

STATE OF MICHIGAN
COURT OF APPEALS

EUGENE ROBRAHN and CHRISTINE
ROBRAHN,

Plaintiff-Appellees/Cross-
Appellants,

v

RFN GROUP INC, d/b/a MARGARITA GRILL,

Defendant-Appellant/Cross-
Appellee

and

ERIC SCOTT JOHNSON

Defendant.

UNPUBLISHED
March 2, 2006

No. 256083
Kent Circuit Court
LC No. 02-004158-NS

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

In this dramshop and premises liability action, defendant¹ appeals as of right from a jury trial verdict for plaintiff². Both defendant and Eric Johnson were found liable to plaintiff with Johnson being liable for \$1,117,949.63 in damages (60 percent) and defendant being liable for \$745,299.76 in damages (40 percent). A default judgment on defendant's cross-claim against Johnson was entered, making Johnson liable for \$186,324.94 of defendant's damages³. We affirm the judgment for plaintiff against defendant.

¹ Both Margarita Grill and Eric Johnson were defendants in the lower court action. Johnson's attorney withdrew before trial and Johnson did not defend at trial. A default judgment against Johnson and for Margarita Grill for indemnification was entered at the close of trial. We will refer to Margarita Grill as defendant and Johnson by name.

² Plaintiff Christine Robrahn's claim for loss of consortium is derivative of and identical to plaintiff Eugene Robrahn's claims. We will refer to Eugene Robrahn as plaintiff.

³ Johnson was not liable for the full amount of the judgment against defendant because the jury found that 25 percent of defendant's liability resulted from the dramshop claim and 75 percent of the liability resulted from premises liability claim. The judgment only

I. FACTS

This case involves a bar fight that occurred at the Margarita Grill, a restaurant and bar in Grand Rapids, Michigan. Anna Lamberts was a server at Margarita Grill the night of the incident. Lamberts testified that she saw Johnson come into the bar with one of her friends. Lambert testified that she heard Johnson say shortly after he arrived at the bar, “I want to get into a fight. I want to kill somebody.”

Lambert testified that she continued serving other people in the bar and at one point noticed plaintiff standing near by, facing her. Johnson stood near plaintiff with his back to her. Lambert saw plaintiff put up his hands and, although she could not hear what he was saying, she believed plaintiff mouthed “I don’t know what you are talking about, back off.” Johnson then punched plaintiff in the face and plaintiff fell to the ground and was bleeding. Lambert testified that Johnson then went to where plaintiff fell and stomped on his head. Other witnesses confirmed that Johnson stomped on or kicked plaintiff’s head after plaintiff fell to the ground.

Lambert testified that she knew that the group of people Johnson was with had been kicked out of the bar a few weeks ago. Lambert testified that her friend also told her that defendant had been involved in a fight at another bar that night, but she did not remember if she was told that before or after the fight with plaintiff. Lambert also testified that she did not have Johnson thrown out when he said he wanted to fight or kill someone because she did not take him seriously and he was with her friend.

Guerin Trent Pierre testified that he was working at Margarita Grill on the night of the incident as the head of security. He has known Johnson since 1995 or 1996 and he let Johnson and his friends in a side door to the bar, at no charge. Johnson’s friends told Pierre that Johnson drank a fifth of gin before coming to the bar. Pierre testified that he spoke with Johnson and Johnson was not showing signs of being intoxicated; Johnson was walking straight and could hold a conversation. Pierre testified that he thought that Johnson’s friends were embellishing how much alcohol Johnson had consumed. Pierre also remembered that Johnson stated he was not planning on drinking anything at the bar that night. Pierre testified that he did not see the fight. Pierre knew that Johnson and his friends had been involved in a fight at another bar earlier that night, but he did not remember whether he found this out before or after the fight. Pierre also testified that no one had complained about Johnson before the fight.

Johnson testified that around the time of this incident, he rarely drank. However, on this night, he was drinking and consumed several alcoholic beverages before arriving at the Margarita Grill. One of Johnson’s friends, who had not been drinking that night, commented that Johnson was acting silly or intoxicated. Johnson believed that the alcohol he consumed could have affected his speech and made him act impulsively. Johnson testified that he arrived at the Margarita Grill around 11:30 p.m. or midnight and drank two “Scotty Specials,” which were drinks containing mostly Jack Daniels and a

ordered that Johnson indemnify defendant for the percentage of damages attributable to the dramshop claim. See MCL 436.1801(6).

small amount of Coke “floating” on the top, after arriving. Johnson stated that he also had two additional regular Jack Daniels and Coke drinks later that night.

Johnson testified that the confrontation with plaintiff began when Johnson accidentally stepped on plaintiff’s foot. Johnson stated that he turned around, said excuse me, and plaintiff was angry and started to point his finger at Johnson and shoved him. Johnson stated that he then hit plaintiff and plaintiff fell over. Johnson denied stomping on plaintiff’s head, and stated that after plaintiff fell, he walked around to try to find Pierre.

Grand Rapids police officers responded to the assault. Officer Aaron Rossin testified that he placed Johnson in a police car. Officer Joseph Garrett testified that he arrived after Johnson was in the police car. Garrett went to handcuff Johnson and Johnson did not resist physically, but kept questioning why he was being arrested. Garrett testified that Johnson was intoxicated and told him “I couldn’t have assaulted anyone, I’m too drunk.” Garrett stated that Johnson smelled of alcohol and was unable to hold a conversation, but was not unsteady on his feet. Garrett also stated that once at the police station, Johnson was uncooperative with the officers. Johnson testified that once at the jail, he was so drunk that he passed out in the holding cell.

As a result of Johnson’s actions, plaintiff suffered from a bleed on one side of his brain, a contusion on the other side of his brain, cracks in his skull, and cranial nerve damage. Plaintiff’s cerebral spinal fluid leaked out of his ears because of the skull fracture. At the time of trial, plaintiff continued to suffer from a loss of hearing in higher frequencies, vision troubles, neck and headache pain, dizziness, problems with memory and attention, fatigue, some facial paralysis, and personality changes. Testimony indicated that plaintiff would likely not recover much more from many of these problems.

II. JNOV ON DRAMSHOP CLAIM

Defendant argues that it was entitled to a judgment notwithstanding the verdict (JNOV) on plaintiff’s dramshop claim because there was insufficient evidence that Johnson was visibly intoxicated when he was served by defendant. We disagree.

A. Standard of Review

The trial court’s decision on a motion for JNOV is review de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). This Court reviews “the evidence and all legitimate inference in the light most favorable to the nonmoving party.” *Id.* quoting *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). “A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ.” *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

B. Analysis

There was sufficient evidence for the jury to find defendant liable on plaintiff’s claim under the dramshop act.

MCL 436.1801 states, in part:

(2) A retail licensee shall not directly or indirectly, individually or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a person who is visible intoxicated.

(3) Except as otherwise provided in this section, an individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death.

“A person is visibly intoxicated when the person’s intoxication would be apparent to an ordinary observer.” *Miller v Ochampaugh*, 191 Mich App 48, 57; 477 NW2d 105 (1991). This is an objective standard and “it is only necessary for the jury to determine that the allegedly intoxicated person appeared visibly intoxicated to an ordinary observer and that the allegedly intoxicated person was served alcohol by the dramshop defendant while visibly intoxicated.” *Id.* at 60. Circumstantial evidence may be used to show that a person was visibly intoxicated at the time the dram shop served the person alcohol. *Reed v Breton*, 264 Mich App 363, 375; 691 NW2d 779 (2004). However, “the mere fact that the alleged intoxicated person drank alcoholic beverages is not sufficient to establish that he was visibly intoxicated.” *Heyler v Dixon*, 160 Mich App 130, 145; 408 NW2d 121 (1987).

In considering defendant’s motion for JNOV, the trial court had to construe the evidence in a light most favorable to plaintiff and determine whether the facts presented to the jury precluded judgment for the plaintiff as a matter of law. *Merkur Steel Supply Inc v Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004). If, based on the evidence, reasonable minds could differ, the question is one for the jury and JNOV is not proper. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005). Considering the evidence in the light most favorable to plaintiff, there was sufficient evidence for this issue to be decided by the jury.

Johnson testified that he was not a regular drinker at the time of the assault. Johnson also testified that before arriving at defendant’s bar, he had one mixed drink at his home, one mixed drink at The BOB, and two to three drinks at The Deuce. Johnson testified that he felt intoxicated when he walked over to defendant’s bar. Johnson stated that he felt smiley and was told that his face had a red color to it. Johnson also testified that once at defendant’s bar, he had two “Scotty Specials,” which were strong drinks containing mostly Jack Daniels. Johnson also had two more regular Jack Daniel and Cokes later in the night. Lamberts testified that had she been provided alcohol training, she may have recognized that Johnson’s behavior was a sign of intoxication. The police

officers who responded to the assault also testified that Johnson smelled of alcohol, had trouble holding a conversation, and was acting intoxicated. Although, the officers did not observe Johnson in the bar, they observed him fairly close in time to when the fight occurred. See *Heyler, supra* at 147 (finding sufficient evidence of visible intoxication when the defendant testified that he drank a large amount of alcohol and police officers responding to an accident minutes after the defendant left the bar testified that the defendant smelled of alcohol). Plaintiff also presented expert testimony that, based on Johnson's testimony of what he drank, Johnson was visibly intoxicated when he was served his final drinks at the bar. There was also evidence that an employee of defendant's was told that Johnson drank a fifth of gin before coming to the bar.

Although defendant elicited testimony from witnesses at the bar that night that Johnson did not appear intoxicated while at the bar, plaintiff did present some evidence of Johnson's visible intoxication, thereby creating a question for the jury. Plaintiff also presented circumstantial evidence from the police and a toxicology expert that Johnson was visibly intoxicated when he was served by defendant. We find that the evidence presented, including circumstantial evidence, created a factual issue for the jury, and therefore, the trial court did not err in denying defendant's motion for JNOV. *Zantel Marketing Agency, supra* at 146.

III. JNOV ON PREMISES LIABILITY CLAIM

Defendant next argues that a JNOV should have been entered on plaintiff's premises liability claim because defendant had no duty to protect plaintiff from the criminal acts of Johnson. We agree.

A. Standard of Review

The trial court's decision on a motion for JNOV is review de novo. *Sniecinski, supra* at 131. Additionally, whether defendant had duty to protect plaintiff from the criminal act of Johnson is a question of law that is reviewed de novo. *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002).

B. Analysis

The trial court erred in failing to grant defendant a JNOV on the issue of premises liability, as defendant did not have a duty to prevent the criminal act of Johnson as a matter of law.

Generally, there is no duty to protect an individual from the criminal acts of a third party, absent some special relationship. *Graves, supra* at 493. "The rationale underlying this general rule is the fact that '[c]riminal activity, by its deviant nature, is normally unforeseeable.'" *Id.*, quoting *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). Our Supreme Court defined a merchant's duty as follows:

A premises owner's duty is limited to responding reasonably to situations occurring on the premises because, as a matter of public policy, we should not expect inviters to assume that others will disobey the law. A merchant

can assume that patrons will obey the criminal law. This assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee. It is only a present situation on the premises, not any past incidents, that creates a duty to respond.

Subjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten. Because criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere. However, even police, who are specially trained and equipped to anticipate and deal with crime, are unfortunately unable universally to prevent it. This is a testament to the arbitrary nature of crime. Given these realities, it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so, effectively vicariously liable for the criminal acts of third parties. [*MacDonald v PKT, Inc.*, 464 Mich 322, 335; 628 NW2d 33 (2001) (citations omitted).]

Accordingly, “a merchant has no obligation generally to anticipate and prevent criminal acts against invitees.” *Id.* at 334. However, a duty on behalf of merchants will arise on behalf of “invitees that are “readily identifiable as [being] foreseeably endangered.”” *Id.* at 332 (citations omitted). “‘Readily’ is defined as ‘promptly; quickly; easily.’” *Mason v Royal Dequindre, Inc.*, 455 Mich 391, 398; 566 NW2d 199 (1997), overruled in part on other ground by *MacDonald, supra* at 334-335. Whether an invitee is “foreseeably endangered” cannot be determined from past acts of criminal activity or whether the criminal act in general was foreseeable. *MacDonald, supra* at 339. Rather, the proper inquiry is “once a disturbance occurs on the premises, whether a reasonable person would recognize a risk of *imminent* harm to an identifiable invitee.” *Id.* (emphasis added). Additionally, once a duty arises, the merchant fulfills the duty by making reasonable efforts to contact the police. *Id.* at 336.

Plaintiff did not present sufficient evidence that a situation occurred on defendant’s premises that should have notified defendant of a risk of imminent harm to plaintiff, an identifiable invitee. *Id.* at 335. Although plaintiff presented some evidence of past fights that Johnson or his friends had been involved in, they are not properly considered when determining whether defendant had a duty toward plaintiff. *Id.* at 336. The only possible “disturbance” that occurred on defendant’s premises that night before the incident with plaintiff was Johnson stating “I want to get into a fight. I want to kill somebody” to a server at the bar. Therefore, the question is whether a reasonable person would recognize these statements as identifying “a risk of *imminent* harm to an identifiable invitee,” *id.* at 339, that being plaintiff. The statements do not provide sufficient evidence for plaintiff’s premises liability claim. First, the server who heard Johnson make the statement testified that she did not take him seriously because she had heard talk like that in the bar before and nothing had ever happened. Additionally, the statement was made when Johnson first came into the bar around 11:30 p.m. or midnight. The assault on plaintiff did not occur until around 1:00 a.m. Therefore, the statement was not an indicator of imminent harm to plaintiff. It does not appear that the statement and

the assault on plaintiff were connected. The assault seemed to be the result of some sort of confrontation between plaintiff and Johnson. Once the assault on plaintiff occurred, defendant fulfilled its duty by ensuring that the police arrived in a prompt manner. Therefore, the trial court erred in failing to grant defendant a JNOV on plaintiff's premise liability claim.

However, we find that this error does not require reversal of the jury award and a new trial.⁴ Plaintiff received a single recovery for his injuries. See *Grace v Grace*, 253 Mich App 357, 368; 655 NW2d 595 (2002). Plaintiff sought recovery from defendant based on negligence. This negligence was based on two theories, dramshop liability and premises liability. Plaintiff did not claim a different set of damages for each theory. Plaintiff also did not receive double damages because the jury found defendant liable on both the dramshop and the premises liability claim. Instead, plaintiff claimed that defendant's negligence caused all his damages. When a single theory can support the entire damage award, no apportionment between the theories is necessary. *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 302; 616 NW2d 175 (2000). Here the dramshop claim or the premise liability claim would have supported all of plaintiff's damages. Therefore, even though the jury improperly considered the premises liability claim, a reduction of damages is not required because the damages are supported by the properly considered dramshop claim.

IV. WITNESS TESTIMONY

Defendants argue that the trial court erred by allowing two of plaintiff's witnesses, Dr. Scalf and Dr. Ancell, to testify, even though they were not able to testify to proximate under the required standard of certainty. We disagree.

A. Standard of Review

The admissibility of an expert witness' testimony is a matter within the trial court's discretion and this Court reviews the trial court's decision for an abuse of discretion. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999). "[A]n abuse of discretion is found only if 'an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling.'" *Id.*, quoting *Cleary v Turning Point*, 203 Mich App 208, 210; 512 NW2d 9 (1994).

B. Analysis

The trial court did not abuse its discretion by allowing the experts to testify as to their opinion on the cause of plaintiff's injuries.

⁴ Defendant failed to raise any issue in its brief or counter-statement of questions regarding whether the court must remit a portion of plaintiff's damages based on the jury's allocation of defendant's fault as between the premises liability and dramshop theories. Consequently, we conclude no remittitur of damages is appropriate.

At trial the deposition of Dr. William Scalf was read to the jury and a video deposition of Dr. Robert Ancell was played for the jury. The record provided shows that defendant only objected to the testimony of Dr. Scalf on causation grounds at trial. Defendant may have objected to this type of causation testimony during Dr. Ancell's deposition, however the deposition was not transcribed in the lower court record and a transcript was not provided on appeal. The lack of a transcript of Dr. Ancell's testimony also leaves us unable to determine what causation testimony Dr. Ancell may have given. Therefore, defendant has waived this argument with respect to Dr. Ancell's testimony. See *Myers v Jarnac*, 189 Mich App 436, 444; 474 NW2d 302 (1991).

Dr. Scalf testified that plaintiff suffered from a skull fracture that allowed fluid to leak from his brain. Dr. Scalf further opined that plaintiff's injuries were consistent with being stomped or kicked in the head. Defendant argues that because each doctor could only state plaintiff's injuries were "consistent with" being kicked or stomped in the head, the testimony was speculative and inadmissible. MRE 702 governs the admissibility of expert testimony and states:

If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise

"The trial court has an obligation under MRE 702 'to ensure that any expert testimony admitted at trial is reliable.'" *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 602; 705 NW2d 703 (2005), quoting *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). Where expert testimony is based only on speculation, the trial court should exclude or strike the testimony. *Carpenter v Consumers Power Co*, 230 Mich App 533, 561; 583 NW2d 913 (1998). However, "[a]s long as the basic methodology and principles employed by an expert to reach a conclusion are sound and create a trustworthy foundation for the conclusion reached, the expert testimony is admissible no matter how novel." *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 492; 566 NW2d 671 (1997). In determining the admissibility of expert testimony under MRE 702, our Supreme Court articulated three conditions for admissibility: "(1) the expert must be qualified, (2) the testimony is relevant to assist the trier of fact to understand evidence or to determine a fact in issue, and (3) the testimony is derived from recognized scientific, technical, or other specialized knowledge." *Clerc, supra* at 602, citing *People v Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990) (Brinckley, J.).

The experts' testimony was admissible. There is no dispute on the experts' qualifications. Additionally, the testimony was helpful to the trier of fact as it explained plaintiff's injuries and symptoms. The testimony also helped the jury in determining whether Johnson's conduct was a proximate cause of plaintiff's injuries. There is also no dispute on whether the testimony was derived from recognized scientific knowledge. Thus, we find defendant's argument to be without merit.

V. JURY INSTRUCTIONS

Defendant next argues that the trial court should have instructed the jury that plaintiff's own intoxication could have contributed to his injuries and the jury should have been provided with a verdict question consistent with this instruction. We disagree.

A. Standard of Review

This Court reviews claims of instructional error de novo. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). The trial court's decision on whether a requested instruction is supported by the evidence and applicable to the case is reviewed for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 515; 556 NW2d 528 (1996). "If, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury, no error requiring reversal occurs." *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). Additionally, this Court will not reverse instructional error unless the failure to do so would be inconsistent with substantial justice. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002).

B. Analysis

Defendant has not shown any errors in the jury instructions given in this case that would require reversal.

"MCR 2.516(D)(2) states that the trial court must give a jury instruction if a party requests such instruction and it is applicable to the case." *Lewis, supra* at 211. "Jury instructions should not omit material issues, defenses, or theories that are supported by the evidence." *Ward v Consolidated Rail Corp*, 472 Mich 77, 83-84; 693 NW2d 366 (2005). Defendant argues that it is entitled to a new trial because the trial court failed to instruct the jury on several defenses.

Defendant first argues that the jury should have been instructed to determine the applicability of MCL 600.2955a, which states:

It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.

"Thus, pursuant to MCL 600.2955a, in order to successfully avail itself of the absolute defense of impairment, defendant in this case was required to establish that (1) the decedent had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and (2) that as a result of that impaired ability, the decedent was fifty percent or more the cause of the accident or event that resulted in his death."

Harbour v Correctional Med Services, Inc, 266 Mich App 452, 456; 702 NW2d 671 (2005). Although there was evidence presented at the trial that showed plaintiff was intoxicated, there was no evidence that plaintiff was fifty percent or more the cause of his injuries. Defendant presents no argument or evidence that would support a finding that plaintiff was fifty percent or more the cause of his injuries. Therefore, the trial court did not abuse its discretion in denying defendant's request for an instruction on MCL 600.2955a.

Additionally, the trial court did not abuse its discretion in denying defendant's request for an instruction on comparative negligence. Comparative negligence is a defense to both the dram shop defendant and the allegedly intoxicated person when the facts support it. *Heyler v Dixon*, 160 Mich App 130, 153-154; 408 NW2d 121 (1987).

When deciding whether an instruction on comparative negligence is appropriate, the question is whether, in viewing the evidence most favorably to the defendant, there is sufficient evidence for the jury to find negligence on the part of the injured plaintiff. . . . Circumstantial evidence and permissible inferences therefrom may constitute sufficient proof of negligence. . . . The trend is to allow all issues, when supported by facts, to go to the jury. [*Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 623; 563 NW2d 693 (1997), quoting *Duke v American Olean Tile Co*, 155 Mich App 555, 565-566; 400 NW2d 677 (1986).]

“[A] trial court's decision not to instruct the jury on comparative negligence does not amount to an abuse of discretion where the record evidence does not reveal that the plaintiff was negligent.” *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 151; 640 NW2d 892 (2002). When determining if there was evidence to support a requested instruction, the court views the evidence in the light most favorable to defendant. *Id.*

MCL 600.2959 provides:

In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in [MCL 600.]6306. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in [MCL 600.]6306, and noneconomic damages shall not be awarded.

Plaintiff argues that defendant is not entitled to a defense of comparative negligence because plaintiff was the victim of an intentional tort. However, the application of the comparative fault statute does not depend on the conduct of the plaintiff or the defendant. *Lamp, supra* at 602. All “at fault” conduct, including

intentional conduct, see MCL 600.6304(8), is within the reach of the comparative fault statutes. *Lamp, supra* at 602. “Consequently, the comparative fault statutes apply to all persons, including the plaintiff, who are found to be at fault, i.e., whose conduct is a proximate cause of the plaintiff’s damages. A plaintiff will be considered at fault if a defendant proves that the plaintiff’s conduct was both a cause in fact and a legal, or proximate, cause of his own damages.” *Id.* at 605.

Here, the trial court did not abuse its discretion in denying the instruction on comparative fault because there was not sufficient evidence that plaintiff was a factual and proximate cause of his own injuries. The only evidence defendant suggests supports an instruction on comparative fault is testimony that plaintiff pushed and/or poked Johnson. Although this may have been evidence of plaintiff being the factual cause of his damages, it did not support plaintiff being the proximate or legal cause of his own damages. “Legal or proximate, cause is ‘that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred.’” *Lamp, supra* at 600, quoting *Helmus v Dep’t of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999). Although it was foreseeable that plaintiff’s action of pushing and/or poking Johnson may have caused some type of physical altercation, the degree of force Johnson used was not foreseeable. Plaintiff was not a proximate cause of his injuries and the trial court did not abuse its discretion in refusing to instruct the jury on comparative negligence.

Defendant next argues that the jury should have been instructed on plaintiff’s duty to use ordinary care, on plaintiff’s intoxication affecting negligence, and on mutual affray. However, as discussed above, there was not sufficient evidence for the court to give an instruction on comparative negligence, therefore, the jury did not need to be instructed to consider plaintiff’s duty of care or how plaintiff’s intoxication may have affected his own negligence.

Furthermore, the evidence did not support the instruction on mutual affray. The jury instructions for mutual affray provide:

If plaintiff voluntarily engaged in a fight with defendant for the sake of fighting and not as a means of self-defense, then plaintiff may not recover for an assault or battery unless the defendant beat the plaintiff excessively or used unreasonable force. [SJI 115.06.]

There was no evidence that plaintiff engaged in a physical fight with Johnson for the sake of fighting. Although Johnson testified that plaintiff pushed and/or poked him after Johnson stepped on his foot, Johnson’s response of punching plaintiff so hard that he fell to the floor and then kicking or stomping on plaintiff’s head was not reasonable force. Johnson used excessive force and therefore, the trial court did not abuse its discretion in denying defendant’s request to instruct the jury on mutual affray.

Defendant has not shown any errors in the jury instructions that denied it substantial injustice. The instructions as given fairly presented the issues to be tried and the applicable law. The trial court did not err in denying defendant’s requests

VI. REMITTITUR

Defendant argues that it was entitled to remittitur of the excessive jury verdict because the jury failed to deduct plaintiff's current income from the economic damages award. We disagree.

A. Standard of Review

The trial court's decision to deny a motion for remittitur is reviewed for an abuse of discretion. *Diamond v Witherspoon*, 265 Mich App 673, 692; 696 NW2d 770 (2005). This Court views the evidence in the light most favorable to the nonmoving party. *Id.* at 693. Additionally,

“[T]he question of the excessiveness of a jury verdict is generally one for the trial court in the first instance. The trial court, having witnessed all the testimony and evidence as well as having had the unique opportunity to evaluate the jury's reaction to the proofs and to the individual witnesses, is in the best position to make an informed decision regarding the excessiveness of the verdict. Accordingly, an appellate court must accord due deference to the trial court's decision and may only disturb a grant or denial of remittitur if an abuse of discretion is shown.” [*Id.* at 692-693, quoting *Palenkas v Beaumont Hosp*, 432 Mich 527, 531; 443 NW2d 354 (1989).]

B. Analysis

The trial court did not abuse its discretion in denying defendant's motion for remittitur. When determining a motion for remittitur, the trial court is to consider whether the evidence supports the jury award. A motion for remittitur should be granted when the jury award exceeds the highest award the evidence presented at trial will support. *Diamond, supra* at 694. “When determining whether an award is excessive, a court may consider whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact, whether it was within the limits of what reasonable minds would deem to be just compensation for the injury inflicted, and whether the amount actually awarded is comparable to other awards in similar cases.” *Id.* “The trial court is in the best position to determine whether a jury's verdict was motivated by impermissible considerations.” *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995). Additionally, “a verdict should not be set aside simply because the method of computation used by the jury in assessing the damages cannot be determined, unless it is not within the range of evidence presented at trial.” *Diamond, supra* at 694.

Defendant argues that the jury did not consider plaintiff's current income when determining its award of past and future economic damages. However, defendant does not argue why it believes that jury did not consider plaintiff's current income or how the jury verdict reflects that the jury did not consider plaintiff's current income in determining its award, except to say that it “is evident” that the jury only considered

plaintiff's potential income. Defendant also does not shown in what way the yearly amounts the jury awarded were excessive or by what number these amounts should be reduced. Defendant does not argue any numbers or arithmetic at all. Therefore, defendant failed to properly present this argument on appeal and has abandoned the issue. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004) (appellant may not leave it to the Court to find the factual support for its claim).

Additionally, the jury award was within the evidence presented at trial. Plaintiff testified that before the assault, he had started his own business as a stonemason and he made \$35,000 the year he was injured. Plaintiff testified that his business was just starting up and he felt that he would have made more than \$50,000 a year within the next few years, had he kept his business. Plaintiff also testified that he worked around 10 to 15 hours a week currently, doing odd jobs for a friend. There was no indication that this work was permanent. The jury verdict awarded plaintiff \$2,950 for the remainder of 2003, \$38,000 for 2004, \$43,000 for 2005, and \$50,000 for 2006. The award increases a small amount (around \$1,000 to \$1,800) a year until 2037. This award was within the evidence presented by plaintiff⁵ and the trial court did not abuse its discretion in denying defendant's motion for remittitur.

VII. DAMAGE APPORTIONMENT

Plaintiffs argue that the trial court erred by apportioning responsibility for damages between defendant and Johnson in plaintiffs' dramshop action. We disagree.

A. Standard of Review

The interpretation of a statute is a question of law that is reviewed de novo. *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004). "[O]ur primary task in construing a statute, is to discern and give effect to the intent of the Legislature." *Id.* at 665, quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 19 (1999). "If the language of a statute is clear, no further analysis is necessary or allowed." *Eggleston v Bio-medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

B. Analysis

The trial court did not err in allowing the jury to apportion fault between defendant and Johnson on plaintiff's dramshop claim.

Tort reform in 1995 replaced joint and several liability for joint tortfeasors in Michigan with several liability. *Smiley v Corrigan*, 248 Mich 51, 53; 638 NW2d 151 (2001). This means that, in actions where the tort reform statutes apply, "defendants now

⁵ Plaintiff also argues that expert testimony from Dr. Robert Ancell supports the jury's award of wage loss damages. However, Dr. Ancell's testimony at trial consisted of a videotaped deposition that was played for the jury. The transcript of the deposition was not provided to this Court on appeal.

are only accountable for damages in proportion to their percentage of fault.” *Id.* MCL 600.2957(1) provides:

In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and . . . in direct proportion to the person’s percentage of fault. In assessing the percentage of fault of each person, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

The dramshop act provides:

Except as otherwise provides for under this section and section 815, a civil action under subsection (3) against a retail licensee shall be subject to the revised judicature act . . . MCL 600.101 to 600.9947. [MCL 436.1801(11).]

The clear language of the statute makes tort reform legislation applicable to dramshop action, except where the dramshop act has a specific contradictory provision. *Miller, supra* at 63-64. Plaintiff argues that the language that allows a plaintiff to recover actual damages against a dramshop, when the unlawful sale of alcohol is a proximate cause of a plaintiff’s injuries, MCL 436.1801(3), expressly contradicts the provisions allowing apportionment of damages under tort reform. We find this argument to be meritless.

The statutes do not expressly conflict. The dramshop act does not expressly address apportionment of damages at all. Plaintiff argues that MCL 436.1801(3) provides that plaintiff is allowed to recover all actual damages for which the intoxication was a proximate cause. However, the statute does not provide for a plaintiff to recover *all* actual damages from the dramshop defendant. The statute states “plaintiff shall have the right to recover actual damages.” There is no provision in the statute that mandates that plaintiff has the right to recover all his damages from the dramshop defendant.

Furthermore, this Court in *Weiss v Hodge (After Remand)*, 223 Mich App 620, 633; 567 NW2d 468 (1997), stated that

the fact that comparative fault applies to dramshop actions supports the conclusion that the relative fault of the liquor licensee may exceed the liability of the AIP [allegedly intoxicated person]. *Brown, supra* at 21-22. Thus, because juries in dramshop cases are required to apportion fault among multiple tortfeasors, including both the AIP and the liquor licensee, this permits a jury to find varying degrees of culpability between these parties. [Citing MCL 600.6304.]

Plaintiff argues that this statement by this Court in *Weiss* is dictum and not binding. Dictum is ““judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not

precedential (though it may be considered persuasive).”” *Carr v City of Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003) (citations omitted). “[H]owever, [] “[w]hen a court of last resort intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as binding precedent.”” *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001) (citations omitted) (emphasis in *Higuera*). The question this Court was deciding in *Weiss* was whether it was proper for a jury to determine that the dramshop defendant was more liable than the defendant who assaulted the plaintiff. The determination that juries are required to apportion fault in dramshop cases was necessary to determine the issue presented and was not dictum. It was necessary for the Court to determine that apportioning fault was proper before it could even consider whether a jury could properly apportion more fault to the dramshop defendant.

Therefore, based on the holding in *Weiss* and the clear language of the statute, we conclude that it was proper for the trial court to allow the jury to apportion damages on plaintiff’s dramshop claim.

Affirmed.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette