

**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 MOTION FOR JUDGMENT ON THE PLEADINGS
AND TO DEEM ALLEGATIONS ADMITTED**

Comes now the Plaintiff, through counsel, and pursuant to Tennessee Rule of Civil Procedure 12.03, respectfully moves this Court to enter judgment on the pleadings as to her negligence and negligence *per se* claims asserted against the Defendant for the wrongful death of Joaquin Bastidas. As grounds, the Plaintiff respectfully states as follows:

I. FACTS

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 Defendant has since been criminally charged with vehicular homicide regarding Mr. Bastidas' death. See **Exhibit A**, Arrest Warrant. The warrant for the Defendant's arrest in Case No. GS880601 states as follows:

Mr. McLemore was involved in a motor vehicle collision on Nolensville Pike near Paragon Mills. Mr. McLemore crossed over into oncoming traffic and

struck another vehicle head-on. Two other parties involved in this collision were killed, and another party was seriously injured. Mr. McLemore admitted to paramedics while he was in the ambulance that he had been drinking earlier in the evening, Officer Breeding overheard him admit to drinking. Once at the hospital Mr. McLemore admitted to Officer Berens to using cocaine prior to the collision. Mr. McLemore agreed to perform HGN where he showed multiple indicators of impairment. A pipe consistent with drug use was also located in the driver side of Mr. McLemore's vehicle.

Id.

The Plaintiff filed her Complaint in this matter on July 18, 2019. *See* Doc. #1, Complaint. The Defendant ultimately filed an Answer on August 29, 2019. *See* Doc. #8, Answer. Of note, the Defendant's Answer does not deny or otherwise contest even a single factual allegation in the Plaintiff's Complaint. *See id.* at pp. 1–3. Instead, as to virtually every allegation in the Plaintiff's Complaint, the Defendant neither admitted nor denied the Plaintiff's claims,¹ and instead pleaded only that: "This Defendant asserts his 5th Amendment rights." *See id.* at ¶¶ 9–22, 24–28, 30–32, 34–37, 39–40, 42–43.

Critically, though, the Defendant does admit—either directly or else due to his failure to deny or assert his Fifth Amendment rights²—all of the following allegations in set forth in the Plaintiffs' Complaint, which alone are outcome-determinative as to the Plaintiff's negligence claim:

1. Plaintiff Berenise Sanzon is decedent Joaquin Bastidas's mother and next-of-kin. She is an adult citizen and resident of Davidson County, Tennessee.

¹ The Defendant attempts to lodge a general denial at paragraph 44 of his Answer despite declining to deny any specific allegation in the Plaintiff's Complaint. *See* Doc. #8, ¶ 44. Given that the Defendant has admitted several allegations in the Plaintiff's Complaint, however, *see id.* at ¶¶ 1–8, 23, 29, 33, 38, a general denial cannot be maintained. *See* Tenn. R. Civ. P. 8.02, May 17, 2005 Advisory Cmt. ("If the defendant intends to controvert every averment of the complaint, the defendant may do so by a general denial, but the signature of the defendant's attorney, as required by Rule 11, is the certificate of the attorney that there is good ground to support the pleading; general denials under these circumstances should be rare.") (emphasis added).

² "Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading[.]" Tenn. R. Civ. P. 8.04.

2. Defendant Howard McLemore is the criminal defendant in Case No. GS880601 (Complaint No. 2019-0090226), who wrongfully caused Mr. Bastidas's death.

...

5. The Plaintiff has the authority to bring this wrongful death action pursuant to Tenn. Code Ann. § 20-5-107(a).

...

7. On February 3, 2019, Mr. McLemore was involved in a motor vehicle collision on Nolensville Pike near Paragon Mills.
8. Mr. McLemore crossed over into oncoming traffic and struck another vehicle head-on.

...

23. Tenn. Code Ann. § 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.

...

29. Tenn. Code Ann. § 55-10-401 provides that:

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;

(2) The alcohol concentration in the person's blood or breath is eight-hundredths of one percent (0.08%) or more[.]

...

33. Tenn. Code Ann. § 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."

...

38. At all times relevant to this Complaint, the Defendant 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.

See Doc. #1, Complaint, pp. 2–6.

Additionally, rather than denying any specific allegation, the Defendant "asserts his 5th Amendment rights" with respect to multiple allegations in the Plaintiff's Complaint that affect only the pending civil dispute and for which the privilege cannot properly be invoked. For instance, the Defendant asserts his Fifth Amendment rights in response to the allegation that: "the Defendant is liable to Mr. Bastidas's heirs and next-of-kin for his wrongful death." Doc. #1, p. 3, ¶ 20; Doc. #8, ¶ 20. He further asserts his Fifth Amendment rights in response to the Plaintiff's allegations that: "With respect to each statute violated by the Defendant, Joaquin Bastidas was within the class of persons whom the state intended to benefit and protect by enacting the respective law," Doc. #1, p. 4, ¶ 22; Doc. #8, ¶ 22; "Defendant was negligent *per se* by failing to maintain a safe lookout that prevented him from striking Joaquin Bastidas's vehicle," Doc. #1, p. 4, ¶ 25; Doc. #8, ¶ 25; "Defendant was negligent *per se* by failing to keep his vehicle under proper control

such that it did not strike Joaquin Bastidas's vehicle," Doc. #1, p. 4, ¶ 26; Doc. #8, ¶ 26; "Defendant was negligent *per se* by failing to devote the requisite time and attention to operating his vehicle such that it did not strike Joaquin Bastidas's vehicle," Doc. #1, p. 4, ¶ 27; Doc. #8, ¶ 27; "Defendant was negligent *per se* by failing to see and avoid a collision with Joaquin Bastidas's vehicle," Doc. #1, p. 5, ¶ 28; Doc. #8, ¶ 28; and, most critically: "As a direct and proximate result of the Defendant's *per se* negligent conduct, Joaquin Bastidas and the Plaintiff, as next-of-kin, suffered pain, physical injuries, including death, and economic injuries[,]" Doc. #1, p. 6, ¶ 36; Doc. #8, ¶ 36. *See also* Doc. #1, p. 6, ¶ 40 ("As a direct and proximate result of the Defendant's negligent conduct, Joaquin Bastidas and the Plaintiff, as next-of-kin, suffered pain, physical injuries, including death, and economic injuries.").

II. LEGAL STANDARD

Admissions in an Answer are conclusive and binding against the pleader. *See First Tennessee Bank, N.A. v. Mungan*, 779 S.W.2d 798, 801 (Tenn. Ct. App. 1989). ("[F]actual statements in pleadings are judicial admissions being conclusive against the pleader in the proceedings in which they are filed unless they have been amended or withdrawn."); *Irvin v. City of Clarksville*, 767 S.W.2d 649, 653 (Tenn. Ct. App. 1988) ("Admissions in pleadings are judicial admissions that are conclusive on the pleader until withdrawn or amended."). *Cf. Trane Co. v. Morrison*, 566 S.W.2d 849, 851 (Tenn. 1978) ("Defendants' answer . . . was in effect a binding admission for all purposes, that plaintiff sustained an accidental injury causally connected with his employment by Trane Company, and that his injury had resulted in a medically determined permanent partial disability."). Further, "[a]verments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading[.]" Tenn. R. Civ. P. 8.04.

“After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” Tenn. R. Civ. P. 12.03. Judgment on the pleadings should be granted where the moving party “is clearly entitled to judgment.” *McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn. 1991) (citation omitted). Thus, where—as here—the admissions in a Defendant’s Answer reflect that the Plaintiff “is clearly entitled to judgment,” *id.*, judgment should be granted on the pleadings as a matter of law.

Earlier this year, two-thirds of a Court of Appeals panel concluded that a party’s “assertion of [their] Fifth Amendment privilege in [an] answer to the allegations of [a] complaint cannot, in and of itself, be taken as an admission of the allegations in accordance with Rule 8.04,” *see Smith ex rel. Agee v. Palmer*, No. M201701822COAR3CV, 2019 WL 405731, at *17 (Tenn. Ct. App. Jan. 30, 2019), notwithstanding Tennessee Rule of Civil Procedure 8.04’s mandate that “[a]verments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading[.]”³ *Id.* That panel made clear, however, that a defendant’s invocation of the privilege alone “does not end the inquiry,” because “the person who claims the privilege is not the sole judge of its validity, and, if it clearly appears that he is mistaken as to its justification, the [trial] court may require him to answer.” *Smith*, 2019 WL 405731, at *17 (quoting *Rogers v. Webster*, 776 F.2d 607, 611 (6th Cir. 1985)). Consequently, when a defendant in a civil case invokes his Fifth Amendment privilege in lieu of admitting or denying a factual allegation, the opposing party may move the Court “to deem the allegations of the complaint admitted or ask[] the court to make a

³ For appellate purposes only, the Plaintiff respectfully preserves the claim that *Smith ex rel. Agee v. Palmer*, No. M201701822COAR3CV, 2019 WL 405731 (Tenn. Ct. App. Jan. 30, 2019), was wrongly decided and should be overruled.

determination of the validity of the claim as to specific allegations.” *Id.*

III. ARGUMENT

Here, the Defendant has admitted all of the following allegations—either by admitting them directly, failing to deny them, or failing to invoke a claim of privilege regarding them—which, collectively, are outcome-determinative as to the Plaintiff’s negligence claim:

1. Plaintiff Berenise Sanzon is decedent Joaquin Bastidas’s mother and next-of-kin. She is an adult citizen and resident of Davidson County, Tennessee.
2. **Defendant Howard McLemore** is the criminal defendant in Case No. GS880601 (Complaint No. 2019-0090226), who **wrongfully caused Mr. Bastidas’s death.**

...

5. The Plaintiff has the authority to bring this wrongful death action pursuant to Tenn. Code Ann. § 20-5-107(a).

...

7. On February 3, 2019, **Mr. McLemore was involved in a motor vehicle collision on Nolensville Pike near Paragon Mills.**
8. **Mr. McLemore crossed over into oncoming traffic and struck another vehicle head-on.**

...

23. Tenn. Code Ann. § 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.

...

29. Tenn. Code Ann. § 55-10-401 provides that:

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;

(2) The alcohol concentration in the person's blood or breath is eight-hundredths of one percent (0.08%) or more[.]

...

33. Tenn. Code Ann. § 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.”

...

38. **At all times relevant to this Complaint, the Defendant 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.**

Doc. #1, Complaint, pp. 2–6 (emphases added).

Further, rather than admitting or denying the Plaintiff's claims, the Defendant has improperly invoked his Fifth Amendment privilege in response to at least the following similarly outcome-determinative allegations, which affect disputed civil matters only and collectively suffice to establish the Defendant's liability for all claims asserted against him:

20. [T]he Defendant is liable to Mr. Bastidas's heirs and next-of-kin for his wrongful death.

...

22. With respect to each statute violated by the Defendant, Joaquin Bastidas was within the class of persons whom the state intended to benefit and protect by enacting the respective law.

...

25. The Defendant was negligent *per se* by failing to maintain a safe lookout that prevented him from striking Joaquin Bastidas's vehicle.

26. The Defendant was negligent *per se* by failing to keep his vehicle under proper control such that it did not strike Joaquin Bastidas's vehicle.

27. The Defendant was negligent *per se* by failing to devote the requisite time and attention to operating his vehicle such that it did not strike Joaquin Bastidas's vehicle.

28. The Defendant was negligent *per se* by failing to see and avoid a collision with Joaquin Bastidas's vehicle.

...

36. As a direct and proximate result of the Defendant's *per se* negligent conduct, Joaquin Bastidas and the Plaintiff, as next-of-kin, suffered pain, physical injuries, including death, and economic injuries.

...

40. As a direct and proximate result of the Defendant's negligent conduct, Joaquin Bastidas and the Plaintiff, as next-of-kin, suffered pain, physical injuries, including death, and economic injuries.

Id. at pp. 3–6.

As such, the Plaintiff respectfully moves this Court “to deem the[se] allegations of the complaint admitted,” or else, “to make a determination of the validity of the claim as to specific allegations.” *Smith*, 2019 WL 405731, at *17.

Given the above admissions, all of the essential elements of the Plaintiff's negligence claim, and additionally—depending on how the Court resolves the Plaintiff's

Fifth Amendment invocation—the Plaintiff’s negligence *per se* claim have been admitted.⁴ As such, the Defendant’s liability for Joaquin Bastidas’s wrongful death under both the Plaintiff’s negligence and negligence *per se* theories is conclusively established as a matter of law. Accordingly, a judgment on the pleadings should issue against the Defendant as to both negligence counts of the Plaintiff’s Complaint, *see* Doc. #1, pp. 4–6 (setting forth negligence and negligence *per se* claims). Thereafter, a hearing should be scheduled on the damages owed to the Plaintiff and the propriety of the punitive damages claimed in Count III of the Plaintiff’s Complaint, *see id.* at pp. 6–7.

IV. CONCLUSION

For the foregoing reasons, judgment on the pleadings should issue as to the Plaintiff’s negligence and negligence *per se* claims asserted against the Defendant for the wrongful death of Joaquin Bastidas; the allegations in paragraphs 20, 22, 25, 26, 27, 28, 36, and 40 of the Plaintiff’s Complaint should be deemed admitted; and a hearing should be scheduled on the damages that the Defendant owes the Plaintiff and the propriety of punitive damages as a consequence of the Plaintiff’s reckless conduct.

⁴ *See West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 550 (Tenn. 2005) (“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.”); *Smith v. Owen*, 841 S.W.2d 828, 831 (Tenn. Ct. App. 1992) (“In order 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).”).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th 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 20th day of September, 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.