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1 (Thereupon, the following was heard in open
2 court at 11:01 a.m.)

3 THE CLERK: 1:08 civil 827 Suhail Najim
4 Abdullah Al Shimari, et al versus CACI International,
5 Incorporated, et al.

6 MS. BURKE: Good morning, Your Honor. Susan
7 Burke for the plaintiffs, and I have with me my colleague
8 Bob LoBue who is down from New York, and he'll be arguing
9 the motion, sir. He has been admitted pro hac.

10 THE COURT: All right, good morning.

11 MR. KOEGEL: Good morning, Your Honor. Bill
12 Koegel and John O'Connor for the CACI defendants.

13 THE COURT: Good morning, Mr. O'Connor. Good
14 morning, Mr. Koegel.

15 MR. O'CONNOR: Good morning, Your Honor.

16 MR. KOEGEL: We're here today asking the
17 Court to correct an error from four years ago. Four
18 years ago, Your Honor issued a decision on our motion for
19 partial summary judgment with respect to the common law
20 tort claims of three of the four plaintiffs. The three
21 plaintiffs that were the subject of that motion had been
22 added to this action after it was transferred from Ohio
23 to Virginia. They were added in an amended complaint.

24 When the Court denied that motion for partial
25 summary judgment, there were two core decisions featured

1 in that opinion.

2 First, the Court concluded that it needed to
3 apply Virginia's statute of limitations law. There was
4 no real dispute over that point among the parties or with
5 the Court back in 2008.

6 Rather, the second issue is what divided the
7 parties. The plaintiff's counsel had urged the Court to
8 conclude that Virginia would recognize equitable tolling
9 during the pendency of a putative class action in another
10 jurisdiction.

11 THE COURT: It was an open question. You're
12 saying it was an open question or was it a question that
13 I was just wrong. I think I was wrong.

14 MR. KOEGEL: I think you were just wrong,
15 Your Honor.

16 In 1999, the Fourth Circuit had ruled that
17 Virginia would not recognize this equitable tolling. The
18 plaintiffs argue there was a 2001 Supreme Court decision
19 in the *Welding* case that effectively repudiated the
20 Fourth Circuit's analysis.

21 Our response to that was that *Welding* did not
22 concern equitable tolling, and it said nothing about
23 class actions.

24 THE COURT: Right.

25 MR. KOEGEL: But this Court became the first

1 court in the state of Virginia to recognize equitable
2 tolling based upon the pendency of a putative class
3 action in another jurisdiction.

4 Fast forward to 2012 --

5 THE COURT: Well, let me say, sometimes
6 right, sometimes wrong, but never indecisive.

7 MR. KOEGEL: I understand, Your Honor.

8 In 2012, the Virginia Supreme Court in a
9 decision that was unanimous, clear and unequivocal
10 concluded that Virginia does not recognize equitable
11 tolling for a putative class action in another
12 jurisdiction.

13 THE COURT: I understand what you -- if that
14 ruling was wrong, then you conclude I ought to dismiss
15 the added claims for the Virginia statute of limitations,
16 correct? That's your argument.

17 MR. KOEGEL: That's correct, Your Honor, to
18 do in this case what you did in the *Sanchez* case.

19 THE COURT: Exactly. But now we have another
20 issue being raised that apparently, I think, you raised
21 in your brief in 2008. I don't think anyone focused on
22 it, and that is what law applies here.

23 MR. KOEGEL: Let me talk about, that, Your
24 Honor. Before we get to what law applies, let me address
25 the first issue that the plaintiff raise because they

1 assert that the Virginia Supreme Court's decision in
2 *Casey* represented a fundamental change in the law and as
3 a result it ought to be applied prospectively only.

4 The short response to that is *Casey* was not a
5 change in Virginia law. *Casey* did not overrule any prior
6 Virginia decisions. *Casey* did not, by its plain terms,
7 indicate that it was establishing a new principle of law
8 in Virginia.

9 Rather, *Casey* cited longstanding law in
10 Virginia that statutes of limitations are to be narrowly
11 construed and that the only exceptions permitted are
12 those created by the legislature, not the judiciary.

13 As a result, *Casey* could hardly have come as
14 a surprise. It did not represent a change in the law.
15 And none of the courts that have applied *Casey* have
16 engaged in the retroactivity analysis advocated by the
17 plaintiffs.

18 Now, perhaps their theory is that the judges
19 in those cases simply didn't do the complete job and
20 forgot to conduct that retroactivity analysis.

21 We think the better explanation is that since
22 *Casey* did not represent a change in Virginia law, there
23 is no retroactivity analysis required.

24 But that does take us to the second issue,
25 what law applies. Because the plaintiffs have now

1 discovered that Ohio law in their new theory applies,
2 that because the --

3 THE COURT: That's new to me, too. This is
4 new to me, too, that Ohio law applies.

5 MR. KOEGEL: This is the theory de jour.

6 THE COURT: But then you said it was
7 transferred from Ohio here on the defendant's motion. Is
8 that right?

9 MR. KOEGEL: By consent, transferred by
10 consent.

11 THE COURT: All right, okay.

12 MR. KOEGEL: They claim that the transferor
13 court law, Ohio law, would apply to this case with
14 respect to all plaintiffs.

15 Now, we don't dispute that Ohio law, with
16 respect to the statute of limitations, would apply to
17 plaintiff Al Shimari and that's because he was a
18 plaintiff in Ohio, and he was the only plaintiff in Ohio
19 when the case was transferred.

20 Under the Supreme Court's *Ferens* decision,
21 he's entitled to take advantage of Ohio law because he
22 went to Ohio and filed suit.

23 The other three plaintiffs were never in
24 Ohio. They were never plaintiffs in Ohio. They never
25 took advantage of whatever Ohio law might provide to

1 them. They didn't join this case until after it had come
2 to Virginia. As a result, their claims are governed by
3 Virginia law.

4 *Ferens* made it clear that for a plaintiff to
5 take advantage of the law of another forum, he had to be
6 a plaintiff there. And if he's not, he's not entitled to
7 take advantage of that transferor court's law.

8 As we know, a plaintiff is master of his
9 complaint. And the Supreme Court recognized that there
10 were a number of reasons that it was going to permit a
11 plaintiff the law of the transferor court to follow that
12 plaintiff's claim.

13 That's well established, and as a result, we
14 didn't move with respect to plaintiff Al Shimari. Our
15 motion was directed at the three plaintiffs that have
16 never been -- never been plaintiffs in Ohio.

17 Since they weren't plaintiffs there under the
18 Supreme Court's *Ferens* decision, their claims are
19 governed by the Virginia statute of limitations. It's
20 two years. There's no dispute that they did not join
21 this action until well more than two years after they
22 were released, and that since there is no equitable
23 tolling in Virginia which is indisputable given the *Casey*
24 decision, their claims are untimely and the common law
25 claims for those three can't proceed. It's really that

1 simple.

2 THE COURT: All right, thank you.

3 MR. LOBUE: Good morning, Your Honor. My
4 name is Robert LoBue. I am admitted pro hac vice, and
5 I'm representing the three plaintiffs on this motion
6 whose claims have been challenged.

7 We have presented the Court with two
8 alternative and independently sufficiently grounds to
9 deny the motion. And I think the logical way to approach
10 them is to start with the analysis of Virginia law and
11 see if there's a ready answer there.

12 If and only if the Court decides that *Casey*
13 is to be given retroactive application to this case would
14 we then ask the Court to move to the larger issue. And
15 it is -- we've rethought this given *Casey* and the
16 complications it creates. We've rethought the whole
17 issue which is the applicable statute of limitations on a
18 clean slate. And we think there is a very reasonable
19 argument, which I will address momentarily, that in fact
20 the assumption that the Court and parties made in 2008
21 that Virginia law applies may not be -- may not have been
22 the accurate assumption.

23 But let me stay with Virginia law for a
24 moment. The defendants ask this Court to apply Virginia
25 law. But the Virginia law they ask the Court to apply is

1 simply the *Casey* decision.

2 And they completely ignore the equally valid,
3 equally relevant, equally important line of cases that
4 have been repeatedly espoused by the Virginia Supreme
5 Court and Court of Appeals on the question when a
6 decision is given retroactive effect.

7 The defendants completely give the back of
8 their hand to the three-part test that has been espoused
9 in cases we cite such as *Fountain* and *Blaylock*. This
10 three-part test comes from the United States Supreme
11 Court decision back in the 70s, *Chevron versus Huson*, the
12 granddaddy of retroactivity cases.

13 And the first question is did the new
14 decision either overrule clear past precedent or decide
15 an issue of first impression whose resolution was not
16 clearly foreshadowed?

17 Now, I agree that *Casey* did not by its term
18 overrule any past precedent. But I would submit to Your
19 Honor that it was a decision of first impression that was
20 not clearly foreshadowed.

21 Now, the defendants say this was always the
22 law of Virginia. And I suppose in some metaphysical
23 sense, the true law has been out there since the day of
24 creation. It's just a matter of when you get to discover
25 it.

1 But that's not how these cases have been
2 addressed as a practical matter because of the real world
3 prejudicial effects on people who have relied on the
4 state of the law before this new decision came down.

5 *Casey* was a decision of first impression.
6 There was no prior Virginia decision that we're aware of
7 and none that the defendants cite that address the
8 question whether the pendency of a class action in
9 another jurisdiction gave rise to a tolling of the
10 statute of limitations either under the heading of
11 equitable tolling or under the Virginia statute which is
12 discussed at length in the *Casey* decision.

13 At the end of the day, we don't care if you
14 give our argument the heading of equitable or statutory.
15 We want to end up in the same place, of course.

16 So the emphasis by the defendants on whether
17 it was equitable or statutory I think really doesn't lead
18 anywhere.

19 THE COURT: So we're clear that at the time I
20 made my decision, there was a Fourth Circuit case and
21 there was a case that I relied upon, a Virginia case --

22 MR. LOBUE: Yes.

23 THE COURT: -- to predict what the Court
24 would do.

25 MR. LOBUE: Yes.

1 THE COURT: It turns out that was wrong. And
2 you're saying that that suggests that the law was not
3 clear at that time?

4 MR. LOBUE: Well, Your Honor, let's if I may,
5 let's look at the prior state of the law with something
6 of a microscope.

7 There was this Fourth -- Fourth Circuit case
8 called *Wade* which in the absence of Virginia law focused
9 on the question whether Virginia would allow tolling when
10 the earlier case had been pending in a jurisdiction other
11 than Virginia, whether the federal courts or some other
12 state. That was the principal, almost exclusive focus of
13 the Fourth Circuit in *Wade*.

14 The Fourth Circuit read Virginia law to say
15 that even though there are lots of cases from other
16 jurisdictions that talk about tolling when the prior case
17 is in the same court system, the circuit said they didn't
18 think Virginia would allow cross jurisdictional tolling.

19 THE COURT: That was predicted.

20 MR. LOBUE: That was their prediction. That
21 specific prediction on that specific issue was actually
22 dead wrong because in the *Welding* case which was on the
23 books when Your Honor took this on four years ago, the
24 Virginia Supreme Court said no, we would look to cases
25 that had been pending in another jurisdiction, including

1 specifically the federal court system and that under the
2 very broad and inclusive language of the Virginia tolling
3 statute, yes that would give rise to tolling.

4 Now, what *Welding* did not address and what
5 had never been addressed until *Casey* this year is whether
6 the current plaintiff seeking to get -- seeking to invoke
7 tolling had to be a named plaintiff in the other earlier
8 case or just a potential class member.

9 That was a brand new issue for Virginia.
10 Resolved, we concede against our interest in *Casey*, but a
11 brand new 2012 issue.

12 And, when Your Honor addressed this issue in
13 2008, what was the state of law on that particular issue?
14 I would refer Your Honor to two United States Supreme
15 Court cases, *American Pipe and Crown, Cork & Seal*. We
16 cite them in our brief.

17 These cases at the federal level, to be sure,
18 those cases say that, yes, when you have a present party
19 who is a potential member of a class action that has
20 later been dismissed, yes, that party, once they come --
21 once they file their own case can take advantage of the
22 tolling rule.

23 Well, so the state of the law in 2008 was no
24 Virginia case addressing the issue of whether you had to
25 be a named plaintiff or just a class action. Multiple

1 United States Supreme Court cases saying, that's okay.
2 You get tolling in that instance.

3 How can one not conclude that *Casey* was
4 anything other than a decision of first impression? So,
5 that we would respectfully submit, that triggers the
6 retroactivity analysis under Virginia law. And then you
7 need to look at the other two elements of the test, and
8 I'll mention this briefly because the defendants don't
9 even address it.

10 The second element is essentially to take a
11 look at the policy considerations under the new rule. In
12 this case, *Casey* really didn't talk about policy
13 considerations, but *Wade* did. *Wade* said, well, we don't
14 want to open the floodgates to lots and lots of, you
15 know, class members who then start filing individual
16 cases.

17 Well, as applied here, that's really not a
18 policy consideration because all we're saying is that the
19 very limited class of individuals such as these
20 plaintiffs whose cases were pending when *Casey* was
21 decided, would be given a reprieve and an opportunity to
22 go forward. There's no question that for the future,
23 everyone is on notice of the *Casey* decision.

24 So this is not going to be an open-ended
25 open-the-floodgates type of policy problem.

1 At a more general policy level, you know, the
2 statute of limitations, as we all know, is there to
3 prevent stale claims when evidence has been lost and so
4 forth. These defendants have been on notice of legal
5 exposure since 2004. So, that's not a policy issue
6 either.

7 THE COURT: If you would turn now to the
8 issue of which law applies, whether it's Ohio or
9 Virginia, and tell me about your view of *Ferens* as it
10 relates to parties who were not named in the original
11 action in the transferor court.

12 MR. LOBUE: Yes, Your Honor. Our view is
13 that *Ferens* is distinguishable for two reasons. *Ferens*,
14 being the second of two important Supreme Court cases,
15 *Van Dusen* being the first.

16 *Ferens* looked at the *Van Dusen* rule applying
17 the transfer law. And the situation -- frankly unusual
18 situation where the plaintiff filed in a remote
19 jurisdiction, presumably in order to gain the benefit of
20 some provision of that jurisdiction and then the
21 plaintiff moved to transfer its own case to another
22 jurisdiction.

23 And in that circumstance, the Supreme Court
24 carved out an exception, one that does not apply here
25 saying that when the plaintiff both files the case and

1 then moves to transfer its own case, we are going to
2 require the plaintiff to actually file in the remote
3 jurisdiction not just to file in the later jurisdiction
4 and say, well I could have filed over there.

5 That is not a consideration in cases like
6 this where number one, you already have a pending case
7 raising the same claims that has already been transferred
8 from Ohio to Virginia and where the defendants, not the
9 plaintiff, move to transfer.

10 So, there's no question here that the
11 defendants wanted to litigate this case in Virginia, not
12 in Ohio. We don't have the kind of situation that the
13 Supreme Court was faced with in *Ferens*.

14 So I think *Ferens* is distinguishable on those
15 grounds. I see no basis in logic or law to extend that,
16 I think, fairly narrow carveout that was established in
17 *Ferens* to a situation where the defendants have moved to
18 transfer and these plaintiffs, of course, came in by
19 amendment after the transfer.

20 It would be kind of silly to say they need to
21 go to Ohio, file the case there, and you know, and then
22 get it transferred here.

23 THE COURT: That's what was done in *Ferens*;
24 isn't it?

25 MR. LOBUE: I'm sorry.

1 THE COURT: That's what was done in *Ferens*,
2 isn't it?

3 MR. LOBUE: That's what the Supreme Court
4 said had to be done in *Ferens*. So effectively, I agree
5 with Your Honor.

6 But I'm saying, simply it makes no sense when
7 it's the defendants who have moved to transfer the case.

8 THE COURT: I understand they've identified
9 several district court decisions on that question. I'm
10 not sure -- I shouldn't say I'm not sure. I am not
11 confident that they conform to *Ferens*, but I'm concerned
12 about it.

13 If you would take up for a moment those
14 District Court cases. One of them is *Lombard* from New
15 York. Are you familiar with it?

16 MR. LOBUE: Your Honor, I --

17 THE COURT: If you're not, don't worry about
18 it.

19 MR. LOBUE: It's --

20 THE COURT: There are a lot of cases.

21 MR. LOBUE: It's in my book, but it doesn't
22 mean I'm familiar with it. I apologize.

23 THE COURT: That's fine. That's fine.
24 That's fine.

25 Well, the questions I have for you was how

1 to -- whether or not *Ferens* applied and how to
2 distinguish it.

3 So your view is that once the case is
4 transferred, the transferor law would apply, which would
5 be Ohio law. And any added parties would then be treated
6 under Ohio law. So it would not be necessary for the
7 Court to treat the case as some parties under Ohio law,
8 some under Virginia law?

9 MR. LOBUE: I think it would certainly be
10 more sensible to have all the parties treated the same
11 way, because they effectively have the same case. So
12 yes, that would be our position.

13 Now, we looked for cases that have exactly
14 the same fact pattern. We didn't find much specifically
15 on new parties coming in. We did cite one District Court
16 case that precedes *Ferens* that came out the way we're
17 asking this Court to come out. It's the *Pappion* case.

18 But we also found a number of Court of
19 Appeals cases that are cited in our brief in which claims
20 were added after the transfer. And in those cases, the
21 Courts of Appeals have uniformly said to the extent there
22 is an issue of substantive law as to whether it's a valid
23 claim or not, those newly amended claims brought into the
24 case after transfer are treated by the law of the
25 transferor state under the *Van Dusen* rule.

1 THE COURT: Right. But that's not the same
2 as adding additional parties.

3 MR. LOBUE: Well, it might be. I'm not sure,
4 Your Honor.

5 THE COURT: Well, I'm just saying from the
6 standpoint of the way you described the cases, it's
7 correct.

8 MR. LOBUE: It's the closest analogy we could
9 find.

10 THE COURT: All right.

11 MR. LOBUE: Your Honor, if I could have one
12 second. There is a matter raised in the reply brief that
13 we didn't have an opportunity to brief.

14 The argument is made that it would be
15 offensive to due process to apply Ohio law here. I'd
16 like to respond to that simply --

17 THE COURT: *Phillips Petroleum* case.

18 MR. LOBUE: I'm sorry.

19 THE COURT: *Phillips Petroleum*.

20 MR. LOBUE: Yes, *Phillips Petroleum*. I'd
21 just like to respond by citing two cases for the Court in
22 which the -- these courts stated that that *Shupps'* rule
23 of due process limitations only applies to the
24 applicability of substantive law, not to procedural law.

25 And those cases are *Sun Oil versus Wortman*,

1 W-O-R-T-M-A-N 486 US 717, 1988 and *Goad, G-O-A-D versus*
2 *Celotex*, 831 F2d. 508, Fourth Circuit, 1987.

3 So I think that takes --

4 THE COURT: Is that 831, F2d.

5 MR. LOBUE: 508 Fourth Circuit '87.

6 THE COURT: All right, and the other was 486
7 US 717?

8 MR. LOBUE: Yes, sir.

9 THE COURT: Thank you.

10 MR. LOBUE: Unless the Court has any
11 questions, that completes our presentation.

12 THE COURT: Thank you very much.

13 Mr. Koegel.

14 MR. KOEGEL: Thank you, Your Honor. An
15 assertion was made that we rely solely upon *Casey*.
16 That's demonstrably incorrect.

17 THE COURT: That's not what you're brief
18 said. I understand that.

19 MR. KOEGEL: We reply on *Wade* which was
20 correct in predicting what Virginia would do.

21 So to describe *Casey* as a case of first
22 impression is simply inaccurate. Absent a case of first
23 impression, no retroactivity analysis is required, which
24 is exactly the way every court to apply *Casey* has
25 approached it.

1 No one has gone through the retroactivity
2 analysis suggested by the plaintiffs.

3 With respect to *Ferens*, the Court was quite
4 clear in explaining why a plaintiff was able to take
5 advantage of the law of the transferor court. It was
6 because the plaintiff had gone to that court, availed
7 itself of that jurisdiction and was not going to be
8 divested of that law if the case were transferred for the
9 convenience of the parties.

10 THE COURT: And the Court noted that in
11 *Ferens* that the transferor or court would have to
12 consider a motion to transfer under 1404 and decide if
13 it's appropriate to transfer this subsequently filed
14 suit.

15 MR. KOEGEL: That's correct, Your Honor. Now
16 with respect to these plaintiffs and the plaintiffs argue
17 that well, we move to transfer. That's correct.
18 Transfer, however was on consent. And more importantly,
19 we never had a choice with respect to these three
20 plaintiffs. They were never in Ohio. We never had the
21 opportunity to determine whether their claims ought to be
22 transferred. They didn't join the case until after it
23 arrived in Virginia.

24 So, the fact that we moved to transfer a
25 single plaintiff case to which that plaintiff consented

1 can hardly then bind us with respect to an opportunity we
2 never had, that is, to address what to do with those
3 three plaintiffs' claims had they been filed in Ohio.

4 But the fact of the matter is, they were
5 never plaintiffs in Ohio. They never took advantage of
6 the laws of Ohio. And the rationale of *Ferens* clearly
7 supports Virginia law statute of limitation with respect
8 to their common law claims.

9 And that's precisely why *Lombard* and the
10 other cases we've cited have concluded that when a
11 defendant is added, the law of the transferor forum will
12 not apply to that new defendant. Rather the law of the
13 transferee forum will be applicable.

14 The plaintiffs again ask the Court to be the
15 first to go down a path that no other court has chosen.
16 If the plaintiffs rationale were correct, the Court such
17 as *Lombard* would have come out the other way. But,
18 instead, they've concluded that the law of the transferor
19 forum will not apply to a new defendant.

20 Take that body of law together with *Ferens*
21 and its rationale, and the three plaintiffs that jointed
22 this case in Virginia are simply not able to invoke and
23 take advantage of any Ohio law.

24 Plaintiff Al Shimari can and has done that.
25 We don't dispute that. But that same option is not

1 available to the other three plaintiffs who were never in
2 Ohio.

3 The *Shupps* case that Your Honor mentioned
4 makes it clear that a court may well be required to apply
5 the law of different jurisdictions to different parties.
6 That's an unremarkable proposition.

7 As a result, there is absolutely no barrier
8 to the Court doing that here. And in fact, we suggest
9 given the wholesale absence of any connection between the
10 three plaintiffs and the state of Ohio, there is
11 absolutely no basis to apply Ohio law to their common law
12 tort claims with respect to the statute of limitations.
13 They're untimely and should be dismissed.

14 THE COURT: All right. Thank you.

15 Counsel, I'm going to take the matter under
16 advisement. I'll written a written ruling in due course.
17 Thank you for the quality of your
18 preparation.

19 We'll take the morning recess now for 15
20 minutes.

21 (Proceeding concluded at 11:37 a.m.)
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CERTIFICATE OF REPORTER

I, Renecia Wilson, an official court reporter for the United State District Court of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions in the case of Suhail Al Shimari, et al vs. CACI, International, et al.

I further certify that I was authorized and did report by stenotype the proceedings and evidence in said motions, and that the foregoing pages, numbered 1 to 23, inclusive, constitute the official transcript of said proceedings as taken from my shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 19th day of August, 2013.

/s/
Renecia Wilson, RMR, CRR
Official Court Reporter