

NO. 13-935

**In The
Supreme Court of the United States**

**WELLNESS INTERNATIONAL NETWORK,
LTD., RALPH OATES AND CATHY OATES**

Petitioners,

v.

RICHARD SHARIF,

Respondent.

**On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit**

Respondent's Brief In Opposition

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i.

QUESTIONS PRESENTED

I. Whether the petition for a writ of certiorari should be denied on the grounds, the petition asks this Court to grant interlocutory review, contrary to this Court's policy against piecemeal appeals?

II. Whether the petition for certiorari should be denied on the grounds, "implied consent" to the exercise of authority barred by *Stern v. Marshall*, 131 S.Ct. 2594, (2011) cannot be derived solely from the fact that the Respondent did not expressly challenge the bankruptcy's court's authority before *Stern* was decided?

III. Whether the petition for a writ of certiorari should be denied on the grounds, the Petitioners, as creditors did not have standing under 11 U.S.C. § 541 to raise an alter-ego claim against the Respondent's mother's revocable living trust?

**PARTIES TO THE PROCEEDINGS AND
RULE 26.9 STATEMENT**

Petitioner Wellness International Network Limited, is a subsidiary of WIN Network, Inc. No publicly-held entity owns ten percent or more of the stock of Wellness International Network, Limited.

The petitioners are Wellness International Network, Limited, Ralph Oates and Cathy Oates, the plaintiffs and appellees below.

The respondent is Richard Sharif, the defendant and appellant below.

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STATEMENT OF THE CASE

The Petitioners (hereinafter collectively referred to as “WIN”) have adequately set forth the history of the proceedings in the court’s below in their Statement of the Case. Therefore, it will not be necessary for the Respondent to repeat the entire history of the proceedings in this Response to WIN’s Petition for Writ of Certiorari except for the following points.

Richard Sharif filed a voluntary bankruptcy petition under Chapter 7 of the Bankruptcy Code 11 U.S.C. §§ 701 *et.seq.* On November 3, 2009 WIN (the only creditors who filed a proof of claim in Sharif’s bankruptcy case) filed an adversary complaint stating they had obtained a judgment in the amount of \$655,596.13 in the Northern District of Texas against Richard Sharif and four other persons.

The first four (4) Counts of WIN’s complaint contended that pursuant to 11 U.S.C. § 727 Sharif was not entitled to a discharge of his debts. Count V alleged “Plaintiffs are entitled to a Declaratory Judgment that the Soad Wattar Revocable Living Trust is the alter-ego of the Debtor and that all assets of the Trust should be treated as part of the Debtor’s estate.”

From December of 1996 until her death in March of 2010 Soad Wattar was the sole beneficiary of the Trust. Upon her death, Sharif’s sister, Ragda Sharifeh became the beneficiary of the Trust. Sharif was named as a Successor Beneficiary from

April 24, 2007 until October 8, 2007 and acted as the Trustee of the Trust from the date upon which it was conceived in 1996 until the date he resigned on July 21, 2010. The Trust's assets for several years prior to Sharif filing for bankruptcy protection were held by Wells Fargo Financial Advisors who were investors for the Trust. The bankruptcy court as a sanction because of Sharif's failure to comply with WIN's discovery requests entered a final judgment which declared the Trust to be Sharif's alter ego.

Additionally, WIN in its Jurisdictional Statement and in its Statement of Case makes several statements which are not correct and are contradicted by the record in the court's below. Therefore, Sharif will address each of these incorrect statements below:

- In its Jurisdictional Statement WIN states that the first time Respondent raised a constitutional issue was in his reply brief in the appeals court. (Pet. pg.1, fn.1) This statement is not accurate because the Respondent's Docketing Statement filed in Appeal No.12-1349 shows that the Respondent asserted the bankruptcy court did not have the jurisdiction to enter the default judgment on Count V of WIN's complaint. (Dkt. Entry No. 5)
- WIN states at pg. 6 of its petition "Once in bankruptcy, Sharif again

failed to produce documents about his assets to his bankruptcy trustee. Pet. App. 7a-8a. Based on a personal financial statement Wellness obtained showing that Sharif had more assets than he listed on his bankruptcy schedules, Wellness filed suit against Sharif in the bankruptcy court pursuant to 11 U.S.C. § 727 seeking to block Sharif's discharge. Pet App. 8a. As part of the complaint, Wellness also sought a declaratory judgment that assets Sharif purportedly held in the trust — the same assets appearing on Sharif's personal financial statement — actually were property of Sharif's bankruptcy estate. “

However these statements are not correct for the following reasons: First, on April 21, 2010, Horace Fox, Jr., the Trustee over Sharif's bankruptcy estate made the following statement to the bankruptcy court judge:

MR. FOX: I have nothing substantive to add. I believe that the discovery that I had asked for has been substantially, although over a long period of time, complied with. (TR. pg. 9, 4/21/2010).

Therefore, the record shows that the Trustee advised the bankruptcy court on April 21, 2010

that Sharif had complied with his discovery requests. Admittedly, the 7th Circuit wrote in its opinion that Sharif had not turned over documents which the Trustee had requested. However, the 7th Circuit's statement is based upon 7th Circuit adopting the district court's finding which adopted the bankruptcy court's fictional finding.

In addition, WIN's statement that the assets contained in the Trust were the same assets listed on Sharif's personal financial statement is also not correct. On August 5, 2010 when Horace Fox, Jr., obtained an order to take control over the assets of the Soad Wattar Trust, the res of the Trust consisted of approximately \$850,000 in securities and approximately \$50,000 in cash. Whereas, Sharif's 2002 personal financial statement listed approximately 5 Million Dollars in real property, on-going businesses and cash which were actually owned by Sharif's sisters or did not exist.

- WIN also states at pg. 6 of its petition, *inter alia*, "On July 6, 2010, the bankruptcy court denied Sharif's summary judgment motion, entered a default judgment against Sharif in which the bankruptcy court found that the assets held by Sharif in the so called Soad Wattar Trust were property of Sharif's bankruptcy estate." (Pet. at pg. 6). However, three of these statements are not correct for the following reasons: First, the bankruptcy court never made any factual findings that the Soad Wattar Trust was Sharif's alter-ego, because the order entered by the bankruptcy

court clearly shows that the bankruptcy court as a sanction ruled that the Soad Wattar Trust was Sharif's alter-ego. (Dkt. Entry No. 68, Case No. 09-AP-00770); Secondly, the record also shows that the bankruptcy court never denied Sharif's summary judgment motion, because the record shows that an agreed order was entered into between the parties on the grounds that Sharif's summary judgment motion was moot after the bankruptcy court entered its July 6, 2010 order. (Dkt. Entry No. 71, Case No. 09-AP-00770); and, Thirdly, Sharif never owned any of the assets contained in the Soad Wattar Trust., nor did he ever reap any benefit from the Trust for acting as its Trustee. Because, Exhibits attached to Sharif's summary judgment motion clearly proved that the assets contained in the Trust were in fact owned by Sharif's mother Soad Wattar as the Beneficiary of the Trust, and, upon her death were to be owned by Sharif's sister, Ragda Sharifeh as the Successor Beneficiary to the Trust. These Exhibits also showed that Sharif never received any compensation from the Trust for acting as its Trustee. (Dkt. Entry No. 65, Case No. 09-AP-00770).

REASONS FOR DENYING THE PETITION

I. The Writ Should Be denied Because the Decision is Interlocutory and Two Fundamental Issues Remain Unresolved

WIN seeks immediate review of a judgment which is plainly interlocutory. The court of appeals REVERSED the district court's decision to AFFIRM the bankruptcy court's judgment on WIN's alter-ego claim alleged in Count V of their complaint and directed the district court to conduct further proceedings on remand. More specifically, the 7th Circuit Court of Appeals held:

“ In sum, the portion of the district court's judgment affirming the bankruptcy court's entry of default judgment denying discharge of Sharif's debts is AFFIRMED. The portion of the district court's judgment affirming the bankruptcy court's entry of default judgment on WIN's alter-ego claim is VACATED, and the case is REMANDED to the district court for further proceedings consistent with the instructions set forth in this opinion. Lastly, the district court's judgment affirming the bankruptcy court's two fee awards is REVERSED and REMANDED to the district court with instructions to remand the orders to the bankruptcy court for recalculation.” (WIN's Pet. App. 66a).

The 7th Circuit in its opinion also tendered specific instructions to the district court:

“Accordingly, on remand the district court shall determine whether the alter-ego claim is a core or a non-core proceeding, then the court may treat the bankruptcy court’s order purporting to enter final judgment on the alter-ego claim as proposed findings of fact and conclusions of law to be reviewed de novo. *See* Fed. R. Bankr. P. 9033(d) (“The district judge shall make a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge’s findings of fact or conclusions of law to which specific written objections has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions.”). If on the other hand, the court determines the alter-ego claim to be a core proceeding, then it shall order that the reference of the alter-ego claim to be withdrawn and conduct fresh discovery proceedings in the district court, though the district judge will have the discretion in setting a more abbreviated schedule given that prior discovery has been had.” (WIN’s Pet. App. 54a).

Therefore, because the 7th Circuit has remanded this case to the district court to resolve two issues, WIN's petition for certiorari is premature. Additionally, WIN fails to mention in its petition that there is another bankruptcy court appeal presently pending in the district court which is directly related to this case in which WIN has intervened.

This appeal is docketed in the U.S. District Courts for the Northern District of Illinois as Case No. 11-CV-7374 and involves Sharif's sister, Ragda Sharifeh, wherein she seeks to recover the assets of the Soad Wattar Trust presently under the control of Sharif's bankruptcy Trustee in her capacity as the Successor Beneficiary of the Soad Wattar Trust. The Executive Committee for the N.D. of IL., has reassigned this appeal to the calendar of the district court judge to whom the 7th Circuit has directed to conduct further proceedings consistent with its instructions set forth in its opinion.

The interlocutory character of this case "of itself alone furnishe[s] sufficient ground for the denial" of WIN's petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Brotherhood of Locomotive Fireman v. Banger & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment before exercising our certiorari jurisdiction").

Accordingly, until the district court complies with the 7th Circuit's mandate and until a final judgment is entered by the 7th Circuit related to any subsequent appeals arising from the district court's final judgment, WIN's petition for writ of certiorari is premature and should be denied.

II. Implied Consent In Waiving a Constitutional Right Cannot Be Derived From A Litigant's Failure To Raise An Unknown Constitutional Right

WIN suggests in its Petition at pg. 27 that "The Court should resolve the question of Whether Article III permits a Debtor who voluntarily files for bankruptcy to consent to the entry of a final judgment by the bankruptcy court." (Pet. at 27).

However, the law is well-settled that "an effective waiver mustbe one of a 'known right or privilege.'" *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see also *Krentz v. Robertson Fire Prot. Dist.*, 228 F.3d 807, 908 & n.8 (8th Cir. 2000). (knowing and voluntarily waiver standard applies in both civil and criminal context). As a general matter, "courts closely scrutinize waivers of constitutional rights, and 'indulge every reasonable presumption against a waiver.'" *Sambo's Rests., Inc., v. City of Ann Arbor*, 663 F.2d 686, U.S. 389 (1937).

A closely related principle is that where there is an intervening change in the law, an exception to normal waiver rules "exists to protect

those who, despite due diligence, fail to prophesy a reversal of established adverse precedent. *GenCorp, Inc. v. Olin Corp*, 477 F.3d 368, 375 (6th Cir. 2007). As this Court held in *Curtis Publishing*, a party does not waive a “known right” simply by failing to assert the right before it was recognized in a subsequent decision. 388 U.S. at 143-45; *see also Hormel v. Helvering*, 312 U.S. 552, 558-59 (1941) (exception to waiver exists in “those [cases] in which there have been judicial interpretations of existing law after decision below and pending appeal — interpretations which if applied might have materially altered the result”). The federal circuits have repeatedly reiterated this common-sense point; “Where the Supreme Court decides a relevant case while litigation is pending....omission of an argument based on the Supreme Court’s reasoning does not amount to a waiver....” *Indiana Bell Tel. Co. v. McCarthy*, 362 F.3d 378, 390 (7th Cir. 2004). As the Second Circuit observed, “the doctrine of waiver demands conscientious, not clairvoyance, from parties,” and thus a party should be allowed to assert a new objection on appeal when there is a “changed legal landscape.” *Hawknet Ltd. v. Oversea Shipping Agencies*, 590 F.3d 87, 92-93 (2d Cir. 2009).

This Court’s decision in *Stern v. Marshall*, 131 S.Ct. 2594 (2011), changed existing positive law by declaring part of 28 U.S.C. § 157(b) unconstitutional. *Stern* effected a change in the existing positive law by declaring that — despite the language of § 157(b) — bankruptcy courts lack constitutional authority to issue final judgments on state law counterclaims that would not be resolved

in the process of ruling on a creditor's proof of claim. *Stern*, 131 S.Ct. at 2620.

Moreover, the question of whether implied consent based on a litigant's conduct is sufficient to satisfy the Article III requirement under *Stern*, is presently being considered by this Court in *Executive Benefits Insurance Agency v. Arkison*, No. 12-1200 (argued January 14, 2014).

Finally, WIN in its petition at pg. 36, asks the Court to hold their petition in abeyance pending the Court's resolution of the *Executive Benefits* case if the Court denies their petition for certiorari. (Pet. at 36) However, holding WIN's petition in abeyance pending the Court's decision in *Executive Benefits* would only needlessly delay the proceedings related to case which are presently pending in district court. Moreover, if the Court's decision in *Executive Benefits* is in some way favorable to WIN arguments raised in their petition, WIN could move the district court pursuant to Rule 60 of the Federal Rules of Civil Procedure to vacate any adverse ruling that may be entered against them. Therefore, WIN will not suffer any prejudice if their petition is denied.

III. As a creditor WIN did not have standing under 11 U.S.C. § 541 to raise an alter-ego claim against the Soad Wattar Trust alleged in WIN's Adversary Complaint.

WIN argues at pg 23 of its petition that the Seventh Circuit's ruling conflicts with decisions of the First, Fourth, Fifth, Sixth, Eight and Tenth

Circuits, all of which hold that federal law dictates to what extent a debtor's property is property of the bankruptcy estate for purposes of 11 U.S.C. § 541. (Pet. at 23).

Additionally, WIN states in a footnote on this same page that "Sharif's argument that only a trustee has the ability to seek relief under § 541 is incorrect. Wellness did not seek turnover of estate property to itself; instead it sought a declaration that would benefit the estate. Creditors frequently bring such § 541 actions...." (Pet. at pg. 23, fn.2)

However, nowhere in WIN's petition has WIN argued that the Soad Wattar Trust was the alter-ego of Sharif or is the term alter-ego used. Instead, WIN in its petition refers to the Soad Wattar Trust as "assets Sharif purportedly held in trust." (Pet. at pg. 6) and "assets purportedly held by Sharif in the so called Soad Wattar Trust." (Pet. at pg. 6). Undoubtedly, because, only the Trustee has standing to bring an alter-ego claim under 11 U.S.C. § 541.

According to *Koch Refining v. Farmers Union Central Exchange*, 831 F.2d 1339 (1979), the Illinois alter-ego action is available first to the Chapter 7 case Trustee and then, upon abandonment, to any creditor who could have brought such action in the absence of the bankruptcy case. *See id.* at 1345-47 & n.9. As stated above, Horace Fox, Jr., the Trustee over Sharif's bankruptcy estate advised the bankruptcy court that he was satisfied with the discovery that

Sharif had produced. Consequently, he did not bring an alter-ego claim against the Soad Wattar Trust.

The issue of whether WIN had standing to bring an alter-ego claim against the Soad Wattar Trust is still pending in the District Court in the Northern District of Illinois in Case No. 11-CV-7374 in which WIN has voluntarily intervened.

Moreover, the fact that WIN without having standing as a creditor brought the alter-ego claim against a non-party in this case, distinguishes this case from *Executive Benefits* case where the bankruptcy trustee who had standing to bring a § 541 action to recover property for the bankruptcy estate commenced an action. In light of WIN not having standing to bring the alter-ego action in this case the Court should deny their petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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