
IN THE SUPREME COURT OF NEBRASKA

IVAN EICHER and DELORES EICHER, PATRICK SWEENEY and LOIS SWEENEY,
EMMETT GULLEY, STEVEN W. STARMAN, WILLIAM STREET, DAVID WELTON,
DON NOVACHICH, JERRY GILLS, RENEE RICHTER, LORI HILL
and JENNIFER FRANS GRIESS

Plaintiffs/Appellees,

vs.

MID AMERICA FINANCIAL INVESTMENT CORPORATION, SCOTT
W. BLOEMER, and ELENA [sic] HOLLINGSHEAD,

Defendants/Appellants.

APPEAL FROM THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA
Honorable Peter C. Bataillon

BRIEF OF APPELLEES

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
PROPOSITIONS OF LAW	2
STATEMENT OF FACTS	3
ARGUMENT	4
I. The District Court Had Statutory Authority Pursuant to Neb. Rev. Stat. § 25-2001 to Correct its Clerical Error or Error from Oversight or Omission.....	4
II. The District Court's Order Nunc Pro Tunc Corrected its Clerical Error or Error from Oversight or Omission	6
III. The District Court's Attorneys Fees Award Should Be Upheld if There Is Any Basis For or Evidence in the Record to Support the District Court's Award of Attorneys Fees	10
CONCLUSION	11
AFFIDAVIT OF SERVICE	13

TABLE OF AUTHORITIES

Cases	Page
<i>Andrews v. Nebraska State Railway Commission</i> , 178 Neb. 799, 135 N.W.2d 712 (1965)	6
<i>Bower v. Butcher</i> , 171 Neb. 452, 106 N.W.2d 689 (1960)	8
<i>Continental Oil Co. v. Harris</i> , 214 Neb. 422, 333 N.W.2d 921 (1983)	7, 9
<i>Farmer v. Farmer</i> , 200 Neb. 308, 263 N.W.2d 664 (1978)	8
<i>Fay v. Dowding, Dowding & Dowding</i> , 261 Neb. 216, 623 N.W.2d 287 (2001)	8
<i>Gunia v. Morton</i> , 175 Neb. 53, 120 N.W.2d 371 (1963)	9
<i>Hogan v. Garden County</i> , 268 Neb. 631, 686 N.W.2d 356 (2004)	1
<i>Interstate Printing Co. v. Department of Revenue</i> , 236 Neb. 110, 459 N.W.2d 519 (1990)	9
<i>Larson v. Bedke</i> , 212 Neb. 134, 322 N.W.2d 367 (1982)	8
<i>Mills v. Denny Wiekhorst Excavating, Inc.</i> , 206 Neb. 443, 293 N.W.2d 112 (1980)	10
 Statutes	
NEB. REV. STAT. § 25-2001 (2004)	4, 5, 6
 Other Authorities	
49 C.J.S. JUDGMENTS § 280 (1997)	7

STATEMENT OF THE CASE

A. Nature of the Case

This appeal is from an Order Nunc Pro Tunc by the District Court correcting a clerical error set forth in the District Court's prior order dated June 16, 2003, to state that its award of attorney fees is based on Defendants' violation of the Nebraska Consumer Protection Act ("NCPA"), not the Nebraska Deceptive Trade Practices Act ("NDTPA"). This is the second appeal of a case filed by thirteen plaintiffs alleging fraud, civil conspiracy rescission and violations of the NCPA and the NDTPA. The parties recently filed a joint motion to consolidate the two appeals.

B. Issues Tried in the Court Below

1. Whether the Court had authority/jurisdiction pursuant to NEB. REV. STAT. §25-2001 to enter an Order Nunc Pro Tunc to correct its clerical error or error from omission; and
2. Whether the June 16, 2003 Order contained a clerical error or an error from oversight or omission when it stated that fees were awarded under the NDTPA instead of the NCPA.

C. How the Issues Were Decided

Pursuant to NEB. REV. STAT. §25-2001, the District Court issued an Order Nunc Pro Tunc on October 5, 2004, correcting its June 16, 2003 order to state that its award of attorney fees based on Defendants' violation of the NDTPA was a clerical error or error from oversight or omission and should have been awarded based on Defendants' violation of the NCPA. (ST3).

D. Standard of Review

"When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court." *Hogan v. Garden County*, 268 Neb. 631, 686 N.W.2d 356 (2004).

PROPOSITIONS OF LAW

I.

Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the case is submitted for decision in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

NEB. REV. STAT. § 25-2001(3) (2004).

II.

In the absence of a showing to the contrary, the court . . . ordering the nunc pro tunc amendment of its own records is presumed to have acted properly and to have been justified in making the amendment.

Andrews v. Nebraska State Railway Commission, 178 Neb. 799, 805, 135 N.W.2d 712, 717 (1965).

III.

The purpose of an order nunc pro tunc is to correct a record, which was mistakenly recorded, in order to properly reflect the action really had.

Andrews v. Nebraska State Railway Commission, 178 Neb. 799, 801, 135 N.W.2d 712, 715 (1965).

IV.

A clerical error must not be taken in too narrow a sense; it includes not only errors made by the clerk in entering the judgment but also those mistakes apparent on the record, whether made by

the court or by counsel during the progress of the case, which cannot reasonably be attributable to the exercise of judicial consideration or discretion.

49 C.J.S. JUDGMENTS § 280 (1997).

V.

Orders nunc pro tunc can be supported by the judge's notes, court files, or other record entries as well as other oral or written evidence which establishes that the order was required to allow for the record to reflect the truth.

Continental Oil Co. v. Harris, 214 Neb. 422, 425, 333 N.W.2d 921, 923 (1983).

VI.

The findings of the trial court must be sustained if there was sufficient evidence to support them.

Mills v. Denny Wiekhorst Excavating, Inc., 206 Neb. 443, 445, 293 N.W.2d 112, 113 (1980).

STATEMENT OF FACTS

On or about May 15, 2001 thirteen plaintiffs filed an action in the District Court of Douglas County, Nebraska against Mid America Financial Investment Corporation, Scott Bloemer and Elaina Hollingshead (collectively hereinafter referred to as "Defendants"), alleging claims of fraud, civil conspiracy, rescission and violations of the Nebraska Consumer Protection Act ("NCPA") and the Nebraska Deceptive Trade Practices Act ("NDTPA"). (T1-18 in S-03-001257). On or about April 28, 2003, the District Court of Douglas County held that the Defendants defrauded the Plaintiffs of their homes, that Defendants were involved in a civil conspiracy to defraud each of the Plaintiffs and that Defendants violated the NCPA. (T30-40 in S-03-001257). The trial court found that Defendants were jointly and severally liable to each of the Plaintiffs, rescinded the transactions, and reconveyed

property to Plaintiffs whose homes Defendants had not yet sold and awarded damages. (T30-40 in S-03-001257). The court also awarded Plaintiffs their costs and attorney fees under the NCPA, stating the amount of the fees would be determined at a later hearing date. (T30-40 in S-03-001257).

On or about June 16, 2003, the District Court of Douglas County awarded costs in the amount of \$6,192.79 and attorneys fees in the amount of \$377,323.40 pursuant to the NDTPA (the court, in a later Order Nunc Pro Tunc dated October 5, 2004 stated that it mistakenly ordered fees to be awarded under the NDTPA instead of the NCPA) but was silent as to whether they were also awarded pursuant to the NCPA. (T43-44 in S-03-001257 and ST3).

In the District Court's Order Nunc Pro Tunc dated October 28, 2003, the Court held that the NDTPA provides no private right of action except for injunctive relief. (T55-56 in S-03-001257).

During the pendency of the first appeal, Plaintiffs filed a motion asking the court to correct the clerical mistake in its June 16, 2003 order to state that the award of attorneys fees was pursuant to the NCPA rather than the NDTPA. (T12). In an Order Nunc Pro Tunc dated October 5, 2004, the District Court of Douglas County stated that it made a clerical mistake or an error from oversight in its order dated June 16, 2003 when it held that the costs and fees were based on the NDTPA. (ST3). The District Court of Douglas County, in its October 5, 2004 Order Nunc Pro Tunc, stated that costs and fees are awarded under the NCPA. (ST3).

ARGUMENT

I. The District Court Had Statutory Authority Pursuant to Neb. Rev. Stat. § 25-2001 to Correct Its Clerical Error or Error from Omission or Oversight.

The District Court had statutory authority to correct its June 16, 2003 Order. NEB. REV. STAT. § 25-2001(3) states:

Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the case is submitted for decision in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

NEB. REV. STAT. § 25-2001 (2004). Pursuant to this statute, Plaintiffs filed a motion asking the District Court to correct its clerical error or error arising from oversight or omission.

The Defendants argue that (1) the District Court did not have subject matter jurisdiction to correct its earlier order because the underlying action had already been appealed; and (2) the Plaintiffs' motion asking the court to modify its order was untimely because more than six months had elapsed since the entry of the order, and therefore the motion should not have been granted. The District Court did have jurisdiction, pursuant to NEB. REV. STAT. § 25-2001, to correct its clerical error or error from oversight or omission during the pendency of the appeal before the case was submitted for decision in the appellate court. *See* NEB. REV. STAT. § 25-2001 (2004). Additionally, the Plaintiffs' motion asked the court to correct a clerical error or error from oversight or omission, and was timely because the appeal of the case was pending and the case had not been submitted to the appellate court for decision. The District Court ruled on Plaintiffs' motion on October 5, 2004. Defendants filed their reply brief in the first appeal of this case on October 28, 2004. Therefore, the case had not yet been submitted for decision in the appellate court when the District Court issued its Order Nunc Pro Tunc on October 5, 2004.

Because NEB. REV. STAT. § 25-2001 specifically authorizes the District Court to correct clerical mistakes or omissions from oversight on a party's motion prior to the case being submitted to the appellate court, Defendants' arguments that the Plaintiffs' motion was untimely and that District Court did not have subject matter jurisdiction to correct its earlier order fail. As such, the October 5, 2004 Order should be affirmed.

II. The District Court's Order Nunc Pro Tunc Corrected its Clerical Error or Error from Oversight or Omission

The District Court properly issued its Order Nunc Pro Tunc correcting its clerical mistake. Pursuant to NEB. REV. STAT. § 25-2001, the District Court may correct clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission at any time on the court's initiative or on the motion of any party. NEB. REV. STAT. § 25-2001. "In the absence of a showing to the contrary, the court . . . ordering the nunc pro tunc amendment of its own records is presumed to have acted properly and to have been justified in making the amendment." *Andrews v. Nebraska State Ry. Comm'n*, 178 Neb. 799, 805, 135 N.W.2d 712, 717 (1965). The purpose of an order nunc pro tunc is to correct a record, which was mistakenly recorded, in order to properly reflect the action really had. *Andrews*, 178 Neb. at 801, 135 N.W.2d at 715.

The District Court's Order Nunc Pro Tunc properly corrected the clerical mistake or error from oversight or omission because it awarded attorney fees based on Defendants' violation of the NCPA, not the NDTPA. Contrary to appellants' argument that "there is nothing in the record which demonstrates that the trial court's Order of June 16, 2003 . . . did anything other than to record what the trial judge intended to order at that time," the District Court's previous orders make it clear that the June 16, 2003 order contained a clerical error when it awarded fees under the NDTPA. (Brief for

Appellant at 9, *Eicher v. Mid America Financial Investment Corp.*, No. A-04-001184). The District Court's April 28, 2003 Order stated that attorney fees were awarded under the NCPA and the District Court's Order dated October 28, 2003 stated that the NDTPA provides no private right of action except for injunctive relief. (T30-40 in S-03-001257; T55-56 in S-03-001257). As the District Court stated in its October 5, 2004 order,

Since the Court did not mention the NDTPA in its first order of April 25, 2003, and stated in that order that attorney fees were appropriate under the NCPA and that a hearing was set to determine that award, it is obvious that this Court inadvertently, mistakenly or by oversight stated that the award of attorney fees in its order of June 16, 2003 was under the NDTPA rather than the NCPA.

(ST3). Orders nunc pro tunc can be supported by the judge's notes, court files, or other record entries as well as other oral or written evidence which establishes that the order was required to allow for the record to reflect the truth. *Continental Oil Co. v. Harris*, 214 Neb. 422, 425, 333 N.W.2d 921, 923 (1983).

The District Court's correction of its order to refer to the NCPA instead of the NDTPA was clearly a correction of a clerical error. The term "clerical error" is broadly construed:

A clerical error must not be taken in too narrow a sense; it includes not only errors made by the clerk in entering the judgment but also those mistakes apparent on the record, whether made by the court or by counsel during the progress of the case, which cannot reasonably be attributable to the exercise of judicial consideration or discretion.

49 C.J.S. JUDGMENTS § 280 (1997).

The Nebraska Supreme Court has previously upheld an order nunc pro tunc replacing an incorrectly used term with the correct term, classifying the error as an error from oversight. In *Farmer v. Farmer*, the court corrected its decree to state "petitioner" rather than "respondent". 200 Neb. 308, 309, 263 N.W.2d 664, 666 (1978). Similarly, in this case, it was proper for the District Court to replace the incorrect term "NDTPA" with the correct term "NCPA"

Additionally, the Nebraska Supreme Court has upheld orders nunc pro tunc which correct errors in oversight from failures to include all of the court's findings in an order. *See Larson v. Bedke*, 212 Neb. 134, 322 N.W.2d 367 (1982); *Bower v. Butcher*, 171 Neb. 452, 106 N.W.2d 689 (1960). In *Larson*, the Nebraska Supreme Court affirmed an order nunc pro tunc which included findings regarding prescriptive title to property previously not included in the prior order because the failure to include the findings was a clerical omission by counsel. *Larson*, 212 Neb. at 136, 322, 322 N.W.2d at 368. Similarly, in *Bower*, the Nebraska Supreme Court affirmed an order nunc pro tunc of the district court authorizing a freight line company to travel through two cities not listed in the prior order because the error was "apparently through oversight in preparing the order." *Bower*, 171 Neb. at 456, 106 N.W.2d at 692. As in *Larson* and *Bower*, the District Court's failure to include a finding on attorneys fees under the NCPA in its June 16, 2003 Order was an error from oversight or omission.

The cases cited by the Appellants are distinguishable from the present case because (1) no clerical errors were made; (2) the nunc pro tunc orders changed the rights fixed by the prior order; and/or (3) the courts had no evidence before them to show that the court's earlier order did anything other than reflect what the trial court intended to hold. *See Fay v. Dowding, Dowding & Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001) (holding that order nunc pro tunc in worker's compensation

case which withdrew a prior order of affirmance was not proper because it did not correct a clerical error); *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990) (holding that entry made nunc pro tunc, which amended earlier order to reflect the correct date of an order being affirmed, was improper because there was no evidence before the court to show that a clerical mistake was made); *Continental Oil Co. v. Harris*, 214 Neb. 422, 333 N.W.2d 921 (1983) (holding that order nunc pro tunc, which modified earlier order confirming the amount to be paid for property at a foreclosure sale but adding the terms "less the amount of taxes and special assessments," was improper use of an order nunc pro tunc because it changed the rights fixed by the prior order and because there was nothing before the court to show that the prior order did anything other than reflect what the trial judge intended to decree at the time); *Gunia v. Morton*, 175 Neb. 53, 120 N.W.2d 371 (1963) (holding that order nunc pro tunc, which amended prior order that stated plaintiff was to remove all dirt from defendant's land to state that the dirt on plaintiff's land "varies in depth from one to eight feet and is in the amount of 3,500 cubic yards," was not proper because the additional language was not included as a result of a clerical error, as the judge had no independent recollection of the matters in dispute and there were no inconsistencies in the two orders).

In this case, a clerical error or error from oversight was made because the Order used the term "NDTPA" instead of "NCPA." The record in this case establishes that the June 16, 2003 Order contained a clerical mistake because (1) the April 28, 2003 Order found Defendants violated the NCPA and awarded fees based upon that act; and (2) this Court's October 28, 2003 Order states that there is no private right of action under NDTPA. As such, the District Court properly issued its Order Nunc Pro Tunc and the order should be affirmed.

III. The District Court's Attorneys Fees Award Should be Upheld if There is Any Basis For or Evidence in the Record to Support the District Court's Award of Attorneys Fees

Even if the District Court did not have the authority to issue the Order Nunc Pro Tunc correcting its clerical error or if the District Court's Order Nunc Pro Tunc did not correct a clerical error, the District Court's award of attorneys fees will be upheld if there is any basis in the record to support it. "The findings of the trial court must be sustained if there was sufficient evidence to support them." *Mills v. Denny Wieckhorst Excavating, Inc.*, 206 Neb. 443, 445, 293 N.W.2d 112, 113 (1980). In *Mills*, the plaintiff brought a claim for breach of contract. *Mills*, 206 Neb. at 444, 293 N.W.2d at 113. The trial court awarded the plaintiff damages in the amount of the reasonable value of his partial performance, but failed to make a specific finding that the plaintiff had substantially performed. *Id.* at 445, 293 N.W.2d at 113. However, the Nebraska Supreme Court upheld the damages award of the trial court finding that, "although the trial court did not make a specific finding that there had been substantial performance by the plaintiff, the evidence would sustain a finding to that effect." *Id.* at 446, 293 N.W.2d at 114.

Similarly, in the present case, although the District Court, in its June 16, 2003 Order did not specifically award costs and attorneys fees pursuant to the NCPA, the record would sustain a finding to this effect. The NCPA provides for the recovery of attorneys fees. The District Court, in its April 28, 2003 Order, previously awarded attorneys fees pursuant to the NCPA. Accordingly, there is a sufficient basis for and there is evidence in the record to support the District Court's award of attorneys fees. As such, the October 5, 2004 Order Nunc Pro Tunc should be affirmed.

CONCLUSION

The District Court had statutory authority under NEB. REV. STAT. § 25-2001 to issue its

October 5, 2004 Order Nunc Pro Tunc to correct its clerical error or error from oversight or omission. The District Court's October 5, 2004 Order Nunc Pro Tunc corrected a clerical error or error from oversight or omission when it replaced the incorrect term, "NDTPA," with the correct term, "NCPA." Even if the District Court lacked authority to issue its Order Nunc Pro Tunc or its Order Nunc Pro Tunc did not correct a clerical error, there is a sufficient basis for and there is evidence in the record to support the District Court's award of attorneys fees. Accordingly, the October 5, 2004 order should be affirmed.

IVAN EICHER and DELORES EICHER,
PATRICK SWEENEY and LOIS SWEENEY,
EMMET GULLEY, STEVEN W. STARMAN,
WILLIAM STREET, DAVID WELTON,
DON NOVACHICH, JERRY GILLS, RENEE
RICHTER, LORI HILL and JENNIFER FRANS
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IN THE SUPREME COURT OF NEBRASKA

IVAN EICHER and DELORES EICHER,)
PATRICK SWEENEY and LOIS SWEENEY,)
EMMETT GULLEY, STEVEN W. STARMAN,)
WILLIAM STREET, DAVID WELTON, DON)
NOVACHICH, JERRY GILLS, RENEE RIGHTER,)
LORI HILL and JENNIFER FRANS GRIESS,)

CASE NO. S-04-001184

Appellees,)

vs.)

AFFIDAVIT OF SERVICE

MID AMERICA FINANCIAL INVESTMENT)
CORPORATION, SCOTT W. BLOEMER, and)
ELAINA HOLLINGSHEAD,)

Appellants.)

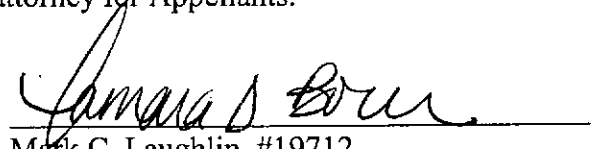
STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

COMES NOW Tamara D. Borer, and being first duly sworn under oath, deposes and states as follows:

1. That she is one of the attorneys for Ivan Eicher and Delores Eicher, Patrick Sweeney and Lois Sweeney, Emmett Gulley, Steven W. Starman, William Street, David Welton, Don Novachich, Jerry Gills, Renee Righter, Lori Hill and Jennifer Frans Griess, the Appellees in the above matter.

2. That on this 8th day of February, 2005, she sent by United States mail, postage prepaid, two (2) copies of the Brief of Appellees to Mark Weber and Betty Egan, 11240 Davenport Street, P. O. Box 540125, Omaha, Nebraska 68154-0125, attorney for Appellants.

FURTHER AFFIANT SAYETH NOT.

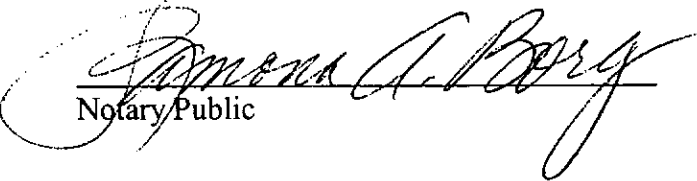


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Subscribed and sworn to before me this 8th day of February, 2005





Notary Public

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