

# In the Superior Court of Pennsylvania

No. 2560 EDA 2016

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LENORA PARTLOW, Administratrix of the  
Estate of CALVIN WILSON, JR.,  
Plaintiff/Appellee

v.

KAHLILE GRAY,  
Defendant/Appellant

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BRIEF FOR PLAINTIFF/APPELLEE

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On Appeal from the Judgment of the Court of Common Pleas of  
Philadelphia County, Pennsylvania Entered July 12, 2016  
at June Term, 2013, No. 678

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## I. COUNTER-STATEMENT OF THE STANDARDS OF REVIEW

This Court has held that it will overturn a trial court's denial of a motion for a new trial only where the trial court grossly abused its discretion or committed an error of law that controlled the outcome of the case. *See Gianni v. William G. Phillips, Inc.*, 933 A.2d 114, 116 (Pa. Super. Ct. 2007). While "viewing the evidence in the light most favorable to the verdict winner" — here the plaintiff — this Court turns its focus to "whether a new trial would produce a different verdict." *Gunn v. Grossman*, 748 A.2d 1235, 1239 (Pa. Super. Ct. 2000). "Consequently, if there is any support in the record for the trial court's decision to deny a new trial, that decision must be affirmed." *Id.*

A trial court possesses very broad discretion concerning the admission or exclusion of evidence. As this Court has explained:

The admission or exclusion of evidence is within the sound discretion of the trial court, and in reviewing a challenge to the admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law. Thus, our standard of review is very narrow . . . . To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party.

*McManamon v. Washko*, 906 A.2d 1259, 1268 (Pa. Super. Ct. 2006) (internal citations omitted).

## **II. COUNTER-STATEMENT OF THE QUESTIONS PRESENTED**

1. Whether defendant Kahlile Gray's request for a new trial based on the trial court's supposedly improper admission of evidence of his alcohol use is moot and inconsequential to this appeal, given that: (a) Gray formally conceded his negligence and the issue of causation in the accident that killed Calvin Wilson; (b) evidence of Gray's alcohol use had no bearing on the jury's separate and independent finding that Wilson bore no responsibility whatsoever for the accident; and (c) evidence of Gray's alcohol use had no effect, nor does Gray contend otherwise, on the jury's compensatory damages award, an award that Gray's appeal fails to challenge in any respect?

2. In the unlikely event that Gray's challenge to the trial court's admission of evidence of his alcohol usage is not rejected as moot and inconsequential to this appeal, did the trial court properly admit evidence of Gray's intoxication at the time of the collision, consisting of blood alcohol content measurement of 0.073 two hours following the accident

and related testimony from plaintiff's toxicology expert, as independently confirmed by a highly trained and experienced police officer's observations of Gray at the scene as displaying signs of alcohol or drug intoxication? [Corresponding to Questions 1 and 2 listed in the Brief for Appellant.]

3. Did the trial court abuse its considerable discretion in excluding, as irrelevant to the collision, video evidence (and expert testimony predicated thereupon) showing Wilson operating his motorcycle long before, in both time and distance, he arrived near the scene of the accident, when such video evidence and expert testimony had absolutely no relevance to the question the jury had to resolve, which was whether Wilson himself was negligent to any degree in causing the accident that resulted in his death when he proceeded on a green light through an intersection, only to be hit by a Dodge Durango operated by Gray making a left turn from the opposite direction lacking the right-of-way for such a left turn in the presence of oncoming traffic that included Wilson's motorcycle? [Corresponding to Questions 3 and 4 listed in the Brief for Appellant.]

### **III. COUNTER-STATEMENT OF THE CASE**

#### **A. Relevant Factual History**

On the evening of Friday, April 4, 2013, apparently after having consumed numerous alcoholic beverages, defendant-appellant Kahlile Gray decided to get behind the wheel of his Dodge Durango SUV and go for a drive. R.2679a. Gray was traveling north on Belmont Avenue, a four-lane (two in each direction) roadway, with an additional left turn lane in the center at intersections. Gray decided to make a left turn onto Parkside Avenue. R.2577a.

Heading from the opposite direction was Calvin Wilson, riding his Suzuki motorcycle. R.2577a. Wilson had decided to go on an afternoon motorcycle ride with a friend who was on his own motorcycle. R.2721a. Sadly, fate brought Wilson to Belmont Avenue, approaching the Parkside Avenue intersection from the south, at the same time that Gray arrived at that same intersection from the opposite direction on Belmont in his Dodge Durango SUV. R.2577a.

The blood draw that the Philadelphia Police instructed defendant Gray to undergo confirmed that he had a blood alcohol content of 0.073 two hours following the accident, based on having consumed numerous



alcoholic beverages before the accident. R.2679a. The investigating police officer, who had substantial experience and particularized training in detecting alcohol and drug use, observed that Gray had bloodshot, watery eyes and was behaving lethargically following the accident, two specific signs and symptoms that indicated suspected alcohol use to the investigating officer. R.2484a, 2486a-88a.

Although Gray in his Brief for Appellant attempts to explain this evidence away, offering its own “alternative facts” to provide a potentially innocuous explanation for Gray’s bloodshot eyes and lethargic behavior (Brief for Appellant at 27), the investigating police officer at the time unquestionably viewed Gray’s physical manifestations for what they in fact were, as demonstrating intoxication. R.2484a, 2486a-88a. And the investigating officer’s intuition proved correct, as the resulting blood draw unambiguously confirmed. R.2679a. An exploding airbag does not cause alcohol to enter a driver’s bloodstream, and thus the Brief for Appellant is incapable of offering any “alternative facts” to explain away the significant amount of alcohol in defendant Gray’s system at and in the hours immediately after the collision that killed Calvin Wilson.

Video evidence displayed for the jury at trial, recorded on a GoPro camera attached to Wilson's motorcycle, established that traffic moving in both directions on Belmont Avenue had a green light. R.2577a, 2721a. This meant that cars seeking to turn left from Belmont onto Parkside had to yield the right-of-way to vehicles traveling from the opposite direction straight on Belmont through the intersection. R.2509a, 2516a. Calvin Wilson was properly in the left lane of the two lanes heading south through the intersection when Gray, turning left onto Parkside, failed to yield the right-of-way to through traffic from the opposite direction and instead proceeded to turn left directly into the path of Gray's motorcycle, striking Wilson's motorcycle and causing Wilson and his cycle to be thrown to the ground at a high rate of speed. R.2668a, 2722a. Despite wearing a motorcycle helmet and other protective clothing, the force of the collision and the resulting injuries and trauma ended Wilson's life either at the scene of the accident or shortly thereafter while being transported by ambulance to a nearby hospital. R.2577a, 2630a, 2721a, 2783a.

The video evidence established that Wilson and his riding companion on a separate motorcycle turned onto Belmont Avenue from Montgomery Drive in Fairmount Park. R.2588a. The trial court allowed the

jury at trial to see the video evidence beginning when Wilson turned onto Belmont, which was 0.6 miles, and many blocks, away from the location of the accident at the intersection of Belmont and Parkside. R.2588a, 2633a.

The jury saw the manner in which Wilson was driving his motorcycle, including the fact that he had executed three wheelies while driving that 0.6 mile stretch between Montgomery Drive and the accident location at the intersection of Belmont and Parkside. R.2633a, 2668a-69a. The jury also saw that Wilson had a green light when he entered that intersection and that he was proceeding through the intersection within the speed limit in full control of his motorcycle when, without warning, Gray decided to execute a left-hand turn from the opposite direction on Belmont despite the existence of through traffic from the other direction that had the right-of-way given the green light in both directions on Belmont Avenue. R.2721a.

On the evening of April 4, 2013, at the time of his untimely death, Calvin Wilson was 27 years old. R.2577a, 2635a. He had two young sons, and he was engaged to be married to their mother, his high school sweetheart and fiancé. R.2635a. Wilson worked full-time as a bus driver for SEPTA when his life was tragically cut short. R.2635a.

After hearing all the evidence, the jury returned a verdict that defendant Kahlile Gray was negligent and that Gray's negligence was the cause of Calvin Wilson's death. R.2890a. These first two answers were already pre-marked on the jury verdict slip on agreement of the parties as the result of Gray's concession that he was negligent and that his negligence caused the accident. R.2884a. The jury's first actual finding on its verdict slip was that plaintiff's decedent, Calvin Wilson, was not comparatively negligent in causing the accident. R.2890a. Thus, the jury found as a fact that defendant Gray was 100% responsible, and that plaintiff's decedent Wilson was 0% responsible, for causing the accident that resulted in Wilson's death. R.2890a.

As to damages, the jury awarded zero for conscious pain and suffering. R.2890a. The jury awarded \$1,850,000 for net loss earning capacity, and the jury awarded \$1,250,000 to Wilson's children for loss of support, companionship, affection, and the like. R.2890a. The jury's total award of damages in plaintiff's favor was \$3.1 million. Defendant Gray's appeal does not challenge the jury's award of damages as excessive or in any other respect.

## **B. Relevant Procedural History**

This case proceeded to trial before the Honorable Frederica Massiah-Jackson on February 8, 2016 in the Court of Common Pleas of Philadelphia County. The jury returned its verdict in favor of plaintiff, and against defendant, on February 11, 2016. R.2890a.

Gray's appeal seeks a new trial on essentially two grounds. The first ground concerns the trial court's admission of evidence that defendant Gray was under the influence of alcohol at the time his negligence caused the collision that killed Calvin Wilson. Judge Massiah-Jackson allowed that evidence of alcohol intoxication for two purposes. First, notwithstanding that Gray opted to stipulate at the outset of trial that Gray's negligence had caused the accident resulting in Wilson's death, Gray continued to defend against liability by asking the jury to hold that Wilson had been comparatively negligent. R.2634a.

Thus, evidence of Gray's intoxication was relevant to the extent that the jury might find that Wilson was also comparatively negligent to allow the jury to assess their respective shares of fault. Trial court's Rule 1925(a) opinion at 4. And second, plaintiff had also pursued a claim for punitive damages against Gray, as to which the trial court did not enter nonsuit in

Gray's favor until after the jury returned its verdict on the issues of comparative negligence and compensatory damages. R.2891a.

As explained below, unless a new trial on the issue of Wilson's supposed comparative negligence were necessary due to the trial court's decision to exclude earlier irrelevant portions of the GoPro video, the trial court's decision to allow evidence of Gray's alcohol intoxication — even if constituting an abuse of discretion, which it does not — cannot be a basis for granting a new trial here. Thus, for the reasons explained below, this Court should hold that Gray's challenge to the admission of the alcohol evidence is moot and inconsequential to this appeal. As an alternate basis for affirmance, plaintiff's argument below also establishes that the trial court's admission of this alcohol consumption evidence was entirely proper, and therefore not an abuse of discretion, under this Court's relevant precedents. Moreover, the trial court's holding that Gray waived his objection to the admission of this evidence by not raising any objection at trial also provides a complete, alternate basis for affirmance. *See* Pa. R. App. P. 1925(a) opinion at 3–4.

The second and final focus of Gray's appeal argues that Judge Massiah-Jackson abused her discretion in excluding from evidence video

showing Wilson driving his motorcycle before he turned onto Belmont Avenue, some 0.6 miles before the collision. According to Gray, video evidence of how Wilson was driving before he reached Belmont Avenue was relevant to the jury's determination of whether Wilson was comparatively negligent in the accident, even though that video shows Wilson far removed in distance and time from the point of impact, and even though defendant Gray had no knowledge or ability to know at the time of the collision the manner in which Wilson had been driving elsewhere earlier that day.

Gray raised both of these issues in his post-trial motion for a new trial, which the trial court denied. R.1856a-57a. The reasons supporting Judge Massiah-Jackson's denial of Gray's post-trial motion raising these issues appears in the trial court's Rule 1925(a) opinion attached to the opening Brief for Appellant.

#### **IV. SUMMARY OF THE ARGUMENT**

Defendant-appellant Kahlile Gray has appealed seeking a new trial in this case, in which Gray conceded at trial that he was negligent and that his negligence caused the death of plaintiff's decedent, Calvin Wilson.

R.2884a. Gray's appeal challenges two evidentiary rulings of the trial court, which this Court under longstanding Pennsylvania law must review under the highly deferential abuse of discretion standard. As explained herein, the trial court did not abuse its considerable discretion on either of the two challenged evidentiary rulings, and thus the trial court's judgment and denial of Gray's motion for post-trial relief should be affirmed.

Gray's first challenge concerns the trial court's admission of evidence establishing that he was driving under the influence of alcohol at the time of the collision that caused Calvin Wilson's untimely death. As demonstrated below, the trial court's admission of this evidence was entirely proper under governing Pennsylvania precedents. Moreover, because Gray conceded the issues of his own negligence and causation, and because the jury additionally found — focusing solely on Wilson's own conduct — that Wilson was not comparatively negligent, Gray's challenge to the admission of this intoxication evidence should be rejected as moot and inconsequential to the jury's verdict. Furthermore, as the trial court recognized in its Rule 1925(a) opinion, Gray's challenge to the admission of this evidence has also been waived.



Gray's second and final evidentiary challenge concerns the trial court's entirely sensible decision to limit the video evidence of how plaintiff's decedent, Calvin Wilson, was operating his motorcycle before the collision to the 0.6 miles of footage showing Wilson's driving across numerous city blocks on Belmont Avenue before the collision occurred when Gray, lacking the right-of-way, suddenly turned left heading from the opposite direction on Belmont, onto Parkside Avenue. The portion of the video that the jury was permitted to see is the only portion of the video that captured whether Wilson was operating his motorcycle negligently as he approached the scene of the collision and as he entered into the very intersection where the collision tragically occurred. As the trial court properly recognized, video evidence of how Wilson was driving his motorcycle further removed in time and distance from the location of the collision was both irrelevant to the jury's resolution of this case and unnecessarily cumulative of evidence already before the jury. Thus, the trial court did not abuse its considerable discretion in excluding this evidence, given that the jury observed the video evidence that was actually relevant to determining whether or not Wilson was comparatively negligent in causing the collision that resulted in his death.

Any appeal seeking a new trial following a jury's verdict based on challenges to the trial court's admission or exclusion of evidence faces a steep uphill battle, and this particular appeal is no exception. For the reasons explained herein, to the extent that the evidentiary rulings of the trial court challenged on appeal are even properly before this Court for adjudication on the merits, it is plain that the trial court did not abuse its considerable discretion. The trial court's judgment and denial of defendant's motion for post-trial relief should therefore be affirmed.

## V. ARGUMENT

### A. Gray's Challenge To The Trial Court's Admission Of Intoxication Evidence Is Moot, Because That Evidence Pertained Solely To Allocating Responsibility If The Jury Found Both Plaintiff's Decedent And Defendant Comparatively Negligent

In *Stuckley v. Zoning Hearing Bd. of Newtown Twp.*, 79 A.3d 510, 516 (Pa. 2013), the Supreme Court of Pennsylvania explained that "Where the issue[] in a case [is] moot, any opinion issued would be merely advisory and, therefore, inappropriate." More recently, in *Printed Image of York, Inc. v. Mifflin Press, Ltd.*, 133 A.3d 55, 59 (Pa. Super. Ct. 2016) (citation and internal quotation marks omitted), this Court explained that "[a]n issue

before a court is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.”

In this case, defendant Kahlile Gray’s challenge to the trial court’s admission of evidence pertaining to his alcohol intoxication is moot and inconsequential to the outcome of this case, and therefore this Court has no reason to decide the first two related issues that Gray attempts to raise on appeal.

At the start of trial, counsel for Gray conceded in open court that Gray was negligent in causing the accident and that Gray’s negligence was a cause of Wilson’s death. R.2633a. When the parties were working together with Judge Massiah-Jackson to craft the jury verdict slip, counsel for the opposing parties agreed on the record that, as a result of Gray’s concession of liability, the answers to the first two questions on the jury verdict slip — (1) was defendant Gray negligent and (2) was Gray’s negligence a cause of Wilson’s death — were pre-marked “yes” before the verdict slip was given to the jury. R.2884a.

Thus, the jury in this case had no alternative, regardless of whether it heard or did not hear evidence of Gray’s alcohol intoxication at the time of

the collision, to find anything other than that Gray was negligent and that Gray's negligence was a cause of Wilson's death. R.2884a. Rather, the trial court's admission of the alcohol evidence served only two purposes: (1) the jury could consider it, in the event that the jury independently found that Wilson was comparatively negligent, in assessing the opposing parties' respective shares of responsibility; and (2) if plaintiff's claim for punitive damages was permitted to reach the jury, which at the close of the compensatory damages phase was not allowed to happen, then the jury could weigh the evidence in deciding whether to impose punitive damages and in what amount.

The issue of Gray's alcohol use only went to the question of his liability, which Gray's counsel conceded at the outset of trial and which the verdict slip established with the consent of both parties. R.2633a, 2884a. Gray's alcohol use played no role in the jury's separate and independent finding that Wilson was not himself independently negligent, because the question of whether Wilson was comparatively negligent pertained only to Wilson's own conduct in the moments before the collision. *See Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1098 (Pa. 2012) (recognizing that for purposes of comparative negligence, "a plaintiff's conduct is scrutinized"); *Krentz v.*

*Consolidated Rail Corp.*, 910 A.2d 20, 28 (Pa. 2006) (“comparative negligence is a method for determining how much responsibility should be allocated to the defendant in light of the plaintiff’s conduct”); *Von der Heide v. Commw. of Pa., Dep’t of Transp.*, 718 A.2d 286, 288 (Pa. 1998) (“Comparative negligence denotes the negligent conduct of the plaintiff which is concurrent with the defendant’s negligent conduct.”).

Given that, under Pennsylvania law, the comparative negligence inquiry focuses solely on the plaintiff’s own conduct, it is not surprising that nowhere does Gray’s appellate brief even attempt to suggest that the admission of evidence of Gray’s alcohol use influenced, or conceivably could have influenced, the jury’s separate and independent finding that Wilson was not negligent. Similarly, Gray’s alcohol use played no role in the jury’s determination of plaintiff’s compensatory damages, which resulted in an award that Gray’s appeal does not even attempt to challenge as excessive or in any other respect.

To summarize, Gray’s challenge to the trial court’s admission of evidence of his alcohol intoxication — which challenge lacks any merit for the reasons explained below — should be dismissed as moot. The jury had no alternative, given the concession of Gray’s own counsel and the agreed–

upon pre-marked verdict slip, but to find Gray negligent and that Gray's negligence caused Wilson's death. The issue of Gray's alcohol intoxication would have been relevant in assessing relative liability only if the jury also separately and independently found Wilson to have been comparatively negligent. But the jury did not find Wilson comparatively negligent, an inquiry that depended solely on Wilson's own conduct leading up to the collision. And Gray does not contend, nor is it even conceivably possible, that the alcohol intoxication evidence influenced the jury's determination of plaintiff's compensatory damages, an award that Gray's appeal does not challenge in any respect whatsoever.

For all of these reasons, the first two issues that Gray raises on appeal — pertaining solely to the trial court's admission of alcohol intoxication evidence — are moot and inconsequential and thus should be rejected as affording no basis whatsoever for a new trial.

**B. Regardless Of Mootness, The Trial Court Did Not Abuse Its Considerable Discretion In Allowing The Jury To Hear And Consider Evidence Of Defendant Gray's Alcohol Intoxication**

As this Court has explained, "the decision whether to admit evidence of intoxication in a civil trial is subject to an abuse of discretion standard of

review.” *Locke v. Claypool*, 627 A.2d 801, 803 (Pa. Super. Ct. 1993). For the reasons that follow, the trial court did not abuse its discretion in this case in admitting such evidence, assuming Gray’s challenge is not moot and immaterial to the outcome of his appeal.<sup>1</sup>

Notwithstanding defendant Gray’s stipulation as to his own negligence, Gray’s defense that plaintiff’s decedent, Calvin Wilson, was comparatively negligent required plaintiff to prove that Gray’s negligence was more than a 50 percent factual cause of the accident that killed Wilson in order to recover. R.2884a.

Among the evidence that plaintiff presented to the jury to obtain a plaintiff’s verdict was the testimony of officer Gary Harrison of the Philadelphia Police Department’s Accident Investigation Unit, who investigated the accident scene and its cause. R.2459a-563a.

Officer Harrison testified that he had completed specific training concerning individuals who are suspected to be driving under the influence of alcohol and drugs and that his division of the Philadelphia

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<sup>1</sup> In this section of the Brief for Plaintiff-Appellee, plaintiff addresses Questions 1 and 2, and argument sections I and II, of the Brief for Appellant, because those issues and argument sections in fact are focused on a single issue pertaining to the trial court’s admission of evidence of defendant’s intoxication at the time of the collision.

Police Department was responsible for “the testing of all DUIs within the city limits.” R.2468a. Officer Harrison testified that when investigating any car crash, including this one, if a person appears to be intoxicated on alcohol, it is normal procedure to send that person for a blood test to determine whether he or she was impaired when the crash occurred. R.2470a.

Officer Harrison testified that, at the scene of the collision, he observed that defendant Gray appeared lethargic and had bloodshot, watery eyes. R.2484a. Based on those in-person observations, officer Harrison determined that defendant Gray appeared to be intoxicated on alcohol. R.2486a. As a result, officer Harrison directed defendant Gray to submit to a blood test to determine his blood alcohol concentration. R.2486a.

Defendant Gray was tested for blood alcohol concentration two hours after the collision, during which time defendant Gray was not consuming any additional alcohol. R.2487a. The results of defendant Gray’s blood test indicated that his blood alcohol level was .074% two hours after the collision. R.2488a. When officer Harrison later interviewed defendant Gray regarding the collision, Gray lied and denied using alcohol on the day of



the collision, notwithstanding the objective results of his blood work.  
R.2512a-13a.

Although Gray in his Brief for Appellant attempts to explain this evidence away, offering its own “alternative facts” to provide a potentially innocuous explanation for Gray’s bloodshot eyes and lethargic behavior (Brief for Appellant at 27), the investigating police officer at the time unquestionably viewed Gray’s physical manifestations for what they in fact were, as demonstrating intoxication. And the investigating officer’s intuition proved correct, as the resulting blood draw unambiguously confirmed. An exploding airbag does not cause alcohol to enter a driver’s bloodstream, and thus the Brief for Appellant is incapable of offering any “alternative facts” to explain away the significant amount of alcohol in defendant Gray’s system at and in the hours immediately after the collision that killed Calvin Wilson.

Indeed, it is difficult to conceive of any corroborative evidence establishing a driver’s intoxication that is incapable of being explained away based on the imagination of a clever defense counsel. Take a case in which the defendant smells of alcohol. Aside from the most likely explanation that the defendant had consumed alcoholic beverages, clever

defense counsel could attempt to explain away the scent of alcohol on the defendant by asking the testifying witness whether someone's having spilled alcohol on the defendant's clothing might not present an alternative explanation for why the defendant smelled that way. The relevant issue under Pennsylvania law has never been whether defense counsel might be able to offer an inventive alternative explanation for why a witness suspected intoxication. Rather, all the Pennsylvania law requires is that a witness has perceived behavior consistent with the driver's intoxication. As Judge Massiah-Jackson's Rule 1925(a) opinion confirms at pages 5-7, that very sort of confirmatory evidence unquestionably exists in this case.

Given the evidence that Defendant Gray was intoxicated on alcohol at the time of the collision, plaintiff engaged toxicology expert Dr. Gary Lage to testify at trial as to the ways in which defendant Gray's impairment contributed to or caused the collision. Lage confirmed on direct testimony that defendant Gray's blood alcohol level was .074% two hours after the collision, demonstrating scientifically that he was intoxicated at the time of impact. R.2747a. Lage testified that defendant Gray's blood alcohol level at the time of the collision would have been between .07% and .104%, representing that Gray would have had to have consumed approximately

five to six alcoholic beverages within a few hours before the collision, which would have adversely impacted his ability to drive safely. R.2747a-48a. Lage testified within a reasonable degree of scientific certainty that defendant Gray's intoxication on alcohol at the time of the collision caused him to suffer from a loss of inhibition and experience sedation, loss of judgment, impaired vision, impaired depth perception, impaired reaction times, and impaired coordination. R.2747a-48a. On cross-examination, Lage testified unequivocally that defendant Gray's use of alcohol contributed to causing the collision. R.2749a.

At trial, there was no factual dispute regarding whether defendant Gray used alcohol on the day of the collision, whether he was intoxicated and impaired on alcohol at the time of the collision, or whether defendant Gray's intoxication on alcohol contributed to or caused the collision. Specifically, Gray chose not to testify at trial, therefore forfeiting his opportunity to refute the specific, concrete evidence offered by plaintiff as to his intoxication on alcohol which contributed to or caused the collision. In addition, defendant Gray offered no witnesses to testify as to any alternative theory explaining defendant Gray's elevated blood alcohol content following the collision, nor did Gray offer an expert toxicologist to

counter the professional opinions regarding his impairment offered by Dr. Lage.

In *Locke*, 627 A.2d at 803 (internal quotations omitted), this Court explained that “[t]he well-settled law of this Commonwealth is that where recklessness or carelessness is at issue, proof of intoxication is at issue, proof of intoxication is relevant, but the mere fact of consuming alcohol is inadmissible as unfairly prejudicial, unless it reasonably establishes intoxication.” As explained above, in this case, the facts reasonably establish intoxication. To establish intoxication, corroborative evidence may be used. *See Braun v. Target Corp.*, 983 A.2d 752, 760 (Pa. Super. Ct. 2009) (“Corroborative evidence to establish intoxication can be in the form of expert testimony . . . . Corroborative evidence can also be in the form of lay testimony as to the injured party’s conduct just prior to or immediately after the incident . . . .”) (citation omitted).

There is no precise “type or amount of evidence necessary to establish the requisite degree of intoxication . . . .” *Id.* However, intoxication has been found admissible when a responding officer detected alcohol and a later blood test confirmed it. *See id.* at 761. Blood alcohol tests have also been allowed to show intoxication. *Id.* When “the totality of the

evidence pointed to more than a ‘mere hint of intoxication,’ [it] justified the submission to the jury of the evidence of husband’s intoxication and blood alcohol test results.” *Surowiec v. GMC*, 672 A.2d 333, 336 (Pa. Super. Ct. 1996).

In this case, the expert testimony from plaintiff’s toxicology expert witness, Dr. Lage, established that defendant Gray was unfit to drive at the time of the accident. And the testimony of police officer Harrison that defendant Gray had bloodshot eyes and appeared lethargic immediately after the collision, suggesting to Harrison that he should send Gray for an alcohol blood analysis, which proved positive, constituted evidence establishing alcohol intoxication based on the defendant’s conduct immediately following the accident.

As Judge Massiah-Jackson cogently explained in her Rule 1925(a) opinion, “the evidence of Defendant-Gray’s Blood Alcohol Content was admissible because additional testimony from a police officer and from Plaintiff’s expert witness provided [the necessary] corroborative evidence of ‘unfitness’ to drive.” Rule 1925(a) opinion at 5.

Lastly, as Judge Massiah-Jackson’s Rule 1925(a) opinion notes at page 4, to the extent that Gray is arguing on appeal that his concession of

negligence should have resulted in the trial court's exclusion of the evidence of his intoxication at the time of the collision, Gray's challenge is waived on appeal, because he failed to timely raise it in the trial court. *See Dibish v. Ameriprise Financial, Inc.*, 134 A.3d 1079, 1096-97 (Pa. Super. Ct. 2016) ("On appeal the Superior Court will not consider a claim which was not called to the trial court's attention at a time when any error committed could have been corrected.") (internal quotations omitted); Pa. R. App. P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

For these reasons, in the event that this Court does not conclude that Gray's challenge to the trial court's admission of blood alcohol evidence is either waived or moot and inconsequential given the stipulation that Gray's negligence caused Wilson's death and the jury's separate and independent finding that Wilson's own conduct did not make Wilson comparatively negligent, this Court should hold that the trial court did not abuse its considerable discretion in allowing admission of the blood alcohol evidence under the circumstances of this case.

**C. The Trial Court Did Not Abuse Its Discretion In Ruling That The Jury Could Only See The Final 17 Minutes Of the GoPro Video Showing Calvin Wilson Traveling The Final 0.6 Miles On Belmont Avenue Heading To The Point Of The Collision**

Police and rescue personnel recovered the GoPro camera that had been attached to Calvin Wilson's motorcycle at the scene of the accident.

R.2495a. The camera contained footage of the preceding 40 minutes.<sup>2</sup>

R.2582a.

Plaintiff's counsel argued to the trial court that the video segment that the jury would be allowed to see should begin just as Wilson's motorcycle reached the intersection of Belmont and Parkview where the collision occurred. R.2582a. Defendant's counsel argued to the trial court, by contrast, that the entire 40 minute GoPro video should be displayed to the jury, because the video showed Wilson operating his motorcycle in an

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<sup>2</sup> In this section of the Brief for Plaintiff-Appellee, plaintiff addresses Questions 3 and 4, and argument sections III and IV, of the Brief for Appellant, because those issues and argument sections in fact are focused on a single contention pertaining to the trial court's exclusion of evidence of, and defendant's proposed expert testimony relating to, plaintiff's operation of his motorcycle before turning onto Belmont Avenue some 0.6 miles, and many city blocks, before the accident happened. The trial court did allow the jury to see all available video evidence beginning at the point when plaintiff's motorcycle was stopped at a traffic light on Montgomery Drive immediately before plaintiff turned onto Belmont Avenue, where 0.6 miles further down the road, the collision that claimed plaintiff's life occurred at the intersection of Belmont and Parkside.

unsafe manner earlier in the day, at a considerable time and distance away from the location of the collision. R.2582a-83a.

Rejecting both parties' approaches, Judge Massiah-Jackson ruled instead that the final 17 minutes of the GoPro video could be shown to the jury, beginning where Wilson's motorcycle turned onto Belmont Avenue from Montgomery Drive and extending through and beyond the collision that tragically claimed Calvin Wilson's life. Trial court's Rule 1925(a) opinion at 8. The jury thus saw Wilson operating his vehicle for 0.6 miles down a major city street, for many city blocks, before reaching the intersection where the collision occurred. *Id.* The video segment displayed for the jury showed Wilson passing other vehicles on Belmont Avenue. *Id.* The video also showed Wilson executing three wheelies on Belmont before reaching the intersection where the collision that claimed his life occurred. *Id.* Additionally, the video and expert testimony confirmed that Wilson was traveling at the speed limit when he entered into the intersection where the accident occurred, and that Wilson had the right-of-way because a green light was displayed in both directions on Belmont Avenue. R.2721a, 2735a-36a. During trial, defense counsel conceded that the traffic light was green for both directions on Belmont Avenue and that, as a result,



Calvin Wilson had the right-of-way when Gray improperly and dangerously decided to execute a left-hand turn from the opposite direction notwithstanding the presence of oncoming through traffic. R.2721a.

Judge Massiah-Jackson, as the trial judge presiding over the trial of this case, had her pulse on the relevant facts and a firm grasp of the evidence such that she was uniquely positioned to determine where to draw the line between evidence relevant to the jury's determination and evidence irrelevant to the jury's determination. A trial judge's call in this regard is entitled to considerable deference under the applicable abuse of discretion standard. *See McManamon*, 906 A.2d at 1268.

In *Finnerty v. Darby*, 138 A.2d 117 (Pa. 1958), the Supreme Court of Pennsylvania explained, "[t]his Court has frequently ruled that testimony as to the speed or operation of an automobile *at a point near and a short time before the collision* is admissible and relevant to the issue of the speed of the vehicle at the time of the accident." *Id.* at 124 (emphasis added). In this case, as already explained above, Judge Massiah-Jackson allowed the jury to see the video of Wilson's operation of his motorcycle "at a point near and a short time before the collision."

In *Finnerty*, Pennsylvania's highest court continued, "[w]hether the evidence of speed is too remote in time and distance depends upon the facts in each case." *Id.* In this case, Judge Massiah-Jackson exercised her considerable discretion to conclude that evidence pertaining to Wilson's operation of his motorcycle before turning onto Belmont Avenue, some 0.6 miles, and many city blocks, away from the location of the collision, was simply too remote in time and distance to be relevant, especially because the jury was able to see the very video of Wilson operating his motorcycle into the intersection where the collision occurred.

In earlier decisions, the question that often presented itself was whether evidence of how a party was driving at an earlier time could be used to allow a jury to draw conclusions about how that party was driving at a later point in time, as to which no first-hand evidence existed. Thanks to the advent of modern technology, in this case the jury had first-hand video evidence of how Calvin Wilson was driving in the moments leading up to the collision that claimed his life. Thus, there was no need to rely on evidence of how he was driving at an earlier point in time to infer how he must have been driving in the moments immediately before the collision, because that most relevant evidence was available and shown to the jury.

Judge Massiah-Jackson fully appreciated this point in ruling that the earlier video evidence, and defendant's proposed expert testimony based on that earlier video evidence, was simply irrelevant to the jury's resolution of this dispute.

As this Court recognized in *Turney Media Fuel, Inc. v. Toll Bros., Inc.*, 725 A.2d 836, 840 (Pa. Super. Ct. 1999), a trial court does not abuse its discretion when it properly excludes proposed expert testimony as irrelevant. Thus, the fourth and final issue that Gray has raised in his Brief for Appellant does not merit relief here.

In her Rule 1925(a) opinion, Judge Massiah-Jackson also justified her exclusion of the video evidence more remote from the accident scene in time and distance because that evidence would merely have been unnecessarily cumulative of the evidence that the jury heard the defense present at trial. *See* Rule 1925(a) opinion at 8-10. For this reason as well, the trial court did not abuse its considerable discretion in excluding this evidence. *See Flenke v. Huntington*, 111 A.3d 1197, 1202 (Pa. Super. Ct. 2015) (recognizing that cumulative evidence is properly excluded by a trial court under Pa. R. Evid. 403).

In his Brief for Appellant, Gray fails to demonstrate how the jury's consideration of video showing the manner in which Wilson was operating his motorcycle before he reached Belmont Avenue was relevant in any conceivable way to whether Wilson was negligent in causing the collision that occurred in the intersection of Belmont and Parkside.

It would have been equally irrelevant had plaintiff sought to introduce video footage of the lawful and careful method that Wilson always operated his SEPTA bus along its daily route to establish that Wilson was driving in a non-negligent manner at the time of the collision. The jury saw the video of Wilson entering the intersection where the collision occurred. The jury saw the video of Wilson traveling 0.6 miles toward that intersection, across many blocks of city streets, immediately preceding the collision. The manner in which Wilson was driving earlier that day, even further removed in time and distance from the point of the collision, unquestionably was of zero relevance to the jury's determination of whether Wilson was comparatively negligent in causing the collision.

For all of these reasons, the trial judge did not abuse her discretion in allowing the jury to see only that segment of the GoPro video showing Wilson operating his motorcycle on Belmont Avenue across many city

blocks as he approached the scene of the collision and then the collision itself occurred. The trial court did not abuse its considerable discretion in ruling that the manner in which Wilson operated his motorcycle earlier in time and further removed in distance from the point of the collision simply had no relevance to the jury's determination of whether Wilson was comparatively negligent in causing the collision that resulted in his death.

## VI. CONCLUSION

For all of the foregoing reasons, the judgment of the trial court and its order denying defendant's motion for post-trial relief should be affirmed.

Respectfully submitted,

Dated: January 30, 2017

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This brief complies with the type-volume limitations of Pa. R. App. P. 2135(a)(1) because this brief contains 6,662 words excluding the parts of the brief exempted by Pa. R. App. P. 2135(b).

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Dated: January 30, 2017

/s/ Howard J. Bashman

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## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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