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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

Case No. 2020-CP-40-01934
Appellate Case No. 2025-000063

Stivers Brothers Automotive, Inc., Respondent,

v.

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

SUPPLEMENTAL APPENDIX TO RECORD ON APPEAL

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Plaintiff's Third Motion to Compel Production of Documents and to Strike Defendants' Delayed Assertion of Privilege, filed September 5, 2024, and Exhibits395

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
STIVERS BROTHERS)
AUTOMOTIVE, INC.,)
)
Plaintiff,)
)
v.)
)
W. WARNER PEACOCK)
and PEACOCK AUTMOTIVE, LLC,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CASE NO. 2020-CP-40-01934

**PLAINTIFF’S THIRD MOTION
TO COMPEL PRODUCTION OF
DOCUMENTS AND TO STRIKE
DEFENDANTS’ DELAYED
ASSERTION OF PRIVILEGE**

**TO: THIS HONORABLE COURT AND BRADFORD N. MARTIN, ESQ., ATTORNEY
FOR DEFENDANTS**

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, as soon as counsel may be heard, will move before the presiding judge of the Court of Common Pleas for the Fifth Judicial Circuit for an Order pursuant to Rule 37(a), SCRCF, compelling the Defendants for a third time to answer the Plaintiff’s Second Set of Interrogatories and Third Requests to Produce in full; specifically, to include the documents designated in the “privilege log” provided by the Defendants along with the document production served on Plaintiff’s counsel on July 5, 2024.

BACKGROUND

The Defendants have twice been ordered by the Court to respond in full to the Plaintiff’s Second Set of Interrogatories and Third Requests to Produce; first on July 31, 2023, and again on June 26, 2024. In the latter order, the Court explicitly stated: “The Defendants shall provide *complete discovery responses* within ten (10) days.” (*emphasis added*).

The Court denied the Plaintiff’s request that the Defendants’ pleadings be stricken pursuant to Rule 37(b)(2), SCRCF, noting that it did “not impose more severe sanctions pending prompt

compliance,” but held that reasonable attorney’s fees should be assessed against the Defendants for their “thinly veiled attempt to circumvent a previous order of the Court.” Despite the clear warning, the Defendants continue to attempt to circumvent orders of the Court and the Plaintiff is *still* seeking complete responses to the discovery requests it served in December of 2021. (*emphasis added*).

The Defendants produced a substantial number of responsive documents within ten days of the order. However, the Defendants withheld other responsive documents, citing the “attorney-client privilege.” These withheld documents are not communications between the Defendants and their counsel in this matter; rather, these communications largely involve Defendant Warner Peacock and other shareholders of Defendant Peacock Automotive, LLC (hereinafter, “Peacock”): J. Gregory “Greg” Humphries and John M. “Jay” Brennan¹. In addition, certain electronic communications between agents of Peacock and Cary Griffin, Esq. of Burr and Forman have been withheld pursuant to claims of attorney-client privilege. The Court ordered that the Defendants produce “*complete* discovery responses,” without exception. (*emphasis added*).

PROCEDURAL HISTORY

The Defendants have a long asserted that communications involving certain member/managers of Peacock are privileged because members Greg Humphries and Jay Brennan happen to practice law in Florida. The Defendants first asserted the privilege, repeatedly, in their answers to the Plaintiff’s first set of interrogatories, dated December 4, 2020.

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 the sale of its Hyundai assets

¹ Jay Brennan’s self-directed IRA is a shareholder of Peacock Automotive, LLC.

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.

Instead, the Defendants first filed a motion to alter or amend, which was denied on November 1, 2023. On November 7, 2023, the Defendants filed a petition for writ of certiorari in the original jurisdiction of the Supreme Court of South Carolina, again seeking to evade Judge Hyman's order. On November 8, 2023, the Plaintiff filed a second motion to compel and for sanctions pursuant to Rule 37(b), SCRPC.

On January 10, 2024, after briefing on the issue, the Supreme Court issued an order denying the Defendants' petition for a writ of certiorari. On February 9, 2024, rather than comply with Judge Hyman's order, the Defendants served additional discovery of their own, including the Defendants' Seventh Requests for Production upon the Plaintiff, as well as a subpoena directed to ServisFirst Bank. On February 21, 2024, the Plaintiff filed a third motion for sanctions based on

the Defendants' persistent refusal to provide complete answers to its Second Set of Interrogatories and Third Requests to Produce.

The parties appeared before the Honorable R. Scott Sprouse on May 21, 2024, for a hearing on the Plaintiff's second motion to compel and for sanctions filed on November 8, 2023, as well as Plaintiff's third motion for sanctions filed on February 21, 2024. In an Order dated June 26, 2024, Judge Sprouse ordered the Defendants to provide complete discovery responses to the Plaintiff's Second Set of Interrogatories and Third Requests for Production within ten days.

On July 5, 2024, the Defendants responded to Interrogatory # 14 and each of the requests for production as follows: "see documents produced contemporaneously herewith." Produced contemporaneously were thousands of documents; mainly, electronic communications between Defendant Warner Peacock, employees of Stephens, Inc.², and prospective buyers.

The Defendants simultaneously produced a privilege log (attached to this motion as Exhibit A) listing documents withheld from the discovery production based on the "attorney client privilege." To the Defendants' credit, they provided somewhat-detailed descriptions of the documents—e.g., "Email from Greg Humphries to Jeffrey Bankowitz at Gray Robinson, Warner Peacock, and John Brennan at Gray Robinson regarding AutoNation draft APA." However, neither Judge Hyman nor Judge Sprouse ever ruled that the Defendants were entitled to withhold certain documents based on the attorney-client privilege.

On July 26, 2024, Judge Sprouse ordered the Defendants to pay the Plaintiff's attorney fees in the amount of \$5000.00.

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

LAW

“South Carolina courts *strictly* construe the attorney-client privilege.” In re Mt. Hawley Insurance Company, 427 S.C. 159, 167, 829 S.E.2d 707, 712 (2019). “While South Carolina bestows significant weight to the attorney-client privilege, the privilege is not absolute.” Id. citing Ross v. Med. Univ. of S.C., 317 S.C. 377, 384, 453 S.E.2d 880, 884 (1994). “The attorney-client privilege does not extend to communications made in furtherance of criminal, tortious, or fraudulent conduct.” Id. referencing State v. Doster, 276 S.C. 647, 651, 284 S.E.2d 218, 220 (1981). “Likewise, information—in and of itself—does not become privileged merely because it was communicated to an attorney.” S.C. State Highway Dep’t v. Booker, 260 S.C. 245, 256, 195 S.E.2d 615, 621(1971).

ARGUMENT

1. UNDER THE CIRCUMSTANCES, IT MUST BE PRESUMED THAT THE ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY

Greg Humphries is a member of Defendant Peacock. He is also licensed to practice law in the State of Florida. The self-directed IRA of Jay Brennan is a member of Defendant Peacock. Jay Brennan is also licensed to practice law in the State of Florida.

The documents sought by the Plaintiff are communications relevant to Defendant Peacock’s decision seek a prospective buyer of its fourteen (14) South Carolina dealerships and flee this State after this litigation commenced. These communications are not privileged simply because some involve members of Peacock who are licensed to practice law in Florida. *See Booker, supra.*

In fact, “the party asserting the [attorney-client] privilege has the initial burden to make a prima facie showing that the communications in question are privileged.” In re Mt. Hawley Insurance Company, 427 S.C. 159, 169, 829 S.E.2d 707, 713 (2019). The Defendants have made

no such showing. “It must be shown that the relationship between the parties was that of attorney and client.” State v. Love, 275 S.C. 55, 271 S.E.2d 110 (1980). The Defendants, again, have made no such showing. In the absence of any evidence to the contrary, it is reasonable to assume that the relationship between the parties was merely that of shareholders.

Neither Greg Humphries nor Jay Brennan have ever been licensed to practice law in the State of South Carolina. Neither Greg Humphries nor Jay Brennan have filed an application for admission *pro hac vice* in this case.

Jay Brennan was the only member of Peacock to attend the early neutral evaluation in December of 2020. Pursuant to Rules 16 and 6(b) of the South Carolina Alternative Dispute Resolution (SCADR) Rules, Brennan presumably attended as an “officer, director, or employee having full authority to settle the claim for a corporate party,” because he was not any “party’s counsel of record,” “the mediator,” or “a representative of the insurance carrier.” No other person is allowed to attend.

Further, now that it has been established that Peacock was seeking to liquidate its assets no later than May 9, 2020, more than two months before the highly suspect first post-breach APA was submitted to the Plaintiff, these communications are alleged by Plaintiff to have been made in furtherance of tortious and fraudulent conduct. *See State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 220 (1981) (“The attorney-client privilege does not extend to communications made in furtherance of criminal, tortious, or fraudulent conduct”).

2. EVEN IF THESE DOCUMENTS WERE PRIVILEGED, THE ATTORNEY-CLIENT PRIVILEGE HAS BEEN WAIVED

The documents produced by the Defendants on July 5, 2024, contain communications which, according to the Defendants, would be covered by the “attorney client privilege,” because they are between Defendant Warner Peacock and other attorneys, including fellow Peacock

shareholders Jay Brennan, and Greg Humphries³, as well as Alfred G. Smith, Esq., with Shutts & Bowen LLP.⁴ See Exhibit B.

“Any voluntary disclosure by the client to a third party waives the attorney-client privilege not only as to the particular communication disclosed, but also to all communications between the same attorney and the same client on the same subject. Marshall v. Marshall, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984). Therefore, the attorney-client privilege—to the extent that Defendants were ever entitled to assert it—has been waived by this voluntary disclosure.

Further, in Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014), the Supreme Court of South Carolina held that a party’s “continued noncompliance with the court’s discovery orders” was grounds for dismissal of the action as a sanction and was not an unduly harsh penalty. 409 S.C. at 276, 762 S.E.2d at 541. Coincidentally, the Davis case evolved from a dispute over communications listed in a privilege log which were allegedly protected from disclosure by the attorney-client privilege. 409 S.C. at 275, 762 S.E.2d at 540.

The Supreme Court remarked: “[I]n our view, Appellants’ failure to comply with the various orders of the court was willful and deliberate and caused unnecessary delay of this case and prejudice to Respondents.” 409 S.C. at 283, 762 S.E.2d at 544. The same can be said in this case. The Plaintiff is still seeking complete responses to discovery requests that were served nearly three years ago and have been ordered to be produced in full by two different Circuit Judges. A finding that the attorney-client privilege has been waived under the circumstances with respect to the communications in the privilege log is objectively a much lighter sanction than the outcome of Davis, even though harsher sanctions may be justified.

³ PA 11450

⁴ PA 11397 - 11399

CONCLUSION

For the reasons stated herein, the Plaintiff's third motion to compel should be granted, and the Defendants should produce the documents listed in the privilege log. In addition, the Court should rule that the attorney-client privilege has been waived by the Defendants.

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/s/ J. Michael Baxley

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Attorneys for Plaintiff

Irmo, South Carolina

September 5, 2024

EXHIBIT A

Privilege Log

October 20, 2020 10:10 am	Email from Warner Peacock to Greg Humphries at Shutts & Bowen regarding Buyers List and NDA	attorney client privilege
December 28, 2020 5:04 pm	Email from Warner Peacock to Greg Humphries at Shutts & Bowen regarding AutoNation Diligence Request	attorney client privilege
December 28, 2020 5:35 pm	Email from Warner Peacock to Greg Humphries at Shutts & Bowen regarding real estate diligence request	attorney client privilege
December 28, 2020 5:57 pm	Email from Greg Humphries to Jeffrey Bankowitz at Gray Robinson, Warner Peacock, and John Brennan at Gray Robinson regarding AutoNation draft APA	attorney client privilege
December 30, 2020 10:54 am	Email from Jeffrey Bankowitz at Gray Robinson to Greg Humphries at Shutts & Bowen and Warner Peacock regarding Draft APA with AutoNation	attorney client privilege
December 30, 2020 10:57 am	Email from Warner Peacock to Jeffrey Bankowitz at Gray Robinson and Greg Humphries at Shutts & Bowen regarding APA draft from AutoNation	attorney client privilege
February 25, 2021 5:27 pm	Email from Greg Humphries to Diane Reinhart, Jeffrey Bankowitz at Gray Robinson, Warner Peacock and Alfred Smith at Shutts & Bowen regarding APA disclosure schedules	attorney client privilege
February 25, 2021 10:27 pm	Email from Greg Humphries to Diane Reinhart, Jeffrey Bankowitz at Gray Robinson, Warner Peacock, and Alfred	attorney client privilege

	Smith at Shutts & Bowen regarding disclosure schedules	
March 3, 2021 2:54 pm	Email from Greg Humphries to Jeffrey Bankowitz at Gray Robinson, Jay Brennan at Gray Robinson and Diane Reinhart regarding APA schedules	attorney client privilege
March 5, 2021 12:08 pm	Email from Jeffrey Bankowitz to Cary Griffin at Burr & Forman regarding schedules for APA with AutoNation	attorney client privilege
March 7, 2021 11:12 am	Email from Cary Griffin to Jeffrey Bankowitz at Gray Robinson, Greg Humphries at Shutts & Bowen, and Ieann Warfield at Shutts & Bowen regarding schedules for APA with AutoNation	attorney client privilege
March 8, 2021 10:04 am	Email from Cary Griffin to Warner Peacock regarding schedules for sale to AutoNation	attorney client privilege
March 8, 2021 10:33 am	Email from Warner Peacock to Cary Griffin at Burr & Forman regarding sale to AutoNation	attorney client privilege
March 8, 2021 10:35 am	Email from Cary Griffin to Warner Peacock regarding sale to AutoNation	attorney client privilege
March 8, 2021 10:50 am	Email from Warner Peacock to Cary Griffin at Burr & Forman regarding sale to AutoNation	attorney client privilege

EXHIBIT B

CONFIDENTIAL

PA - 011450

From: Warner Peacock
Sent: Thursday, August 19, 2021 8:53:38 AM
To: 'Gempton, Chris'
Subject: FW: AN Letter Agreement
Importance: Normal
Sensitivity: None
Attachments:
Peacock AN Letter Agreement (Draft of 8-17-21)-22809715-v2.docx; Change-Pro Redline - Letter Agreement-22809720-v and Peacock AN Letter Agreement (Draft of 8-17-21)-22809715-v2.pdf;

Chris, I thought I would send you this so you can push Lance along. I believe the change we made is consistent with our conversation yesterday. They also have our turn of the Settlement Agreement that I can send you but the one change we made was more "legal-speak" so I don't know if you want to get involved in that.

From: J. Gregory Humphries <JHumphries@shutts.com>
Sent: Wednesday, August 18, 2021 4:52 PM
To: Warner Peacock <wpeacock@peacockautomotive.net>; Jay Brennan <jay.brennan@gray-robinson.com>
Subject: FW: AN Letter Agreement

fyi

From: J. Gregory Humphries
Sent: Wednesday, August 18, 2021 4:51 PM
To: Phillips, Lance <lancephillips@eversheds-sutherland.com>
Cc: Alfred G. Smith <ASmith@shutts.com>
Subject: AN Letter Agreement

Lance, Attached is the Letter Agreement. Usual caveats apply. Let me know if this is consistent with the conversations between the parties today. Thanks, Greg

J. Gregory Humphries
Partner | Shutts & Bowen LLP
Tel: (407) 835-6940
300 South Orange Ave., Ste. 1600, Orlando, FL 32801
Bio | E-Mail | vCard | www.shutts.com

Shutts

ELECTRONICALLY FILED - 2024 Sep 05 10:46 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

CONFIDENTIAL

PA - 011397

From: Matthew Marks
Mail received time: Fri, 2 Oct 2020 21:18:52
Sent: Friday, October 2, 2020 5:18:53 PM
To: Warner Peacock
Subject: Re: Stephens EL
Importance: Normal
Sensitivity: None

Warner - I spoke to our committee, and we are excited to move forward on this transaction with you. If you would sign the letter, I will do the same.

We have the outline of a book complete already. Let us continue to touch that up, work on a list of prospects and let you know the other final items that we are missing to complete the prep work. At this point, it likely makes sense to update the financials for the September performance - which I am certain will continue to be great!

Enjoy your weekend, and let's connect first of the week.

Best,

Matthew

From: Warner Peacock <wpeacock@peacockautomotive.net>
Sent: Friday, October 2, 2020 9:09 AM
To: Matthew Marks
Subject: FW: Stephens EL

EXTERNAL EMAIL

For our 10:30 call.

From: Alfred G. Smith <ASmith@shutts.com>
Sent: Thursday, October 1, 2020 6:18 PM

ELECTRONICALLY FILED - 2024 Sep 05 10:46 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

CONFIDENTIAL

PA - 011398

ELECTRONICALLY FILED - 2024 Sep 05 10:46 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

To: Warner Peacock <wpeacock@peacockautomotive.net>
Cc: Greg Humphries <jhumphries@shutts.com>
Subject: Stephens EL

Warner,

Please find attached a revised letter for your review.

Let me know if you would like to discuss or if you have any questions.

Regards,

Al

[<http://ftp.firmseek.com/shutts/images/shutts105.jpg>]

Alfred G. Smith
Partner

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