

STATE OF MICHIGAN
COURT OF APPEALS

CLIFFORD D. KILBOURNE,

Plaintiff/Counter-Defendant-
Appellant,

v

DALE E. KILBOURNE,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

August 19, 2003

No. 240178

Mecosta Circuit Court

LC No. 00-013923-CB

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Plaintiff Clifford Kilbourne appeals as of right a final judgment denying several claims arising out of the dissolution of his partnership with his brother, defendant Dale Kilbourne, and awarding Dale Kilbourne \$50,000 damages for personal injuries resulting from the physical altercation with Clifford Kilbourne that precipitated the partnership's dissolution. We affirm.

I. Basic Facts And Procedural History

Beginning in 1997, Clifford and Dale Kilbourne undertook several construction projects together, although it is disputed exactly when their partnership was formed. According to Clifford Kilbourne, he and Dale Kilbourne, bought a parcel of property in June 1997, bid the "Landgraf" construction job together, and began working together as partners in a construction business. However, according to Keith Landgraf, he dealt exclusively with Dale Kilbourne and was unaware of any partnership between the parties in 1997. In addition, the partnership books did not indicate payments for the Landgraf home project. The parties did not file a partnership tax return for 1997 and neither had a builder's license.

Clifford Kilbourne claimed Dale Kilbourne paid him \$100 a day to work on a speculative house referred to as the "Craft Road" project in August 1997 and promised him and another contractor, Vern Welker, a share of the profits from the house. Welker confirmed that Dale Kilbourne promised them a share of the profits. However, according to Dale Kilbourne, he did not promise either of them a share of the profits in the speculative house; Dale Kilbourne claimed that Clifford Kilbourne was his employee, not a partner, on this project.

Clifford Kilbourne testified that he obtained a builder's license in January 1998, that he and Dale Kilbourne filed a certificate of co-partnership in February 1998, and that they executed a partnership agreement in November of 1998. In December of 1999, the brothers had a fight regarding an ongoing disagreement. According to Dale Kilbourne, Clifford Kilbourne did not want him soliciting bids from subcontractors and was angry when a plumber asked for blueprints in order to submit a bid on an upcoming project. Clifford Kilbourne, however, claimed that he merely told Dale Kilbourne he should not solicit bids because they were attempting to wind up the partnership, not starting new business. Clifford Kilbourne claimed that Dale Kilbourne became angry during the fight and shoved him. Clifford Kilbourne said that he was surprised and that he reacted by punching Dale Kilbourne twice.

Dale Kilbourne denied touching Clifford Kilbourne. According to Dale Kilbourne, after he and Clifford Kilbourne walked the plumber to his car, Clifford Kilbourne followed him back in the house. Dale Kilbourne claimed that Clifford Kilbourne called him a son of a bitch, told him there would be "none of this stuff," and punched him in the chest. According to Dale Kilbourne, he bent over trying to catch his breath and Clifford punched him in the left side of the head with his right fist.

The parties' nephew, Kenneth Kilbourne, testified that he was walking from the kitchen where he had been working toward the room where his uncles were so he could ask them a question. As he approached, he heard Clifford Kilbourne call Dale Kilbourne a son of a bitch and saw Clifford Kilbourne hitting Dale Kilbourne. Kenneth Kilbourne testified that he did not see Dale Kilbourne shove Clifford Kilbourne.

After falling to the floor, Dale Kilbourne left the house disoriented, went to his car, and called the police from his cellular phone. After the officer finished interviewing him, Dale Kilbourne drove to his doctor's office because he felt disoriented and had blurred vision along with a lump on his head. He was referred to ophthalmologist Ralph Crew, M.D., on December 29, 1999. Dr. Crew did not find an eye injury and told Dale Kilbourne his headache and blurred vision should improve, but that if it did not to come back and see him.

Dale Kilbourne testified that he missed several weeks of work after the fight, did not go back to work until January, and refused to work with Clifford Kilbourne. Dale Kilbourne said that he worked on one of the speculative houses for the first year after the fight. Clifford Kilbourne testified that at the time of the physical altercation, \$25,000 worth of material had already been purchased for the "Doyle" project, so he installed the existing material under the partnership, negotiated a release of the partnership for the remainder of the project, then drew up a new contract between himself and the client to finish the project. In addition, \$7,800 was owed to the partnership from the "Ridderman" project, and Clifford Kilbourne obtained this money and negotiated a release from liability on behalf of the partnership.

Clifford Kilbourne stated he received \$12,000 from the "Langworthy" project, and used it toward paying off a \$15,000 note on the "Rogers Heights" speculative house. He then wrote a personal check for the remaining \$3,000. Clifford Kilbourne admitted taking \$6,800 from the partnership account during this time as wages for winding up partnership affairs. Clifford Kilbourne sent Dale Kilbourne a letter, dated December 29, 1999, declaring the partnership terminated. Dale Kilbourne admitted that on the day dissolution papers were filed, he filed a "d/b/a" using the old partnership name. Clifford Kilbourne sought to prevent Dale Kilbourne

from using the partnership name, but the trial court denied that request. Clifford Kilbourne testified defense counsel offered to buy the partnership name from him for \$250, and he countered that he would sell the name for \$10,000. Clifford Kilbourne also testified that because Dale Kilbourne took the business name, he had to change his license, his banking account, and his company name and invest in new advertisements. Clifford Kilbourne began another business, C&K Construction, in February of 2000.

In March of 2000, Dale Kilbourne again visited his regular doctor for routine checkups. The following notations were made in his medical records:

Dale Kilbourne continues to have light sensitivity and watering of the left eye. He also continues to have left frontal headache since his head injury. Our notes from the last time said he wasn't having further problems with this, but now he says he's still having headaches but didn't mention it before because he thought they would go away. He is involved in legal proceedings against his brother.

In June of 2000, Clifford Kilbourne filed a complaint seeking an accounting and distribution of partnership assets; thereafter, Dale Kilbourne filed a counterclaim against Clifford Kilbourne for assault and battery. Dr. Crew testified that Dale Kilbourne visited him again in August of 2000, complaining of continued blurry vision, headaches, light sensitivity and watering from his left eye. The visual field test Dr. Crew performed on Dale Kilbourne indicated that he was missing the bottom left corner of his vision. Dr. Crew ordered an MRI to rule out the possibility of a tumor, aneurysm, or hemorrhage. The MRI showed no evidence of injury; however Dr. Crew explained that it only gave a gross picture and would not show small damage. Dr. Crew indicated that the injury was permanent and could not be helped with surgery or medication.

The trial court denied Clifford Kilbourne's damages claim for the Craft Road speculative house and the Landgraf project because it determined they happened before the partnership began. The trial court denied Clifford Kilbourne reimbursement for one-half the funds he paid on the partnership note and property taxes for the Rogers Heights speculative house because it determined that he did not sufficiently establish damages. The trial court awarded Clifford Kilbourne \$1,000 of the \$5,000 he requested for confiscation of the partnership name, and \$1,000 of the \$5,000 he requested to compensate for winding up the partnership affairs. The trial court awarded Dale Kilbourne \$50,000 for personal injuries and awarded the Rogers Heights property to him, but ordered him to pay Clifford Kilbourne one-half its \$30,000 value.

II. The Trial Court's Findings Of Fact

A. Standard Of Review

Clifford Kilbourne claims that the trial court did not sufficiently state its findings of fact. We review a court's findings of fact in a bench trial for clear error, and its legal conclusions de

novo.¹ MCR 2.517 provides that when a trial court tries a case without a jury it must specifically state its findings of fact and legal conclusions on record. A trial court's findings are sufficient where it is clear that it was aware of the issues and the law was correctly applied.² Here, the trial court indicated it was aware of the issues when it recited the procedural positions and testimony of both parties.

B. Battery

Where a defendant uses excessive or unreasonable force, a plaintiff is not estopped from claiming damages for battery arising from a mutual affray.³ A person must use only the amount of force deemed reasonably necessary at the time to defend himself, and must desist once his objective of self-preservation is attained.⁴ Where there is conflicting evidence whether the victim of battery pushed the batterer first, the testimony does not clearly preponderate toward self defense.⁵ The trial court found that Clifford Kilbourne could have walked away in the context of using only the amount of force reasonably necessary to protect himself.⁶ Therefore, we conclude that the trial court made sufficient findings on the record on the battery issue.

C. The Partnership Note

We also conclude that the trial court did not err by denying reimbursement of one-half the partnership note Clifford Kilbourne paid for with personal funds. The trial court's opinion reflected the fact that Clifford Kilbourne did not provide sufficient evidence to support his property tax claim. If a trial court's opinion reveals the factual basis for its conclusion, its findings are sufficient.⁷ Clifford Kilbourne provided no information as to how he arrived at \$5,000 as proper compensation for loss of goodwill, and offered no evidence of reasonable compensation for winding up partnership affairs. Where error is caused by an aggrieved party's negligence or plan, it does not require reversal.⁸

¹ *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; ___ NW2d ___ (2003).

² *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995).

³ *Brown v Swartz Creek VFW*, 214 Mich App 15, 23; 542 NW2d 588 (1995), citing *Galbraith v Flemming*, 60 Mich 403, 407; 27 NW 581 (1886).

⁴ *Kent v Cole*, 84 Mich 579, 581; 48 NW 168 (1891).

⁵ *Hindy v Avedisian*, 339 Mich 616, 618; 64 NW2d 676 (1954).

⁶ *Kent*, *supra* at 581.

⁷ *In re Forfeiture of \$19,250*, 209 Mich App 20, 20; 530 NW2d 759 (1995).

⁸ *Farm Credit Services v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998).

III. Causal Connection

A. Standard Of Review

Clifford Kilbourne argues that Dale Kilbourne presented no conclusive evidence establishing the causal connection between the battery and his vision impairment. Proximate cause is an issue of fact, which is reviewed for clear error.⁹ A plaintiff must prove by a preponderance of the evidence that the injuries resulted from the battery.¹⁰

B. The Testimony

Dale Kilbourne testified that he had not previously suffered from headaches, disorientation, and blurred vision. Neither Clifford Kilbourne nor the parties' sister recalled Dale Kilbourne mentioning blurred vision before the incident. Furthermore, although Dr. Crew could not conclusively state that the battery caused Dale Kilbourne's injuries, he established that Dale Kilbourne suffered actual, irreparable vision impairment – not caused by a tumor, aneurysm, or hemorrhage – that interfered with his ability to work. We conclude that this testimony established a sufficient causal connection between the battery and his vision impairment.

IV. Clifford Kilbourne's Subjective Belief

A. Standard Of Review

Clifford Kilbourne claims the trial court erred by not considering his subjective belief that he was using reasonable force. We review de novo the trial court's conclusions of law while reviewing its findings of fact for clear error.¹¹

B. Honest Belief Versus Reasonable Belief

Clifford Kilbourne's actions must be judged according to his honest belief of the circumstances as they appeared to him at the time,¹² but he was only entitled to use the amount of force necessary to defend himself.¹³ However, if a defendant used unnecessary force, but honestly believed he was using a proper amount of force, *and his belief was reasonable*, then he is not guilty of assault.¹⁴ Reasonableness is judged by an objective standard. Therefore, we conclude that the trial court's failure to determine whether Clifford Kilbourne honestly believed

⁹ *Meek v Dep't of Transportation*, 240 Mich App 105, 115; 610 NW2d 250 (2000).

¹⁰ *Rebentisch v Korda*, 331 Mich 656, 661; 50 NW2d 192 (1951).

¹¹ *Alan*, *supra* at 512.

¹² *Galbraith*, *supra* at 406.

¹³ *Kent*, *supra* at 581.

¹⁴ *Id.* (emphasis added).

he used necessary force was irrelevant because the trial court determined that the belief to be objectively unreasonable.

V. The Trial Court's Damage Award

A. Standard Of Review

Clifford Kilbourne claims that the trial court's award of \$50,000 shocks the judicial conscience because there was no believable evidence of injury. This Court reviews for clear error a damages award granted by a judge sitting without a jury.¹⁵ There are no absolute standards for measuring personal injury awards.¹⁶ The Michigan Supreme Court has given guidelines to determine whether to remit a damages award:

[a] whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; [b] whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; [c] whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions.^[17]

B. Applying The Guidelines

Whether reasonable minds would consider the award just compensation involves a review of the objective evidence.¹⁸ Here, Dale Kilbourne's ophthalmologist testified that his vision was permanently affected in both eyes and the eye damage was a type often caused by head injury. He further testified that the impairment made it dangerous to climb ladders and difficult to read. In addition, Dale Kilbourne testified that he still had problems with the blind spot, bright lights, and headaches.

We find no evidence of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake. A reasonable person could have determined that \$50,000 was just compensation for Dale Kilbourne's injury. We have reviewed cases from 1991 to 2003, from our own and other jurisdictions, involving head injuries that resulted in vision defects.¹⁹ While

¹⁵ *Precopio v Detroit*, 415 Mich 457, 465-467; 330 NW2d 802 (1982).

¹⁶ *Id.* at 464-465.

¹⁷ *Palenkas v Beaumont Hosp*, 432 Mich 527, 532; 433 NW2d 354 (1989), citing *Precopio*, *supra* at 465.

¹⁸ *Palenkas*, *supra* at 532.

¹⁹ *Petraszewsky v Keeth*, 201 Mich App 535, 537; 506 NW2d 890 (1993); *Frohman v City of Detroit*, 181 Mich App 400, 403; 450 NW2d 59 (1989); *Danaher v Partidge Creek Country Club*, 116 Mich App 305, 309-310; 323 NW2d 376 (1982); *Frazer v St. Tammany Parish School Board*, 774 So 2d 1227, 1230 (La App, 2001); *Brumfield v Coastal Cargo Co, Inc*, 768 So 2d 634, 637 (La App, 2000); *Corley v Delaney*, 629 So 2d 1255, 1259 (La App, 1994); *Woodward & Lothrop v Hillary*, 598 A2d 1142, 1143 (DC App, 1991).

many of the plaintiffs sustained injuries far more severe than those suffered by Dale Kilbourne, their awards reflected the severity of their injury. The range of damage awards was \$40,000 to \$2,250,000. Thus, we conclude that the \$50,000 awarded was not excessive in light of the injury.

VI. Pre-Partnership Projects

A. Standard Of Review

Clifford Kilbourne argues that the trial court erred when it determined that two projects begun before 1998 – namely, the Craft Road speculative house and the Landgraf project – were not partnership projects. Whether a partnership exists is a question of fact, which is reviewed for clear error.²⁰

B. Legal Standards

A partnership is “a voluntary association of two or more persons . . . to carry on as co-owners a business for profit.”²¹ Profit sharing is prima facie evidence of a partnership that may be rebutted by showing that the payments were wages.²² The Michigan Supreme Court has clarified that whether a partnership exists depends on the parties’ intent to jointly carry on a business for profit, not on their intent to form a partnership.²³ When there is no express agreement, the parties’ conduct determines whether a partnership exists.²⁴

C. Applying The Standards

With respect to the Craft Road project, the trial court noted that Clifford Kilbourne did not invest in the purchase of the property and was paid a salary. The court determined that while the project may have involved a partnership with a third party, it was not part of the partnership in the instant case. Although Clifford Kilbourne claimed that Dale Kilbourne promised to split the profit with him and Welker, another construction worker, Dale Kilbourne testified that Clifford Kilbourne was an employee, not a partner, and denied offering to share profits. Both Clifford Kilbourne and Welker acknowledged that they were paid \$100 a day while working on the project. The wages indicated that Clifford Kilbourne was merely an employee.

Furthermore, Clifford Kilbourne testified he was not involved in the purchase of the property and was unaware of how much the property cost. While joint ownership of property

²⁰ *Miller v City Bank & Trust Co*, 82 Mich App 120, 123; 266 NW2d 687 (1978).

²¹ MCL 449.6.

²² MCL 449.7(4)(b).

²³ *Byker v Mannes*, 465 Mich 637, 638-639; 641 NW2d 210 (2002).

²⁴ *Id.* at 648.

does not create a partnership,²⁵ the fact that Clifford Kilbourne made no capital contribution could indicate that the parties intended an employer-employee relationship.²⁶

In addition, although there may have been an agreement to share profits, there apparently was no agreement to share losses. When Dale Kilbourne was sued by the buyers of the house and entered into a settlement agreement with them, neither Clifford Kilbourne nor Welker were added as parties to the suit or asked to contribute to the damage settlement. Because partners, in absence of an agreement indicating otherwise, share losses in proportion to their share of profits,²⁷ and because neither Welker nor Clifford Kilbourne contributed to the damages settlement, this would also indicate that a partnership did not exist. Furthermore, Welker testified that he did not believe he was a partner. This would also rebut any prima facie indication of a partnership caused by the purported agreement to share profits. Thus, the trial court did not clearly err when it determined the Craft Road project was not part of the partnership.

With respect to the Landgraf project, Clifford Kilbourne testified that he and Dale Kilbourne bid the project together and worked together. However, the partnership books never showed payments for the project, which was not completed until July 1999. Moreover, the homeowner testified that he dealt exclusively with Dale Kilbourne, made all checks payable to Dale Kilbourne, and was unaware of a partnership in 1997. Therefore, we conclude that the trial court did not err when it determined that Clifford Kilbourne failed to establish that the 1997 projects were part of the partnership between the parties.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray

²⁵ MCL 449.7(2).

²⁶ *Miller, supra* at 124-125.

²⁷ MCL 449.18(a).