

1951

Nathan Seamons v. Larry D. Anderson et al : Defendants and Cross-Appellants Brief

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Seamons v. Andersen*, No. 7691 (Utah Supreme Court, 1951).
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IN THE SUPREME COURT OF THE STATE OF UTAH

NATHAN SEAMONS, as the surviving
partner of SEAMONS & LOVELAND,
Plaintiff and Cross-Appellant,

vs.

LARRY D. ANDERSON and
HANS P. ANDERSON,

Defendants and Appellants,
and RICHARD PETERSON,
Defendant, Counter-Claimant,
Cross-Claimant, Respondent
and Cross-Appellant,
and CLAYTON E. NIELSEN and
RAY BITTERS, Co-Partners,

doing business in the firm name and
style of VALLEY CAR MARKET,

Defendants and
Cross-Appellants.

FILED

SEP 10 1951

Clark, Supreme Court, Utah

Defendants and Cross-Appellants Brief

CLAYTON E. NIELSEN AND RAY BITTERS

Case No. 7691

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and Bitters.

Hon. Lewis Jones, Judge

Appeal from the District Court of the First Judicial
District of the State of Utah, in and for the County of
Cache.

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BRIEF OF CROSS-APPELLANTS
CLAYTON E. NIELSEN AND RAY BITTERS
Case No. 7691

STATEMENT OF FACTS

This action was commenced by Nathan Seamons for a money judgment against the defendants, Andersons, upon a conditional sales contract covering a 1948 Mercury and for the foreclosure of said contract. Richard Peterson was joined as a party defendant. He had been the prior owner of said automobile and wrongfully held

the certificate of title to it. Ray Bitters, doing business as Valley Car Market, and his employee, Clayton E. Nielsen, were also joined as defendants. They had acted as the middlemen in the sale of the automobile from the defendant, Peterson, to the defendant, Larry D. Anderson.

The defendant, Richard Peterson, in his pleadings, answered the plaintiff's complaint and also filed a counter-claim against the plaintiff and a cross-complaint against the defendants, Nielsen and Bitters, asking that the Mercury be delivered up to him or that he have a money judgment in the sum of \$550.00, which he claimed was due him by the plaintiff, Seamons, and the defendants, Nielsen and Bitters. He asked for no relief against the Andersons at the outset, but later made a claim against them. The defendants, Andersons, filed an answer to the plaintiff's complaint and a cross-complaint against Nielsen and Bitters asking for a money judgment against them. No relief was granted the Andersons on this prayer against Nielsen and Bitters, and although the defendants, Andersons, assigned this an error (Point No. 7, Page 121) in their Statement of Points relied upon by the appellants on appeal, this assignment of error and portion of the appeal was later waived by the Andersons (Tr. 349), and is not now before this Court.

The facts of this case began in April, 1949, when the defendant, Peterson, first approached the defendant, Nielsen, at the Valley Car Market, and requested them to sell his 1948 Mercury (Tr. 8, 9, 247). Nielsen was an employee of Valley Car Market, owned and operated by Bitters (Tr. 300, 301, Exhibit B1). Peterson expressed a

desire to receive \$1950.00 for the car, and Valley was to receive a commission over and above said sum (Tr. 42, 248, 266). The Mercury was delivered to the Valley Car Market for Valley to sell for Peterson, and later on the defendant, Larry Anderson, turned up as a prospective purchaser (Tr. 9, 188). Nielsen informed Anderson that the price of the Mercury was \$2095.00 (Tr. 189), and Larry Anderson asked Nielsen about trading in a 1938 Packard. Nielsen told Anderson that he would have to clear this with Peterson, which he did (Tr. 9, 27, 189, 259). The agreement arrived at between Anderson and Peterson, through the Valley Car Market, was that the purchase price for the Mercury was to be \$2095.00, payable by the Andersons by a trade-in allowance on the 1938 Packard of \$425.00, \$1400.00 to be secured through finance and a balance of \$270.00 in cash by June 1st. (\$425.00 plus \$1400.00 plus \$270.00 equals \$2095.00). Of this, Peterson was to receive \$1950.00 and Valley Car \$145.00. This agreement was entered into on April 25, 1949. (Defendant Peterson's Exhibit No. 1, Tr. 10, 211). The \$270.00 was represented by a post-dated check (for some reason made out in the sum of \$267.00). In brief, the total consideration passing was \$2095.00, broken down as follows: \$1400.00 from finance, \$425.00 on the Packard and \$270.00 by a post-dated check (Tr. 211), Peterson to get \$1950.00 and Valley Car \$145.00.

The Packard automobile, valued at \$425.00, was delivered by Anderson as part of the purchase price and left with Valley Car Market by Peterson to be sold for him (Tr. 286, 46, 47, 49).

The \$1400.00 was secured from the Commercial Credit Corporation, through the plaintiff, and it was in connection with this financing transaction that the defendants, Andersons, executed the conditional sales contract upon which the plaintiff commenced this action. Of the said \$1400.00, the sum of \$1300.00 was paid to Richard Peterson, and \$100.00 was retained by Valley Car Market as part of its commission (Tr. 249, 288).

As to the \$267.00 check, \$150.00 was paid on this check by Larry Anderson on May 6, 1949, of which sum \$100.00 was paid to Peterson sometime later in May and \$50.00 retained by Valley Car Market upon their commission (Tr. 289, 262). Later on, this \$267.00 check was turned over to Peterson with the sum of \$117.00 remaining unpaid on it by the Andersons (Tr. 212, 249, 72). The reason the check was kept by Nielsen and not delivered to Peterson sooner was that Peterson was out of the area so much that it was more convenient to have Anderson make the payments, such as the \$150.00 payment on it, to Nielsen (Tr. 77.)

Therefore, on this original transaction, Peterson received \$1300.00 of the finance money, \$425.00 by the trade-in of the Packard, and \$100.00 on the post-dated check, and has coming the sum of \$117.00 from Anderson on the post-dated check. The Valley Car Market received \$100.00 of the finance money and \$50.00 of the payment made on the post-dated check. The total of this consideration equals \$2095.00, (less \$3.00 to be accounted for because the post-dated check was made for \$267.00 instead of \$270.00) of which \$1945.00 went to Peterson's and \$150.00 to Valley Car Market's.

Pursuant to a subsequent agreement with Peterson, Valley Car Market attempted to sell the 1938 Packard taken in by Peterson, and finally did sell it to one Darley for a Chrysler trade-in and \$225.00 in cash. Of this \$225.00 in cash Valley paid \$108.00 to the finance company in an effort to save the Mercury from repossession, with Peterson's approval (Tr. 20, 21, 299); the sum of approximately \$65.00 or \$75.00 was paid to various concerns in order to put the Packard into a condition to meet inspection requirements at the time of sale, (Tr. 45, 46, 47, 299 and defendants, Nielsen's and Bitters' Exhibits B3, B4, B5, Findings of Fact No. 8), and the balance of said \$225.00, together with the Chrysler, were tendered to Peterson, who refused them for the reason that he wanted to wait to see what was going to come of the deal (Tr. 40, 48, 299). The Trial Court made a finding in his oral decision (Tr. 344) that the Chrysler automobile belonged to defendant Peterson.

STATEMENT OF POINTS

Point 1. That the trial court erred in making and entering its decree dated April 9, 1951, in awarding the defendant, counter-claimant and cross-claimant, Richard Petersonn, judgment against the defendants, Clayton E. Nielsen and Ray Bitters, jointly and severally, for the sum of \$300.00, and in making and entering any of its findings of fact or conclusions of law which are in support of said judgment.

Point 2. That the court erred in making and entering its findings that Nielsen and Bitters were partners in Valley Car Market and in making its finding No. 16 that

at the time of the original transaction the Andersons paid the sum of \$100.18 to the other parties.

The Statement of Points relied upon by the defendants, Clayton E. Nielsen and Ray Bitters, as cross-appellants, on file herein (Vol. 1, Tr. on Appeal, Page 132), contains fourteen points most of which said points allege that the court committed error in making certain findings of fact and conclusions of law, resulting in an erroneous judgment against the cross-appellants, Nielsen and Bitters, as stated in Point No. 1 above. In order to prevent redundancy or duplicity in accordance with Rule 75 of the Utah Rules of Civil Procedure, said points are not repeated here, but will be argued under the broad Point No. 1 hereinabove set forth.

ARGUMENT

Point 1

The cross-appeal of the defendants, Clayton E. Nielsen and Ray Bitters, who are sometimes referred to herein as Valley Car Market or just Valley, goes only to that portion of the court's decree wherein the court awarded the defendant and cross-claimant, Richard Peterson, judgment against Nielsen and Bitters jointly and severally. We strongly feel that the court's judgment in this respect is not supported by any evidence, and that it is in direct conflict with the jury's findings in its advisory verdict, questions and answers No. 1 and 2, which findings the court adopted.

The jury's advisory verdict (Vol. 1, Tr. of Record, Page 76) insofar as the cross-appellants, Nielsen and Bitters, are concerned on appeal, provides as follows:

"1. Did Richard Peterson ever authorize the Valley Market or Clayton Nielsen to sell and deliver the Mercury car in question to Larry D. and H. P. Anderson? (Answer "yes" or "no.")

ANSWER: Yes.

2. Was Richard Petersen, by agreement with the Valley Car Market, to receive \$1950 for his Mercury regardless of what the Packard sold for from said Valley Car Market? (Answer "yes" or "no.")

ANSWER: No.

The defendant, Peterson, in all of his pleadings concerning and directed toward the defendants, Nielsen and Bitters, and in his testimony throughout the trial, attempted to establish the theory that Nielsen and Bitters were in effect insurers insofar as his \$1950.00 was concerned.

He attempted to convince everyone that regardless of what happened, he was to receive \$1950.00 in cash and that it was Nielsen and Bitters who owed it to him. A reference to the Transcript of Testimony (Tr. 247, 264) will show that at the outset, Nielsen told Peterson that Valley could not buy the Mercury, but that they would attempt to sell it for him. Later on, when the Packard had been turned in to Peterson as part of the consideration for the Mercury, Nielsen again told Peterson that Valley could not purchase the Packard, but that they would try to sell it for him (Tr. 286). Notwithstanding this early understanding, Peterson continued to maintain that it was Nielsen and Bitters who owed him the money for the Mercury (Tr. 263, 264, 265, 266).

A reference to the jury's advisory verdict, question and answer No 2, leaves little doubt in one's mind that the jury rejected this theory, for the jury specifically found that Peterson was not to receive \$1950.00 in cash regardless of what the Packard sold for.

There is only one logical interpretation to place on this jury finding: That the sale from Peterson to Anderson through Valley was not a cash transaction for \$2095.00, but that Peterson agreed to take the Packard trade-in plus cash for his Mercury. In other words, the Packard was part of the consideration which Peterson agreed to take, and when Anderson delivered it, Peterson received the equivalent of \$425.00 cash.

Associating this with the jury's answer to question No. 1, we must conclude that the jury found that Peterson was aware of the terms of the agreement between Valley and Anderson and that he acquiesced in the same. These terms were as stated in the written contract between Valley and Andersons, dated April 25, 1949, (Defendant Peterson's Exhibit No. 1) which it is important to note, Peterson had in his possession and introduced into evidence at the trial, this contract provided that Anderson was to pay for the Mercury by trading in his 1938 Packard at a value of \$425.00, by securing \$1400 from the finance company and by making a deferred payment of \$270.00, which is obviously represented by the \$267.00 check signed by Larry Anderson, delivered to Valley and in turn delivered to Peterson, who had it in his possession and who introduced it into evidence as his Exhibit No. 4.

The evidence clearly brings out that insofar as Peterson and Valley Car were concerned, there were two sep-

arate arrangements. The first: The arrangement whereby Peterson agreed with Valley to have Valley sell his 1948 Mercury to Anderson. The second: The arrangement whereby Peterson agreed with Valley to have Valley sell Peterson's 1938 Packard, which he had taken in from Anderson on the Mercury.

The evidence shows that the first transaction was complete with one exception to be mentioned when Larry Anderson produced \$2095.00 worth of consideration by securing \$1400.00 from finance, \$425.00 on a trade-in of the Packard and \$270.00 by a promise to pay in the future. The exception referred to is the fact that Anderson still owes \$117.00 on the last-named item, since he only paid \$150.00 on the deferred payment represented by the \$267.00 post-dated check. The jury agreed with this theory in answering question No. 2.

Under no possible juggling of the facts can Peterson or the lower court make a valid finding supported by evidence that on this first transaction there is anything due from Nielsen and Bitters or Valley to Peterson. The only sum remaining due is the sum of \$117.00 on the post-dated check and there is no doubt in anyone's mind but that this is due from Anderson to Peterson and not from Nielsen, Bitters or Valley to Peterson. Peterson realized this during the trial, and made a belated effort to salvage something by amending his prayer to ask for a judgment against the Andersons.

Thus, if there is any sum due from Nielsen, Bitters or Valley to Peterson, it must be by reason of the second arrangement, i.e., the sale of the 1938 Packard for Peter-

son. Nielsen testified during his examination that there was approximately the sum of \$52.00 due and owing to Peterson by Valley Car Market. Actually, when all of the figures were totaled, said sum was \$41.49, as will be shown below. The Packard sold to one Darley for a Chrysler trade-in and \$225.00 cash. There is no question as to the Chrysler since it still was available at the trial, and the Court, at the time it made its oral decision, made a finding that the Chrysler automobile did belong to Peterson (Tr. 344). Nielsen testified that this Chrysler was available to Peterson but that Peterson never bothered to do anything about it. Peterson never denied this. As to the \$225.00 cash, \$108.00 was paid to the Finance company, with Peterson's approval, to save the Mercury from repossession (Tr. 20, 21, 299). Peterson never denied this. Further sums were expended by Valley to put the Packard in a condition to pass inspection so that it could be sold. These sums are evidenced by the defendants, Nielsen's and Bitters' Exhibit B3, B4 and B5, representing \$13.56 paid to Hopkins Auto Parts, \$13.05 to Russells Incorporated, and \$48.90 paid to Seamons and Loveland. These repair items total \$75.51, and the Court, in its findings of fact No. 8, found these expenditures to have been made. If we add the \$108.00 paid to finance to the \$75.51 paid for fixing the Packard, we have a total of \$183.51. If we deduct this from the \$225.00 cash received on the Packard, we have a balance of \$41.49 which Valley Car Market owes to defendant, Peterson. This, of course, was tendered to Peterson, who refused to accept it for the reason that he wanted to wait to see what was going to come of the deal (Tr. 48, 299).

It therefore appears that Valley owes Peterson said sum of \$41.49, which Valley has always been willing to pay. If Valley owes Peterson any more, it is the sum of \$5.00, due to the fact that from the original consideration on the Mercury, Peterson received only \$1945.00 instead of \$1950.00, and Valley received \$150.00 as commission instead of \$145.00. This is brought out more fully in the recapitulation which is made a part of this brief and follows hereafter.

The total of these two sums, \$41.49, plus \$5.00, falls far short of the \$300.00 which the Court awarded Peterson in his judgment against Nielsen, Bitters and Valley.

When the evidence is read and analyzed, we strongly feel that it amply supports the theory of the case above presented and that the evidence in no way supports the Court's finding and conclusion that Nielsen and Bitters owe Peterson \$300.00.

If we accept the theory of the defendant, Peterson, as adopted by the Court, then we must completely ignore the findings of the jury as represented by question and answer No. 2 of the advisory verdict. We must further adopt the theory that Nielsen, Bitters and Valley Car Market were not merely agents of Peterson in selling the various automobiles but that they were insurers, guaranteeing under any and all circumstances that the cars would sell for certain prices. We think that the evidence shows that Nielsen contacted Peterson throughout the period of time of the various arrangements to secure his suggestions and authority before taking action.

On the other hand, we further feel that Mr. Peterson's testimony indicates that he adopted a very careless manner during all of said time, knowing full well what was going on, but failing to do anything to change it. Particular reference is made to the Transcript of Testimony, pages 263 through 266, which strongly indicates that Peterson was attempting to hold Nielsen for the purchase price of the car even though Peterson had previously testified that Nielsen had told him that Valley could not purchase the car but could merely act as a selling agency, and even though Peterson had approved the sale to Anderson. In other words, Peterson refused to accept any of his responsibilities, and then attempted to circumvent his carelessness and negligence by putting all of the burden on someone else where it did not belong.

It is further interesting to note, as the evidence unfolds itself, that no where along the line did Peterson assert any authority or ownership of the Mercury, whether during his conversation with Anderson after Anderson had bought it, or in his later conversation with Nielsen or Seamons. He knew he had sold the car, and that Anderson had paid everything for it except the \$117.00. It was not until long afterwards, when the controversy arose, that he commenced to claim, apparently as an afterthought, that he was the owner of the Mercury.

It is of further importance to note that no where in Peterson's testimony does he assert that Nielsen acted beyond his authorization as Peterson's agent in any of the transactions. He does not deny that part of the Packard money was paid on the Mercury payments to save it from repossession with his authorization, nor did he

deny that sums were expended on the Packard in order to effect a sale of it after he had told Nielsen to sell it for the best that he could. He never denied that he was offered the Chrysler and the net proceeds of the cash taken in on the sale of the Packard.

In order to summarize the various transactions, there follows a Recapitulation which sets up the various arrangements between the parties, the considerations involved and their disposition:

RECAPITULATION

By agreement, entered into by Valley and Anderson, and approved by Peterson, Anderson was to pay \$2095.00 for Mercury as follows:

Trade in (Packard)	\$ 425.00	
Finance (Seamons)	1400.00	
Deferred cash payment	270.00	(For some reason
	—————	check was made
	\$2095.00	out for \$267.00)

From the above consideration:

1. Petersen received the Packard, and made an agreement with Valley to sell it, so he received from Anderson a consideration of \$425.00

2. Peterson received \$1300.00 from the \$1400.00 secured by financing \$1300.00

3. Peterson received \$100.00 from Anderson as part payment on the post-dated check \$100.00

4. There still remains a balance to be collected on the check in the sum of \$117.00, which is due from

Anderson to Peterson \$117.00
 This totals \$1942.00

which is \$8.00 less than the \$1950.00 agreed upon.

From the above consideration:

1. Valley received \$100.00 from the \$1400.00
 secured from finance \$100.00

2. Valley received \$50.00 from the \$150.00
 paid in on the check \$50.00

This totals \$150.00
 or \$5.00 more than the commission Valley was authorized
 to receive (all over 1950.00.)

Thus, we see that Anderson owes Petersen \$117.00
 on the check and \$3.00 as the difference between \$267.00
 and \$270.00, and Valley owes Petersen \$5.00.

As to the Packard, which was a separate transaction:

It sold for a Chrysler and \$225.00.

1. The Chrysler was available for Petersen, but he
 never took it. He authorized its sale in court and it was
 sold for \$25.00.

2. The \$225.00 cash was distributed as follows:
 \$108.00 to Commercial Credit to protect the Mercury.
 (with Petersen's sanction.)

13.56 to Hopkins to prepare for inspection.

13.05 to Russells' Inc. to prepare for inspection.

48.90 to Seamons & Loveland to prepare for in-
 spection. (all with Petersen's sanction.)

\$183.51 Total

Which leaves a balance of \$41.49 of the \$225.00, which sum Valley tendered to Petersen, who refused it.

Thus, Valley owes Petersen \$41.49, and in addition, the Chrysler automobile belong to Petersen, who authorized its sale in court.

ARGUMENT

Point II

In making its oral decision, the trial Court specifically found that Nielsen and Bitters were operating Valley Car Market as partners (Tr. 345). In its findings the Court again found the parties to be partners and entered a judgment against them jointly and severally.

It is our contention that the evidence conclusively shows that Bitters was the owner of the car lot and that Nielsen was his employee. The evidence shows that Bitters started the car lot without Nielsen and that later Nielsen came to work for him. Later on, Nielsen left his employment and when Bitters disposed of the lot he did so as his own property and there never was any claim by Nielsen that he had any interest in it. There is no need to go into any lengths on this point since the Transcript of Testimony, pages 300 and 301, together with Exhibit B1, sets up what the relationship was.

As to the Court's finding that the Andersons paid the sum of \$100.18 to the other parties at the time of the original transaction, we are unable to find one bit of evidence in the records substantiating this finding. The only cash passing at the time of the original transaction was the \$1400.00 finance money.

The \$100.18 which the Court refers to, is presumably the \$108.00 which Valley Car paid to the finance company

on the Mercury payments out of the proceeds on the Packard in order to save the Mercury from repossession.

While this finding is not important, we do raise it for the reason that we feel the Court's findings are unsubstantiated by the evidence, and we point this out as one example among many. Of course, the bulk of the findings attacked by these cross-appellants go to the court's finding that Nielsen and Bitters, as partners, owe Peterson \$300.00, which we have argued more fully in Point I above.

CONCLUSION

The veidence does not support the Court's finding and conclusion that Nielsen and Bitters, jointly and severally, owe Peterson \$300.00. On the other hand, the evidence strongly supports the fact that Nielsen and Bitters owe less than \$50.00 to Peterson and that they tendered it to him but he refused to accept it.

We stongly urge the proposition that the evidence does not support the Court's findings, and that the judgment against Nielsen and Bitters in the sum of \$300 should be reversed, and that any judgment against Nielsen and Bitters be limited to the sum of \$46.49, which sum Valley Car has always been willing to pay.

Respectfully submitted,

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