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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE S.C. ADMINISTRATIVE LAW COURT

Honorable Deborah B. Durden, Administrative Law Judge

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

Watertoys, LLC, d/b/a Tidalwave Watersports,.....Appellant,

v.

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

RETURN TO APPELLANT’S “RETURN/MEMORANDUM OF LAW”

Pursuant to this Court’s Order filed June 23, 2025, Respondent South Carolina Department of Revenue (the Department) files this Return.

Under Rule 210(c), SCACR, “[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal.” The Supreme Court of South Carolina emphasized this specific requirement. *See Henning v. Kaye*, 307 S.C. 436, 438, 415 S.E.2d 794, 794–95 (1992) (“Appellant is reminded that the Record on Appeal shall not contain any matter not presented to the trial court.”). Over the Department’s objection, Appellant included matters in the Record on Appeal which were not presented to the lower court or tribunal. The Department moved this Court because the Department could not acquiesce to Appellant’s blatant disregard for the South Carolina Appellate Court Rules. In direct contradiction to Appellant’s characterization of the Department’s objection as “hyper-technical,” the Supreme Court of South Carolina held 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. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review. *Henning v. Kaye*, 307 S.C. at 437, 415 S.E.2d at 794.

Simply put, the rules matter.

This Court allowed Appellant to demonstrate how pages 21–39 and 43–48 of the Record on Appeal were before the Administrative Law Court (ALC), including any proof of the same. Appellant just had to show that the documents were filed with the ALC. Appellant could review copies of its own filings and those served upon it by the Department or request a copy of the filings from the ALC. However, such effort would be fruitless because the documents were never filed or otherwise presented to the ALC. Instead, Appellant conflates the documents on pages 21–39 and 43 with separate and distinct documents while including no proof those documents were before the ALC. For the remaining documents, Appellant concedes that pages 44–48 were not presented to the ALC. Going beyond the scope of this Court’s June 23, 2025 Order, Appellant repeats arguments from Appellant’s Brief—to which the Department already responded in Respondent’s Brief—and asks the Court to remand the case, so it can present these documents to the ALC.¹ As discussed below, the Court should dismiss this case pursuant to Rule 260(a), SCACR, or alternatively, strike pages 21–39 and 43–48 of the Record on Appeal.

Pages 21-36 of the Record on Appeal were not presented to the ALC.

Appellant makes a patently inaccurate statement: “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.” Return/Memorandum of Law at 7 (emphasis in original). Page 1 of the Record on Appeal contains

¹ On page 4 of the Return/Memorandum of Law, Appellant erroneously asserts, “Appellant requested procedural direction from the Court that the Administrative Law Judge ignored.” Page 218 of the Record on Appeal contains Appellant’s email and the ALC’s response.

two paragraphs, and neither refers to the Notice of Audit. The first paragraph is a brief procedural history of the case. The second paragraph is a mere recitation of the law regarding whether summary judgment is appropriate. To the contrary, the Order states on page 1, “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 refers to the Department Determination on pages 206–211 of the Record on Appeal.²

As explained in the Department’s Reply to Return to Motion to Strike, pages 21–36 of the Record on Appeal include materially different documents from the Department Determination on pages 206–211. Page 21 is an Audit Appointment letter. Scheduling an audit is not the equivalent of a final agency decision—the Department Determination. Pages 22–36 are a Proposed Assessment. A Proposed Assessment is not the equivalent of the Department Determination either. S.C. Code Ann. § 12-60-30(10) (2014) defines “Department determination” as “the final determination within the department from which a person may request a contested case hearing.” On the other hand, S.C. Code Ann. § 12-60-30(23) (2014) defines “Proposed assessment” as “the first written notice sent or given to the taxpayer stating that a division within the department has concluded that a tax is due.” Even if these documents were effectively interchangeable (which they are not), pages 21–36 were not presented to the lower court. None of the ALC’s Orders in this matter contain the calculations in pages 21–36 of the Record on Appeal. The numbers do not match. However, the Department Determination on pages 206–211 was presented to the ALC and that contained the calculations on which ALC relied.

² The Department Determination without the cover letter and enclosures also appears on pages 75–77 of the Record on Appeal as an attachment to the Agency Information Sheet.

Further, Appellant disputed the calculations for the first time after appealing the matter to the Court of Appeals. This Court then remanded the matter to the ALC on the limited issue of those calculations on July 18, 2024. At the hearing on remand, the parties agreed on the numbers in the Department's Brief on Remand. *See* ROA at 247–249. Specifically, the Department brought a witness who was prepared to testify in support of the numbers in the Department's Brief on Remand, but Appellant represented to the ALC that there was no dispute as to those numbers. *Id.* Therefore, the ALC relied on the agreed upon numbers in the Department's Brief on Remand, which are identical to the amount of tax in the Department Determination with updated amounts for the penalty and interest.

Pages 37-39 of the Record on Appeal were not presented to the ALC.

Appellant confuses pages 37–39 of the Record on Appeal with the Request for a Contested Case Hearing Form. *See* Return/Memorandum of Law at 9 (“[Pages 37–39] are the **Administrative Law Court’s** application form Appellant submitted to file an administrative appeal” [emphasis added]). However, the ALC’s Request for a Contested Case Hearing Form is on page 50 of the Record on Appeal. Page 37 is a letter addressed to the Department (not the ALC), and pages 38–39 are a Department (not ALC) form. Unlike the completed Request for a Contested Case Hearing Form on page 50, pages 37–39 were not presented to the ALC. In addition to misidentifying the documents, Appellant offers no proof these documents were presented to the ALC because the documents were not presented to the ALC.

Page 43 of the Record on Appeal was not presented to the ALC.

Appellant confuses page 43 of the Record on Appeal with the Department Determination on pages 206–211, which is the decision appealed to the ALC. While Appellant’s Return/Memorandum of Law describes page 43 as the Department’s Administrative Decision appealed to the ALC (i.e. Department determination), Appellant more accurately describes the document in the index to the

Record on Appeal as “Notice of Transfer to litigation (Cardona letter dated January 24, 2023).” A notice of internal transfer does not constitute a Department Determination. In fact, the document itself provides, “the matter will be transferred to the Office of General Counsel for Litigation for the issuance of a Final Agency Determination.” Under S.C. Code Ann. § 12-60-30(11) (2014), the Department appoints a department representative to prepare the Department Determination and represent the department at the contested case hearing. In this matter, the Department transferred the matter to the Office of General Counsel for Litigation and appointed the undersigned as department representative, who prepared the Department Determination on pages 206–211.

Pages 44-48 of the Record on Appeal were not presented to the ALC.

Appellant admits that it did not present pages 44–48 to the Administrative Law Court. *See* Return/Memorandum of Law at n.2. Appellant’s counsel claims he intended to submit its Answers to the Department’s Requests to Admit with an affidavit attached to Appellant’s Reply to the Department’s Response to Appellant’s Motion for Reconsideration. As discussed in the Department’s Brief, the ALC rules did not authorize Appellant’s Reply. Therefore, even if the Answers had been submitted to the ALC (which they were not) as an attachment to Appellant’s Reply, the filing would have been late, unauthorized, and unpreserved for appellate review. Regardless, Appellant failed to demonstrate or provide any proof that pages 44–48 were presented to the ALC and instead concedes they were not.

The Court should deny Appellant’s Motion for Remand or Supplement Record.

Although Appellant complains throughout its Return/Memorandum of Law about wasting judicial resources, it asks the Court to remand this matter to the ALC to give Appellant another opportunity to present pages 21–39 and 43–48 to the ALC. Like failure to preserve an issue, failure to present documents to the lower court forecloses the inclusion of the documents in the Record on Appeal. Further, Appellant cannot appeal the failure to make a record below when it did not request

a record or object to the failure to make a record. *See Ferguson v. Ferguson*, 300 S.C. 1, 386 S.E.2d 267 (Ct. App. 1989). The appellant has the burden of presenting the Court with an adequate record. *See Harkins v. Greenville Cnty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000). If an issue is not made on the record, it is not preserved for appellate review. *See Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 213, 723 S.E.2d 597, 608 (Ct. App. 2012). Appellant failed to present pages 21–39 and 43–48 to the ALC, and judicial economy demands it be denied another bite at the apple.

Appellant again misunderstands the South Carolina Appellate Court Rules. Rule 212(b), SCACR, allows a party to move to supplement the Record on Appeal, but the matters it seeks to supplement still must have been presented to the lower court or administrative tribunal. *See Norris v. Ferre*, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993) (denying party's motion to supplement record with matters not presented to the trial judge). In other words, Rule 212(b), SCACR does not permit a circumvention of Rule 210(c), SCACR. The purpose of Rule 212(b), SCACR is to allow a party to supplement the Record on Appeal with materials presented to the lower court or tribunal but not previously designated. While Appellant did fail to designate its Answers to the Department's Requests to Admit, Appellant also did not present those Answers or any of the other documents on pages 21–39 and 43–48 to the ALC. Therefore, Appellant's motion to supplement should be denied.

Conclusion

The Court's June 23, 2025 Order held this appeal in abeyance for the limited purpose of allowing Appellant to demonstrate how pages 21–39 and 43–48 of the Record on Appeal were before the ALC, including any proof of the same. Appellant impermissibly exceeded the scope and made arguments related to its appeal and filed a motion. Ultimately, Appellant failed to demonstrate how pages 21–39 and 43–48 of the Record on Appeal were before the ALC and included no proof of the same. Therefore, the Court should dismiss this case pursuant to Rule 260(a), SCACR, or alternatively, strike pages 21–39 and 43–48 of the Record on Appeal.

Respectfully submitted,



Marcus D. Antley, III, Esquire (Bar No. 102176)

W. Allen Myrick, Esquire (Bar No. 14718)

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*Attorneys for Respondent South Carolina Department of
Revenue*

August 1, 2025

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE S.C. ADMINISTRATIVE LAW COURT

Honorable Deborah B. Durden, Administrative Law Judge

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

Watertoys, LLC, d/b/a Tidalwave Watersports,.....Appellant,

v.

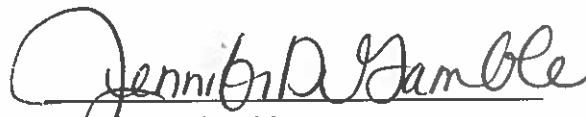
South Carolina Department of Revenue,.....Respondent.

PROOF OF SERVICE

I, the undersigned Paralegal with the South Carolina Department of Revenue, attorneys for the Respondent, hereby certify that I have served all counsel listed below with Return to Appellant's "Return/Memorandum of Law" via electronic mail:

Thomas R. Goldstein
PO Box 71121
N. Charleston, SC 29415-1121
tgoldstein@cobblaw.net

Counsel for Appellant


Jennifer D. Gamble
Senior Paralegal

August 1, 2025

From: [Jennifer Gamble](#)
To: [tgoldstein](#)
Cc: [Marcus "Trey" Antley, III](#); [Jason Luther](#); [Allen Myrick](#)
Subject: Watertoys LLC d/b/a Tidalwave Watersports v. SC Department of Revenue (2024-000962)
Date: Friday, August 1, 2025 10:16:00 AM
Attachments: [SCDOR's Return 8-1-25.pdf](#)

Good Morning Mr. Goldstein:

Attached and served upon you please find Respondent's Return to Appellant's "Return/Memorandum of Law" in the above referenced matter.

Thank you,

Jennifer

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
OFFICE OF GENERAL COUNSEL

300A Outlet Pointe Blvd.
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Main Line: 803.898.5130
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SC Court of Appeals

VIA ELECTRONIC MAIL to ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
SC Court of Appeals
Clerk of Court
1220 Senate Street
Columbia, SC 29201

**Re: Watertoys, LLC, d/b/a Tidalwave Watersports v. South Carolina Department
of Revenue
Appellate Case No. 2024-000962**

Dear Ms. Kitchings:

Attached please find Respondent South Carolina Department of Revenue's Return to Appellant's "Return/Memorandum of Law" in the above referenced matter. Additionally, I have enclosed a Proof of Service.

By copy of this letter, the Department is serving Appellant.

Sincerely,

A handwritten signature in blue ink that reads "Marcus D. Antley III".

Marcus D. Antley, III

Enclosures
MDA/jdg

c: Thomas R. Goldstein, Esquire