

1954

# John Soter and Tom Soter v. Zeke Snyder and Strevell-Paterson Finance Company : Brief of Respondents

Utah Supreme Court

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A. W. Sandack; Arthur H. Nielsen; Attorneys for Defendant;

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# In the Supreme Court of the State of Utah

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JOHN SOTER and TOM SOTER,  
*Plaintiffs and Appellants,*

vs.

ZEKE SNYDER and STREVELL-PAT-  
ERSON FINANCE COMPANY, a  
corporation,  
*Defendants and Respondents.*

Civil No. <sup>8160</sup>~~6180~~

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## BRIEF OF RESPONDENTS

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**FILED**

AUG 4 1954

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## BRIEF OF RESPONDENTS

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### STATEMENT OF THE CASE

Appellants' brief fairly states the issues of this case, however, since their action lies in fraud and deceit the full circumstances of the case will be presented with particularity in the argument section of this brief.

## STATEMENT OF POINTS

### POINT 1.

THE SPECIAL FINDING OF THE JURY THAT DEFENDANT SNYDER DID NOT STATE IN SUBSTANCE:

A. That he grossed over \$50,000.00 in 1951, and

B. That he made a net profit of between \$7,000.00 and \$8,000.00 in 1951,

IS FULLY SUPPORTED BY ALL OF THE EVIDENCE AND TESTIMONY IN THIS CASE.

### POINT 2.

THE CONDUCT OF APPELLANTS NEGATIVE ANY MATERIAL REPRESENTATION.

### POINT 3.

THE COURT'S JUDGMENT IN THE AMOUNT OF \$10,600.00 IN FAVOR OF DEFENDANT SNYDER IS IN ACCORD WITH THE LAW AND THE AGREEMENT OF THE PARTIES.

## ARGUMENT

### POINT 1.

THE SPECIAL FINDING OF THE JURY THAT DEFENDANT SNYDER DID NOT STATE IN SUBSTANCE:

A. That he grossed over \$50,000.00 in 1951, and

B. That he made a net profit of between \$7,000.00 and \$8,000 in 1951,

IS FULLY SUPPORTED BY ALL OF THE EVIDENCE AND TESTIMONY IN THIS CASE.

The burden was upon the appellants (Soters) to prove fraud charged by clear and convincing evidence.

*Taylor v. Moore*, 51 P. 2d 222

*Campbell v. Zion's Coop*, 141 P. 401

The respondents (Snyder and Strevell-Paterson) having prevailed, the evidence must be reviewed in the light most favorable to them.

*Pace vs. Parrish*, 247 P. 2d 273

The burden in an action in deceit based upon fraudulent representations was upon the plaintiffs to prove all of the essential elements:

1. That a representation was made.
2. Concerning a presently existing material fact.
3. Which was false.
4. Which the representer either.
  - a. Knew to be false, or
  - b. Made recklessly, knowing that he had insufficient knowledge upon which to base such representation;

5. For the purpose of inducing the other party to act upon it.

6. That the other party, acting reasonably and in ignorance of its falsity.

7. Did in fact rely upon it.

8. And was thereby induced to act.

9. To his injury and damage.

*Stuck v .Delta Land and Water Co.*, 227 P. 791

*Jones v. Pingree*, 273 P. 303

23 Am. Jur. 772

Let us examine the facts presented to the jury in the light of the law stated:

### *Background Facts of the Delmar Transaction*

The Soters first contacted Snyder in August, 1952, answering a newspaper advertisement (R. 25, 58). They understood Snyder originally asked \$27,500.00. They suggested that Snyder accept their six-plex income property on a trade (R. 49). Snyder advised them a few days later he was not interested in a trade deal.

The Soters dropped their interest in purchasing the Delmar following this call from Snyder and looked around the city for other beer taverns (R. 68). Sam's Lounge, 4th South and West Temple was investigated (R. 68). They actually entered into an earnest money agreement to purchase the Spa Beer Tavern, 4th South and Main Street, for about \$12,000.00 (R. 69), and forfeited deposit money when they decided the lease was not attractive.



One evening in November, 1952, the Soters testified they met a friend "Blackie," a bartender who worked at the Glenwood Club, across the street from the Delmar, and they advised Blackie of their continued interest in purchasing a beer tavern (R-71). Blackie recommended they buy the Delmar.

"Across the street, the Delmar, that's a nice place and they seem to have a nice business" (R-71).

Soter stated:

"I talked to him (Snyder) before, but he wanted too much money, around \$27,500.00 and I wouldn't pay that much money for it."

Soter then asked Blackie to contact Snyder and determine if Snyder would accept less than \$27,500.00 (R-71).

About three to four days later, Blackie reported to Soter that he had contacted Snyder and he would cut the price to \$25,000.00. Soter requested that Blackie continue to bargain for a lower price, and two to three days later, Blackie reported again to Soter that Snyder would agree to take \$23,000 (R-72, 171).

Until the actual meeting of Snyder and the Soters at the Canton Cafe to consummate the deal held a few days later, Blackie had not disclosed to Snyder who his interested "buyers" were (R-75, 172, 176). The Soters then asked Blackie to arrange to meet Snyder with them a few days later to close the deal (R-72); until the Canton Cafe meeting the Soters directed no inquiry to Snyder about any phase of the business.

### *Business Experience of Purchasers*

At the date of the transaction between the parties, the plaintiffs had 17 to 18 years of experience in the beer business in Utah (R-46). Since 1933 they operated two places in Tooele County—Handy Corner Tavern and Lakeview Cafe (R-47). In 1948, the Soters sold out the beer places and purchased the Capitol Motor Lodge (State Street, Salt Lake City) for \$110,000.00 (R-47). This property they sold in January, 1949. Prior to purchasing the Delmar Lounge from the defendant Snyder, the Soters owned a six-plex income apartment unit (R-49) which they originally requested Snyder to accept on a trade for the Delmar (R-49). In May 1953, nearly six months after the Delmar purchase, the plaintiffs negotiated for the repurchase of the Capitol Motor Lodge, finally buying it back in October, 1953 (R-58) a 29-unit motel with restaurant. It is significant in retrospect that plaintiffs' repurchase of the Capitol Motor Lodge took place about 30 days *after* attempting to rescind the Delmar sale, nearly 11 months after the alleged fraud.

### *The Agreement*

The title-retaining sales agreement (Plaintiff's "Exhibit No. 1") provides the Soters pay \$23,000.00 for the business and fixtures, payable \$10,000.00 cash, \$300.00 per month until fully paid, *without interest*. Concurrently, defendant Snyder executed an attractive lease to the plaintiffs for six years with an option for an additional five years at \$500.00 per month rent (Plaintiffs' "Exhibit No. 2"). The lease provided, *in the event hard liquor sales were permitted by law, the rent would be an additional \$50.00 per month*. When the plaintiffs at-

tempted to rescind the sales agreement September 3, 1953, they had paid an equity of \$12,600.00 on the contract (R-14). Plaintiffs continued to make the monthly rental payments of \$300.00 only after being served with a Landlord's Demand to Pay Rent (R-232, "Exhibit 16-17").

### *The Transaction*

Tom Soter and his father came into the Delmar Lounge around the first of August, 1952, in response to Snyder's advertisement (R-167). Snyder told them he wanted \$27,500.00 on terms, or \$25,000.00 cash for his place. Tom Soter suggested a trade on his six-plex. Snyder was not interested (R-168). Snyder showed them through the Lounge and said: "It would be a good buy for a partnership" (R-168). At the early meeting in August, Snyder gave them the rent figure, the cost of bartender help, light and heat bills. Snyder testified: "When I purchased the place I went to the beer distributors and asked them as to the amount that was sold to the place before I would buy it and I suggested they do the same" (R-169). The Soters then made no inquiry with respect to the amount of business (R-169). Snyder told them *he was making a nice living and if he couldn't get his price he wasn't interested in selling*" (R-169.)

Nothing more took place between the Soters and Snyder until a Friday night in November 1952, just before the election (R-171) when Blackie contacted Snyder on behalf of some interested parties (R-172). They haggled over the selling price and four days later Blackie arranged a meeting between Snyder and his interested parties at the Canton Cafe (R-173).

Mr. Snyder testified, under direct examination, his version of the entire Canton meeting set forth as follows: (R-173, 174, 175, 176 and 177).

"Q. Did you have any conversations with this person Blackie between this first meeting and the Canton meeting?

A. He came back to me and told me we would meet at eight o'clock, that was all, that he would have the party there.

Q. Did you know at that time who these parties were that he was . . .

A. No, I had no idea who the party was.

Q. Now, just describe what took place at the meeting at the Canton Cafe, what you saw and what you heard, who was there and the whole substance of your conversation.

A. I walked over from the Delmar to the Canton Cafe and waited on the outside, and these people — I waited until about five minutes after eight, and these people appeared, and it happened to be Tom Soter, who I had met before, and his brother, John, who I hadn't seen before, and they introduced me to John Soter. Blackie, of course, was there, and we went up into the balcony part of the cafe, and we ordered some coffee, and we started in talking, and they said they were interested in buying it, but the twenty-seven thousand five hundred dollars didn't seem a right figure for them to pay.

I says, 'Well, I don't know. Blackie had told me you wanted to pay cash for it, and I had told Blackie I had lowered the price to twenty-five thousand, which you had probably been told about.'

So they asked me about the amount of business that I had done. I told them that I . . . I says, 'There

is only one way for you to get a true picture of buying a business. That is to see how much has been purchased. You have the privilege of going to the beer distributors and getting these figures; and in the meantime, if I shouldn't call, which I will call on if I get to it, you call me or have them call me if you are there in their business, and I will give them the authority to show you the books.' I says, 'And from the amount that you find out from the distributors and the costs that I have given you, the costs of the employees, the entertainment, and the rent and everything, including license and insurance, and the amount that we get for the product that we sell, *you should determine from those figures whether I am making no money or not, because you have been in the beer business.*' (Italics added.)

So we finally got down to a figure. They still said it was too high, so we came down to twenty-three thousand dollars. I told them that I wanted to go into the used-car business. They says, 'Well, the twenty-three thousand dollars sounds all right to us.'

I says, 'Well, twenty-three thousand cash.'

They says, 'No, we will give you ten thousand down and the balance on terms of three hundred dollars a month.'

I says, 'Well, if that is all the cash I am going to get, and to go into the used-car business, I would naturally need a little more money, and I would have to pay interest, so I think it isn't unfair if I should ask you for five per cent interest, and I know that I will have to pay six, eight, or possibly ten.'

It turned out I pay one per cent a month, which happens to be twelve. They says, 'Well, why don't you give us a good deal' . . .

Q. Who said this?

A. Tom and John both. 'Why don't you give us a good deal and not charge us any interest?'

I says, 'Well,' I says, 'At least at the very minimum for three per cent interest.'

'No, we will take the place, and we want something we can make a living in.'

I says, 'Well, you can make a living provided you both work a shift, but if you have no intention of working a shift, don't buy the Delmar.'

They says, 'Well, we are going to work a shift. That is why we are buying it.'

Finally we come to an agreement that we would meet in Mr. Bernstein's office, who happened to be my attorney at the time, and draw up the papers, and in Mr. Bernstein's office I told them and I told them at the meeting provided they weren't given a license, and although the papers were signed and no license was available to them, but wouldn't be given to them, that they did not have to go through with their contract; and later on we went into the attorney's office and had the contract drawn up.

Now when we went to Sam Bernstein's office, who happens to be in the same room with Mr. Metos, who is the plaintiff's attorney here, Mr. Bernstein drew up the lease and also the conditional sales contract. Mr. Metos read both. Tom Soter read them. I believe his father looked at them also. His brother, John Soter wasn't there at the time. Before Tom Soter signed the contract, the lease and the conditional sales contract, Mr. Metos said to him, 'Now, this is what you want? You are sure you know what you are signing?' and Mr. Tom Soter said, 'Why, yes. This isn't the first business I have ever bought.'

- Q. What date was that statement made?
- A. That was made on November 14, I believe, at the signing of the lease, the date of the sale.
- Q. Is that the date the lease bears?
- A. I believe so. I believe the conditional sales. I'm not sure as to the lease. They took place over on December 1.
- Q. 14th day of November, both instruments bear that date. Now, referring again to the Canton Cafe before we get off that subject, did either John or Tom Soter ask you specifically how much business you had done in the year 1952 up until the time this conversation took place?
- A. They asked me how much business I was doing. I couldn't give them any figure in '52 because there wasn't any figure to give them. I told them over the period of years that I had operated the Delmar I presume it would average approximately fifty thousand a year. I had no books.
- Q. Did you bring any books with you that night?
- A. No, no books whatsoever.
- Q. Did they ask you to go get any books that night?
- A. No. I told them as far as books were concerned, I says, 'Anyone can give you a set of books.' I says, 'You want the true figure. If you want the true picture, the only way you can get the true picture is from the distributors.'
- Q. Were you asked by Blackie the night that you made this arrangement to bring your books with you at that meeting?
- A. No, sir. I didn't know who the party was even."

Defendant Snyder's direct examination testimony regarding the representations follows: (R-179)

"Q. Did you ever make the statement, Mr. Snyder, to either Tom or John Soter, or his father, at any time, that you did fifty to sixty thousand dollars' worth of business a year and specifically in the year 1951.

A. No.

Q. Were you ever asked a statement how much business did you do in the year 1951?

A. No.

Q. Did you ever make the statement, Mr. Snyder, either to John or Tom Soter at any time that you made a profit of between seven to eight thousand dollars a year?

A. I never said that I made a profit of seven or eight thousand dollars a year. I told them that I made a good living out of the Delmar, and I also stated that I figured it was a good living because I had paid twenty-eight hundred dollars a year payments on my home, and with the life insurance that I carry on my wife and myself I presume it would cost me in the neighborhood of five thousand dollars. It could have cost me less to live. There was no exact figure as to the amount that I had earned.

Q. Did you ever make a statement with respect to how much money you were drawing out of the business?

A. Yes. The same amount."

Viewed by present-day business dealings between buyer and seller, the protest that this transaction was fraudulent had a hollow ring which seven of eight jurors recognized.

The record is fully quoted to illustrate how completely fair Snyder dealt with the Soters. The Soters knew the beer business



first-hand. They tried unsuccessfully to pawn off upon Snyder an exchange property of their own. Snyder told them unless he got his price he wasn't interested in selling and that the Delmar would be a good business provided the Soters worked behind the bar themselves (R-105). Snyder was not interested in selling at his first meeting and the Soters looked for other taverns. They investigated two others and actually made a deal forfeiting their deposit money because of a poor lease. Then they again sought out Snyder through Blackie as undisclosed parties, toward the end of obtaining a substantial price reduction. The Soters admitted relying upon Blackie's estimate of the business not Snyder's. The price reduction was their main objective and when the business failed to meet their expectation they cry fraud for the first time eleven months later. During the first three months of their operation knowing the business to be under expectation, the Soters induced Strevell-Paterson Company to make a substantial loan to Snyder and admit in writing they have no other claim or set-off against the transaction. In March and April of 1953 they list the property for sale themselves and for \$3,000.00 more than they paid (R-63). The whole key to this contest lies primarily in the Soters' desire to take back the Capitol Motor Lodge which they first attempted in May of 1953, six months after the Delmar deal, and finally succeed in doing in October 1953 (R-57-58). Again, on August 30, 1953, the Soters treat the Delmar as their own and list it for sale with Thayne Adams Company at \$25,000.00, \$2,000.00 more than they paid Snyder (R-64).

This jury wasn't blind to the fact that the Soters desired to get out of the Delmar deal in order to get back into the

Capitol Motor Lodge deal. In order to give his full time to the Capitol management, one of the Soters quit bartending in October, 1953. Fraud was a clear afterthought that backfired.

Mr. Snyder at no time represented the business earned a net profit of between \$7,000.00 and \$8,000.00 in 1951, or that he grossed in excess of \$50,000.00 that year. What he said was that he drew that out of the business to live on and over the years (since 1949) the business had averaged about \$50,000.00 considering the total volume divided by the total number of years he had the business.

Snyder invited the Soters to check with his beer suppliers and on that basis to determine if he was making an attractive profit. Soters' recollection that he had made this statement several time was not clear (R-222). Finally, in July 1953, the Soters contacted these beer distributors (R-103) and did obtain this information, but over six months later.

### *"To Their Injury and Damage"*

The Soters produced their profit and loss statement at the trial showing their twelve months' operation from the date of purchase to November 30, 1953 (Ex. P-3). Once again their claim of fraud is exploded by neither damage nor injury, but relatively good business considering the fact that for the year 1953-1954, all businesses were somewhat depressed.

Their statement shows the following:

Beer Sales .....	\$33,069.93	
Soft Drink Mixers .....	5,217.91	
Miscellaneous .....	617.95	
Amusement Machines .....	1,964.00	
Punch Boards .....	1,485.10	
Total Gross Receipts .....	\$42,354.89	
Cost of Merchandise Sold .....	17,010.14	
Gross Profit on Total Receipts		\$25,344.75
Less Operating Expenses:		
Salaries paid others .....	4,447.10	
Repairs and upkeep .....	621.61	
Taxes and licenses .....	1,748.05	
Advertising .....	101.45	
Miscellaneous .....	400.28	
Utilities .....	1,283.32	
Sign rental maintenance .....	407.21	
Rent .....	6,000.00	
Bad checks .....	429.03	
Linen .....	266.08	
Ice .....	200.01	
Insurance .....	582.12	
Depreciation .....	2,310.00	
Total operating expenses .....		\$18,796.26
Net Profit before owners' salaries		\$ 6,548.49

The Soters' net profit after taking a depreciation loss of \$2,310.00, the cost of the business over ten years, is in excess of \$6,500.00 and including depreciation equals \$8,858.49. It is a little hard to understand what injury and damage actually resulted to the Soters from their own figures. Their own figures betray their claim of any damage.

In the light of the background of all the facts necessary to make out the fraud case, it is not difficult to understand the jury's finding. Applying the formula for fraud, the Soters would bat exactly zero on each of the nine elements constituting fraud by the previous decisions of this Court.

## POINT 2.

### THE CONDUCT OF APPELLANTS NEGATIVE ANY MATERIAL REPRESENTATION.

Approximately three months after the sale of the Delmar Lounge respondent Zeke Snyder negotiated a loan with Strevell-Paterson Finance Company offering the contract between himself and the Soters as collateral security for the repayment of such loan. Before making the loan Strevells required a statement from appellants as to the amount owing by them to Mr. Snyder, as well as an acknowledgment that there were no off-sets or claims against said amount.

This statement of balance owing was introduced in evidence as Exhibit D-4 and was identified by John Soter, who on cross examination testified that the statement was signed in the latter part of February after appellants had sustained a loss for the months of December and January and were behind for the month of February (R. 107-108). Mr. Soter further testified that he was informed by respondent that the latter was attempting to make a loan; "that Strevells wanted to make sure appellants don't have any claims or off-sets against that amount (R.108) and:

“Q. As a matter of fact, when Mr. Snyder gave you that statement to sign, you didn’t make any protest about it, did you?

A. No.

Q. You didn’t tell him you were reluctant to sign it, did you?

A. No, sir.

Q. You didn’t tell Strevell-Paterson you were reluctant to sign?

A. No, sir.

Q. You signed it, didn’t you?

A. Exactly.

Q. And you read it over before you signed it?

A. That’s right.

Q. And you knew Mr. Snyder couldn’t get his loan unless you signed it?

A. I guess that’s right.

Q. You had business with Strevell before?

A. We have, yes.

Q. And when you did business and made a loan, they required security?

A. Exactly.

Q. And you knew they were requiring verification of this contract and the fact that there was no dispute between you before they would loan Mr. Snyder that money?

A. That’s right.

Q. And you signed it so he could get the loan?

A. Exactly.

Q. And you didn't call Strevell's and tell them anything about it?

A. No, sir."

If there had been any representation made to appellants by respondent Snyder as to the volume of business done or his "take-home pay" upon which from the business appellants relied on entering into the contract for the purchase of the Delmar Lounge as claimed in the pleadings, then surely appellants would have refused to sign any statement admitting there were no off-sets or charges but would have questioned the contract at that time and would have protected themselves with respect to the matter.

### POINT 3.

THE COURT'S JUDGMENT IN THE AMOUNT OF \$10,600.00 IN FAVOR OF DEFENDANT SNYDER IS IN ACCORD WITH THE LAW AND THE AGREEMENT OF THE PARTIES.

The Soters entered into an absolute and unconditional promise to pay Snyder \$23,000.00 for the business and fixtures. They breached their agreement on September 3, 1953, after paying in \$10,000.00 cash, eight monthly payments of \$300.00 each, making a total of \$12,400.000, owing Snyder the balance of \$10,600.00 and flatly refusing the pay him any more.

Utah does not have a Uniform Conditional Sales Act, and in almost all jurisdictions, whether the Act is in effect or not, a conditional vendee's promise to pay the purchase

price gives the vendor the absolute right to the purchase price where that promise to pay is unconditional.

47 *Am. Jur. Sales*, Section 894 p. 102

Appellants' single case authority, *American-La France Fire Engine Co. v. Bagge* (1929) District Court of Appeal, Third District, California, 276 P. 1066, is not authority for his proposition since a collateral agreement rendered the promise to pay conditional.

Granted that defendant Snyder had the right of repossession upon buyers' default, he was likewise entitled to have his just demands against the defaulting purchasers satisfied. Snyder had several methods of securing this right. He could have retaken the property or he could have recovered the purchase price. The fact that he had the right to retake possession does not restrict or bar his right to recover the purchase price. 47 *Am. Jur. Sales*, Section 895, P. 103.

Appellants have confused Snyder's substantive rights with his procedural rights. Snyder is entitled to only one satisfaction against the buyers and that is what he sought here, a judgment for the balance due under the contract. See 101 *ALR* 520, and 18 *Am. Jur.*, Section 36, P. 156.

To limit Snyder only to retake possession after default would be totally unjust, for the Soters also were tenants of Snyder of his real property. By keeping up the monthly lease payments and defaulting on the fixture agreement, the Soters would, by their reasoning compel Snyder to retake the fixtures while requiring him to rent them his premises.

The contract language is clear. Upon failure of the Soters to make the payments, Snyder declared the entire purchase price due and upon the Soters' failure to pay the accelerated sum, the contract provides Snyder "may" retake possession of the property. This right to elect a remedy should not prevent the conditional seller from standing on the contract and suing for the full purchase price. Appellants contend the legal effect of this paragraph is to give Snyder only one remedy upon the Soters' default. The law is otherwise and it should be so, even without statutory provision. The Court awarded judgment to Snyder in the sum of \$10,600.00 together with interest, and required that upon the payment in full of said judgment, Snyder shall deliver to the Soters full title to all of the personal property, an Order that is entirely consistent with the Seller's remedies and the Buyer's rights.

## CONCLUSION

This case was fully tried and considered by a jury and Court. We respectfully submit that the judgment appealed from should be affirmed.

Dated this 4th day of August, 1954.

A. W. SANDACK

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ARTHUR H. NIELSEN

*Attorney for Defendant Strevell-  
Paterson Finance Company, a corporation*