

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APR 06 2022

SC 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 STRIKE PORTIONS OF APPELLANT'S
DESIGNATION OF MATTER AND FOR CORRECTION OF APPELLANT'S INITIAL
BRIEF**

INTRODUCTION

On March 14, 2022, Respondents filed a Motion To Strike Portions Of Appellant's Designation Of Matter And For Correction Of Appellant's Initial Brief. Stivers respectfully responds to Respondents' motion.

ARGUMENT

This appeal arises out of an order concluding that the provisions of S.C. Code Ann. Section 56-15-10 *et seq.*, commonly referred to by our appellate courts as "the Dealers Act" and "the Dealer's Act", did not apply to Respondents/Dealers, and thus the remedies under the Act

are not available to car dealers as opposed to individual purchasers. While this seems a straightforward and discreet issue, because this case involves a dispute between two automobile dealers about a dealership itself, there is a significant amount of underlying documentation and interaction with different courts that ripened and distilled this matter into a justiciable issue. A dispute has now broken out about what should be included in the Designation of Matter. Stated simply, Appellant's position is that the Court of Appeals should not be forced into ruling within a vacuum, and should have the benefit of the evidence below that resulted in the decision now on appeal. Appellant further argues that the appellate rules intone a more broad view of designating matter to be included in the Record on Appeal.

Rule 208(b)(1)(C), SCACR, addressing the statement of the case in initial briefs, provides in pertinent part:

The statement . . . shall contain, *as a minimum* . . . the date of and description of such orders, judgments, decisions and proceedings of the lower court . . . that may have affected the appeal, or *may throw light upon the questions involved in the appeal*; and *any changes made in the parties by death, substitution, or otherwise*.

Whatever is *required as a minimum*, is necessarily relevant to the appeal.

Matters designated proposed to be stricken

Among Respondents' grievances is the designation of a motion for warrant of attachment erroneously suggested in its filing to have been heard by Judge Alison Lee. As set forth in the email exchange with Judge Lee's law clerk attached hereto and incorporated herein by reference, Judge Lee declined to hear that motion.

Respondents' reliance upon a footnote addressing a preservation issue in *Croft as Trustee of James A. Croft Trust v. Town of Summerville*, 428 S.C. 576, 597, n. 5, 837 S.E.2d 219, 230 (Ct. App. 2019), an appeal from the Town of Summerville Board of Architectural Review, is

inapposite. This Court has not ordered Stivers to strike anything from its designation of matter.

Respondents' remaining grievances regarding Stivers' designation of matter can be grouped into three categories:

Documents relating to Stivers' motion for continuance

These documents include the hearing notices, the motions roster, the motion for continuance, the Form 4 Order entered March 23, 2021, at 8:22 AM, the Form 4 Order entered March 24, 2021, at 1:07 PM, and the Form 4 Order entered November 12, 2021. These documents constitute such orders and proceedings of the lower court that may have affected the appeal, or may throw light upon the questions involved in the appeal.

A separate hearing notice dated March 3, 2021, was issued by the Clerk of Court corresponding with each of the seven motions scheduled to be heard by the lower court on March 23, 2021, at 9:30 AM. Each notice provided, "All requests for continuances must be in writing with a \$25.00 filing fee and received by the Chief Administrative Judge prior to the hearing". The lower court referred to one of the hearing notices as her prior Order in the second full paragraph of the proposed order submitted by Respondents and issued on November 12, 2021.

The motions roster listed three additional motions also scheduled before the lower court for 9:30 AM on March 23, 2021, for a total of 10 motions. Counsel for both sides emailed initial letters to the court to address questions raised by the sequence in which the motions were listed on the roster beginning with a letter from Stivers' counsel dated March 12, 2021, and a letter from Respondents' counsel dated March 15, 2021.

On March 17, 2021, after receiving five additional memoranda from Respondents' counsel, Stivers' counsel submitted a second letter to the court to advise of his intention to move for a continuance as suggested in each of the seven hearing notices. Respondents submitted a

letter in response on the following day.

On the same day, Respondents' counsel sent an email to the court about a proposed "courtesy binder" Respondents intended to submit. Still later on the same day, Respondents' counsel dispatched an incomplete binder of select motions and memoranda to the court by overnight mail. Copies of all of the letters are attached to Plaintiff's Motion To Alter Or Amend And Memorandum In Support as Exhibits A, B, C, D, E, F, G, and H to which Respondents have not objected.

As reflected in the pages of the transcript designated by Stivers to which Respondents do not object, the lower court began the hearing as follows:

... There was a motion for a continuance that was filed last week. You should have seen as of this morning that motion for continuance was denied.

I've also read a number of letters submitted by counsel for both parties. I have intentionally not responded to them because as a court of record, you have - - one very important tenant of this Court is that it is a court of record and I do not decide motions or any other substantive matters by letter or e-mail or anywhere outside of the record. So I have intentionally failed to respond to those, but *I have read each of them, each and every condescending word, but I'm prepared to go forward.*

As I said, I've denied the motion for a continuance. And I'll just tell you, I found it to be a bit illogical and to some extent, disingenuous. Counsel was ill-prepared, or would not be prepared, 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 my office. Frankly, I think if there was a shortage of time, it would have been better spent preparing for the hearing rather than writing letters and e-mails to the Court.

I [sic] 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.

(Transcript, page 2, line 8 – p. 3, line 15).

The lower court continued:

Although the senior Mr. Studemeyer didn't think it was possible for me to be ready for motion hearings or possibly to do my job, I suppose . . .

(Transcript, page 4, lines 21 -24).

When considering a motion for judgment on the pleadings, the court must regard all properly pleaded factual allegations as admitted. On review of the motion, the court may not consider matters outside the pleadings. *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000).

The lower court was clearly annoyed with having received letters from both sides. The court perceived a good faith 'heads up' as a challenge to her intellect or preparedness.

The Form 4 Order issued on March 24, 2021, at 1:07 PM denying both sides' motions for judgment on the pleadings, followed by the Form 4 Order dated March 25, 2021, amending it to grant Defendants' motion for judgment on the pleadings, is potentially indicative of confusion. This is not intended to be a criticism of a respected Circuit Court Judge. In fact, it is understandable given the number of documents and communications in this case alone, not to mention the magnitude of attempting to manage a large Common Pleas Non-Jury docket. The Form 4 Order entered on November 12, 2021, nearly eight months later, is indicative of the magnitude of that caseload.

Stivers referred to these orders and proceedings on pages 14 – 15 of the Initial Brief of Appellant. It is Stivers' firm belief that these orders and proceedings affected the appeal, or may throw light upon the questions involved in the appeal and should not be stricken.

Notice Of Dismissal As To Defendants, Mary Kaye Peacock, Ken Griffey, Jr., and Jay Brennan.

The dismissal of Defendants, Mary Kaye Peacock, Ken Griffey, Jr., and Jay Brennan, constitute changes made in the parties and should not be stricken. Rule 208(b)(1)(C) requires that the statement of the case shall contain, as a minimum . . . any changes made in the parties.

Documents relating to Stivers' motion for warrant of attachment

These documents include Respondents' motion for early neutral evaluation, Stivers' motion for warrant of attachment, the supporting affidavits attached thereto, Exhibit B to Plaintiff's Memorandum In Support Of Motion For Warrant Of Attachment, and Plaintiff's Memorandum In Opposition To Defendants' Motion To Compel, Exhibit A.

These documents reflect that while Respondents had represented to the court that they were seeking an early neutral evaluation to explore settlement, Warner Peacock and Peacock Automotive were selling all assets in South Carolina, including a Beaufort County residence, in preparation for departure from the State. Stivers referred to the motion for early neutral evaluation on page 16 of the Initial Brief of Appellant.

Errors proposed to be corrected

Respondents also propose to *correct* Stivers' statement of the case.

First, because Respondents dispute Stivers' suggestion that this is an appeal from two separate but related orders, Respondents contend that this is *contested* matter prohibited by Rule 208(b)(1)(C).

In Respondents' Motion To Dismiss Appeal As To Judge Newman's March 24, 2021 Order previously filed with this Court, the Respondents contended that "there is no nexus between the Order denying the motion to amend and the Orders granting Respondents' motion for judgment on the pleadings and striking the Dealer's Act". This Court denied Respondents'

motion by order filed March 2, 2022. Whether Respondents' continue to dispute a matter that has already been determined by this Court is of no consequence.

Respondents also seek to correct Stivers' statement of the case to the extent that it includes, "Stivers *alleged* that Peacock sabotaged the transactions by failing to pursue approval by the manufacturers and by failing to pursue an assignment of the lease". Rule 208(b)(1)(C), SCACR requires that the statement of the case contain, *as a minimum* the nature of the action or matter.

All that Stivers has done is set forth what it *alleges*. Respondents deny that they sabotaged the transactions. Whether Respondents sabotaged the transactions by failing to pursue approval by the manufacturers and by failing to pursue an assignment of the lease will ultimately be decided upon remand by a jury, should such a remand occur.

Respondents' reliance upon *Henning v. Kaye*, 307 S.C. 436, 415 S.E.2d 794 (1992) is also misplaced. While Stivers agrees that the *Henning* case includes an admonition from the Supreme Court that, "Counsel is advised that the South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State", that admonition followed the Court's observation that, "Appellant's brief fails to comply with [the] Rule 207 in the following particulars: the components of the brief are incorrectly organized and labeled, the issues are not distinctively headed, the table of authorities is not alphabetized or referenced to the body of the brief, the statement of the case contains contested matter and omits required information, and the arguments contain no citations to the record or to the cases listed in the table of authorities".

CONCLUSION

No one doubts the authority of this Court to control the content of the record on appeal.

Respectfully, Respondents continuing citation to cases like the *Croft* case and the *Henning* case involving the Supreme Court's refusal to dismiss an appeal because of numerous deficiencies in a brief is, at best, tenuously related to the questions on appeal and incongruent with the orderly mechanism in place to guide appeals in this State.

Based upon the foregoing, Stivers submits that Respondents' motion should be denied.

April 1, 2022

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Jocelyn Newman, Circuit Court Judge

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PROOF OF SERVICE

I certify that I have served the Return To Respondents' Motion To Strike Portions Of Appellant's Designation Of Matter And For Correction Of Appellant's Initial Brief and Affidavit of Counsel by depositing a copy of it in the United States Mail, postage prepaid, on April 1, 2022, addressed to their attorney of record, Bradford N. Martin, Post Office Box 10410, Greenville, South Carolina 29603.

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via email ctappfilings@sccourts.org
and Confirmed by U.S. Mail

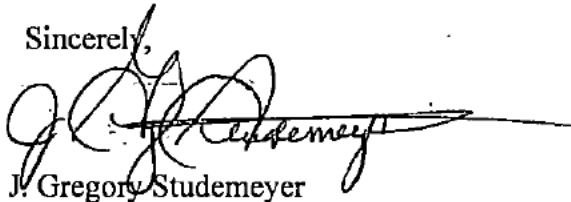
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Stivers Brothers Automotive, Inc., Appellant
v.
W. Warner Peacock and Peacock Automotive, LLC, Respondents
Appellate Case No. 2021-001489

Dear Ms. Kitchings:

Enclosed herewith is the Return To Respondents' Motion To Strike Portions Of Appellant's Designation Of Matter And For Correction Of Appellant's Initial Brief, Affidavit of Counsel, and a Proof Of Service in the above referenced matter.

Sincerely,



J. Gregory Studemeyer

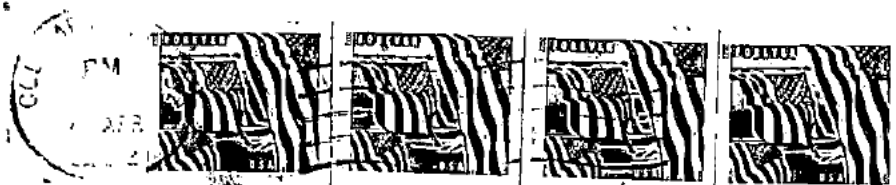
Enclosures

cc: Bradford N. Martin, Esq. via email and Confirmed by U.S. Mail
J. Michael Baxley, Esq. via email and Confirmed by U.S. Mail



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