

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

In re

Case No. 99-32996

PAMELA KAY WOODWARD
a/k/a PAMELA KAY REED

Debtor

**MEMORANDUM ON ALLOWANCE OF COMPENSATION
AND REIMBURSEMENT OF EXPENSES OF H. DOUGLAS NICHOL**

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This matter is before the court upon the Application of [sic] for Allowance of Compensation and Reimbursement of Expenses (Application for Compensation) filed by H. Douglas Nichol, as attorney for N. David Roberts, Jr., Chapter 7 Trustee, requesting compensation in the amount of \$3,333.33 and reimbursement of expenses of \$1,169.89 pursuant to 11 U.S.C.A. § 328(a) (West 1993) and Federal Rule of Bankruptcy Procedure 2016(a). A hearing on Mr. Nichol's Application for Compensation was held on July 10, 2003, at which time the court heard from Mr. Nichol, the Chapter 7 Trustee, the United States Trustee, and other parties in interest regarding allowance of compensation to Mr. Nichol. An evidentiary hearing was not conducted.

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

I

The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on July 22, 1999, and the Trustee was duly appointed to act on behalf of the Debtor's bankruptcy estate. Prior to the commencement of her bankruptcy case, the Debtor and her husband retained Mr. Nichol and the law firm of Gillenwater, Nichol & Associates to represent them in a civil action against Walgreen Company. Subsequent to his employment, Mr. Nichol filed a lawsuit in the Knox County Circuit Court, case no. 1-612-99 (the State Court Lawsuit). The Debtor did not list the State Court Lawsuit in the statements and schedules filed with her bankruptcy petition; however, the Trustee discovered its existence, and, on February 28, 2000, sent a letter to Mr. Nichol, advising that he was the Trustee in the Debtor's Chapter 7 bankruptcy case, and that "[a]s her Trustee I am now the holder of the interest in the [State Court Lawsuit, which] as it relates to [the

Debtor] cannot be settled, compromised or dismissed without my consent as Trustee.” The Trustee also advised Mr. Nichol that his employment would have to be approved by the bankruptcy court, and he requested a status report of the lawsuit and a copy of any fee arrangements between Mr. Nichol and the Debtor.

In response, Mr. Nichol sent a letter to the Trustee dated March 1, 2000, acknowledging the Trustee’s February 28, 2000 letter, and enclosing copies of the complaint and answer in the State Court Lawsuit and of Mr. Nichol’s fee arrangement with the Debtor and her spouse. Additionally, Mr. Nichol advised the Trustee that the Debtor’s claim was based upon a derivative action for loss of consortium, that the case was not yet set for trial, and that depositions were scheduled for June 2000.

On July 16, 2002, the Trustee again wrote to Mr. Nichol, asking for the status of the State Court Lawsuit and reminding Mr. Nichol that as the Trustee of the Debtor’s Chapter 7 bankruptcy case, he was the holder of the Debtor’s interest in the action. Mr. Nichol did not respond to this letter. The Trustee conducted additional research and discovered that the State Court Lawsuit had been settled and dismissed on April 18, 2002, without his knowledge and/or consent. Thereafter, on August 16, 2002, the Trustee sent a third letter to Mr. Nichol, which stated, in material part:

I had placed you on notice that I was the owner of the above litigation on behalf of the debtor and have corresponded with you on several occasions. I have learned that an order of compromise and dismissal was entered on April 18, 2002. I was not made aware of those events and anticipate filing an action to revoke the debtors [sic] discharge and/or to set aside the Circuit Court dismissal since I was not made a party to the settlement. Accordingly any settlement as to the debtor is null and void and I may have claims against those who settled my claims without my consent. Why was this settlement [sic] without involving me? . . . Please advise me immediately of what has occurred[.]

The Trustee filed an adversary proceeding on January 15, 2003, against the Debtor, Mr. Nichol, and Mr. Nichol's law firm, requesting an appropriate monetary judgment to recover the settlement amount paid to the Debtor in accordance with the unauthorized settlement of the State Court Lawsuit.¹ The Defendants filed answers to the Trustee's complaint, and ultimately, the parties reached an agreement.

On June 12, 2003, the Trustee filed a Motion to Compromise and Settle and Notice of Hearing (Compromise and Settlement) in the Debtor's Chapter 7 bankruptcy case, asking the court to approve *nunc pro tunc* the settlement of the State Court Lawsuit, whereby the Debtor's gross proceeds totaled \$10,000.00.² The Trustee agreed that it was a good settlement, since the Debtor and her spouse are now divorced, and her claim was based upon loss of consortium. Additionally, pursuant to the proposed Compromise and Settlement, the Trustee agreed not to oppose an application by Mr. Nichol to be employed as special counsel for the bankruptcy estate, *nunc pro tunc*, provided that the United States Trustee did not oppose the application, and as long as Mr. Nichol remitted the entire \$10,000.00 settlement to the Trustee for administration. Once Mr. Nichol was employed by the bankruptcy estate, he would be entitled to file an application for compensation and reimbursement of expenses. Also, under the terms of the Compromise and Settlement, the Trustee would dismiss the pending adversary proceeding against the Debtor, Mr. Nichol, and his law firm, and in fact, after receiving the \$10,000.00 settlement proceeds from Mr.

¹ Adv. Proc. No. 03-3003. Most of the facts stated in the preceding paragraphs of this Memorandum are derived from the pleadings filed in the adversary proceeding and are undisputed.

² Pursuant to his fee arrangement with the Debtor for the State Court Lawsuit, Mr. Nichol was entitled to a one-third contingency fee plus reimbursement of all expenses. The Debtor accordingly netted \$5,496.78 from her \$10,000.00 share of the settlement proceeds.

Nichol, the Trustee filed an Order of Dismissal of the adversary proceeding, which was entered on July 11, 2003.

Under the terms of the Compromise and Settlement, the Trustee filed an Application to Approve Employment of Counsel for a Special Purpose (Application to Employ) on June 11, 2003, proposing to employ Mr. Nichol as special counsel for the bankruptcy estate in connection with the State Court Lawsuit pursuant to 11 U.S.C.A. § 327 (West 1993).³ Specifically, the Application to Employ sought to employ Mr. Nichol under the terms of his fee agreement with the Debtor, whereby he would be entitled to a one-third contingency fee and reimbursement of all expenses, "subject to the terms and the requirements of 11 U.S.C. §328 and B.R.C.P. [sic] 2016." The Application to Employ was accompanied by a proposed Order Authorizing Employment [of] Attorney approved by the Chapter 7 Trustee and United States Trustee which was subsequently signed by the court and entered, without a hearing, on June 19, 2003, *nunc pro tunc* to February 2000.⁴

On June 23, 2003, Mr. Nichol filed the Application for Compensation presently pending before the court, requesting compensation of his one-third contingency fee in the amount of

³ The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C.A. § 327(e).

⁴ The court has no hesitation in saying, upon reflection, that it should not have followed its customary procedure of summarily entering employment orders approved by the United States Trustee. Given the *nunc pro tunc* nature of the Order and Mr. Nichol's complete disregard of the bankruptcy estate's interest in the State Court Lawsuit, the court should not have validated his actions through the entry of the June 19, 2003 employment Order. Nonetheless, because Mr. Nichol paid the \$10,000.00 settlement proceeds to the Trustee out of his own pocket, the court will not now undo the Order Authorizing Employment [of] Attorney.

\$3,333.33 and reimbursement of expenses in the amount of \$1,169.89. There were no attachments to the Application for Compensation or to the Notice of Hearing on Application for Compensation and Reimbursement of Expense also filed by Mr. Nichol on June 23, 2003, setting July 10, 2003, as the hearing date concerning his Application for Compensation and advising parties in interest that any objections to compensation must be filed prior to July 7, 2003.

The court held the hearing on Mr. Nichol's Application for Compensation on July 10, 2003, at which time it also addressed the Objection of Creditor Pete Kerr to Settlement, Compensation and Reimbursement of Expense, which was untimely filed on July 9, 2003.⁵ At the hearing, both the Trustee and the United States Trustee expressed their concern with awarding the fees based upon Mr. Nichol's failure to obtain authorization for the State Court Lawsuit settlement after being notified of and acknowledging the Trustee's interest in the Debtor's claim, but neither objected to payment of Mr. Nichol's expenses. The court inquired as to why Mr. Nichol believed that he was entitled to compensation based upon his conduct concerning the State Court Lawsuit, in that he failed to include the Trustee in any settlement negotiations and then ultimately settled it without the Trustee's knowledge and/or authorization, thereby forcing the Trustee to file an adversary proceeding to recover the settlement proceeds for the benefit of the Debtor's bankruptcy estate. In response, Mr. Nichol stated that he was unaware that the Trustee retained any interest in the State Court Lawsuit once the Debtor was discharged. He also argued that it was a good settlement, from which the bankruptcy estate would receive a net benefit of \$5,496.78, after his

⁵ The Notice of Hearing on Application for Compensation and Reimbursement of Expense filed by Mr. Nichol's counsel on June 23, 2003, which was served on all parties in interest, requires that objections to the Application for Compensation be filed by July 7, 2003. At the hearing, Mr. Kerr's attorney advised that he did not object to payment of expenses, and he agreed to the Compromise and Settlement under certain terms incorporated into the Order approving the settlement.

requested compensation and reimbursement of his expenses. Further, Mr. Nichol argued that he would be unduly prejudiced if he was not allowed his requested compensation in that he has already paid the settlement proceeds to the Debtor's former spouse and to the Debtor.

II

A professional requesting compensation bears the burden of proof that he is entitled to such compensation. *In re Hutter Constr. Co., Inc.*, 126 B.R. 1005, 1011 (Bankr. E.D. Wis. 1991); *In re Gillette Assocs., Ltd.*, 101 B.R. 866, 879 (Bankr. N.D. Ohio 1989). The compensation of professionals is governed generally by 11 U.S.C.A. § 330 (West 1993 & Supp. 2003), providing that "[a]fter notice to the parties in interest and the United States Trustee and a hearing, and subject to section[] . . . 328, . . . the court may award reasonable compensation for actual, necessary services rendered by . . . [an] attorney" employed by the bankruptcy estate pursuant to § 327. 11 U.S.C.A. § 330(a)(1)(A). Section 328(a) provides that:

The trustee . . . may employ or authorize the employment of a professional person under section 327 . . . of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C.A. § 328(a). An application for compensation is reviewed under the "reasonableness standard" of § 330(a) unless the professional requesting fees was "unambiguously" employed under § 328(a) and has "explicitly" stated so in the application for employment. *Circle K Corp. v. Houlihan, Lokey, Howard & Zukin, Inc. (In re Circle K Corp.)*, 279 F.3d 669, 674 (9th Cir. 2001). In this case, Mr. Nichol's Application to Employ filed on June 11, 2003, unequivocally

stated that his employment, if approved, would be “paid as an administrative expense of the estate subject to the terms and the requirements of 11 U.S.C. § 328[.]”

If the court has given prior approval to specified compensation, such as a contingency fee, “§ 328 controls and the court starts with that approved compensation, modifying it only for developments unforeseen when originally approved.” *Donaldson Lufkin & Jenrette Sec. Corp. v. Nat’l Gypsum Co. (In re Nat’l Gypsum Co.)*, 123 F.3d 861, 862 (5th Cir. 1997); *see also Peele v. Cunningham (In re Texas Sec. Inc.)*, 218 F.3d 443, 445 (5th Cir. 2000) (“Section 328 applies when the bankruptcy court approves a particular rate or means of payment, and § 330 applies when the court does not do so.”); *Nischwitz v. Airspect Air, Inc. (In re Airspect Air, Inc.)*, 288 B.R. 464, 471 (B.A.P. 6th Cir. 2003) (holding that the § 330(a) reasonableness standard applies only when the court has not approved specific terms of a professional’s employment under § 328(a)). Along those lines, once the court has approved employment pursuant to § 328, it may not “later reduce previously approved contingency fees based upon the usual tests for reasonable compensation [set forth in § 330].” *Airspect Air, Inc.*, 288 B.R. at 470 (quoting *In re Olympic Marine Servs., Inc.*, 186 B.R. 651, 654 (Bankr. E.D. Va. 1995)). Under the precise language of the statute, once a bankruptcy court has approved specific terms of employment under § 328(a), it is bound by such approval to award the agreed upon compensation unless “the original terms [of employment] were improvident in light of unanticipated developments.” *In re Westbrook*, 202 B.R. 520, 523 (Bankr. N.D. Ala. 1996).

For an intervening circumstance to render a court’s decision to grant an application for compensation improvident, it “must be one that would have affected the court’s decision in the first

place[, and the circumstance] must have been relevant to that decision in some way, rendering it untenable or unwise in hindsight.” *Airspect Air, Inc.*, 288 B.R. at 471. Moreover, the circumstance must have been unknown or unpredictable at the time that the application to employ under § 328(a) was approved. *Westbrooks*, 202 B.R. at 523.

In this case, there have been no intervening, unanticipated, unknown, or unpredictable circumstances that have arisen since June 19, 2003, the date upon which the court entered the Order authorizing Mr. Nichol’s employment *nunc pro tunc* to February 2000. Relating the facts back to February 2000, the effective date of the employment Order, the court finds there is nothing unpredictable about a personal injury lawsuit settling prior to trial. Additionally, all parties agree that the settlement itself was very good, especially in light of the fact that the Debtor is now divorced from her former spouse, and her claim was for loss of consortium. Furthermore, where the Debtor’s Chapter 7 bankruptcy case was once a no-asset case, because of the settlement, the estate will now have assets of at least \$5,496.78 to be divided among her creditors.

Although the court agrees with the Trustee and the United States Trustee that Mr. Nichol should not be allowed full compensation based upon his conduct after February 28, 2000, when he was first notified that the Debtor had filed a Chapter 7 bankruptcy case and the Trustee was, at that point, the holder of any claim in the State Court Lawsuit, this Application for Compensation is not governed by § 330, whereby the court may conduct a reasonableness review. Mr. Nichol’s Application to Employ was approved pursuant to the requirements of § 328(a), so his Application for Compensation is governed by § 330(a), as it is subject to the provisions of § 328. Therefore, the court may not determine, after the fact, that the fee arrangement set forth

in Mr. Nichol's Application to Employ and allowed pursuant to the court's Order authorizing his employment is now unreasonable. Under the statutory scheme and precedent case law by which the court is bound, the court has no alternative but to grant Mr. Nichol's Application for Compensation as to his requested one-third contingency fee in the amount of \$3,333.33.

Conversely, all applications for compensation must comply with Federal Rule of Bankruptcy Procedure 2016(a), which requires that "[a]n entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth *a detailed statement* of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." FED. R. BANKR. P. 2016(a) (emphasis added). "Fee applications must be so complete so as to be self-contained and self-sufficient documents from which all, or at least most, ambiguities can be resolved." *Solomon v. Wein (In re Huhn)*, 145 B.R. 872, 875 (W.D. Mich. 1992). The court is not required to simply "rubber-stamp" charges when the applicant provides no breakdown of requested expenses. *Gillette Assocs., Ltd.*, 101 B.R. at 881. Accordingly, a court may not grant an application for compensation that is filed without sufficient documentation of requested fees and expenses. *Huhn*, 145 B.R. at 875; *In re Riker Indus., Inc.*, 122 B.R. 964, 971 (Bankr. N.D. Ohio 1990).

Mr. Nichol seeks reimbursement of expenses in the amount of \$1,169.89; however, he has not provided the court with any detailed statement of expenses incurred, as required by Rule 2016(a). There are no attachments to the Application for Compensation, nor does the Application itself provide the court with any sort of itemization as to the actual expenses incurred by Mr. Nichol for which he now seeks reimbursement. Because he has not complied with Rule 2016(a),

the court must deny Mr. Nichol's request for reimbursement of expenses in the amount of \$1,169.89.

In summary, Mr. Nichol's Application for Compensation will be granted as to his request for the one-third contingency fee in the amount of \$3,333.33, and payment of this compensation shall be an administrative expense of the bankruptcy estate pursuant to 11 U.S.C.A. § 503(b)(2) (West 1993 & Supp. 2003), entitled to priority under 11 U.S.C.A. § 507(a)(1) (West 1993 & Supp. 2003). Mr. Nichol's Application for Compensation will be denied as to his request for reimbursement of expenses in the amount of \$1,169.89.

An order consistent with this Memorandum will be entered.

FILED: July 25, 2003

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. 99-32996

PAMELA KAY WOODWARD
a/k/a PAMELA KAY REED

Debtor

ORDER

For the reasons stated in the Memorandum on Allowance of Compensation and Reimbursement of Expenses of H. Douglas Nichol filed this date, the court directs the following:

1. The Application of [sic] for Allowance of Compensation and Reimbursement of Expenses filed by H. Douglas Nichol, attorney for N. David Roberts, Jr., Chapter 7 Trustee, is GRANTED as to the request for attorney fees and DENIED as to the request for reimbursement of expenses.

2. H. Douglas Nichol, Attorney, is awarded compensation from the estate in the amount of \$3,333.33 representing his one-third contingency fee from the proceeds realized by the Trustee from the settlement of the Debtor's personal injury claim in the matter styled *Robert Wayne Woodward and Pamela Kaye Woodward*, Knox County Circuit Court case no. 1-612-99.

SO ORDERED.

ENTER: July 25, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE