

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 99-31279

WILLIAM SHAUN PIERCE  
d/b/a PIERCE CRIPPEN CONSTRUCTION  
SARA RUTH PIERCE

Debtors

**MEMORANDUM ON DEBTORS' OBJECTION TO CLAIM  
OF JOHN DALE JAMISON TRUST AND MOTION FOR TURNOVER**

**APPEARANCES:** Jean Brown, Esq.  
5100 North Broadway, Suite 1  
Knoxville, Tennessee 37918  
Attorney for the John Dale Jamison Trust,  
William Brannick, Trustee

McGHEE, NEWTON & WYKOFF, P.C.  
John P. Newton, Jr., Esq.  
Post Office Box 2132  
Knoxville, Tennessee 37901  
Attorneys for the Debtors

Gwendolyn M. Kerney  
Post Office Box 228  
Knoxville, Tennessee 37901  
Chapter 13 Trustee

**RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE**

On September 17, 1999, John Dale Jamison filed a nonpriority unsecured claim in the amount of \$21,200.00. By an Amended Claim filed on October 7, 1999, the John Dale Jamison Trust, William Brannick, Trustee (the Jamison Trust), was substituted as the claimant in place of John Jamison.

Before the court is the Objection to Claim of John Jamison and Motion for Turnover filed by the Debtors on January 26, 2000.<sup>1</sup> The Jamison Trust filed a Response to Objection to Claim and Motion for Turnover on March 1, 2000. A hearing was held on April 5, 2000.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(B), (E) (West 1993).

## I

William Shaun Pierce and Sara Ruth Pierce, the Debtors, work together, doing business as Pierce Crippen Construction. Mr. Pierce, a licensed general contractor, oversees the daily operation of the construction projects. Mrs. Pierce oversees the financial aspects of the business, keeps the books and records, and assists with purchasing materials for the projects.

Mr. Pierce testified that the business, Pierce Crippen Construction, Inc., had been a corporation until the latter half of 1996 when it was dissolved by the state of Tennessee. The Debtors were not immediately aware of the dissolution and continued to operate as a corporation. The Pierces testified that they learned of the dissolution from their attorney, David Lufkin, who

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<sup>1</sup> The Debtors, both in their objection and Brief in Support of Objection to Claim of John Jamison and Motion for Turnover filed March 29, 2000, erroneously refer to the claimant as John Jamison. Pursuant to the Amended Claim filed on October 7, 1999, the claimant is the Jamison Trust.

represented them in state court litigation related to this claim which commenced in 1998. Mr. Pierce testified that they did not learn of the dissolution until the state court litigation had begun. Mrs. Pierce, however, testified that they learned of the dissolution from Mr. Lufkin in late 1997; that for a thirty to sixty day period thereafter they considered whether to reincorporate their business or operate under some other form; and that during that period they used a personal bank account for the business.

John Dale Jamison is a neighbor of the Pierces and the beneficiary of the Jamison Trust, an irrevocable trust established by Mr. Jamison's father.<sup>2</sup> As the beneficiary of the Jamison Trust, Mr. Jamison has a lifetime possessory interest in property owned by the Jamison Trust located at 7425 Royal Springs Boulevard in Knoxville, Tennessee. Mr. Jamison resides on the property and is responsible for its maintenance. In 1997, Mr. Pierce, as an employee of the corporation, submitted two proposals to Mr. Jamison for construction projects at his home. They entered a contract based upon the second written proposal which was dated August 15, 1997. The contract provided that the corporation would provide labor and materials to build a two car garage, a modification of an existing deck which would connect the garage and the house, a concrete sidewalk and patio, a retaining wall, and the pouring of a new concrete driveway. The total price of the contract was \$41,208.65. Changes to the contract were to be done on a change order basis.

In addition, Mr. Pierce and Mr. Jamison orally agreed that the corporation would do work inside the house. That work was not included in the written proposal. Mr. Pierce testified that

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<sup>2</sup> The Jamison Trust was established on January 6, 1997, under the terms of the John Douglas Jamison 1997 Irrevocable Trust for the Benefit of John Dale Jamison.

the extra work was to include carpet replacement, shelve building, tile work, kitchen counter-top installation, painting and the removal of certain structures, and that the corporation would be reimbursed for labor and costs and would receive a profit. Mr. Jamison testified that the price for the work was incorporated into the original contract.

Mrs. Pierce testified that work on the project began in August 1997 and continued until April 1998. Her records showing expenses for labor and materials for the work reflect that a total of \$36,463.90 was expended by the corporation during the project for the work done under the written contract and that \$2,922.75 was expended for the extra work done inside the house. Shortly after work on the project had begun, Mr. Jamison made two advance payments to fund the project. The first was by an October 20, 1997 check from the Jamison Trust in the amount of \$10,000.00 made payable to Mr. Jamison, endorsed by him to the order of Mr. Pierce, and endorsed by Mr. Pierce. The second was by a November 14, 1997 check from the Jamison Trust in the amount of \$11,200.00 made payable to Mr. Jamison, endorsed by him to the order of Mrs. Pierce, and endorsed by Mrs. Pierce.

During the project, the friendly relationship between the Pierces and Mr. Jamison deteriorated. The evidence at trial indicated that Mr. Jamison was unsatisfied with the pace at which the work was performed. In April 1998, the garage and driveway were completed and Mr. Pierce stopped working on the project. The connection between the garage and house was not completed because, the Pierces testified, they did not have the necessary building permit.

On June 12, 1998, Mr. Jamison filed a Complaint against the corporation, Pierce Crippen Construction, Inc., in the Circuit Court for Knox County, Tennessee, seeking damages for the corporation's alleged "fail[ure] to perform under reasonable standards" in meeting its obligations under the construction contracts with him. Pierce Crippen Construction, Inc. filed a Motion for Summary Judgment on December 2, 1998. The corporation argued that the Jamison Trust, as the owner of the property upon which the work was performed, had standing to bring the suit and that John Jamison, the trust beneficiary, did not have standing to bring the suit. In addition, the corporation asserted that Tennessee law barred recovery in the lawsuit because the corporation was not notified of the alleged insufficiency and allowed to finish or repair its work.

On March 29, 1999, the Debtors filed their petition under Chapter 13. Their Chapter 13 Plan was confirmed on June 9, 1999. The bar date for filing nongovernmental proofs of claim was August 4, 1999. The Debtors did not schedule Mr. Jamison or the Jamison Trust as creditors in their bankruptcy because the state court action was not against them, but was instead against the corporation. They testified that they did not believe that they were personally responsible for any debt arising from the work for Mr. Jamison.

On August 13, 1999, Mr. Jamison filed a Motion to Amend his Complaint against the corporation in state court, seeking to add as plaintiffs the "John Douglas (sic) Jamison Trust" and William Brannick as Trustee. On September 3, 1999, the Circuit Court for Knox County entered a Final Judgment Order granting the corporation's Motion for Summary Judgment and dismissed the Complaint. The basis of the dismissal was the court's finding that Pierce Crippen Construction, Inc. did not receive notice of the allegedly insufficient work or an opportunity to repair or finish

it. The court made no determination on the issue of Mr. Jamison's standing to bring the suit. The Final Judgment Order does not designate the Jamison Trust or its trustee, William Brannick, as plaintiffs.<sup>3</sup>

On September 17, 1999, two weeks after his state court action against the corporation was dismissed, Mr. Jamison filed a proof of claim in the Debtors' bankruptcy in the amount of \$21,200.00. The basis given for the claim was stated as "[p]ayment for services not properly rendered." On October 7, 1999, an amended proof of claim was filed substituting the Jamison Trust as the creditor in place of Mr. Jamison. Mr. Jamison, however, has received payments from the Chapter 13 Trustee in the total amount of \$3,919.00 based on the proof of claim.

The Jamison Trust asserts in its Brief in Support of the Claim of John Dale Jamison Trust filed March 30, 2000, that it did not learn of the Debtors' bankruptcy until after the state court dismissed Mr. Jamison's action.<sup>4</sup> Mr. Jamison testified that he learned of the bankruptcy from other residents in his subdivision. Although he did not recall the exact date that he learned of the bankruptcy, he testified that it must have been shortly after the petition date because he believed that the residents who told him about the bankruptcy filing did so just after reading about it in the newspaper. Mr. Jamison testified that he contacted his attorney to inquire about the bankruptcy filing after hearing the news from his neighbors.

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<sup>3</sup> The court presumes that the state court did not act on Mr. Jamison's Motion to Amend before it dismissed his Complaint.

<sup>4</sup> The court cannot make a finding from the record before it regarding the date the Jamison Trust learned of the Debtors' bankruptcy. The terms of the Jamison Trust expressly invests the Trustee with the power "[t]o compromise or abandon any claim in favor of or against the trust." Further, the trustee holds the legal title to the trust property, while the beneficiary holds only a beneficial interest in it. See *Myers v. Myers*, 891 S.W.2d 216, 219 (Tenn. Ct. App. 1994). Thus, notice to Mr. Jamison was not notice to the Jamison Trust which is a separate legal entity.

The Debtors presented evidence that John Jamison's attorney also received notice of the bankruptcy in the form of an April 21, 1999 letter from David A. Lufkin, their attorney in the state court litigation, to Kevin Teffeteller, who represented Mr. Jamison in the state court litigation at that time. In the letter, Mr. Lufkin wrote that he was relaying to Mr. Teffeteller "a conversation I recently had with John Newton, the attorney who represents Mr. & Mrs. Pierce d/b/a Pierce Crippen Construction Co. As I think you know, they have filed a Chapter 13 bankruptcy."

## II

Pursuant to an Order entered March 16, 2000, the court is called upon to resolve the following issues:

1. Whether the claim of John Jamison<sup>5</sup> should be disallowed pursuant to 11 U.S.C. § 502(b)(9), because it was filed after the August 4, 1999 bar date fixed for filing nongovernmental claims.
2. Whether the Debtors, at the commencement of their case, owed John Jamison the amount or any lesser amount, asserted in his claim.
3. Whether the Debtors are entitled to an order requiring John Jamison to turnover \$3,919.00 paid on his claim by the Chapter 13 Trustee.

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<sup>5</sup> The Order, here and in paragraph 2, should have referred to the claim of the Jamison Trust not John Jamison. See *supra* note 1.

### III

Under 11 U.S.C.A. § 502(a) (West 1993), the claim of a creditor who files a proof of claim is deemed allowed unless a party in interest objects. If a party in interest objects, the court is required to determine the amount of the claim as of the date of the bankruptcy petition and allow the claim subject to certain exceptions set forth in 11 U.S.C.A. § 502(b) (West 1993 & Supp. 2000). In 1994, Congress amended that subsection by including § 502(b)(9) which provides that a nongovernmental creditor's claim will not be allowed if the "proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure . . . ." 11 U.S.C.A. § 502(b)(9). The time for filing a proof of claim is governed by FED. R. BANKR. P. 3002(c) which provides that, subject to certain exceptions not relevant here, a proof of claim is timely filed in a case under Chapter 7, 12 or 13 if it is filed no later than ninety days after the first date set for the meeting of creditors held under 11 U.S.C.A. § 341(a) (West 1993).

Courts within the Sixth Circuit have determined that late-filed claims must be disallowed in a Chapter 13 case. *See Gullatt v. United States (In re Gullatt)*, 169 B.R. 385, 391 (M.D. Tenn. 1994); *In re Helton*, 183 B.R. 474, 475 (Bankr. E.D. Ky. 1995); *In re Zimmerman*, 156 B.R. 192, (Bankr. W.D. Mich. 1993); *see also In re Bargdill*, 238 B.R. 711, at 719 (Bankr. N.D. Ohio 1999) (explaining that legislative history of § 502(b)(9) demonstrates that it was intended to overrule cases that permitted the allowance of late-filed claims in a Chapter 13 case). In doing so, they frequently cite the necessity of a rigid bar date to the formulation and administration of a plan of reorganization. *See Gullatt*, 169 B.R. at 388; *Zimmerman*, 156 B.R. at 199; *see also Bargdill*,



238 B.R. at 719 (highlighting that policy in distinguishing the application of § 502(b)(9) to cases under Chapter 7 from those under Chapter 13).

*Internal Revenue Serv. v. Hildebrand*, 245 B.R. 287 (M.D. Tenn. 2000), reconciled the need for rigid application of the bar date and the plight of creditors who receive no notice of the bankruptcy until after the date has passed. In *Hildebrand*, the court considered the Internal Revenue Service's appeal in three cases that, along with twelve others, had been consolidated for trial in *In re McQueen*, 228 B.R. 408, 410 (Bankr. M.D. Tenn. 1998), *rev'd*, *Hildebrand*, 245 B.R. 287. In *McQueen*, the bankruptcy court had determined that there is no exception to the bar date for a Chapter 13 creditor without notice of the bankruptcy, absent some equitable tolling. *See McQueen*, 228 B.R. at 410-11. It concluded that lack of notice was not cause for equitable tolling. *See id.* The district court reversed, finding that "where a governmental unit receives no notice of entry of an order for Chapter 13 relief until after the period for filing claims has passed, that claim is not automatically barred by 11 U.S.C. § 502(b)(9)." *Hildebrand*, 245 B.R. at 291. Although the holding applied specifically to governmental creditors, its reasoning and the reasoning in decisions which it cited apply to all creditors. *See id.* at 289-291.

The court explained that creditors in Chapter 13 cases are "'entitled to notice of . . . the filing of the case, the first meeting of creditors, and the dates by which creditors must file claims.'" *Hildebrand*, 245 B.R. at 290 (quoting *In re Friesenhalm*, 169 B.R. 615, 623 (Bankr. W.D. Tex. 1994)). Absent actual or constructive notice, "the bar date prescribed by § 502(b)(9) is not effective." *Id.* (citing *United States v. Hairopoulos (In re Hairopoulos)*, 118 F.3d 1240, 1245 (8th Cir. 1997)). It concluded that "[t]his result obtains despite the express language of § 502(b)(9),

which should not be interpreted as imposing a bar date in abrogation of the long-standing principles of due process and fundamental fairness.” *Id.*

In addition, the court found support for its decision in *United States v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087 (6th Cir. 1990). In *Cardinal Mine*, the Sixth Circuit articulated the importance of providing notice to creditors in the bankruptcy context in a Chapter 7 case:

Due process and equitable concerns require that when a creditor does not have notice or actual knowledge of a bankruptcy, the creditor must be permitted to file tardily when the creditor does so promptly after learning of the bankruptcy.

. . . .

The failure of the Bankruptcy Rules to provide relief to creditors who receive no notice of a bankruptcy and have no knowledge of it cannot deprive those creditors of their substantive right not to have their property rights taken away without notice. Bankruptcy courts are courts of equity and can provide a remedy when there is a substantive right.

*Cardinal Mine*, 916 F.2d at 1089, 1091.

In the present case, the Debtors did not schedule Mr. Jamison or the Jamison Trust as a creditor because the then-pending state court action was against the corporation. They did not believe that they were personally responsible for any debt arising from their work for Mr. Jamison. Mr. Jamison testified that he received actual notice of the Debtors’ bankruptcy from his neighbors relatively soon after it was filed and that he contacted his attorney shortly thereafter to discuss that information.

The claim at issue, however, was not filed by Mr. Jamison, but by another entity, the Jamison Trust. There is no evidence establishing the date that the Jamison Trust learned of the

bankruptcy, whether Mr. Jamison informed the Trustee, William Brannick, of the bankruptcy, or whether the Jamison Trust and Mr. Jamison had employed the same attorneys before the August 4, 1999 deadline for filing claims.<sup>6</sup> Although Mr. Jamison's attorney in the state court action, F.D. Gibson, filed a motion on August 13, 1999, to add the Jamison Trust and its Trustee as parties in that action, it is not apparent from the copy of the motion admitted into evidence whether Mr. Gibson was also representing the Jamison Trust and its Trustee either at that time or before the August 4, 1999 claims bar date.

The debtor carries the burden of proving that an unsecured creditor had actual notice of the bankruptcy. *See Credit Alliance Corp. v. Concord Coal Corp. (In re Concord Coal Corp.)*, 81 B.R. 863, 868 (S.D. W.Va. 1988); *In re Robertson*, 13 B.R. 726, 732 (Bankr. E.D. Va. 1981). "It is a principle of uniform application that the burden of proof in establishing 'actual' knowledge is on the bankrupt. Mere constructive notice or imputed knowledge of the bankruptcy proceeding is insufficient in this regard." *Robertson*, 13 B.R. at 732 (citation omitted). The Debtors have not established that the Jamison Trust had knowledge of their bankruptcy prior to the deadline for filing claims or at any other time before the Jamison Trust filed its claim. Thus, the Jamison Trust's claim may not be disallowed under § 502(b)(9) as untimely.

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<sup>6</sup> Both the September 17, 1999 claim filed by John Dale Jamison and the October 7, 1999 claim substituting the Jamison Trust as the claimant, were signed by Attorney Jean Brown.

#### IV

A creditor's claim will be disallowed if "such claim is unenforceable against the debtor and property of the estate, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured . . . ." 11 U.S.C.A. § 502(b)(1) (West 1993 & Supp. 2000). Under FED. R. BANKR. P. 3001(f), "a proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." If substantial evidence is presented to attack the validity of the claim or its amount, the creditor must then prove the validity and amount of the claim. See *McGee v. O'Connor (In re O'Connor)*, 153 F.3d 258, 260 (5th Cir. 1998); *Carlson v. United States (In re Carlson)*, 126 F.3d 915, 921-22 (7th Cir. 1997).

The Jamison Trust's proof of claim states that it is for payment for services not properly rendered. In its brief and at the April 5, 2000 hearing, however, the Jamison Trust argued that its claim is based on the Debtors' alleged fraud and conversion. No evidence was presented at the hearing to support a finding of fraud or conversion. Further, the Jamison Trust did not establish that the Debtors misappropriated funds paid by John Jamison for work performed under the written and oral contracts.

The substance of the Jamison Trust's claim is for breach of contract as is indicated clearly in its proof of claim and the evidence that it presented at the hearing. The services at issue are those agreed to in the contract based upon the August 15, 1997 written proposal for work on the exterior of John Jamison's home and the oral contract for work on the interior of the home.

It is undisputed that both contracts were between John Jamison, individually, and Mr. Pierce, as an employee of the dissolved corporation, Pierce Crippen Construction, Inc., and that the payments at issue were made by Mr. Jamison when he endorsed to the order of Mr. and Mrs. Pierce respectively two checks that he received from the Jamison Trust. Thus, the Jamison Trust argues that it has a claim for payment of services not properly rendered despite the undisputed facts, which it has not addressed, that it was not a party to the contracts, and did not actually make the payments at issue.

In general, a person may bring an action on a contract only if the person is a party to the contract or a person for whose benefit the contract was made. *See First Tennessee Bank Nat'l Assoc. v. Thoroughbred Motor Cars, Inc.*, 932 S.W.2d 928, 930 (Tenn. Ct. App. 1996). The latter is referred to as a third party beneficiary. *See First Tennessee Bank Nat'l Assoc.*, 932 S.W.2d at 930. The law regarding contract claims brought by third party beneficiaries in Tennessee has been summarized by the Sixth Circuit as follows:

Tennessee law recognizes two kinds of third-party beneficiaries, intended and incidental. Only if a party is an intended beneficiary may it maintain an action to enforce the contract. *Moore Construction Company, Inc. v. Clarksville Department of Electricity*, 707 S.W.2d 1 (Tenn. App. 1985). Further, there is a presumption that a contract is executed solely for the benefit of the parties to it. *Id.* at 9. Thus, to establish that they are intended beneficiaries to the contract, [alleged third party beneficiaries] must establish (1) the existence of a valid contract between the principal parties and (2) that the clear intent of the contract is to benefit them. *United American Bank of Memphis v. Gardner*, 706 S.W.2d 639, 641 (Tenn. App. 1985). Intent to benefit may be shown if "there is either an expression in the contract that the contracting parties intended to benefit the third party (the 'intent to benefit' test) or proof that the promisor's performance will otherwise discharge a duty owed to a third party beneficiary by the promisee (the 'duty owed' test) . . . ." *Moore Construction, supra*, at 9.

*Davidson & Jones Dev. Co. v. Elmore Dev. Co, Inc.*, 921 F.2d 1343 (6th Cir. 1991) (footnote omitted); see also *First Tennessee Bank Nat'l Assoc.*, 932 S.W.2d at 930. A court must consider the facts “‘in light of the specific contractual agreements and the circumstances under which they were made’” when determining whether a person is an intended third party beneficiary of a contract. *First Tennessee Bank Nat'l Assoc.*, 932 S.W.2d at 930 (quoting *Moore Construction Co.*, 707 S.W.2d at 9-10). The person claiming third party beneficiary status bears the burden of proof. See *id.*

The contracts between Mr. Jamison and Mr. Pierce, acting on behalf of Pierce Crippen Construction, Inc., do not express an intent to benefit the Jamison Trust. There is no other evidence to suggest such an intent nor is there evidence that Mr. Pierce was aware that the property on which the work was to be performed was not owned by Mr. Jamison. Although improvements made to the house could conceivably benefit the Jamison Trust as the owner of the property, there is no evidence that such a benefit was more than incidental under these circumstances. The court concludes that the Jamison Trust is not a third party beneficiary of the contracts. Because the Jamison Trust is not a party to the contracts or a third party beneficiary of them, it may not bring a claim based on the contracts.

The Jamison Trust has not established that it may enforce a claim against the Debtors and its claim will be disallowed pursuant to 11 U.S.C.A. § 502(b)(1).

## V

Finally, the Debtors have filed a motion asking the court to order Mr. Jamison to turn over \$3,919.00 in plan payments that he has received from Chapter 13 Trustee Gwendolyn M. Kerney. An action for turnover must be brought in an adversary proceeding. *In re Dillon*, 148 B.R. 852, 853 (Bankr. E.D. Tenn. 1992). Parties may waive the requirement of an adversary proceeding. *Village Mobile Homes, Inc. v. First Gibraltar Bank (In re Village Mobile Homes, Inc.)*, 947 F.2d 1282, 1283 (5th Cir. 1991); *Dillon*, 148 B.R. at 853. Mr. Jamison has not objected to the Debtors' motion for turnover on that procedural basis and is deemed to have waived the requirement.

The court has no choice but to order Mr. Jamison to return the \$3,919.00 that he received from the Chapter 13 Trustee. He has not filed a claim in the Debtors' bankruptcy. Further, he may not transfer the payments to the Jamison Trust because its claim will be disallowed for the foregoing reasons.

## VI

In summary, the Jamison Trust has not established that it has an enforceable claim against the Debtors and therefore its claim will be disallowed under § 502(b)(1). In addition, Mr. Jamison

will be ordered to return the \$3,919.00 that he received from the Chapter 13 Trustee. An appropriate order will be entered.

FILED: May 1, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE



**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 99-31279

WILLIAM SHAUN PIERCE  
d/b/a PIERCE CRIPPEN CONSTRUCTION  
SARA RUTH PIERCE

Debtors

**ORDER**

For the reasons set forth in the Memorandum on Debtors' Objection to Claim of John Dale Jamison Trust and Motion for Turnover filed this date, the court directs the following:

1. The Debtors' Objection to Claim of John Jamison and Motion for Turnover filed January 26, 2000, is SUSTAINED.
2. The claim of the John Dale Jamison Trust, William Brannick, Trustee, filed October 7, 1999, as a nonpriority unsecured claim in the amount of \$21,200.00, which amends the claim of John Dale Jamison filed September 17, 1999, is DISALLOWED.
3. John Dale Jamison shall, within ten (10) days, turn over to the Chapter 13 Trustee, Gwendolyn M. Kerney, the \$3,919.00 paid him through the Debtors' Chapter 13 Plan.

SO ORDERED.

ENTER: May 1, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE