In the

Supreme Court of the United States

MONICA ALDINGER, Petitioner,	:	
v.	:	No. 74-6521
MERTON L. HOWARD, etc., et al., Respondents	:	

Washington, D. C.
March 24, 1976

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Respondents.

Washington, D. C.

Wednesday, March 24, 1976

The above-entitled matter came on for argument at 1:35 p.m.

BEFORE:

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

APPEARANCES:

NORMAN ROSENBERG, ESQ., Spokane Legal Services Center, West 246 Riverside Avenue, Spokane, Washington 99201, for the petitioner.

DONALD C. BROCKETT, ESQ., Spokane County Prosecuting Attorney, County-City Public Safety Building, Spokane, Washington 99201, for the respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-6521, Aldinger against Howard.

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

ORAL ARGUMENT OF NORMAN ROSENBERG ON BEHALF OF PETITIONER

MR. ROSENBERG: Mr. Chief Justice, and may it please the Court: In 1966 this Court, in the case of United Mine Workers v. Gibbs, clarified and explained the doctrine of pendent jurisdiction. In this lengthy and comprehensive opinion, the Court referred to the joinder of claim, it did not refer to the joinder of parties specifically, and that raises the issue that's before you today, and this issue is this: Whether the district court has the power to assert pendent jurisdiction over claims, state law claims, that are appropriately related to existing Federal claims against a party over whom there is no independent basis of Federal jurisdiction.

Now, since Gibbs, this issue --

QUESTION: Against whom no other claim is pending, is that right?

MR. ROSENBERG: Yes, your Honor, that is correct.

Now, since Gibbs, this issue has arisen on a number of occasions and in many different factual settings and context.

Now, the very simple facts of this case raise the issue quite clearly, and I would like to set them forth very briefly.

The petitioner was fired from her public position in the County Treasurer's office. The County Treasurer fired her and then published in a letter that her work was excellent but that she had been living with her boyfriend. The fact that this is untrue is of no importance to this situation. Obviously, though, these facts raised both federal and state law causes of action.

QUESTION: Would there clearly be a cause of action under state law in Washington?

MR. ROSENBERG: Yes, your Honor.

QUESTION: Against the county?

MR. ROSENBERG: Against the county, yes, sir, because under Washington law, the county is specifically liable for the torts of its officers, agents, and employees.

The complaint filed in the district court asserted federal jurisdiction over the federal claims against both parties and state claim and asserted pendent jurisdiction over the state claims that existed as well.

QUESTION: If you look at the complaint, where was a state cause of action stated? Referring to the appendix, I couldn't find it.

MR. ROSENBERG: Your Honor, that's one of the things

I feel obligated to explain.

This complaint is not well drafted. There are sufficient matters and sufficient allegations in it to raise the state claims under appropriate rules of federal procedure.

QUESTION: Where? I read this carefully and I just couldn't find a state cause of action stated. If there isn't any, this question assertedly involved in this case doesn't exist, does it?

MR. ROSENBERG: If that's true, it doesn't exist, but it does exist.

QUESTION: Where in the complaint?

MR. ROSENBERG: First of all, the state claims are this: In the appendix, the complaint is on page 12.

QUESTION: Yes.

MR. ROSENBERG: First of all, the State claims are the intentional invasion of the petitioner's privacy, the intentional infliction of emotional distress, the tort of libel, perhaps slander.

Now, let me go through the complaint and show where the allegations are, your Honor.

First of all, the county is named. That's in the caption.

QUESTION: Yes.

MR. ROSENBERG: Secondly, the Treasurer is named as a county official, and the county is being sued and the

Treasurer is being sued in his capacity as a county official.

Fourth, in paragraph 6, on page 14, it says, "Defendant Spokane County is a public corporation and an action may be maintained against it," and, of course, the complaint asserts that pendent jurisdiction may rise.

QUESTION: An action may be maintained against it, but where is any cause of action stated under State law?

MR. ROSENBERG: Well, the list of State claims is not there, but sufficient facts are available, your Honor, to show that a claim is available against --

QUESTION: If they are and if the statute of limitations hasn't run, you are entitled to go back and file a complaint stating a cause of action under State law, but I can't find any stated here.

MR. ROSENBERG: Your Honor, under Civil Rule 8, under notice pleadings, we have alleged enough facts -- let me even list the facts for you.

QUESTION: Will you identify the place where we will find them as we go along so we can mark it up?

MR. ROSENBERG: Yes, your Honor. In the appendix on page 12. All the facts in the record are in the amended complaint.

Now, what that amended complaint reflects is that there was a firing, the stated reasons for the firing, the committing of the reasons, or the expression of the reasons --

QUESTION: I am sorry to interrupt you again, but an ordinarily complaint must do more than reflect, it must allege, is that not so?

MR. ROSENBERG: Yes, sir. The issue in this case is whether the district court has the power to deal with this.

Now, the court had the power to cause us to amend the pleadings. He could have dismissed under Rule 12(b)(6). He could have entertained a motion to strike, a motion for a more specific statement. I submit that the power question is a threshold question that this Court must deal with before the district court has the opportunity to help us straighten out our complaint.

QUESTION: Well, the question that you say the Court must preliminarily deal with arises if and only if a cause of action is stated under state law.

MR. ROSENBERG: Yes, sir.

QUESTION: You agree with that.

MR. ROSENBERG: Yes.

QUESTION: I just still have trouble seeing where, if anywhere, is one stated.

MR. ROSENBERG: Your Honor, the case of Connelly v. Gibson would have to guide the Court in that determination. Of course, Connelly is concerned with a district court's dismissal under Rule 12(b)(6). And if I could quote something very briefly from Connelly, I think you will find that we have

stated sufficient facts to apprise the county of the nature of the claim against it. Connelly states, on page 45, "In appraising the sufficiency of a complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

QUESTION: Mr. Rosenberg, I notice in paragraph 1 of your complaint, on page 12 of the appendix, and again in paragraph 20, on page 15, you say that inasmuch as the plaintiff's dismissal was authorized by 36.16 of the Revised Code of Washington, that statute, on its face, is violative of plaintiff's rights under the 1st and 14th Amendments. Doesn't that kind of militate against your contention that there was a state law claim.

MR. ROSENBERG: No, sir. No state law, no local ordinance, regulation, can empower anyone, a state official, a county official, anyone else, to violate someone's civil rights.

QUESTION: But if the State of Washington has a statute that, as you say in your complaint, specifically authorizes a dismissal, it may be totally unconstitutional, but can you consistently with that statute maintain that the State courts would grant you State relief?

MR. ROSENBERG: If a tort was involved.

QUESTION: In the State courts, your cause of action would be a Federal cause of action because your claim would be that the State law violates the Federal Constitution.

MR. ROSENBERG: No, sir, your Honor. You are ignoring the State law claim of libel, slander, intentional infliction of emotional distress --

QUESTION: But that's not stated here. At least I can't find it and so far you haven't pointed it out to me.

QUESTION: Slander is certainly not mentioned.

MR. ROSENBERG: Your Honor, I concede that point, but I also suggest very strongly that we can fix this complaint up so that it has suitable State law claims.

QUESTION: Now? You had plenty of time to do it.

MR. ROSENBERG: Your Honor?

QUESTION: And you haven't.

MR. ROSENBERG: This case is stayed in the district court pending the outcome of the power question. If that court has the power to consider the State claims, I guarantee you that he will assist us to make them more clear to him.

QUESTION: You mean you want the court to draw your complaint for you?

MR. ROSENBERG: No, sir, we will draw the complaint.

QUESTION: I think you want us to do it.

MR. ROSENBERG: No, sir, I would like you not to deal with this issue. I would like to get to the power question

that is before you.

The district court dismissed all the claims against Spokane County. It dismissed the Federal claims in light of Moor v. County of Alameda, and then it dismissed the State law claims simply by stating that it no longer had an independent basis of Federal jurisdiction so it could not entertain them.

Now, the district court recognized the problems that it had and it dismissed the State law claims without getting to the merits of them in the way that it felt would be the clearest possible way to point out the incongruity that exists in the Federal system. The order of dismissal stated very clearly that he did not get to the merits and that he dismissed solely because he hasn't the power, and he included the rule 54(b) certificate and a certificate pursuant to 28 U.S. Code 1292(b). We went directly to the Court of Appeals for the Ninth Circuit who affirmed and certiorari by this Court was granted.

Meanwhile, proceedings are stayed in the district court.

Now, the incongruity that the court tried to point out was that the Gibbs case misconstrued and misapplied in two clearly opposing and exclusive ways. The joinder of claims very easily could contemplate the joinder of parties in a number of cases and the majority of the circuits and district courts have held that. In appropriate cases parties are

incidentally joined.

The Ninth Circuit, however, has ruled that there is absolutely no power to join parties, and these claims cannot be joined no matter what the circumstance, no matter how closely related to the Federal claims.

The Ninth Circuit admits that support for its position is eroding, and this Court pointed out in Moor v. County of Alameda that the Ninth Circuit stood virtually alone in its inflexible lack of power theory.

Well, the answer to this question is a difficult one and it requires this Court to put itself in the place of the district courts that contend daily with a very heavy docket and a very large trial case load. What is the answer? The answer that the district courts have found in many cases is to join all possible claims that are related to one another and try them all in one suit and dispose of them simultaneously. And pendent jurisdiction allows them to do this, especially pendent jurisdiction with respect to the joinder of parties.

QUESTION: Could you have sued all the parties that you wanted to sue in the Superior Court of Spokane County?

MR. ROSENBERG: Yes, we could have, your Honor.

QUESTION: You could have gotten all the relief in the Washington State court system, I take it, that you could have gotten in the Federal suit.

MR. ROSENBERG: Sure, we could have, your Honor. But

the petitioner felt, and I agree, that it's unwise to sue Spokane County and an officer of Spokane County in Spokane County Superior Court. She has given a Federal cause of action and felt that it would be the wiser choice to make.

QUESTION: Is this not done every day of the week by taxpayers and contractors suing in the State courts? Are you suggesting some sort of conflict of interest, or some lack of capacity on the State courts to deal with this kind of problem?

MR. ROSENBERG: No, sir, I am suggesting simply that as a practical matter it was felt wiser not to sue Spokane County in Spokane County Superior Court.

QUESTION: That doesn't tell me very much.

MR. ROSENBERG: I am afraid I cannot tell you more than that because I wasn't present at that time.

I at this point will agree with the analysis. I feel that -- I agree with a number of studies that have been made with regard to the distinction between Federal and State jurisdiction, and I feel that in Federal question cases there is strong Federal policy to keep the cases in Federal court. I would refer this Court to page 51 of the opening brief. In the footnote there are quotations from an American Law Institute study on the division of jurisdiction, and it gives three very good reasons why Federal cases should be heard in Federal court.

QUESTION: Of course, under Judge Niell's ruling your Federal case would be held in Federal court. If just your State law claim, it wouldn't be heard there.

MR. ROSENBERG: Yes, sir. And judicial economy, convenience are the primary considerations that the Court should consider when electing to join or not join pendent claims or pendent parties. Pendent jurisdiction is a doctrine of discretion; the Court may or may not join as it sees fit. And the reasons frequently cited are judicial economy, convenience to the parties, avoidance of piecemeal litigation. There are a number of very good reasons.

QUESTION: Do you see any difference in the pendent claim issue that was passed on in Gibbs and the pendent party issue, that is, where you already have all parties properly before the Federal court to say we will add a claim by one against the other, because there are already existing Federal claims against them, and the pendent party situation that you have here where the party is not here in Federal court by virtue of any other Federal claim, indeed,by no Federal claim at all.

MR. ROSENBERG: That's correct, but I see no significance in that distinction.

QUESTION: I would suppose the party would. If you are talking about efficiency, that party wouldn't -- it might make some sense if he is already there to say we ought to also

try out some other claims arising out of the same transaction.

MR.ROSENBERG: Your Honor, that party is there available to be sued and will be sued in one court or the other. The question is whether we will have two trials or one of precisely and exactly the very same issue. By State law the county is liable for the torts of its officers. That means that the trial that we are going to have over the State claims against the Treasurer are exactly the same trial we will have over the State claims against the county, identical in every way.

QUESTION: In Washington state courts, do you have an intermediate court of appeals between your trial courts and your Superior Court and the State Supreme Court?

MR. ROSENBERG: Yes, sir.

QUESTION: And the Supreme Court sits down at Olympia?

MR. ROSENBERG: Yes, sir.

QUESTION: When you are talking about judicial economy and convenience of the parties, I should think it would be much more convenient to try a case out in Spokane,then go down to Olympia on your appeal than to come all the way here.

MR. ROSENBERG: Well, your Honor, we didn't anticipate an appeal on this procedural issue. We have been trying to get to court for a long time. The Federal court and the County Superior Court are within six blocks of one

another. It is just as convenient for the county to go to one or the other.

QUESTION: But in the State court, you could try both the Federal and the State claim together.

MR. ROSENBERG: That's true. There is no question about that.

QUESTION: So if you want to talk about one or two trials, there is one place at least there is no question but what you could have just one trial, that's the State court.

MR. ROSENBERG: Yes, sir. Keep in mind, however, that this doctrine arises not only in this particular case, but it cuts across jurisdictional lines. It comes up with respect to virtually every jurisdiction granting basis of Federal jurisdiction. And there are some that are exclusively Federal. What happens in those cases when the party cannot go to State court?

In this case we happen to be able to. But we made a choice of forum that was open to us under the Federal and State law.

QUESTION: Well, for your Federal issue it was.

MR. ROSENBERG: Yes, sir.

QUESTION: You certainly couldn't have brought the State issue to the Federal court independently.

MR. ROSENBERG: That's true.

At this point it's probably important for me to recite

some of the considerations the courts have found in joining pendent parties, not only claims but parties as well. In virtually every basis of Federal jurisdiction, . plaintiffs and defendants have been joined in Federal question cases, diversity cases, Taft-Hartley cases-- Gibbs was a Labor-Management Relations Act case -- Federal Employer's Liability Act cases, SEC cases, civil rights cases, patent copyright cases, admiralty cases. No one could possibly foretell the combination of Federal and State claims that will arise. And that's why pendent jurisdiction is the appropriate vehicle to deal with this situation. While the court has the power to join, it doesn't have the obligation to join. It may join if it feels it appropriate.

Now, the Gibbs court set out an appropriate test that is as appropriate now as it was then, and that test is this: First of all, the court must consider the substance of the claim. Obviously if there is strong Federal policy to keep it in Federal court, then the court could do that. Are the State claims such that they would confuse the issue?

QUESTION: Mr. Rosenberg, let me just get something sorted out in my mind. How could there ever be a Federal policy favoring keeping the State claim in the Federal court, because by hypothesis your State claim is always one that could not be brought in the Federal court in the first instance, at least against a particular defendant that you are seeking to bring

into Federal court?

MR. ROSENBERG: Yes, Mr. Justice Stevens. I made a slip. I meant of the Federal cause of action, there is strong Federal policy to keep some in Federal court, and in others there is no strong Federal policy. For example, in a diversity basis of jurisdiction, it makes no difference whether the Federal court keeps it or not because they are applying State law. In some Federal question cases there is exclusive jurisdiction in the Federal court and it has to stay in Federal court.

QUESTION: Is it not correct that every situation with which you are concerned would necessarily be the kind that would be a common law or State law claim and the kind that would be brought into Federal court only under diversity grounds if there were diversity?

MR. ROSENBERG: No, sir, not at all. This is really in virtually every jurisdiction granting basis of jurisdiction.

QUESTION: But not against the defendant whom you cannot sue in Federal court.

MR. ROSENBERG: That's true. But there is a claim against somebody who is appropriately and closely related to the other defendant. Now, we are in Federal court already. There is an existing Federal claim. The question is simply may we join the appropriately and closely related State claims and have one trial of all the issues that are raised on a set

of facts or two?

QUESTION: If you prevail against the Treasurer on the Federal claim, would that same record entitle you to prevail against the county, I think you told us, on the State claim because under Washington law the county is responsible if its Treasurer is responsible? Is that right?

MR. ROSENBERG: No, sir. The county is not responsible. The county may be liable. We would have to proceed against the county and sue them and try the case again.

QUESTION: No, no. I say if you can join the county as pendent party here, then you would have only one record, wouldn't you?

MR. ROSENBERG: Yes, sir, if we can join the county, we would have --

QUESTION: The same record you relied on for recovery against the Treasurer on the Federal claim, is that right?

MR. ROSENBERG: No, sir, there are different claims involved. There is a Federal claim and there are separate State claims. Now, the State claims --

QUESTION: I know, but would the evidence on both be the same?

MR. ROSENBERG: Oh, identical.

QUESTION: All right. And if the evidence satisfied, the Federal claim would be against whom?

MR. ROSENBERG: The Federal claim is against the

Treasurer.

QUESTION: All right. And the State claim would be against the county, the employer?

MR. ROSENBERG: No, sir. There are State claims against the Treasurer as well, and it's those State claims against the Treasurer that are identical with the State claims against the county.

QUESTION: I see.

MR. ROSENBERG: There is a separate Federal claim, there are separate --

QUESTION: If you prevail on the State claim -- rather, the same evidence would entitle you to prevail on both the State and Federal claims against the Treasurer, is that it?

MR. ROSENBERG: Very similar. There are a few extra ingredients in the Federal claim, but virtually identical.

QUESTION: And then having a recovery against the Treasurer on the State claim, does that also give you recovery against the county?

MR. ROSENBERG: Well, if the county was a party, yes, because it is identical --

QUESTION: Isn't that right? And that's why you want to make the county a party?

MR. ROSENBERG: Yes.

QUESTION: So the county would be a pendent party to a State claim.

MR. ROSENBERG: Yes, sir. The claim against the county is a pendent claim, and by virtue of it being against the county, the county is a pendent party.

QUESTION: So you get the State issue in the Federal court as a pendent issue under Gibbs.

MR. ROSENBERG: Yes, sir.

QUESTION: Then you want something pendent to that State claim.

MR. ROSENBERG: No, sir. The State claim is to be pendent to the Federal claim. There are already State claims in the Federal court, the State claims against the Treasurer.

QUESTION: And they are pendent.

MR. ROSENBERG: They are pendent to the Federal claim against the Treasurer.

Now, we also have State claims against the county and they, too, should be pendent to the Federal claims.

QUESTION: But how do we know that the evidence will be identical, as you say, until we know what those State claims are? For example, you mentioned the libel claim which you haven't actually alleged in the complaint, which might require proof of publication to third parties, which isn't part of your Federal claim. And each of your State claims might involve some fact not necessarily a part of your Federal claim, isn't that true?

MR. ROSENBERG: That's true, and you won't know that;

the district court will know that.

QUESTION: In other words, if it is part of your burden to show that the evidence would be substantially identical, you really haven't done that until you have pleaded your State claim, have you?

MR. ROSENBERG: On the district court level, that's true, because the district court must make an inquiry and determine if the case, if the two claims are reasonably related and closely related sufficient for him to assume jurisdiction over them. He will make an inquiry in this regard.

QUESTION: Can he do that on this particular pleading?

MR. ROSENBERG: Certainly not. He can't do it whether this pleading is good or bad, because he doesn't have the power to do it and that's what he said in his order of dismissal. He specifically refused to rule on the validity and whether our State claims were suitable or not. He can't do it whether he wants to or not.

Now, district courts in all the other circuits can do it, but he cannot. And that's the problem with this case. How can a court make a decision like this? The court,first of all, I submit, has to have the power. Once it has the power, it has to make an inquiry and determine the nature of the claims and whether they are suitably related. And the Gibbs court sets forth an appropriate test for relationship.

QUESTION: Does he take any directions at all from

the complaint?

MR. ROSENBERG: Yes, sir. He would read the complaint to determine what the causes of action are.

QUESTION: Again I ask you, where would he get the State action out of that complaint?

MR. ROSENBERG: Your Honor, I submit, and I admit, that this complaint is not very well drafted. I submit --

QUESTION: Then it should have been dismissed, which it was dismissed.

MR. ROSENBERG: As a matter of fact, it was dismissed.

QUESTION: And he said it was no good. What are you doing, confessing that?

MR. ROSENBERG: No, sir. The case was dismissed in 1971. It went to the Ninth Circuit Court of Appeals-- it was dismissed for failure to state a claim as well as abstention. It went to the Ninth Circuit Court of Appeals, was reversed and remanded, because there was a claim stated. Now, that, of course, is referring to a Federal claim. They didn't get to the validity of the State claim.

But the district court can straighten out this complaint. He can order us to amend it. He can dismiss it if he wishes. He can do anything he wants with it. But at this point he doesn't even have the power to consider it.

QUESTION: It would only be a coincidence, even though a high probability that the Federal district judge sitting on

the case would be a judge familiar with Washington law. It might be a judge from one of the other States in the circuit there very easily. Here you have been back and forth, I don't know exactly how many times, and I take it the same six blocks from the Federal court to the State court works the other way and you could have put a new caption on this complaint and proved the complaint as you suggest, walked down the street and action probably would have long since been over.

MR. ROSENBERG: We could have done that.

QUESTION: Meanwhile you have been a very large statistic on the Federal court systems for quite a long time.

MR. ROSENBERG: Well, if the case wasn't dismissed in the initial round of pleadings, we would have been over four years ago. Yes, we could have tried it in the State court, but in terms of election of remedies that are available to us, we selected in the Federal court.

QUESTION: I am speaking of the time when it appeared that your only claim was a State claim, and I submit to you that's the time it should have been in the State court and ever since then.

MR. ROSENBERG: Your Honor, with all due respect, there has never been a time that there was only a State claim. There has always been a Federal claim against the County Treasurer. There has always been that claim, except when it was dismissed and reversed to remand.

QUESTION: I did not say only a State claim, I said a State claim, because, as Mr. Justice White suggested, State courts are enforcing Federal claims every day in the week.

MR. ROSENBERG: Your Honor, of course, this issue is not before the Court. The fact is we are in Federal court and whether the Federal court can pend State claims to it or not, whether they have the power to do that is the only issue.

Let me be as clear as I can. We are not asking this Court to rule that the district court must hear the State claims,but simply that the district court has the power to hear them, and if it wishes to in the exercise of its discretion, it will do that. I feel confident that we can go back before the district court and convince them that it's an important thing to do.

QUESTION: In the Moor case that wasn't the outcome, was it?

MR. ROSENBERG: No, sir, this Court found --

QUESTION: You could prevail here and still lose ultimately.

MR. ROSENBERG: Yes, that's true, we could.

QUESTION: How many courts of appeals agree with you on pendent parties?

MR. ROSENBERG: The District of Columbia, the First, Second, Third, Fourth, Fifth, Sixth, and Eighth.

QUESTION: So everyone agrees with you except the

Ninth?

MR. ROSENBERG: No, the Ninth has ruled on it and disagrees very vehemently. The Seventh Circuit --

QUESTION: All agree with you except the Ninth because it has ruled on it.

MR. ROSENBERG: The Seventh doesn't. The Seventh has ruled on it only once and really didn't give it suitable treatment.

QUESTION: Is that in the Hampton case?

MR. ROSENBERG: Yes, sir. And that's understandable.

QUESTION: The Court of Appeals has ruled against you here?

MR. ROSENBERG: Yes, the Ninth Circuit Court of Appeals.

QUESTION: Yes. So they are the only circuit against you?

MR. ROSENBERG: Yes, sir, and the Seventh as well.

QUESTION: And the Seventh. All right.

MR. ROSENBERG: I would like to read something from a very recent First Circuit Court of Appeals opinion in conclusion. The First Circuit Court of Appeals was dealing with a case that had a virtually interminable history in the Federal court system. It had been appealed a number of times, was exceedingly complex, multiple parties, multiple issues, and at the conclusion of the Court of Appeals treatment of it, they said this: This

case is one where if there had not existed a doctrine allowing Federal jurisdiction over pendent parties, it would have had to be invented. There are a number of cases where --

QUESTION: In order to keep it going as long as it did?

MR. ROSENBERG: I think in order to sort it all out. I think he was referring to the problems that would exist if the case was bifurcated in a number of different courts, he would have had a bigger problem than he had right then.

I would like to reserve any time I have left.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Rosenberg. Mr. Brockett.

ORAL ARGUMENT OF DONALD C. BROCKETT ON BEHALF OF RESPONDENTS

MR. BROCKETT: Mr. Chief Justice and Members of the Court: The difficulty that the Court is having with the complaint in this case and with the allegations contained therein are some of the problems that the county had with being joined as a party or the attempt to join the county as a party in the Federal district court in Spokane County. And further, it would be our contention, as it has been in the brief that we filed with this Court, that if this Court gets beyond the complaint to a realization that there is in fact a State claim which has been alleged that could be pendent to a Federal claim under the civil rights action, that it should then

seriously reconsider the doctrines of pendent and ancillary jurisdiction to determine whether or not this may not be part of the problem with the Federal court systems and with the numbers of cases that are filed in the Federal court systems at the present day.

One of the admissions, I think, by counsel here is that the case could well have been filed in the Superior Court of Spokane County, on the basis of the State claims if there were any and on the basis of the Federal claim of violation of the Federal Civil Rights Act.

QUESTION: Do you know of any case ever filed in a trial court of your State stating a cause of action under 42 United States Code 1983?

MR. BROCKETT: I don't think I know of any particular actions, your Honor, that have been filed in State courts, but I think it's because of the fact that counsel representing individuals in civil rights cases feel, as counsel stated here, that it's wiser to file those cases in Federal court.

QUESTION: There is a specific jurisdictional statute, 28 United States Code 1343 conferring Federal district court jurisdiction over such a cause of action. Would a State court in Washington as a matter of its jurisdiction under the law of the State have jurisdiction over a cause of action stated under 42 United States Code 1983?

MR. BROCKETT: I don't believe, your Honor, that that

particular section of the United States Code gives exclusive jurisdiction.

QUESTION: That section doesn't give any jurisdiction, Volume 42. Volume 28, 1343 gives jurisdiction to the Federal court, not exclusively nor unexclusively, it just gives Federal jurisdiction.

MR. BROCKETT: Federal jurisdiction, that's correct.

QUESTION: I just wondered if your State courts, trial courts, have jurisdiction over a cause of action brought, stated under 1983 of Volume 42.

MR. BROCKETT: We believe that they would have the jurisdiction with the Federal court in order to hear that particular case.

QUESTION: Do you know of any case brought in the State --

MR. BROCKETT: No, not specific cases, because again of the choice by counsel in filing in Federal district court.

QUESTION: It generally is to bring it into the Federal district court.

MR. BROCKETT: Now, the attempt in this particular case -- and I think again this is the poorest case for this Court to be deciding the matter of pendent jurisdiction in attaching a State claim to a Federal claim, because of the fact that the complaint itself alleges an absence of a State claim. In fact, as this Court has noted, the Revised Code of Washington 36.16.070

specifically provides that the Treasurer of Spokane County, as any other elected official of Spokane County, has the discretion to discharge at pleasure an employee, and what counsel is asking in this case, what petitioner is asking, is that the particular statute when and if it is ruled to be unconstitutional or to have been applied in an unconstitutional manner would then create a State claim against the county for the action of the Treasurer and would then ask that that State claim be made pendent to the Federal cause of action which has been filed under the Federal Civil Rights Act.

The difficulty that the county expresses here is much the same as the difficulty expressed by this Court in Moor v. County of Alameda, that there is to be a system of federalism, that there is to be a distinction between the State and the Federal courts, and that as Mr. Justice Rehnquist, I believe, said in a recent opinion, if such an extension of pendent jurisdiction as this would allow to bring into the case an additional party that this Court has held should not be a person under the Federal Civil Rights action, that that would only call for an ingenious counsel to determine that there was a Federal question and then determine that there should be pendent jurisdiction over any State claim that might be thought to exist and therefore would go into the Federal court system.

The questions of jurisdiction are questions, of course, of constitutional law and it has been determined and it has been

written specifically in Article III, section 2 of the Constitution that the Federal courts are courts of limited jurisdiction. Many of the writers on the extension of pendent jurisdiction and ancillary jurisdiction and the confusion between the two doctrines have indicated, and the county would propose here, that the Federal court system is becoming a system of general jurisdiction by means of the use of pendent jurisdiction to allow the joining of State claims in particular cases. And it is especially an extension which I do not believe this Court wishes to exercise in this case because it would join a party which has specifically been held not to be a person under the Civil Rights Act.

The problems created by the extension of pendent jurisdiction are many and have been mentioned in various writings, And I think this Court should certainly consider those problems. Number one, the major problem, is that if the State court in considering a question of Federal law should err in interpreting the Federal law, then it can be corrected on review by this Court. However, if the Federal district court would err in interpreting a State law, that particular question is not subject to review by the State courts, and therefore this Court should consider that question and force these causes of action to be tried on the basis of State claims in State courts with an appropriate review by this Court or other Federal courts.

QUESTION: What you just said is true with respect to any diversity case, isn't it?

MR. BROCKETT: That's true, your Honor, but I think --

QUESTION: .. sometimes can be frustrated by the fact if he is pulled on the Federal side, he just can't get a definitive State ruling on the issue.

MR. BROCKETT: That's correct, your Honor. But the diversity case, I would contend to you, is a different situation than the Federal question case and the allowing of the expansion of the Federal question case by pendent jurisdiction. Diversity is specifically granted to the Federal courts on the basis of the idea historically that an individual who was a citizen of another State could not get a fair trial by coming into that particular State. There is some questioning of that particular doctrine at the present time because of the movement of society in the present day and the fact that there are many lawsuits that are brought in local jurisdictions that are in fact holding police officers liable for their conduct, and I would warrant in this particular case if the facts warrant it, would hold the Treasurer and the county liable for any tortious conduct.

QUESTION: .. which was reported in 1969 ? rather disparages this less valid idea about New Englanders getting a bad deal in some other jurisdiction, and vice versa, are they not?

MR. BROCKETT: That is correct, your Honor. I think that's something for this Court to consider in determining whether or not in fact the diversity problem hasn't crept into the Federal question problem.

QUESTION: Well, this Court can't do anything about the diversity jurisdiction. Only Congress can do that. You are suggesting we can do something about pendent jurisdiction cases.

MR. BROCKETT: Yes.

QUESTION: And ancillary jurisdiction.

MR. BROCKET: Yes, and what I am suggesting is this Court go back historically to the Constitution and determine that the Federal courts should have province and power only over cases arising under the Constitution and laws of the United States or diversity cases, which as your Honor has said they can do nothing about. I think it is ridiculous for the doctrine of ancillary or pendent jurisdiction to have allowed an extension and to in effect fill up the Federal courts with questions that should be better heard in State courts.

QUESTION: Mr. Brockett, you certainly don't need any broad doctrine like that to prevail here on your case, do you? All you are saying is that the principles that give this topendent claim shouldn't be extended by this Court to a new class of pendent parties.

MR. BROCKETT: What we are saying, your Honor, is that specifically this Court should refuse to go any further than

it has or in fact may wish to retreat from the position that it took in Moor v. County of Alameda and determine in fact that there should not even be a pendent jurisdiction over claims even though between the same parties.

QUESTION: And overrule Gibbs.

MR. BROCKETT: Yes, and overrule Gibbs.

QUESTION: And Hearn v. Ousler, too?

MR. BROCKETT: And Hearn v. Ousler and the other cases which this Court has decided. I would refer to a phrase which I found in briefing for this case that I thought was of interest from Mr. Justice Holmes in which he once said, "In my opinion, the prevailing doctrine has been accepted upon a subtle fallacy that never has been analyzed. If I am right, the fallacy has resulted in an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."

Now, what I would say on the basis of that is that ancillary jurisdiction --

QUESTION: What is the citation of that paper?

MR. BROCKETT: I am sorry, your Honor, it isn't from a case. It's from a speech of Mr. Justice Holmes.

QUESTION: But it didn't have to do with this subject, did it?

MR. BROCKETT: No, it didn't. It wasn't on the

question.

QUESTION: It's a rather famous work.

MR. BROCKETT: It was just the question of whether or not the Court should reanalyze its opinions and retreat from them if it's warranted.

QUESTION: Yes.

MR. BROCKETT: I think that this Court should find that ancillary jurisdiction certainly has a role to play in the Federal jurisdictional scheme of things. Ancillary jurisdiction in its proper role is the jurisdiction of the court to hear those matters which are ancillary to the cause before the court on the basis of the defendant who is an unwilling party to the action, who has been brought into the action, and decides that he wishes to raise a matter which is within then the ancillary jurisdiction of the court.

The pendent jurisdiction problem, however, whether it extends to claims as it was extended in this Court by Moor v. County of Alameda, or more importantly, whether it extends to parties who are not properly a party to the particular action, as we allege the County of Spokane is not in this case, the court should distinguish between those doctrines, and we would submit should overrule the doctrine of pendent jurisdiction and not allow it within the Federal courts.

The doctrine has created problems in this regard. It would seem appropriate that a Court either has jurisdiction

over a case or it does not have jurisdiction over a case. This Court recently, on January 20 of this year, in the case of Thermtorn Products, Inc. v. Hermansdorfer, ruled that once a case has been removed to the Federal district court, that district court has jurisdiction of the case and that in fact the Court was somewhat split on the determination as to whether or not that jurisdiction could be given up and the case could be sent back to the State court because of the crowded docket of the Federal district court.

QUESTION: The issue in that case was whether or not the district court's order to remand is reviewable.

MR. BROCKETT: That's correct. Part of the issue was, your Honor.

QUESTION: There was no disagreement indicated as to his erroneous action in remanding.

MR. BROCKETT: No, that's correct. I think the statement, however, in that case that I am referring to that I would allege in this case is appropriate, is that the court, once it had jurisdiction, could not give it up. Now, the reason I state that is for this reason: In the doctrine of pendent jurisdiction, under the Moor v. County of Alameda case, it is interesting to note that this Court has said that some courts have jurisdiction but do not need to exercise it, that in fact it is discretionary with the court as to whether or not that jurisdiction should be exercised.

I would warrant and content to this Court that we decide that either the court has jurisdiction, which shall be exercised in all cases, or it does not have the jurisdiction. And the Ninth Circuit and the district judge, Judge Niell in this case, said that he was without power to hear this particular State claim because of the --

QUESTION: What was the State claim, by the way? I notice that the judge in his order dismissing and the Court of Appeals in its opinion always heard some State claims.

MR. BROCKETT: Well, your Honor, that's the interesting --

QUESTION: They were stated orally in the sense that they were provable in the facts of the case?

MR. BROCKETT: That's correct, although our contention is that there is a specific allegation in the complaint itself that the action as taken was warranted by State statute. So that there can in fact be no State --

QUESTION: Both courts below referred to assumed there was one.

MR. BROCKETT: Yes.

QUESTION: Stated there was one -- I mean, said "these State claims."

MR. BROCKETT: They were concerned about that State claim, if one existed, but then retreated to the position that they had no power to even consider whether a State claim existed because of the particular --

QUESTION: They say one did exist, as my brother White said, if you look on page 27 of the Court of Appeals' opinion.

MR. BROCKETT: That's correct.

QUESTION: And if you look at page 20 in the record the district judge is dismissing, saying, "Nor has this court power to exercise pendent jurisdiction over the claims against Spokane County."

MR. BROCKETT: Yes, and those claims were just claims that were assumed to be existent for the purpose of determining whether the court had power to even hear the case. That's why the case came to this Court on the basis of the Ninth Circuit opinion that the court did not have the power.

QUESTION: Mr. Brockett, you read the Ninth Circuit, as did the district court, as holding that there is no power and not merely that it would be an abuse of discretion to exercise the power that existed?

MR. BROCKETT: That's correct. In fact, in this particular case, if the case is sent back from this Court, goes back to the Federal district court, he may still exercise the discretion not to hear the case.

QUESTION: I understand that as to the district, but that's the way you read the Court of Appeals also as going off on power. I found the opinion a little bit ambiguous.

MR. BROCKETT: No, I think the Ninth Circuit Court does in fact, as this Court has said before, virtually stands

alone in determining that the pendent jurisdiction may not be extended to pendent parties, and that's the determination to be made in this case if this Court determines that this is an appropriate case in which to make that determination itself.

We would contend that the doctrine of removal, that the doctrines of abstention and certification by the Federal district court are doctrines that have in fact grown up as a result of the fact that the courts do not want to exercise jurisdiction over the State law claims and that they themselves feel that these claims should be better placed in the State courts, that the State courts should make State law, that if that law then is in derogation of Federal rights, that it will be ruled upon by the Federal courts and will be appealed to this particular court. Otherwise, the States should have the right to rule on their own State law. And as the Chief Justice has mentioned, because of the court dockets that are very crowded, the court judges are required to move around and may well be in a State in a diversity case, for example, and not be that familiar with the State law. The Federal court ruling upon the question of State law may be looked to by a State legislature to give some guidance to it when in fact the State legislature should not be looking to the Federal court's determination. That determination should be made properly by a State court with a review under our constitutional system and system of federalism by the Federal courts.

The petitioner in this case in his reply brief has indicated that it is absurd for the respondent to contend that this extension of the doctrine of pendent jurisdiction is being used to extend the scope of a 1983 action, section 1983 of the United States Code. We would contend that that's not so absurd when one looks at 15 Am. Jur.Trials 620, at section 27, which states this: Pendent jurisdiction is used for two purposes: One, to try common law or statutory tort claims against individual defendants sued under section 1983, and, two, to bring the city or other entity into the action thus avoiding in part the holding of Monroe v. Pape that cities are not suable under section 1983.

We would contend that that's exactly what's happening in the Federal court system, that by the use of the doctrine of pendent jurisdiction and by an imaginative pleading or an imaginative party, a Federal cause of action is filed, and then the party attempts to apply for the pendent jurisdiction over the State law claim, which should not be there.

We would ask that this Court determine that there is no power,as the Ninth Circuit has said, to entertain under pendent jurisdiction especially additional parties. That if there is power and if there is discretion, then, for the court to hear or not to hear on the basis of that power, what kind of a rule will there be that will be established throughout the country upon which all lawyers and courts can base some

consideration in a determination of the application of pendent jurisdiction? If it's to be based upon discretion, will it not have to be on a case-by-case basis? And if the discretion is exercised on a case-by-case application, then how is there any rule to which one can refer?

The other difficulty is that if we are attempting to save judicial time and energy in adopting the doctrine of pendent jurisdiction, how will there be a saving of judicial time and energy if the court has to determine on a case-by-case basis in the Federal system whether or not the application of pendent jurisdiction and that doctrine is appropriate in that particular case and will it not require review by this Court on a case-by-case basis as to the exercise of that discretion?

If the fairness is what's to be considered, then is there a fairness to the defendant who has a right to be sued in the State court on the basis of the State law claim and have that State law claim determined by the State court if the action can be joined on the basis of pendent jurisdiction even though he was not a proper party to the Federal question filed in the district court?

QUESTION: If you sue the Treasurer and the County in the State court, the County on State law claims and the Treasurer on Federal claim and a State claim, and the Treasurer removed to the Federal court, do you think the whole

case could come to the Federal court?

MR. BROCKETT: I think that that might well be a determination for the Federal district judge at that point.

QUESTION: What do you think the statute means? It says the entire case may be removed.

MR. BROCKETT: I think that that might very appropriately bring the entire case into the Federal system, but it would be by virtue of a move of the defendant as opposed to a move of the plaintiff.

QUESTION: So there is a power question.

MR. BROCKETT: I think it's a power question when we look at it on the basis of the filing by the plaintiff and the attempt by him to join an additional party or an additional claim under pendent jurisdiction. But I think that that power question is better resolved --

QUESTION: It couldn't be a question, then, if the whole case were removable. I'm not suggesting that it is, but if it were wholly removable and the Federal court could handle it, it wouldn't be a jurisdictional issue.

MR. BROCKETT: Well, your Honor, I would submit this, that that is the proper application of the doctrine of ancillary jurisdiction as opposed to what should be distinguished in considering that jurisdiction from pendent jurisdiction. That is the proper doctrine of ancillary jurisdiction in which the defendant has chosen to remove and the defendant who is in

the court then asks that there be a jurisdiction by a proper joinder even though of another party who he feels is liable rather than himself.

The 28 United States Code 1338(b) which appears to be argued as an extension by Congress of pendent jurisdiction over patent and copyright cases, the county would allege in this case, has been the only extension of that doctrine by congressional authority and that the other extension of pendent jurisdiction has been a court-created doctrine which this Court should carefully consider and recede from so that cases will be appropriately filed in the State courts, the determinations will be made under State law, and then if there is some difficulty with Federal question or the Federal constitutional application, it will come into the Federal courts only upon that basis.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Brockett.

You have just one minute left, Mr. Rosenberg. Do you have anything further?

REBUTTAL ARGUMENT OF NORMAN ROSENBERG

MR. ROSENBERGBEHALF OF PETITIONER

MR. ROSENBERG: Yes, very briefly.

I, too, found the Ninth Circuit Court of Appeals opinion very curious. On the one hand, they affirm that there was no power. On the other hand, he did what he didn't allow

the district court to do, analyze on a case-by-case basis whether it was appropriate to join the case. He said that this case was not an appropriate one to join. That's his view. Implicitly that states that there are cases that are appropriate to join, and that is the value of pendent jurisdiction.

The reason for pendent jurisdiction has had woven through it the underlying rationale of judicial economy and it's only the district court that has the case before it that can decide with any effectiveness at all whether it is appropriate to join all the claims and hear them all. An inflexible rule will be unworkable, will cause distress, and will not promote judicial economy but will cause duplication of lawsuits.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:28 p.m., the oral argument in the above-entitled matter was concluded.)