



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERALD MASARONE,

:

Plaintiff Below,
Appellant,

:

v.

:Case No: 489, 2025

SUSAN WELAN,

:

Defendant Below,
Appellee.

**PLAINTIFF APPELLANT'S OPENING BRIEF ON APPEAL FROM
THE SUPERIOR COURT OF THE STATE OF DELAWARE**

GILL, WELSH &
CHAMBERLAIN, P.A.

/s/ Edward C. Gill

Edward C. Gill, Esquire
Attorney for Plaintiff
Below Appellant
P.O. Box 824
Georgetown, DE 19947
Bar ID 2112
(302) 854-5400

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CONTRIBUTORY RECKLESSNESS TO BE A CAUSE OF THE ACCIDENT IN QUESTION. (A39-A40)

B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THERE NEED BE NO PROXIMATE CAUSE OF A PLAINTIFF'S CONTRIBUTORY RECKLESSNESS TO AN ACCIDENT FOR THAT CONTRIBUTORY RECKLESSNESS TO ACT AS A COMPLETE BAR TO RECOVERY.

C. MERITS OF ARGUMENT: THE TRIAL COURT ERRED IN FINDING THAT EVEN IF THE CONTRIBUTORY RECKLESSNESS DEFENSE SURVIVED AS A COMPLETE BAR TO A PLAINTIFFS RECOVERY THAT THAT CONTRIBUTORY RECKLESSNESS MUST BE A PROXIMATE CAUSE OF THE ACCIDENT.

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ON BEHALF OF THE PLAINTIFF? THIS ISSUE WAS RAISED BELOW WHEN THE PLAINTIFF OBJECTED TO CONTRIBUTORY RECKLESSNESS BEING PART OF THE CASE PRIOR TO TRIAL (A10-A12), DURING TRIAL (A28), AT THE CLOSE OF EVIDENCE, (A33-A35) IN THE PRAYER CONFERENCE (A37-A38) AND WHEN THE JURY HAD A QUESTION AS TO WHETHER IT WAS NECESSARY FOR ANY CONTRIBUTORY RECKLESSNESS TO BE A CAUSE OF THE ACCIDENT IN QUESTION. (A39-A40)

B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THERE WAS EVIDENCE OF CONTRIBUTORY RECKLESSNESS OF THE PLAINTIFF.

C. MERITS OF ARGUMENT: THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON CONTRIBUTORY RECKLESSNESS, EVEN IF THAT CONCEPT SURVIVED THE COMPARATIVE FAULT STATUTE AND THERE WAS NO NECESSITY OF ANY CONTRIBUTORY RECKLESSNESS TO BE A PROXIMATE CAUSE OF THE ACCIDENT, WHEN THERE WAS NO CREDIBLE EVIDENCE OF ANY CONTRIBUTORY RECKLESSNESS OF THE PLAINTIFF.

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Special Jury Verdict Form - Order being appealed

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EXHIBIT C

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NATURE AND STAGE OF THE PROCEEDINGS

Appellant Plaintiff Gerald Masarone filed this personal injury action against defendant Susan Welan on January 24, 2023, in the Superior Court of the State of Delaware in Sussex County. On July 17, 2024, at a zoom conference the Trial Judge entered rulings barring the defendant from introducing into evidence Mr. Masarone's prior criminal record, his conviction for a driving while under the influence at bar, the prison sentence he received as a result of that conviction, and the fact that he did not have a valid driver's license at the time of the conviction. (A42, A44-A46) The Judge did allow the jury to hear proof of the plaintiff being under the influence and that he had a .15 bac. (A47)

The matter came to Trial before a jury on November 17, 2025 through November 18, 2025. On November 18, 2025, the jury entered a verdict that plaintiff's conduct on the date of the accident was reckless. (A41)

On December 3, 2025, plaintiff took a timely appeal of that verdict. On December 11, 2025, defendant Susan Welan took a cross appeal of the verdict.

This is Plaintiff Appellant's Opening Brief on Appeal.

SUMMARY OF ARGUMENT

ARGUMENT I

THE SUPERIOR COURT ERRED WHEN IT FOUND THAT DELAWARE'S COMPARATIVE NEGLIGENCE STATUTE, 10 DEL. CODE SEC. 8132, DID NOT ABGROGATE THE COMMON LAW DEFENSE OF CONTRIBUTORY RECKLESSNESS.

ARGUMENT II

EVEN IF THE DEFENSE OF CONTRIBUTORY RECKLESSNESS SURVIVED THE ENACTMENT OF THE COMPARATIVE NEGLIGENCE STATUTE THE SUPERIOR COURT ERRED IN FINDING THAT THERE WAS NO NECESSITY OF THE CONTRIBUTORY RECKLESSNESS BEING A PROXIMATE CAUSE OF THE ACCIDENT IN QUESTION.

ARGUMENT III

EVEN IF THE COMPARATIVE NEGLIGENCE STATUTE DID NOT ABROGATE THE COMMON LAW DEFENSE OF CONTRIBUTORY RECKLESSNESS AND THERE WAS NO REQUIREMENT THAT SUCH CONTRIBUTORY RECKLESSNESS BE A PROXIMATE CAUSE OF THE ACCIDENT IN QUESTION THE SUPERIOR COURT ERRED IN PROVIDING A JURY INSTRUCTION

ON THIS ISSUE WHEN THERE WAS NO SUFFICIENT EVIDENCE OF
CONTRIBUTORY RECKLESSNESS TO SUBMIT TO THE JURY.

CONCISE STATEMENT OF FACTS

On December 10, 2021, Gerald Masarone was driving his motorcycle on Route 24 at the intersection of Bay Front Road. He testified at Trial that he was not sure if he intended to go straight at that intersection or go right despite the fact that in his deposition he had indicated that he intended to make a right turn at that intersection. (A29-A32) At the time he was driving his motorcycle he had a BAC of .15. (A14)

Two independent witnesses were in the first car stopped on Bay Front Road at that intersection with Route 24. The driver of that car, David Ritter, described the accident as the defendant, Susan Welan, made a left turn immediately into the path of Gerald Masarone's motorcycle causing the accident to occur when Mr. Masarone had the right of way. (A15-A16)

Mr. Ritter testified that Mr. Masarone was not driving in excessive speed and in fact had a gap in the vehicle in front of him. There was nothing erratic about Mr. Masarone's driving and he had the right of way. (A17-A18)

Mr. Ritter's ex-wife, Kathy Ritter, also testified. She gave the same description of the accident and also pointed out that on behalf of Mr. Masarone there was no erratic driving and no speeding. (A19)

Another motorcyclist who was riding behind Mr. Masarone, James Dodd, also testified. Mr. Dodd indicated that Mr. Masarone was slowing

down and not going too fast when he approached the intersection. Mr. Dodd indicated that he did not think that Mr. Masarone could have avoided the collision. (A20-A22)

The defendant, Susan Welan, also testified. She admitted that Mr. Masarone had the right of way. She admitted that she only had a solid green light when she made the left turn into Mr. Masarone's path. She admitted that there was nothing to impair her sight on the roadway but she did not see Mr. Masarone. (A23-A25)

Ms. Welan admitted that she received a ticket to inattentive driving and pled guilty to that ticket because she was guilty of inattentive driving. (A26) She admitted that she did not look the way in which Mr. Masarone was coming. She admitted,

“Q. And you made a mistake and you just didn't see anybody coming and you didn't look that way; is that what happened?
A. Yeah.” (A27)

ARGUMENT I

A. QUESTION PRESENTED: DID THE SUPERIOR COURT ERR IN FINDING THAT DELAWARE'S COMPARATIVE NEGLIGENCE STATUTE, 10 DEL. CODE SEC. 8132, DID NOT ABROGATE THE COMMON LAW DEFENSE OF CONTRIBUTORY RECKLESSNESS? THE ISSUE WAS RAISED BELOW WHEN THE PLAINTIFF OBJECTED TO CONTRIBUTORY RECKLESSNESS BEING PART OF THE CASE PRIOR TO TRIAL (A10-A12), DURING TRIAL (A28), AT THE CLOSE OF EVIDENCE, (A33-A35) IN THE PRAYER CONFERENCE (A37-A38) AND WHEN THE JURY HAD A QUESTION AS TO WHETHER IT WAS NECESSARY FOR ANY CONTRIBUTORY RECKLESSNESS TO BE A CAUSE OF THE ACCIDENT IN QUESTION. (A39-A40)

B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE COMMON LAW DEFENSE OF CONTRIBUTORY RECKLESSNESS SURVIVED DELAWARE'S ENACTMENT OF ITS COMPARATIVE NEGLIGENCE STATUTE, 10 DEL. CODE SEC. 8132.

C. MERITS OF ARGUMENT: THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT DELAWARE'S COMPARATIVE

NEGLIGENCE STATUTE ABROGATED THE COMMON LAW
DEFENSE OF CONTRIBUTORY RECKLESSNESS.¹

A little over a year ago this issue was before this Court in the case of *Northan, Jr., v. Thomas*, 339 A.3d 1226 (2025) (Exhibit B) That appeal involved a Superior Court granting of summary judgment. *Northan, Jr., v. Thomas*, 2024 WL 2974271 (Karsnitz, R. J. June 12, 2024) (Exhibit C)

The *Northan* case involved a plaintiff speeding at 140 mph. In that case the Superior Court granted summary judgment in favor of the defendants, finding that contributory recklessness prevents a plaintiff from recovering against a negligent defendant and that no comparison is to be done between the negligence of that defendant and the contributory recklessness of the plaintiff.

The issue of whether the comparative negligence statute abrogates that common law defense of contributory recklessness was presented squarely before this Court on the appeal. However, this Court in its opinion expressly indicated that, “We do not address the Superior Court’s holding as to contributory recklessness.” (Exhibit B)

¹ *Plaintiff thanks and credits Patrick C. Gallagher, Esquire for not only his ideas set forth in this argument but also his assistance.*

The issue now is once again squarely presented to this Court. This argument is based upon the fact that in 1984 Delaware adopted 10 Del. Code Sec. 8132 which does require a jury to weigh the respective fault between the parties in deciding whether a plaintiff in a personal injury action can recover. To plaintiff's knowledge and research other than the *Northan* Superior Court decision no Delaware Court since then has accepted that that contributory recklessness still exists as a complete defense until the Trial Court in the case at bar made such a decision. Plaintiff respectfully submits that the Trial Court erred in making this finding.

Indeed, there have been two decisions in which Courts have at least touched upon the issue at bar since the adoption of the comparative negligence statute. This Court touched upon that issue in the case of *Staats v. Lawrence*, 576 A.2d 663 (Del. Super. 1990). In that case this Court in discussing the defenses, including contributory negligence, contributory wanton conduct, and assumption of risk found that since the accident at bar there had occurred before the adoption of the Delaware comparative negligence statute that those defenses would be a complete defense. This statement would not have been necessary had the defense of contributory recklessness survived the comparative negligence statute.

The Superior Court also recognized that contributory recklessness or wantonness did not survive the comparative negligence statute. In *Trievel v.*

Sabo, 1996 WL 944981 (Quillen, J. 1988) Affd., Del. Super., 7148 A.2d 742 (1988) (Exhibit D), the Superior Court pointed out that the defense of contributory wantonness was not permitted after the adoption of the comparative negligence statute.

Indeed, this Court specifically commented on the impact of the comparative negligence statute as opposed to past bars on relief for an injured plaintiff. In Koutoufaris v. Dick, 604 A.2d 390 (Del. 1992), this Court stated, “in our view, adoption of a comparative negligence standard in 1984 manifests a legislative intention from that date to retreat from a system of inflexible and unforgiving rules in favor of evaluation of the plaintiff’s conduct on a case-by-case basis”.

The defendant at bar may argue that the comparative negligence statute does not include the word reckless anywhere. While that is correct it must be pointed out that at least three other states with similar statutes that do not include the word reckless allow the comparison of a plaintiff’s recklessness with a defendant’s negligence. G.E.C. Minerals, Inc., v. Harrison W. Corp. 781 P.2d 115 (Colo. App. 1989), McClellan v. Ill. Cent. R.R. Co., 37 So 2d 738 (1948), Baldwin v. City of Omaha, 607 N.W. 2d 841 (Neb. 2000)

Therefore, it is respectfully submitted that the Superior Court erred in resurrecting the doctrine of contributory negligence when faced with the

uncomfortable fact that a drunk driver was seeking to recover for his personal injuries when operating a motorcycle when he should have not been. Delaware law requires that under those circumstances that a jury be required to compare the parties conduct under the comparative negligence statute, *10 Del. Code Sec. 8132*. Therefore, it is respectfully prayed that the matter be reversed and remanded to the Superior Court for a new trial.

ARGUMENT II

A. QUESTION PRESENTED: DID THE TRIAL COURT ERR IN FINDING THAT EVEN IF CONTRIBUTORY RECKLESSNESS SURVIVED AS A COMPLETE DEFENSE DESPITE A DEFENDANT'S NEGLIGENCE THAT ANY CONTRIBUTORY RECKLESSNESS ON BEHALF OF A PLAINTIFF MUST BE A PROXIMATE CAUSE OF THE ACCIDENT. THIS ISSUE WAS RAISED BELOW WHEN THE PLAINTIFF OBJECTED TO CONTRIBUTORY RECKLESSNESS BEING PART OF THE CASE PRIOR TO TRIAL (A10-A12), DURING TRIAL (A28), AT THE CLOSE OF EVIDENCE, (A33-A35) IN THE PRAYER CONFERENCE (A37-A38) AND WHEN THE JURY HAD A QUESTION AS TO WHETHER IT WAS NECESSARY FOR ANY CONTRIBUTORY RECKLESSNESS TO BE A CAUSE OF THE ACCIDENT IN QUESTION. (A39-A40)

B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THERE NEED BE NO PROXIMATE CAUSE OF A PLAINTIFFS CONTRIBUTORY RECKLESSNESS TO AN ACCIDENT FOR THAT CONTRIBUTORY RECKLESSNESS TO ACT AS A COMPLETE BAR TO RECOVERY.

C. MERITS OF ARGUMENT: THE TRIAL COURT ERRED IN FINDING THAT EVEN IF THE CONTRIBUTORY RECKLESSNESS DEFENSE SURVIVED AS A COMPLETE BAR TO A PLAINTIFFS RECOVERY THAT THAT CONTRIBUTORY RECKLESSNESS MUST BE A PROXIMATE CAUSE OF THE ACCIDENT.

Over plaintiff's objection the Trial Court instructed the jury on the concept of contributory recklessness. It instructed the jury as follows:

"Now reckless conduct reflects a knowing disregard of a substantial and unjustifiable risk. It amounts to an "I don't care" attitude. Recklessness occurs when a person with no intent to cause harm performs an act so unreasonable and so dangerous that he or she knows, or should know, that harm will probably result.

And contributory recklessness is defined as - - or operates as a complete bar to recovery for negligence. Contributory recklessness exists when a plaintiff, with no intent to cause harm, performs an act which is so unreasonable and dangerous that he either knows or should have known that there would have been an eminent likelihood of harm that may result.

Stated differently, a plaintiff who engages in some overt act that recklessly exposes to himself to a known danger is guilty of contributory wantonness. Any finding to that effect constitutes complete defense for the defendant. (A37-A38)

Clearly, the Trial Court did not indicate that there was any requirement that a plaintiffs recklessness be a proximate cause of an accident to bar recovery.

This is further evidenced by the jury verdict sheet. (Exhibit A) There was no requirement for a jury to find any proximate cause of a plaintiff's recklessness as to the accident in question.

This became even clearer when the jury asked a question of the Court during deliberations. The jury inquired of the Court, "Does a person have to be a cause of the accident in order for them to be judged reckless?" (A39)

Once again, over objection by the plaintiff the Court answered this question with, "No," making it clear to the jury that they did not have to find any connection whatsoever between any reckless conduct and the accident itself. (A40)

It is well accepted law that for a parties wrongful conduct to have some effect upon an accident or injury it must be a proximate cause of that event. Culver v. Bennett, 588 A.2d 1094 (Del. 1991) In this case there is absolutely no evidence that any conduct of Mr. Masarone was a proximate cause of this accident.

Strangely, this is contrary to even what the Court had been stating. In discussing the applicability of the defense of contributory recklessness the Court stated, "I agree with you, Mr. Gill, if he was impaired and sitting at a stop sign and/or stop light and rear ended, his conduct would not be reckless." (A36) However, when reading the actual jury instruction which

the Court gave it is clear that under the scenario set forth by the Court that a plaintiff would in fact be barred from recovery.

Finally, the very language of contributory recklessness leads to the conclusion that there must be some relationship between the recklessness and the accident in question. What would the possible meaning of the modifying word contributory be if it did not mean contributing to the accident in question.

Plaintiff respectfully submits that this is error and that even if this Court should find that the concept of contributory recklessness does still survive the comparative negligence statute that contributory recklessness must be found by a jury to be a proximate cause of the accident to act as a bar to recovery. Thus, the decision of the jury in following the incorrect jury instruction should be set aside and a new trial should be ordered.

ARGUMENT III

A. QUESTION PRESENTED: DID THE TRIAL COURT ERR IN PROVIDING THE JURY WITH A JURY INSTRUCTION ON CONTRIBUTORY RECKLESSNESS OF THE PLAINTIFF, IF THAT CONCEPT SURVIVED DELAWARE'S COMPARATIVE FAULT STATUTE AND THERE WAS NO NEED FOR PROXIMATE CAUSE OF ANY CONTRIBUTORY RECKLESSNESS TO THE ACCIDENT, WHEN THERE WAS NO EVIDENCE OF CONTRIBUTORY RECKLESSNESS ON BEHALF OF THE PLAINTIFF. THIS ISSUE WAS RAISED BELOW WHEN THE DEFENSE OBJECTED TO CONTRIBUTORY RECKLESSNESS BEING PART OF THE CASE PRIOR TO TRIAL (A10-A12), DURING TRIAL (A28), AT THE CLOSE OF EVIDENCE, (A33-A35) IN THE PRAYER CONFERENCE (A37-A38) AND WHEN THE JURY HAD A QUESTION AS TO WHETHER IT WAS NECESSARY FOR ANY CONTRIBUTORY NEGLIGENCE TO BE A CAUSE OF THE ACCIDENT IN QUESTION. (A39-A40)

B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THERE WAS EVIDENCE OF CONTRIBUTORY RECKLESSNESS OF THE PLAINTIFF.

C. MERITS OF ARGUMENT: THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON CONTRIBUTORY RECKLESSNESS, EVEN IF THAT CONCEPT SURVIVED THE COMPARATIVE FAULT STATUTE AND THERE WAS NO NECESSITY OF ANY CONTRIBUTORY RECKLESSNESS TO BE A PROXIMATE CAUSE OF THE ACCIDENT, WHEN THERE WAS NO CREDIBLE EVIDENCE OF ANY CONTRIBUTORY RECKLESSNESS OF THE PLAINTIFF.

The evidence in the case at bar was clear. This accident occurred when the defendant, Susan Welan, made a left turn in front of plaintiff Gerald Masarone who had the right of way. All of the evidence led to that conclusion.

Plaintiff Gerald Masarone was proceeding on Route 24. Defendant Susan Welan was making a left turn and turned directly into his path.

This was confirmed by two independent eye witnesses who were stopped at a traffic light as the first car of this incident. (A15-A19) There was no evidence of erratic driving or speeding by plaintiff. (A17, A19) The defendant herself admitted that she had a solid green light, Mr. Masarone had the right of way, there was no impairment of her sight but she did not see the plaintiff because she did not look in that direction. Thus, there was absolutely no evidence of any contributory recklessness whatsoever of the plaintiff.

It certainly is true that Mr. Masarone was under the influence of alcohol with a BAC of .15. However, as the Trial Judge succinctly stated, “just driving a motorcycle with .15 is just not automatically recklessness.” (A13)

The defendant may argue that Mr. Masarone indicated in trial that he did not know whether he was going straight or making a right turn at the intersection somehow constitutes recklessness when in his deposition he indicated that he was making a right turn. However, this is simply inaccurate, particularly when putting this together with the testimony of all of the independent witnesses. A plaintiff’s confusion as to whether he was making the turn or not does not mean that any conduct that he engaged in was in fact reckless. At most it goes to the jury’s assessment of credibility.

For a jury instruction to be given there must be some credible evidence supporting that instruction. Guiterrez v. State, 842 A.2d 650 (Del. 2004). There was absolutely no evidence in this case to support such a jury instruction and this additional error justifies reversing the jury’s verdict and remanding the matter for a new trial.

CONCLUSION

For the reasons set forth herein, Plaintiff Appellant, Gerald Masarone, respectfully prays that the jury's verdict of November 18, 2025, be set aside and the matter be remanded for a new Trial in the Superior Court of the State of Delaware in and for Sussex County.

GILL, WELSH &
CHAMBERLAIN, P.A.

/s/ Edward C. Gill
Edward C. Gill, Esquire
Attorney for Plaintiff Appellant
Bar I.D. 2112
16 North Bedford Street
P.O. Box 824
Georgetown, De 19947
854-5400

DATED: 4.17.2026

AFFIDAVIT OF ELECTRONIC MAILING

BE IT REMEMBERED that on this 17th day of April, 2026, Ashley Whalen, Paralegal, for Gill, Welsh & Chamberlain, P.A., does state that she forwarded, via electronic filing, Plaintiff Appellant's Opening Brief on Appeal from the Superior Court of the State of Delaware

to: Jeffrey A. Young, Esquire
Young & McNelis
300 South State Street
Dover, DE 19901

/s/ Ashley Whalen
Paralegal