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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM S. C. ADMINISTRATIVE LAW COURT

Debra B. Durden, Judge

Appellate Case No.: 2024-000962
Administrative Law Court Docket No.: 23-ALJ-17-0362-CC

Watertoys, L.L.C., d/b/a Tidalwave Watersports, ……Appellant,

v.

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

RETURN/MEMORANDUM OF LAW
(Return to Respondent's Motion to Strike Contents of Record on Appeal)

In accordance with the Court's Order dated June 23, 2025, directing Appellant to file a response as to the Department of Revenue's May 7, 2025, request to remove 25 pages from the Record on Appeal, Appellant responds as follows:

Procedural Summary

The Department of Revenue asks this Court to strike three documents in the Record on Appeal:

1) The Department of Revenue's February 22, 2022, Notice of Audit (pages 21-36);

2) The Appellant's March 17, 2022, appeal form to the Administrative Law Court (pages 37-39); and

3) The Appellant's December 5, 2023, Responses to the Department of Revenue's Requests for Admission (pages 44-48).

Respondent moved on May 7, 2025, for an Order requiring these 24 pages be removed from the Record on Appeal on the ground that they were not presented to the Administrative Law Judge. As explained in more detail below, Respondent's second challenge (to pages 37, 38, & 39 and page 43) is probably a scrivener's error because pages 37-39 are the form the Administrative Law Court requires litigants file to begin an appeal, and page 43 is the Department's January 24, 2023, Administrative Decision denying Appellant's administrative appeal; in other words, the decision appealed to the Administrative Law Court. Without these filings, there is nothing for the Administrative Law Court to review, so obviously they were before the Court.

In its June 23rd Order, this Court directs Appellant to demonstrate how these matters were before the Administrative Law Court "including any proof of the same." Because the Administrative Law Court **granted** summary judgment without a hearing, there is no transcript, depriving the parties and the Court of a record. The absence of a record makes impossible the ability to cite to a specific page in a transcript to point out what the Administrative Law Court did or did not consider in **granting** summary judgment. The failure to provide a hearing is a central pillar of Appellant's appeal addressed in Argument 1, discussing how the procedural vacuum prevents drawing positive deductions from a negative. The absence of a transcript necessarily limits Appellant's ability to provide proof to this Court's question as to what the Administrative Law Judge considered. We can draw reasonable inferences from the Orders under review. As discussed below, the inclusion of pages 37-39 and 43 cannot seriously be questioned. Respondent seeks to exploit the Administrative Law Court's failure to allow a hearing to disadvantage the Appellant instead of engaging in meaningful evaluation of the

Exemption 13 legal issue under review. The wasteful fencing over procedure is at variance with the Respondent's published mission statement pledging integrity, effectiveness, and fairness to each taxpayer. (See D.O.R. "Mission Statement" quoted below.) In the latest salvo over procedure, Respondent points to counsel's March 21, 2024, correspondence to the Administrative Law Court, contending that correspondence—sent before either party filed for summary judgment—proves Appellant waived the Rule 56 right to a hearing on summary judgment. See R.O.A. page 218 for the e-mail and page 79 for the March 20th letter that was attached:

> Robin,
> Here is the letter to Judge Durden and our agreed upon stipulation of facts. As set forth in the attached letter, which I've already mailed, I do not know if the judge wants to set a briefing schedule or hear argument of counsel or both or neither. I'm in unfamiliar territory here. (R.O.A. page 218)

The March 20, 2025 "attached letter, which I've already mailed" is in the R.O.A. at page 79 and states in its entirety:

> Opposing counsel and I have engaged in substantial efforts to resolve this case, and while we did not succeed in resolving the case in its entirety, we have agreed to present the case to your Honor on a Stipulation of Facts without calling factual witnesses. (We also agreed that I would have the right to call the taxpayer's principal, Michael Fiem, if your Honor has question(s) about any factual matter related to the operation of the business.) I am attaching to this letter our agreed upon Stipulation of Facts.
>
> In light of our decision not to call fact witnesses (unless you have a question about the operation of the business), may I inquire as to your preference in how we present the case? I am informed that as a contested (as opposed to appellate) case, your Honor addresses it *de novo*. Would you, therefore, prefer to set a briefing schedule ahead of the hearing date, or rather take the matter on argument of counsel only, or allow us to present the case and then direct a briefing schedule on specific questions, if any? I do not have enough experience in Administrative Law Court to have a body of experience from which to draw to anticipate what your preference might be. (Mr. Antley has been generous with his expertise in trying to keep me on the right path, which I assume is just one of the benefits of advanced age.) **Would you mind letting us know what your preference is as to how we tailor our presentation?** I thank you in advance for your attention to this request. By copy of this letter, I am providing a copy of my communication with your Honor to opposing counsel. With kind regards, I am (emphasis added)

The Department of Revenue asserts this letter waived the hearing requirement contained in Rule 56, *South Carolina Rules of Civil Procedure*, but not only is that assertion refuted by the letter: "may I

inquire as to your preference in how we present this case," but also, the correspondence demonstrates Appellant requested procedural direction from the Court that the Administrative Law Judge ignored. The Administrative Law Judge did acknowledge that Rule 56 governs the application for summary judgment, as stated in the fifth sentence on page 1 of the April 18, 2024 Order under review (R.O.A. page 1): "Therefore, Rule 56, SCRCP, applies in determining whether summary judgment is proper in this case." Most importantly, the Administrative Law Court acknowledged in the first sentence of the Order under review that the case was before the Court "pursuant to a Request for Contested Case Hearing filed on September 5, 2023, . . ." (R.O.A. page 1) However, because the Administrative Law Judge never conducted a hearing, the parties are left to grope in the dark to answer this Court's request to identify what the lower court relied upon in granting summary judgment. Because the parties are forced to grope in the dark for the lack of a hearing, the Court could remand the issue with instructions to conduct a hearing.[1]

As set out in the first argument in Appellant's Brief, Rule 56(c) **requires** a hearing before granting summary judgment and *Dedes v. Strickland* , 307 S.C. 153, 414 S.E.2d 132 (1992) reversed a grant of summary judgment for failure to provide the exchange of documents 10 days prior to "the time fixed for the hearing." The Order under review concedes this point on the first page, and the Administrative Law Court's procedure is troubling not only because Appellant asked for guidance before filing the motion, but also because the Administrative Law Court acknowledged the hearing requirement and still threw Appellant out of Court in part because: "it was incumbent upon Petitioner to file an affidavit or other evidence setting forth the factual dispute." R.O.A. page 8 [May 14, 2024,

[1] A remand would allow the Administrative Law Court to hold a Rule 56(c) hearing, which would allow the Court to identify the evidence relied upon in granting summary judgment. Of course, any evidence of a genuine issue of material fact requires reversal. In an abundance of caution, Appellant includes a supplemental motion for remand should the Court determine that such a request is procedurally necessary, but only to avoid another procedural attack that Appellant failed to plead properly. Procedure aside, Appellant concedes the outcome of such a revisit is an exercise in futility.

Order denying reconsideration] The record refutes this erroneous conclusion because Appellant specifically requested clarification on procedure before filing a motion for summary judgment. The Administrative Law Court threw Appellant out of court without a hearing, a clear violation of Rule 56. See Appellant's March 20, 2024 correspondence to the Court at page 79 R.O.A.: "We also agreed that I would have the right to call the taxpayer's principal, Michael Fiem, if your Honor has question(s) about any factual matter related to the operation of the business." The Administrative Law Court never responded and proceeded to decide the case without a hearing—the exact prejudicial error addressed by the Supreme Court in *Dedes v. Strickland*:

> We find that the appellant did not receive timely notice of the motion hearing as required by rule 6(d), SCRCP, that he was wrongfully denied the opportunity to submit affidavits, documents, or testimony opposing respondent's motion for summary judgment, and the rights of the appellant were prejudiced thereby. *Dedes* at page 134

Appellant called this citation, and an affidavit,[2] to the Administrative Law Judge's attention in its Motion for Reconsideration (R.O.A. page 140), which the Court ignored and reaffirmed summary judgment, again without a hearing! Appellant's counsel may be a dinosaur hamstrung by traditional (outdated?) notions of procedure that do not anticipate a Court **granting** summary judgment without a hearing, but just because Appellant chose a lawyer fit for pasture does not abrogate the Rule 56(c) requirement for a hearing or the Rule 6(d) method of minimum notice. Respondent seeks to leverage the lack of hearing by proving a negative; to wit, that Appellant did not demand a hearing. Granting summary judgment is fundamentally different from denying summary judgment because a denial of summary judgment does not prejudice anyone's rights.

As set forth in Appellant's brief, both the South Carolina Constitution, Article I, § 22, and Rules 6(d) and 56(c) guarantee every litigant a right to be heard prior to the Court entering a final

[2] As discussed below in discussion #3, Appellant believed it submitted the December 5, 2023 Answers to Requests for Admission along with the May 6, 2024 affidavit but further investigation reveals Appellant did not.

decision. The Administrative Law Court cannot render a decision against Appellant " except on due notice and an opportunity to be heard." Article I, § 22, *S. C. Const.* The concept of a court imposing the "drastic remedy" of summary judgment without "an opportunity to be heard" is both unknown and shocking, especially where, as here, Appellant asked for direction from the Court before filing its motion. The Court never answered, and Respondent attempts to transform this negative into a positive—that because the Court did not hold a hearing the vacuum, the absence of a hearing proves it did not consider the documents Respondent seeks to extirpate from the record. The Respondent cannot point to an absence of hearing as evidence of a positive conclusion, and demanding Appellant prove otherwise is equivalent to a demand to prove a negative. The point is not that Appellant is deprived of a record. The point is that the Respondent must bear the consequence because of the summary judgment standard:

> Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *E.g., Koester v. Carolina Rental Center, Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994); Rule 56(c), *SCRCP*. In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Id.* Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues. *Baughman v. American Tel. and Tel. Co*., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). *Conner v. City of Forest Acres*, 348 S. C. 454, 560 S.E.2d 606 (2002) (Supreme Court affirmed Court of Appeals' reversing grant of summary judgment on wrongful discharge.)

Even when facts are not in dispute, but the inferences drawn from them are disputed, summary judgment is inappropriate and Respondent cannot short-circuit the appellate process by deciding what Appellant can include, claiming a veto power to expurgate the record: "Summary judgment should not be granted even when the evidentiary facts are not in dispute, if there is dispute as to the conclusion to be drawn from those facts." *Carolina Prod. Maintenance, Inc. v. United States Fidelity and Guar. Co.*, 310 S.C. 32, 425 S.E.2d 39 (Ct. App. 1992) As discussed more fully

below, the Administrative Law Court acknowledged reliance on each of the items Respondent asks to be removed except for the Appellant's responses to Requests to Admit.

Research[3] has not revealed another case in which a court **granted** summary judgment without a hearing, and the procedural vacuum created by the absence of a hearing leaves both the parties and the Court to grope in the dark as to what evidence the trial court evaluated or weighed in reaching summary judgment. As set forth in Appellant's first argument in its brief, the Administrative Law Court's Order under review neither discussed nor applied the summary judgment standard other than a passing reference that Rule 56 applied. Appellant fully briefs how the lack of a record of a hearing is a fatal flaw requiring reversal. Had the Administrative Law Judge held a hearing, then we would know specifically what evidence she considered in reaching her decision to end the case. The lack of a transcript is the first pillar of the appeal addressed in Appellant's brief. However, the lack of a record necessarily limits the present analysis of what was before the Administrative Law Court to (1) the Order under review and (2) the reasonable inferences drawn from that Order and the communication with the Court quoted above. Appellant addresses each of Respondent's specific documentary objections individually:

1.
Department of Revenue's Notice of Audit and claim. Pages 21-36

As identified on page 1 of the Order under Review (pages 1-6, R.O.A.), the Administrative Law Court **specifically refers to the Department's Notice of Audit** in issuing its April 18, 2024 Order granting summary judgment. But for the fear of being denied for insufficient argument, the

[3] "Research" on Appellant's side means going to the "Fastcase" library provided by the South Carolina Bar and searching keywords as well as consulting the print *Annotated South Carolina Rulebook*. Appellant has no idea what Chat GPT or other artificial intelligence programs would turn up.

analysis over the inclusion of this document should stop there.[4] However, in an abundance of caution, Appellant further discusses this undisputable fact.

In granting summary judgment, the Administrative Law Court adopted the Department of Revenue's calculations, which are the calculations set forth in the Department's Notice of Audit. See page 1 of the Record on Appeal where the Administrative Law Judge writes: "Petitioner **contests a determination** by the South Carolina Department of Revenue (Respondent, DOR, or Department) finding it liable for admissions taxes arising out of parasailing rides for which it charged passengers admission fees **from September 1, 2018, to December 31, 2021 (the Audit Period).**" (emphasis added) This "determination" at page 22 is materially identical to the "determination" at page 75, a document which the Respondent agrees should be in the R.O.A. The only difference is that the August 18, 2023 determination on page 75 updates the interest and penalties form the February 17, 2022 "proposed assessment" on page 22. The Administrative Law Court references the same Notice of Audit the Department of Revenue now wastes judicial resources in asking one of the two to be removed from the Record on Appeal. There were more than one "Notices of Audit," and it makes no difference to the Court's analysis which one is included in the Record on Appeal. They are indistinguishable except the alleged penalties and interest grew as time passed. The Department of Revenue relies on the same Notice of Audit as set forth in Stipulation #5 at page 80 of the Record on Appeal: "The Department conducted an audit examination to determine the Petitioner's compliance with admissions tax requirements for the Periods at Issue." If the Notice of Audit is not part of the Record on Appeal, then there is no evidence for the lower court to make any calculations, which would require an automatic reversal for lack of evidentiary support. To prove the alleged arrearage, the Department of Revenue either had to call a witness or offer its calculations, and those calculations

[4] The Southeast Reporters are littered with lawyer autopsies and scarred survivors whose appeals were dismissed or denied for points being insufficiently argued.

are contained in the Notice of Audit, which is what the Appellant appealed. It is astonishing and a waste of judicial economy that the Department of Revenue seeks now to purge the very administrative determination that creates this dispute. Even if the Administrative Law Court had not specifically referred to "the Audit Period," and even if the Appellant were 100% wrong and the Respondent 100% right, including the Department of Revenue's administrative determination in the Record on Appeal would not prejudice the Respondent in the slightest. Respondent tethers a litigant—which is already out of business—to an inconsequential debate over an immaterial dispute about the contents of the Record on Appeal, a dispute almost frivolous. So much for the Department of Revenue's mission statement (quoted above and in the conclusion below). Appellant is neither the first nor the last citizen chewed up by bureaucracy, the harm Article I, § 22 is designed to prevent, and like Hamlet, the resolution turns on what is missing, starting with the Administrative Law Court's ignoring Appellant's March 20, 2023, request for guidance. Obviously, the lower court relied on the Notice of Audit in granting summary judgment because the Court adopted both its theory and its calculations in granting summary judgment without providing Appellant an opportunity to be heard. It is, therefore, demonstrably frivolous for the Department to demand the Notice of Audit be removed because the Administrative Law Court identified the "Notice of Audit" on the first page of the Order.

2.

Appellant's 37-39 Notice of Appeal under the *Administrative Procedures Act*. Pages 37-39

Appellant respectfully submits that Respondent's request to remove pages 37-39 must be a scrivener's error because it is indisputable the Administrative Law Court relied on pages 37-39 because those pages are the Administrative Law Court's application form Appellant submitted to file an administrative appeal. Rather than burdening this Court with something so obvious, Appellant shows that the Department of Revenue's mandatory application form ("*Protest Pursuant to Revenue Procedures Act*") for review is indisputably part of the record, without which the Administrative Law

Court would not have taken up the case. Without filing the jurisdictional application for an administrative appeal, the Administrative Law Court would not entertain a contested case appeal. The filing is the administrative equivalent to a Notice of Appeal, a necessary jurisdictional document demonstrating exhaustion of an administrative remedy. Appellant believes Respondent erroneously designated pages 37-39 for removal from the Record on Appeal because there is no other explanation.[5]

3.

Appellant's Responses to Department of Revenue's Request to Admit. Pages 44-48

Respondent is correct that the Taxpayer's Responses to Request to Admit were either not filed with the Administrative Law Court at all or, if at all, not until the Motion for Reconsideration. The letter of transmittal references only the Fiem affidavit and not the Responses to the Department of Revenue's Requests for Admission. Appellant regrets the error and takes responsibility for it, explaining that at the time of this filing, Appellant's counsel was vacating the law firm's building, which the firm had occupied since 1974, and it was a chaotic and difficult transition.

However, as set forth above, Respondent conflates two widely separate issues: the limits on Rules 59 and 60 motions for reconsideration, which only limited introduction of new matter and the Appellant's right to hearing under Rules 56 and 6 before being thrown out of court on summary judgment. For purposes of this analysis, Appellant concedes that the Responses to Request for Admission were not considered by the Administrative Law Judge, but this is not the central point since the Administrative Law Court never provided Appellant the required hearing. This failure is the salient reason the case must at least be remanded because a reviewing Court only has three available remedies:

[5] Respondent similarly demanded that Appellant delete the Notice of Appeal (and other documents) from the Record on Appeal because the lower court did not rely upon it in deciding the case. Obviously, the lower Court did not consider the Notice of Appeal that had yet to be filed, but the Notice of Appeal is still part of the record on appeal because it is the jurisdictional document allowing review. The form at pages 37-39 is the administrative equivalent.

1) It can direct Appellant to remove pages 44-48 or allow Appellant to supplement the record; or

2) It can determine to leave them in because they are both inconsequential and cumulative to identical facts contained in the Stipulation of Facts and in the briefing to the Administrative Law Court and Respondent can identify no prejudice; or

3) It can remand the entire case because:

   a) The Administrative Law Court denied Appellant a hearing on summary judgment, which would have permitted the Appellant to introduce them, and/or

   b) The Administrative Law Court handed down its decisions on April 18,and May 14, 2024, granting summary judgment based on the Court's erroneous finding/conclusion that the law required it to defer to the Department of Revenue's interpretation. See Order under review at page 4 of the R.O.A.: "[C]ourts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration of its own regulations 'unless there is a compelling reason to differ.'")[6] Two months later, the U. S. Supreme Court handed down *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S.Ct. 2244 (June 28, 2024) on June 28, 2024, abrogating the deference principle on which the Administrative Law Court grounded its decision. The U. S. Supreme Court held:

   > Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers anticipated that courts would often confront statutory ambiguities and

[6] The Administrative Law Court also erred in ignoring the Department of Revenue's 22-year history (R.O.A. page 144) agreeing with the Appellant, including through a 2014 audit. This 22-year "deference" creates at least a genuine issue of material fact that Respondent's position on the exemption is mistaken and "requires further inquiry into the facts of the case . . . to clarify the application of law." *Schmidt v. Courtney and Kemper Sports*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003). Given an opportunity to appear before the Court, Appellant could have drawn emphasis to this 22-year history to the Court's attention because the Administrative Law Judge disregarded Appellant's written statements. See page 106 of the R.O.A.: "Finally, Tidalewave has been in operation since 2005 in the same business and even underwent a Department of Revenue audit in 2014, which found no deficiencies related to the amusement tax." [April 8, 2024 brief to the Administrative Law Court]

> expected that courts would resolve them by exercising independent legal judgment. *Chevron* gravely erred in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate. (emphasis in original)

For any or all of these reasons, while Respondent is correct that the Answers to the Department of Revenue's Requests for Admission were not filed with the Administrative Law Court, they are merely cumulative to the Stipulation of Facts. They also show how the required Rule 56(c) hearing would have allowed Appellant to make a full presentation to the Administrative Law Court and allow the parties to create a proper record for a reviewing Court as guaranteed by Article I §22 of the South Carolina Constitution.

Conclusion

"The Record on Appeal shall include all matter to be designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267." (Rule 210(c) "Content" *S. C. Appellate Court Rules*) This Rule also mandates that nothing shall be included that "was not presented to the lower court or tribunal." Subsection (h), "Review Limited to Record on Appeal," says: "the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 212 allows parties to supplement a record on appeal, but the financial constraints frequently dictate litigation strategies, or, as Uncle Arthur was known to ask: "how much justice can you afford?"[7] Rule 208(b)(1)(C) allows a statement of case to include a "description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal." In light of these rules against a

[7] Arthur Howe, 1927-2004, uncle to multiple generations of South Carolina lawyers, related through a reverence for the pursuit of justice.

background of Courts' preference for deciding cases on their merits and the fact that this appeal is predicated upon the Administrative Law Court's failure to allow a hearing before ending the case, a State Agency's deployment of procedural gamesmanship disputing 24 pages in a record on appeal is mystifying.

Because the Administrative Law Court did not allow a hearing, no one can point to a transcript to identify what documents "were before the Administrative Law Court (ALC), including any proof of the same." (Court of Appeals' Order, June 23, 2025) Without a hearing, we are forced to rely on reasonable inferences, and it is clear from the Order under review and the required filings that all but the Appellant's Answers to the Department's requests for admission were clearly before the Administrative Law Court since they are either incorporated into the Order under Review or required jurisdictional filings without which the case would not be considered. Obviously, the Appellant's mandatory jurisdictional filings are part of the record presented to the Administrative Law Judge without which there would be no appeal. As for the answers to requests for admission, while they were not marked as exhibits and presented to the Administrative Law Judge specifically, but the Administrative Law Court erred in short circuiting the summary judgment process and preventing the Appellant an opportunity to make a full presentation. This error, a violation of Article I, § 22, requires remand at least. Furthermore, the decision under review is grounded on judicial deference, which the U. S. Supreme Court abrogated two months after the Administrative Law Judge reached her decision. Thus, the Order under review is controlled by an error of law, also requiring, at least, a remand if not a reversal, making the dispute over the Record on Appeal almost irrelevant. If the Court reaches a conclusion that a remand is required under Rule 56 and/or *Loper Bright*, Appellant is filing a corresponding motion for remand/motion to supplement in conjunction with this brief if the Court believes a separate motion is necessary to raise these issues. No matter what this Court decides on

the contents of the Record on Appeal, the decision below is controlled by fundamental errors of law requiring reversal or at least remand.

Finally, the Respondent's pattern of procedural fencing is irreconcilable with its published Mission Statement commitment to taxpayers "to administer the revenue and regulatory laws of this state in a manner deserving the highest degree of public confidence in our integrity, effectiveness, and fairness." (Department of Revenue Mission Statement) The Department of Revenue's pattern of exploitation of procedural strategies to deny or delay review through hyper-technical objections to almost everything connected with this case is inconsistent with its Mission Statement. Despite the Department's published commitment, it has erected numerous barriers to Appellant's case being decided on the merits to prevent or delay meaningful judicial review. The latest objection over documents whose inclusion in the Record do not cause the slightest prejudice to the Department of Revenue consumes limited judicial resources and is inconsistent with its mission statement. The case is ready for review, and the *Loper-Bright* decision vacated the reasoning employed by the Administrative Law Judge in granting summary judgment. The record is complete for judicial review, the briefing is finalized, and the case is ready for a decision. To force the Appellant to recompile the Record on Appeal over inconsequential materials serves no purpose other than delay and saddling Appellant with additional expense over documents that do not prejudice the Respondent in the slightest. The Court should deny the request and decide the case on its merits.

Respectfully submitted,

July 21, 2025

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