IN THE COURT OF APPEALS OF IOWA

No. 9-015 / 97-2302
Filed June 23, 1999

CHRISTOPHER J. BOOS,

Plaintiff-Appellant,

FILED
JUN 23 1999
CLERK SUPREME COURT

vs.

PAUL L. ERTZ,

Defendant-Appellee.

Appeal from the Iowa District Court for Clayton County, James L. Beeghly, Judge.

The plaintiff appeals from the district court's order granting the defendant a credit against the plaintiff's tort judgment. **REVERSED.**

Roger L. Sutton of Sutton & Troge, Charles City, for appellant.

Beth E. Hansen and Robert L. Ford of Swisher & Cohrt, P.L.C., Waterloo, for appellee.

Considered by Huitink, P.J., Mahan, J., and Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

SCHLEGEL, S.J.

The plaintiff-appellant, Christopher Boos, appeals the district court's order granting the defendant-appellee, Paul Ertz, a credit against Boos' tort judgment for an advance by Ertz's insurer prior to the lawsuit. Boos claims the district court erred in ordering such a credit in response to Ertz's request for a *nunc pro tunc* order. He argues such a remedy was not requested during the trial as a setoff or as a matter subject to a collateral source instruction. We reverse.

Boos fell from a ladder at Ertz's home, injuring his foot. Ertz's insurer advanced a medical payment to Boos in the amount of $1000 for medical services received after the fall. Boos sued Ertz seeking to recover damages for injuries sustained in the fall. The jury returned a verdict which included an award of $7,670.41 for medical expenses. After the verdict, Ertz filed an application for a *nunc pro tunc* order crediting the insurer's payment. The district court entered a ruling giving Ertz a pro tanto credit of $1000 against Boos' judgment.

Boos claims Ertz did not raise the issue at trial whether he should receive credit for the insurer's payment as a setoff or a collateral source payment, therefore Ertz did not preserve error for appeal. Boos argues instructions regarding setoff and collateral source payments were not submitted to the jury and that issue is waived. Boos also argues the court abused its discretion in ordering a pro tanto credit when Ertz did not ask for that remedy.

Ertz responds he raised the question before the judge whether the insurer's payment for medical services would be credited against any damage award returned

by the jury for medical expenses. He also argues the $1000 credit was proper, regardless of the terminology used by the court.

We first address the use of a *nunc pro tunc* application to seek the credit as we find it dispositive. A *nunc pro tunc* order is to correct some inadvertent omission in an order, to make the order accurately reflect actions taken but omitted through inadvertence or mistake, not to change the result.[1] *Wirtanen v. Provin*, 293 N.W.2d 252, 255 (Iowa 1980); *see also State v. Walker*, 304 N.W.2d 193, 196 (Iowa 1981). The *nunc pro tunc* application asked the court to take an action which had not been taken, not to change the order to include an action taken at trial but omitted from the order. We conclude the trial court improperly used Ertz's *nunc pro tunc* application

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[1] A nunc pro tunc entry makes the record show now what was actually done then. *See Feddersen v. Feddersen*, 271 N.W.2d 717, 718 (Iowa 1978); *State v. Onstot*, 268 N.W.2d 219, 220 (Iowa 1978); *Headley v. Headley*, 172 N.W.2d 104, 108 (Iowa 1969). Its purpose is "to make the record show truthfully what judgment was actually rendered ...." *General Mills, Inc. v. Prall*, 244 Iowa 218, 225, 56 N.W.2d 596, 600 (1953). "It is not for the purpose of correcting judicial thinking, a judicial conclusion or mistake of law." *Headley*, 172 N.W.2d at 108. *See also* [*State v.*] *Steffens*, 282 N.W.2d [120] at 122-23 [(Iowa 1979)]; 46 Am.Jur.2d Judgments § 201, at 443-44 (1964). Thus if a court makes an error of fact or law in arriving at its judgment, the appropriate remedy is not by way of a nunc pro tunc order but by other available procedures such as a motion under rule 179(b), R.Civ.P., or a motion for new trial under rule 244, R.Civ.P.

In re Marriage of Bird, 332 N.W.2d 123, 124 (Iowa App. 1983) (quoting *McVay v. Kenneth E. Montz Implement Co.*, 287 N.W.2d 149, 150-51 (Iowa 1980)).

to modify the result of the trial. Accordingly, we reverse the court's order giving Ertz a credit against Boos' judgment.

REVERSED.

No. 97-2302. [9-015] BOOS v. ERTZ

Appeal from the Iowa District Court for Clayton County, James L. Beeghly, Judge. **REVERSED.** Considered by Huitink, P.J., Mahan, J., and Schlegel, S.J. Opinion by Schlegel, S.J. (3 pages $1.20)

The plaintiff-appellant, Christopher Boos, appeals the district court's order granting the defendant-appellee, Paul Ertz, a credit against Boos' tort judgment for an advance by Ertz's insurer prior to the lawsuit. Boos claims the district court erred in ordering such a credit in response to Ertz's request for a *nunc pro tunc* order. Boos claims Ertz did not raise the issue at trial whether he should receive credit for the insurer's payment as a set off or a collateral source payment, therefore Ertz did not preserve error for appeal. The *nunc pro tunc* application asked the court to take an action which had not been taken, not to change the order to include an action taken at trial but omitted from the order. We conclude the trial court improperly used Ertz's *nunc pro tunc* application to modify the result of the trial.