



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 REPLY BRIEF IN SUPPORT OF HIS**  
**APPEAL AND ANSWERING BRIEF IN OPPOSITION TO**  
**DEFENDANT APPELLEE'S CROSS 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

DATED: 5/18/2026

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B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING EVIDENCE OF PLAINTIFF’S PRIOR DUI CONVICTIONS AND OPERATING A MOTOR VEHICLE WITHOUT A LICENSE.

C. MERITS OF ARGUMENT: DEFENDANT CLAIMS THAT IN THE EVENT OF A RE-TRIAL THAT THE TRIAL COURT’S RULINGS ON ADMISSABILITY OF EVIDENCE WERE AN ABUSE OF DISCRETION AND THAT AT A NEW TRIAL THE DEFENDANT SHOULD BE ABLE TO INTRODUCE EVIDENCE OF PLAINTIFF’S PRIOR DUI CONVICTIONS AND LACK OF A LICENSE. PLAINTIFF RESPECTFULLY DISAGREES.

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### **CONCISE STATEMENT OF FACTS**

The defendant, in a not so subtle fashion attempts to prejudice this Court against the plaintiff, included facts which were not in the record to be decided by the jury. These include the defendant failing to have a valid license, the defendant's criminal history, and the presence of opiates and marijuana in a blood test purportedly done of the defendant. None of those facts were presented to the jury in this case. Despite that, the defendant includes all of those at the outset of its recitation of the facts in its Answering Brief on Appeal.

## **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.<sup>1</sup>

The Defendant in arguing that the concept of contributory recklessness still exists and prevents a plaintiff from recovery against the negligent defendant cites various cases. Other than the Superior Court decision in Northan, Jr., v. Thomas, 2024 WL2974271 (Karsnitz, R.J. June 12, 2024) (Exhibit C), none of them deal with the issue now before this Court.

The case of Staats v. Lawrence, 576 A.2d 663 (Del. Super. 1990) of course dealt with an accident that had occurred prior to the enactment of Delaware's Comparative Negligence Statute, 10 Del. Code Sec. 8132. Furthermore, the Court in that case made it clear in discussing defenses such as contributory recklessness indicated that they were still in play since the accident had occurred prior to the enactment of that statute. There of course would have been no need for this comment if in fact contributory recklessness survives the comparative negligence statute.

With regards to Triewel v. Sabo, 1997 WL817878 (Quillen, J. 1997) plaintiff erroneously included the wrong *Triewel* decision as an Exhibit to his

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

Opening Brief. The correct *Triebel* decision is attached as Exhibit D to this Brief.

The *Triebel* Court did state, “if the law would permit contributory wantonness...” (Id. at p4) This sentence would make no sense if contributory wantonness still did exist as a defense.

The defendant further cites *Layfield v. Brittingham*, 2007 WL4149860 (Del. Super. 2007), *affd.* 962 A.2d 916. Once again, in that case this issue was not litigated but simply agreed upon by the parties so no legal decision was made.

In *Hufford v. Moore*, 2007 WL4577684 (Del. Super. 2007), the Superior Court distinguished gross negligence from recklessness. However, the Court did indicate that even if a Plaintiff was grossly negligent he or she could still recover under Delaware’s Comparative Negligence Statute.

Finally, the last two cases cited by the defendant, *Bishop v. Progressive Direct Insurance Company*, 2016 WL7242582 (Del. Super. 2016); and *Andino v. Nexius Solutions, Inc.*, 2026 WL540791 (Del. Super. March 13, 2026) also do not address the issues at bar. The *Andino* Court simply quotes the same erroneous jury instruction which was given in the case at bar.

Therefore, it is respectfully submitted that this case presents a matter of first impression to this Court as to whether the Comparative Negligence

Statute, 10 Del. Code Sec. 8132, does away with contributory recklessness of a Plaintiff being a complete bar for recovery. Plaintiff respectfully submits that the intent of this statute along with the case law interpretations of the statute and good public policy make the answer to that question one in the affirmative.

## **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.

The Defendant instead of discussing in depth the failure of the Trial Court to require any proximate cause between contributory recklessness and the accident once again discusses evidence that she claims the Trial Court erroneously kept out. Furthermore, the Defendant suggests to this Court a made up scenario not only not supported by the evidence but contrary to the direct evidence.

It is abundantly clear that the jury was instructed in this case that there was no necessity of any sort of proximate cause for any contributory recklessness to act as a complete bar to recovery accepting the defendant's argument. The Trial Court did not even include any sort of temporal instruction as to a connection between any reckless behavior of the plaintiff and the accident in question. The only place where this is mentioned at all is in the special verdict form which speaks of plaintiff's conduct on the day of the accident. (Exhibit A to Opening Brief)

If there remains any question about the lack of the Trial Court requiring proximate cause between the recklessness and the accident it is

further emphasized in the Special Verdict Form. Question number one regarding whether plaintiffs conduct being reckless did not contain any requirement of the recklessness being a proximate cause of the accident, consistent with the jury instructions. This is to be contrasted with question two which asked if the defendant's negligence, if found, proximately caused the accident.

There was clearly no ambiguity and no intention by the Trial Court to require the jury to find proximate cause between recklessness and the accident itself. This was once again made completely clear when the jury asked the question to the Court, "does a person have to be a cause of the accident in order for them to be judged reckless?" (A39)

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)

Therefore, if this Court should find that the concept of contributory recklessness survives as a complete bar to a plaintiff's recovery after the enactment of 10 Del. Code Sec. 8132, the Trial Court erred by expressly instructing that there need be no connection whatsoever between the recklessness and the accident in question.

The defendant nowhere in her argument makes the claim that there was no necessity of proximate cause between the contributory recklessness

and the accident in question. Despite that, in its response to Argument number two in Summary of Argument, she clearly and unequivocally states, “Denied.” Thus, the Trial Court clearly incorrectly instructed the jury on this issue which completely deprived the plaintiff of his opportunity for a fair trial.

### **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 Defendant, contrary to the evidence produced at Trial, suggests that a scenario in which plaintiff was somehow driving recklessly was supported by the evidence. This is of course completely incorrect.

No one in the Trial disputed that Defendant Welan made a left turn in front of the Plaintiff who had the right of way. This was confirmed by the two independent witnesses who were directly in front of the accident and saw no evidence of her erratic driving or speeding and even the defendant herself.

The Defendant attempts to construct a scenario for this accident out of the simple fact that while the Plaintiff stated in his deposition that he thought he was about to make a right turn but was not sure about whether he was going straight or making a right turn at trial somehow supports the jury finding recklessness and the Court finding sufficient evidence to give the instruction on this issue. As stated in Plaintiff's Opening Brief, this

confusion of the Plaintiff only, at best, would serve to diminish his credibility but does not open up a whole new scenario as to how the accident occurred.

The defense also differs with the Trial Judge's statement that, "just driving a motorcycle with .15 is just not automatically recklessness." (A13) Plaintiff respectfully submits that this decision of the Trial Court, which has not been taken up on the cross appeal of this matter, is the law of the case and clearly correct. Thus, there was no evidence whatsoever to justify the instruction being given on contributory recklessness.

## **SUMMARY OF ARGUMENT ON CROSS APPEAL**

The Superior Court did not abuse its discretion when excluding evidence of Plaintiff's prior DUI convictions and the fact that he was operating a motor vehicle without a license. While the Defendant in Summary of Argument did indicate that the Trial Court excluded evidence of the ignition interlock device Plaintiff could not find that citation to same in the portions of the Appendix cited by Defendant. In any event, such evidence was also clearly inadmissible.

## **ARGUMENT I ON CROSS APPEAL**

A. QUESTION PRESENTED: DID THE SUPERIOR COURT ERR WHEN IT EXCLUDED EVIDENCE REGARDING PLAINTIFF'S PRIOR DUI CONVICTIONS AND THE FACT THAT PLAINTIFF WAS OPERATING A MOTOR VEHICLE WITHOUT A LICENSE BY ABUSING ITS DISCRETION.

B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING EVIDENCE OF PLAINTIFF'S PRIOR DUI CONVICTIONS AND OPERATING A MOTOR VEHICLE WITHOUT A LICENSE.

C. MERITS OF ARGUMENT: DEFENDANT CLAIMS THAT IN THE EVENT OF A RE-TRIAL THAT THE TRIAL COURT'S RULINGS ON ADMISSABILITY OF EVIDENCE WERE AN ABUSE OF DISCRETION AND THAT AT A NEW TRIAL THE DEFENDANT SHOULD BE ABLE TO INTRODUCE EVIDENCE OF PLAINTIFF'S PRIOR DUI CONVICTIONS AND LACK OF A LICENSE. PLAINTIFF RESPECTFULLY DISAGREES.

The Trial Court did a complete *DRE 404 (b)* analysis pursuant to Getz with regards to the evidence of the prior DUI's. Consistent with existing case law, *Baker v. Goldsborough*, 2015 WL6941257 (Del. Super. 2015), this was clearly an appropriate decision. The Plaintiff's prior DUI convictions

would not have helped the jury in answering questions as to what occurred on the date of the accident in this case, December 10, 2021. Further, the fact that the Plaintiff had six (6) prior convictions would have clearly been unduly prejudicial and prevented him from receiving any sort of fair Trial. The very fact that the Defendant consistently throughout her arguments cites to this fact in an attempt to prejudice this Court makes this point abundantly clear. (B72-73)

Likewise, the Trial Court did not abuse its discretion in not allowing the fact that the Plaintiff did not have a license to be submitted to the jury. This would not have proven or disproven any fact that the jury was to decide in the case and, of course, was consistent with existing case law as set forth by the Court. (B67-68)

The Defendant also argues that the Trial Court found that the evidence regarding the ignition interlock device which was required for Plaintiff to drive was also excluded. Unfortunately, the citations in the Defendant's brief regarding this argument (B65-B77) do not support the fact that this was excluded. In any event, an attempt to introduce that into evidence clearly would have been inadmissible.

Therefore, in the event of a retrial on this matter the Trial Judge's evidentiary rulings regarding admission of evidence should remain the law of the case.

## **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 with the Trial Court's previous evidentiary rulings remaining the law of the case.

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: 5/18/2026

**AFFIDAVIT OF ELECTRONIC MAILING**

BE IT REMEMBERED that on this 18<sup>th</sup> day of May 2026, Ashley Whalen, Paralegal, for Gill, Welsh & Chamberlain, P.A., does state that she forwarded, via electronic filing, Plaintiff Appellant's Reply Brief in Support of His Appeal and Answering Brief in Opposition to Defendant Appellee's Cross 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