

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE TENTH CIRCUIT**

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IN RE CHERISE ROUNDY BLACK,  
Debtor.

BAP No. UT-02-065  
BAP No. UT-02-066

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STEVE S. CHRISTENSEN,  
Appellant – Cross-  
Appellee,

Bankr. No. 99C-27020  
Chapter 13

v.

ORDER AND JUDGMENT\*

CHERISE ROUNDY BLACK,  
Appellee – Cross-  
Appellant,

ANDRES DIAZ, Trustee,  
Appellee.

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Appeal from the United States Bankruptcy Court  
for the District of Utah

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Before McFEELEY, Chief Judge, PUSATERI, and CORDOVA,<sup>1</sup> Bankruptcy  
Judges.

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McFEELEY, Chief Judge.

Creditor Steve S. Christensen appeals the following two orders of the

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\* This order and judgment is not binding precedent, except under the  
doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP  
L.R. 8018-6(a).

<sup>1</sup> The Honorable Donald E. Cordova, Chief Bankruptcy Judge for the District  
of Colorado, heard oral argument in this appeal but passed away February 16,  
2003. Prior to his death, he had considered this matter fully and participated in  
the panel's conference and resulting decision.

United States Bankruptcy Court for the District of Utah: Findings of Fact and Conclusions of Law, entered December 6, 2001, and Order Denying Motion for Reconsideration of Order on Proof of Claim, entered August 13, 2002. He argues that the bankruptcy court erred when it allowed his claim at less than the full contractual amount and interest, failed to award him the attorney fees that he incurred in the pursuit of his claim, and denied his motion to reconsider. Debtor Cherise Roundy Black cross appeals, asserting that the bankruptcy court erred when it heard the motion for reconsideration on the grounds that once the confirmation order was appealed the bankruptcy court had no jurisdiction over the motion for reconsideration. We affirm the bankruptcy court on both the appeal and the cross appeal.

### **Background**

On September 8, 1998, Cherise Roundy Black (“Debtor”) entered into a contractual agreement with divorce attorney/creditor Steve S. Christensen (“Christensen”) in which he agreed to represent her in property settlement proceedings following her divorce. On May 25, 1999, Christensen filed with the state of Utah an Amended Notice of Attorney’s Lien in the amount of \$37,014.92 based on the work he had done in those proceedings.

On July 1, 1999, the Debtor filed a petition under Chapter 13. Subsequently, Christensen filed a \$41,428.66 claim in the Debtor’s Chapter 13 case claiming a total of \$37,698.06 for pre and post trial divorce work (“Claim 6”). Claim 6 includes a claim for 18% interest on the outstanding balance of the claim up to the date of the filing of the bankruptcy petition. Nothing on the claim indicated that Christensen was seeking postpetition interest.

On December 3, 1999, Christensen filed an Objection to the First Amended Plan and asked that Claim 6 be allowed as a secured claim in the amount of \$41,428.66 plus 10% interest accruing from July 1, 1999. On April 10, 2000, the

bankruptcy court entered an Order Confirming the Debtor's Chapter 13 Plan ("First Confirmation Order"). The First Confirmation Order reduced Claim 6 to \$5,000 plus 10% interest to be paid through the plan.

On April 17, 2000, Christensen filed a notice of appeal of the First Confirmation Order. The appeal was heard by a panel of this Court. On April 11, 2001, a panel of this Court entered an Order reversing the First Confirmation Order, holding that the bankruptcy court erred when it considered parol evidence to explain the Debtor's understanding of the unambiguous written fee agreement. The panel remanded the case to the bankruptcy court "for consideration of the issue of reasonableness of Appellant's fees and the effect of Utah state law with respect to Appellant's right to enforce an award of those fees."<sup>2</sup>

On August 3, 2001, Christensen filed an Amended Proof of Claim ("Claim 12"). In Claim 12, Christensen asserted a secured claim in the amount of \$41,428.66 secured by an attorney's charging lien. The remand hearing on the reasonableness of Christensen's fees was held on October 31, 2001. At the hearing, the bankruptcy court made an oral ruling allowing \$17,601.00 of Christensen's claim. However, because of offsets of \$500 paid by the Debtor and a \$7,101 sanction award against Christensen for violating the automatic stay, the bankruptcy court found that only \$10,000 of that amount was payable through the plan as a secured claim at 10% interest and an unsecured nonpriority claim of \$630.00.

On December 6, 2001, the bankruptcy court entered Findings of Facts and Conclusions of Law ("Claims Order") that presumably memorialized the oral ruling made on October 31, 2001. The Claims Order is not part of the record filed with the main appeal or cross appeal.

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<sup>2</sup> Christensen v. Black (In re Black), Nos. UT-00-026 and UT-00-030, 2001 WL 359580, at \*\*4 (10th Cir. BAP Apr. 11, 2001).

On December 7, 2001, the bankruptcy court entered an Order Confirming Amended Plan, Disallowing Claims, and Allowing Attorney's Fees (Second Confirmation Order), which included Christensen's claim as purportedly memorialized in the Claims Order. On December 10, 2001, Christensen timely filed a Notice of Appeal of the Second Confirmation Order.

Christensen filed a Motion for Reconsideration on Proof of Claim ("Motion for Reconsideration") on December 17, 2001. A hearing was held on the Motion for Reconsideration on July 10, 2002. On August 13, 2002, the bankruptcy court entered an Order Denying Motion for Reconsideration of Order on Proof of Claim ("Order Denying Reconsideration"), stating in the order that the motion was being denied because of the oral findings of fact and conclusions of law made on the record at the hearing. This appeal timely followed.

### **Discussion**

At issue are two orders: the Claims Order and the Order Denying Reconsideration. Christensen appeals both, arguing that the bankruptcy court erred when it reduced his claim for the following reasons: 1) it entered no findings on the record with regard to the reasonableness of his fees; 2) it did not award him the contractual rate of interest on the outstanding balance of his claim; and 3) it did not award him the attorney fees that he incurred in the pursuit of his claim. The Debtor cross appeals arguing that the bankruptcy court did not have the jurisdiction to consider the Motion for Reconsideration once Christensen had filed an appeal of the Second Confirmation Order with this Court<sup>3</sup>.

This Court reviews an order determining reasonable attorney fees under 11 U.S.C. § 502(4)(a) for abuse of discretion. See Landsing Diversified Props. - II v. First National Bank & Trust Co. (In re Western Real Estate Fund, Inc.), 922

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<sup>3</sup> Christensen made a separate Motion for Extension of Time for Filing Appellant's Reply Briefs ("Motion"). This Motion was unopposed. We grant the Motion and considered the reply brief in this decision.

F.2d 592, 598 (10th Cir. 1990) (commenting “that appellate courts generally defer to fee determinations by the bankruptcy court”). A court abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). The Tenth Circuit has stated that an abuse of discretion occurs when a judgment is ““arbitrary, capricious, whimsical, or manifestly unreasonable.”” FDIC v. Oldenburg, 34 F.3d 1529, 1555 (10th Cir. 1994) (quoting United States v. Hernandez-Herrera, 952 F.2d 342, 343 (10th Cir. 1991)). Thus, before a court may determine that an abuse of discretion has occurred it must have an opportunity to review the entire record. In the main appeal, Christensen did not include in the record the Claims Order. In the cross appeal, the Debtor did not include in the record a transcript of the hearing on the Motion for Reconsideration.

The burden of providing an appellate court with an adequate record for review is on the appellant. Fed. R. App. P. 10(b)(2). The record on appeal shall include “the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court.” Fed. R. Bankr. P. 8006; see also Fed. R. Bankr P. 8009(b)(3) (stating that the appendix to a brief shall include “the judgement, order, or decree from which the appeal is taken”). Failure to include a pertinent transcript of a hearing may also result in a deficient record. McGinnis v. Gustafson, 978 F.2d 1199, 1201 (10th Cir. 1992) (affirming the district court upon a finding that the appellant’s failure to include a transcript of the district court’s oral ruling “raises an effective barrier to informed, substantive appellate review”).

The validity of an appeal is not affected by an appellant’s failure to include all relevant materials. When an appellant fails to comply with the appellate rules, a district court or a bankruptcy appellate panel has the discretion to take that

action it “deems appropriate, which may include dismissal of the appeal.” Fed. R. Bankr. P. 8001. The pertinent inquiry is whether the record provided “discloses the factual and legal basis of the trial court order to allow appellate review.” Knowles Bldg. Co. v. Zinni (In re Zinni), 261 B.R. 196, 202 (6th Cir. BAP 2001).

Although the bankruptcy court made oral findings on the record, and Christensen provided us with the relevant transcript, in the absence of the Claims Order, we do not know on what legal foundation the bankruptcy court relied when making its decision, nor do we know if any of the oral findings were changed or supplemented by the subsequent Claims Order. The failure by the parties to provide a copy of the Claims Order thwarts any attempt by this Court to apply the abuse of discretion standard, particularly when, as here, a claim is made that the bankruptcy court did not enter adequate findings. We have no basis on which to evaluate Christensen’s argument because we do not know what ultimate findings of fact or conclusions of law the bankruptcy court made in the Claims Order.

In her cross appeal, the Debtor contends that the bankruptcy court did not have the jurisdiction to consider the Motion for Reconsideration once Christensen filed an appeal of the Second Confirmation Order with this Court. She asks for attorney fees for the time and effort in appearing at the hearing for the Motion for Reconsideration.

Questions about a bankruptcy court’s jurisdiction are reviewed de novo. Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd., Inc.), 40 F.3d 1084, 1085 (10th Cir.1994); Personette v. Kennedy (In re Midgard Corp.), 204 B.R. 764, 770 (10th Cir. BAP 1997). Here the Debtor made an argument that the bankruptcy court was divested of jurisdiction and thus could not review its Claims Order by an appeal of a related order, the Second Confirmation Order. In its Order Denying Reconsideration the bankruptcy court states: “[a]fter hearing the evidence and argument of counsel, the Court made its findings of fact and

conclusions of law on the record.” Aplt. Ap. at 421. Neither party included the transcript of the hearing on the Motion for Reconsideration.

On its face, there is no indication that the appeal of a related order would divest the bankruptcy court of jurisdiction of an entirely separate order. In the absence of the transcript, we do not know the legal or factual foundations upon which the bankruptcy court supported its conclusion that it did have jurisdiction over the Motion for Reconsideration, nor do we know the arguments the Debtor presented in support of her theory that it did not.

While under Bankruptcy Rule 8001 this panel has the discretion to dismiss both the appeal and the cross appeal on the grounds that the appellant and the cross appellant did not supply an adequate record, we are not limited to that remedy. Fed. R. Bankr. P. 8001. As a general rule, the Tenth Circuit has held that the failure to provide a trial transcript on appeal warrants affirming the trial court when the issue on appeal requires the appellate court to review that transcript. McGinnis, 978 F.2d at 1201; see also In re Rambo, 209 B.R. 527, 530 (10th Cir. BAP), aff’d, 132 F.3d 43 (10th Cir. 1997). The rule is appropriate because when an appellant has failed to provide a reviewing court with an adequate record, the appellant has failed to provide evidentiary support for his or her appellant argument.

In this case, we conclude that the general rule of affirming the trial court in the absence of a pertinent trial transcript is equally applicable when an appellant neglects to include in the record the order on appeal. In the absence of any evidentiary support of Christensen’s claim that the bankruptcy court erred in its legal conclusions and factual findings in the Claims Order or in the Order Denying Reconsideration, we will affirm the bankruptcy court. Concurrently, in the absence of any evidence that the bankruptcy court erred in its findings that it had jurisdiction over the Order Denying Reconsideration, we will affirm the

bankruptcy court.

Both parties have asked for the costs of pursuing this appeal. Neither party has presented any evidence that would warrant awarding such costs.

**Conclusion**

For the reasons stated herein, the bankruptcy court's Findings of Fact and Conclusions of Law and its Order Denying Motion for Reconsideration are AFFIRMED.