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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Jamien Rae Jensen, *et al.*,

Plaintiffs,

vs.

EXC, Inc., *et al.*,

Defendants.

) No. 3:15-cv-08019-SPL

) **PLAINTIFFS' MOTION FOR**
) **SUMMARY JUDGMENT**

) **ORAL ARGUMENT REQUESTED**

Plaintiffs, Jamien Rae Jensen and Chavis Johnson, Personal Representative of the Wrongful Death Estate of Butch C.J., bring this motion for summary judgment on liability pursuant to Fed. Rule of Civ. P. 56 and LRCiv 56.1. This case has a long history. But the salient point in time for this motion is what occurred on Highway 160

1 in Kayenta, Arizona, on September 21, 2004. The undisputed facts establish that the bus
2 was driven in violation of numerous and various duties owed and that at various points
3 in the timeline, compliance with applicable duties would have avoided the collision.
4 The undisputed facts establish the reckless and wanton nature of the driving of the bus.
5 The violations of various traffic statutes constitute negligence per se.

6 Because there is no question as to liability, this Court should grant summary
7 judgment on liability and schedule a trial on damages.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. Facts.**

10 Plaintiff's Statement of Undisputed Material Facts (SOF) encompasses the
11 significant facts and need not be repeated here. A brief summary is set forth.

12 On the morning of September 21, 2004, Defendant Conlon was driving a 57-
13 person van on a tour with 39 other occupants and their luggage from the Hampton Inn in
14 Kayenta (SOF 1, 4, 6, 8). The tour was heading west to the Grand Canyon (SOF 10).

15 Before turning onto westbound Highway 160, Mr. Conlon saw an SUV driven by
16 Bert Wisner to his east that pull out onto westbound Highway 160 within a few hundred
17 feet of Mr. Conlon's position (SOF 11, 12, 13). Despite knowing that he had a slower
18 vehicle and knowing that the highway narrowed to a single lane 1500 feet to the west,
19 Mr. Conlon pulled out of the driveway before Mr. Wisner had passed the driveway (SOF
20 15, 17, 18, 20). Mr. Conlon almost immediately pulled into the left lane in front of the
21 faster-moving SUV (SOF 19). The SUV had to go to the right to pass the bus (SOF 20,
22 21). Mr. Conlon was paying attention to Mr. Wisner on his right side and improperly
23 allowed the bus to enter a designated two-way left turn lane occupied by a vehicle
24 driven by Butch Johnson (SOF 28, 29, 30, 32, 33).

25 Decedent Butch Johnson was driving eastbound with his wife Jamien Rae Jensen
26 and child, Dakota Jensen, in their Pontiac. Mr. Johnson was in the center turn lane prior
27 to the collision (SOF 32). Mr. Conlon saw Mr. Johnson at the last moment and veered
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1 the bus sharply to the right (SOF 23). The bus crashed into the left front of Mr.
 2 Johnson's vehicle, killing him instantly and injuring Ms. Jensen and their son (SOF 24).

3 The area of impact occurred in the center of the road, in the area close to the line
 4 between the left westbound travel lane and the turn lane (SOF 25). The physical
 5 evidence and Mr. Conlon's veering of the bus establish that Mr. Conlon was driving the
 6 bus outside of his travel lane and in the center turn lane prior to veering and immediately
 7 prior to impact (SOF 29, 30, 33). The defense expert himself, who only opined on the
 8 locations of the vehicles at the point of impact and not before, testified that the point of
 9 impact was 1.5 to 2 feet in the west travel lane from the line between that lane and the
 10 center turn lane (SOF 25, 37). He further testified that the point of impact between the
 11 bus and the car was 2-3 feet in from the bus' driver's side edge of the bumper in the
 12 front (SOF 25, 37). The defense testimony, when combined with Mr. Conlon's own
 13 admission that he took evasive action before impact, as confirmed by Mr. Wisner,
 14 establishes that Mr. Conlon had the bus well into the center turn lane before impact
 15 (SOF 25, 29, 30, 33, 37).

16 **II. Because there is no genuine issue of material fact that Conlon committed**
 17 **multiple acts of negligence and negligence per se and that those acts caused**
 18 **this accident, Plaintiffs are entitled to judgment as a matter of law and a**
 19 **trial on damages.**

20 A. Summary judgment.

21 Summary judgment is appropriate when there is no genuine dispute as to
 22 any material fact and, viewing those facts in a light most favorable to the
 23 nonmoving party, the movant is entitled to judgment as a matter of law.
 24 Fed. R. Civ. P. 56(a). Summary judgment may also be entered "against a
 25 party who fails to make a showing sufficient to establish the existence of an
 element essential to that party's case, and on which that party will bear the
 burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
 (1986). A fact is material if it might affect the outcome of the case, and a
 dispute is genuine if a reasonable jury could find for the nonmoving party
 based on the competing evidence. *Anderson v. Liberty Lobby, Inc.*, 477
 U.S. 242, 248 (1986).

26 *Thompson v. City of Lake Havasu City*, No. CV-16-08271-PCT-DLR, 2018 WL 803422,
 27 at *2 (D. Ariz. Feb. 9, 2018).

1 B. Conlon committed multiple acts of negligence, negligence per se, and
 2 gross negligence.

3 1. Negligence elements.

4 To establish a claim for negligence, a plaintiff must prove four elements:
 5 (1) a duty requiring the defendant to conform to a certain standard of care;
 6 (2) a breach by the defendant of that standard; (3) a causal connection
 7 between the defendant's conduct and the resulting injury; and (4) actual
 8 damages.

9 *Gipson v. Kasey*, 214 Ariz. 141, 143, 150 P.3d 228, 230 (2007)(citation omitted). A
 10 gross-negligence claim additionally requires a showing of “[g]ross, willful, or wanton
 11 conduct.” *Noriega v. Town of Miami*, 243 Ariz. 320, 407 P.3d 92, 98 (Ct. App. 2017),
 12 review denied (Apr. 12, 2018)(citation omitted).

13 Violations of statutes “enacted for the protection and safety of the public is ...
 14 negligence per se.” *Good v. City of Glendale*, 150 Ariz. 218, 221, 722 P.2d 386, 389 (Ct.
 15 App. 1986). The undisputed facts establish negligence, negligence per se, and gross
 16 negligence.

17 2. Duties owed.

18 Conlon owed various duties to drive in a safe and prudent manner. In general, a
 19 driver has a duty to keep a proper lookout and yield the right of way. *Davis v. Weber*, 93
 20 Ariz. 312, 318, 380 P.2d 608, 612 (1963). A driver has “the duty under all
 21 circumstances and at all times to be vigilant and anticipate the presence of others and to
 22 keep his vehicle under such control as would enable him to avoid collision with other
 23 persons using proper care and caution.” *Brooks v. De La Cruz*, 12 Ariz. App. 591, 595,
 24 473 P.2d 793, 797 (1970)(citations omitted).

25 Conlon was required to yield to the Wisner vehicle. A.R.S. § 28-774 (“The driver
 26 of a vehicle about to enter or cross a highway from a private road or driveway shall
 27 yield the right-of-way to all closely approaching vehicles on the highway.”); *see also*
 28 A.R.S. § 28-856 (“The driver of a vehicle emerging from an alley, driveway or building
 within a business or residence district shall ... 3. On entering the roadway, yield the
 right-of-way to all closely approaching vehicles on the roadway.”). As the driver of a

commercial vehicle, Conlon independently had this duty as a matter of commercial driving standards. (SOF 39).

Upon pulling out onto Highway 160, Conlon was obligated to remain in the right lane. A.R.S. § 28-721.A provides:

On all roadways of sufficient width, a person shall drive a vehicle on the right half of the roadway except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing the movement.
2. When the right half of a roadway is closed to traffic while under construction or repair.
3. On a roadway divided into three marked lanes for traffic under the rules applicable on the roadway.
4. On a roadway designated and signposted for one-way traffic.

Conlon was required to keep his slower moving vehicle in the right lane. A.R.S. § 28-721.B (“On all roadways, a person driving a vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall drive the vehicle in the right-hand lane then available for traffic or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.”).

Conlon had the duty to keep the bus fully within its travel lane. A.R.S. § 28-729 provides:

If a roadway is divided into two or more clearly marked lanes for traffic, the following rules in addition to all others consistent with this section apply:

1. A person shall drive a vehicle as nearly as practicable entirely within a single lane and shall not move the vehicle from that lane until the driver has first ascertained that the movement can be made with safety.

Conlon violated each of these duties.

3. Violations.

The undisputed facts establish Conlon’s violations of the various statutory and common law duties. Each of these independently is sufficient to find liability as a matter of law since at each instance, proper and prudent behavior would have prevented

1 the accident.

2 First, Conlon pulled out of the driveway when Wisner's vehicle was approaching
3 in the same westbound direction on Highway 160 (SOF 9, 11, 12, 17, 18). Conlon
4 admitted that Wisner was close, within 300 feet or less (SOF 13). Conlon admitted that
5 the bus was slower than the SUV (SOF 20). Conlon admitted to moving in front of the
6 SUV with only 50 feet or less between them while the bus was moving slower (SOF 19,
7 20).

8 Conlon's decision to pull out onto Highway 160 before Wisner passed by his
9 location violated Conlon's duties to keep a proper lookout and yield, his duty to wait
10 until closely approaching vehicles pass, and his duty to wait for traffic to clear before
11 moving his commercial vehicle onto the road.

12 Second, upon pulling onto Highway 160, Conlon admitted to pulling over into
13 the left travel lane almost immediately (he was in right lane for only 75 feet if at
14 all)(SOF 19). He knew he was driving a heavier, slower vehicle and he knew Wisner
15 was going faster, yet he pulled over in front of him anyway (SOF 19, 20). He cut
16 Wisner off, forcing Wisner to the right travel lane (SOF 20, 21, 39).

17 Conlon's decision to cut off Wisner and forcing him to the right lane violated
18 Conlon's duty to yield, his duty maintain a proper lookout, his duty to stay to the right
19 side of the roadway, and his duty to keep his slower-moving vehicle in the right-hand
20 lane.

21 Third, Conlon failed to maintain a proper lookout, as he was watching Wisner's
22 vehicle to his right side (SOF 28). Conlon never realized he had left his lane of travel
23 and improperly entered the designated two-way left turn lane (28, 29, 30, 33, 35, 36).

24 Fourth, Conlon drove out of his lane into the turn lane (SOF 25, 26, 29, 30, 33,
25 35, 36, 37). Conlon was looking at Wisner's vehicle on the bus' right side (SOF 28).
26 He was concerned about the narrowing of the roadway ahead and created an unsafe
27 situation (SOF 41). The area of impact occurred in the center of the roadway, on or very
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1 close to the line between the left westbound travel lane and the turn lane (SOF 25).
2 Conlon veered the bus to the right just before the bus crashed into the Pontiac,
3 confirming that the bus was out of its travel lane and in the turn lane immediately prior
4 to the impact (SOF 23, 37).

5 Conlon's actions created a dangerous situation. He was distracted by Wisner and
6 he drove out of his lane of travel. These actions violated his duty to keep a proper
7 lookout, his duty to allow faster traffic to pass on the left, his duty to keep the bus
8 entirely within its lane of travel, and his duty to keep his vehicle under proper control
9 and use due care to avoid a collision.

10 4. Causation.

11 There is no genuine issue that Conlon's actions, pulling out before Wisner
12 passed, not staying in the right-hand lane but instead pulling out in front of Wisner in
13 the left lane, driving outside his lane into the two way left turn lane, etc., caused this
14 accident (SOF 35, 38, 39, 40, 41, 42). He created a dangerous situation and could have
15 prevented the accident by proper and prudent action at multiple points along the brief
16 timeline (*id.*). His actions were reckless and wanton in creating such a dangerous
17 situation (*id.*). Had Conlon complied with any one of the duties identified he would
18 have been travelling in the right-hand lane of westbound Highway 160, at the time
19 Butch Johnson and his family safely passed and completed a left turn from the
20 designated two-way left turn lane. Instead, Conlon drove the bus in such a manner that
21 resulted in the death of Butch Johnson and the severe harms and damages to his family.

22 **III. Conclusion and relief requested.**

23 Because the undisputed facts establish multiple violations of duties, each of
24 which independently establishes liability, and because there is no dispute that
25 compliance with the duties at each stage of the sequence of events independently would
26 have prevented the accident, summary judgment on liability is appropriate. This Court
27 should grant the motion and set a date for trial on damages.

DATED this 11th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that, on May 11, 2018, the foregoing Plaintiffs' Motion for Summary Judgment was electronically transmitted to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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