1965

# Christine E. Andrus v. Ida Allred : Appellant's Brief

# IN THE SUPREME COURT OF THE STATE OF UTAH

CHRISTINE E. ANDRUS,
*Plaintiff and Respondent,*

—vs.—

IDA ALLRED,
*Defendant and Appellant.*

Case No. 10[illegible]

FILE[illegible]

# APPELLANT'S BRIEF

Clerk, Supreme [illegible]

Appeal from the Judgment of the Third Dist[illegible]
Salt Lake County. Honorable Stewart M[illegible]

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# IN THE SUPREME COURT OF THE STATE OF UTAH

CHRISTINE E. ANDRUS,
*Plaintiff and Respondent,*

—vs.—

IDA ALLRED,
*Defendant and Appellant.*

Case No. 10282

# APPELLANT'S BRIEF

## STATEMENT OF THE NATURE OF THE CASE

This is an action for personal injuries arising out of an automobile accident wherein plaintiff, a passenger, fell out of defendant's car which started to roll forward after defendant had gotten out and as plaintiff was preparing to alight therefrom.

## DISPOSITION IN LOWER COURT

At the pre-trial conference both parties made motions for a summary judgment. Plaintiff's motion for summary judgment was granted and defendant's denied. Defendant appeals from the trial court's order and judgment.

## RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the summary judgment in favor of the plaintiff and judgment in her favor as a matter of law.

## STATEMENT OF THE FACTS

The following facts which are undisputed are disclosed by the published deposition of the plaintiff and the answers to interrogatories filed by the defendant.

Plaintiff resides at 4481 South 9th East, Salt Lake City, Utah. (Deposition R. 52, page 3.) She and the defendant, Ida Allred, have known each other for many years. Mrs. Allred's daughter married Mrs. Andrus' son over 18 years ago. (Deposition, (R. 52) page 5.)

On February 8, 1964 at about 7:30 P.M. Mrs. Allred, the defendant, called at the plaintiff's home to make a social visit. Defendant invited plaintiff to go with her to Harman's Cafe at 39th South and State Street for dinner. Each paid for her own dinner and Mrs. Andrus did not pay anything for the ride. She was riding as a guest in the car. (Answers to interrogatories, Nos. 4 and 5, (R. 8), Deposition, (R. 52), Pages 5 and 6.)

The plaintiff and defendant went to Harman's Cafe in the defendant's 1950 Cadillac which was equipped with an automatic transmission. After they had eaten they then returned to plaintiff's home, it then being about 9:30 P.M. Defendant brought the car to a stop directly in front of plaintiff's home at the gate where the sidewalk leads into her front porch. (Answers to interrogatories, Nos. 3 and 9) (R. 8, 9

She applied her foot to the foot brake, left the motor running and thought she had pulled up the emergency brake, but may not have pulled it on full. The car was left in drive gear. (Answers to interrogatories, Nos. 6, 7 and 8) (R. 8, 9)

The car was facing north and standing on a wide gravel shoulder. No part of the car was on the hard surface. The gravel shoulder was quite level. (R. 52) (Deposition, pages 8 and 9)

After talking for a few minutes the defendant got out of the car on the driver's side to go around on the passenger's side of the car to assist the plaintiff out of the car, although this had not been her habit on previous occasions. (Answers to interrogatories, No. 10) (R. 9) As she started around the back of the car she heard the plaintiff holler that the car was rolling. She ran back to get in the left side of the car to stop it but did not get under the wheel of the car until it about came to a stop. By that time the plaintiff had fallen out of the car and was lying on the ground in an injured condition.

The plaintiff opened the door to get out and as she did so the car started to roll forward, while she was still sitting on the seat. Reference is made to her deposition for her own account. (R. 52) Page 7, Line 17 to Page 8, Line 9.

"Q. Now, were you inside the car when it started to roll?

A. Yes, partly. I was partly inside of the car when it started to roll.

Q. Now, which part of you was inside, and which part was out?

A. This side; my left side.

Q. Your left side was in?

A. Yes, it was.

Q. Was your right foot outside?

A. No. My left foot was inside of the car.

Q. Yes, and how about your right foot?

A. Well, it was outside. It was on the—

Q. Had it touched the ground?

A. I can't remember that.

Q. You just—

A. Just on foot, there.

Q. It was just hanging out the door, kind of, was it?

A. Yes, it was.

Q. I see. And then the car started to roll forward, did it?

A. It started to roll, just started rolling. That's all.

Q. To the north, started to roll to the north?

A. Yes. * * *

Q. How far did the car roll before you were thrown out, do you suppose?

A. About forty feet, I think."

Page 9, Lines 18 to 20.

"Q. Now you opened the door yourself to the car did you?

A. Yes. I opened the door myself and was starting to get out when the car started to roll."

Page 11, Lines 1 to 20.

"Q. Now, when the car started forward, then, you were still sitting down on the seat, were you?

A. Yes. Yes, I was. I was sitting sideways on the seat. Was just going to get out, and I had a hold of the door with this hand.

Q. Which way were you facing? Towards the front of the car, or towards the door?

A. Well, was facing that way. I must have been facing that way to be a hold of the door, wouldn't I?

Q. Well, I don't know. You could reach out to the side and open it. Do you recall which way you were facing when you opened the door?

A. Well, I was facing to the east when I opened the door, sure.

Q. All right. But you were sitting on the seat?

A. Yes, I was.

Q. And you say you rolled about forty feet before you fell out?

A. Well, the car did. I don't know how many feet it was when I was throwed out."

In summary, the plaintiff's testimony is that she took hold of the door handle, opened the door turning sideways in the seat to get out, and that she still had hold of the door handle as the car started rolling forward. Her left foot she says was in the car and her right was hanging out the door. She finally lost her balance and fell out the right side of the car after traveling about 40 feet. There is no evidence to the contrary.

There was no evidence of intoxication or wilful misconduct and the question is whether, under these facts,

the plaintiff was or was not, at the time of the accident, a guest within the meaning of the Utah guest statute.

## ARGUMENT

### POINT I.

AT THE TIME OF THE OCCURRENCE OF THE ACCIDENT THE PLAINTIFF WAS STILL A GUEST IN THE DEFENDANT'S AUTOMOBILE.

Utah's Guest Statute, Section 41-9-1, U.C.A. 1953 provides as follows:

> "Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the state of Utah, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle.***"

Section 41-9-2 provides:

> "Guest defined. For the purpose of this section the term 'guest' is hereby defined as being a person who accepts a ride in any vehicle without giving compensation therefor."

Street or Highway defined, Section 41-1-1 (bb)

> "The entire width between property lines of every way or place of whatever nature when any part thereof is open to the public, as a matter of right, for purposes of vehicular traffic."

The purposes of various legislatures in enacting guest statutes have been set forth in many cases. A few of these purposes are herein set forth as follows: To deny recovery for negligence against one transporting in his

automobile a member of his family, a social guest or a casual invitee, in an action brought by the recipient of his hospitality, *Kruzie v. Sanders,* Calif., 143 P(2) 704; to prevent one who traveled with another in an automobile as a guest, or without compensation, from recovering unless it was proven that the driver was guilty of gross negligence or wilful and wanton misconduct, *Juhasz v. Barton,* Fla., 1 So. (2) 476.

In the case of *Jensen v. Mower,* 4 Utah (2) 336, our court has stated its opinion:

> "That in the adoption of this statute the legislature sought to relieve the hardship which is visited upon a generous driver who is sued by an invited rider for ordinary negligence of the driver when the rider gave nothing to compensate the driver for the transportation."

It has been held that, being in derogation of common law, such statutes are to be construed strictly. Calif., *Prager v. Israel,* 98 P. (2) 729. On the other hand, it has also been held that the guest statutes should be liberally construed to effectuate their purpose. Iowa, *Nielsen v. Kohlstredt,* 117 NW (2) 900, Vol. 4 Blashfield Cyclopedia of Automobile Law and Practice, Perm. Edition, § 2313, Page 363.

It is undisputed that defendant's vehicle was on the shoulder of the highway and that the place where the defendant's vehicle stopped to allow the driver and passenger to get out, as well as the shoulder along which the vehicle rolled after defendant alighted from the vehicle, were open to the public as a matter of right for purposes of vehicular traffic.

It is also undisputed that the plaintiff was still within the vehicle when it started to roll forward and fell out of the vehicle while it was in motion on such highway.

The plaintiff, therefore, falls within the guest statute technically speaking.

Plaintiff contends and the trial court found that the ride had ended when the car stopped in front of the plaintiff's home, even though the plaintiff had not safely alighted from the car, and that the car was not still moving on the highway within the meaning of the guest statute when the plaintiff was injured. (R 38)

At least 26 states have enacted guest statutes which vary somewhat from state to state. Most of them provide that no person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall be liable, etc., and make no mention of while riding on a highway.

Utah, Nevada, Texas, North Dakota and California have statutes similar to each other which provide that any person who as a guest accepts a ride in any vehicle moving upon a public highway (or being transported upon a public highway) cannot recover unless the driver is guilty of wilful or wanton conduct, etc.

Counsel has been unable to find any case in which a court has gone as far as plaintiff asks this court to go in holding that the guest relationship had terminated at the time of plaintiff's injury. The case of *Prager v. Israel,* 1940, Calif. 98 P(2) 729, relied upon by plaintiff in sup-

port of plaintiff's position is distinguishable in that in the Prager case the plaintiff did have one foot on the ground, at least and was not sitting on the seat. In our case plaintiff was completely seated in the automobile and no part of her body touched the ground before the car started rolling. In the Prager case the car had been stopped for several hours. In our case the motor was still running and the car had been stopped for only about five minutes. The car was still on a portion of the highway used for regular traffic purposes. The plaintiff was still definitely within the automobile.

The question whether at the time of injury there has been a termination of the host-guest relationship between the driver of an automobile and one ridng therein within the meaning of a statute, (or of the rule established even in the absence of statute in some jurisdictions) holding the driver of a motor vehicle liable for an injury to a guest only in case of gross or wilful negligence depends upon the provisions of the statute (where there are statutes) and upon the facts involved in the particular cases. No general rule can be stated governing the determination of these questions. 146 ALR 682, Annotation.

In some cases a distinction as to whether or not one was or is a guest within the meaning of the guest statute depends upon whether the statute requires one to be in or upon the vehicle at the time of the accident. In the absence of statute the same rule is often applied. (Although no so-called guest statute exists in Massachusetts, it is there held under their common law that an automobile host is not liable for an injury to a guest in the absence of gross negligence.)

In the case of *Adams v. Baker,* Mass., 1945, 59 NE (2) 701, plaintiff, a gratuitous guest, fell while alighting from the defendant's vehicle. As she stepped from the right door of the car her right foot went into about a three inch hole along the right edge of the highway. The only question was whether the guest relationship had terminated. The trial court held as a matter of law that the guest relationship on these facts had not terminated. The Supreme Court on appeal stated:

> "There was no error in the action of the judge in allowing defendant's motion for directed verdict. Upon the evidence the jury would have been obliged to find that the plaintiff was partly in or upon the defendant's vehicle at the time of the accident, and that the gratuitous undertaking had not been terminated. * * * The stopping of the automobile and the departure of the plaintiff therefrom were necesary to the conclusion of the gratuitious undertaking."

In the case of *Eskelman v. Wilson,* 1948, Ohio, 80 NE (2) 803, where defendant had transported plaintiff to a social gathering and before beginning on return trip the plaintiff went into the car but alighted when defendant could not find her keys and stepped away about 2 feet and the vehicle, while moving backward, struck the plaintiff, the plaintiff when injured was not "*in or upon said motor vehicle,*" and was not a "guest" within the guest statute. Defendant contended plaintiff was still a guest. The court said, "To hold as defendant contends would require the elimination from the statute of the words "*in or upon said motor vehicle.*" (Italics ours.)

In the case of *Tallios v. Tallios,* 359 Ill. App. 299, 112 NE (2) 723, the plaintiff was riding as a guest in a vehicle driven by her husband who was driving as agent of his father, the defendant in the action. The plaintiff suddenly discovered that her purse was missing and the driver stopped the vehicle so that the plaintiff could check and see if the purse was in the vehicle. She opened the door, got out and searched for the purse, but was unable to find it. She had one foot on the running board and one on the ground and was preparing to close the door when the truck lurched suddenly forward and struck and injured the plaintiff. The question was whether or not the plaintiff was still a guest under the circumstances. The trial court held as a matter of law that the plaintiff was a guest and limited her right of action to recovery under the guest statute. Plaintiff cited in her brief the case of *Prager v. Israel,* the California case. The court rejected the reasoning in the California case and stated that the primary purpose of statutory construction is to ascertain the intention of the legislature, not only from the language used, but also from the reason and necessity for the act, the evil sought to be remedied and the object and purposes sought to be obtained by it. Citing cases.

The reasoning of the court in arriving at its decision is set forth herein as we feel that is helpful in the interpretation of our own guest statute.

> " 'That there should be a difference between the liability of a person who, out of the generosity of his heart, renders gratuitously some service to his fellow traveler over those rendering such service for hire and barter, can hardly be ques-

tioned. Those who are charitably inclined should not be restrained by fear of the consequences of their own charitable act and the recipients should not be permitted to gain by the generosity of their host. Undoubtedly the Legislature, in adopting this act, was aware of the frequency of litigation in which passengers, carried gratuitously in automobles, have sought the recovery of large sums for injuries alleged to have been due to negligent operation, and where, in the use of the automobile, which is almost universal, generous drivers might find themselves involved in litigation that often turned upon questions of ordinary negligence. It was evidently the intention of the Legislature not only to correct this abuse but to promote the best interests of the people in their relation to each other.'

"A narrow or literal interpretation of the words 'person riding in a motor vehicle as a guest, without payment for such ride,' limiting the effect of the statute to accidents occurring when a guest is seated in an automobile in motion, would defeat or at least impair, the purpose of the legislation. To give full effect to the legislative intent a generous owner or driver must be protected at all times that the relation of host and guest exists in connection with the free ride. The beginning and end of that relation is not unlike the beginning and end of the relation of carrier and passenger for hire in a public conveyance. In the latter case the relation begins with the attempt of the passenger to enter the conveyance and ends when he has alighted in safety on completion of the journey. It is not interrupted or terminated by a temporary absence from the conveyance for a reasonable and usual purpose. 10 Am. Jur., Carriers, page 33, 34, 54 and 56. So, the relation of host and guest between automobile owner or driver and a passenger riding without payment or compensation

> begins when the guest attempts to enter the automobile, and ends only when he has safely alighted at the end of the ride. Here the ride had not terminated. Plaintiff was injured before she reached her destination. The stopping of the automobile to permit further search for plaintiff's purse and the act of plaintiff in getting out of the car to more effectively make the search, were usual and customary acts incidental to a normal courtesy to plaintiff as defendant's guest. She did not lose her status as a guest."

Section 9-201 Ill. Anno. Statute, 1958, Perm. Ed., provides:

> "No person riding in or upon a motor vehicle * * * as a guest without payment for such ride * * * shall have a cause of action for damage against the driver or operator of such vehicle unless such accident shall have been caused by wilful and wanton misconduct of the driver or operator. * * *"

In the case of *Randolph v. Webb,* Ill., 1963, 194 NE (2) 118 in an action by a guest against the driver of a vehicle for injuries received as she was putting money in a parking meter when the host's car rolled forward and injured her, the court held that she was not a guest within the statute and that the "host-guest relationship within the guest statute begins when the guest attempts to enter the automobile and ends when he has safely alighted at the end of the ride."

In the case of *Frankenstein v. House,* Calif., 1940, 107 P (2) 624, where an elderly woman accepted an invitation to ride as guest of the owner of a car and entered the car, but the owner absented himself temporarily, and

the car rolled down the hill causing the woman to be thrown therefrom, the woman remained a guest at all times until she was thrown to the street and couldn't recover on the owner's simple negligence. The court said, "As long as a person without compensation to the driver has entered a car upon the invitation of such driver and remains in the vehicle upon a highway during such ride, he is a guest."

An annotation in 50 ALR (2) commencing at Page 974 contains numerous cases with a wide variety of facts pertaining to guests injured after having alighted or while alighting from the host's car. These cases all appear to be consistent with the decision urged upon this court by your appellant herein.

## CONCLUSION

The facts of this case clearly bring the plaintiff within the purview of the Utah guest statute and there being no wilful misconduct or intoxication involved the trial court's decision granting plaintiff a summary judgment should be reversed and judgment entered in favor of the defendant.

Respectfully submitted,

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