

No. 18-9184

ORIGINAL

Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

Michael B. White
Darla K. White, deceased
Petitioner

v

Colleen K. Corcoran, Chapter 7 Trustee
Frankenmuth Credit Union,
Respondents

PETITION FOR A WRIT OF CERTIORARI

Petitioner pro se:

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Darla K. White, deceased
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QUESTIONS PRESENTED

1. Did the 6th Circuit Court of Appeals err when it determined that a Chapter 11 debtor-in-possession loses all rights to recover under 11 USC 506(c) upon the case being converted to Chapter 7, including loss of recovery for \$18,529.05 in preservation costs incurred from Chapter 11 petition to conversion?
2. Did the 6th Circuit err when it determined a Chapter 7 debtor-in-possession, who performed some of the duties of the Chapter 7 trustee, may not recover under §506(c) even though the bankruptcy court ordered debtor pay ad valorem taxes and other preservation expenses of \$6,168.20, but would not order trustee to pursue recovery?
3. Did the 6th Circuit err in determining Petitioner did not prove he had a “colorable claim that would benefit the bankruptcy estate,” thus Debtors could not directly seek recovery of preservation costs?

To all Debtor-petitioner answers: Yes. All others answer: No.

PARTIES TO THE PROCEEDING

Petitioner pro se:

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RULE 29.6 STATEMENT

Petitioner is an individual and is not nongovernmental corporation. Petitioner does not have a parent corporation or shares held by a publicly traded company.

ORAL ARGUMENT

Petitioner does not oppose oral argument, but suggests this court can resolve the matter without it, leaving oral argument to the court's discretion.

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ORDER BELOW

The 6th Circuit issued its order on November 21, 2018, case 18-1301 (6th Circuit), see Appendix, App 1, Petitioner Debtor White requested 6th Circuit en banc hearing which was denied January 7, 2019 (Appendix, App 2), the mandate was issued January 15, 2019 (Appendix, App 3).

The matter made it way to the 6th Circuit, via the *White v Corcoran et al*; In re: Michael B. White and Darla K. White, deceased; case 17-cv-12394-BC, U.S. District Court, E. D. Mich. N.D., decided May 31, 2018.

The matter made its way to the U.S. District Court, via In re: Michael B. White & Darla K. White (deceased), Chapter 11 converted to Chapter 7, case 13-21977-dob, U.S. Bankruptcy Court, E.D. Mich. N.D, Docket 696, date July 11, 2017.

JURISDICTION

U.S. Supreme Court has jurisdiction under 18 USC 1254(1) and 11 USC 2101(c).

The 6th Circuit Court of Appeals had jurisdiction per 28 USC 1291. The U.S. District Court had jurisdiction per 28 USC 158(a)(1). The Bankruptcy Court had jurisdiction under 28 USC 157 and 28 USC 1334.

LAW UNDER REVIEW

11 USC 506(c) “The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.”

11 USC 1107(a) a debtor in possession shall have all the rights...and powers, and shall perform all the functions and duties...of a trustee serving in a case under this chapter.

Hartford Underwriters Ins. Co. v Union Planters Bank, N.A., 530 U.S. 1 (2000) footnotes 3: A Chapter 11 debtor-in-possession has the same rights as a trustee,” and footnote 5: “We do not address whether a bankruptcy court can allow other interested parties to act in the trustee's stead in pursuing recovery under §506(c).”

Contrary to the 6th Circuit’s assertion, this case does not involve 11 USC 1109(b) right to be heard in Chapter 11.

STATEMENT OF THE CASE

Michael B. White and Darla K. White were husband and wife since 1982. Darla became disabled in 2007. Darla died on January 1, 2015. Most of Darla's assets passed directly to Michael by-passing her Michigan probate estate. Assets in her probate estate passed to Michael as sole heir, he is the personal representative, and the estate has no creditors. See *Bass v Leatherwood*, 788 F3d 228(6th Circuit 2015).

July 30, 2013, Debtors White filed Chapter 11 reorganization, the case was converted to Chapter 7 liquidation on August 22, 2014.

Under 11 USC 541, upon filing a bankruptcy petition, all rights and interests of the debtor become bankruptcy estate assets, then property is removed from the bankruptcy estate by debtor's 11 USC 522 exemptions and 11 USC 554 abandonment. Debtors did claim 11 USC 522(d)(1) homestead and (d)(5) wildcard exemptions against the property, however, the bankruptcy court denied them as it would deplete the money in the bankruptcy estate. §554(b) states, "On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."

The property involved in this matter is 11085 Block Road, a home, barns, and 40.42 acres of land, in Birch Run, Michigan. Ultimately, the property was sold per 11 USC 363, rather than abandoned to Debtors under §554.

Debtors White's 11 USC 522(d) exemptions were denied pursuant to *Baldrige v Ellmann (In re: Baldrige)* 553 F. App'x 598 (6th Circuit 2014) and *Brown v Ellmann (In re: Susan Brown)* case 16-1967 (6th Circuit, March 20, 2017), meaning Debtors received no money from the sale.

Debtors expended \$24,697.25 for preserving 11085 Block Road from date of Chapter 11 petition until its sale:

1. Chapter 11, July 30, 2013 - August 21, 2014, amount spent \$18,529.05
2. Chapter 7, August 22, 2014 – August 8, 2015, amount spent \$6,168.20.

Debtors were the only party to pay any preservation costs. All sums expended by Debtors were reasonable, necessary costs and expenses of preserving the property. Trustee and Frankenmuth Credit Union did not object to need or reasonableness. The Credit Union was the primary beneficiary of the sale, receiving 87% of the gross proceeds. Trustee did pay some (property taxes, title insurance, transfer fees), but not all, (trustee commissions, auction fees and commissions) expenses directly related to the sale.

Had 11085 Block Road property been abandoned from the bankruptcy estate to Debtors pursuant to §554, the preservation sums expended by Debtors would not be recoverable under §506(c) as it would have been Debtors' property retroactive to the

date of petition. See *Brown v O'Keefe*, 300 U.S. 598, 602 (1937); *Sessions v Romadka*, 145 U.S. 29, 51-52 (1892).

To seek recovery under §506(c) the property must be property of the bankruptcy estate.

Debtors payment of reasonable and necessary preservation costs benefited the bankruptcy estate. But for Debtors' preservation-- the property would have been devalued for lack of maintenance and would have been forfeited to the county for post-petition real estate taxes. The property was sold and the sale approved by the bankruptcy court. By definition the property must have meaningful, consequential value and benefit to the estate otherwise §554 would require abandonment to Debtors. If Debtors did not pay back real estate taxes and the property forfeited to the county the bankruptcy estate and the lender would have lost all their interest in the property. Debtors assert paying back real estate taxes, and other necessary costs, is "colorable claim" as but for Debtor paying them the property would not have been available for sale by the bankruptcy estate.

Debtors motioned the bankruptcy court for Trustee to either pay the preservation costs from the bankruptcy estate or seek recovery from Frankenmuth Credit Union under §506(c), or alternatively to allow Debtors to directly seek reimbursement from the credit union per 506(c). The bankruptcy court (and subsequent courts) denied Debtor's request thus violating *Hartford Underwriters* and derivative standing under *In re: Trailer Source, Inc.*, 555 F3d 231 (6th Circuit 2009).

The U.S. District Court affirmed the bankruptcy court. The 6th Circuit Court of Appeals affirmed both lower courts.

In addition to requesting reimbursement for "necessary costs and expenses of preserving the property," Petitioner motioned the bankruptcy court to issue an order to require an evidentiary hearing to expose that Chapter 7 Trustee knew the sale of the property was a loss and the steps she took to hide the loss. In the bankruptcy court, Petitioner-Debtor asserted Trustee deceived the bankruptcy court with fraudulent intent to approve the sale of the homestead (Bkr 13-21977-dob, docket 351). Trustee asserted there would be a \$5,000.00 profit to the bankruptcy estate, if Debtors' homestead exemptions were not paid. Debtor asserted Trustee fraudulently structured her motion by intentionally omitting the \$7,756.85 auction commission (Bkr docket 351), \$3,500.00 auctioneer advertising and miscellaneous expense (Bkr 302), \$10,150.00 attorney fees directly tied to the sale (Bkr 442), and \$11,518.26 trustee's 11 USC 326 commission (Bkr docket 594), totaling \$32,925.11. The \$5,000.00 profit Trustee asserted was actually a loss of \$27,925.11 (not including debtors' homestead exemption). The \$32,925.11 in undisclosed expenses were known to Trustee at the time she petitioned the bankruptcy court to approve the sale. Under 11 USC 363, Trustee was obligated to show a profit, otherwise §363

obligated the bankruptcy court to deny the sale. Debtor asserts Trustee fraudulently constructed her motion to deceive the bankruptcy court, so Trustee could collect her \$11,518.26 commission (and later her attorney fees) from the co-mingled sales of other assets, thereby putting her own financial interest ahead of both the debtor and the bankruptcy estate's unsecured creditors. The 6th Circuit did not address the evidentiary hearing issue.

SUMMARY OF LAW

Hartford clearly decided Chapter 11 debtors-in-possession can surcharge the property bearing the secured creditor's lien. Neither §506(c) nor *Hartford* placed a time limit as to how quickly the Chapter 11 debtor-in-possession must make the surcharge. The 6th Circuit says Chapter 11 costs must be sought before conversion to Chapter 7; however, the 6th Circuit made a flawed reading of *Hartford*. At pages 7 and 8 of *Hartford* is in discussion of Hartford's allegation that Chapter 11's section §1109(b) right to be heard was applicable in Chapter 7. Any other interpretation is out of context and flawed as it would necessitate the debtor-in-possession to make several recovery filings to avoid portions of the legitimate §506(c) costs being non-recoverable upon conversion. No other circuit has interrupted *Hartford* as the 6th Circuit has.

The 6th Circuit decision at page 3 failed to differentiate the role of *Hartford* versus the role of White. *Hartford* was merely a general administrative claimant, while White was acting in the place of the Trustee while performing duties of the Trustee.

Hartford did decide that an unsecured creditor cannot seek recovery of preservation costs under §506(c), but *Hartford* footnote 5 specifically left open the issue whether other interested parties may seek recovery. This case requests a Chapter 7 debtor-in-possession be allowed to recovery expenses. Because the Trustee did not have the money to pay bills, and the credit union refused to pay them, had Debtors White not paid the bills and the property lost to local government real estate tax forfeiture the bankruptcy estate would have lost a valuable asset to no one's gain. This follows the logic the court put into its *Hartford* footnote 5, "We do not address whether a bankruptcy court can allow other interested parties to act in the trustee's stead in pursuing recovery under §506(c)." The footnote continues to note *Hartford* did not seek trustee to pursue the claim and did not seek permission to act on behalf of trustee. The only theory this court rejected in *Hartford*, is that *Hartford*, an unsecured administrative claimant, did not have an independent right to seek direct recovery.

It is also important to note, where *Hartford* volunteered to provide the insurance, in this case Debtors were required to provide the preservation costs by Chapter 11 rules and by the bankruptcy court's order. Debtors believes the bankruptcy court violated *Law v Siegel*, 571 U.S. ____ (2014) by not granting Debtor's 11 USC 522(d) homestead and wildcard exemptions and violated the Debtor's right to due process by ordering Debtors to pay the bills without any hope of recovery, thereby depriving Debtors their Fresh Start.

The acceptance of this petition will clarify and expand matters which *Hartford Underwriters Ins. Co. v Union Planters Bank, N.A.*, 530 U.S. 1 (2000) ("Hen House") left open regarding bankruptcy code 11 USC 506(c). Hartford footnote 3, "Debtors-in-possession may also use the section, as they are expressly given the rights and powers of a trustee by 11 U. S. C. §1107." Footnote 5 states, "We do not address whether a bankruptcy court can allow other interested parties to act in the trustee's stead in pursuing recovery under §506(c)." Hartford did resolve that a creditor cannot automatically use §506(c) to surcharge preservation expenses against property securing another creditor's claim; however, this case involves the debtor performing the duties of the trustee in Chapter 11 and performing some of the duties of trustee while in Chapter 7.

11 USC 506(c) states, "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property."

In *Hartford*, footnote 5, the Supreme Court recognized bankruptcy courts have been addressing the issue of "other interested parties" on a piece-meal basis. This Court's acceptance of Petitioner's request will bring harmony to the issue, giving bankruptcy judges, secured creditors, trustees, and debtors, both Chapter 11 and Chapter 7, a clear road map as to the best use of scarce financial resources, and whose duty it is to seek expense recovery.

The 6th Circuit committed three egregious errors, all at page 3 of its decision. Justice requires their decision be reversed and corrected.

1. The 6th Circuit did recognize Debtors White was a Chapter 11 debtor-in-possession performing the duties of a trustee; however, the 6th Circuit misapplied *Hartford Underwriters Ins. Co. v Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) deeming the 11 USC 1109(b) "right to be heard" in Chapter 11 was applicable and superseded recovery under §506(c) upon conversion.
2. After case conversion to Chapter 7, the 6th Circuit failed to recognize Debtors White was a Chapter 7 debtor-in-possession performing some of the duties of a trustee and "but for" recovery from the property securing the secured

creditor's claim Debtors are without justice. The 6th Circuit decision actually gives the bankruptcy code the opposite effect Congress intended. By allowing the bankruptcy court to make Debtors pay the bills, without any benefit to the Debtors, and for the sole benefit of the bankruptcy estate, the 6th Circuit financially punished debtor for filing bankruptcy, rather than providing a Fresh Start.

3. Regarding derivative standing, the 6th Circuit erred when it stated Debtors White failed his duty to prove a "colorable claim that would benefit the bankruptcy estate," a needed prerequisite under *In re: Trailer Source, Inc.* 555 F3d 231, 245 (6th Circuit 2009). On this point, the 6th Circuit is clearly wrong because "but for" Debtors preservation the bankruptcy estate would not have had a property to sell. Also, the 6th Circuit failed to recognize reimbursement of Debtors' costs does not cost the bankruptcy estate. The money will come from the secured creditor Frankenmuth Credit Union, who has received an unfair windfall by not paying any of the necessary expenses.

REASONS FOR GRANTING THE WRIT

Rules of the Supreme Court of the United States Rule 10(c) a United States court of appeals...has decided an important federal question in a way that conflicts with relevant decisions of this Court. In this case, the 6th Circuit has failed to follow this court's mandate that a Chapter 11 debtor-in-possession may recover under 11 USC 506(c).

In this case, Petitioner was a Chapter 11 debtor-in-possession while \$18,529.05 of reasonable and necessary property preservation expenses were incurred, and Petitioner was the Chapter 7 debtor-in-possession performing some of the functions of trustee while another \$6,168.20 was incurred.

"From the viewpoint of the wage-earner there is little difference between not earning at all and earning wholly for a creditor. The amount...may here be small, but the principle, once established, will equally apply where both are very great," *Local Loan Co. v Hunt*, 292 U.S. 234 (1934).

This petition should be accepted for clarification and furtherance of the law. *Hartford* footnote 5 specifically left open whether other claimants have the same rights under §506(c). Petitioner was performing some functions of the trustee while a Chapter 7 debtor-in-possession. Trustee assigned her duty and then Debtors were denied both reimbursement and their §522(d) exemptions.

Hartford further left open the issue of derivative standing, in the event Trustee refuses to perform her duties. The *Hartford* decision did not accept Hartford Insurance's argument that trustee may lack the incentive to pursue §506(c) claims, this court found such situations would be "limited by the fact that the trustee is

obliged to seek recovery under the section whenever his fiduciary duties so require.” In this case, trustee breached her obligation to seek recovery, and the bankruptcy court refused to force Trustee to do her duty.

The bankruptcy court ordered Debtors to use their post-petition earnings to fund preservation costs because the Trustee did not have the money to pay them. If Trustee did not pay the costs the property would have been forced to be abandoned back to debtors under 11 USC 554, thus removing it from the bankruptcy estate. To keep the property in the bankruptcy estate, the bankruptcy court ordered Debtors pay the preservation costs at a time Debtor could least afford it, while bankrupt and fighting a terminal illness. For added financial insult the bankruptcy court denied Debtors’ their 11 USC 522(d) homestead exemption on the flawed theory there was no equity in the property against which to claim the exemption and that it was Trustee, not Debtors, that created the equity from the sale. Debtors believe this is a violation of *Law v Siegel*, 571 U.S. ____ (2014) not only by denying the exemptions but also by failing to follow the bankruptcy code regarding §554 abandonment. The reason for denying the exemptions is it would have forced abandoning the property to back to debtor.

Previous to *Hartford*, the circuits were split whether a third party could recovery under §506(c). *Boatmen First Nat’l Bank of Kansas City v Kansas Public Employees Retirement System*, case 95-1077 (8th Circuit 1995) ruled an administrative claimant could seek recovery under 506(c) for payroll taxes, interest, and penalties. *In re: JKK Chevrolet, Ford Motor Credit Company v. Chrysler Credit Corporation*, cases 04-2374 and 04-2458 (4th Circuit 2005) that court that reasoned allowing claimants to proceed directly against secured creditors undermines the fundamental purpose of the Bankruptcy Code, which is to provide equitable distribution to similarly situated creditors. The Fourth Circuit stated trustees “owe fiduciary duties to the creditors of the estate. A failure to seek recovery of a qualifying claim under section 506(c) may constitute a breach of those duties.”

When Debtors paid the bills, trustee was unable to pay Debtors, who then also became a creditor to the bankruptcy estate.

Burdening debtors with non-recoverable preservation costs defeats the purpose of the bankruptcy code and the intention of Congress. “A fundamental goal of the federal bankruptcy laws enacted by Congress is to give debtors a financial “fresh start” from burdensome debts (www.uscourts.gov/services-forms/bankruptcy-basics/process-bankruptcy-basics). “It [bankruptcy] gives the honest but unfortunate debtor...a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt,” *Local Loan Co. v Hunt*, 292 U.S. 234, 244 (1934).

11 USC 704 states it is a trustee’s duty to, (a)(2) be accountable for property received, and (a)(1) states, “collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is

compatible with the best interests of parties in interest.” There is often a time period that property must be preserved while trustee decides whether there can be a meaningful and profitable sale benefiting the unsecured creditors or if the property must be §554 abandoned back to debtor. If trustee believes abandonment is likely, trustee will be unwilling to expend bankruptcy estate money on preservation costs. Additionally, in many cases, such as this one, trustee did not have the money available within the bankruptcy estate. If debtor believes the property will be abandoned, debtor has the financial incentive to preserve the property as it will remain debtor’s property. In such cases, expenses could not be recovered under §506(c), however, as long as debtor pays the bills, trustee has no incentive to promptly abandon the property. If debtor cannot see a recovery of expenses at sale, it is imprudent for debtor to continue to bear the burden the preservation costs which creates an unfortunate set of circumstances for all. If no one preserves the property, it will devalue or, as in the case of this property, but for Chapter 7 Debtors, it would have been forfeited to the county government for unpaid ad valorem real estate taxes.

Frankenmuth Credit Union received a windfall of \$24,697.25 at the sole expense of Petitioner who was both a Chapter 11 and Chapter 7 debtor-in-possession.

Acceptance of this petition, will create consistency in the enforcement of this court’s mandate that pursuant to §506(c) Chapter 11 debtors-in-possession may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

Petition acceptance will create the clear voice that when the Chapter 7 trustee passes the duty to preserve property to the Chapter 7 debtor, the money spent for the benefit of others will be re-paid upon sale of the property.

“A secured creditor has an interest in its collateral, but that collateral is the property of the estate. The trustee has a duty to maintain the collateral, concomitant with his fiduciary duties in managing the estate...inherently a matter of the trustee's duty, not inherently one of his discretion, (*In re: Foremost Mfg. Co.) Architectural Bldg. Components v McClarty*, 137 F3d 919 (6th Circuit 1998).

CONCLUSION

Petitioner suggests oral arguments are not necessary, but does not oppose it. This court has already stated Chapter 11 debtors-in-possession are entitled to recover necessary and reasonable preservation costs pursuant to 11 USC 506(c), the only furtherance of law needed is clarification the right to recover while in Chapter 11 is not voided by conversion to Chapter 7 or another chapter.

Hartford footnote 5, should be extended to include Chapter 7 debtors-in-possession when the trustee has assigned a portion of trustee’s mandatory duties to

the Chapter 7 debtor-in-possession. Thus, under those circumstances, the debtor is entitled to recover the property preservation costs as if debtor was the trustee, or to mandate trustee must seek expense recovery.

In the alternative, to allow the Chapter 7 debtor-in-possession derivative standing to directly pursue under §506(c) recovery of the reasonable and necessary property preservation expenses incurred while a debtor-in-possession.

RELIEF REQUESTED

1. Petitioner requests this court grant the Writ for Certiorari.
2. Mandate Debtors are authorized to directly seek §506(c) expense recovery against property proceeds for those amounts incurred while in Chapter 11.
3. Mandate Chapter 7 trustee must seek §506(c) recovery of reasonable and necessary preservation costs expended by Debtors while Chapter 7.
4. In this case, to mandate if Chapter 7 trustee fails to initiate recovery proceedings within 30 days, Debtors may directly pursue the Chapter 7 amounts against the property proceeds.
5. Mandate *Law v Siegel* was violated when Debtors were denied their §522 homestead exemptions.
6. Other relief the court deems appropriate under the circumstances.

Original submission April 3, 2019
Re-submission May 2, 2019


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