Taxable Costs in Civil Cases Under Nebraska Law

by Timothy J. Thalken

Congratulations! The trial court has just entered a judgment in favor of your client and now it is time to recoup the costs he or she incurred during the case. This article discusses under what circumstances a court may award costs in a typical civil case and what is, and is not, recoverable as a taxable cost under Nebraska law. It will also raise issues you should consider regarding when to file a motion to tax costs and whether the Legislature should provide additional clarity regarding taxable costs. This article does not address what costs are available on appeal.

A. When Are Costs Taxable?

Nebraska has long held that under the common law, courts do not have inherent authority to award taxable costs.[1] Thus, "litigation costs are not recoverable by a party unless authorized by statute or a uniform course of procedure."[2]

Timothy J. Thalken

Timothy J. Thalken is a partner at Fraser Stryker PC LLO. Tim's practice is focused on representing clients in all manners of litigation. He has extensive trial, arbitration, administrative, and appellate experience. Tim is a *summa cum laude* graduate of Creighton University and received his law degree, with distinction, from the University of Nebraska College of Law. You can learn more information about his practice at http://www.fraserstryker.com/Attorneys/Timothy-J-Thalken.shtml.

1. Statutory Authorization

Nebraska statutes mandate that costs be awarded in certain circumstances while merely granting discretion to the court to award costs in others. It is beyond the scope of this article to discuss every circumstance in which costs must, or may, be awarded. Below is a brief discussion of some of the key cost statutes that typically come into play in civil cases.

a. Mandatory Cost Awards

Upon entry of a judgment in favor a party in an action for the recovery of (1) money only or (2) specific real or personal property, "costs shall be allowed of course."[3] This rule applies to judgments in favor of both plaintiffs[4] and defendants.[5] Thus, in a typical personal injury or breach of contract case, the Court must award costs to the prevailing party.

b. Discretionary Cost Awards

In cases not involving the recovery or money only or specific real or personal property, such as equitable actions, the court "may award and tax costs . . . as in its discretion it may think right and equitable."[6] Within this discretion, the Court may apportion costs amongst the parties.[7] The Court may, but is not required to, tax costs in a declaratory judgment action.[8]

2. Uniform Course of Procedure

Nebraska case law does not provide insight as to when costs are taxable due to a uniform course of procedure. In *Falls City*, the Nebraska Supreme Court explained that whatever the uniform course of procedure is with respect to awarding costs is frozen in time as of 1980 because a "'uniform course of procedure' which did not exist in 1980 could never develop under the principle we have applied since then."[9] In

other words, if there was no uniform course of procedure authorizing an award of costs prior to 1980, none could develop subsequently.

The case law regarding a uniform course of procedure for taxing costs appears to confuse *what* costs are taxable with *when* costs are taxable. Absent statutory authority, there appears to be no uniform course of procedure in Nebraska as to when costs are taxable. However, once a court determines a party is entitled to costs, what costs are taxable may be determined by reference to a uniform course of procedure. For example, there is no statute which authorizes a court to tax the expense of an original deposition as a cost. However, before 1980, Nebraska courts awarded prevailing parties the expenses of an original deposition as a cost.[10] The authority to tax the expenses of an original deposition as a cost to a prevailing party appears to be derived from a uniform course of procedure, although no case has expressly so held.

B. What Costs Are Taxable?

Now that you have determined that your client is entitled to a mandatory or discretionary award of costs, you must determine what costs are taxable. For those of you who practice regularly in federal court in Nebraska, this question is easily answered by reviewing to the Bill of Costs of Handbook published by the Clerk of the U.S. District Court.[11] To my knowledge, no such easy reference manual exists in Nebraska state court, leaving practitioners to comb through the case law and the statutes to determine what is taxable. To give you a head start on your research, below are lists of costs that the Nebraska Supreme Court has determined are, and are not, taxable.

1. Taxable

The Nebraska Supreme Court and Court of Appeals have determined that the costs associated with the following are taxable: (1) executed orders of attachment,[12] (2) answers filed to garnishment interrogatories,[13] (3) replevin orders,[14] (4) service of process,[15] (5) completion of records in concluded district court cases,[16] (6) filing fees,[17] (7) subpoena and witness fees[18] and (8) original deposition fees, regardless if the depositions are used at trial, if they were taken in good faith and you took the deposition.[19]

2. Not Taxable

Nebraska appellate precedent also identifies costs that are generally not taxable including: (1) expert witness fees,[20] (2) expenses of making copies of depositions,[21] (3) expenses of making enlargements of exhibits,[22] (4) photocopies,[23] (5) faxes,[24] (6) postage,[25] (7) videotaping depositions,[26] (8) presenting evidence electronically,[27] (9) deposition reporting fees,[28] (10) copies of depositions taken by the opposing party,[29] (11) fees charged by an opposing party's expert in responding to discovery under Neb. Ct. R. of Dis. § 6-326(b)(4)(C)(i) and (ii),[30] (12) costs of medical or expert reports made in preparation for litigation[31] and (13) attorney fees unless authorized by statute.[32]

It is important to keep in mind that some litigation expenses which are not taxable costs in some circumstances are taxable in others. For example, while photocopy charges are not recoverable as a taxable cost,[33] they may be recoverable as an element of an attorney fee.[34] Where a statute authorizes an award of attorney fees, the attorney fees are considered costs.[35] This leads to the anomalous situation where photocopies are not taxable costs except where the photocopies are recoverable as part of an attorney fee which is a taxable cost!

C. When Should a Motion to Tax Costs Be Filed?

Unlike federal law which requires a motion to tax costs to be filed within 14 days after the entry of a judgment, or by a date set by court order,[36] Nebraska law is silent as to when a motion to tax costs must be filed. This creates a number of potential pitfalls for practitioners.

It is well-established that an award of costs is part of the judgment.[37] Because costs are part of the judgment, the Nebraska Supreme Court holds a party must file a motion to tax costs *before* the judgment is entered.[38] For example, the Nebraska Supreme Court holds that if a motion for attorney fees is filed before a judgment is entered, the judgment is not final and appealable until the court rules on the motion.[39] Because attorney fees are considered costs,[40] the same rule should apply to a motion to tax costs. This raises a host of practical problems.

Frequently Nebraska trial courts enter an order resolving the substantive, dispositive issues raised in a motion and in that order simultaneously enter judgment granting relief. For example, a court may (1) grant a motion for summary judgment and simultaneously enter a judgment of dismissal or (2) enter a judgment on a jury verdict. The judgment often generically states that costs are awarded in favor of the prevailing party, without identifying the amount of costs awarded. Because a party does not know whether he or she will win the motion or trial, no motion for costs is typically filed before the judgment was entered.

If this situation arises, for the reasons discussed below, the safest procedure a prevailing party may employ to recover costs is to file a motion to alter or amend the judgment and ask the court to tax a specific amount of costs.[41] In order to be effective, a motion to alter or amend must be filed within ten days after the judgment is entered.[42]

In the alternative, a party may attempt to tax costs by filing a motion to modify the judgment. A court has inherent authority to modify its judgment in the same term in which

it was rendered.[43] The legislature has extended by statute the timeframe in which a court has inherent power to modify a judgment to six months after the term expires.[44] For example, if a judgment were entered on December 28, and the term of court expires on December 31, the court has inherent authority until June 30 to modify its own judgment to specify the amount of costs.[45]

If a motion to modify the a judgment is not filed within six months after the expiration of the term, the Court still has authority to modify its judgment. In dicta in *Muff v. Mahloch Farms Co.*,[46] the Nebraska Supreme Court stated: "It therefore appears that costs may be retaxed at a subsequent term when the court has failed to follow a mandatory statutory duty to tax costs, in the event of a clerical error or the failure to perform a ministerial act, and in instances authorized by section 25-2001, R.R.S.1943, for the vacation or modification of judgments at subsequent term."[47] However, after the six month deadline, the moving party must show that the judgment should be modified because of: (1) mistake, neglect or omission by the clerk, (2) fraud, (3) newly discovered evidence, (4) erroneous proceedings against an infant or a person of unsound mind, (5) death of one of the parties, (6) unavoidable casualty or misfortune, or (7) for taking judgments upon warrants of attorney for more than was due to the plaintiff when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.[48] It will be difficult to meet this standard in most cases.

Relying on a court's inherent authority to modify the judgment as a means to obtain costs is problematic if the losing party appeals the judgment. What the dicta in Muff does not address is the well-established rule that an appeal from a final judgment divests the district court of jurisdiction.[49] This raises the question of what happens if the party who loses at trial perfects an appeal before the trial court is able to rule on a motion to tax costs? The Supreme Court answered this question in *McLaughlin v. Hellbusch*.[50]

In *McLaughlin* the trial court entered judgment in favor of the defendant in a medical malpractice action. The victorious defendant then filed a motion to tax costs. However, before the trial court ruled on the motion, the plaintiff perfected her appeal. While the appeal was pending, the trial court entered an award of costs. The Nebraska Supreme Court held that the award of costs was invalid because "after an appeal has been perfected, a trial court lacks jurisdiction to enter an order for costs."[51] The decision in *McLaughlin* appears to limit the dicta in *Muff* that the trial court may tax costs after a judgment is entered to situations where no appeal from the judgment has been perfected.

A motion to alter or amend the judgment under Neb. Rev. Stat. § 25-1329 filed within 10 days of the judgment, may have been able to save the award of costs in McLaughlin. Arguably, a pending motion to alter or amend the judgment prevents the opposing party from perfecting an appeal while the motion is pending because there is no final judgment until the motion to alter or amend is ruled upon.[52] Thus, a notice of appeal should not divest the trial court of jurisdiction to enter an award of costs where those costs are requested as part of a timely motion to alter or amend the judgment.

The result in *McLaughlin* may also have been avoided had the prevailing party filed a motion for an order nunc pro tunc rather than a motion to tax costs.[53] By statute a trial court can correct judgments during the pendancy of an appeal up to the time the case is submitted for decision by the appellate court, and thereafter with leave from the appellate court, by issuing an order nunc pro tunc. An order nunc pro tunc is available to correct "clerical mistakes" and "errors arising from oversight or omission."[54] However, it is an open question whether a Nebraska court would consider a failure to specifically identify the amount of taxable costs owed in a judgment to be a "clerical mistake" or an error of "oversight or omission."

If the trial court has not awarded a specific amount of costs before an appeal is perfected, another jurisdictional issue is presented. In order to be a final order, "a judgment for money must specify the amount awarded or specify the means for determining the amount."[55] If a judgment generically awards costs, but does not specify an amount, the judgment should not be a final order. Because, in general, appellate courts only have jurisdiction over appeals from final judgments, the appellate court would lack jurisdiction over the appeal.[56] Thus, if a judgment generically states that costs are taxed to the prevailing party, but does not specify the amount of costs to be taxed, and the losing party appeals before the prevailing party files a motion to tax costs, the prevailing party may want to move for summary dismissal of the appeal, and/or assign a lack of appellate jurisdiction in its appellate brief. Arguably, once the appeal is dismissed, the trial court would have jurisdiction to rule on a motion for costs. Once costs are taxed, the judgment would be final and appealable.

Trial judges can help avoid some of the pitfalls identified above by not immediately entering a judgment as part of a dispositive order. Especially in cases where the award of costs is mandatory, the trial court can enter an order which resolves the substantive claims but which allows the prevailing party a certain number of days to submit a motion to tax costs. The order can indicate that a judgment will be entered after that motion is ruled upon. Because the order leaves open the issue of the amount of costs to be awarded, it should not be a final order subject to immediate appeal.[57] After the trial court rules on the motion to tax costs, it can then enter a separate judgment, specifically identifying the amount of costs awarded. That judgment should be final and immediately appealable.

Issuing a separate order and judgment is not without its own

problems. Practitioners may be confused regarding whether the order is a final appealable order leading to premature appeals of non-final orders. However, if the trial court's order is sufficiently clear that there will be additional proceedings regarding the taxation of costs, this confusion can be limited.

Practitioners cannot rely on the fact that after the appellate court resolves the appeal, the trial court will have the opportunity to award costs after the mandate is issued. For example, in *Salkin* the Nebraska Supreme Court disapproved of dicta in two of its prior cases which suggested that after an appeals court issued its mandate, the district court had jurisdiction to address a motion for attorney fees.[58] The lesson of *Salkin* is that taxable costs should be addressed on the front-end, before a judgment is entered, or within ten days after a judgment is entered through a motion to alter or amend, rather than after an appeal is perfected. A failure to timely file a motion to tax costs may prevent your client from recovering costs to which he or she is entitled.

Conclusion

The Supreme Court has made it clear that only the Legislature can define what costs are taxable. The Legislature has severely limited the types of costs which are recoverable. In my view, this is an area which calls out for legislative action. For example, copies of depositions are invaluable in preparing for trial. It makes little sense that if a party notices a deposition, the costs of the deposition transcript are taxable, but if an opposing party notices the deposition, and you only obtain a copy, the cost of the copy is not taxable. The bar, as well as the courts, would also benefit from more certain rules regarding when a motion to tax costs must be filed, and the effect of such a motion on an appeal. Additional clarity could avoid premature appeals and limit the risk that litigants will be deprived of costs to which they are entitled because of procedural uncertainty.

Endnotes

1 *Geere v. Sweet*, 2 Neb. 76, 76-77 (1872); *Wallace v. Sheldon*, 56 Neb. 55, 76 N.W. 418 (1898).

2 *City of Falls City v. Nebraska Municipal Power Pool*, 281 Neb. 230, 235, 795 N.W.2d 256, 260 (2011).

3 Neb. Rev. Stat. § 25-1708 (Cum. Supp. 2010).

4 *Id.*

5 Neb. Rev. Stat. § 25-1710 (Reissue 2008).

6 Neb. Rev. Stat. § 25-1711 (Reissue 2008).

7 *Id.*

8 Neb. Rev. Stat. § 25-21,158 (Reissue 2008).

9 281 Neb. at 235, 795 N.W.2d at 260.

10 *See Stocker v. Wells*, 155 Neb. 472, 478, 52 N.W.2d 284, 287 (1952).

[11] http://www.ned.uscourts.gov/internetDocs/info/Taxation.pdf

[12] Neb. Rev. Stat. § 25-1005 (Reissue 2008).

[13] Neb. Rev. Stat. § 25-1026 (Reissue 2008).

[14] Neb. Rev. Stat. § 25-10,107 (Reissue 2008).

[15] Neb. Rev. Stat. § 25-507(4) (Reissue 2008).

[16] Neb. Rev. Stat. § 33-106(3) (Reissue 2008).

[17] *Martensen v. Rejda Bros., Inc.*, 283 Neb. 279, 290, 808 N.W.2d 855, 865 (2012).

[18] *Id.*; *Young v. Midwest Family Mut. Ins. Co.*, 276 Neb. 206, 214, 753 N.W.2d 778, 784 (2008).

[19] *Young*, 276 Neb. at 214, 753 N.W.2d at 784; Stocker, 155 Neb. at 478, 52 N.W.2d at 287.

[20] *Falls City*, 281 Neb. at 234, 795 N.W.2d at 259.

[21] *Id.*

[22] *Id.*

[23] *Id.* citing *In re Estate of Snover*, 4 Neb. App. 533, 546 N.W.2d 341 (1996).

[24] *Id.*

[25] *Id.*

[26] *Falls City*, 281 Neb. at 237, 795 N.W.2d at 261.

[27] *Id.*

[28] *Martensen*, *supra*.

[29] *Bartunek v. Gentrup*, 246 Neb. 18, 20, 516 N.W.2d 253, 254 (1994).

[30] *Id.* at 21, 516 N.W.2d at 255.

[31] *Moore by and through Moore v. State*, 245 Neb. 735, 515 N.W.2d 423 (1994).

[32] *Wetovick v. County of Nance*, 279 Neb. 773, 797, 782 N.W.2d 298, 317 (2010).

[33] *Falls City*, 281 Neb. at 234, 795 N.W.2d at 259.

[34] *Nat'l Am. Ins. Co. of Nebraska, Inc. v. Cont'l W. Ins. Co.*, 243 Neb. 766, 777, 502 N.W.2d 817, 825 (1993) (stating that an award for photocopy charges may be recoverable as an attorney fee).

[35] *Brodersen v. Traders Ins. Co.*, 246 Neb. 688, 691, 523 N.W.2d 24, 26 (1994); *Salkin v. Jacobsen*, 263 Neb. 521, 525, 641 N.W.2d 356, 360 (2002).

[36] Fed. R. Civ. P. 54(d)(2)(B)(i).

[37] *Muff v. Mahloch Farms Co.*, 186 Neb. 151, 153, 181 N.W.2d 258, 260 (1970)

[38] *Salkin*, 263 Neb. at 527, 641 N.W.2d at 361 (2002) (holding that motion for attorney fees, which are considered costs under Nebraska law, must be filed before the judgment is entered).

[39] *Id.*

[40] *Muff*, 186 Neb. at 153, 181 N.W.2d at 260; *See*, *e.g.*, Neb. Rev. Stat. § 44-359 (authorizing the taxation of attorney fees as costs).

[41] Neb. Rev. Stat. § 25-1329 (Reissue 2008).

[42] *Id.*

[43] *Emry v. Am. Honda Motor Co., Inc.*, 214 Neb. 435, 441, 334 N.W.2d 786, 791 (1983)

[44] Neb. Rev. Stat. § 25-2001(1) (Reissue 2008).

[45] *Id.*

[46] 186 Neb. 151, 153, 181 N.W.2d 258, 260 (1970)

[47] *See also Rehn v. Bingaman*, 152 Neb. 171, 173, 40 N.W.2d 673, 675 (1950) (quoting *Smith v. Bartlett*, 78 Neb. 359, 110 N.W. 991 (1907) ("An award of costs to the successful party is as much a part of the judgment entered as the damages allowed, and the court cannot, after the term, change this award except for some statutory cause allowing the court to set aside or modify its judgment at a subsequent term.")).

[48] Neb. Rev. Stat. § 25-2001(4) (Reissue 2008).

[49] *Anderson v. Houston*, 274 Neb. 916, 933, 744 N.W.2d 410, 424 (2008).

[50] 251 Neb. 389, 396, 557 N.W.2d 657, 662 (1997)

[51] *Id.*; *see also Remmen v. Zweiback*, A-94-802, 1996 WL 58760 (Neb. App. Feb. 13, 1996) (holding that the district court did not have jurisdiction to award attorney fees and costs after an appeal was perfected); *WBE Co., Inc. v. Papio-Missouri River Natural Res. Dist.*, 247 Neb. 522, 526, 529 N.W.2d 21, 24 (1995) (trial court lacked jurisdiction to award attorney fees after appeal perfected).

[52] *See Crawford v. Crawford*, 18 Neb. App. 890, 895, 794 N.W.2d 198, 202 (2011) (stating that denial of a motion to alter or amend makes the judgment "final and appealable."); *Gebhardt v. Gebhardt*, 16 Neb. App. 565, 572, 746 N.W.2d 707, 713 (2008) (same)

[53] Neb. Rev. Stat. § 25-2001(3) (Reissue 2008).

[54] Neb. Rev. Stat. § 25-2001(1) (Reissue 2008).

[55] *State ex rel. Fick v. Miller*, 252 Neb. 164, 166, 560 N.W.2d 793, 795 (1997).

[56] *Fick*, supra.

[57] *See* Neb. Rev. Stat. § 25-1912 (Reissue 2008); *Fick*, 252 Neb. at 165, 560 N.W.2d at 795 (holding that an order granting an attorney fee in an amount to be determined at some future time is not a final appealable order until the amount of the fee is fixed by the court); *McCaul v. McCaul*, 17 Neb. App. 801, 805, 771 N.W.2d 222, 226 (2009) (holding that where an order reserves some issues for later determination, it is not a final appealable order); *Salkin*, 263 Neb. at 527, 641 N.W.2d at 361 (holding that when a motion for attorney fees is made prior to judgment, the judgment will not become final and appealable until the court rules on the motion.)

[58] *Salkin*, 263 Neb. at 527, 641 N.W.2d at 361.