

2.
**ON JULY 20, 1995 DALE SMITH AND DONNA SMITH, INDIVIDUALLY,
D/B/A DALES'S CHARTER SERVICE, BREACHED NO DUTY TO
JOSEPHINE BUTZEN, DECEASED, AND ARE ENTITLED TO
SUMMARY JUDGMENT**

3.
**ON JULY 20, 1995 DONNA SMITH, INDIVIDUALLY, D/B/A DALES'S
CHARTER SERVICE, DID NOT DRIVE, OWN, OR CONTROL THE
COACH BUS, BREACHED NO DUTY TO JOSEPHINE BUTZEN,
DECEASED, AND IS ENTITLED TO SUMMARY JUDGMENT**

I.
BACKGROUND AND PROCEEDINGS TO DATE

On July 20, 1995, eighty-four year old JOSEPHINE BUTZEN (deceased on July 17, 1996) claims to have fallen on DALE'S CHARTER coach bus number 005 while the coach was driven in London, Ontario, Canada. As a result of her July 20, 1995 fall on the DALE'S CHARTER Coach bus, JOSEPHINE BUTZEN sustained a non-displaced hairline pelvic fracture. The Estate for JOSEPHINE BUTZEN further claims her July 17, 1996 death from emphysema and cardiac arrest was a proximate cause of the injuries she sustained on July 20, 1995.

On July 20, 1995 DALE SMITH was the driver of the DALE'S CHARTER coach bus. Bus passengers paid MAYFLOWER TOURS, INC. for the tour, not DALE'S CHARTER MAYFLOWER TOURS, INC. hired DALE'S CHARTER to drive DALE'S bus. The tour lasted three days.

As a result of JOSEPHINE BUTZEN'S July 20, 1995 fall and July 17, 1996 death, EDWINA SKELTON, Special Administrator, filed a four count wrongful death and survival complaint, (see Exhibit "1"). Counts I and II are directed against DALE SMITH and DONNA SMITH. Paragraphs 5 of both Count I and Count II allege:

5. At all times relevant, it was the duty of Defendants, Dale Smith and Donna Smith, Individually and d/b/a Dale's Charter Service and as Agents of Dale's Charter Service, as a common carrier to exercise the highest degree of care and caution in the ownership, operation, management, maintenance and control of the bus to avoid injury to the plaintiff.

Counts III and IV are directed against MAYFLOWER TOURS, INC. DALE'S CHARTER answered the Plaintiff's complaint (see Exhibit "2"), as did MAYFLOWER TOURS, INC., (see Exhibit "3"). Plaintiff answered the affirmative defenses of MAYFLOWER TOURS, INC., (see Exhibit "4"). MAYFLOWER TOURS, INC. filed a contribution cross-claim against DALE'S CHARTER, (see Exhibit "5"). DALE'S CHARTER answered the contribution cross-claim, (see Exhibit "6"). MAYFLOWER TOURS, INC. answered the affirmative defenses asserted in DALE'S CHARTER'S answer to the contribution counter-claim, (see Exhibit "7").

II. **STATEMENT OF FACTS**

On July 20, 1995 JOSEPHINE BUTZEN was 84 years old. The Defendants are DALE SMITH and DONNA SMITH, DALE'S CHARTER, and MAYFLOWER TOURS, INC. On July 20, 1995, DALE'S CHARTER was a sole proprietorship owned by DALE SMITH. DALE SMITH operates coach buses. DONNA SMITH is DALE SMITH'S wife and the office manager of DALE'S CHARTER. DONNA SMITH was not the business owner, (see Exhibit "8," Discovery Deposition of Donna Smith, p. 8; Exhibit "19," Affidavit of Donna Smith). DONNA SMITH was not driving the motor coach on the day of JOSEPHINE BUTZEN'S July 20, 1995 fall; (see Exhibit "8," p. 16; Exhibit "19," Affidavit of Donna Smith). The Co-Defendant is MAYFLOWER TOURS, INC. MAYFLOWER TOURS, INC. was a tour operator providing transportation and guide

services to the public, (see Exhibit "9," Discovery Deposition of Ronald Smith, deposition Exhibit "1," Affidavit).

On or about June 10, 1995 JOSEPHINE BUTZEN purchased a \$585.00 bus vacation package entitled "Toronto Theatre and Niagara Falls" tour from Mayflower Tours, Inc. and was issued a receipt, (see Exhibit "9," Discovery Deposition of Ronald Smith, Deposition Exhibit "5"). The package was a four day coach bus vacation including three nights lodging, two plays and four meals, (see Exhibit "10," Discovery Deposition of Dale Smith, Deposition Exhibit "15" - Itinerary.) The tour left on July 20, 1995 and was to return July 23, 1995. The highlight of the trip was the Donnie Osmond Show. For this trip, MAYFLOWER TOURS, INC. paid DALE'S CHARTER \$2,300 for the tour, (see Exhibit "8," Discovery Deposition of Ronald Smith, p. 87).

Bus passengers booked their trip through MAYFLOWER TOURS, INC., and MAYFLOWER TOURS, INC. "reserved the right to accept, decline, or retain any person as a member of the tour," (see Exhibit "9," Discovery Deposition of Ronald Smith, ps. 72-79). The trip was arranged based on a special agreement between DALE'S CHARTER and MAYFLOWER TOURS, INC., (see Exhibit "9," Discovery Deposition of Ronald Smith, p. 93).

The tour left from the Chicago area the morning of July 20, 1995 with forty senior citizens, mostly ladies. Additionally, MAYFLOWER TOURS, INC. had two tour trainees on board, (see Exhibit "11," Discovery Deposition of Pat Mason, p. 89). Pat Mason was the tour director from MAYFLOWER TOURS, INC., (see Exhibit "11," Discovery Deposition of Pat Mason, p. 9), and DALE SMITH was the only employee of DALE'S CHARTER on the bus, (see Exhibit "10," Discovery Deposition of Dale Smith, p. 9). DALE SMITH drove motor coach No. 05, owed by DALE'S CHARTER, which was MCI bus No. 005, purchased in 1993, (see Exhibit "10,"

Discovery Deposition of Dale Smith, p. 10). At the time of the accident, the coach bus was unaltered and unmodified since its purchase from the dealer or factory, (see Exhibit "10," Discovery Deposition of Dale Smith, p. 10; Exhibit "18," Affidavit of Dale Smith).

The tour started on July 20, 1995, and JOSEPHINE BUTZEN was on the bus. As bus driver, DALE SMITH did not have the responsibility of giving safety instructions, (see Exhibit "9," Discovery Deposition of Ronald Smith, Deposition Exhibit "1"; Exhibit "11," Discovery Deposition of Pat Mason, ps. 37, 116). Safety instructions were given by MAYFLOWER TOURS, INC. director, Pat Mason, (see Exhibit "9," ps. 34, 35, 37, 85, 86, 111, 116). DALE SMITH'S job was to drive the bus, (see Exhibit "12," Discovery Deposition of Anthony George, ps. 32-37).

Bus passengers Audrey Bischoff, Margaret Wright, Audrey Jasin, Leah Templin, and Candy Rogers provided evidence depositions.

According to Audrey Bischoff, JOSEPHINE BUTZEN boarded the DALE'S CHARTER bus the morning of July 20, 1995, (see Exhibit "13," Evidence Deposition of Audrey Bischoff, p. 13). The bus was new. The bus was proceeding to London, Ontario, Canada. According to Audrey Bischoff, the bus was heading into London, Ontario, Canada at about 6:00 p.m., (Exhibit "13," Evidence Deposition of Audrey Bischoff, p. 15). Eighty-four year old JOSEPHINE BUTZEN got up from her chair to use the bus bathroom, (Exhibit "13," Evidence Deposition of Audrey Bischoff, p. 17). JOSEPHINE BUTZEN was on her way back to her seat, (Exhibit "13," Evidence Deposition of Audrey Bischoff, p. 17). JOSEPHINE BUTZEN walked two rows forward from the bathroom (see Exhibit "13," Evidence Deposition of Audrey Bischoff, p. 19). The bus stopped, (see Exhibit "13," Evidence Deposition of Audrey Bischoff, p. 20). Audrey Bischoff watched JOSEPHINE BUTZEN fall down. Audrey Bischoff does not know why the bus stopped, (see Exhibit "13,"

Evidence Deposition of Audrey Bischoff, p. 69).

Margaret Wright testified there were about 40 people on the bus and MAYFLOWER'S tour director was on board, (see Exhibit "14," Evidence Deposition of Margaret Wright, ps. 6, 7). The first day, before they stopped for the night, Margaret Wright witnessed [JOSEPHINE BUTZEN] fall down, (Exhibit "14," Evidence Deposition of Margaret Wright, p. 9). Three minutes before the bus was pulling into the Hotel, Pat Mason announced to all passengers they were near the hotel, (Exhibit "14," Evidence Deposition of Margaret Wright, p. 17). Just before arriving at the hotel, she saw JOSEPHINE BUTZEN get up. Wright testified that JOSEPHINE BUTZEN fell when the coach was stopping, (Exhibit "14," Evidence Deposition of Margaret Wright, p. 10). She had no knowledge DALE SMITH knew he would need to apply his brakes when JOSEPHINE BUTZEN fell, (Exhibit "14," Evidence Deposition of Margaret Wright, p. 25). She further stated the bus was not speeding; did not strike any cars, nor did the bus brakes squeal, (Exhibit "14," Evidence Deposition of Margaret Wright, p. 38). The bus was slowing down as it was coming to a corner, (Exhibit "14," Evidence Deposition of Margaret Wright, ps. 30-38). The bus did not slam its brakes, (Exhibit "14," Evidence Deposition of Margaret Wright, p. 19). She had no criticism of DALE SMITH'S driving, (Exhibit "14," Evidence Deposition of Margaret Wright, p. 25).

Audrey Jasin gave her evidence deposition, (see Exhibit "15," Evidence Deposition of Audrey Jasin). She testified JOSEPHINE BUTZEN fell while the bus was stopping, (Exhibit "15," Evidence Deposition of Audrey Jasin, p. 18). No other passengers were ejected from their chairs, nor was the bus speeding, (Exhibit "15," Evidence Deposition of Audrey Jasin, p. 22). She was not of the opinion the bus was driving too fast at the time BUTZEN fell, (Exhibit "15," Evidence Deposition of Audrey Jasin, ps. 23, 28, 29). While the bus was stopping, she did not hear the squeal

of tires, nor did the bus strike any other cars, (Exhibit "15," Evidence Deposition of Audrey Jasin, p. 23). She had no criticism of the way DALE SMITH drove the bus, (Exhibit "15," Evidence Deposition of Audrey Jasin, p. 20).

Leah Templin also gave her evidence deposition. She testified her fare was paid directly to MAYFLOWER TOURS, INC., (see Exhibit "16 ," Evidence Deposition of Leah Templin, p. 17). She testified the tour director reminded passengers to stay in their seats while the coach bus was moving because the bus might have to make a sudden stop, (Exhibit "16 ," Evidence Deposition of Leah Templin, p. 16).

At the time JOSEPHINE BUTZEN fell, they were on their way to the Howard Johnson's Motel in London, Ontario, Canada, (Exhibit "16 ," Evidence Deposition of Leah Templin, p. 19). The bus was moving slowly in city traffic, and JOSEPHINE BUTZEN was up moving around, (Exhibit "16 ," Evidence Deposition of Leah Templin, p. 19). The bus stopped suddenly, (Exhibit "16," Deposition of Leah Templin, p. 20). Leah Templin was not thrown from her seat; no other passengers were thrown from their seats, (Exhibit "16 ," Evidence Deposition of Leah Templin, ps. 21, 29). Leah Templin had no criticism of the way DALE SMITH drove the bus, (Exhibit "16," Evidence Deposition of Leah Templin, p. 24).

Bus passenger Candy Rogers also provided an evidence deposition. Candy Rogers boarded the bus on Michigan City, Indiana. After Candy Rogers got on board, MAYFLOWER TOURS, INC. director, Pat Mason, told passengers it was dangerous to walk down the aisles while the bus was moving, (see Exhibit "17," Evidence Deposition of Candy Rogers, ps. 7, 32).

Candy Rogers was seated a little behind half-way of the bus, (Exhibit "17," Evidence Deposition of Candy Rogers, p. 9). She saw JOSEPHINE BUTZEN "tooling down the aisle" toward

the rear of the bus, not holding onto anything, (Exhibit "17," Evidence Deposition of Candy Rogers, ps. 10, 1, 16). JOSEPHONE BUTZEN came back up the aisle from the restroom, (Exhibit "17," Evidence Deposition of Candy Rogers, p. 11). JOSEPHINE BUTZEN fell next to Candy Rogers when the bus was stopping, (Exhibit "17," Evidence Deposition of Candy Rogers, ps. 11, 12). There was nothing unusual about the stop, (Exhibit "17," Evidence Deposition of Candy Rogers, p. 12). The bus was not speeding or driving erratically; she had no criticism of the way DALE SMITH drove the bus, (Exhibit "17," Evidence Deposition of Candy Rogers, p. 22). At the time the bus stopped, she did not hear the squealing of the tires, (Exhibit "17," Evidence Deposition of Candy Rogers, p. 23). No other passengers were thrown from their seats, (Exhibit "17," Evidence Deposition of Candy Rogers, p. 23). The bus did not hit anything, (Exhibit "17," Evidence Deposition of Candy Rogers, p. 23).

MAYFLOWER TOURS, INC.'S tour director, Pat Mason, provided her discovery deposition, (see Exhibit "11," Discovery Deposition of Pat Mason). Fares were paid by passengers to MAYFLOWER TOURS, INC., (Exhibit "11," Deposition of Pat Mason, p. 118). The trip started in Illinois and ended up in Canada the same day, (Exhibit "11," Discovery Deposition of Pat Mason, p. 116). At the time of JOSEPHINE BUTZEN'S fall, the bus was approaching the hotel in London, Ontario, (Exhibit "11," Discovery Deposition of Pat Mason, p. 27). The coach had over forty passengers, (Exhibit "11," Discovery Deposition of Pat Mason, p. 36). After all passengers were on-board, Pat Mason told passengers to stay seated while the coach was moving, especially when the bus was in a stop-and-go area, (Exhibit "11," Discovery Deposition of Pat Mason, ps. 34-35, 85, 86, 111). DALE SMITH was not required to give passenger safety instructions, (Exhibit "11," Discovery Deposition of Pat Mason, ps. 37, 116).

Pat Mason told passengers they were coming to the hotel, (Exhibit "11," Discovery Deposition of Pat Mason, ps. 55, 58). She did not see JOSEPHINE BUTZEN get up, (Exhibit "11," Discovery Deposition of Pat Mason, p. 54). They were driving on an access road a couple of blocks from the hotel, (Exhibit "11," Discovery Deposition of Pat Mason, p. 56). The route was determined by MAYFLOWER TOURS, INC., (Exhibit "11," Discovery Deposition of Pat Mason, p. 57).

JOSEPHINE BUTZEN fell after the bus was stopping for a stop light, (Exhibit "11," Discovery Deposition of Pat Mason, ps. 65-66). The fall took place after Pat Mason made the announcement they were near the hotel, (Exhibit "11," Discovery Deposition of Pat Mason, p. 87).

She had no criticism of DALE SMITH'S driving, (Exhibit "11," Discovery Deposition of Pat Mason, p. 16). At the time the bus was stopping for the stoplight, DALE SMITH'S driving was not erratic or irregular, (Exhibit "11," Discovery Deposition of Pat Mason, p. 117). At the time the bus stopped for the light, she did not hear the squealing of brakes; no other passengers were ejected from their seats, (Exhibit "11," Discovery Deposition of Pat Mason, p. 117). The bus did not hit anything, (Exhibit "11," Discovery Deposition of Pat Mason, ps. 117, 119).

DALE SMITH testified in his deposition that DALE'S CHARTER SERVICE was a sole proprietorship from 1979 through 1999, He was the sole proprietor, (Exhibit "10," Discovery Deposition of Dale Smith, p. 5, 80). He was the only DALE'S CHARTER SERVICE employee on the bus, (Exhibit "10," Discovery Deposition of Dale Smith, p. 9).

Immediately before JOSEPHINE BUTZEN'S fall, DALE SMITH was traveling on Wellington Road in London, Ontario, after having exited the highway, (Exhibit "10," Discovery Deposition of Dale Smith, p. 14). They were on their way to the hotel, (Exhibit "10," Discovery Deposition of Dale Smith, p. 31). Traffic was moderate, (Exhibit "10," Discovery Deposition of Dale

Smith, p. 18). The intersection where he eventually stopped was 100 yards away when he first saw it, (Exhibit "10," Discovery Deposition of Dale Smith, p. 17). The light was green, (Exhibit "10," Discovery Deposition of Dale Smith, p. 19). His speed was 25 to 30 miles per hour; no vehicles did anything unusual in front of him, (Exhibit "10," Discovery Deposition of Dale Smith, ps. 21-22, 77). He slowed to 25 miles per hour, and 45 feet from the intersection, the traffic light turned from green to yellow, (Exhibit "10," Discovery Deposition of Dale Smith, ps. 26, 27). He applied his brakes, (Exhibit "10," Discovery Deposition of Dale Smith, p. 26). The bus came to a stop 5 feet from the intersection for the red light, (Exhibit "10," Discovery Deposition of Dale Smith, p. 28).

The bus they were on was bus No. 005, a 1993 MCI coach he purchased new in 1993, (Exhibit "10," Discovery Deposition of Dale Smith, p. 47).

ARGUMENT

1.

DALE'S CHARTER WAS A PRIVATE CARRIER, NOT A COMMON CARRIER, AND IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S ALLEGATIONS **DALE'S OPERATED AS A COMMON CARRIER**

On July 20, 1995, DALE'S CHARTER operated as a private carrier, owing its passengers only the duty of ordinary care. The distinction between a common carrier and a private carrier, and the differing duties of care owed by each is found in *Doe v. Rockdale School District* 287 Ill. App.3d 791,679 N.E.2d 771 (3rd Dist., 1997). In *Doe v. Rockdale School District* 287 Ill. App.3d 791,679 N.E.2d 771,773 (3rd Dist., 1997), the court stated:

"A common carrier undertakes for hire to carry all persons indifferently, who may apply for passage so long as there is room and there is no legal excuse for refusal" *Hantel.*, 323 Ill.App. 364, 55 N.E.2d 710. "...A private cartier by contrast undertakes by special agreement, in a particular instance only, to transport persons or

property from one place to another either gratuitously or for hire Long, 187 Ill.App.3d 614, 543 N.E.2d 525. A private carder makes no public profession to carry all who apply for carriage, transports only by special agreement, and is not bound to serve every person who may apply” Meyer, 333 Ill. App. 301, 77 N.E.2d 454.

In Doe v. Rockdale School District (see general, Id.), a mother filed suit against Crawford Bus Lines and Rockdale School District when her child was sexually assaulted on Crawford Bus Lines school bus. Rockdale School District had an agreement with Crawford Bus Lines wherein Crawford Bus Lines would transport Rockdale School District’s special education students out of county. Under the terms of the agreement between the Rockdale School District and Crawford Bus Lines, Crawford Bus Lines agreed to transport Rockdale School District's special education students at an agreed rate for and agreed period of time Doe v. Rockdale School District 679 N.E.2d at 773. The contract between Rockdale School District and Crawford Bus Lines also did not provide for the transportation of any additional passengers or cargo. Before the court was the issue whether the Rockdale School District, as Crawford Bus Lines’ alleged principal, was operating as a common carrier. Id. at 773. In finding that neither Rockdale School District nor Crawford Bus Lines were acting as common carders, the court wrote:

“...by specific agreement, Crawford transported only special education students between home and school. Crawford, like the defendant in Hantel, provided a specific service to a specific group of people, namely the School District's special education students” Doe v. Rockdale School District 679 N.E.2d at 773.

Similar to the facts and holding of Doe v. Rockdale School District 287 Ill. App.3d 791,679 N.E.2d 771 (3rd Dist., 1997), on July 20, 1995, DALE SMITH undertook, by special agreement with MAYFLOWER TOURS, INC., to transport MAYFLOWER TOURS, INC. passengers for the limited three day tour, (see Exhibit “9,” Discovery Deposition of Ronald Smith, p. 93).

MAYFLOWER TOURS, INC., and not DALE'S CHARTER, retained the right to deny passage to any or all who applied, (Exhibit "9," Discovery Deposition of Ronald Smith, p. 94). DALE SMITH'S relationship to MAYFLOWER TOURS, INC.'S passengers did not make DALE SMITH a common carrier. On this tour, DALE SMITH did not undertake to carry all passengers indifferently who may apply, because MAYFLOWER TOURS, INC. retained the right to decide who went on the trip, (Exhibit "9," Discovery Deposition of Ronald Smith, Deposition Exhibit "1"). DALE'S CHARTER SERVICE transported MAYFLOWER TOURS, INC.'S passengers subject to the agreement MAYFLOWER TOURS, INC. had with its passengers. This tour was arranged by MAYFLOWER TOURS, INC. Passengers paid MAYFLOWER TOURS, INC., and MAYFLOWER TOURS, INC. paid DALE'S CHARTER, (see Exhibit "12," Discovery Deposition of Anthony George, ps. 19-20).

Here, DALE'S CHARTER, in its special agreement with MAYFLOWER TOURS, INC. was to transport MAYFLOWER TOURS, INC.'S passengers for \$2,300.00 for three days to and from Canada. DALE'S CHARTER was not carrying, nor did it hold itself out to carry members of the general public not associated with MAYFLOWER TOURS, INC.'S tour.

Where a carrier dedicates the full capacity of his vessel to one shipper's cargo, it is presumed in the absence of other evidence that the ship is a private carrier. See: *J. Aron & Company v. Cargill Marine Terminal* 998 F.Supp. 700 (E.D. La., 1998). Here, the passengers on-board DALE'S CHARTER SERVICE'S bus were exclusively MAYFLOWER TOURS INC. passengers. These passengers were transported via the private agreement between MAYFLOWER TOURS, INC. and DALE'S CHARTER, and the trip was of limited duration, (see Exhibit "18," Affidavit of Dale Smith).

Accordingly, Plaintiff has failed to sustain her burden of proof that during the “Toronto Ilaeatre and Niagara Falls” tour, DALE'S CHARTER operated as a common carrier. As to Count I and Count II of her Complaint at Law, movants request this court grant summary judgment, finding that DALE’S CHARTER operated as a private contract carder, and not a common carrier, owing JOSEPHINE BUTZEN the duty of ordinary care.

ARGUMENT 2.

DALE SMITH AND DONNA SMITH, INDIVIDUALLY, D/B/A DALES'S CHARTER SERVICE, BREACHED NO DUTY TO JOSEPHINE BUTZEN AND ARE ENTITLED TO SUMMARY JUDGMENT

Without any factual showing of negligence, Plaintiff attempts to hold DALE’S CHARTER liable for JOSEPHINE BUTZEN’S fall when DALE SMITH was stopping his bus for a stoplight. No Illinois precedent exists establishing DALE’S CHARTER can be liable for coming to a sudden stop without factual testimony establishing the stop was unusually violent or more than a usual and ordinary stop incident to operating a bus. *Malone v. Chicago Transit Authority* 76 Ill.App.2d 451 222 N.E.2d 93, 95 (1st Dist., 1966)¹.

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In cases involving the negligent stopping of a bus, in order to survive summary judgment, most states require the plaintiff to not only establish there was a jerk or stop, but that the jerk or stop was extraordinary and beyond the passenger's reasonable anticipation. *Meussner v. Port Authority of Allegheny County* 745 A.2d 719 (Pa., 2000); *Urquhart v. New York City Transit Authority* 85 N.Y.S.2d 828, 647 N.E.2d 1346 (N.Y. App. Div., 1995) [holding: “To establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger when the vehicle comes to a halt, the plaintiff must establish that the stop caused a jerk or lurch that was unusual and violent”]; *Neighbarger v. Central Ohio Transit Authority* 9 Ohio App.3d 83,458 N.E.2d 388 (Ohio, 1992) [holding: “the mere occurrence of jerking in the operation of the carder, absent evidence of an unusual suddenness, force, or violence, is not evidence of negligence”]; and *Blackman v. Miami Transit Company* 125 So.2d, 128 (Fla., 1960) [holding: “the sudden stopping of the bus was not a basis for a finding that the bus was negligently operated, in the absence of other evidence, relating to the stop, of some act of commission or omission by the driver which together with the ‘sudden’ stop would suffice to show a violation of the carrier’s duty”].

Five bus passengers have been deposed: Audrey Bischoff, Margaret Wright, Audrey Jasin, Leah Templin, and Candy Rogers. Two party occurrence witnesses, MAYFLOWER TOURS, INC.'S director, Pat Mason, and DALE SMITH provided their depositions.

At about 6:00 p.m. on July 20, 1995, eight-four year old JOSEPHINE BUTZEN got up to use the bathroom while the coach was moving, (Exhibit "13," Evidence Deposition of Audrey Bischoff, ps. 7, 67-70). JOSEPHINE BUTZEN was 5'4", weighing 160 lbs., (Exhibit "13," Evidence Deposition of Audrey Bischoff, p. 97). JOSEPHINE BUTZEN came back from the bathroom, the bus lurched, and JOSEPHINE BUTZEN fell into a bus seat, (Exhibit "13," Evidence Deposition of Audrey Bischoff, p. 72). Establishing the stop was not unusually violent, JOSEPHINE BUTZEN was not thrown either forward or down on the floor, (Exhibit "13," Evidence Deposition of Audrey Bischoff, ps. 20, 72). Audrey Bischoff offered no explanation why the bus stopped, nor did she establish DALE SMITH knew he was going to stop, (Exhibit "13," Evidence Deposition of Audrey Bischoff, p. 82). Other than testifying the bus "lurched forward" or stopped suddenly, Audrey Bischoff offered no facts showing the reason or circumstances of Dale Smith's stop was as a result of negligent operation.

The testimony of *Margaret* Wright, Audrey Bischoff, and Leah Templin lend no factual support to Plaintiff's allegations of negligence. Margaret Wright said "for some reason, he [DALE SMITH] had to apply his brakes and JOSEPHINE BUTZEN went down, (Exhibit "14," Evidence Deposition of Margaret Wright, p. 11). She did not see why the bus stopped, nor did she feel it was speeding or driving too fast for conditions, (Exhibit "14," Evidence Deposition of Margaret Wright, ps. 21-28). All Margaret Wright offered was that the bus was slowing down when JOSEPHINE BUTZEN fell, (Exhibit "14," Evidence Deposition of Margaret Wright, p. 30, 32). Audrey Jasin

did not see JOSEPHINE BUTZEN fall down and was not familiar with traffic conditions, (Exhibit “15,” Evidence Deposition of Audrey Jasin, ps. 9, 22). Like all other witnesses, she testified the bus was not speeding or driving too fast, (Exhibit “15,” Evidence Deposition of Audrey Jasin, ps. 22, 23, 28). Leah Templin did not see JOSEPHINE BUTZEN fall down and confirmed the bus was not driving too fast for traffic condition, (Exhibit “16,” Evidence Deposition of Leah Templin, ps. 9, 20).

Candy Rogers testified DALE SMITH was not driving erratically or speeding when JOSEPHINE BUTZEN fell. She factually confirmed the bus was stopping for a stop light and that JOSEPHINE BUTZEN fell into her lap, (Exhibit “17,” Evidence Deposition of Candy Rogers, p. 12).

MAYFLOWER TOURS, INC.’S tour director, Pat Mason, again confirmed that DALE SMITH was not driving erratically and offered no criticism of DALE SMITH’S driving, (Exhibit “10,” Discovery Deposition of Dale Smith, p. 116).

The Plaintiff has made no showing through DALE SMITH that DALE SMITH was negligent while operating his coach, (Exhibit “10,” Discovery Deposition of Dale Smith, ps. 21-26). DALE SMITH testified his coach was 45 feet back from the intersection when the light turned from green to yellow, (Exhibit “10,” Discovery Deposition of Dale Smith, p. 27), and he was traveling 25 miles per hour, (Exhibit “10,” Discovery Deposition of Dale Smith, p. 28). When the light turned yellow, he was 45 feet from the intersection. He applied his brakes, stopping his bus before going through a red light, (Exhibit “10,” Discovery Deposition of Dale Smith, p. 28).

Under the facts of this case, Plaintiff’s proof that DALE SMITH’S stop was unusual or violent must consist of more than a mere characterization that DALE SMITH’S stop was “sudden.” No witnesses have provided any facts showing DALE SMITH was driving erratically or too fast for

conditions. This is further confirmed because JOSEPHINE BUTZEN was not thrown forward down the coach, but appeared to fall into a bus seat in front of her.

The only facts brought out are that DALE SMITH stopped his bus to avoid going through a yellow light. While the stop is described as “sudden” or “quick,” there is no evidence suggesting DALE SMITH’S speed was excessive. Again, no other passengers were thrown from their seats, and it is undisputed that JOSEPHINE BUTZEN fell while she was walking within a moving coach bus.

The stop which occurred here was incidental to ordinary travel. Ruling out stops of extraordinary violence, the stopping of DALE SMITH’S bus to avoid going through a red light is not the basis for finding the bus was negligently operated. In the absence of other evidence relating to DALE SMITH’S stop of some act or omission by DALE SMITH, which together with the “sudden” stop is sufficient to show a breach of DALE SMITH’S duty to MAYFLOWER TOURS, INC.’S passengers, there is no breach of duty.

WHEREFORE, as there is no triable issue of fact sustaining the allegations of Count I and Count II of Plaintiff's complaint, the Defendants, DALE SMITH and DONNA SMITH, individually, d/b/a DALES’S CHARTER SERVICE, respectfully request this Honorable Court enter a summary judgment in their favor and against the Plaintiff.

ARGUMENT

3.

ON JULY 20, 1995, DONNA SMITH DID NOT DRIVE, OWN, OR CONTROL THE COACH BUS, BREACHED NO DUTY TO JOSEPHINE BUTZEN, DECEASED,

AND IS ENTITLED TO SUMMARY JUDGMENT

In order to hold DONNA SMITH responsible for JOSEPHINE BUTZEN'S fall, plaintiff must establish DONNA SMITH owed a duty to JOSEPHINE BUTZEN and breached the duty owed to JOSEPHINE BUTZEN. Similarly, it must be established DONNA SMITH'S actions or inactions were a proximate cause of JOSEPHINE BUTZEN'S fall.

Plaintiff alleges in her complaint DONNA SMITH was the owner, agent, or employee of DALE'S CHARTER SERVICE, (Exhibit "1," Par. 1).

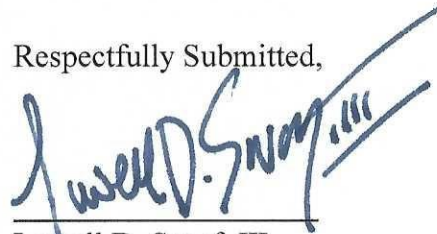
DALE'S CHARTER SERVICE is a sole proprietorship owned by DALE SMITH, (Exhibit "10," Discovery Deposition of Dale Smith, ps. 2-16; Exhibit "18," Affidavit of Dale Smith; Exhibit "19," Affidavit of Donna Smith). DONNA SMITH does not own the assets of DALE'S CHARTER SERVICE. DONNA SMITH did not drive the bus. DONNA SMITH was not on the bus. DONNA SMITH did not control or supervise DALE SMITH while he drove the bus in Canada. DONNA SMITH was the office manager of DALE'S CHARTER SERVICE. DONNA SMITH did not set the trip itinerary, nor select the bus route taken on the Niagra Falls trip, nor have anything to do with DALE SMITH'S driving or JOSEPHINE BUTZEN'S fall.

It is incumbent upon the Plaintiff to factually establish that DONNA SMITH was responsible for JOSEPHINE BUTZEN'S falling on DALE SMITH'S bus when DALE SMITH was stopping for a red light. The Plaintiff has not established DONNA SMITH knew or should have known the bus would stop; that DONNA SMITH exercised control over DALE SMITH, or that DONNA SMITH had any involvement with JOSEPHINE BUTZEN'S fall. Here, Plaintiff has not established any causal connection between DONNA SMITH acting as an office manager of DALE'S CHARTER SERVICE and JOSEPHINE BUTZEN'S fall.

WHEREFORE, as there is no triable issue of fact sustaining the allegations of Count I and Count II of Plaintiff's complaint against DONNA SMITH, the Defendant, DONNA SMITH, individually, d/b/a DALES'S CHARTER SERVICE, respectfully requests this Honorable Court enter a summary judgment in favor of DONNA SMITH, individually, d/b/a DALE'S CHARTER SERVICE.

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Respectfully Submitted,



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