

NEBRASKA SUPREME COURT

Tom Houser v. American Paving Asphalt, Inc.

299 Neb. 1 (2018) · No. No. S-16-778 · Decided February 16, 2018

SUMMARY

The Nebraska Supreme Court reviewed an appeal from a county court judgment involving a homeowner’s breach of contract claim against an asphalt paving company. The court addressed the district court’s authority to extend the time for filing a statement of errors, the applicable scope of appellate review, the sufficiency of evidence supporting repair damages, and attorney fees and sanctions. The district court’s judgment was affirmed in part and reversed and remanded in part.

CASE DETAILS

COURT	Nebraska Supreme Court
WRITING FOR THE COURT	Heavican, C.J.; Wright, J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.; Kelch, J.; Funke, J.
JURISDICTION	Nebraska
DECIDED	February 16, 2018
DOCKET	No. S-16-778
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Homeowner Tom Houser prevailed in a county court breach-of-contract action against American Paving Asphalt, Inc. The district court, acting as an intermediate appellate court, reduced the damages award and remanded for entry of judgment. Houser appealed and American Paving cross-appealed to the Nebraska Supreme Court.
STANDARD OF REVIEW	Appeals from county court are generally reviewed for error appearing on the record. Under that standard, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. The district court's ruling on a motion to extend the time for filing a statement of errors is reviewed for abuse of discretion. Because the district court abused its discretion in granting the extension, the Supreme Court reviewed the county court's judgment for plain error.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion; precedential
PARTIES	Tom Houser v. American Paving Asphalt, Inc.

TOPICS

appellate procedure

standard of review

preservation of error

breach of contract

damages

PRACTICE AREAS

Appellate procedure

Civil procedure

Contracts

Construction law

Remedies

QUESTIONS PRESENTED

1. Whether the district court had discretion to extend the time for filing a statement of errors in an appeal from county court.
2. Whether the district court abused its discretion by allowing American Paving to file its statement of errors out of time under the circumstances presented.
3. Whether review of the county court judgment was therefore limited to plain error.
4. Whether the cost of Houser's 2-inch asphalt overlay was recoverable as damages for American Paving's breach of contract.
5. Whether the county court plainly erred in awarding damages for patchwork repairs and discovery sanctions and attorney fees.
6. Whether the award of \$861.75 in costs should be affirmed.

HOLDINGS

1. A district court has discretion to extend the time for filing a statement of errors; the governing rule does not prohibit such an extension, and the authority is not limited to the rule permitting suspension of court rules.
2. The district court abused its discretion by granting American Paving's motion to file its statement of errors out of time because the delay resulted from counsel's own neglect and the motion was filed only after the merits had been briefed.
3. Because the district court abused its discretion in allowing the late statement of errors, review of the county court's judgment was limited to plain error.
4. The county court did not plainly err in awarding \$26,189.09 for the 2-inch asphalt overlay, and the district court erred by reversing that portion of the county court's verdict.
5. The county court did not plainly err in awarding \$5,660 for patchwork repairs, \$1,514 in discovery sanctions and attorney fees, or \$861.75 in costs.

KEY QUOTATIONS

"On the whole, our case law teaches that there is flexibility in applying the statement of errors rule." (299 Neb. at 18-19)

"Thus, we hold that on appeal from the county court, a district court's ruling on a motion to extend the time for filing a statement of errors will be reviewed for an abuse of discretion." (299 Neb. at 19)

“Because the district court abused its discretion, its review in this case should have been limited to plain error. In turn, our review of the county court’s judgment will be limited to plain error.” (299 Neb. at 20)

FACTUAL BACKGROUND

Houser contracted with American Paving in 2008 to convert his limestone driveway to asphalt. The driveway began cracking and deteriorating within several years, and an engineer attributed the premature failure to inadequate asphalt thickness and poor base and subgrade compaction. Houser paid \$5,660 for patchwork repairs and later \$26,189.09 for a 2-inch overlay over the entire driveway. The county court awarded Houser damages, costs, and discovery-related sanctions and attorney fees.

PROCEDURAL HISTORY

The Douglas County Court entered judgment for Houser in the amount of \$40,551.94 and later awarded \$1,514 in discovery sanctions and attorney fees. American Paving appealed to the Douglas County District Court but filed its statement of errors late. The district court allowed the late filing, affirmed liability, reduced damages to \$5,660 for patchwork repairs, allowed \$861.75 in costs, rejected recovery of the \$26,189.09 overlay cost, and affirmed the \$1,514 sanctions. The Nebraska Supreme Court held that the district court abused its discretion by allowing the late statement of errors, limited review to plain error, affirmed the patchwork-repair damages, sanctions, and costs, reversed as to the overlay damages, and remanded through the district court to the county court.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The Supreme Court reversed the district court insofar as it reversed the county court's award of \$26,189.09 for the 2-inch overlay. It remanded to the district court with directions to remand to the county court with directions to enter judgment consistent with the opinion, while affirming the portions concerning \$5,660 in patchwork repairs, \$1,514 in discovery sanctions, and \$861.75 in costs.

CASES CITED

- Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co., 295 Neb. 419, 889 N.W.2d 596 (2016)
- State ex rel. Unger v. State, 293 Neb. 549, 878 N.W.2d 540 (2016)
- Zwygart v. State, 270 Neb. 41, 669 N.W.2d 362 (2005)
- Heckman v. Marchio, 296 Neb. 458, 894 N.W.2d 296 (2017)
- Putnam v. Scherbring, 297 Neb. 868, 902 N.W.2d 140 (2017)
- In re Interest of Luz P. et al., 295 Neb. 814, 891 N.W.2d 651 (2017)
- Jacob v. Nebraska Dept. of Corr. Servs., 294 Neb. 735, 884 N.W.2d 687 (2016)
- In re Adoption of Jaelyn B., 293 Neb. 917, 883 N.W.2d 22 (2016)
- Carrel v. Serco Inc., 291 Neb. 61, 864 N.W.2d 236 (2015)

- Marcuzzo v. Bank of the West, 290 Neb. 809, 862 N.W.2d 281 (2015)
- In re Integration of Nebraska State Bar Ass'n, 133 Neb. 283, 275 N.W. 265 (1937)
- Smeal Fire Apparatus Co. v. Kreikemeier, 279 Neb. 661, 782 N.W.2d 848 (2010)
- Hossaini v. Vaelizadeh, 283 Neb. 369, 808 N.W.2d 867 (2012)
- State v. Hausmann, 277 Neb. 819, 765 N.W.2d 219 (2009)
- State v. Osborne, 20 Neb. Ct. App. 553, 826 N.W.2d 892 (2013)
- Lindsay Ins. Agency v. Mead, 244 Neb. 645, 508 N.W.2d 820 (1993)
- Federal Nat. Mortgage Ass'n v. Marcuzzo, 289 Neb. 301, 854 N.W.2d 774 (2014)
- State v. Hays, 253 Neb. 467, 570 N.W.2d 823 (1997)
- In re Estate of Morse, 248 Neb. 896, 540 N.W.2d 131 (1995)
- State v. Griffin, 270 Neb. 578, 705 N.W.2d 51 (2005)
- State v. Engleman, 5 Neb. Ct. App. 485, 560 N.W.2d 851 (1997)
- State v. Gerstner, 244 Neb. 508, 507 N.W.2d 490 (1993)
- Miller v. Brunswick, 253 Neb. 141, 571 N.W.2d 245 (1997)
- Steffy v. Steffy, 287 Neb. 529, 843 N.W.2d 655 (2014)
- In re Interest of Samantha L. & Jasmine L., 286 Neb. 778, 839 N.W.2d 265 (2013)
- In re Interest of Jamya M., 281 Neb. 964, 800 N.W.2d 259 (2011)
- City of Gordon v. Montana Feeders, Corp., 273 Neb. 402, 730 N.W.2d 387 (2007)

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