In the
Missouri Court of Appeals
Western District

**ZACH MCGUIRE, ET AL.,**

**Respondents,**

**v.**

**KENOMA, LLC, ET AL.,**

**Appellants.**

**WD75873**

**OPINION FILED:**

**OCTOBER 15, 2013**

**Appeal from the Circuit Court of Henry County, Missouri**
**The Honorable James Kelso Journey, Judge**

**Before Division One: Victor C. Howard, P.J.,**
**Joseph M. Ellis, and Anthony Rex Gabbert, JJ.**

Synergy, LLC and Kenoma, LLC (collectively "Synergy")[1] appeals the circuit court's nunc pro tunc order awarding Respondents (collectively "Plaintiffs") post-judgment interest. Synergy raises only one issue on appeal. In its sole point on appeal, Synergy contends that the circuit court erred in entering its nunc pro tunc orders awarding Plaintiffs post-judgment interest. Synergy argues that a nunc pro tunc order may only be used to correct clerical errors and the failure to award post-judgment interest on the damages award was a substantive error, which the court had no jurisdiction to correct after its judgment became final. We affirm.

[1] We refer to Synergy, LLC and Kenoma, LLC collectively as "Synergy" and the twelve Respondents collectively as "Plaintiffs" as was done in this Court's opinion on the first appeal. *McGuire v. Kenoma, LLC*, 375 S.W.3d 157 (Mo. App. 2012).

On May 10, 2011, the circuit court entered a judgment following a jury verdict awarding Plaintiffs damages on their tort claims. The last post-trial motion, Synergy's motion for a new trial, was filed on June 9, 2011. The May 10, 2011 judgment did not award Plaintiffs post-judgment interest, nor did it state an applicable interest rate.

Synergy appealed the May 10, 2011 judgment, which was affirmed in part and reversed in part by this Court.[2] Plaintiffs did not cross-appeal. On September 27, 2012, this Court issued its mandate. On October 2, 2012, Plaintiffs filed in the circuit court a Motion to Set Judgment Interest Rate and Affix Plaintiffs' Costs. In so doing, Plaintiffs requested an amendment nunc pro tunc of the final judgment to receive post-judgment interest, at the rate of 5.09 percent on a principal sum of $1,510,000, retroactive to May 10, 2011. The circuit court held a hearing on October 24, 2012, orally granting Plaintiffs' motion. The oral ruling was followed by a docket entry summarizing the circuit court's decision.

On November 7, 2012, the circuit court entered its "Nunc Pro Tunc Journal Entry" retroactively amending its final judgment to award Plaintiffs the interest they had requested. Synergy filed a notice of appeal within ten days of the circuit court's decision. Subsequently, the circuit court entered another judgment titled "Journal Entry of Nunc Pro Tunc and Judgment," which was signed by the circuit court judge and dated December 31, 2012. Synergy appeals.

**Standard of Review**

We will review a nunc pro tunc order under the same standard of review applicable to any other court-tried case. *State v. LaJoy*, 216 S.W.3d 256, 258 (Mo. App. 2007) (citation omitted). The decision of the circuit court will be affirmed unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law.

[2] *McGuire v. Kenoma, LLC*, 375 S.W.3d 157 (Mo. App. 2012).

*Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Additionally, this Court reviews the interpretation of a statute *de novo* as a question of law. *Joshi v. Ries*, 330 S.W.3d 512, 515 (Mo. App. 2010).

**Nunc Pro Tunc**

In Synergy's sole point on appeal, it contends that the circuit court erred in entering its nunc pro tunc orders awarding Plaintiffs post-judgment interest. Synergy argues that a nunc pro tunc order may only be used to correct clerical errors and the failure to award post-judgment interest on the damages award was a substantive error, which the court had no jurisdiction to correct after its judgment became final. We find no error.

Once a judgment becomes final a court's power to amend the judgment is limited. *See Pirtle v. Cook*, 956 S.W.2d 235 (Mo. banc 1997). One way a court may amend a final judgment is through the use of a nunc pro tunc order. *Id.* at 240; Rule 74.06(a). A nunc pro tunc order allows courts to correct clerical errors. *Id.* This is so regardless of whether the court has jurisdiction over the cause because a court is considered to have continuing jurisdiction over its records. *Pirtle*, 956 S.W.2d at 240. "The power to issue nunc pro tunc orders, however, constitutes no more than the power to make the record conform to the judgment already rendered; it cannot change the judgment itself." *Id.* at 240 (citations omitted). In order to constitute a valid nunc pro tunc order, the court must not "correct anything that resulted from the exercise of judicial discretion because any such change constitutes a change in the court's judgment." *Id.* at 243 (citations omitted). Additionally, the clerical error must be discernable from the record. *Id.*

On May 10, 2011, the circuit court entered a judgment following a jury verdict awarding Plaintiffs damages on their tort claims. The judgment, however, did not award Plaintiffs post-

judgment interest, nor did the judgment state the applicable interest rate. The crux of Synergy's sole argument is that because the circuit court failed to award post-judgment interest to the Plaintiffs in its May 10, 2011 judgment it cannot correct the omission using a nunc pro tunc order because the error is substantive, not clerical.

In determining whether the order correcting the error is clerical in nature, the order must not correct anything that resulted from judicial discretion. *Soskin v. Wolfson*, 999 S.W.2d 261, 264 (Mo. App. 1999). Here, the correction changed nothing discretionary. Section 408.040.2, RSMo Cum. Supp. 2006[3] reads in pertinent part: "[I]n tort actions, interest shall be allowed on all money due upon any judgment or order of any court from the date of judgment is entered by the trial court until full satisfaction." Section 408.040.2 grants post-judgment interest to Plaintiffs in this case. Our courts have found that "[t]he purpose of [this] statute is 'to compensate a judgment creditor for the judgment debtor's delay in satisfying the judgment pending the judgment debtor's appeal.'" *Kansas City Power & Light Co. v. Bibb & Assocs., Inc.*, 197 S.W.3d 147, 160 (quoting *Johnson v. BFI Waste Sys. of N. Am., Inc.*, 162 S.W.3d 127, 129 (Mo. App. 2005)). "The theory for awarding interest is to compensate one party for the use or loss of use of money to which that party is entitled." *Good Hope Missionary Baptist Church v. St. Louis Alarm Monitoring Co., Inc.*, 358 S.W.3d 528, 534 (Mo. App. 2012) (citations omitted). '"It is almost an axiom of American jurisprudence that he who has the use of another's money, or money he ought to pay, should pay interest on it."' *Lindquist v. Mid-America Orthopaedic Surgery, Inc.*, 325 S.W.3d 461, 465 (Mo. App. 2010) (quoting *Laughlin v. Boatmen's Nat'l Bank*, 189 S.W.2d 974 (Mo. 1945)).

[3] All statutory references in this opinion are to the 2006 Cumulative Supplement of the Missouri Revised Statutes unless otherwise noted.

In this case, the court's judgment failed to conform to Section 408.040.2 by not explicitly awarding Plaintiffs post-judgment interest in which they were entitled. The failure of a court's judgment to conform to a statute is an omission that may be properly corrected by a nunc pro tunc order. *State ex rel. Missouri Highway & Transp. Comm'n v. Roth*, 735 S.W.2d 19, 22 (Mo. App. 1987) (referencing *State ex rel. Grant v. Juden*, 50 S.W.2d 702, 703-04 (Mo. App. 1932)). In *State ex rel. Mo. Highway & Transp. Comm'n v. Roth*, the Eastern District determined that a court's failure to issue a judgment that conforms with statutory dictates concerning such judgments creates the presumption that a clerical error occurred. *Roth* is a condemnation case in which a jury entered a verdict in favor of the landowners for $3.25 million. *Id.* at 20. The trial court issued its judgment in accordance with the $3.25 million jury verdict. *Id.* However, prior to the jury verdict, the condemnation commissioners issued an award to the landowners for $4.22 million. *Id.* Thus, the jury award was $970,000.00 less than the commissioners' award, which the landowners had already received. *Id.* The judgment, however, made no mention of the $970,000.00 deficiency. *Id.*

A year later, the trial court issued a nunc pro tunc order that required the landowners to repay $970,000.00 to the highway commission. *Id.* The trial court amended the judgment nunc pro tunc in order to conform to a statute that required judgment to be entered against landowners to the extent that the amount awarded by the condemnation commissioners exceeded a subsequent jury award. *Id.* at 21. In determining that the nunc pro tunc order was correctly entered, the Eastern District explained that:

> The law is that where upon the trial of a cause, a judgment is shown to have been rendered for one of the parties, and a statute directs what that judgment shall be, *it is presumed* that the judgment rendered by the court was such a judgment as only could have been rendered, and anything short of that will be attributed to the mistake or misprision of the clerk.

*Id.* at 22 (emphasis added). The court further noted that the fact "[t]hat an error is made by a judge rather than a clerk does not prevent it from being classified as a clerical error." *Id.* Thus, the court concluded that the trial court correctly amended the judgment nunc pro tunc because the trial court "intended its judgment in [the] condemnation case, a *sui generis* proceeding, to have conformed to the mandatory provisions of the statute governing condemnation proceedings." *Id.*

Subsequent cases have recognized the presumption set forth in *Roth*.[4] *See Korman v. Lefholz*, 890 S.W.2d 771, 773 (Mo. App. 1995) (citing *Roth*, 735 S.W.2d at 21-22) ("Where a statute directs what the judgment shall be, it is presumed that the judgment rendered by the court was such a judgment as only could have been rendered, and any omission or deviation is classified as clerical error correctable by nunc pro tunc."); *In re Marriage of Ray*, 820 S.W.2d 341, 344 (Mo. App. 1991) (citing *Roth*, 735 S.W.2d at 22) ("If a statute directs that a judgment contain certain language or provisions, then the omission of such language or provisions in the judgment will be attributed to clerical error which may be corrected by a nunc pro tunc order.").

Missouri courts have further found that, in light of the presumption, failure to comply with the mandate of the law "is deemed to be a clerical error, even though in fact the fault [was that] of the judge." *Newberry v. State*, 812 S.W.2d 210, 212 (Mo. App. 1991); see also *Hassler v.*

[4] Likewise, commentators have also noted the presumption that a judgment that fails to conform to the dictates of a statute constitutes a clerical error. *See* 2 *Missouri Practice: Methods of Practice: Litigation Guide* § 19.4 (citing Roth, 735 S.W.2d 19) ("If a statute directs what the judgment shall be where a decision is made in favor of a party, and the court makes a mistake in reducing that decision to judgment, the general presumption that judgments are correct as written will be affected so that the judgment rendered by the court could only be that which the statute prescribed, permitting it to be corrected within the meaning [of a nunc pro tunc order]."); 16 *Missouri Practice: Civil Rules of Practice* § 74.06(a)-2 (citing Roth, 735 S.W.2d 19) (noting that a nunc pro tunc order may be appropriate "where the court enters a judgment for a party but the judgment is contrary to the dictates of an applicable statute. In such a case, it will be presumed that the judgment rendered by the court is the judgment required by the statute, and anything short of that will be presumed to be due to clerical error rather than an error by the judge.").

*State*, 789 S.W.2d 132, 134 (Mo. App. 1990) (noting that the presumption annunciated in *Roth* applies "even if the judge actually made the error"). Therefore, the court's failure to award Plaintiffs interest in its judgment, as required by Section 408.040.2, may be classified as a clerical error. As a result, the clerical error may be properly corrected by a nunc pro tunc order, which is what the court did in this case.

Synergy contends, however, that while Section 408.040.2 presumably applies in this case, Plaintiffs should not be awarded post-judgment interest because they failed to ask for it. Synergy argues that the Plaintiffs should have asked the court to amend its judgment awarding post-judgment interest prior to the judgment becoming final or the Plaintiffs should have raised the issue on appeal. Clerical errors, however, may be corrected at any time and need not be raised on appeal or before the judgment becomes final. Rule 74.06(a). As previously stated, the awarding of post-judgment interest is a statutory right bestowing an entitlement upon successful parties, such as the Plaintiffs in this case. § 408.040.2; *Good Hope Missionary Baptist Church*, 358 S.W.3d at 534-35. The statute itself does not require nor state that the successful party has to ask for or take any proactive steps to obtain post-judgment interest. *See* § 408.040.2. While the court should have included post-judgment interest in its judgment, its failure to do so did not deprive Plaintiff's of their right to it. The court's nunc pro tunc order corrected its omission of interest, which it was statutorily required to include. Synergy makes no argument that Plaintiffs were not statutorily entitled to the interest. Therefore, the Plaintiffs are entitled to and may be awarded post-judgment interest even though they did not ask for it.

In Synergy's last argument in furtherance of its sole point on appeal, it argues that Section 408.040.2 requires that the court state in the judgment the applicable interest rate. Synergy further argues that the court needed evidence to determine the intended Federal Funds Rate for

the date judgment was entered. First, the fact that the court failed to enter the applicable interest rate does not prevent the Plaintiffs from recovering post-judgment interest. *Good Hope Missionary Baptist Church*, 358 S.W.3d at 535 (finding that "the trial court's judgment should have included the applicable interest rate for any post-judgment interest Good Hope may become entitled to recover" and modifying the judgment to include the post-judgment interest rate). Second, the statutory language clearly states how the court is to calculate the interest rate. Section 408.040.2 reads in pertinent part: "All such judgments and orders for money shall bear a per annum interest rate equal to the intended Federal Funds Rate, as established by the Federal Reserve Board, plus five percent interest, until full satisfaction is made. " Thus, the court is to find the Federal Funds Rate on the day of judgment and add five percentage points.

Nevertheless, Synergy argues that the intended Federal Funds Rate varies depending upon what source is used. For example, the Federal Reserve Bank of New York may have a different rate than the Federal Reserve Bank of Cleveland. However, Synergy's argument is misguided. The statute clearly states to look at the Federal Funds Rate, *as established by the Federal Reserve Board*. § 408.040.2 (emphasis added). Every day the Federal Reserve Board releases its Federal Funds Rate.[5] Once the court has the Federal Funds Rate it adds five percentage points to calculate the post-judgment interest. *Id*. Here, the court correctly calculated the applicable rate. The judgment was dated May 10, 2011. The intended Federal Funds Rate for that date was 0.09.[6] Add 0.09 to five and one gets 5.09 percent, which is the interest rate the court used.

[5] http://www.federalreserve.gov/releases/h15/update/default.htm

[6] *Id.*

We conclude, therefore, that the circuit court did not err in entering its nunc pro tunc orders to amend its final judgment and award Plaintiffs post-judgment interest because, pursuant to Section 408.040.2, the awarding of post-judgment interest is mandatory. After failing to include the statutorily mandated post-judgment interest in its order, the court did not err by correcting its omission via a nunc pro tunc order and Rule 74.06(a). We affirm the circuit court's nunc pro tunc orders.



Anthony Rex Gabbert, Judge

All concur.