

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable John D. McLeod, Administrative Law Judge

Case No. 16-ALJ-17-0113-CC
Appellate Case No. 2017-001519

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SEP 18 2017
SC Court of Appeals

Books-A-Million, Inc.,.....Appellant,

v.

South Carolina Department of Revenue,Respondent.

**Respondent’s Motion for an Order Requiring Appellant to
Amend Appellant’s Initial Brief and Designation of Matter
and to Strike References to Matter that was not Presented to the Lower Court**

Pursuant to Rules 240, 208(b)(4), 209(b), and 210(c) of the South Carolina Appellate Court Rules (SCACR), the South Carolina Department of Revenue (the “Respondent”), through the undersigned counsel, hereby moves this Court for an order (1) requiring Books-A-Million, Inc. (“the Appellant”) to Amend its Initial Brief to include references to the record, (2) requiring the Appellant to amend its Designation of Matter to include all materials properly referenced in its Initial Brief, and (3) to strike all references to matter that was not presented to the lower court. The Respondent’s Motion is based on the Appellant’s failure to include references to the record, the Appellant’s failure to include in its Designation of Matter all materials referenced in its brief, and the Appellant’s improper reference to matter that was not presented to the lower court.

I. The Appellant’s Initial Brief Must Include References to the Record.

The Appellant failed to include specific references to the record in its Initial Brief. Pursuant to Rule 208(b)(4), SCACR, the initial brief “**shall** contain references to [materials] which may be properly included in the Record on Appeal” (emphasis added). Rule 208(b)(4), SCACR, further states “these references should be to the page and line number of the [materials] to be referenced.” Despite such requirement, the Appellant failed to provide specific references. Instead, the references to some materials in the Appellant’s Initial Brief appear as follows: “(R. p. ___).” See e.g., Appellant’s Init. Brief p. 3. Other references do not include any citations. See e.g., Appellant’s Init. Brief p. 15. As such, the Appellant’s Initial Brief fails to comply with the requirements of Rule 208(b)(4), SCACR. Additionally, the Appellant’s failure to properly reference materials hinders the Respondent’s ability to timely file the Respondent’s Initial Brief as the Respondent must comb through all the materials in the Appellant’s Designation of Matter, and possible other materials not designated, to determine exactly what the Appellant attempted to reference in its Initial Brief. Accordingly, because the Appellant must include references to the record in its brief, this Court should order the Appellant to amend its Initial Brief to include specific references to the record.

II. The Appellant’s Designation of Matter Must Include All Materials Referenced in its Brief.

The Appellant failed to include all cited materials in its Designation of Matter as required by Rule 209(b), SCACR. Pursuant to Rule 209(b), SCACR, the Appellant must “clearly identify what the party desires to have included in the Record on Appeal” However, the quotes appearing on pages 15–17 of the Appellant’s Initial Brief appear to come from materials in another case and are not included in the Appellant’s Designation of Matter. Specifically, the Appellant appears to cite stipulations of facts, a Tax Commission ruling, and a taxpayer’s brief related to

Meyers Arnold v. S.C. Tax Comm'n, 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985). A review of the Appellant's Designation of Matter demonstrates that the Appellant failed to designate any of those materials.

As stated above, initial briefs must include references to the record. See Rule 208(b)(4), SCACR. Moreover, Rule 209(b), SCACR requires that each party designate all matters such party would like included in the record. Reading Rules 208 and 209 together, it is clear that references can only be made to materials in the record, and those materials must be included in the party's Designation of Matter. Therefore, any materials referenced by the Appellant in its Initial Brief must be included in its Designation of Matter. Failure to include all materials in the Designation of Matter puts the Respondent at a disadvantage because the Respondent cannot identify and locate the cited materials. If the Respondent cannot identify the materials quoted by the Appellant, the Respondent cannot review said materials and, thus, cannot file a complete and accurate Initial Brief. Accordingly, because all matters referenced in an initial brief must be included in the record on appeal, this Court should order the Appellant to amend its Designation of Matter to include all materials properly referenced in its Initial Brief.

III. The Record Shall not Include Matter Which was not Presented to the Lower Court.

The Appellant improperly referenced in its Initial Brief matter that was not presented to the lower court. Specifically, the quotes on pages 15–17 of the Appellant's Initial Brief do not appear to come from materials that were presented to the lower court.¹ Rule 210(c), SCACR, specifically states “[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal.” Rules 208(b)(4) and 209(b) both make reference to “materials properly

¹This assertion is based on the Respondent's lack of recognition of said quotes. However, because the Appellant failed to include citations, the Respondent had no way to verify the quotes and determine where they came from.

included in the record.” As such, only materials related to matter that was presented to the lower court may be referenced in an initial brief and included in a designation of matter. Here, however, the Appellant appears to cite materials from another case. Materials from that other case were not presented to the lower court. Accordingly, those materials should not be referenced in the Appellant’s Initial Brief. Therefore, this Court should strike the quotes on pages 15–17 of the Appellant’s Initial Brief because such quotes do not come from materials properly included in the record.

Wherefore, the Respondent moves this Court for an order (1) requiring the Appellant to amend its Initial Brief to include specific references to the record as required by Rule 208(b)(4), SCACR, (2) require the Appellant to amend its Designation of Matter to include all materials properly referenced in its Initial Brief pursuant to Rule 209(b), SCACR, and (3) striking references to matter not presented to the lower court.

Respectfully submitted,



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Attorneys for Respondent
South Carolina Department of Revenue

Columbia, South Carolina
September 14, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable John D. McLeod, Administrative Law Judge

Case No. 2012-ALJ-17-0113-CC
Appellate Case No. 2017-001519

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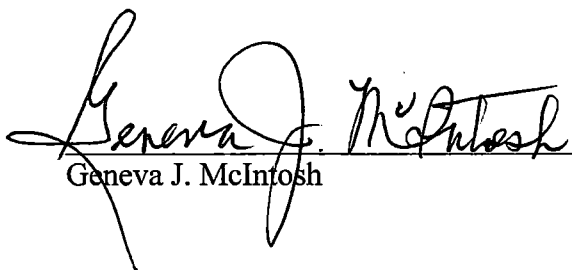
Books-A-Million, Inc.,.....Appellant,

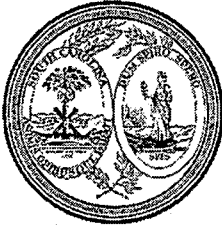
v.

South Carolina Department of Revenue,.....Respondent.

CERTIFICATE OF SERVICE

I, Geneva J. McIntosh, hereby certify that I have mailed, via United States Postal Service, First Class Mail, postage pre-paid, a copy of the Respondent's Motion for an Order Requiring Appellant to Amend Appellant's Initial Brief and Designation of Matter and to Strike References to Matter that was not Presented to the Lower Court in the above-referenced case to the attorneys of record, Burnet R. Maybank, III, Esquire and James P. Rourke, Esquire, Nexsen Pruet, LLC, P.O. Box 2426, Columbia, SC 29202 on this 14th day of September, 2017.


Geneva J. McIntosh



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE

300A Outlet Pointe Blvd., Columbia, South Carolina 29210
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September 14, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Books-A-Million, Inc., v. South Carolina Department of Revenue
Case No. 16-ALJ-17-0113-CC
Appellate Case No. 2017-001519

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Respondent's Motion for an Order Requiring Appellant to Amend Appellant's Initial Brief and Designation of Matter and to Strike References to Matter that was not Presented to the Lower Court in connection with the above referenced matter. Also enclosed is a Certificated of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

A handwritten signature in cursive script that reads "Lauren Acquaviva".

Lauren Acquaviva
Counsel for Litigation
Lauren.Aquaviva@dor.sc.gov
803-898-5110

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SEP 18 2017

SC Court of Appeals

c: Burnet R. Maybank, III, Esquire
James P. Rourke, Esquire

Enclosures

LA:gjm



SOUTH CAROLINA DEPARTMENT OF REVENUE
 300A OUTLET POINTE BOULEVARD
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 COLUMBIA SC 29211-9979

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SC Court of Appeals

THE HONORABLE JENNY ABBOTT KITCHINGS
 CLERK OF COURT
 SOUTH CAROLINA COURT OF APPEALS
 P O BOX 11629
 COLUMBIA SC 29211

