

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

APR 11 2022

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
The Honorable Jocelyn Newman, Circuit Court Judge

**SC Court of Appeals**

Stivers Brothers Automotive, Inc. .... Appellant,

v.

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

Case No. 2020-CP-40-01934  
Appellate Case No. 2021-001489

**RESPONDENTS' REPLY TO APPELLANT'S RETURN TO THE  
MOTION TO STRIKE PORTIONS OF  
APPELLANT'S DESIGNATION OF MATTER  
AND FOR CORRECTION OF APPELLANT'S  
INITIAL BRIEF**

**I. INTRODUCTION**

Respondents agree that this Court should be provided with "...the benefit of the evidence below that resulted in the decision now on appeal..." Appellant's Return, p. 2. However, Appellant is attempting to include matter dealing with Motions never made,<sup>1</sup> never appealed,<sup>2</sup> or never pursued<sup>3</sup> and which did not result in the two decisions on appeal.

<sup>1</sup> Appellant argues Judge Newman's decision was the result of bias. It suggested there could be bias in its Motion to Alter or Amend; however, it never filed a Motion to Recuse.

<sup>2</sup> Appellant did not appeal the denial of its Motion for Continuance or granting of an Early Neutral Evaluation.

<sup>3</sup> Not only was the Motion for a Warrant of Attachment not before the lower court, but Appellant has also abandoned that motion.

Appellant's Notice of Appeal only addresses Judge Newman's denial of its Motion to Serve a Second Amended Complaint and granting of the Motion for Judgment on the Pleadings. The Notice does not include the denial of the continuance, the granting of an Early Neutral Evaluation, Judge Newman's recusal,<sup>4</sup> or the abandoned Warrant of Attachment. Further, none of these are evidence that resulted in the two decisions Stivers has appealed. However, Stivers' Initial Brief and Designation of Matter attempt to include all of these matters in the appeal.

The Appellate Rules do not allow arguments and material unrelated to the issues on appeal. None of this is proper and should be disallowed by this Court. The only matter properly before this Court is matter presented to the lower court and relevant to whether or not a Second Amended Complaint should be allowed and whether or not the Dealers Act should be stricken.

## **II. APPELLANT'S IMPROPER DESIGNATION OF MATTER**

### **A. Matters Not Before the Lower Court**

The Record on Appeal shall not contain matters which were not presented to the lower court or which are irrelevant. Appellant erroneously claims that the Court of Appeals case of *Croft*<sup>5</sup> has no application to this matter because it has not been ordered to strike anything from the Designation of Matter. This is the exact purpose of this Motion: Respondents are asking this Court to strike matters contained in Appellant's Designation of Matter. The *Croft* case held that any matter not presented to the lower court and not relevant to the issues on appeal should not be included. Therefore, *Croft* is entirely relevant to this Motion.

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<sup>4</sup> Appellant engaged in a letter writing campaign in order to influence the Court, and was called out on it. Now, Appellant's counsel is attempting to disqualify Judge Newman for doing so.

<sup>5</sup> *James A. Croft Trust v. Town of Summerville*, 428 S.C. 576, 597, n.5, 837 S.E.2d 219, 230 (Ct. App. 2019), vacated on other grounds, 433 S.C. 413, 860 S.E.2d 352 (2021).

Appellant appears to argue that Rule 209(b) and Rule 210(c), SCACR should be ignored. Rule 209(b) prohibits irrelevant matter in the Designation, and Rule 210(c) prohibits inclusion of matters not presented to the lower court.

The Notice of Dismissal as to Defendants Mary Kaye Peacock, Ken Griffey, Jr. and Jay Brennan, filed July 2, 2020, (almost a year prior to the hearing before the lower court) is not an issue on appeal and was not a matter before the lower court at the March 23, 2021 hearing. Appellant misunderstands that the ability to recite the history of the proceedings in the Statement of the Case does not mean that each event in the history is properly included in the Record.

Likewise, the Motion and Order for Early Neutral Evaluation (ENE) (filed July 30, 2020 and October 2, 2020) were not before the lower court at the March 23, 2021 hearing and never appealed. Further, the Motion for ENE is irrelevant to this appeal and improper for consideration. Appellant continues to ignore the confidentiality rules of the ENE by attempting to put that issue in the middle of this Appeal. ADR Rule 15(d) applies Rule 8 of the ADR Rules regarding confidentiality of neutral evaluations. Rule 8(a) provides that communications during a mediation settlement conference shall be confidential. Stivers' defiantly continues to reference this confidential, court-ordered procedure.

Appellant argues that matters not filed until six months after the matters on appeal were heard by the lower court are properly included in the Record because they reflect the fact that Respondents were not sincere in their request for the ENE. Not only is the content of the ENE confidential and not proper to be considered by the lower court, but also matters that have not even been filed at the time of the hearing of the lower court cannot reasonably be argued as relevant to the lower court's Orders. These matters include the Motion for Warrant of Attachment filed

September 22, 2021; Affidavit filed September 17, 2021; Exhibit B to Appellant's Memorandum in Support of Motion for Warrant of Attachment, filed September 22, 2021; and Appellant's Memorandum in Opposition to Defendant's Motion to Compel, Exhibit A (it is unclear whether Appellant is referring to its September 24, 2021 Memorandum or its June 11, 2021 Memorandum).

Respondents would clarify that the issue of the Warrant of Attachment was requested by Stivers to be argued at the hearing before Judge Lee on September 28, 2021, but was declined because it was not before her for a ruling at that time. It is undisputed, however, that none of the matters related to the Warrant were before Judge Newman, and therefore, cannot be included in the Record pursuant to Rule 210(c), SCACR.

**B. Matters Which Are Irrelevant to the Appeal**

Appellant has not appealed the denial of its Motion for Continuance and that matter is not before this Court. Therefore, the Form 4 Order denying Stivers' Motion is not relevant to the appeal. Similarly, the Form 4 Order regarding Respondents' Motion for Summary Judgment is not a matter on appeal and, therefore, not relevant. Appellant indicates this Order is relevant to show the magnitude of the caseload before the lower court. This is not an issue on appeal.

The hearing notices and the hearing roster are irrelevant to this appeal. Appellant does not state as grounds for its appeal that it did not receive the hearing notices or that they were otherwise defective. Appellant can certainly list in its Statement of the Case the motions that were before Judge Newman.

Appellant makes the argument that the lower court erroneously considered that correspondence had been submitted by Appellant regarding its request for a continuance. This argument does not make the hearing notices or the roster relevant to the appeal. While

Respondents disagree as to the meaning of the interchange between the lower court and Appellant's counsel, it does not object to the inclusion of this portion of the transcript.

Appellant does not argue in its Initial Brief that the lower court was confused when it amended its Form 4 Order regarding the Motion for Judgment on the Pleadings. The erroneous Form 4 Order issued on March 24, 2021, at 1:07 p.m. was corrected by the Form 4 Order the very next morning on March 25, 2021 at 9:32 a.m.<sup>6</sup> Rule 60(a) allows the lower court to correct a clerical error. Appellant is only appealing the Order granting judgment on the pleadings; therefore, the erroneous order is not relevant to this appeal.

### **III. APPELLANT'S STATEMENT OF THE CASE CONTAINS CONTESTED MATTERS**

The Statement of the Case is meant to contain a concise statement of the uncontested procedural history of the case. The Rules allow for the presentation of contested matters and arguments elsewhere in the Brief. Appellant overlooks the fact that the Statement of the Case shall not contain contested matters. Rule 208(b)(1)(C), SCACR. Respondents are simply asking that Appellant's Brief comply with the Rule. This Court's March 2, 2022 Order provided that the parties could present their arguments regarding the appropriateness of the appeal of the denial of Appellant's Motion for a Second Amended Complaint in the Briefs and that the Court would consider the issue after briefing. This ruling does not alter the Court's rules regarding the Statement of the Case in Appellant's Brief. Respondents ask that Appellant amend its Initial Brief to comply with Rule 208(b)(1)(C), SCACR.

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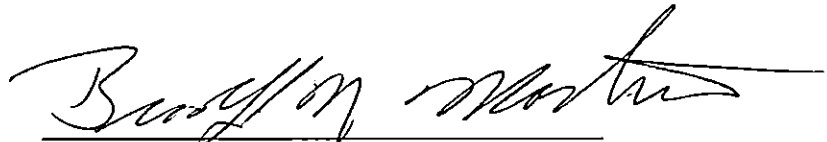
<sup>6</sup> Appellant understood this was a clerical error, as the lower court ruled at the hearing: "I understand your argument, Mr. Studemeyer, but I'm granting defendant's motion for judgment on the pleadings as to the cause of action." TR p. 92 (Ex. A.)

#### IV. CONCLUSION

The issues on appeal are twofold: 1) should the Dealers Act apply; and 2) should Appellant be allowed to amend its Complaint a third time. Filing the Record improperly with pejorative inferences about Judge Newman, the failure to grant a continuance, a non-argued and abandoned Warrant of Attachment, and a non-appealed order requiring an ENE are exactly the kind of matter that this Court's Rules protect it against. Respondent respectfully requests this Court to apply the clear, straight forward, and fair Rules of Appellate Procedure.

Finally, Appellant is required to limit its Statement of the Case to a concise, non-contested procedural history. Appellant cannot ignore the rules simply because it wishes this Court to know about matter not allowed by the Rules of Appellant Procedure. Respondents request the Court strike the improper items from Appellant's Designation of Matter and require Appellant to conform its Statement of the Case to Rule 208(b)(1)(C), SCACR.

Respectfully submitted,



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864.552.9990  
Attorneys for Respondent

April 8, 2022

1 STATE OF SOUTH CAROLINA  
 2 IN THE COURT OF COMMON PLEAS  
 3 FIFTH JUDICIAL CIRCUIT  
 4 COUNTY OF RICHLAND

5 Civil Action No. 2020-CP-40-01934

6	STIVERS BROTHERS AUTOMOTIVE, )	
7	INC., )	
8	Plaintiff, )	TRANSCRIPT
9	vs. )	OF
10	W. WARNER PEACOCK, et al, )	PROCEEDINGS
11	Defendant. )	

11 -----/

12 March 23, 2021

13 B E F O R E:

14 HONORABLE JOCELYN NEWMAN  
 15 RICHLAND COUNTY COURTHOUSE  
 16 COLUMBIA, SOUTH CAROLINA

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

18 For the Plaintiff:

19 THE STUDEMAYER LAW FIRM  
 20 7478 Carlisle Street  
 Irmo, South Carolina 29063  
 BY: J. GREGORY STUDEMAYER, Attorney at Law and  
 R. GREGORY STUDEMAYER, Attorney at Law

21 For the Defendant:

22 BRADFORD NEAL MARTIN & ASSOCIATES, P.A.  
 23 201 West McBee Avenue  
 Greenville, South Carolina 29601  
 BY: BRADFORD NEAL MARTIN, Attorney at Law and  
 LAURA W. H. TEER, Attorney at Law

24 BY: Karen A. Kocsis, CCR

1 probably affirm whatever you decide. But just  
2 because it has never been raised before does not  
3 make it wrong.

4 Stivers is not a consumer. They are not an  
5 owner of an automobile going against a surety bond.  
6 Stivers is suing for termination of the APAs.

7 If they were suing under the bond, 320 would  
8 apply, but they haven't sued our surety. They could  
9 have, or "surety." I know Mr. Studemeyer said I  
10 didn't pronounce it correctly. So it is clearly a  
11 case involving a contact between one dealer and  
12 another dealer and 80 says, agreements to which this  
13 chapter applies and it doesn't include these  
14 agreements. Therefore, that particular cause of  
15 action needs to come out.

16 THE COURT: Yeah. I understand your argument,  
17 Mr. Studemeyer, but I'm granting defendant's motion  
18 for judgment on the pleadings as to cause of action  
19 and I ask Mr. Martin to prepare a proposed order.

20 In that regard, based on 15 -- I'm sorry --  
21 56-15-80 and the inclusion of those terms implies  
22 inclusion of others and you know, I'm looking  
23 through all the cases cited by Mr. Studemeyer. None  
24 of those is a dealer versus dealer case. You know,  
25 we maybe making law here. But I think that

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**SC Court of Appeals**

The Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2021-001489

Stivers Brothers Automotive, Inc. ....Appellant,

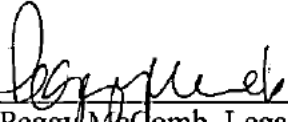
v.

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

**PROOF OF SERVICE**

I, Peggy McComb, Legal Assistant to attorneys for Respondents, W. Warner Peacock and Peacock Automotive, LLC, certify that I have served a copy of Respondent’s Reply to Appellant’s Response to the Motion to Strike Portions of Appellant’s Designation of Matter and for Correction of Appellant’s Initial Brief *via email* and by depositing a copy in the U.S. Mail, sufficient first class postage prepaid, on April 8, 2022 addressed to J. Gregory Studemeyer, Esq. and Ryan Studemeyer, Esq., Studemeyer Law Firm, P.C., Post Office Box 1014, Irmo, SC 29063 and J. Michael Baxley, Esq., Douglas Jennings Law Firm, LLC, 225 Seven Farms Drive, Suite 202, Charleston, SC 29492.

April 8, 2022

  
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April 8, 2022

Via email [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org) and U.S. Mail  
The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29021

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APR 11 2022

SC Court of Appeals

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

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of Respondents' Reply to Appellant's Response to the Motion to Strike Portions of Appellant's Designation of Matter and for Correction of Appellant's Initial Brief and a Proof Of Service.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Bradford N. Martin

LWHT/pm

cc: J. Gregory Studemeyer, Esq.  
Ryan Studemeyer, Esq.  
J. Michael Baxley, Esq.

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APR 11 2022  
SC Court of Appeals

Bradford Neal Martin & Associates, PA  
P.O. Box 10410  
Greenville, SC 29601

The Hon. Jenny Abbott Kitchings  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

