NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4682-13T3

RICHARD LUKENDA,

Plaintiff-Respondent,

v.

MICHELLE GRUNBERG,

Defendant-Appellant,

and

NORMAN GRUNBERG and
MARY GRUNBERG,

Defendants.

Argued October 27, 2015 – Decided December 31, 2015

Before Judges Reisner and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-389-11.

Todd Landis argued the cause for appellant (Hardin Kundla, McKeon & Poletto, P.A., attorneys; James L. Fant, on the briefs).

James D. Martin argued the cause for respondent (Martin Kane & Kuper, attorneys; Mr. Martin, on the brief).

PER CURIAM

In this personal injury case, defendant Michelle Grunberg appeals from a May 23, 2014 order denying her motion for a new

trial, which challenged the trial court's decisions as to juror misconduct and the striking of defendant's comparative negligence defense. On her appeal, defendant presents the following points for our consideration:

> POINT I
>
> DEFENDANT IS ENTITLED TO DE NOVO REVIEW OF THE TRIAL COURT'S DECISIONS.
>
> POINT II
>
> THE TRIAL COURT ABROGATED ITS RESPONSIBILITY TO ROOT OUT POTENTIAL PREJUDICE CAUSED BY JUROR MISCONDUCT.
>
> POINT III
>
> THE TRIAL COURT ERRONEOUSLY STRUCK DEFENDANT'S DEFENSE OF COMPARATIVE NEGLIGENCE.

For the reasons that follow, we affirm.

I.

We begin by summarizing the most pertinent trial evidence. On December 25, 2010, defendant sent plaintiff Richard Lukenda a text message inviting him to visit her at her parents' house in Mountainside. Both parties were thirty-two years old at the time. Prior to receiving this text, plaintiff had been celebrating Christmas at his father's house, where he had arrived between 3:00 and 4:00 p.m. Plaintiff testified that he consumed one glass of wine with dinner at around 5:00 to 5:30 p.m. After he received defendant's text, plaintiff left his

father's house and made the five-minute drive to defendant's house between 8:00 and 9:00 p.m.

Upon plaintiff's arrival, defendant poured a glass of scotch for him and a glass of wine for herself. At approximately 9:30 p.m., defendant's parents and younger brother returned home. Plaintiff spoke with defendant's family, and defendant's father refilled the parties' drinks. Defendant, her brother, and her parents all testified that they observed signs of plaintiff's intoxication during this conversation. These signs included plaintiff allegedly swaying back and forth and slurring his speech. Plaintiff disputed these accounts, testifying that he was never intoxicated.

There was considerable disagreement as to the facts and circumstances that led to plaintiff's injury. According to plaintiff, at around 11:30 p.m., he told defendant that he was going to go home; defendant responded "no, you can't," and as plaintiff went to shake the hand of defendant's mother, defendant delivered a blindsided kick directly to the center of his knee, causing him to collapse. Describing the force of the impact, plaintiff said, "It was devastating. It was tremendous [because] I felt the bone just dislocate." Plaintiff further testified that defendant described the kick as a "martial arts move."

Defendant provided a different account of the incident. Defendant testified that after plaintiff indicated he was going to leave, she started asking him for his keys out of fear that he would drive home intoxicated. After plaintiff refused these requests, defendant approached plaintiff from behind while he was in the middle of his turn playing Wii bowling, and attempted to reach into his pockets to secure his keys. At this point, with defendant's body weight pressed against plaintiff's back, plaintiff fell and his knee struck "the black stone floor."

Defendant's mother, a registered nurse, gave plaintiff a narcotic painkiller as he was in excruciating pain and unable to walk. Defendant's brother drove plaintiff to the hospital, but plaintiff did not stay due to an expected waiting time of three to four hours. Plaintiff was eventually diagnosed with multiple injuries to his right knee, including a complete tear of the anterior cruciate ligament and an oblique tear of the posterior horn of the lateral meniscus. At the time of trial, plaintiff had undergone three surgeries to repair the damage to his knee.

At trial, plaintiff's expert, Dr. Wendell O. Scott, testified that the injury to plaintiff's knee occurred as the result of some lateral force or twisting of the knee. Dr. Scott described plaintiff's surgeries for the jury and indicated that plaintiff "has reached maximum medical improvement." He further

stated that plaintiff's "prognosis is poor . . . because his condition is permanent. It cannot be corrected. . . . [H]e is left with a degenerative knee[,]" which presents "a higher risk of posttraumatic arthritis."

During a break in Dr. Scott's testimony, juror number two briefly communicated with him, in violation of the judge's orders. Dr. Scott stated that juror number two came up to him and "said that he thought I was a great teacher and smiled." Defendant immediately moved for a mistrial. Before ruling on the motion, the judge questioned juror number two, who stated that he did make a brief comment to another juror about Dr. Scott's testimony: "I just said that what he's saying is so fascinating. I never knew that they could drill through bones and things like that." Juror number two then assured the judge that the contact would have no effect on his ability to be a fair and impartial juror.

After strongly admonishing juror number two to avoid any further discussions about the case until deliberations, the judge ruled on defendant's motion:

> I'm not going to grant a mistrial. I [do not] think [there was] any harm done by what was said, particularly with the cautions [I have] given him. And, you know, a mistrial is a last resort in any trial and I think what [we have] done and the cautions [I have] given him will be sufficient to make sure that there's no other comments by him

> or anybody else about anybody until the case is over.

The record does not indicate that either party asked the court to question any other jurors.

At the close of defendant's case, plaintiff moved to strike the defense of comparative negligence. The court first concluded that proximate cause was undisputed; that is, the interaction between plaintiff and defendant somehow caused plaintiff's injury. The court then stated:

> So, the question is, is the fact that the [p]laintiff was drunk, assuming the jury finds that, or that he decided to use his vehicle, the type of negligence that would be causative of the injury. And the question I have in my mind and the problem I have is that I [do not] think it goes to his negligence. I think it goes to whether a jury considers that his activity prompted her activity and whether that makes her activity reasonable under the circumstances. And — but I [do not] think his activity can be considered negligent in and of itself.
>
> . . . .
>
> [Plaintiff's] activity may have caused her to cause the accident . . . but [that is] not comparative negligence. That's not negligence. Okay? So, I'm not going to charge comparative negligence. . . . [B]ut you can argue that what he did caused her to do what she did and that she [should not] be . . . punished because she was trying to protect him and protect others. You can argue that.

At the conclusion of the trial, a unanimous seven-person jury returned a verdict in plaintiff's favor, concluding that he proved by a preponderance of the evidence that defendant was negligent, that defendant's negligence was a proximate cause of the accident, and that $425,000 would reasonably compensate plaintiff for his injuries.

Defendant moved for a new trial, arguing that the jury's verdict was a miscarriage of justice, citing the court's rulings on juror misconduct and defendant's comparative negligence defense. On May 23, 2014, Judge Joseph P. Perfilio denied the motion in a very thorough oral opinion, explaining why he did not grant a mistrial or dismiss juror number two, and why he granted the motion to strike defendant's claim of comparative negligence. Before issuing his decision, the judge confirmed with both counsel that no one objected to his taking from the jury the issue of proximate cause with respect to the incident itself — that is, plaintiff's expert testified that plaintiff's injuries were caused by the incident, and defendant did not challenge his opinion.

This appeal followed with defendant again arguing that the judge's rulings regarding jury misconduct and comparative negligence warrant a new trial.

II.

We begin by addressing defendant's argument that the trial court, by only questioning juror number two, failed to determine if juror number two's conduct could have influenced the jury in reaching its verdict and that prejudice to the defense should be presumed.

Because defendant failed to request the trial judge to interview any additional jurors, we conclude that defendant's argument concerning juror misconduct is barred by the doctrine of invited error. See N.J. Div. of Youth & Family Servs. v. M.C., III, 201 N.J. 328, 340 (2010). Defense counsel made no request for the court to interview any of the remaining jurors, a step the judge could easily have taken if defendant had timely raised the issue. Defendant is therefore barred from raising the issue here. Id. at 340. We add the following comments.

Despite interaction between juror and witness, a new trial is not necessary in every instance where it appears that an individual juror has been exposed to outside influence. State v. R.D., 169 N.J. 551, 559-60 (2001). As such, "appropriate voir dire of a juror allegedly in possession of extraneous information mid-trial should inquire into the specific nature of the extraneous information, and whether the juror intentionally or inadvertently has imparted any of that information to other

jurors." Id. at 560. Following this questioning, "the decision to voir dire individually the other members of the jury best remains a matter for the sound discretion of the trial court. No per se rule should obtain." Id. at 561.

We note that "the trial court is in the best position to determine whether the jury has been tainted." Id. at 559. The decision to declare a mistrial is committed to its sound discretion, and "[t]he abuse of discretion standard of review should pertain when reviewing such determinations of a trial court." Id. at 559. Similarly, "[t]he decision to grant a new trial based on jury taint resides in the discretion of the trial court." Id. at 558. A denial of a motion for a new trial "will not be disturbed unless that discretion has been clearly abused." Quick Chek Food Stores v. Spring-field Twp., 83 N.J. 438, 445-46 (1980).

Moreover, the record fails to indicate any harm resulting from juror number two's brief, passing comment. In this case, there was no issue as to medical proximate causation, or the nature and extent of plaintiff's injuries; nor does defendant argue that the verdict was excessive.

III.

Defendant next argues that the trial judge committed reversible error by striking her claim of comparative

negligence. Specifically, she contends that this matter was of the type contemplated by the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to -5.8, and therefore the trial court was required to put before the jury the issue of plaintiff's alleged intoxication. Defendant further contends that by removing the issue of plaintiff's intoxication and negligence, the trial court ran afoul of the statutory mandate of the social host statute, N.J.S.A. 2A:15-5.7.

As a general matter, "the issue of proximate cause should be determined by the factfinder." Fleuhr v. City of Cape May, 159 N.J. 532, 543 (1999) (citation omitted). However, the issue of proximate cause "may be removed from the factfinder in the highly extraordinary case in which reasonable minds could not differ on whether that issue has been established." Ibid. (citation omitted).

The Comparative Negligent Act requires the factfinder to "compare the fault of all parties whose negligence was a proximate cause of the plaintiff's injuries." LaBracio Family P'ship v. 1239 Roosevelt Ave., Inc., 340 N.J. Super. 155, 164 (App. Div. 2001) (citation omitted). Our Supreme Court has noted that "[a] negligent act is not necessarily a substantial factor or proximate cause of an accident simply because it contributed to the occurrence in the sense that absent such an

act the accident would not have transpired." Brown v. United States Stove Co., 98 N.J. 155, 172 (1984) (citation omitted). In light of the expert testimony of Dr. Scott, and the fact that defendant failed to present any contrary expert testimony, the trial court determined that proximate cause was not an issue, concluding that plaintiff "had nothing to do with the accident. It [was not] as if he were wobbling . . . and somebody just pushed him and made him fall;" instead, "he was either kicked or jumped on."

The record indicates that plaintiff was in some sort of an awkward position when the incident occurred. According to defendant, plaintiff was bent over playing Wii bowling; according to plaintiff, he was in a semi-kneeling position, going to shake hands with defendant's mother. Even accepting defendant's claim that plaintiff was intoxicated, it is clear that plaintiff's alleged intoxication was not a proximate cause of the accident.

Our cases have held that "carelessness is not to be necessarily inferred merely from proof of the existence of a state of intoxication. A drunken man may be careful." Petrone v. Margolis, 20 N.J. Super. 180, 188 (App. Div. 1952) (citation and internal quotation marks omitted); see also Gustavson v. Gaynor, 206 N.J. Super. 540, 545 (App. Div. 1985) (noting that

the mere fact that an individual has consumed some alcohol is by itself insufficient to warrant an inference that the individual was intoxicated and that the intoxication therefore rendered the individual negligent), certif. denied, 103 N.J. 476 (1986).

Defendant's argument that the judge's rulings violated the social host provisions[1] of the Comparative Negligence Act clearly lacks substantive merit. The social host statute has no application here as plaintiff did not assert that defendant negligently provided him with alcoholic beverages.

Moreover, although not specifically provided with a comparative negligence charge, the jury had the opportunity to consider plaintiff's alleged level of intoxication in its decision. The judge provided the jury with a "reasonableness under the circumstances" charge:

> Inherent in this duty [of defendant] is an obligation to take reasonable actions to prevent guests who are visibly intoxicated and to whom the social host has also provided some alcohol from operating a vehicle when so intoxicated. In this case, the [d]efendant, Michelle Grunberg, alleges that the [plaintiff], Richard Lukenda, was visibly intoxicated at the home of her parents and that the [p]laintiff was served at least one alcoholic beverage by her.
>
> . . . .

[1] N.J.S.A. 2A:15-5.2(b) and -5.5.

> Visibly intoxicated means a state of intoxication accompanied by a perceptible act or series of acts which presents clear signs of intoxication. So, in this case, if you find that Richard Lukenda was visibly intoxicated at the home of Ms. Grunberg on December 25th, 2010, and you also find that the [d]efendant reasonably believed . . . that he intended to operate his motor vehicle, and that the actions of Ms. Grunberg were intended to prevent the operation of the motor vehicle, and that those actions were reasonable in nature, then you must find that the [d]efendant was not negligent.
>
> On the other hand, to put the shoe on the other foot, if you find that Richard Lukenda was not visibly intoxicated, or that the [d]efendant, Ms. Grunberg, did not reasonably believe he intended to operate a motor vehicle, or that Ms. Grunberg's actions were not intended to prevent him from operating a motor vehicle, or that her actions were not reasonable, then you must find that the [d]efendant was negligent.

Accordingly, the jury had a full opportunity to consider plaintiff's level of intoxication, and assess the reasonableness of defendant's actions under the circumstances.

Defendant relies on Tiger v. American Legion Post, 125 N.J. Super. 361 (App Div. 1973), as supporting her position that plaintiff's comparative negligence should have been submitted to the jury. In Tiger, a tavern patron was injured in a vehicular hit-and-run after she was negligently served while intoxicated. Id. at 364-65. The injured plaintiff sued the bar, and the

plaintiff's motion to strike the defense of contributory negligence was granted. Id. at 365. This court ultimately determined that the trial court committed reversible error by striking the defense. Id. at 368.

Defendant's reliance on Tiger is misplaced. In Tiger, the plaintiff was "admittedly an alcoholic who tended to black out." Id. at 366. We therefore concluded that

> a jury might find from the evidence that by voluntarily over-indulging in intoxicating liquor, with knowledge of the effect it would have upon her, plaintiff allowed her faculties to become impaired to the extent that she was unaware of what was happening and thereby exposed herself to danger and injuries which a sober person of ordinary prudence and foresight would have avoided. A jury might also find that plaintiff's condition was such that she was unable to detect or comprehend the approach of the vehicle which struck her, either by hearing it or observing the beam of its headlights, or to step out of the way, if she was conscious of impending danger.
>
> [Id. at 368-69 (citations omitted).]

In this case, plaintiff's level of intoxication played no role in the mechanism of injury. Instead, plaintiff's injury resulted from direct contact between defendant and plaintiff. The record does not indicate that plaintiff's alleged intoxication was a proximate cause of plaintiff's injury.

Affirmed.