

**IN THE EIGHTH CIRCUIT COURT
FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE**

BERENISE SANZON, individually, and	§	
as next-of-kin to the deceased,	§	
JOAQUIN BASTIDAS,	§	
	§	
<i>Plaintiff,</i>	§	Judge Kelvin Jones
	§	
v.	§	Case No. 19C1685
	§	
HOWARD MCLEMORE,	§	JURY DEMANDED
	§	
<i>Defendant.</i>	§	

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF HER
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This action arises out of the wrongful death of Joaquin Bastidas, who was killed by the Defendant, Howard McLemore, on February 3, 2019, in Davidson County, Tennessee. The undisputed material facts of this case demonstrate, *inter alia*, that:

(1) Defendant McLemore was driving 96 miles per hour in a 40-mile-per-hour zone at the time of the crash and did not brake;

(2) Defendant McLemore used cocaine just prior to the crash and was impaired by cocaine during the crash; and

(3) Defendant McLemore killed Mr. Bastidas because Defendant McLemore failed to maintain his lane and crossed over into oncoming traffic, causing a head-on collision.

Thus, summary judgment should issue regarding the Defendant’s liability as to Plaintiff’s claims for negligence and negligence *per se*, and the Court should schedule a hearing to determine the proper measure of damages for Mr. Bastidas’s wrongful death.

II. UNDISPUTED MATERIAL FACTS

Plaintiff Berenise Sanzon is decedent Joaquin Bastidas's mother and next-of-kin.¹ On February 3, 2019, Joaquin Bastidas was fatally injured during a crash with Defendant Howard McLemore that occurred on Nolensville Pike in Paragon Mills.² At all times relevant to the Plaintiff's Complaint, the Defendant admits that he had a duty to other individuals on the road, including Joaquin Bastidas, to follow the traffic laws and to exercise due care to avoid causing injuries to others.³

The February 3, 2019 crash occurred after Mr. McLemore's car crossed over into the oncoming lane of traffic, resulting in a head-on collision with Mr. Bastidas's vehicle.⁴

¹ Doc. #8, Defendant's Answer, ¶ 1 ("Admitted").

² **Exhibit A**, Preliminary Hearing Testimony, p. 27, line 24–p. 28, line 5:

Q. You were the lead investigator in the crash from February 3rd on Nolensville Pike and Paragon Mills?

A. Yes, sir.

Q. Who all was injured and killed in that crash?

A. I know that Ms. Burns was deceased. Mr. Bastidas was deceased. Ibrahim was transported, and Mr. McLemore was transported.

³ Doc. #8, ¶ 38 ("Admitted").

⁴ **Exhibit A**, p. 28, lines 14–25:

Q. Were you able to determine how the crash happened?

A. Yes. It was apparent that the crash occurred in the northbound lanes on Nolensville Road. The Honda that was involved was traveling northbound. There was a white Chevy Camaro which was traveling southbound. The crash occurred over into the northbound lanes of Nolensville Road.

Q. And who was the driver of the Chevy Camaro?

A. Mr. McLemore.

Q. And that went into the wrong lane?

At the time of impact, Defendant Howard McLemore was driving 96 miles per hour and did not brake.⁵ The speed limit was 40 miles per hour.⁶

A. It did. The -- the crash occurred like in the No. 2 Lane.

See also **Exhibit A**, p. 8, line 24–p. 9, line 9:

Q. Were you able to tell how this crash happened?

A. It appeared to be a head-on collision with a southbound vehicle versus a northbound vehicle.

Q. Was one of the vehicles going the wrong direction?

A. It was crossed over in the oncoming lane of traffic, yes, sir.

Q. Which -- which vehicle had crossed over into the oncoming lane of traffic?

A. The white Camaro.

Q. That was the defendant's vehicle?

A. Yes, sir.

⁵ **Exhibit A**, p. 29, lines 1–6:

Q. Were you able to determine the speed of the Camaro?

A. I was. I obtained a search warrant to download the EDR of that vehicle -- excuse me -- the EDR of that vehicle. And it showed an indication that it was traveling at 96 miles an hour at impact, with no braking.

See also **Exhibit A**, lines 3–8:

Q. All right. Now, according to the EDR on the Camaro, you said that it indicated it was traveling 96 miles an hour?

A. At impact.

Q. Was there any indication of braking at any time --

A. No.

⁶ **Exhibit A**, p. 29, lines 7–8:

Q. And what was the speed limit?

A. 40 miles an hour.

After the crash, Mr. McLemore stated that he had been drinking prior to the crash.⁷ Mr. McLemore also stated that he had used cocaine just prior to the crash.⁸ Accordingly, an HGN test was administered by responding officers, which demonstrated all six indicators that Defendant McLemore was impaired.⁹

After the crash, a crack pipe was found on the driver's side of Defendant McLemore's vehicle.¹⁰ A blood test also indicated the Defendant McLemore had active

⁷ **Exhibit A**, p. 8, lines 11–18:

Q. (By Mr. Anderson) Did you hear the defendant make any statements?

A. Shortly after I'd arrived, after they got him extracted from the vehicle, I followed him to the ambulance where they had began to work on him. And the paramedic on the ambulance asked him if he had been drinking tonight, and he mumbled an answer, "Yes," and nodded his head vertically up and down.

⁸ **Exhibit A**, p. 25, line 20–p. 26 line 6:

All right. Now, you indicated that when you spoke to Mr. McLemore he made statements indicating that he had used cocaine --

A. Correct.

Q. -- at some point? Did he indicate at any point in those statements a time frame of any kind, or --

A. He said it was just prior to the wreck. He didn't give me an exact time frame, but he just said it was prior to the wreck.

Q. It was prior to the wreck.

A. Yeah, just prior.

See also **Exhibit A**, p. 19, line 24–p. 20, line 1 ("I asked him if he had done anything else, he told me he did do cocaine prior in the evening, prior to the wreck.").

⁹ **Exhibit A**, p. 20, lines 3–7 ("I then asked if he would be willing to perform HGN, if I could check his eyes. He said, "Yes." I did the HGN Test, where I saw all six clues of impairment. That, coupled with the statement of him doing cocaine, I went down to obtain a search warrant.").

¹⁰ **Exhibit A**, p. 33, lines 13–23:

Q. And I guess before I go there: Were you -- did you actually conduct a search of either the inside of -- the inside of either of the two vehicles?

cocaine and active Zoloft in his system.¹¹ The proximate cause of the crash was Mr. McLemore's failure to maintain his lane due to intoxication.¹²

III. ELEMENTS OF PLAINTIFF'S CLAIMS

The Plaintiff has asserted claims of both negligence and negligence *per se*. To prevail under her negligence theory:

A negligence claim requires proof of the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate or legal cause.

West v. E. Tenn. Pioneer Oil Co., 172 S.W.3d 545, 550 (Tenn. 2005).

A. Peering inside, I did, you know, observe what I could. In the front floorboard of the Camaro, I did observe a glass pipe that, in my experience as a police officer, have learned that that's what somebody uses to smoke crack cocaine out of.

Q. Right.

A. I did find that in their front floorboard, driver floorboard side of the Camaro.

See also **Exhibit A**, p. 20, lines 8–11 (“While I was on my way to obtain the search warrant, I talked with Officer Coleman, who told me that a pipe consistent with drug use had been located in the vehicle of the defendant on the driver’s side.”).

¹¹ **Exhibit A**, p. 21, lines 2–10:

A. It had -- that he had Setraline, which is Zoloft, present in his system. He had cocaine in his system at the rate of 70 nanograms per milliliter, and a benzo -- I can't say the word very well -- benzoylecgonine, which is the cocaine metabolite, in his system at a level of 902 nanograms per milliliter.

Q. The report shows the active Zoloft and active cocaine; correct?

A. Correct.

¹² **Exhibit A**, p. 29, lines 12–15:

Q. What do you -- what is your opinion as to the proximate cause of this crash?

A. The crash occurred due to failure to maintain lane on the part -- part of the intoxication of Mr. McLemore.

Additionally, with respect to the Plaintiff's claim for negligence *per se*:

To recover on the basis of negligence *per se*, three elements must be established. First, it must be shown that the defendant violated a statute or ordinance which "imposes a duty or prohibits an act for the benefit of a person or the public." *Nevill v. City of Tullahoma*, 756 S.W.2d 226, 232–233 (Tenn. 1988) (citing *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458, 32 S.W. 460 (1895) and *Memphis Street Railway v. Haynes*, 112 Tenn. 712, 81 S.W. 374 (1904)). Second, the proof must show that the injured party was within the class of persons whom the legislative body intended to benefit and protect by the enactment of that particular statute or ordinance. *Traylor v. Coburn*, 597 S.W.2d 319, 322 (Tenn. App. 1980) (citing *Carter v. Redmond*, 142 Tenn. 258, 218 S.W. 217 (1920)). In addition to establishing negligence *per se* by showing these two elements, the plaintiff must of course show that such negligence was the proximate cause of the injury. *Brookins v. The Round Table*, 624 S.W.2d 547, 550 (Tenn. 1981); *Alex v. Armstrong*, 215 Tenn. 276, 283, 385 S.W.2d 110, 114 (1964).

Smith v. Owen, 841 S.W.2d 828, 831 (Tenn. Ct. App. 1992).

IV. STANDARD FOR SUMMARY JUDGMENT

"Summary judgment should be granted if the nonmoving party's evidence at the summary judgment stage is insufficient to establish the existence of a genuine issue of material fact for trial." *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 265 (Tenn. 2015), *cert. denied*, 136 S. Ct. 2452 (2016). In *Rye v. Women's Care Ctr. of Memphis*, the Tennessee Supreme Court held that: "There is simply nothing in the history or text of Tennessee Rule 56 which necessitates rejecting the standards enunciated in the *Celotex* trilogy." *Id.* at 262. Accordingly, *Rye* harmonized Tennessee's summary judgment standard with its federal counterpart by formally adopting the standard outlined by the U.S. Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986), which instructs that:

If the moving party will bear the burden of persuasion at trial, that party must support its motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle it to a directed verdict if not controverted at trial. Such an affirmative showing shifts the burden of

production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a “genuine issue” for trial or to submit an affidavit requesting additional time for discovery.

Id.

V. PLAINTIFF’S ENTITLEMENT TO SUMMARY JUDGMENT

A. NEGLIGENCE

The Defendant concedes his duty of care to Mr. Bastidas and other individuals on the road to follow the traffic laws and to exercise due care to avoid causing injuries to others. *See* Doc. #8, Defendant’s Answer, ¶ 38 (“Admitted”).

The undisputed material facts of this case additionally demonstrate that in clear violation of that duty, Defendant McLemore drove 96 miles per hour—more than twice the speed limit—and did not brake before impact,¹³ all while impaired by cocaine,¹⁴

¹³ **Exhibit A**, p. 29, lines 1–6:

Q. Were you able to determine the speed of the Camaro?

A. I was. I obtained a search warrant to download the EDR of that vehicle -- excuse me -- the EDR of that vehicle. And it showed an indication that it was traveling at 96 miles an hour at impact, with no braking.

See also **Exhibit A**, p. 38, lines 3–8:

Q. All right. Now, according to the EDR on the Camaro, you said that it indicated it was traveling 96 miles an hour?

A. At impact.

Q. Was there any indication of braking at any time—

A. No.

¹⁴ **Exhibit A**, p. 21, lines 2–10:

A. It had -- that he had Setraline, which is Zoloft, present in his system. He had cocaine in his system at the rate of 70 nanograms per milliliter, and a benzo -- I can’t say the word very well -- benzoylecgonine, which is the cocaine metabolite, in his system at a level of 902 nanograms per milliliter.

resulting in the Defendant crossing over into oncoming traffic and causing a fatal head-on collision with Mr. Bastidas's vehicle. The proximate and legal cause of the crash and Mr. Bastidas's resulting death are also affirmatively established.¹⁵

Under these circumstances, Defendant McLemore's liability for negligence is uncontestable and established as a matter of law. Accordingly, summary judgment should issue regarding his liability for negligence, and the Court should schedule a hearing to determine the proper measure of damages owed to the Plaintiff for Mr. Bastidas's wrongful death.

B. NEGLIGENCE *PER SE*

Tennessee Code Annotated § 55-8-136(b) requires that:

Notwithstanding any speed limit or zone in effect at the time, or right-of-way rules that may be applicable, **every driver of a vehicle shall exercise due care by operating the vehicle at a safe speed**, by maintaining a safe lookout, **by keeping the vehicle under proper control** and by devoting full time and attention to operating the vehicle, under the existing circumstances as necessary in order to be able to see and to avoid endangering life, limb or property and to see and **avoid colliding with any other vehicle or person**, or any road sign, guard rail or any fixed object either legally using or legally parked or legally placed, upon any roadway, within or beside the roadway right-of-way including, but not limited to, any adjacent sidewalk, bicycle lane, shoulder or berm.

Id. (emphasis added).

Additionally, Tennessee Code Annotated § 55-10-401(a) provides that:

Q. The report shows the active Zoloft and active cocaine; correct?

A. Correct.

¹⁵ **Exhibit A**, p. 29, lines 12–15:

Q. What do you -- what is your opinion as to the proximate cause of this crash?

A. The crash occurred due to failure to maintain lane on the part -- part of the intoxication of Mr. McLemore.

It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park, or apartment house complex, or any other premises that is generally frequented by the public at large, while:

(1) **Under the influence of any intoxicant**, marijuana, **controlled substance**, controlled substance analogue, **drug, substance affecting the central nervous system, or combination thereof** that impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of oneself that the driver would otherwise possess;

Id. (emphasis added).

Further, Tennessee Code Annotated § 55-10-205(a) provides that: “Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property commits reckless driving.” *Id.*

By driving more than twice the legal speed limit, failing to brake, and colliding head-on with Mr. Bastidas’s vehicle after failing to maintain his lane and crossing over into incoming traffic—all while under the influence of cocaine, an illegal controlled substance—the Defendant unmistakably violated all of the above penal statutes. Further, “violation of a penal statute is negligence per se and will sustain an action for a civil wrong” where, as here, “it affirmatively appears that such violation was the proximate cause of the injury.” *Stinson v. Daniel*, 220 Tenn. 70, 76–77 (1967). *See also Cook By & Through Uithoven v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994) (“Cook also was negligent per se in purchasing and consuming alcoholic beverages in violation of T.C.A. § 57-4-203(b)(2)(A) and in driving her automobile in an intoxicated condition in contravention of T.C.A. § 55-10-401 *et seq.*”).

Consequently, Defendant McLemore’s liability for negligence *per se* under three separate penal statutes is established as a matter of law as well. Accordingly, summary

judgment should issue regarding the Defendant's liability for negligence *per se*, and the Court should schedule a hearing to determine the proper measure of damages owed to the Plaintiff for Mr. Bastidas's wrongful death.

VI. CONCLUSION

For the foregoing reasons, there is no genuine dispute that Mr. Bastidas's wrongful death was caused by Defendant's negligent and *per se* negligent conduct. Accordingly, the Plaintiff's Motion for Summary Judgment as to Defendant's liability for negligence and negligence *per se* should be **GRANTED**, and this Court should hold a prompt hearing trial to determine the appropriate measure of damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2019, a copy of the foregoing was sent via USPS mail, postage prepaid, or via email to the following parties:

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NOTICE OF HEARING ON MOTION

A hearing on the above motion will be held on the 8th day of November, 2019 at 9:00AM CST at the Davidson County Courthouse, 1 Public Square, Nashville, TN. Failure to appear or respond to this motion may result in this motion being granted.