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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

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2021-001489

Stivers Brothers Automotive, Inc., Appellant,

v.

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

RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL AS TO JUDGE NEWMAN'S MARCH 24, 2021 ORDER

INTRODUCTION

This appeal arises out of rulings on two motions heard by the same judge, at the same time, on the same day, and reflected in Form 4 orders issued within 24 hours of one another. In one order, the lower court granted Respondents' motion for judgment on the pleadings, concluding that the Dealers Act does not allow one dealer to sue another dealer. In the other, the lower court denied Stivers' motion to serve a second amended and supplemental complaint ("motion to amend") addressing its claim under the Dealers Act.

On January 14, 2022, Respondents' Motion To Dismiss Appeal As To Judge Newman's March 24, 2021 Order was prematurely and erroneously served and filed. Stivers now responds to Respondents' motion.

ARGUMENT

By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis. *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019).

The holdings in *Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004), that an order denying a motion to amend an answer, and *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988), that an order denying a motion to file a late answer, are not immediately appealable, have nothing to do with the companion orders on appeal in this case. Nor does a footnote in *Brown v. Cty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005), a case holding that a motion to dismiss is not reviewable, have anything to do with this appeal or constitute a "holding" supporting Respondents' motion. Nor does a footnote in *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017), a case involving the grant of summary judgment and dismissal of a third party complaint for contribution under the South Carolina Contribution Among Joint Tortfeasors Act, have anything to do with this appeal. Nor does *Morris v. Anderson County*, 349 S.C. 607, 564 S.E.2d 649 (2002), an action involving the denial of a motion for summary judgment under the Tort Claims Act, or *Watson v. Underwood*, 407 S.C. 443, 756 S.E.2d 155 (Ct. App. 2014), an action involving the denial of a petition to terminate a trust, have anything to do with this appeal.

However, the cases cited by Respondents in the footnotes in *Brown* and *Smith* support Stivers' position that the lower court's denial of its motion to amend is immediately appealable as a companion issue. Those cases stand for the proposition that Courts have made a practice of accepting appeals of interlocutory orders not ordinarily immediately appealable when appeals are companion to issues that are reviewable. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338, 574 S.E.2d 502, 512 (Ct. App. 2002). Respondents have not questioned the immediate appealability of the lower court's grant of their motion for judgment on the pleadings, dismissing Stivers' claims against Respondents under the Dealers Act.

STIVERS' PROPOSED AMENDMENT

In response to Stivers' motion to amend, Respondents argued:

> "If you really look at this second amended complaint, it's really just the same old song. It's just saying, You breached the contract. You shouldn't have done it. You're bad. You need to be punished and it literally is exactly the same and the reason why it would be futile is because, there is really no change in the cause of action as counsel admitted . . .

(Transcript, p. 12, lines 3 – 10.)

The lower court accepted Respondents' argument:

> But truly, I think that this amendment is futile. (Transcript, p. 21, lines 16 – 17).

For at least 134 years, our appellate courts have been consistent that amendments that do not substantially change a claim should be granted, and any mere formal or slight change does not appear to be prohibited. *Sibley v. Young*, 26 S.C. 415, 2 S.E. 314, 318 (1887). In *Sibley*, the plaintiffs sought to amend their complaint to recover money evidenced by sealed notes by inserting allegations that the same money claimed under the special contract was had and

received by the defendants. There, the Court noted:

> Their substantial claim or cause of action was their alleged right to have a return of their money, and the alleged violation of this right by the defendants, to whom it had been advanced; and the fact that the plaintiffs claimed that such alleged right and corresponding duty of the defendants was evidenced by sealed notes cannot affect the real nature of their claim, or forbid them from making other allegations in support of such claim.

The *Sibley* court also noted at p. 319:

> It is true that applications for amendment are addressed to the discretion of the circuit judge, and hence the granting or refusing of such applications is not ordinarily appealable, (*Trumbo v. Finley*, 18 S.C. 315, and the cases therein cited;) but when the refusal is based upon a legal ground, as in this case, and not upon discretion, then the matter does become appealable.

Stivers agrees with Respondents that its proposed amendment would not substantially change its claim. The lower court's conclusion that the amendment would have been futile was based upon a legal ground rather than upon discretion.

THE FORM 4 DENYING STIVERS' MOTION TO AMEND IS COMPANION TO THE ORDER GRANTING JUDGMENT ON THE PLEADINGS, AN ORDER THAT RESPONDENTS DO NOT CHALLENGE AS INTERLOCUTORY

Stivers' motions to amend, to compel, for judgment on the pleadings, to stay and/or to enlarge time, and Respondents' motions for judgment on the pleadings, to seal, and for summary judgment were all scheduled before the same judge, on the same day, at the same time. The lower court announced its decision to begin with Stivers' motion to amend the complaint "because [the Court thought] that [would] – could delay, resolve, postpone, bare on the procedural posture of a number of the other motions". (Transcript, p. 3, lines 10 – 15). The lower court recognized the relationship between the motion to amend and the motions for judgment on the pleadings.

In response to Stivers' motion to amend, after incorporating nearly all of their arguments on each of their motions, including the absence of damages, notwithstanding a liquidated damages clause, and failure to mitigate damages, in support of their motion for summary judgment (Transcript, pp. 12 - 19), Respondents asserted that the lower court was constrained by *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010), rev'd on other grounds, 401 S.C. 1, 736 S.E.2d 242 (2012), a case brought under the Stored Communications Act, to deny Stivers' motion to amend.

The Plaintiff in *Jennings* had failed to allege that a party sought to be added had actually violated the SCA. On that basis, the court in *Jennings* properly found that the proposed amendment would be futile.

But for the lower court's erroneous conclusion that one dealer could not sue another dealer under the Dealers Act, there would have been no basis for concluding that an amendment of Stivers' claim under the Dealers Act, which did not substantially change its claim, would have been futile. There could be no closer nexus or companionship between issues than an order dismissing a claim under the Dealers Act and an order denying a motion to amend a claim under the Dealers Act.

Based upon the foregoing, this Court should defer ruling on Respondents' motion until it has the opportunity to review the briefs of the parties and the record on appeal. Thereafter, Respondents' motion should be denied.

January 28, 2022

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ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

COUNTY OF RICHLAND

Civil Action No. 2020-CP-40-01934

STIVERS BROTHERS AUTOMOTIVE, INC.,
Plaintiff,
vs.
W. WARNER PEACOCK, et al,
Defendant.

TRANSCRIPT OF PROCEEDINGS

March 23, 2021

B E F O R E:

HONORABLE JOCELYN NEWMAN
RICHLAND COUNTY COURTHOUSE
COLUMBIA, SOUTH CAROLINA

A P P E A R A N C E S:

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had insufficient time to prepare to argue motions today because of some optional filings that were made within the deadline -- or prior to the deadline set by the Court, but did have time to send numerous letters, e-mails and other correspondence to the Court, to my office. Frankly, I think if there was a shortage of time, it would have been better spent preparing for the hearings rather than writing letters and e-mails to the Court.

I respective of all that, I am prepared to go forward with all of the motions beginning with the motion to amend the complaint, because I think that will -- that could delay, resolve, postpone, bare on the procedural posture of a number of the other motions. If that is granted, certainly you'll want to probably file a new motion for a judgment on the pleadings or revised motions for summary judgment. To some extent, there aren't huge differences. I don't know.

Anyway, but we will between begin there with Mr. Studemeyer and a motion to amend the complaint a second time.

So, Mr. Studemeyer, let me hear from you.

MR. G. STUDEMEYER: I don't have my hands on this particular motion. So I'm going to step aside

denied where the proposed amendment would be futile and you have the discretion to deny the motion.

If you really look at this second amended complaint, it's really just the same old song. It's just saying, You breached the contract. You shouldn't have done it. You're bad. You need to be punished and it literally is exactly the same and the reason why it would be futile is because, there is really no changes in the causes of action as counsel admitted, and if the cause of action has an essential element like damages that is not presented to the Court, it's futile to go ahead and amend the complaint to try avoid summary judgment based on the fact that they didn't prove damages. It's also clear that they have not mitigated their damages and just by amending the complaint with the same causes of action, by alleging post-termination actions doesn't follow the problem of mitigation.

So it is futile in our opinion, Your Honor for them to amend the complaint. This case will literally be one year old on April 13th, which is just a couple weeks away. They've had a ton of time to get ready. A ton of time to figure out what they are going to do; how they are going to sue us. There is no surprise. This plaintiff is a

sophisticated group out of originally think St. Louis who have owned and bought and sold dealerships for years. They had an ivy legal lawyer who negotiated the original APAs back in January. They had very sophisticated people. These documents were negotiated by very sophisticated lawyers. Lawyers who do these contracts all time. I won't even think about doing these contracts because that is not my area of the law. There's special lawyers and all they do is negotiate these contracts for buy/sell agreements and that is what these two lawyers were: Humphries for Peacock, and I think McBride for Stivers. So the simple fact is there has been no surprise here. There has been no new news, and as far as the escrow deposit, Mr. Humphries and Mr. McBride knew full well that Mr. Humphries' firm would put the escrow in the firm account. Notice there is no allegation that Mr. Humphries ran off to Acapulco with the money. There is no allegation that he did something wrong. There is not even an allegation that the money is still not in the escrow account. Mr. Humphries works for a gigantic law firm and do you think for one second he has the right to take this money out of the law firm's escrow account? They are not even

alleging that. So there is no new thing here whatsoever. This amended complaint is at the last minute, the 11th hour is a very clever attempt to avoid the inevidentable. And the inevidentable is, when these contracts were terminated on March 27th much to the relief of the automotive industry, the wonderful thing was that the dealerships became very profitable because people were at home, they were weren't going on vacations. They were getting money and they said, you know what, we need a new car. We can afford the payments of a new car and the sale of cars exploded all throughout the country in May, June, July and August. So what's really happened here and when the negotiations re-began, they produced to us a document that we put in the record that the Hyundai store in Columbia for Stivers made over $100,000 in just the month of May alone. So what we have here is a futile attempt to try to keep this thing going on. The truth of the matter is, they have no damages.

In fact, the reason why you don't have an affidavit from Mr. Stivers saying I lost money because he probably made a fortune. The fact that the sale didn't occur was one of the best things that ever happened to him. And what happened is

once it got to be July, they decided, Heck. The market going great. We're going to make some money. Let's just keep this dealership and then let's just sue them also.

Well, motions for summary judgment require a response. We have clearly shown there is no damages whatsoever. We have clearly shown nothing has been provided to you and that all this attempt is a futile attempt to amend on the same theories, the same causes of action that all require damages to be proven.

I have cited for you cases, the Higgins case and the *Medical Services MUSC* case that clearly show that when you have amendments that are futile, they should be denied. So, also we have the *Jennings* case, Your Honor that we've cited and the *Jennings* case clearly says that although the amend should generally be freely given, it may be denied where the proposed amendment would be futile. And in *Jennings* if you remember the facts of that case, that's where it was a divorce case and apparently the wife had gotten into the email account of the husband and she sent these emails to the lawyer, so they wanted to add the lawyer has a party. And the Supreme Court said, No, or the Court of Appeals

said, No, it would be futile since the lawyer wasn't the one that did the spying. He couldn't be liable under the act. So just like in that situation, if we are in entitled to summary judgment, this motion to amend would be futile.

So clearly -- and then as far as the actual complaint itself, it's not done in good faith. It is filled with negative comments. It's filled with footnotes. I mean that is a violation of the South Carolina Rules of Pleadings. You can't have footnotes in a pleading, you can't do it. It calls names to people; it puts Greg Humphries a lawyer, a fine lawyer in the middle of this case and he's not even a party. It's just filled with bad faith things and the second amended complaint offers the settlements were disingenuous and were a tenuous sham affidavit with previously admitted that it terminated negotiations by continuing a demand for specific performance.

So how can he on the one hand Mr. McBride say, Yes, we are willing to settle with you. Yes, we worked out all the things except for one little thing. But we're going to put a less than 24-hour deadline on you and Greg Humphries calls him and says, Look. I can't get in touch with my client. Too

bad. The line in the sand. The world is over. So that is not good faith whatsoever.

We also have recited the case of *Simpson versus Temple University* that comes from the eastern federal court in Pennsylvania, Your Honor, where the Court found that for all practical purposes the plaintiff seeks to amend your complaint as a predicate to opposing the pending motion for summary judgment. And that is exactly what we have here. And it was denied on the motion to amend the complaint, which contradicted the prior testimony. So it's just not just for the plaintiff to allege Peacock's offers for specific performance were made in bad faith when it had previously admitted that it simply decided not to consider the offers. This proposed complaint is just not made in good faith.

And the final thing is, of course it contains all this improper material. These footnotes are immaterial, impertinent and scandalous and I can go on forever. I'm sure you read it and it's probably curled your hair like it did mine. And the final thing Your Honor is, and this just shocks me. It literally refers to the confidential early neutral evaluation. And that is a hundred percent violation of the confidentiality rules that apply to APR

rules. I have never in my entire life and been doing this a while ever had a lawyer do such a thing. I mean to literally snub his nose at the confidentiality rules of ENE is just horrible and this amended complaint is filled with that kind of stuff.

So, for example, he claims that Warner Peacock didn't bother to come. Well, he knew that Warner Peacock was exposed to Covid-19. He knew that Warner Peacock appeared by Zoom and for him to make these audacious claims when it's supposed to be confidential just shows sort of a disrespect for the rules, a disrespect for this Court and we think taking all that into consideration, this case needs to come to an end today. He's had almost a year to prepare his case. He has harassed us he's called us every name. You know, I've never been called a gas lighter before until this case. And it's just remarkable.

So what I'm saying Your Honor is, let's get to merits. Let's look at the summary judgment motions. Let's see just see if he's produced any evidence of damages. Let's see if he's produced any damages of mitigation. Let's get to the essence of the case and let you decide whether we go forward or not or

whether this quote, charade, end quote, needs to come to an end.

THE COURT: All right. Young Mr. Studemeyer. That was -- the last part there was really the first thing that stood out at me is this talk about the early neutral evaluation, but even before that the things that have happened since July 2nd, I guess beginning on July 3rd. Are those not attempts at resolution of pending litigation? I mean, I hesitate to use word the "settlement" because I don't know that that is exactly what it was, but because litigation had commenced and these are actions, really back and forth about the very subject of the litigation, are these not settlement efforts? I mean certainly the early neutral evaluation is, but even before that, are those not settlement efforts and if so how is it proper to include those in an amended complaint?

MR. R. STUDEMEYER: Well, Your Honor I think that is what the defendants wanted to appear as and that is precisely why we requested to file this amended and supplemental pleadings.

Once you see the shenanigans that went on here, Your Honor, five deadline extensions, seven months of negotiations after the initial breach took place

competitor and an agreement wasn't getting signed. It was to their detriment to continue to believe that the defendants would actually consummate and perform under an APA. And I did fill out my duty of candor. I should point out that I am not the ivy league attorney that opposing counsel was referring to.

THE COURT: You should have taken that one. Look.

MR. R. STUDEMEYER: I should have. I think it was my duty to admit that one. If it wasn't already apparent.

THE COURT: I would never have known the difference.

MR. R. STUDEMEYER: Thank you, Your Honor.

THE COURT: But truly, I think that this amendment is futile. I do understand that your client may claim some additional damages as a result of the back and forth that continues to occur, and I don't think that is inappropriate. And I think that certainly defendants are on notice that the damages could be -- you know, they are not quantified in the amended complaint as it is. Certainly they are not quantified. There is no number put on them in the amended complaint, but I think all of that goes to

the issue of damages, but to include what really are settlement negotiations to some extent, particularly where there is a demand for specific performance in the amended complaint, right, and so they come back and forth about this, these are settlement negotiations. They are not appropriate for pleadings, and so the motion to amend the complaint is denied because they are futile.

Now, to the extent there is some debate at trial about failure to mitigate damages, certainly all that opens the door to what happened after July 2nd.

MR. MARTIN: Okay.

THE COURT: Because you got to be able to defend and explain efforts to mitigate once that becomes an issue, but I just don't know that any of that is appropriate for an amended complaint at this juncture. So that motion is respectfully denied.

MR. R. STUDEMEYER: Thank you, Your Honor.

THE COURT: All right. Let's then move onto the motion to compel. I guess really these are both plaintiff's motions so we'll do them sort of back to back. There's a motion to stay and then there is a motion to compel. Motion to stay or enlarge time, sorry, because they really both have to do with the