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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: LESLIE WILTON, ETC., ET AL., Petitioner v. SEVEN
FALLS COMPANY, ET AL.

CASE NO: No. 94-562

PLACE: Washington, D.C.

DATE: Monday, March 27, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LESLIE WILTON, ETC., ET AL., :

4 Petitioners :

5 v. : No. 94-562

6 SEVEN FALLS COMPANY, ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Monday, March 27, 1995

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:02 a.m.

13 APPEARANCES:

14 MICHAEL A. ORLANDO, ESQ., Houston, Texas; on behalf of
15 the Petitioners.

16 WERNER A. POWERS, ESQ., Dallas, Texas; on behalf of the
17 Respondents.

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-562, Leslie Wilton v. Seven Falls
5 Company.

6 Mr. Orlando.

7 ORAL ARGUMENT OF MICHAEL A. ORLANDO

8 ON BEHALF OF THE PETITIONERS

9 MR. ORLANDO: Mr. Chief Justice and may it
10 please the Court:

11 The heart of the issue before the Court today is
12 the use of the word "may" in the context of the Federal
13 Declaratory Judgment Act, which provides that the Federal
14 courts may declare the rights and other legal relations of
15 any interested party seeking such declaration.

16 We contend that the word "may," as used in that
17 context, means three things and only three things. The
18 first is the literal connotation of the word, such that
19 the Federal courts may grant the relief requested and make
20 a declaration, the second meaning is that the court may
21 grant the declaration provided there is a justiciable
22 controversy, and the third meaning, the final meaning, is
23 that the court may grant the relief provided the case does
24 not fall within the category of cases presenting
25 exceptional circumstances as described by this Court's

1 Colorado River doctrine.

2 The present analytical framework of the Fifth
3 Circuit Court of Appeals fails in the third respect, and
4 that is, it gives no balancing of the guidelines that were
5 established in Colorado River and Moses Cone against the
6 virtually unflagging obligation of the district court to
7 accept jurisdiction of the case, and that is precisely the
8 fatal flaw in the Fifth Circuit's approach.

9 The majority of the circuits around the country
10 have adopted the Colorado River-Moses Cone analytical
11 framework, and that seems to be working well with the
12 district courts. They are able to use the factors that
13 have been established as the six factors to be considered
14 in such cases, they balanced those factors, weighed it
15 against the concept that jurisdiction is virtually
16 unflagging, and they either decide --

17 QUESTION: May we just go back to that. We're
18 dealing with a request for a declaratory judgment. It was
19 my understanding, as I think it was Borchard's, who wrote
20 the act, that a declaratory judgment, that that is a
21 matter within the discretion of the trial court, that
22 there is jurisdiction, but it need not be exercised.
23 That's the way the author of the act described it. That's
24 what the notion of a declaratory remedy is. Well, if it's
25 too iffy, the court says we won't handle it, for any of a

1 variety of reasons. Isn't that what a declaratory action
2 is?

3 MR. ORLANDO: Yes, Your Honor, I agree with you,
4 and I agree that that's what Mr. Borchard's understanding
5 of the remedy was as well, is that a new Federal remedy
6 was being created.

7 It was something that at that point in time the
8 Federal courts would not have had the ability to decide a
9 case that just sought a declaration, because there was no
10 Federal remedy along those lines, but the heart of the
11 issue is that there must be a distinction between the
12 exercise, the threshold question of the exercise of
13 jurisdiction versus the granting of the equitable remedy
14 being sought, and the petitioners herein do not contend
15 that granting of a declaration is mandatory. The wording
16 of the statute is contrary to that. What we do contend is
17 that there is discretion to grant the declaratory
18 judgment.

19 QUESTION: But isn't -- doesn't it make sense to
20 infer that there is a derivative or implicit discretion to
21 determine whether to go ahead and have a trial on the
22 issue, because let's assume we apply Colorado River, Moses
23 Cone, or any other set of criteria. If the court right at
24 the threshold says it's perfectly clear that this is a
25 case in which it's quite unlikely that we would, in fact,

1 grant relief, that is a very good reason for the court at
2 that stage to say, we therefore are going to abstain. Why
3 doesn't -- why isn't that a sensible way to give practical
4 effect to the discretion that you concede?

5 MR. ORLANDO: Your Honor, I agree with you that
6 that is a sensible way. The only disagreement that the
7 petitioners have with the way things are happening in the
8 Fifth Circuit Court of Appeals is that what is essentially
9 unfettered discretion is given to the district judge to
10 abstain on that threshold --

11 QUESTION: Well --

12 QUESTION: But --

13 MR. ORLANDO: -- question.

14 QUESTION: May I just ask one other?

15 Your reference to unfettered discretion I think
16 sort of takes its significance from the fact that you
17 continue to reiterate throughout your argument that you
18 have here this morning that there is this unflagging
19 obligation to exercise discretion, which I took you to
20 mean was something inconsistent with abstention, absent an
21 overwhelming case for abstention, and that really is not
22 so.

23 If, in fact, there is the derivative discretion
24 that I was talking about, then we are not in a situation
25 in which there is this unflagging obligation as we are in

1 the circumstances which Moses Cone and Colorado
2 specifically addressed.

3 MR. ORLANDO: Well, Your Honor, beginning with
4 the Brillhart case, which essentially is the respondents'
5 touchstone in this matter, which seemed to give very wide
6 discretion to the district court on the very threshold
7 issue, the very next term, in the Winter Haven case, this
8 Court said that you can decide these -- you can abstain or
9 use discretion, but it's only in, I believe the words
10 were, the extraordinary case, or the exceptional
11 circumstances, and so in the very --

12 QUESTION: Was that a declaratory judgment case?

13 MR. ORLANDO: Yes, Your Honor, the Winter Haven
14 case was a declaratory judgment case.

15 QUESTION: With no other relief sought?

16 MR. ORLANDO: I believe injunctive relief was
17 sought in that case as well.

18 QUESTION: Has this Court ever said what you're
19 contending, that you must exercise the jurisdiction but
20 when you go through the whole trial you stop because you
21 have discretion with respect to the remedy? That just
22 doesn't make any sense.

23 MR. ORLANDO: No, Your Honor, I don't believe
24 the Court has said that, and that's -- I want to make it
25 clear, that is not our position in this case. Our

1 position is that what we merely seek is that this Court
2 declare to the Fifth Circuit that the Colorado River-
3 Moses Cone analytical framework should apply.

4 QUESTION: Well --

5 QUESTION: Well --

6 QUESTION: -- but did the district court, or the
7 circuit court in this case, ever purport to be abstaining?

8 MR. ORLANDO: Not from the literal sense of the
9 word "abstention," which I take to mean dismissal, Your
10 Honor.

11 QUESTION: Well, it seems to me that in your
12 argument so far you have talked about the discretion not
13 to grant declaratory relief as if it were abstention, and
14 it seems to me those are very different things.

15 Now, it may well be that many of the factors you
16 look to with the abstention determination parallel the
17 factors that you look to with reference to declaratory
18 relief, but I suggest that perhaps the one factor that is
19 not present in declaratory relief is a virtual unflagging
20 obligation, and it seems to me that you are conflating in
21 all of your discussions so far abstention and failure to
22 grant declaratory relief in the sound discretion of the
23 court, and that those are analytically two quite separate
24 foundational principles for the court to consider.

25 MR. ORLANDO: Again, Your Honor, I do contend

1 that it is a threshold question. We're not standing
2 before this Court contending that the Colorado River-
3 Moses Cone analysis is not a threshold issue. I believe
4 it is. It is something that the court, the district court
5 in the very first instance, on a motion to dismiss by a
6 respondent should go through the analysis of looking at a
7 given set of standards and say, either this case should be
8 dismissed or stayed based on the guidelines as set by this
9 Court, and --

10 QUESTION: To follow up on Justice Kennedy's
11 question, does your answer suggest that the court should
12 treat a dismissal as exactly the same way as staying?

13 MR. ORLANDO: Yes, Your Honor. In this
14 instance, where we're referring to parallel State court
15 proceedings as being the basis for such an abstention or
16 stay, as the court in Moses Cone noted, the effect of a
17 stay when you're dealing with parallel State court
18 litigation is, practical consequences, the same thing as a
19 dismissal because of the res judicata effect.

20 QUESTION: Well, I suggest to you again that the
21 court did not say, and I don't think you can interpret its
22 opinion as saying, that it was abstaining.

23 MR. ORLANDO: The court -- unfortunately, Your
24 Honor, what's happening is the lower courts, the circuit
25 court opinions as well as the district court opinions, do

1 terribly confuse just the very pure abstention doctrine
2 versus the prudential deference, as some of the cases
3 refer to it as, in the Colorado River Moses Cone analysis.

4 And I would ask the Court that it adopt this,
5 what I would term prudential deference, in the same
6 situation of a declaratory judgment remedy with a
7 diversity based case, and that's what this Court is
8 presented with here today, is the basis for Federal court
9 jurisdiction is purely diversity, do not have a Federal
10 question involved in this case, and under that --

11 QUESTION: Do you want us to say there is an
12 unflagging obligation to grant declaratory relief?

13 MR. ORLANDO: No, Your Honor. That is not what
14 I'm asking. What I am asking the Court to do is to say
15 that there is a virtually unflagging obligation to
16 exercise jurisdiction unless there are exceptional
17 circumstances in which the Court can either abstain or
18 defer to the State court.

19 QUESTION: I think we're back where we started.
20 You're saying there's an unflagging obligation to assert
21 jurisdiction, although once it asserts jurisdiction you
22 can then say, however, we don't think this is an
23 appropriate case for a declaratory judgment, get out of
24 here, right?

25 MR. ORLANDO: That -- yes, Your Honor, I agree,

1 because that is what the Colorado River --

2 QUESTION: So what do you gain by that?

3 MR. ORLANDO: Well, that is --

4 QUESTION: You gain simply the statement we --
5 instead of saying, we don't think this is an appropriate
6 case, get out of here, the court must say, we think this
7 is an appropriate case for us to take jurisdiction, but
8 not to grant relief, get out of here. Have you really won
9 a lot for your clients on --

10 MR. ORLANDO: Your Honor, the practical effect
11 of telling the lower courts, though, that they may simply
12 elect not to take a declaratory judgment case for any
13 reason at all as long as it's not bias or prejudice, means
14 that we have effectively done away with a declaratory
15 judgment --

16 QUESTION: Well, I thought that answer just
17 contradicts what were you telling Justice Souter. I
18 thought you were telling Justice Souter that you were not
19 going to make them go through that extra step of saying we
20 have jurisdiction but we're not going to give you a
21 judgment. I thought you said that that doesn't make any
22 sense.

23 MR. ORLANDO: I'm sorry I was confusing, Your
24 Honor. What I meant in response to Justice Ginsburg's
25 question was, I don't believe that it's necessary to go

1 through a trial process. I thought Justice Ginsburg --

2 QUESTION: But maybe a summary judgment process.
3 In other words, time has got to be spent evaluating
4 perhaps uncontested facts, but time has got to be spent
5 doing something more than would be done if you simply say
6 at the threshold point, get out of here.

7 MR. ORLANDO: No, Your Honor, I do not believe
8 so, because as this Court did, as Judge Hittner did, we
9 had to have a hearing, an oral hearing on the motion to
10 dismiss, and all that the petitioners are requesting
11 herein is that at such time as the district court takes up
12 the motion to dismiss, that he consider that he has a
13 virtually unflagging obligation to accept the
14 jurisdiction, but that in exceptional circumstances he may
15 either abstain completely or defer to the State court.

16 QUESTION: To what extent is what you're saying
17 inconsistent with the statement, there is nothing
18 automatic or obligatory about the assumption of
19 jurisdiction by Federal court in a declaratory judgment
20 action even if the parties are proper and the
21 jurisdictional amount is present. The distinction between
22 jurisdiction over the case and the propriety of exercising
23 that jurisdiction must be borne in mind.

24 Those are Borchard's words about the statute
25 that he largely composed. I take it you don't agree with

1 that.

2 MR. ORLANDO: Well, I do agree from the
3 standpoint that we're not asking the Court to make an
4 initial ruling on the merits when considering whether or
5 not to defer or abstain. All that must be done is an
6 analysis of the very threshold jurisdictional question
7 under a certain set of guidelines, and I believe Borchard
8 in some of his writings also presaged some of the
9 guidelines that the court should use, and although I don't
10 know that he predicted the six that came out of the
11 Colorado River-Moses Cone analysis very well --

12 QUESTION: Why must you go through a checklist,
13 instead of saying, here's a case where the insurer is
14 suing first, and then you have another case where the
15 insured is coming into court, there's no Federal question,
16 there are more parties in the State court action, and the
17 one thing that you shouldn't have is wasting judicial
18 resources by having two courts deal with the same matter
19 at the same time, so one court should defer to the other,
20 right? It's just simply a question of which one should
21 wait.

22 MR. ORLANDO: Well, the main reason that you do
23 force some sort of guidelines onto the district court is
24 because if you do not do that, Your Honor, then
25 essentially you have unfettered discretion, and that's our

1 big squabble today, is that we contend that the district
2 courts should not have unfettered discretion.

3 QUESTION: Do you agree that a fundamental point
4 is, you should not have two lawsuits over the same matter
5 going on at the same time, unless there's extraordinary
6 reason for that?

7 MR. ORLANDO: Yes, Your Honor, I would --

8 QUESTION: All right, and then the decision has
9 to be made which of the two lawsuits, and what are the --
10 we have two lawsuits going on now. What are the standards
11 that you say should control whether the Federal court suit
12 stops and lets the State go forward, or whether the State
13 should stop and let the Federal suit go forward?

14 MR. ORLANDO: Your Honor, the -- our contention
15 is that the Colorado River-Moses Cone analytical framework
16 should be used in precisely that fashion. That's all that
17 we ask. If the district court in reviewing that line of
18 cases makes, in his discretion, the -- an order stating
19 that his court should either abstain completely or defer
20 to the State court, then we wouldn't be here today, and
21 that's precisely what's happening throughout the majority
22 of the district courts around the country today, but just
23 not in the Fifth Circuit.

24 QUESTION: But you say that the district judge
25 can say what you've just said, we should go forward, but

1 then can immediately say, having gone forward we find that
2 all things considered it's better for the State court to
3 proceed than it is for us to proceed, and therefore on the
4 merits we decline the declaratory judgment.

5 MR. ORLANDO: No, that's not what --

6 QUESTION: No. The merits decision is also a
7 Moses Cone decision.

8 MR. ORLANDO: I believe that, Your Honor, the
9 Moses Cone decision was purely a jurisdictional --

10 QUESTION: Right. Now, on the merits of whether
11 to issue a declaratory judgment or not, what is the
12 standard for that?

13 MR. ORLANDO: That -- those facts aren't
14 presented by this case --

15 QUESTION: Well, but --

16 MR. ORLANDO: -- Your Honor, so --

17 QUESTION: But -- yes, I assume not, but
18 let's -- is it the same standard as Moses Cone?

19 MR. ORLANDO: No, I don't believe so. I
20 believe --

21 QUESTION: It's a lot more restrictive of the
22 Federal court than Moses Cone, isn't it?

23 MR. ORLANDO: I believe so, Your Honor. I
24 believe that because the declaratory judgment statute, the
25 grant of a declaration is essentially an equitable remedy,

1 that the court's other equitable decisions would apply in
2 that setting as well. Just as the court must look at
3 whether or not the granting of an injunction was proper in
4 a given case, then the court will exercise the same
5 standard on the merits as it would in any other
6 equitable --

7 QUESTION: And even --

8 QUESTION: On these facts, supposing the
9 district judge had said, I have jurisdiction here, and I
10 have an unflagging obligation to exercise it, but on these
11 facts, there's a lawsuit pending in the State court and
12 I'm not going to grant a declaratory judgment. Is that a
13 permissible disposition of the case in the district court?

14 MR. ORLANDO: Not on that alone, Your Honor,
15 only because that would have been just one of the factors
16 that the Court has said in the Colorado River and Moses
17 Cone analysis that should be looked at. The Court --

18 QUESTION: So you're saying the district court
19 has to go through the whole Moses Cone list, even though
20 it's a declaratory judgment?

21 MR. ORLANDO: Yes, Your Honor, that is precisely
22 the position that this case --

23 QUESTION: How does the fact that it's a
24 declaratory judgment affect the Moses Cone calculus?

25 MR. ORLANDO: It affects it in the sense that

1 this Court's decision just about, I guess 6 years ago in
2 the NOPSI, a shorthand rendition of the New Orleans Public
3 Service case, that was a declaratory judgment case as
4 well, and the Court, although it didn't go through the
5 Colorado River-Moses Cone abstention analysis because it
6 presented a different type of abstention, the Court was
7 having to look at the Burford and Younger abstention
8 doctrines, that was a declaratory judgment case, and it
9 just so happened it presented Federal --

10 QUESTION: My question was, how does the
11 presence of a declaratory judgment request affect the
12 Moses Cone analysis? Are you in the process of answering
13 it, or have you gotten onto something else?

14 MR. ORLANDO: Well, Your Honor, I guess it
15 doesn't change -- our position would be that it does not
16 change the Colorado River-Moses Cone analysis at all, that
17 the same factors --

18 QUESTION: In spite of the discretion granted by
19 the statute itself?

20 MR. ORLANDO: Yes, Your Honor, because the
21 discretion that's granted by the statute itself is the
22 discretion to decide the merits of the case.

23 The statute itself, from just a literal reading
24 of the statute, does not mention the word "jurisdiction."
25 Nowhere in the legislative history of the declaratory

1 judgment statute does the word "jurisdiction" appear.

2 That statute is merely the creation of a Federal
3 remedy, and that got back to my opening statement, Your
4 Honor, that I believe that the only proper way to
5 interpret that language of "may" declare the rights is
6 that threefold test, that you literally can declare the
7 rights, you have to go through the justiciability
8 analysis, you can't grant the declaration if it's not a
9 justiciable controversy, and also, you don't have to grant
10 the relief if you go through the Colorado River-Moses Cone
11 analysis --

12 QUESTION: Mr. Orlando, now Moses Cone, that was
13 not a declaratory judgment action, was it?

14 MR. ORLANDO: No, Your Honor.

15 QUESTION: And I thought after Colorado River,
16 wasn't there that case of Will v. -- what was it?

17 MR. ORLANDO: Calvert --

18 QUESTION: Calvert --

19 QUESTION: Calvert, and didn't the plurality
20 there refer back to Brillhart and say Brillhart set the
21 standard?

22 MR. ORLANDO: Yes, Your Honor.

23 QUESTION: And so why shouldn't we adhere to
24 that? That was a post Colorado River case. Moses Cone
25 wasn't a declaratory judgment case. Why shouldn't we

1 stick with Brillhart?

2 MR. ORLANDO: The Will v. Calvert case, Your
3 Honor, which was decided just a couple of years after --
4 it was in between Colorado River and Moses Cone, there
5 were four justices that were led by the chief justice in
6 the plurality opinion which sent the case back down, as I
7 recall, but the fifth justice, Mr. Justice Blackmun, voted
8 with the other four justices to state very specifically
9 that the Colorado River analysis should apply.

10 So we did have five justices -- even though
11 there were three separate opinions in that case, five of
12 the justices post Colorado River said no, we need to apply
13 the Colorado River analysis.

14 QUESTION: Well, maybe it's time to declare that
15 Brillhart sets the standard.

16 MR. ORLANDO: That is the precise question
17 before this Court --

18 QUESTION: Exactly, and I would like to know why
19 that doesn't present the better point of view.

20 MR. ORLANDO: It doesn't present the better
21 point of view for a couple of reasons. The first and
22 perhaps the most important is just the pure separation of
23 powers between Congress and the legislative branch. The
24 Congress set forth the --

25 QUESTION: Congress gave the judicial branch

1 some discretion in the Declaratory Judgment Act. That's
2 clear on the face of it.

3 MR. ORLANDO: Yes, Your Honor, the Congress did
4 give discretion, but again, I would reemphasize that our
5 position is that that discretion was to grant the relief,
6 not to accept jurisdiction. Congress, it is very clear,
7 and there are some cases -- I can't recall the name of any
8 that this Court has said, but I'm almost certain there is
9 Supreme Court precedent for the authority that the
10 declaratory judgment statute is a remedial statute, that
11 it doesn't say anything about jurisdiction, and while it
12 is a discretionary remedy, there are lots of Federal
13 discretionary remedies, injunction relief, though really
14 our position is that there is no reason to treat the
15 discretionary relief, the equitable type of relief being
16 stated from a declaratory judgment versus any other type
17 of equitable relief that this Court --

18 QUESTION: You know, one of the ironies of the
19 issue is, we talk about Colorado River as unflagging
20 obligation, and of course they didn't retain jurisdiction
21 in that case itself, and one of the factors that Justice
22 Brennan mentioned in the -- in his opinion under all these
23 unflagging factors is desirability of avoiding piecemeal
24 litigation, citing Brillhart.

25 And he also says that the factors don't have any

1 necessary -- you don't know which one is the heaviest and
2 how to weigh them, but I don't know why, even within the
3 Colorado River formulation, one couldn't say that a
4 district judge has some discretion to decide whether,
5 given the case going forward in two different court
6 systems, which one is a better forum for adjudicating the
7 merits.

8 MR. ORLANDO: Part of the problem with that
9 approach, Your Honor, is that if this Court does not give
10 some guidance to the lower courts as to which factors
11 should or should not be looked at by the district court,
12 then in essence the Court is granting unfettered
13 discretion, and what is or may happen is the district
14 court may simply look at his docket and say, my docket is
15 overcrowded with criminal cases --

16 QUESTION: Well, supposing he looks at the
17 docket and says, if I take -- keep this case, I'll be able
18 to try it in about 30 months, it will probably go to trial
19 next week in the State court, and that's the only factor I
20 look at. Is that a sufficient factor?

21 MR. ORLANDO: If that's the only factor, then I
22 would say no, Your Honor. Although it is a fairly
23 compelling factor in and of itself, if the Court didn't
24 look at some of the other reasons why the case might
25 properly be in Federal court, then it would be our

1 contention that again, that would be basically unfettered
2 discretion.

3 QUESTION: Mr. Orlando, you answered Justice
4 O'Connor that that is indeed the issue here, whether we
5 should use as a jurisdictional issue what we have said to
6 be the basis for a merits determination under declaratory
7 judgment actions, but is that really the issue? Do we
8 know that the dismissal in the district court here was a
9 jurisdictional dismissal?

10 MR. ORLANDO: Yes, we do, Your Honor. The
11 dismissal, although the order is not worded specifically
12 saying that I'm declining to accept jurisdiction, a fair
13 reading of the order, as well as the Fifth Circuit
14 opinion, is that it was a threshold question.

15 QUESTION: Where did you get it, it's on B-2, B-
16 1 of the cert petition?

17 MR. ORLANDO: Yes.

18 QUESTION: I think I'm a fair reader, and I
19 can't -- it says, "the district court in its" -- on B-2,
20 "the district court in its discretion may provide
21 declaratory relief." It didn't say, may exercise
22 jurisdiction.

23 "To determine if declaratory relief is
24 appropriate," not if entertaining jurisdiction is
25 appropriate, "the court may consider whether the

1 declaratory judgment action was filed in anticipation of a
2 trial on the same issues," blah, blah, blah, blah, blah,
3 and then it goes down and says, "Thus, the court finds
4 that exercising jurisdiction to grant declaratory relief
5 would result in the piecemeal adjudication."

6 MR. ORLANDO: But it is -- I agree that is the
7 wording, but there was no consideration of the merits of
8 the proceeding, and that's really the basis for my
9 position, Your Honor, is in the motion to dismiss hearing
10 he didn't talk about merits.

11 QUESTION: What is the merits? I mean, the
12 merits is, if there is another State action pending and
13 declaratory judgment was filed in anticipation of trial on
14 that same issue, why isn't that exactly the merits?

15 MR. ORLANDO: Well, the merits of this case
16 would have had to address the propriety of whether or not
17 the insurer should be defending the underlying litigation,
18 which was the principal -- one of the principal issues --

19 QUESTION: But all that could be done in the
20 State court, and I think you agreed with me that one --
21 the fundamental thing that we start with in these days of
22 overcrowded courts, even without that, you should not have
23 two courts proceeding in the same matter at the same time.
24 That's so basic.

25 And then the question is, which one, and it

1 seems that this court, this district court just explained
2 why, that everything could be -- everything that was
3 brought to the Federal court and more was pending before
4 the State court, plus that suit came up in the ordinary
5 course, the insured suing the insurer, not the insurer
6 anticipating the suit.

7 So what reasons, other than the ones that were
8 given, need to be given?

9 MR. ORLANDO: Well, those -- Your Honor, there
10 are perhaps three or four of the other Colorado River-
11 Moses Cone factors that the court should have considered
12 and the court should have balanced those factors in favor
13 of accepting jurisdiction.

14 QUESTION: What factors, other than 1) there
15 should be one lawsuit; 2) the State court is not going to
16 relinquish this case. It's got all the parties, or more
17 of the parties before it than in the Federal court. What
18 else, beyond that, should a sensible district judge
19 consider?

20 MR. ORLANDO: Just, we contend none, other than
21 the Colorado River's --

22 QUESTION: Well, counsel, suppose that the State
23 of New York, I don't know if this is true or not, has a
24 statute which is exactly parallel to the Federal
25 declaratory judgment suit, and this action were brought in

1 the State of New York to enjoin the parties -- to declare
2 the rights of the parties. Would you tell the State court
3 of New York, in determining whether to exercise its
4 discretion to grant a declaratory judgment, that it has to
5 consider Moses Cone factors?

6 MR. ORLANDO: No, Your Honor, I don't believe
7 there would be any --

8 QUESTION: It seems to me that this case is no
9 different than that. Now, many of the factors that the
10 court considers sound very much like Moses Cone factors,
11 and they are, but you don't cite Moses Cone for the
12 proposition that the declaratory judgment relief is either
13 properly or improperly denied in the matter of the Court's
14 discretion.

15 MR. ORLANDO: Yes, Your Honor, I would agree
16 with that, but I would also point out to Your Honor the
17 NOPSI decision, which came just a few years ago, was a
18 declaratory judgment case.

19 QUESTION: Thank you, Mr. Orlando.

20 Mr. Powers, we'll hear from you.

21 ORAL ARGUMENT OF WERNER A. POWERS

22 ON BEHALF OF THE RESPONDENTS

23 MR. POWERS: Mr. Chief Justice, and may it
24 please the Court:

25 As I believe opposing counsel has conceded, what

1 we have before this Court today is merely a question of
2 statutory construction, no more, no less.

3 The question before this Court is, does the
4 Declaratory Judgment Act mean what it says when it says
5 "may" as oppose to "must" declare rights, and are we going
6 to engraft on this statute some requirement that the
7 discretion can only be exercised after there is some
8 hearing on the merits, whatever that means?

9 The issue before this Court is made simpler, it
10 seems, because it comes on the heels -- not on the heels,
11 after the decision in Brillhart some 50 years ago, which I
12 believe has already answered the question of statutory
13 construction for this Court.

14 Justice Frankfurter clearly held that the
15 discretion was vested in the district court by this
16 statute to have the discretion not to exercise
17 jurisdiction over a declaratory judgment act, particularly
18 when there is a State court proceeding that can resolve
19 the issue and all the issues are issues of State law, so
20 that issue has been decided.

21 QUESTION: Did he say that? Was it put that
22 way, not to exercise jurisdiction over the case?

23 MR. POWERS: I believe he does use the term
24 "jurisdiction" in the opinion.

25 QUESTION: Well, maybe, but he might have said,

1 as the Court here said, jurisdiction to grant the -- this
2 is very subtle, but that's what we're talking about, isn't
3 it?

4 MR. POWERS: It is very subtle, and picking up
5 on a point that was made earlier, it may be that we're
6 talking semantics more than anything else.

7 QUESTION: Maybe.

8 MR. POWERS: Is the decision not to exercise
9 jurisdiction to grant the relief no different than saying,
10 I'm exercising my discretion not to grant relief?

11 QUESTION: Right.

12 MR. POWERS: Justice -- Judge Hittner in his
13 opinion was, I thought, very artful in the way he drafted
14 his opinion.

15 QUESTION: Well, although he ended up -- I'm
16 afraid I misled counsel, saying he dismissed. He didn't
17 dismiss. He stayed, and stayed, I guess, is really much
18 more consistent with declining to exercise jurisdiction
19 over the case for the moment. Isn't that right? Or maybe
20 it isn't. Maybe it means I exercise jurisdiction, but I'm
21 just not going to make up my mind about the declaratory
22 judgment. Maybe it's in between the two.

23 MR. POWERS: Indeed. Perhaps it's no different
24 than a court deciding to allocate its docket in such a way
25 that it's going to put this case down the road apiece.

1 QUESTION: Down the road apiece.

2 MR. POWERS: And see what happens in the State
3 court. Now, that's not a jurisdictional decision. That's
4 just a docket allocation.

5 QUESTION: May I ask -- it's just a stay, not a
6 dismissal. Was this an interlocutory appeal, or was
7 that -- is a stay a final judgment? How did the court of
8 appeals have jurisdiction to review this?

9 MR. POWERS: I believe that the court of appeals
10 treated it as a final judgment in that it was for all
11 practical purposes concluded with the stay.

12 QUESTION: But the case was still pending in the
13 district court.

14 MR. POWERS: That is an intriguing --

15 QUESTION: I suppose any time the district court
16 decided to, he could have just said I think I'll -- I find
17 out that the proceedings have been delayed interminably
18 over in the States, and I think we ought to go ahead with
19 this trial. Nothing would have prevented the judge from
20 doing that, would it?

21 MR. POWERS: I think that is a fair point, and
22 perhaps does argue that perhaps abstention analysis is at
23 play here to some degree. I don't know that the court of
24 appeals actually focused on that issue when they took
25 jurisdiction.

1 QUESTION: Maybe that's why they didn't want to
2 publish their opinion.

3 (Laughter.)

4 MR. POWERS: That may very well be the case. But
5 to say that they did not focus on the issue is not to say
6 that had they focused on the issue they may have decided
7 that they didn't have jurisdiction to begin with, perhaps,
8 because they could have construed this as a
9 nonjurisdictional --

10 QUESTION: No, but they affirmed. They didn't
11 dismiss the appeal.

12 MR. POWERS: That is true. That is true.

13 QUESTION: What did Moses Cone do, do you
14 remember? Did they dismiss or stay? We call all of these
15 things abstention cases. I went through them once and I
16 forgot what conclusions I came up with, but some we
17 dismiss and some we simply say, we're going to wait to see
18 what the State court does. What was Moses Cone?

19 MR. POWERS: Your Honor, I do not know the
20 answer to your question. I think that --

21 QUESTION: They're quite different things,
22 really, aren't they?

23 MR. POWERS: Well, they are. As I recall,
24 though, the policy reasons for underlying the abstention
25 doctrines, at least in part, was that it's perhaps less

1 prejudicial to the litigant who is petitioning for relief
2 to stay the action and to keep it on the court's docket in
3 order to see how the State court action or the parallel
4 proceeding, whatever that might be, proceeds, and that's
5 somehow less draconic.

6 I must confess, I don't know that that's
7 necessarily true in a declaratory judgment action. I
8 don't see why they can't simply dismiss the case, and then
9 if it needs to be refiled, it can be refiled later if need
10 be, but I don't know the answer to Your Honor's question.

11 QUESTION: In Colorado River, as I read the
12 opinion we affirmed the order dismissing the complaint.
13 We usually should talk about dismissing actions.

14 MR. POWERS: That's correct.

15 The -- whatever procedure is used, it seems to
16 me, to resolve the matter, is certainly -- should not be
17 dispositive of this appeal. The problem I'm having also
18 with the merits of this issue that's being advanced by the
19 petitioner is, we have had the decision by this Court some
20 50 years construing the statute. There's been no
21 legislative response to it.

22 Now, they've had plenty of time -- the
23 legislature has had plenty of time to engraft whatever
24 protections need to be engrafted on the declaratory
25 judgment statute and has done nothing, which I think leads

1 even more conclusively to a conclusion by this Court that
2 in the absence of some legislative response to the earlier
3 decision, that we should interpret the statute as it was
4 interpreted by Justice Frankfurter.

5 Now, whether that means it's a jurisdictional
6 issue, or it's simply a decision not to grant the relief,
7 how that is handled semantically, it probably would be a
8 pure, a logically pure reasoning to say it's
9 nonjurisdictional, that it's simply a question of
10 interpreting the statute and denying the relief under --
11 with the discretion of the court.

12 QUESTION: Isn't it just the difference between
13 12b(1), which would be subject matter jurisdiction, and
14 12b(6) doesn't state a claim for relief?

15 MR. POWERS: I think so. I think so, but I also
16 think you could probably run a Rule 56 motion and get to
17 the same result. That's why I didn't quite understand
18 earlier why that should make a difference whether you run
19 a Rule 56 motion, a summary judgment motion saying that
20 because of these parallel proceedings you should not
21 exercise jurisdiction here, or you should not grant the
22 relief because there's another forum better suited to
23 grant complete relief with all the parties.

24 Either way, you would get to the same result, it
25 seems to me, whether it would be under Rule 12 or under

1 Rule 56, and surely we're not here in this Court because
2 it was a Rule 12 motion as opposed to a Rule 56 motion
3 that was filed below, but either of those two provisions
4 would, of course, accord the same relief.

5 QUESTION: Maybe the stay result in the district
6 court is like if you grant a motion, a forum non
7 conveniens motion when the forum is broad and the district
8 court wants to make sure that that other litigation really
9 goes forward before dropping the case. If it's
10 reinstituted there may be a statute of limitations
11 question. Maybe that was the logic behind the stay.

12 MR. POWERS: I think so, but I'm not so sure you
13 have a statute of limitations issue with a declaratory
14 judgment action in this case, but that would be -- that is
15 typically one of the reasons for staying instead of
16 dismissing, is to avoid any kind of statute of limitations
17 bar.

18 QUESTION: How did the -- Justice Stevens and I
19 were just speculating, how does a stay get to be
20 appealable as a final order? I mean, suppose he hadn't
21 announced a stay, just put it at the bottom of his stack
22 of cases, just didn't get to it for several years?

23 MR. POWERS: If memory serves, and I always hate
24 to pull a case out of the top of my head, but doesn't the
25 Landis case speak to a situation where a trial court

1 abuses its discretion by manipulating its docket in such a
2 way as to, in essence, never reach judgment on a case?

3 QUESTION: It sounds right to me.

4 MR. POWERS: I think that's the case, but
5 that's --

6 QUESTION: Did you ask for an injunction?

7 MR. POWERS: No. We did not ask for anything.
8 We were the defendant.

9 QUESTION: Well then, 1292, or did the -- pardon
10 me. Did the plaintiff ask for an injunction?

11 MR. POWERS: Absolutely not, simply a
12 declaratory relief.

13 QUESTION: Then 1292(a) doesn't work.

14 MR. POWERS: No.

15 QUESTION: Gee, maybe the case doesn't belong
16 here.

17 (Laughter.)

18 MR. POWERS: We've traveled a long way. It must
19 belong here.

20 (Laughter.)

21 QUESTION: Well, let's go ahead on the
22 assumption it does, yes.

23 MR. POWERS: We must get an opinion on this.
24 The -- but it is an intriguing jurisdictional issue, I
25 grant that. The -- I'm also having difficulty

1 understanding any public policy reason for engrafting the
2 Colorado River notions onto the Declaratory Judgment Act.
3 The -- you know, making Erie leaps into State law is great
4 sport, but you know, the fact is that Federal courts
5 would -- who already have an overly burdened docket ought
6 to be spending what little precious time they have
7 addressing Federal issues, Federal crimes, and not
8 guessing at what a State court will do in resolving purely
9 a State law question.

10 The declaratory judgment action also, as in this
11 case, is simply used for abuse. I mean, for abuse for
12 forum shopping. This is a classic example, it seems to
13 me, of a misuse or abuse of the Declaratory Judgment Act.

14 In this case, to talk a little bit about
15 insurance law for just a moment, typically in a third
16 party insurance contract you have two distinct duty. You
17 have a duty to indemnify, and you have a duty to defend.

18 In this case, the insurance carriers had already
19 decided not to afford coverage to the respondents. They
20 had already rejected any coverage with respect to the
21 defense obligation. They certainly didn't need to
22 petition a Federal court in order to get comfort before
23 they made that decision. They made that decision without
24 any judicial intervention.

25 And in terms of indemnification obligations, the

1 Winkler County action, which is the subject of the
2 declaratory judgment suit below, that State court
3 proceeding is still on appeal. It may be reversed. Who
4 knows what will happen with that State court proceeding,
5 so it's premature to grant a declaratory judgment action
6 with respect to whether or not there will be indemnity.

7 QUESTION: Where is Winkler County?

8 MR. POWERS: It's in West Texas, Your Honor.

9 QUESTION: In -- how large is the county seat?

10 MR. POWERS: Well, Your Honor, I don't know how
11 large the county seat is, but it's a relatively rural
12 area.

13 QUESTION: Is there any reason why all this
14 litigation was brought there rather than somewhere else?

15 MR. POWERS: In the underlying litigation --
16 this, of course, does not involve any of the insurance
17 carriers. It was brought there in part because that -- it
18 was an oil and gas dispute, and venue was proper under
19 State law in that jurisdiction because of where the oil
20 and gas was being developed.

21 QUESTION: The statements you were just making
22 about this being premature as a declaratory judgment
23 action, assume -- and about race to the courthouse assumes
24 that the Declaratory Judgment Act was not meant precisely
25 to permit what occurred here, to permit an out-of-State

1 defendant who does not want to have to be subjected to
2 State courts to file first in order to avoid that.

3 MR. POWERS: Justice Scalia, I will take issue
4 with that, if I may.

5 QUESTION: Well, I'm not -- I'm saying -- I'm
6 just saying what you assumed. I don't know whether it's
7 right or wrong, but why do you assume it?

8 MR. POWERS: Well, the purpose of a declaratory
9 judgment action, as I understand it, is that before a
10 party breaches a contract, before they engage in conduct
11 that might be a breach of contract, and thereby expose
12 themselves to the damages that flow from that, that they
13 would go to court to seek a declaration of what the
14 contract -- contractual rights and duties are.

15 That's the classic example of why you would use
16 a DJ, and that often happens in the insurance industry.
17 An insurance carrier decides to defend, even though they
18 think there's no coverage, and then they simultaneously --
19 before they breach a contract they simultaneously seek a
20 declaration of their rights as to whether they have a duty
21 to defend.

22 In this case, the carriers had already decided
23 to deny defense. They had already breached the contract,
24 if they indeed had breached it, so there was no need to
25 seek a declaration with respect to that issue.

1 With respect to duties of indemnification, as
2 Your Honor knows, you cannot use the declaratory judgment
3 action to adjudicate purely speculative results, and until
4 the Winkler County action is ultimately resolved, either
5 by affirming the trial court's judgment, or modifying it,
6 or remanding it and retrying it, whatever happens, it's
7 impossible to know whether there will ultimately be a duty
8 to indemnify under the insurance contracts, so why are we
9 wasting time with a declaratory judgment action where the
10 carrier has already decided to breach the contract, if it
11 did breach the contract, and it's too early to tell --

12 QUESTION: Well, that was their mistake, then.
13 They really shouldn't have made that decision. They could
14 have just not shown up and say, we really aren't really
15 sure. Should the whole thing turn on that, do you think?

16 MR. POWERS: Well --

17 QUESTION: It's easy enough for an insurance
18 company never to make up its mind categorically until the
19 action is filed.

20 MR. POWERS: I think we would have had a truer
21 application of a DJ action if -- if upon giving notice to
22 the carrier, the carrier had come in and defended the
23 lawsuit and simultaneously sought a declaration of rights.
24 That would be a classic example and a proper example.

25 QUESTION: Why --

1 QUESTION: Is this -- I'm sorry.

2 QUESTION: Go on.

3 QUESTION: Of course, isn't there another factor
4 we at least ought to think about for a minute, that one of
5 the whole purposes of diversity jurisdiction is to avoid
6 the danger of a forum that's somewhat prejudiced in favor
7 of the local citizenry, and if the law would say, well, we
8 will let the local court go forward, we kind of forget why
9 the authors of the Constitution even granted diversity
10 jurisdiction in the first place.

11 MR. POWERS: Well, at the risk, of course, of
12 heresy to the Constitution, I will say there is something
13 that many State courts find offensive, at the concept that
14 a State court is somehow biased simply because a foreign
15 interest is before the bar, and -- but aside from that --

16 QUESTION: That's not our thinking. It's the
17 Founding Fathers.

18 MR. POWERS: Yes, I know, but --

19 QUESTION: I mean, blame it on them.

20 QUESTION: It's not a frivolous suggestion.

21 QUESTION: They did establish diversity
22 jurisdiction.

23 MR. POWERS: But by the same token, by the same
24 token Congress has repeatedly distinguished between
25 Federal jurisdiction -- I mean, diversity jurisdiction and

1 Federal question jurisdiction, making it much easier for
2 litigants to petition a Federal court for relief than for
3 purely diverse parties to seek Federal relief.

4 Besides, they have an answer. They have a
5 remedy. If -- we have removal statutes, and they either
6 apply or they don't apply, and so where a court --

7 QUESTION: I'd say you've nicely avoided that by
8 including another party in the State action, which is a
9 party, a Texas party, so that removal in this case will
10 not be possible, and as I recall they say that occurred
11 after they filed the declaratory judgment.

12 MR. POWERS: Well, two responses to that. First
13 of all, it's not true, and of course, if it were true,
14 they had a remedy. They could have removed the case and
15 argued fraudulent joinder of the nondiverse party, and
16 there's a whole body of law that could have come to their
17 rescue if rescue they needed.

18 But they didn't remove the case. They didn't
19 test the fraudulent joinder, and the reason they didn't do
20 it is because it's patently frivolous, because obviously
21 the Hunts, who are the other plaintiffs and the other
22 carriers, they didn't talk the other carriers into
23 rejecting coverage solely so the Hills could defeat
24 removal jurisdiction, so while that's a nice argument
25 that --

1 QUESTION: It seemed like a nice argument to me.

2 MR. POWERS: Well, it's a nice argument. They
3 have a remedy for that, and so the issue that you're
4 addressing, and that is, are we doing disservice to the
5 Constitution by creating an impediment to a foreign
6 interest seeking relief from a Federal court, the answer
7 is no. The answer is, they have removal statutes. If the
8 removal statutes apply, they will apply, and if the
9 foreign interest has truly a right to be in Federal court,
10 that right will be afforded.

11 QUESTION: But how can they remove, because as I
12 understand it, the State court suit doesn't have
13 complete -- there isn't complete diversity, and there's no
14 basis that you could -- one defendant could get out and
15 get into Federal court.

16 MR. POWERS: And the answer to that, again, is
17 in the Framers of the Constitution and in the Congress. I
18 mean, the district courts are creatures of legislation,
19 and the legislation makes clear that you have to have
20 complete diversity, so I guess the answer to the question
21 is, no, they can't remove the case because there isn't
22 complete diversity, but then it was never envisioned that
23 litigants could petition the Federal court where there
24 wasn't complete diversity. That's just the way the
25 statutes are written.

1 I have -- in responding to your questions, I
2 believe -- I suppose there's one thing I should pick up if
3 I can, Justice Ginsburg, because I want to stress that we
4 should not divorce rules of law from practicality, and
5 there is nothing more egregious than two courts racing to
6 judgment with the same controversy.

7 There is nothing that creates more waste. There
8 is nothing that creates more animosity between two systems
9 of justice, a State system and a Federal system of
10 justice. I've been there. I've seen it, and you see it
11 frequently where, whenever one litigant in the race to
12 judgment is displeased with a ruling by that judge, he
13 runs to the other forum and tries to pit one court against
14 another court.

15 It's not only a waste of resources, it's
16 entirely unseemly, it seems to me, and absent
17 extraordinary circumstances there is no reason for a
18 Federal court to be acting in a purely declaratory manner
19 when you have a pending State court action that can fully
20 resolve the issues.

21 As was noted by one of the justices earlier,
22 somebody has to give. Somebody has to give, and Congress
23 in the DJ statute gives the Federal courts the ability to
24 give, and that's what the Federal courts should do, is
25 they should give, and they should yield to the State court

1 remedy.

2 QUESTION: You would not say it would be an
3 abuse of discretion for a Federal district judge to say,
4 well, that's a pretty complex proceeding over there in the
5 State court. It's going to take a long time to decide.
6 They've got all those parties in, and these parties just
7 want me to decide one narrow issue. I will exercise my
8 discretion to go ahead and decide that. You wouldn't say
9 he'd be off-base doing something like that, would you?

10 MR. POWERS: I think under the law he would
11 probably have the discretion to do that. I would argue
12 that to exercise that discretion would be abusive under
13 those circumstances.

14 I have a hard time imagining any situation in
15 which, given the pendency of a State court action, given
16 that you're only dealing with State law questions, okay,
17 given that you have complete identity of parties in the
18 two proceedings, I find it -- I find it very difficult to
19 conceive of a compelling reason why a Federal court should
20 make an Erie leap that it doesn't need to make solely for
21 the purpose of intruding itself into that State court
22 action. I have a hard time seeing a reason for that.

23 QUESTION: Well, that's surely true when the
24 State action is filed first, but here it was filed second.
25 Suppose an insurance company wants to get this thing --

1 there's some reason why it thinks it's necessary.

2 There are elderly witnesses involved. They
3 don't want to take a chance about witnesses dying, so they
4 want to get it resolved quickly, and they don't know how
5 long it is going to take the plaintiff to file, so they
6 file a declaratory judgment action at once, and then what?
7 I don't know. Contract statute of limitations in Texas,
8 what is it? It's 5 years later in the -- after a lot of
9 evidence has been taken in the declaratory judgment action
10 the State action commences. You wouldn't --

11 MR. POWERS: I think that is why the discretion
12 feature is given to the district court. You could perhaps
13 hypothesize a situation where the State court action is
14 not filed until, say, several years after the Federal
15 court action has been filed, and it has proceeded apace to
16 such a point that it would be a total waste of judicial
17 resources not to reach a resolution.

18 QUESTION: But that's very far afield from your
19 case where the Federal action was reinstituted after you
20 gave notice that you were bringing a suit in State court.

21 MR. POWERS: Indeed, and in this case, of
22 course, very little water had been tread before the State
23 order was entered.

24 Moreover, one fact I think is interesting in
25 this case, bearing on this issue, is that, remember there

1 were two declaratory judgment actions. The petitioners
2 come into this Court saying, all we want is to rush to
3 judgment, rush and hurry and get a declaratory action
4 filed and get resolution of this issue.

5 They dismissed their first case. They dismissed
6 it, and quite frankly would never have refiled it but for
7 the fact that the policyholder declared its intentions to
8 seek affirmative relief in State court, so this is -- just
9 on the facts of this case, this is not one where, as you
10 might posit, a carrier legitimately is at a loss for a
11 declaration of its rights.

12 This is not that case. They did not seek an
13 immediate resolution of the issue. In fact, they agreed
14 to dismiss their case, and there are no --

15 QUESTION: In fairness, though, they agreed to
16 dismiss it because they thought it was moot. Didn't they
17 think that there was not going to be any claim made
18 against them?

19 MR. POWERS: I don't believe that there's
20 anything in the record to suggest that, and I might say,
21 there's been a lot of things outside the record in the
22 briefing, and I haven't pointed that out in opening, but
23 much of the arguments that they make that the Hills have
24 engaged in forum-shopping themselves is really outside the
25 record, and -- but anyway, that did not exist there.

1 Unless there are any other questions by the
2 Court, I appreciate the Court's attention and I yield the
3 rest of my time.

4 CHIEF JUSTICE REHNQUIST: The case is submitted.

5 (Whereupon, at 11:55 a.m., the case in the
6 above-mentioned matter was submitted.)

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CERTIFICATION

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

LESLIE WILTON, ETC., ET AL., Petitioner v. SEVEN FALLS COMPANY, ET AL.

CASE NO.: 94-562

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

BY *Don Mani Federico*

(REPORTER)