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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
B. Alex Hyman, Circuit Court Judge

Appellate Case No. 2025-000063

Stivers Brothers Automotive, Inc., Respondent,

v.

W. Warner Peacock and Peacock Automotive, LLC, Appellants.

REPLY TO APPELLANTS' RETURN TO RESPONDENT'S MOTION TO SUPPLEMENT THE RECORD ON APPEAL

INTRODUCTION

Respondent hereby responds to Appellants' "Objection" to its motion to supplement the Record on Appeal pursuant to Rule 240(f), SCACR. In its motion, Respondent proposed, pursuant to Rule 212(b), SCACR, to supplement the Record on Appeal with the following designated matter: (1) Plaintiff's Third Motion to Compel Production of Documents and to Strike Defendants' Delayed Assertion of Privilege filed September 5, 2024, and Exhibits; and (2) Plaintiff's Motion to Serve a Second Amended and Supplemental Complaint filed October 2, 2025, and Exhibits.

The Final Reply Brief of Appellants chastised Respondent for "attempting to introduce highly contested assertions not in the Record," and reiterated that Rule 210(h), SCACR, limits appellate review to facts appearing in the Record on Appeal. Respondent thus filed the motion to supplement the record so that its so-called "highly contested assertions" could be considered by

the Court and to appease Appellants. Now, Appellants have objected to Respondent's motion based on Rules 209(b) and 210(c), SCACR. [1] Once again, the Appellants want to have their cake and eat it, too.

Appellants assert that the above-mentioned motions and memoranda were not "presented to the lower court" and should not be included in the Record on Appeal pursuant to Rule 210(c), SCACR. Appellants are under the mistaken impression that motions and/or memoranda which were filed after the hearing are never appropriate for appellate review. Respondent asserts that if portions of those motions and/or memoranda discuss "issues" and "arguments" raised to and ruled on by the lower court, then those motions and/or memoranda contain "matter" which may be included in the Record on Appeal.

ARGUMENT

1. "MATTER" IN THE CONTEXT OF RULES 209 – 210, SCACR, PLAINLY REFERS TO THE ISSUES AND ARGUMENTS CONTAINED IN DESIGNATED MATERIALS, NOT THE MATERIALS THEMSELVES

Rule 210(c), SCACR, prohibits the inclusion of "matter" which was not presented to the lower court or tribunal. Appellants have effectively declared a "checkmate" by asserting that Respondent's Third Motion to Compel and to Strike Defendant's Assertion of Privilege was filed "more than a year after the hearing before Judge Hyman," and was "not before Judge Hyman."[2] Appellants likewise claim that the Motion to Serve a Second Amended and Supplemental Complaint was filed after the hearing with Judge Hyman. Thus, according to Appellants, none of this "matter" was raised to and ruled on by Judge Hyman.

In Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004), the Supreme Court clarified the scope of Rules 209 – 210, SCACR, as follows:

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[1] Appellants' Final Brief – Reply, p. 2

[2] Appellants' Objection to Respondent's Motion to Supplement the Record on Appeal, p. 2.

> "Second, a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all *issues* and *arguments* are presented to the lower court for its consideration. *Issues* and *arguments* are preserved for appellate review only when they are raised to and ruled on by the lower court. E.g., Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an *issue* cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any *point* which was not presented and considered below unless it involves jurisdiction of the court); Gaffney v. Peeler, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court)." [*emphasis added*].

In this context, it is abundantly clear that the sort of "matter" contemplated by Rules 209 – 210, SCACR, is concerned with the substance contained within the designated materials; namely, the particular "issues", "arguments", and "points" referenced therein. The date the designated materials were filed is ultimately irrelevant if the particular "issues", "arguments", and "points" discussed therein were raised to and ruled upon by the lower court.

Respondent does not assert that it argued its Third Motion to Compel or Motion to Serve a Second Amended and Supplemental Complaint before Judge Hyman. Rather, Respondent asserts that "issues", "arguments", and "points" referenced in those motions, memoranda, and exhibits were previously raised before Judge Hyman and ruled upon.

For example, the procedural history portion of the Third Motion to Compel specifically discusses the May 23, 2023, hearing before Judge Hyman and provides the Court with context as to why the details of Appellants' bad faith, post-breach conduct has only been "since discovered"[3], years after the original and amended complaints were filed:

> "The Defendants again invoked the privilege on January 7, 2022, in response to the Plaintiff's second set of interrogatories (# 14), wherein the Defendants refused to identify any communications the Peacock organization sent or received regarding

[3] Respondent's Final Brief, p. 8

> the sale of its Hyundai assets in Columbia, South Carolina. On April 12, 2022, the Plaintiff filed its first motion to compel to require the Defendants to respond to that interrogatory as well as its third requests for production. On May 5, 2023, the parties received notice that the motion to compel had been scheduled for a hearing. On May 17, 2023, the Defendants filed a memorandum in opposition to the motion to compel in which it argued that Interrogatory # 14 encompassed communications protected by the attorney-client privilege. On May 23, 2023, *the parties appeared before the Honorable B. Alex Hyman for a hearing on the motion to compel. Judge Hyman, fully briefed on the Defendants' position on the attorney-client privilege, ruled from the bench to grant the Plaintiff's motion to compel, without exception for documents deemed privileged by the Defendants. Judge Hyman's bench ruling was confirmed in a written Order filed on July 31, 2023. The Defendants ignored the order.*" [*emphasis added*].

It is also undisputed that a specific "argument" brought before Judge Hyman at that May 23, 2023, hearing was as follows:

> "In the spring of 2021, the Plaintiff suspected that Peacock intended to sell its South Carolina dealerships. The Plaintiff served a subpoena upon Hyundai Motor America, Inc. to confirm their suspicions, but the Defendants moved for a protective order to frustrate the service of the subpoena. The Defendants also objected to the Plaintiff's second request to produce (dated April 5, 2021) and third request for admission (dated April 9, 2021), both of which pertained to the suspected sale of the Defendants' South Carolina dealerships. On April 21, 2021, Automotive News reported that Peacock was indeed in the process of selling its South Carolina dealerships to AutoNation. Automotive News further reported that Peacock and AutoNation had been in negotiations since November of 2020. *At that moment, the Plaintiff's suspicions were seemingly confirmed that the early neutral evaluation had been merely a diversion tactic, and that one or perhaps both of the unsolicited post-breach APAs received from Peacock after July 15, 2020, had been a charade. In other words, those APAs had been submitted by the Defendants for the sole purpose of fabricating an affirmative defense (specifically, failure to mitigate damages), when in fact the Defendants had no intention of purchasing the Plaintiff's Hyundai assets. Instead, the Defendants had been preparing to liquidate their assets and to flee the state before the Plaintiff could pursue this matter and obtain a potential judgment.*"[4] [*emphasis added*].

The Third Motion to Compel further touches upon the "issue" of whether the unsolicited post-breach APAs had been a charade as Respondent had specifically argued to Judge Hyman:

> "Stephens, Inc. was formally engaged by Defendant Peacock Automotive on October 2, 2020, to act as a financial advisor on behalf of Peacock Automotive in connection with any proposed Transaction involving the Company and one or

[4] Plaintiff's Motion to Compel and Memorandum in Support, pp. 6 – 7, filed April 12, 2022.

> more other parties (each a "Purchaser"). PA 11401 – 11410. However, as the Plaintiff had long suspected, *Stephens, Inc. was assisting Peacock with finding suitors for its South Carolina assets no later than May 9, 2020, long before the post-breach APAs were submitted.* PA 9111 – 9112."[5] [*Emphasis added*].

The Motion to Serve a Second Amended and Supplemental Complaint, which includes a copy of the proposed Second Amended and Supplemental Complaint, specifically references "issues", "arguments", and "points" heard by Judge Hyman. By way of example, paragraph 17 of the proposed Second Amended and Supplemental Complaint, describing Appellants' bad faith, post-breach conduct states:

> "[T]he Defendants orchestrated an attempt to fabricate defenses by vacillating between feigned offers to purchase and counterclaims for fraud, all the while seeking a buyer for the entirety of Peacock Automotive's South Carolina assets in order to flee the State."

There can be no doubt that the "issues", "arguments", and "points" referenced in paragraph 17 were before Judge Hyman[6], who ruled as follows:

> "After carefully considering the memoranda and arguments of counsel, the Court GRANTED the Plaintiff's motion to compel (subparagraph 1 above) because under the broad language of Rule 26(b), SCRCP, as to the permitted scope of discovery, *the Court finds this requested information is relevant to the issue of Defendants' intentions in the transactions that gave rise to this litigation.*"[7]

Furthermore, paragraph 96 of the proposed Second Amended and Supplemental Complaint references and contextualizes the "market measure of damages" specifically adopted by Judge Hyman based on arguments raised at the hearing by the Respondent:

> "On or about October 7, 2020, the Plaintiff sold the Chevrolet assets to a third party and mitigated its damages arising out of Peacock Automotive's breach of the Chevrolet APA. This was a single-shot opportunity because the substitute buyer was a fellow motor vehicle dealer in the Columbia who had for many decades operated franchised dealerships for nearly every motor vehicle manufacturer except

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[5] Plaintiff's Third Motion to Compel Production of Documents, fn. 2, filed September 5, 2024.
[6] *See* fn. 4, *supra.*
[7] Order Granting Plaintiff's Motion for Summary Judgment on the Measure of Damages and Denying Defendants' Motion to Seal Certain Financial Information, filed July 31, 2023.

Chevrolet, and to whom acquiring a Chevrolet dealership had become a matter of personal ambition."

While the Appellants are correct that the motions, memoranda, and exhibits were filed subsequent to the May 23, 2023, hearing before Judge Hyman, the "arguments", "issues", and "points" related to Appellants' bad faith, post-breach conduct, as well as the measure of damages, discussed therein were indeed raised before the lower court.

CONCLUSION

Based on the foregoing, the Appellants respectfully request that the Court grant its motion to supplement the record on appeal pursuant to Rule 212 (b).

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PROOF OF SERVICE

I certify that I have served a copy of the Reply to Appellants' Return to Respondent's Motion to Supplement the Record on Appeal on W. Warner Peacock and Peacock Automotive, LLC by depositing a copy of it in the United States Mail, postage prepaid, on December 15, 2025, addressed to their attorney of record, Bradford N. Martin, Post Office Box 10410, Greenville, South Carolina 29603.

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