FILED
DEC 27 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARVIN P. NOELLER,)
Plaintiff-Appellant,) Filed December 27, 1979
vs.)
PHYLLIS ANN NOELLER,) 296
Defendant-Appellee.) 2-61648

Appeal from Linn District Court - Harold D. Vietor, Judge.

Plaintiff appeals trial court's order nunc pro tunc alleging trial court erred (1) in finding there was an "evident mistake" within the meaning of §602.17, The Code 1975 and (2) in overruling his motion to strike. AFFIRMED.

John K. VonLackum of Wadsworth, Elderkin, Pirnie & Von Lackum, Cedar Rapids, Iowa, for plaintiff-appellant.

Robert F. Wilson of Cedar Rapids, Iowa, for defendant-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, and Johnson, JJ. Carter, J., takes no part.

JOHNSON, J. 410

Plaintiff, Marvin P. Noeller, appeals trial court's order nunc pro tunc correcting an alleged evident mistake in an earlier order entered in proceedings incident to a 1968 divorce action. Plaintiff alleges trial court erred (1) in finding there was an "evident mistake" within the meaning of section 602.17, The Code 1975, and (2) in overruling his motion to strike. We affirm.

The parties were married, divorced, and then remarried on March 2, 1965. Two children were born of the marriage and were minors when the trial court, in 1968, entered its final decree dissolving the parties' second marriage. A stipulation of the parties was incorporated into the July 26, 1968 decree, which provided:

> The home of the parties . . . shall be awarded to plaintiff . . . .
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> . . . .
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> Defendant and the minor children of the parties shall be entitled to reside in this home . . . . The use of this house by said minor children shall be considered by the parties as child support and shall stand in lieu of child support. . . . At any time the home ceases to be used by the minor children of the parties as a home or at the time the youngest of said minor children obtains age 18, the home shall be sold by plaintiff. The proceeds from the sale shall be paid over to a legally qualified and acting guardian or conservator for said minor children in equal shares or the survivor thereof.

Upon plaintiff's sale of the house in 1976, a dispute arose as to how the "proceeds" were to be computed and, on July 15, 1976, plaintiff filed an application for order construing the above paragraph of the decree to provide "that the proceeds from the sale and not the purchase price be paid to defendant as guardian for the minor children . . . ." Defendant's answer prayed the paragraph be construed "to provide that the plaintiff shall pay to the defendant, as guardian of the minor children of the parties', all proceeds from the sale of the house, and not deduct from said proceeds the selling expense, the existing real estate contract, or the accrued and pro-rated real estate taxes."

Hearing was held and, on October 13, 1976, trial court ordered "the legally qualified and acting guardian or conservator of the minor children of the parties shall receive from the proceeds of the sale of the real estate referred to in said stipulation the amount of the principal balance owed plaintiff's vendors on the May 14, 1976, contract at the time the pending offer was accepted . . . less real estate sales commission, if any, and seller's financing costs (points)."

On May 6, 1977, defendant filed an application to construe the October 13, 1976 order alleging the defendant was of the belief the order and intent of the trial court was for the conservator to receive from the plaintiff: the gross selling price of the house of $26,000, less the unpaid balance of $5,804 owed plaintiff's vendors on the May 14, 1966 contract; less the abstracting cost, the real estate sales commission, the cost of documentary transfer tax, and the seller's financing costs; or approximately $17,000. Plaintiff, however, maintained he had fully complied with the October 13, 1976 order by establishing a conservatorship for the minor children and depositing the sum of $3,570.67 therein computed, pursuant to the order, as follows:

--Principal balance owed plaintiff's vendors on 5-14-66 contract at time pending offer was accepted.	$ 5,858.67
--Less real estate commission	- 1,820.00
--Less seller's financing costs (points)	468.00
Net:	$ 3,570.67

Attached to defendant's November 21, 1977 amendment to the application to construe the order was an affidavit of the trial judge who entered the October 13, 1976 order stating his intentions were ". . . the Guardian or Conservator of the minor children of the parties shall receive from the proceeds of the sale of the real estate . . ., the gross selling price less the principal balance of the contract on the date the offer was accepted, also less real estate sales commission, if any, and the seller's financing costs (points)." Plaintiff, thereafter, filed a motion to strike defendant's amendment. On January 17, 1978, trial court found an "evident mistake" had been made through omission in either the writing, dictating, or transcribing of the October 13, 1976 order, and entered an order nunc pro tunc to correct it.

I. Evident Mistake. Plaintiff contends trial court erred in finding there was an "evident mistake" in the October 13, 1976 order, and thereafter entering an order nunc pro tunc to correct it.

An order nunc pro tunc may be entered to correct a mistake of fact but not of law. Knox v. Moser, 72 Iowa 154, 154, 33 N.W. 617, 617 (1887). A mistake of fact is "evident" when it is clear, noticeable, apparent to observation, or clearly established by the evidence offered at the hearing in the trial court. Hamill v. Joseph Schlitz Brewing Co., 165 Iowa 266, 285, 143 N.W. 99, 107 (1917). Whether an "evident mistake" exists

ultimately depends on the variance between the judicial intention and what the record actually reflects. Headley v. Headley, 172 N.W.2d 104, 109 (Iowa 1969). "A nunc pro tunc order is proper to correct an obvious mistake or to make the record conform to an adjudication actually or inferentially made but which by oversight or evident mistake was omitted from the record." Jersild v. Sarcone, 163 N.W.2d 78, 81 (Iowa 1968).[1]

Applying these standards, we conclude trial court properly found an evident mistake existed in the October 13, 1976 order. While the omission from the record of the words contained in the nunc pro tunc order indirectly may have legal effect, it was clearly a mistake of fact. On page two of trial court's findings in its October 13, 1976 order, the court stated:

> The parties cannot agree upon the meaning of the words "proceeds from the sale" as the same are to be applied in determining the Plaintiff's child-support obligation under the stipulation and decree. The Defendant contends that the guardian or conservator for the children should receive from Plaintiff at this time the gross selling price of twenty-six thousand dollars. The Plaintiff, on the other hand, contends that the amount to be so received should be the gross selling price less the unpaid contract balance of approximately $5,804.00; abstracting costs; real estate sales commission; unpaid taxes, including seller's tax prorations; cost of documentary transfer tax; and seller's financing costs (points). Under Plaintiff's theory, the children would receive about $16,000.00.

The court goes on to say that both parties had testified to their respective intentions when they entered into the 1968 stipulation. "Such intent must be determined by the natural import of the language employed", however, "viewed in the light of the circumstances existing at the time of the decree. As so viewed, the Court finds that Defendant's proposed construction is unrealistic." In a later paragraph of its findings, the Court stated "having so disposed of the defendant's contentions, it is next necessary to consider whether the gross sales price should be further reduced by the additional selling costs of Plaintiff . . . ." The trial judge, in his affidavit, acknowledged that his intentions varied from what the record reflected in the October 13, 1976 order.

It was clearly established by evidence and apparent to observation that an inadvertent omission had been made during the writing, dictating, or transcribing of the October 13, 1976 order. Trial court's order nunc pro tunc correcting the omission was proper.

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[1] The usual practice is for the judge who made the order to hear and determine applications to correct it. Headley v. Headley, 172 N.W.2d 104, 107 (Iowa 1969). However, in this case, the trial judge who entered the October 13, 1976 order was no longer on the trial bench when defendant's application to construe the order was filed.

II. Motion to Strike. Plaintiff generally alleges trial court erred in overruling his November 22, 1977 motion to strike on grounds (1) he had changed his position by complying with the October 13, 1976 order and (2) defendant's amendment to the application to construe order was filed without leave of court. We find these contentions are without merit.

It is well settled trial court has wide discretion in deciding to allow an amendment to any pleading after a responsive pleading thereto has been filed. Johnston v. Percy Construction, Inc., 258 N.W.2d 366, 370 (Iowa 1977); Townsend v. Mid-America Pipeline Company, 168 N.W.2d 30, 37 (Iowa 1969). This rule is given liberal interpretion. Smith v. Village Enterprises, Inc., 208 N.W.2d 35, 37 (Iowa 1973). The important consideration is whether the amendment changes the issues. In this case, there clearly was no change in the issues by defendant's amendment. The lower court, therefore, did not abuse its discretion in allowing defendant's amendment to stand.

We find the trial court properly overruled plaintiff's motion to strike where the alleged error was generally stated without applicable authority or facts to support it. See Henneman v. McCalla, 260 Iowa 60, 79, 148 N.W.2d 447, 459 (1967). Further, in his January 20, 1977 answer to defendant's application to modify the 1968 decree, plaintiff admitted the allegations: "that application was made to this Court for orders concerning the principal balance received from the sale and [sic] said house less the indebtedness on said home and that this Court has ruled that the proceeds of the sale of real estate less the amount of principal owed the Plaintiffs vendor at the time the pending offer was accepted less real estate commissions and seller's financing costs were to be paid to the legally qualified and acting guardian or conservator of the minor children." Plaintiff, therefore, must be charged with knowledge of trial court's intended provisions of the October 13, 1976 order and cannot assert he relied to his detriment on a contrary interpretation.

Judgment of trial court is affirmed. Costs of this appeal are assessed against plaintiff.

AFFIRMED.