more step to take prior to trial in which, if it had been successful, would have gotten this case --

QUESTION: But I find that an extraordinary argument, if you're making that, because 1292(b) is an exception to the very firm final judgment rule, and people aren't penalized for failing to --

MR. GELLER: Well, not -- it's not a question of penalizing anyone, Justice Ginsburg. We're simply saying that that was a remedy available to Lewis that he didn't pursue. Now --

QUESTION: Well, it's my -- if 1292 was not something that any litigant must use -- and it's my understanding that it is not -- then, as Justice O'Connor pointed out, a timely objection was made and that objection is preserved for --

MR. GELLER: Well --

QUESTION: -- appeal after final judgment.

MR. GELLER: The only objection that was made in

the motion to remand, Justice Ginsburg, was that there wasn't diversity jurisdiction. It's precisely like this Court's Finn case, which I hope to discuss in a minute. And in Finn, this Court held -- and it has been the rule for 50 years -- that even if there wasn't jurisdiction at the time the case was removed from State to Federal court, if jurisdiction subsequently attaches during the trial, that's the end of the matter.

QUESTION: Suppose in this case that the removal had been after 1 year, or suppose a hypothetical case, removed after 1 year. And the district judge for some reason said, well, that statute is discretionary. He's just wrong and doesn't remove it. Can that ever be cured?

MR. GELLER: Well, first of all, that wouldn't --

QUESTION: Let's assume complete diversity at all times.

MR. GELLER: Right. It would be a --

QUESTION: But you just --

MR. GELLER: There would be a statutory error. It would be in the nature of filing a suit after the statute of limitations had expired. If it would have -- if that objection had been preserved and if the error had never been cured or could not be cured, it is something that perhaps would lead to a reversal on appeal. It's not

something --

QUESTION: Why should that lead to a reversal on appeal?

MR. GELLER: Well --

QUESTION: It seems to me the equities there are much different. There there's diversity at all times.

MR. GELLER: Well --

QUESTION: In your case the judgment is saved only because something happens toward the end.

MR. GELLER: In that case, though, there would be a statutory error, and the question would be, is the statutory error something that should lead to a reversal on appeal? We don't have a statutory error here. The only error that's complained -- that was complained of in the motion to remand was the lack of diversity jurisdiction at the time the case was filed. No separate statutory violation was alleged.

QUESTION: Well, if that objection was well taken -- and it was -- if it had been -- if the district judge had recognized all the circumstances in the case, why isn't that statutory? Diversity is statutory in large part.

MR. GELLER: Well, the only requirement of the removal statute that would be implicated is that there be diversity jurisdiction or some other ground of Federal

jurisdiction at the time the case is removed, but it's not a separate requirement of the removal statute. It's a requirement of 1332.

QUESTION: I would think that your argument is not that it's statutory versus non-statutory, but rather that it's curable versus -- or rather, that its non-curable versus curable.

MR. GELLER: Right. It would --

QUESTION: If you're late, you're late and there's no way that it can ever be made up.

MR. GELLER: There would still --

QUESTION: Whereas, if there is no diversity, that can be altered.

MR. GELLER: Well, that's right. And there may be some statutory errors that are curable, and even if they're not curable, Justice Scalia, they may be harmless errors. I mean, there are a number of reasons why you wouldn't want to reverse a Federal judgment even though some error may have occurred at some earlier part -- point in time, but we're not dealing with an error that's not curable.

QUESTION: I know the case isn't before us, but do you have a conclusion as to what the rule should be if the removal is, say, a day -- a week after the 1-year period of trial?

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MR. GELLER: Yes. I guess our position would be that these sorts of errors should be the subject of a motion to remand in the district court, and that's where the plaintiff's remedy is. Presumably in 99 percent of all cases, the district court will grant those motions if they deserve to be granted. If they are not granted, if the opportunity to seek an interlocutory appeal is not taken, if the case then goes to judgment in Federal court and it's a perfectly valid judgment in all other respects, I think there's a strong argument that that judgment should not be reversed because of that error.

QUESTION: So, what you're saying is that these matters basically are to be left to the district courts.

MR. GELLER: I think that these -- this may be a category of error in which the plaintiff's remedy, even if it's not cured, would be with the district judge and you wouldn't want to reverse a Federal judgment based on them.

But I have to repeat again because it seems to me so critical to this case that we're dealing here with an error that -- not a statutory error and was completely cured and seems to us to be on all fours with the Finn case.

QUESTION: Well, Mr. Geller, what wasn't completely cured was that there was a removal at a time when there was no statutory right to a removal.

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What you're asking us, I think if I get you right, is pretend that this case had been filed anew in the Federal court before the trial. This was -- once Whayne was dropped out, there was complete diversity, and I could understand an argument that says take the case at that point. But I cannot understand an argument that says 1292(b), you didn't use that, so you have --

MR. GELLER: Justice Ginsburg, we're not relying --

QUESTION: -- so you're losing out on something.

MR. GELLER: Excuse me. I'm sorry.

We're not relying, as I suggested earlier, on the failure to take a 1292(b) appeal here except to suggest that, in answer to Justice Kennedy's question, these are the sorts of errors that should be resolved prior to trial. This is one more way in which he could have resolved it prior to trial and he didn't pursue it.

QUESTION: What you are assuming, it seems to me, and might have said to Justice Ginsburg is that although the statutory error in one sense exists forever, the only real interest that is at stake here is an Article III jurisdictional interest. And if an Article III jurisdictional interest gets cured, then the statutory error becomes de minimis, and given the interests in economy and so on, it isn't worth reversing. Isn't that

the nub of what you're saying?

MR. GELLER: That would be the nub of what we're saying if there was in fact a statutory error here, but there wasn't. I have to repeat. I'll try to come to this later on. The removal petition was filed prior to the 1-year period of the statute, so there wasn't a statutory error here.

QUESTION: There was an error in removing the case when there wasn't complete diversity.

MR. GELLER: That was the only error, the jurisdictional error.

QUESTION: And the district court -- if we could just peel away what should not be in the dispute and then argue from there. The case was removed at a time when there was no right to remove it because there was no complete diversity. There was a motion to remand and that motion to remand was incorrectly denied because a non-diverse party was still in the case.

MR. GELLER: Right.

QUESTION: If we could just --

MR. GELLER: That is --

QUESTION: -- say that that's a given --

MR. GELLER: That's the fact.

QUESTION: -- and go on from there.

MR. GELLER: Yes.

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And that's precisely right, Justice Ginsburg, but it seems to me all of those things could have been said and more said in the Finn case. This Court's decision in American Fire & Casualty v. Finn involved precisely the same situation.

QUESTION: With one exception. The 1-year period for removal was not on the scene at the time of Finn.

MR. GELLER: It wasn't but -- I'll say it one last time and then we can -- that 1-year provision was not violated in this case. The removal petition was filed less than a year.

QUESTION: Mr. Geller, then I will say it one more time.

MR. GELLER: Okay.

(Laughter.)

QUESTION: If you had waited until it was proper to remove, you could not have removed because the 1-year period would have run. If you had done it right, if you followed the statute --

MR. GELLER: Yes.

QUESTION: -- and didn't try to remove until you had complete diversity, you could not have removed because the one --

MR. GELLER: That's true.

QUESTION: And the difference in Finn is that 1-year provision was not part of the law at the time of Finn.

MR. GELLER: Well, first of all, even assuming there was this distinct statutory error, apart from the jurisdiction error, it's not an error that the plaintiff has ever alleged or preserved until his merits brief in this Court. He didn't allege it in the court of appeals. He didn't allege it in the response to the rehearing petition in the court of appeals. He didn't allege it in his brief in opposition in this Court. So, the very first time we're hearing about this 1-year provision is in the merits brief in this Court now.

So, I -- we have really two arguments. One is, his argument was never preserved.

QUESTION: Was it raised in the brief in opposition to certiorari?

MR. GELLER: No. No, it wasn't, Mr. Chief Justice.

First time we see this 1-year argument is in the merits brief in this Court. We don't think it's preserved.

But secondly, the 1-year provision was put in the statute like a statute of limitations. It simply says you have to file the removal petition within a year. That

-- I think it's undisputed that that requirement was satisfied here.

Take a case like Newman-Green which is a --

QUESTION: Yes, it was satisfied here and there's no doubt about that.

MR. GELLER: Yes. So, there wasn't a statutory error.

QUESTION: But the point I'm making is that if you had not removed at a time when there wasn't complete diversity, you could have not have removed later. That's -- and that's part of --

MR. GELLER: I accept that point.

QUESTION: -- the scene and I don't think it's genuinely arguable.

MR. GELLER: Fine. I agree.

In any event, this case we think is precisely like Finn where the Court stated a rule, which it repeated more recently in Grubbs, that even if there was no Federal jurisdiction at the time that a case was removed from State to Federal court, the judgment should not be reversed on appeal if in fact Federal jurisdiction was present at the time --

QUESTION: You don't mean it's precisely like the Finn case. It's precisely like --

MR. GELLER: Like the rule --

QUESTION: -- the way you interpret a sentence in the Finn opinion.

MR. GELLER: Well, except what happened in Finn, Justice Stevens, it's --

QUESTION: And you should be relying on the cases that sentence cites, except they all went the other way. They all were cases where the defendant was not allowed to --

MR. GELLER: Well, there are a lot of --

QUESTION: -- take advantage of the error.

MR. GELLER: The rule announced in Finn -- it's true that in Finn the Court --

QUESTION: You're relying on a sentence in Finn, not the holding in Finn.

MR. GELLER: Well, I believe we can debate whether it's the holding. It was the rule of law announced --

QUESTION: It's certainly not the holding because the case went the other way.

MR. GELLER: Well, but what happened in Finn is that the Court also said, of course, on remand this problem can be cured by dismissing the non-diverse defendant, and that is of course precisely what happened on remand in Finn. The plaintiff made a motion to dismiss the non-diverse defendant. The court of appeals granted

the motion, reinstated the verdict for the plaintiff, even though there was no diversity at the time that case had originally gotten into Federal Court, and reinstated the verdict for the plaintiff, and then this Court denied certiorari.

So, what actually happened in Finn was that the rule that we're relying on here which was announced by the Court in Finn was applied, and the verdict -- the judgment of the Federal court was not thrown out. In fact, the judgment for the plaintiff was sustained.

QUESTION: Mr. Geller, do you see a difference between a plaintiff who prevails in such a case, the plaintiff not having brought the case to the Federal court, and the defendant -- the plaintiff was the one who was resisting removal because the plaintiff doesn't remove. A defendant does.

MR. GELLER: Right.

QUESTION: And when a defendant removes and the removal -- there was no basis for the removal at the time? Isn't that a difference in the situation of the plaintiff who is -- doesn't want to be in Federal court but is stuck there because the defendant dragged the plaintiff there? Plaintiff can hang on to the plaintiff's verdict, but that you're not going to allow a defendant who wrongfully removed to profit from that wrongful removal.

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MR. GELLER: The rule announced in Finn doesn't draw the distinction between the plaintiff or the defendant, and notions of consent or waiver or things like that seem to have no relevance, it seems to us, when the defect is a jurisdictional defect. The court either has jurisdiction or it doesn't.

Now, in this respect a very significant case I think is this Court's decision in Newman-Green, which is less than a decade old, a decision that the plaintiff relegates to a footnote and says there's no relevance. But it seems to me it's precisely on point in view of the thought that Your Honor is expressing.

Newman-Green is a case in which the plaintiff filed suit in Federal court alleging diversity of citizenship. There was in fact no diversity of citizenship. That case shouldn't have been in Federal court. Nonetheless, the plaintiff recovered a large judgment.

When the case got to the court of appeals, the jurisdictional error was discovered, and what happened, though, is not that the case was thrown out of Federal court, but that the error was remedied on appeal. And this Court sanctioned that, saying the non-diverse defendant could simply be dismissed from the case on appeal, and in fact that's what happened. The judgment

for the plaintiff was instated.

That was a case where the defendant didn't ask to be in Federal court. He was erroneously dragged into Federal court, and yet a judgment for the plaintiff was sustained by dismissing the non-diverse defendant.

So, it seems to me that's a complete response to the suggestion that the jurisdictional rule should depend upon whether it's the plaintiff or the defendant that may have made the error or who --

QUESTION: I don't see that because the plaintiff has a choice of forum. A plaintiff suing two defendants can drop one of them at any time and perfect the diversity. Isn't there a provision that says you can cure a jurisdictional defect even in the court of appeals? Isn't there a provision that --

MR. GELLER: Well, this Court relied on rule 21 of the Federal Rules of Civil Procedure.

QUESTION: Well, is there not a provision in title 28 to that effect, that you can --

MR. GELLER: I don't believe so.

QUESTION: -- you can cure it?

MR. GELLER: This Court didn't cite any provision. It relied on rule 21.

QUESTION: Well, I don't remember the number of it, but I think you will find that --

MR. GELLER: But --

QUESTION: -- there is such a provision.

MR. GELLER: Well.

QUESTION: In any event, it's the plaintiff -- isn't there this difference, Mr. Geller? The -- our system gives plaintiff the initial choice of forum, and here is a plaintiff in our case who chose a State court, got dragged out of that State court and into a Federal court. There is a difference I think.

MR. GELLER: Well, it's true that the plaintiff has the initial choice of forum but that doesn't trump every other rule. It's also true under the statutes that the defendant, when he sued in a state other than his own -- and there's diversity of citizenship -- has the right to remove that case to Federal court.

Now, as this case was actually tried, there was diversity of citizenship. The defendant was an out-of-state defendant, and therefore it was appropriate for this case to be tried in Federal court.

So, in any event, our position is this case is in fact precisely like Finn, a case that's been -- was decided 50 years ago, has been applied in dozens and dozens of court of appeals cases since, and as stated without qualification in the leading treatises, that even though there may not have been jurisdiction when the case

was removed to Federal court, if jurisdiction attaches subsequently prior to trial, then the judgment should not be reversed on appeal, even if in fact Federal jurisdiction was not present at the time of trial -- at the time of removal.

Now, there's no question that that black letter rule was fully satisfied in this case. At the time of the 6-day jury trial and at the time judgment was entered for Caterpillar, the case was plainly within the Federal court's diversity jurisdiction

QUESTION: Mr. Geller, on your reasoning it wouldn't have mattered even if there was no diversity jurisdiction during trial. So long as it had attached by the time of judgment, that would be enough. Is that correct?

MR. GELLER: Well, Finn talks about both. You know, I don't know what would happen in the situation where there was no diversity jurisdiction at the time of trial, but there was between -- you know, jurisdiction attached between trial and judgment.

QUESTION: Well, if it can be cured after appeal --

MR. GELLER: It would seem that if it could be --

QUESTION: -- then I would suppose it would

follow that if it was cured, let's say, after trial but at some point prior to a remand on appeal, it would be enough.

MR. GELLER: I think that's right, Justice Souter. In Finn itself, it was cured on remand to the court of appeals. So, I think that's right.

But the rule announced in Finn is that there has to be jurisdiction at the time of trial and there was in this case, which is our only point.

QUESTION: So, if the -- if you do take the position that so long as it's cured even after trial but before judgment, does it follow that any of the claims of harm here, if we should get to a harmful error analysis, really would be beside the point?

MR. GELLER: The Court has not engaged in any harmful error analysis in any of these cases.

QUESTION: And it would be inappropriate on your theory.

MR. GELLER: Yes.

QUESTION: Wouldn't it?

MR. GELLER: Yes. That's right because this is a case --

QUESTION: Although you admitted in response to my question that some errors could be prejudicial.

MR. GELLER: Well --

QUESTION: That's what I asked you, and that means that there are some situations that would permit the conducting of a harmless error analysis.

MR. GELLER: Well, I don't think in this situation the Court has ever done that. In Finn it didn't ask would the case have come out differently in State court.

In Newman-Green, which is perhaps a better example, where the Court didn't ask should this -- would the defendant have been -- was the defendant prejudiced by being in district -- Federal district court because that was a case that should have been brought in State court. It didn't ask those questions. It was simply enough as a matter of judicial economy and administration. It was a perfectly fair Federal judgment entered at a time when there was jurisdiction, and the Court said we're simply not going to reverse that sort of a judgment, you know, because of an error that was cured or error that could be cured at this stage.

QUESTION: Mr. Geller, wouldn't 28 U.S.C. 1653 take care of your Newman-Green case, which you say is just like that one? That says defective allegations of jurisdiction -- and it's the plaintiff who alleges jurisdiction in that case -- may be cured upon terms in trial or appellate court. So, the plaintiff says, here's

my allegation of jurisdiction. It was defective. I'm now amending it. That applies to 16 -- to plaintiff's case. It wouldn't apply to a defendant.

MR. GELLER: Well, the Court in Newman-Green rejected reliance on section 1653 is recollection.

QUESTION: Oh. I thought you told me that there was only the rule in the case and there was nothing in title 28.

MR. GELLER: I said rule 21. That's right because the Court unanimously --

QUESTION: 1653 applies only to allegations in jurisdiction.

MR. GELLER: Allegations.

QUESTION: Defective allegations of jurisdiction.

MR. GELLER: Right.

QUESTION: Right?

MR. GELLER: Right.

QUESTION: Not defective jurisdiction.

MR. GELLER: Right, exactly. That's what the Court held in Newman-Green.

QUESTION: It was the basis for Justice Kennedy's dissent, as a matter of fact, in Newman-Green, wasn't it?

MR. GELLER: Well, the debate, as I recollect,

in Newman-Green between the majority and the dissent was --

QUESTION: The dissent was since Congress felt it necessary to explicitly provide for amending even a defective allegation of jurisdiction, it would seem clear that defective jurisdiction cannot be amended, there being no statute providing for that.

MR. GELLER: That was the position of the dissent in Newman-Green.

QUESTION: It was a pretty good position.

MR. GELLER: It was an excellent dissent, Justice Scalia.

(Laughter.)

MR. GELLER: But I believe seven Justices disagreed with it.

Now, our position is that this Court needn't go any further than that in resolving this case. The Sixth Circuit was plainly wrong we believe in reversing the judgment below for lack of subject matter jurisdiction because it's undisputed that diversity jurisdiction existed at the time of trial and at the time of judgment and existed on appeal, exists today in this case.

This Court should apply its settled precedents to reverse the court of appeals judgment and to send the case back for consideration of the rest of plaintiff's

arguments on appeal.

I just want to make one last point and then hopefully reserve the balance of my time for rebuttal just in response to Justice Ginsburg's comments.

The plaintiff has made no effort in this Court to defend the Sixth Circuit's decision, no effort at all to defend the Sixth Circuit's jurisdictional rationale presumably discovering that it is inconsistent with Finn and Grubbs and Newman-Green and that line of cases in this Court.

Instead, his brief conjures up a completely different statutory argument. I've tried to suggest in response to some of the questions these arguments were never made below. No lower court has ever found any violation of the removal statute in this case. So, we think even if there were merit to these statutory arguments, which there isn't, it's really far too late in the day for the respondent to be bringing up new statutory arguments and asking the Court to affirm on those grounds. This case is, we think, precisely governed by the Finn line of cases.

And if the Court has no further questions, I'll reserve the balance of my time.

QUESTION: Very well, Mr. Geller.

Mr. Stayton, we'll hear from you.

ORAL ARGUMENT OF LEONARD J. STAYTON

ON BEHALF OF THE RESPONDENT

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

The petitioner today asks this Court to find the removal was proper, for subject matter jurisdiction did not exist at the time of removal and in fact did not exist until 3 years after the 1-year time limitation for removal under 1446(b) had expired.

QUESTION: As far as that latter point goes, when we granted certiorari in the case, we didn't know that that was an issue, and I doubt whether we would have granted certiorari to decide an issue that is so narrow; that is to say, if you remove within the time period, but that removal is invalid, can a later remedying of the jurisdictional defect preserve the judgment. That's a very narrow question. How many cases are there going to be where this occurs?

So, you raise this new point now after the case is in front of us and are asking us to decide a very, very narrow case. I thought we were going to decide the much broader case of whether when the removal -- whether done before or after the 1-year limitation is applied, when that removal is wrong and the trial court doesn't realize it, and the case proceeds to judgment, the judgment is

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nonetheless to be sustained. But you're asking us to decide a very narrow case now, aren't you?

MR. STAYTON: Yes, Your Honor.

QUESTION: Why didn't you do that when the petition was filed instead of now?

MR. STAYTON: Well, Your Honor, I guess as a practical matter I don't do a whole lot of work in Federal court and wasn't intimately aware of the removal statute. I think the 1-year limitation is tied in with the argument that was raised by the --

QUESTION: Are you familiar with our rule 15, Mr. Stayton?

MR. STAYTON: Yes, Your Honor.

QUESTION: And that if you don't raise it in the brief in opposition, it will be deemed waived -- it may be deemed waived?

MR. STAYTON: Yes, Your Honor.

QUESTION: Well, what's your response to that?

MR. STAYTON: My response to that, Your Honor, if you want to follow that argument, then the argument of the petitioner is also raised. The petitioner never raised its argument that it's making here today under Grubbs and Finn until the petition for rehearing was filed in the Sixth Circuit.

QUESTION: But the -- did the court of appeals

make any response other than just a denial?

MR. STAYTON: No, Your Honor.

QUESTION: But the rule 15 deals with our own treatment of a case, not with what the court of appeals may have said.

MR. STAYTON: That's correct.

QUESTION: And as you agree, I take it, if you don't raise something like that in a brief in opposition, we may be taking a case, as Justice Scalia says, which has something that will prevent us from reaching the issue that the petitioner presents. And it's your obligation to point that out to us.

MR. STAYTON: That's correct, Your Honor, but this Court also held in Hanson v. Denckla that in cases such as -- or in arguments such as the petitioner has made, that if it fails to make that argument in the court below, it also waives that argument before this Court.

The removal statutes are clear that subject matter jurisdiction must be present at the time of removal. Today I ask this Court to adhere to its long history of strict statutory construction in the removal area.

For over 100 years, this Court has held that there must be subject matter jurisdiction at the time of removal. In addition, this Court has consistently held

that the removal statute is to be strictly construed.

QUESTION: Mr. Stayton, how far do you carry that? Suppose your client had won instead of lost in the district court and then the defendant had said just what you're saying now, ah, but there was never any subject matter jurisdiction, so we have to wipe it all out, remand the case to the State court. Would you be saying, yes, that's right? There was never any subject matter jurisdiction.

MR. STAYTON: Well, I think in that case, since the defendant has the -- made the election to have the case removed to Federal court, it would have waived its argument that --

QUESTION: But subject matter jurisdiction is something the court has to raise on its own motion.

MR. STAYTON: That's correct, Your Honor. Of course, 1447 states that if subject matter jurisdiction -- if at any time before judgment subject matter jurisdiction is found not to exist, then it will be remanded. In this case, the argument that subject matter jurisdiction did not exist was raised prior to the time of judgment. And I think 1447 would predominate on that argument, Your Honor.

QUESTION: What -- on the assumption that the court had raised it, would you be standing here saying,

you're right, you got to wipe it all out, send it back, try it in another court?

MR. STAYTON: Well, no, Your Honor. I believe if the defendant had elected to choose the forum by removing it to Federal court, then they would be bound by the district court judgments, Your Honor.

Congress has repeatedly sought to restrict Federal jurisdiction rather than expanding such. This is particularly exemplified in the present case where Congress in 1988 placed a 1-year limitation under 1446(b) on removal of cases. This statute was enacted to avoid interference and disruption where significant progress had been made in the State case, as in this case.

The statutes are clear as to jurisdiction. Under 1332 there must be diversity at the time of removal, and this Court has held as far back as 1806 in Strawbridge that complete diversity is required.

Under 1446, the parties have 30 days to remove after receipt of a paper showing jurisdiction exists, but no more than 1 year after the suit is filed. In the present case, diversity jurisdiction did not exist until 4 years after the suit was filed. After removal, the respondent timely filed a motion to remand under 1447.

QUESTION: Mr. Stayton, let me -- this case seems to me almost an a fortiori case of Newman-Green in

this respect. Newman-Green did not involve the removal provisions we're talking about here, and in the area of removal, Congress has displayed in the statutory scheme, it seems to me, the determination that bygones will be bygones. We don't want to appeal this removal decision. Isn't it the case that if the district court improperly denies removal and sends it back, appeal does not lie from that?

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

QUESTION: Doesn't that indicate that Congress wants this, more than the normal suit that's involved in Newman-Green, to be an area where this matter is taken care of at the district court? Yes, they'll get it wrong sometimes, but it's not an important enough matter that if they've gotten it wrong, we want to review it here.

MR. STAYTON: I don't agree, Your Honor, because in 1447 the Court specifically stated that if subject matter jurisdiction is noted to be absent at any time before final judgment, then the case shall be remanded, which I believe makes a mandatory requirement upon the --

QUESTION: But that -- but that's of necessity. You cannot render a judgment when you have no jurisdiction.

But assuming jurisdiction exists, it seems to me

the scheme is one in which bygones are bygones.

MR. STAYTON: I don't agree, Your Honor, because 1447 specifically states that the case shall be remanded if there's no subject matter jurisdiction, as happened in this case.

QUESTION: But you're not suggesting that would happen even without a motion to remand, are you? I mean, Grubbs certainly covers that, that in the absence of objection, if there's jurisdiction at the time of judgment, that's the way -- that's sustained.

MR. STAYTON: That's correct, Your Honor. Of course, Grubbs has an important difference. I think Grubbs is consistent with 1447. In Grubbs there was no objection, and in fact, no one noticed that there was not jurisdiction until after judgment. So, I believe that is consistent with 1447 since 1447 specifically states that prior to the time of final judgment, if the court notes that there's no subject matter jurisdiction, it shall be remanded.

QUESTION: You did make a timely motion to remand.

MR. STAYTON: That's correct, Your Honor. Within 30 days I filed a motion to remand, and I also filed, while it's not provided for the statute, an objection to removal. So, yes, I did file a timely motion

for remand, Your Honor. That was provided for in the statute.

QUESTION: And it may be that Congress wanted cases remanded to the State court to be left there, but didn't have the same attitude about keeping a case in the Federal court that shouldn't be there.

MR. STAYTON: I believe you may be correct, Your Honor.

QUESTION: But if that is so, and it appears to be so, why should that be? In other words, what would -- what do you think the congressional policy might be to support that difference in treatment depending on whether the remand motion is granted improperly or denied improperly?

MR. STAYTON: In my opinion, the Congress has recognized the rights of the States to determine their own matters. Congress has to recognize --

QUESTION: Well, but this isn't a matter of the rights of States. It's a matter of a determination by a Federal court. And why does one determination which is erroneous get a different treatment from the converse determination which is erroneous? I mean, what do you think the congressional policy is supporting that difference in treatment?

MR. STAYTON: I don't know if I understand your

question completely.

QUESTION: Well, if the remand motion is granted, there's no appeal. If the remand motion is denied and is in error, there can be appeal. It might be a discretionary appeal immediately, and in any case if the party wishes to appeal, feels the same way after judgment, there can be an appeal then, at least in theory. Why do you think that difference in treatment has been provided by the statutory scheme?

MR. STAYTON: Well, I believe it must be a balancing act of Congress with regard to the right of the Federal judiciary versus the State judiciary, Your Honor. And this -- the Congress has recognized, by imposing the 1-year limitation on removal, that we want to avoid interfering with cases that have progressed in State court through a substantial amount of work, as in this case. In this case there had been an extensive amount of discovery in the State court. We had had various hearings with the court. In fact, the case had proceeded far enough --

QUESTION: No, but you can't even get an interlocutory appeal in the case -- in the instance in which it's -- the remand motion is improperly granted.

MR. STAYTON: That's correct.

QUESTION: Don't you think the distinction and that one good argument might be for the disparity of

treatment is that what Congress was really concerned about was the fear that a Federal court might he exercising Article III -- or be purporting to exercise jurisdiction when it had no Article III diversity jurisdiction and that that's the reason for the diversity?

MR. STAYTON: You may be correct, Your Honor.

QUESTION: But if that is correct, then doesn't it follow that if that Article III jurisdictional problem is cured before judgment, that there should not be a reversal on appeal for the fact alone that prior to judgment at some time there was an Article III problem? In other words, you lose on that. If that's the policy, don't you lose?

MR. STAYTON: Well, I think we have to go back to the statute itself which specifically states that if there's no subject matter jurisdiction prior to judgment, the case shall be remanded. And, of course, as I've stated, this Court has consistently held for over 100 years that the statutes are to be strictly construed. So, I would submit that as the reason why Congress has elected to have this case remanded where there is no subject matter jurisdiction.

Of course, I would also point out that non-appealability is not limited to jurisdictional errors, but is -- but applies to all errors which are made at trial as

normally a -- any error at trial merges with the final judgment under 1291. This Court has consistently held through the years that one appeals from the final judgment rather than filing an interlocutory appeal which this Court has held is an exceptional remedy.

The petitioner would have you believe that allowing the judgment to stand where the case was improperly removed was harmless error, but such is not correct. There were several advantages to the respondent being in State court versus Federal. One of the most important was that -- one of my most important pieces of evidence was excluded in the Federal court due to the differences of the Federal Rules of Evidence and interpretation of those by the Sixth Circuit versus Kentucky law.

QUESTION: Mr. Stayton, would you agree that if the 1-year period had not run and therefore you would presume -- by the time there was complete diversity and you would, therefore, presume that the defendant would have made a new removal motion within the 1-year period, that then the error would be harmless?

MR. STAYTON: Saying if diversity had existed prior to the 1-year limitation?

QUESTION: Yes.

MR. STAYTON: Yes, in that case clearly there

would have been --

QUESTION: So, the 1-year problem in the case really goes to the harmless error argument.

MR. STAYTON: To a large extent, Your Honor, yes.

QUESTION: You then disagree with the court of appeals' reasoning.

MR. STAYTON: Excuse me, Your Honor?

QUESTION: I take it then you don't agree or support the reasoning used by the court of appeals to decide this case in your favor.

MR. STAYTON: Well, no. The court of appeals ruled that there was no subject matter jurisdiction at the time of removal. So, I agree that that was correct. Since there was no subject matter jurisdiction at the time of removal, then that could not be cured as the -- at a later time.

QUESTION: So, you do agree with the court of appeals reasoning?

MR. STAYTON: Yes, I agree that they were correct in finding that the case should have been remanded due to the fact that there was no subject matter jurisdiction at time of removal.

The petitioner argues that Newman-Green v. Alfonzo-Larrain would allow the judgment to stand under a

harmless error theory, but that is not applicable here.

First of all, Newman-Green does not deal with removal. Newman-Green deals with two specific areas. First, the question of 28 U.S.C. 1653, as has been noted today, provides that the court of appeals could amend defective allegations of jurisdiction but not defects in jurisdiction. And, second, the court of appeals ruled that they could dismiss a dispensable party under rule 21 rather than remanding to the district court for the district court to do so.

So, in looking at Newman-Green, it would be my position that Newman-Green does not have any bearing upon the matter at bar as it has nothing to do with removal but merely addresses the interpretation of a statute of Congress and a rule of civil procedure.

In summary, with regard to this argument, I would submit that the rule of this Court has been clear that the statutes of Congress are to be strictly interpreted, and I would ask this Court today to strictly construe the statutes and ask that the judgment of the Sixth Circuit be affirmed and this matter be remanded to the State court.

QUESTION: Thank you, Mr. Stayton.

Mr. Geller, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF KENNETH S. GELLER

ON BEHALF OF THE PETITIONER

MR. GELLER: Just two short things, Mr. Chief Justice.

First, the suggestion has been made that Caterpillar didn't make this argument until its rehearing petition in the court of appeals. That's simply not true. Apparently during the oral argument in the Sixth Circuit, some question arose as to what would happen if the jurisdictional error was cured, and Caterpillar on September 28th, 1995, after the oral argument but before the Sixth Circuit decided this case, sent up a post-argument letter which cited Grubbs, cited lower court cases like Able v. Upjohn which cited Finn. So, all of these cases were before the Sixth Circuit, in addition to this argument being before the Sixth Circuit, prior to the Sixth Circuit's decision in this case.

Second, let me just say one last thing about this 1-year provision in addition to the fact that it wasn't violated here and in addition to the fact that this argument has never been preserved. The purpose of the 1-year provision -- Congress put the 1-year limit in the statute a few years ago in order to prevent the delays and disruptions that occur when a case is rested out of one court system and put in another court system after a lot of work has been done on a case in the first court system.

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That's why the 1-year provision is in there, to prevent diversity removals after a case has progressed quite a while in State court.

Yet, that's the precisely the evil that would occur here if the plaintiff's argument prevailed because it would mean that a case that has been essentially completed in Federal court would have to start all over again from scratch in State court and be retried there.

So, the plaintiff's argument -- not only is it inconsistent with the language of the 1-year provision, since the removal occurred here prior to a year, it's plainly inconsistent with Congress' policy in putting the 1-year provision in the statute to acquire a case that's gone to verdict in Federal court to be tried again from scratch in State court, even though there was no error in the Federal proceedings.

So, we would ask that the decision and the judgment of the court of appeals be reversed and that the plaintiff be allowed to raise whatever other arguments he had on appeal in the Sixth Circuit. Thank you.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Geller.

The case is submitted.

(Whereupon, at 10:45 a.m., the case in the above-entitled matter was submitted.)

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BY Ann Nani Federico

(REPORTER)