

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

IN RE: BECKY WHITESIDE

**5:02-bk-14446E
CHAPTER 7**

BECKY WHITESIDE

PLAINTIFF

V.

AP NO.: 5:02-ap-1169

KEITH WHITESIDE

DEFENDANT

**ORDER GRANTING COMPLAINT FOR
TURNOVER, DENYING MOTION TO DISMISS,
AND AWARDING SANCTIONS**

_____ Debtor's Complaint For Turnover and Keith Whiteside's Motion to Dismiss, or in the alternative, Answer, were heard on August 14, 2002. J. Slocum Pickell, Esq. appeared for the Debtor and Plaintiff, Becky Whiteside, who was also present. Kyle Havner, Esq. appeared for the Defendant, Keith Whiteside, who was also present. The Court granted Ms. Whiteside's Complaint for Turnover and denied Mr. Whiteside's Motion to Dismiss. Ms. Whiteside then requested a ruling on her request for attorney's fees and costs in connection with her Complaint For Turnover, and the Court took the matter under advisement. This order serves to clarify the Court's oral rulings and rule on Ms. Whiteside's request for her attorney's fees and costs.¹

Upon consideration of the pleadings, testimony and exhibits presented in court, the Court made the following findings of fact and conclusions of law in accordance with Federal Rule of

¹Debtor's counsel was instructed to prepare an order granting Debtor's Complaint for Turnover; Debtor's attorney did submit an acceptable precedent. However, the Court chose to enter one order granting relief and awarding fees and costs for purposes of clarity.

Bankruptcy Procedure 7052. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E), and the Court has jurisdiction to enter a final judgment in this case.

Mr. and Ms. Whiteside are married but separated pending a divorce action filed by Mr. Whiteside in Jefferson County, Arkansas in November 2001 (the “**Divorce Action**”). They co-own a 1999 Mercury Mountaineer which was in Ms. Whiteside’s possession at the time the Divorce Action was filed. In the Divorce Action, Mr. Whiteside asked the court to order Ms. Whiteside to either reimburse Mr. Whiteside for payments made on the vehicle or alternatively, refinance and retitle the vehicle in her name, or alternatively, surrender the vehicle to him. The Jefferson County Circuit Court denied Mr. Whiteside’s motion for temporary relief at a hearing on January 15, 2002, finding that the division of property between the Whitesides should take place at a final hearing.

On or around April 20, 2002, Mr. Whiteside took possession of the vehicle. Ms. Whiteside filed her bankruptcy petition April 22, 2002. Mr. Whiteside subsequently learned of Ms. Whiteside’s bankruptcy filing but did not return the vehicle to her. She filed the pending Complaint for Turnover on June 26, 2002.

Pursuant to 11 U.S.C. § 542(a), a non-custodian third party holding any property of the estate is required to turn that property over to the trustee. Under 11 U.S.C. § 541(a)(1), the bankruptcy estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” Here, there is no dispute that Ms. Whiteside possessed a property interest in the vehicle at the time she filed bankruptcy. Accordingly, the vehicle was estate property and Mr. Whiteside was required to return the vehicle to Ms. Whiteside pursuant to § 542(a) once she filed bankruptcy. *See also Robinson v. Ford Motor Credit Co. (In re Robinson)*, 36 B.R. 35, 37 (Bankr. E.D. Ark. 1983); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 103 S. Ct. 2309 (1983); *In re Clelland*,

268 B.R. 539, 540 (Bankr. E.D. Ark. 2001). Accordingly, the vehicle should be returned to Ms. Whiteside pending the determination of the Whitesides' property rights to the vehicle in the Divorce Action.

While parties to litigation normally bear the cost of their own attorney's fees, the Bankruptcy Code provides certain exceptions to this general rule. *See Seimer v. Nangle (In re Nangle)*, 2002 WL 1869606 (8th Cir. B.A.P. 2002). Section 362(h) of the Bankruptcy Code states that a party injured by a willful violation of the automatic stay shall recover actual damages, costs and attorney's fees and may recover punitive damages in appropriate circumstances. A failure to turnover property of the bankruptcy estate as required by § 542 constitutes a violation of the automatic stay and is grounds for an award of sanctions under § 362(h). *See Mueller v. Nelson (In re Mueller)*, 1994 WL 369573, 20 (Bankr. D. Neb. 1994). Because Mr. Whiteside failed to turn the vehicle over to Ms. Whiteside after she filed bankruptcy, and she had to file this action to recover the vehicle, the Court finds she should be reimbursed for her attorney's fees and costs incurred in bringing this action.

It is therefore **ORDERED** that

- (1) Debtors' Complaint for Turnover is **GRANTED**;
- (2) Defendant's Motion to Dismiss is **DENIED**;
- (3) the Defendant is ordered to deliver possession of the 1999 Mercury Moutaineer to Debtor immediately, if not delivered already;
- (4) the Defendant is ordered to pay to Mr. Pickell \$535.00 for attorney's fees and costs incurred in bringing this action as outlined in his request for fees and costs attached to this order as "**Appendix 1**" (to the extent Debtor has already paid Mr. Pickell for his services and/or costs in connection with this matter, Mr. Pickell shall transfer any

remaining monies to Debtor after paying himself for any outstanding fees and/or costs); and

- (5) Mr. Havner is ordered to file a pleading in this matter confirming that payment has been made to Mr. Pickell.

IT IS SO ORDERED.

HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATED: _____

cc: Mr. J. Slocum Pickell, Esq. for Plaintiff and Debtor
Mr. Kyle Havner, Esq. for Defendant
Mr. Walter Dickinson, Chapter 7 Trustee
U.S. Trustee