



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERALD MASARONE,

Plaintiff Below/Appellant,
Cross-Appellee,

v.

SUSAN WELAN,

Defendant Below/Appellee/
Cross-Appellant.

Case No: 489,2025

**PART I: DEFENDANT BELOW/APPELLEE'S ANSWERING BRIEF ON
APPEAL AND CROSS-APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF DELAWARE**

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NATURE OF PROCEEDINGS

Defendant Below/Appellee/Cross-Appellant hereby adopts the Appellant's Nature and Stage of Proceedings submission.

In addition, Defendant Below/Appellee/Cross-Appellant has filed this Answering Brief as well as her Cross-Appeal.

SUMMARY OF ARGUMENTS

- I. Denied. Before and after the enactment of *10 Del. C. § 8132*, Delaware courts have held that recklessness trumps negligence in a tort action. Whether by the defendant or by the plaintiff, reckless conduct by the responsible party abrogates any consideration by the fact finder of simple negligence by the other party.
- II. Denied. The trial court did not err by instructing the jury based on applicable Delaware law, particularly under the circumstances of the subject accident.
- III. Denied. Based on the evidence in the case, the Plaintiff's level of intoxication, evidence of his erratic operation of his motorcycle, and his own admission that his decisions were poor and unreasonable, jury consideration of contributory recklessness was entirely appropriate.

STATEMENT OF FACTS

On December 10, 2021, Plaintiff Gerald Masarone chose to operate his motorcycle while intoxicated. (B-12) Following the consumption of multiple beers and liquor (B-14) and despite having no valid license, he mounted his motorcycle and headed down the road. After meeting up with a neighbor, they opted to travel to Massey's Landing in Millsboro, Delaware. (B-6) That trip entailed making a right-hand turn on Route 24 and proceeded to the intersection with Bay Front Road. The most direct route to Massey's Landing was to make a right turn on Bay Front Road to go eastbound. (B-9-10)

On the same date, Plaintiff Masarone had no valid license to operate a motor vehicle. (B-66) Additionally, Plaintiff Masarone had a criminal history of six (6) prior convictions for driving under the influence. (B-70-71) As a result, he was court ordered to install and use an interlock ignition device (IID). (B-65) This IID would prevent his motor vehicle from starting given a certain level of alcohol consumption. Plaintiff Masarone's motorcycle had no such IID attached. Further, at the hospital following the accident, Mr. Masarone tested positive for opiates, and admitted to the routine use of marijuana. (B-15) He also admitted that he knew he should not have been operating a motorcycle on the date in question. (B-12, 27)

As the record reflects, Plaintiff Masarone provided inconsistent sworn testimony about the accident in question. During a sworn deposition on November 30, 2023, Plaintiff Masarone testified that he was intending to make the right-hand turn on Bay Front Road. (B-19) He further testified at that deposition that he had no intention of proceeding straight through the Bay Front Road intersection. (B-21, 22) He went on to testify that he was in the right-hand turn lane approaching the intersection, (B-24) and that he activated his right turn signal (B-25). He also confirmed that to turn safely onto Bay Front Road, his speed would have to be no more than 15 mph (B-30).

By contrast, at trial, after hearing evidence from other witnesses, Plaintiff Masarone testified it was “possible I was going straight.” (B-10) He also conceded his blood alcohol content of 0.15, and the fact that he was driving under the influence of alcohol (B-11). He of course acknowledged that driving a motorcycle under the influence of alcohol was a very poor and unreasonable decision, (B-12-13) and that he knew he should not be operating a motorcycle at the time (B-16).

Notwithstanding Plaintiff Masarone’s deposition testimony, evidence at trial confirmed that he entered the intersection at between 35 and 40 miles per hour, apparently intending to proceed straight without turning. (B-31) Upon entering the intersection, he struck the rear passenger side of Defendant Welan’s vehicle as she made her left-hand turn. Indeed, Plaintiff Masarone testified at trial that he

proceeded straight through the intersection at around 30 to 40 mph and ran into the side of the Welan vehicle (B-31). He also conceded that driving through the turn lane and yet traveling directly through the intersection at that speed would have constituted terrible driving (B-31).

As such, the jury was able to consider the Plaintiff's prior sworn testimony that he had entered the turn lane with his turn signal on, intending to make a right-hand turn to take the shortest path to his ultimate destination, and yet proceeded straight through the intersection at 30 to 40 mph, running into the side of the Defendant's vehicle.... All of that while illegally operating a motorcycle with no license and with a blood alcohol level nearly twice the legal limit, and while evading the IID device required by court order on his car.

ARGUMENT I

A. QUESTION PRESENTED

DENIED. BEFORE AND AFTER THE ENACTMENT OF 10 DEL. CODE § 8132, DELAWARE COURTS HAVE HELD THAT RECKLESSNESS TRUMPS NEGLIGENCE IN A TORT ACTION. WHETHER BY THE DEFENDANT OR BY THE PLAINTIFF, RECKLESS CONDUCT BY THE RESPONSIBLE PARTY ABROGATES ANY CONSIDERATION BY THE FACT FINDER OF SIMPLE NEGLIGENCE BY THE OTHER PARTY.

B. SCOPE OF REVIEW

The decision of whether to admit or exclude evidence is reviewed for abuse of discretion. *Capano v. State*, 781 A.2d 556, 586 (Del. 2001). The standard of review for issues of law is de novo. *Seth v. State*, 592 A.2d 436, 439 (Del. 1991).

C. MERITS OF ARGUMENT

Recklessness trumps negligence. Delaware law and Delaware courts have so held for as long as the issue has been considered. The recent Superior Court decision *Northan, Jr. v. Thomas*, 339 A.3d 1226 (Del. Super. 2025) thoroughly discussed that very issue and its legal history. Additionally, contrary to Appellant's position that no other Delaware court has so held since 1984, that is simply not the case. Without

variance, Delaware courts, by direct decision, dicta, and by universal understanding have upheld the legal tenet that a reckless party cannot diminish his or her responsibility by, or receive credit for, another party's simple negligence.

Plaintiff's brief recognizes the *Staats v. Lawrence* case, 576 A.2d 663 (Del. Super. 1990), authored by then-Judge Steele. That case discusses contributory wantonness/recklessness and the interplay with basic negligence. Judge Steele ultimately concluded, "I find Staats contributorily negligent and contributorily wanton as a matter of law, and that he recklessly assumed the risk of the accident that caused his injuries. Thus, he is barred from recovery on theories of negligence and wanton conduct." *Id.* at 668-669. That decision was affirmed by this Court which held, "Finally, the cases cited by Lawrence make clear that Staats' presence on the roof of a moving vehicle constitutes contributory negligence, wanton conduct, and assumption of the risk, all of which bar recovery as a matter of law."¹ Accordingly, prior to Delaware enacting the comparative negligence statute, 10 Del. Code § 8132, there can be no question that the law would bar any recovery for Plaintiff Masarone, or any other plaintiff, with a jury finding of reckless conduct on that party's part.²

¹ *Staats v. Lawrence*, 582 A.2d 936 (Del. 1990)(underscore added).

² See also, *Green v. Millsboro Fire Co. Inc.*, 385 A.2d 1135, 1143 (Del. Super. 1978) ("It is clear that Green failed to keep a proper lookout. If a jury were to find that the plaintiff's conduct was wanton, such a finding would bar his recovery, even though the defendant may also have acted wantonly.")

However, Plaintiff/Appellant takes the position that the comparative negligence statute enacted in 1984 altered the logic and holding of Staats. It did not. The Superior Court's analysis and reasoning in Northan is an excellent analysis of the comparative negligence statute and its impact on claims for recklessness. Defense counsel sees no need to repeat or try to expand upon the rationale by Resident Judge Karsnitz in Northan, which appellee hereby adopts. Nevertheless, Northan was not the first case since 1984 to weigh in on the issue.

In 1997, then-Judge Quillen authored his decision in Trievel v. Sabo, 1997 WL 817878 (Del. Super. 1997), *aff'd* 714 A.2d 742 (Del. 1998). In that case, the Superior Court held that the Plaintiff's negligence outweighed any conceivable negligence on the part of the Defendant, thus barring the Plaintiff's claim as a matter of law. Most notably for the current appeal, the Trievel court wrote, "Sometimes, comparative negligence rulings barring the Plaintiff are made as a matter of law when the driving appears wanton on its face."³

Indeed, the Trievel court went on to write, "To put it more precisely, if the law would permit contributory wantonness, and if the plaintiff had been hit by a driver driving wantonly, the court would have, on request, submitted contributory wantonness to the jury." Id. at *4. Thus, although not the specific issue addressed by

³ Id. at *3 (also citing other jurisdictions where egregious conduct by a Plaintiff trumped negligence by the Defendant which exceeded the 50% threshold).

the Superior Court or this Court in *Triebel*, the underlying law that wanton or reckless conduct by a plaintiff eliminates any consideration of negligence by the defendant was clearly understood.

Similarly, the Superior Court case of *Layfield v. Brittingham*, 2007 WL 4149860 (Del. Super. 2007), aff'd 962 A.2d 916 (Del. 2008), dealt with a case where a jury determined the plaintiff was 79% responsible for the accident as compared to the defendant's 21% responsibility, thus barring any recovery based on Delaware's comparative negligence statute. However, because the jury also determined the defendant's conduct was reckless, the trial judge instructed the jury to determine a damages amount, which was ultimately awarded to the Plaintiff, despite her 79% fault. As the court noted, and as all parties agreed, based upon the reckless conduct of the defendant, the plaintiff was entitled to the award of damages despite her overwhelming responsibility for the accident. "[The Defendant's] reckless conduct trumps the comparative negligence of Plaintiff." *Id.* at *1. In affirming that decision, this Court found no abuse of discretion by the Superior Court, thus confirming the jurisprudence that where there is recklessness, another's negligence is irrelevant.

Similarly, in 2007, the Superior Court again discussed the issue of negligence, gross negligence, and reckless or wanton conduct. In *Hufford v. Moore*, 2007 WL 4577384 (Del. Super. 2007) the Superior Court considered a motion for summary judgment by a defendant in a case involving an alleged high-speed chase. Although

denying summary judgment and leaving the issues of negligence and recklessness to jury determination, the court acknowledged the fact that a finding of gross negligence or recklessness by the Plaintiff would bar any recovery against the Defendants. Id. at *2. Additionally, the Hufford decision was later cited in 2016 by the Superior Court in Bishop v. Progressive Direct Ins. Co., 2016 WL 7242582 (Del. Super. 2016). Although likewise denying the Defendant's motion for summary judgment, the Bishop court wrote, “Plaintiff may still recover under a theory of negligence per se, because the defendant violated Delaware's reckless driving statute, ‘even if plaintiff is found to be grossly negligent.’” Id. at *3. Again, the underlying foundation and law reflects that recklessness trumps negligence, whether by a defendant or by a plaintiff.

The 2024 decision by the Superior Court in Northan is addressed above. If the reasoning and holding in Northan is followed by this Court, the issue is resolved. That holding runs directly contrary to the Plaintiff's position here. Yet, the Plaintiff seems to focus on the Supreme Court's affirmance of Northan on other grounds as indicating some opposition to the Superior Court's holding regarding recklessness trumping negligence. That is certainly not necessarily the case. Regardless, the Northan logic and its citation to other cases and Restatements is a thoughtful recitation of Delaware law on the issue of recklessness versus negligence. Further,

the Superior Court cited with favor the Northan decision just two (2) months ago. Andino v. Nexius Solutions, Inc., 2026 WL 540791 (Del. Super. Mar. 13, 2026).

The Andino court concluded its decision on various issues with a discussion of contributory recklessness and wantonness. Citing Delaware cases and the pattern jury instruction, that court wrote, “Contributory wantonness 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 know that there is an eminent likelihood of harm which can result. Stated differently, a plaintiff who engages in some overt act that recklessly exposes himself to a known danger is guilty of contributory wantonness. Under Delaware common law, contributory recklessness operates as a complete bar to recovery for negligence.” Id. at *9 (internal quotations and citations omitted)

Accordingly, and contrary to Plaintiff's argument, Delaware courts have repeatedly confirmed that a party's reckless conduct negates any consideration, offset, or credit when compared to simple negligence by an opposing party. As such, the Superior Court's logic and ruling on that issue in this case, as consistent with this long-standing Delaware jurisprudence, should be affirmed.⁴

⁴ For consistent rulings in other jurisdictions, even where any contributory negligence would typically bar a plaintiff's claim, see Estate of Savino v. Charlotte-Mecklenburg Hosp. Authority, 847 S.E.2d 677 (N.C. Ct. App. 2020) (Defendant

ARGUMENT II

A. QUESTION PRESENTED

DENIED. THE TRIAL COURT DID NOT ERR BY INSTRUCTING THE JURY BASED ON APPLICABLE DELAWARE LAW, PARTICULARLY UNDER THE CIRCUMSTANCES OF THE SUBJECT ACCIDENT.

B. SCOPE OF REVIEW

The decision of whether to admit or exclude evidence is reviewed for abuse of discretion. *Capano v. State*, 781 A.2d 556, 586 (Del. 2001). The standard of review for issued of law is de novo. *Seth v. State*, 592 A.2d 436, 439 (Del. 1991).

C. MERITS OF ARGUMENT

could not use contributory negligence defense where Defendant was found reckless) *Muldrow v. Re-Direct, Inc.*, 493 F.3d 160 (D.C.Cir. 2007) (holding that, under District of Columbia law, a defendant's reckless conduct barred reliance on contributory negligence as a defense). *Carter v. National Railroad Passenger Corp.*, 413 F. Supp. 2d 495, 501 (E.D. Pa 2005) ("[P]laintiff's contributory negligence is not a defense if a defendant is found reckless.") *Lee v. Coss*, 39 F. Supp. 2d 170, 174 (D. Conn. 1999) ("The long-standing rule in Connecticut is that contributory negligence [does] not bar an action based on reckless or wanton misconduct, as the fault of the defendant would be more culpable than the fault of the plaintiff.") *Pye v. Aycock*, 480 S.E.2d 455, 461 (S. C. Ct. App. 1997) ("[S]imple contributory negligence does not constitute a defense to reckless or willful conduct.") *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934,938 (Tenn. 1994) ("Tennessee courts have never allowed contributory negligence as a defense to conduct amounting to gross negligence. On the other hand, if a plaintiff is guilty of willful, wanton or reckless misconduct, that conduct is a defense to the defendant's similar conduct.") *Norris v. ACF Indus., Inc.*, 609 F. Supp 549, 553 (S.D.W.Va. 1985) ("The person who engages in [reckless] conduct cannot be relieved of responsibility therefore by the contributory negligence of the aggrieved party.")

The Plaintiff is simply incorrect in stating “there is absolutely no evidence that any conduct of Mr. Masarone was a proximate cause of this accident.” As discussed above, there was evidence in the case that Plaintiff Masarone entered the right turn lane to make a 90-degree turn toward Massey's Landing (going the most direct route to that destination). While that turn would require a speed of no more than 15 miles per hour, and despite the Plaintiff's right turn signal being activated, he entered the intersection at approximately 40 mph and proceeded straight through, colliding with the rear passenger side of the Defendant's turning vehicle. Those actions were also in the context of Plaintiff Masarone operating his motorcycle at nearly twice the legal limit for alcohol consumption, thereby indicating clear impairment. Those facts and that evidence provide an ample basis for a jury conclusion that the Plaintiff's conduct was reckless, willful, and/or wanton at the time of this accident.

What the jury did not know, and which forms the basis of the Defendant's cross appeal, is that Mr. Masarone also did not have a valid motor vehicle license, evaded the interlock ignition device on his car, and had a history of six (6) prior DUI convictions. Still, even without that additional background evidence regarding his mindset, the Plaintiff's decisions that day were the definition of an “I don't care” attitude, and someone making a conscious choice to ignore potential consequences. The Plaintiff's speed, misleading turn signal, position in the roadway and level of

impairment were all considered by the jury and understandably formed the basis of a finding of reckless conduct on his part. Regardless, those facts, while perhaps warranting a judicial determination of recklessness as a matter of law, as in the *Northan* case, certainly open the door to jury consideration of recklessness as in the *Brittingham*, *Hufford*, *Bishop*, and *Andino* cases cited *supra*.

Regarding the proximate cause argument by the Plaintiff, that too must fail. This case is not one where an intoxicated Plaintiff was victimized, i.e. simply stopped at a stoplight and rear-ended. Instead, as discussed above, Plaintiff Masarone voluntarily assumed several risks when climbing onto a motorcycle without a valid license and while admittedly intoxicated. Moreover, as the jury was instructed, and contrary to the Plaintiff's "stopped at a red light" scenario, a finding had to be made that the Plaintiff "engages in some overt act that recklessly exposes himself to a known danger." (B-63-64) An intoxicated plaintiff sitting at a red light who gets rear-ended has not exposed himself to a known danger. An intoxicated plaintiff erratically driving a motorcycle while nearly twice the legal limit for permissible alcohol consumption most certainly has. Thus, to the extent proximate cause is a necessary element in a case where reckless conduct is determined, the jury was required to find that the Plaintiff conducted an overt act that exposed himself to danger, which is indeed a proximate cause determination.

Further, as the Superior Court decisions in *Northan*, *Hufford* and *Bishop* make clear, where there is recklessness by a plaintiff in a motor vehicle collision, that recklessness is a bar to recovery. Again, the instruction given to the jury required a finding that the Plaintiff either knows or should have known that there would be an eminent likelihood of harm that may result” from his conduct. (B-63-64) Plaintiff Masarone's own testimony at trial confirmed that he knew driving his motorcycle on that date, given his alcohol consumption (not to mention DUI history), was a “very poor and unreasonable decision.” (B-13, 16). The trial below contained ample evidence of reckless conduct by the Plaintiff for the jury to consider. Conduct which he knew was unreasonable and risky and posed patently harmful consequences by its own nature. Conduct that a jury could, and did, find reckless.

ARGUMENT III

A. QUESTION PRESENTED

NO. BASED ON THE EVIDENCE IN THE CASE, THE PLAINTIFF'S LEVEL OF INTOXICATION, EVIDENCE OF HIS ERRATIC OPERATION OF HIS MOTORCYCLE, AND HIS OWN ADMISSION THAT HIS DECISIONS WERE POOR AND UNREASONABLE, JURY CONSIDERATION OF CONTRIBUTORY RECKLESSNESS WAS ENTIRELY APPROPRIATE.

B. SCOPE OF REVIEW

The decision of whether to admit or exclude evidence is reviewed for abuse of discretion. *Capano v. State*, 781 A.2d 556, 586 (Del. 2001). The standard of review for issued of law is de novo. *Seth v. State of Delaware*, 592 A.2d 436, 439 (Del. 1991).

C. MERITS OF ARGUMENT

As discussed in the previous section, and in light of the facts of this case, jury consideration that the plaintiff's conduct constituted recklessness was entirely appropriate. The *Gutierrez* case cited by the Plaintiff provides the correct legal standard. However, there was abundant evidence supporting the recklessness instruction. While different witnesses, different versions, and different memories of the accident in question were part of this trial, the Plaintiff's own testimony and

admissions amounted to far more than “confusion.” Rather, the Plaintiff’s testimony and the evidence in the case that he was in the turn lane with a right-hand turn signal activated and intending to turn right for the shortest route to his destination, and that he nevertheless proceeded directly through the intersection at approximately 40 mph, while driving a motorcycle at nearly twice the legal limit for alcohol consumption, is precisely the kind of evidence that a jury should consider in determining negligent versus reckless actions. Much like the cases previously cited where courts permitted jury consideration of party conduct (or held a party reckless as a matter of law) the facts of this case demanded jury consideration of the issue.

Although not outcome determinative, the Defendant in the case *sub judice* respectfully disagrees with the trial judge’s position that “just driving a motorcycle with .15 BAC is not automatically reckless.” Nonetheless, that piece of evidence certainly opens the door to jury consideration of recklessness, particularly when compounded by the erratic motorcycle operation by Mr. Masarone on the date in question. Thus, without restating the evidence, case law and arguments above, sufficient evidence of the Plaintiff’s reckless conduct permitted jury consideration of that issue.

CONCLUSION

For the reasons set forth above, the Superior Court correctly recognized and applied Delaware law regarding contributory recklessness, properly instructed the jury, and properly submitted that issue for jury determination based on the evidence presented at trial. Accordingly, Defendant Below/Appellee respectfully requests that this Court affirm the judgment and rulings of the Superior Court.

GERALD MASARONE,

Appellant,

V.

SUSAN WELAN,

Appellee/Cross-Appellant.

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Case No: 489,2025

Jury of 12 Demanded

PART II: DEFENDANT BELOW/CROSS-APPELLANT’S OPENING

BRIEF ON CROSS-APPEAL

NATURE OF PROCEEDINGS

Defendant Below/Cross-Appellant, Susan Welan, adopts the nature and stage of the proceedings submission in the opening briefs. In addition, this is Defendant Below/Cross-Appellant's Cross-Appeal.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

I. WHETHER THE SUPERIOR COURT ERRED WHEN IT EXCLUDED EVIDENCE, IN A CASE WHERE THE PLAINTIFF'S RECKLESS CONDUCT WAS ALLEGED, OF THE PLAINTIFF'S SIX (6) PRIOR DUI CONVICTIONS, THE FACT THAT PLAINTIFF WAS OPERATING A MOTOR VEHICLE WITHOUT A LICENSE, AND THE IGNITION INTERLOCK DEVICE REQUIREMENTS ON PLAINTIFF'S MOTOR VEHICLE. (B65-B77)

STATEMENT OF FACTS

Defendant Below/Cross-Appellant references and incorporates her statement of facts in her Answering Brief.

ARGUMENT I

A. QUESTION PRESENTED

WHETHER THE SUPERIOR COURT ERRED WHEN IT EXCLUDED EVIDENCE, IN A CASE WHERE THE PLAINTIFF'S RECKLESS CONDUCT WAS ALLEGED, OF THE PLAINTIFF'S SIX (6) PRIOR DUI CONVICTIONS, THE FACT THAT PLAINTIFF WAS OPERATING A MOTOR VEHICLE WITHOUT A LICENSE, AND THE IGNITION INTERLOCK DEVICE REQUIREMENTS ON PLAINTIFF'S MOTOR VEHICLE. (B65-B77)

B. SCOPE OF REVIEW

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. Joseph Floray v. State of Delaware, 720 A.2d 1132, 1135 (Del. 1998).

C. MERITS OF ARGUMENT

On the date of the automobile accident which is the subject of this personal injury claim by Gerald Masarone, Plaintiff Masarone was operating his motorcycle with a .15 blood alcohol level. The Plaintiff's prior deposition and trial testimony confirmed that he was aware of the risks and impropriety of operating a motorcycle while impaired at that level. The evidence at trial also demonstrated inconsistent

versions of the accident by the Plaintiff. Regardless, the evidence included sworn testimony by him that he was driving erratically, intending to make a right-hand turn at the intersection, but then accelerated straight through when he collided with the Defendant's vehicle.

Thus, the Defendant pled as a defense and raised for jury consideration the reckless conduct of the Plaintiff in causing this accident. Even without a full picture of the Plaintiff's mindset and background, the jury determined him to be reckless in causing the accident. As discussed in appellee's answering brief, that decision should stand based on the evidence and the law. However, if for any reason this matter is remanded to the Superior Court for a new trial, Defendant Welan seeks a reversal of the Superior Court's decision granting the Plaintiff's motion to exclude certain evidence.

On December 10, 2021, Plaintiff Gerald Masarone knew he was barred from operating any motor vehicle. He had no valid driver's license, and certainly not a motorcycle endorsement. In addition, Mr. Masarone was undoubtedly aware of his six (6) prior convictions for driving under the influence of alcohol. And yet, Mr. Masarone chose to consume alcohol on that date, consisting of at least several beers and liquor. Given his lengthy DUI history, Plaintiff Masarone was fully aware of the dangers and consequences of consuming alcohol and operating a motor vehicle. Apparently, he did not care.

Additionally, in 2021, Plaintiff Masarone's car was connected to an interlock ignition device. That device was a consequence of his multiple prior DUIs and required him successfully to blow into the device to confirm an unimpaired blood alcohol reading in order to start the car. Plaintiff Masarone's motorcycle had no such device. Knowing that his car would not start given his level of alcohol consumption, Mr. Masarone instead chose to get on his motorcycle on the afternoon of December 10, 2021, further demonstrating his lack of concern or consideration for his conduct or the potential consequences.

As the pattern jury instruction, which was read to the jury states, "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." (B-63-64) In the case at bar, the defense argued the Plaintiff's mental state, decision-making and conduct were indeed reckless and met the necessary legal standard. The jury agreed. And yet, that jury decision was made without the full context of the Plaintiff's decision-making or mindset that day.

The Superior Court's rationale, the cases cited, and the arguments submitted by counsel are attached. (B-65-77). The trial court's exclusion of the subject evidence was based largely on the case Baker v. Goldsborough, 2015 WL 6941257

(Del. Super. 2015) and the Getz analysis. Based on the Baker precedent, the trial judge determined that admitting Plaintiff Masarone's prior DUIs, "was just too prejudicial." (B-73) However, further examination of that case and the trial court's ruling is warranted.

The Baker court assessed the admissibility of a personal injury defendant's prior DUI convictions and driving record in the context of whether punitive damages would apply. The Baker court also performed a DRE 403 analysis and determined that the probative value of the defendant's criminal history was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and undue delay. Id. at *4. Even if this Court adopts the same reasoning and logic of the Baker court, the facts of the instant case are distinct.

In addition, neither the trial court below nor the Baker court considered this Court's decision in Morehead v. State, 638 A.2d 52 (Del.1994). Morehead is a case directly on point that supports the Defendant Below/Cross-Appellant's position that the Plaintiff's previous alcohol convictions should be admitted at trial. Although Morehead was a criminal case, it was one where the State was required to prove recklessness in order to support a conviction for murder in the second degree due to the conduct of a DUI defendant. There, this Court affirmed the trial court's decision to admit two prior DUI convictions of the defendant.

The purpose of that trial evidence was to establish the defendant's state of mind in order to prove that the defendant acted with recklessness. This Court, citing other case law, stated that the prior convictions were, “relevant to establishing that the defendant had grounds to be aware of the risk that his drinking and driving while intoxicated presented to others.” Id. at 55. As opposed to D.R.E. 404(b) concerns regarding bad character, or a jury's conclusion that what was done before will be done again, the case at bar already had the Plaintiff admitting his intoxicated state. Thus, rather than creating some prejudice for the Plaintiff below, the jury could better appreciate his state of mind when operating a motor vehicle after drinking alcohol.

Here, Plaintiff Masarone could not deny his prior convictions or the fact that he was well aware of the consequences of consuming alcohol and operating a motor vehicle (even ignoring the greater risk of operating a motorcycle). As such, his decision to consume alcohol on the date of this accident and still get up on a motorcycle go precisely to his state of mind and his “I don't care” attitude, thereby demonstrating recklessness.

Likewise, the evidence at issue had nothing to do with implicating Plaintiff Masarone's character, but rather his decision-making and attitude at the time of this accident. He testified at trial that he knew consuming alcohol and getting on a motorcycle was an unreasonable and poor decision. Further, the fact that he was intoxicated at the time was uncontested evidence. And yet, because of the excluded

facts, the jury did not know the full extent to which he was flaunting discretion and good decision-making.

The same argument goes to his lack of a valid driver's license at the time. Plaintiff Masarone of course knew that fact and knew that operating a motor vehicle, particularly a motorcycle, on the date in question, was illegal. He apparently simply did not care. The proof of his knowledge and disregard of the law, consequences, and the risks all go to measure his outlook at the time of this accident, and should have assisted the jury in weighing the reckless standard. That evidence underscores and highlights his reckless conduct and his 'I don't care' attitude and therefore should have been admissible for jury consideration.

This was not simply one bad afternoon for this Plaintiff. His decision to climb on a motorcycle and travel up the roads of Sussex County, while nearly double the legal limit for alcohol consumption, and with a full awareness of the fact that he was not permitted to operate any motor vehicle, were reckless decisions. The fact that he had consumed alcohol that day with a criminal history of six (6) prior DUIs, should have been ample warning to avoid operating any motor vehicle. His decision to avoid the IID on his car reflects even more indifference to the dangers of driving. While the jury understandably deemed Mr. Masarone reckless under the facts presented, nonetheless, should this matter be remanded for a new trial, the full context of Plaintiff Masarone's decision-making on the date in question should be part of the

evidence of the case. The jury should have a complete picture, all the facts and the full contexts of his “I don’t care” attitude.

CONCLUSION

For the foregoing reasons, Defendant Below/Appellee/Cross-Appellant respectfully submits that the Superior Court erred in excluding evidence of Plaintiff's prior DUI convictions, lack of a valid driver's license, and ignition interlock requirements, as that evidence was relevant to Plaintiff's knowledge, state of mind, and conscious disregard of known risks in connection with the issue of contributory recklessness. Accordingly, in the event this Court reverses the judgment below and remands this matter for a new trial, Defendant Below/Appellee/Cross-Appellant respectfully requests that this Court reverse the Superior Court's evidentiary ruling precluding that evidence and permit its admission at retrial.