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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

APPEAL FROM THE ADMINISTRATIVE LAW COURT
THE HONORABLE JOHN D. McLEOD
ADMINISTRATIVE LAW JUDGE

CASE NO. 16-ALI-17-0113-CC
APPELLATE CASE NO. 2017-001519
Opinion No. 5721 (S.C. Ct. App. Filed April 29, 2020)
Supreme Court Case No. 2020-001102

Books-A-Million, Inc.,

PETITIONER,

versus

South Carolina Department of
Revenue,

RESPONDENT.

**REPLY TO THE DEPARTMENT OF REVENUE’S RESPONSE TO THE MOTION FOR
LEAVE TO FILE AN *AMICUS CURIAE* BRIEF ON BEHALF OF
WAREHOUSE HOME FURNISHINGS DISTRIBUTORS, INC.**

Warehouse Home Furnishings Distributors, Inc. d/b/a Farmers Home Furniture (“Farmers”) hereby replies to the Response filed by the South Carolina Department of Revenue (the “Department”) in opposition to Farmers’ Motion for Leave to file an *Amicus Curiae* Brief and shows the Court the following:

This Court granted certiorari to review the Court of Appeals’ holding that club membership fees charged by Petitioner Books-A-Million (“BAM”) are subject to sales tax under the South Carolina Sales and Use Tax Act, S.C. CODE ANN. § 12-36-5 *et seq.* because such

membership fees are a direct result of the sale of tangible personal property. The Court of Appeals reached this conclusion on the basis that, but for BAM's sale of tangible personal property, BAM would not be able to sell the club memberships. Books-A-Million, Inc. v. South Carolina Dep't of Revenue, 430 S.C. 388, 398, 844 S.E.2d 399, 404 (Ct. App. 2020).

Sales taxes are calculated based upon a percentage of a person's "gross proceeds of sales." S.C. CODE ANN. § 12-36-910(A). Therefore, central to the Court of Appeals' holding was its interpretation and application of the term "gross proceeds of sales" which is defined as the "the value proceeding or accruing from the sale . . . of tangible personal property." S.C. CODE ANN. § 12-36-90. This Court has agreed to review the Court of Appeals' construction of "gross proceeds of sales."¹

Farmers has moved to file an *Amicus Curiae* Brief, and in its motion requesting leave to do so, explained that it has an interest in the outcome of this Court's interpretation and application of the term "gross proceeds of sales" because it, similar to BAM, offers its customers the option to purchase certain intangible items such as credit insurance policies in addition to the purchase of home goods sold by Farmers. The Department has taken the position that these intangibles offered by Farmers fall within the definition of "gross proceeds of sales" and are subject to sales tax because they constitute "value proceeding or accruing from" the sale of

¹ The Department argues that Farmers mischaracterizes its position in its dispute with BAM and claims its position in the BAM case is only that BAM's membership fees are simply a substitute payment for tangible personal property at a discounted price. The Court of Appeals, however, did not reach its conclusion on that basis. This Court has agreed to review the Court of Appeals' holding that membership fees are subject to sales tax because, but for the sale of tangible personal property, BAM would not be able to sell memberships. The Court of Appeals' interpretation of "gross proceeds of sales" in reaching its conclusion and this Court's review of that interpretation is what may affect Farmers' interests as explained in the Motion for Leave to File an *Amicus Curiae* Brief and herein.

tangible personal property. Farmers is directly impacted by the determination of the meaning and enlargement of the term “gross proceeds of sales;” therefore, Farmers has submitted a proposed *Amicus Curiae* Brief to provide its perspective regarding the continuing, expanding view by the Department as to the meaning of “gross proceeds of sales” and to offer further insight on the ramifications of an overly broad and ambiguous interpretation of the term on other industries.

The Department objects to Farmers’ submission of its *Amicus Curiae* Brief, contending that Farmers does not have the requisite interest in this appeal because its dispute with the Department is too dissimilar from BAM’s matter while simultaneously arguing that Farmers is not impartial enough to be a “friend” to the Court. The Department’s argument fails because it contradicts two well-established roles of an *amicus* where, as here, the “*amicus* has an interest in some other case that may be affected by the decision in the present case,” and “the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997).

The Department’s response shows its misunderstanding of the invaluable role and function of an *amicus* party. Rule 213 of the South Carolina Appellate Court Rules permits the filing of an *amicus curiae* brief, requiring only that the motion for leave “identify the interest of the applicant” and “state the reasons why a brief of an *amicus curiae* is desirable.” Over the years, the federal courts have analyzed the purposes of and the standards required for the submission of *amicus* briefs under Rule 29 of the Federal Rules of Appellate Procedure. The

federal counterpart also requires a movant to state its interest and explain why its brief is desirable.²

“The primary role of the *amicus* is to assist the Court in reaching the right decision in a case affected with the interest of the general public.” Russell v. Bd. of Plumbing Examiners of Cnty. of Westchester, 74 F.Supp.2d 349, 351 (S.D.N.Y. 1999), aff’d, 1 F.App’x 38 (2d Cir. 2001). The view that an *amicus* can only be an impartial friend to the court is long outdated. Neonatology Assocs., P.A. v. Comm’r of Internal Revenue, 293 F.3d 128, 131 (3d Cir. 2002). As recognized by the United States Court of Appeals for the Third Circuit, the rule requires that an *amicus* party have an interest in the case. Therefore, it cannot be reconciled that an *amicus* be both disinterested and interested at the same time. Id.

While the Department suggests that Farmers cannot serve as a friend to the court because it supports the position taken by BAM and has its own self-interests, the courts have overwhelmingly rejected such a proposition. The Third Circuit has stated that such a suggestion “is contrary to the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making.” Thus, the Third Circuit determined, “an *amicus* who makes a strong but responsible presentation in support of a party can truly serve as the court's friend.” Id. It further rejected the argument that an *amicus* cannot have a pecuniary interest in the outcome of a case because such an argument “flies in the face of current appellate practice.” The Third Circuit emphasized that it is quite common for *amici* to have both pecuniary and policy interests in the ultimate holding of a pending case. Id. at 131-32;

² See Senate by & through Leatherman v. McMaster, 425 S.C. 315, 323–24, 821 S.E.2d 908, 912 (2018) (citing Unisun Ins. v. Hawkins, 342 S.C. 537, 542, 537 S.E.2d 559, 561–62 (Ct. App. 2000) for the proposition that when a state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive)).

see also Prairie Rivers Network v. Dynegy Midwest Generation, LLC, 976 F.3d 761, 763 (7th Cir. 2020) (dismissing proposition that an *amicus* act only as a neutral party); Irving Paper Ltd. v. United States, 296 F.Supp.3d 1369, 1373 (Ct. Int'l Trade 2018) (“There is no requirement that an *amicus* be a disinterested party.”).

In fact, the courts recognize that an *amicus* brief is appropriate and can assist the court when:

- (1) the *amicus* has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the *amicus* to intervene and become a party in the present case); or
- (2) the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.

Ryan, 125 F.3d at 1063.

Farmers meets both of these criteria. First, this Court’s decision in the present appeal and its interpretation of the phrase “gross proceeds of sales” will likely have a direct impact on whether the intangible items offered by Farmers to its customers are subject to sales tax. While the Department argues that Farmers cannot use an *amicus* brief to highlight to this Court how a ruling in BAM may affect its own dispute with the Department, such an argument by the Department flatly contradicts one of the stated purposes of an *amicus* brief. It is tremendously useful for the Court to consider how its holding in BAM could have unintended consequences on other litigation. In Irving Paper Ltd., the court dismissed a concern that an *amicus* party was essentially seeking to “pre-litigate” its own case, finding that *amicus* briefs “assist the court more” in instances where the proposed *amicus* “has a direct interest in another case that may be materially affected” by the court’s decision. 296 F.Supp.2d at 1374. It is a recognized legitimate reason to seek *amicus* status when a court’s decision may impact litigation in another case and

the analysis of the proposed *amicus* party could “assist the court in its comprehensive consideration of the issue.” Id.

Second, Farmers’ proposed *amicus* brief provides this Court with a different perspective on how its holding in BAM and interpretation of “gross proceeds of sales” may impact other industries which provide intangible offerings to customers and have ramifications beyond the circumstances of the current parties. It is well understood that an *amicus* brief is proper to “explain the impact a potential holding might have on an industry or other group,” Neonatology Assocs., P.A. 293 F.3d at 132 (internal citation omitted). An *amicus* brief can further extend “useful assistance” to the court in “providing a broader factual context within which to evaluate the issues raised on appeal.” Nat’l Pharms., Inc. v. Feliciano-De-Melecio, 221 F.3d 235, 237 n.1 (1st Cir. 2000); see also Prairie Rivers Network, 976 F.3d at 763 (“[A] friend of the court interested in a particular outcome can contribute in clear and distinct way by, for example . . . “[p]roviding practical perspectives on the consequences of potential outcomes”); Funbus Sys. Inc. v. Cal. Pub. Util. Comm’n, 801 F.2d 1120, 1124-25 (9th Cir. 1986) (recognizing “classic role” of *amici* in “drawing the court’s attention to law that might otherwise escape consideration”) (citation omitted).

The Department argues that Farmers’ issue is not similar enough to the issue raised by BAM and that its proposed *amicus* brief should be rejected because it does not address BAM’s exact issue – whether club membership fees are subject to sales tax. The fact that Farmers’ tax dispute with the Department is not identical to BAM’s issue in all respects is all the more a compelling reason to accept Farmers’ *amicus* brief. The proposed *amicus* brief underscores that this Court’s interpretation of “gross proceeds of sales” in the context of club membership fees

could have potential inadvertent ramifications on the taxation of other intangible items offered by different industries to customers. This is one of the key functions of an *amicus* brief.

Given the discretion the court has to accept an *amicus* brief, the Third Circuit has opined that “it is preferable to err on the side of granting leave,” further noting that “[i]f an *amicus* brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the *amicus* brief,” while “[o]n the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.” Neonatology Assocs., P.A. 293 F.3d at 133.

Farmer’s interest in the underlying appeal is the type of interest envisioned by *amicus* status because it both has a direct interest in another case which could be affected by the Court’s decision in the present appeal and because it can draw the Court’s attention to the potential ramifications of its holding in BAM beyond the perimeters of this case. The proposed *amicus* brief therefore serves the core functions of an *amicus* brief. Farmers therefore respectfully requests that its Motion for Leave to File an *Amicus Curiae* Brief be granted.

[signature on following page]

Respectfully submitted,

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FARMERS HOME FURNITURE**

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