THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

Case No.: 2011-CP-40-6156

Marie Wilson,.....Respondent,

v.

Joseph Williams,.....Appellant.

INITIAL REPLY BRIEF

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In her brief, the Respondent asserts some positions which are inconsistent with the record. The Appellant seeks to clarify those issues to comport with the record.

I. **The trial court lacked jurisdiction to either amend or alter the judgment pursuant to Rule 59 after November 16, 2012**.

The trial court issued two *sua sponte* orders for a new trial nisi remittitur eight (8) and nine (9) days after the jury was discharged and judgment was entered against the Respondent without any notice to the parties or an opportunity to be heard. The Appellant contends that the trial court's orders of November 14, 2012 and November 15, 2012 were void as the trial court failed to comply with the strict requirements of notice and opportunity to be heard pursuant to Rule 59 (d); therefore, the time period for which the trial court retained jurisdiction started on November 6, 2012 and ended on November 16, 2012. The Appellant did not receive notice of the *sua sponte* orders until November 19, 2012, which was three (3) days after the trial court's jurisdiction ended.

Rule 59 (d) of the South Carolina Rules of Civil Procedure, states the following:

> **On Initiative of Court**. Not later than 10 days after entry of judgment, the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds thereof.

Our Supreme Court has examined the issue of *sua sponte* orders and determined that a trial court may alter or amend an order up to ten days after entry of the judgment. *Doran v. Doran* 288 S.C. 477, 343 S.E.2d 618 (1986). In *Doran*, the trial court issued a *sua sponte* order a month after the judgment reserving jurisdiction to

modify the order. Neither party had appealed the final order in the *Doran* case. Our Supreme Court held that the trial court "loses jurisdiction to modify an order after the term at which it is issued." Furthermore, the Supreme Court determined that an "order is no longer subject to any amendment or modification which involves the exercise of judgment or discretion on the merits of the action."

Just as in *Doran*, the Appellant's case involves *sua sponte* orders issued by the trial court without any timely filed motions or appeal from the parties. Likewise, the Appellant contends that this trial court lacked jurisdiction to reconsider the order because the ten (10) day term which provided the trial court with the authority to amend, alter or reconsider expired on November 16, 2012.

The Respondent claims this issue is not preserved solely because the Appellant's attorney did not file a Rule 59 motion and asserts that the Appellant is somehow trying to "bypass" Rule 59 (e) because of some "misapprehension" as to when the rule is applied; however, our Supreme Court has taken a different position. Our Supreme Court has held that the courts will not require parties to engage in futile actions in order to preserve issues for appellate review. *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000). In *Staubes*, the Supreme Court determined that a Rule 59 (e) motion was not warranted when the party did not request a specific ruling on his motion to amend the complaint. The Supreme Court held that it would have been futile to file a motion when the trial court's order treated the pleadings as amended and where the party was aware that the trial court had decided to grant summary judgment on any negligent claim the party raised.

The Appellant's case is similar to *Staubes* and the Appellant is clear in his

contention that it would have been futile to make a post-trial motion where the trial court no longer retained jurisdiction to entertain any post trial motions. The trial court's orders were void because the trial court failed to comply with the notice and opportunity to be heard requirements of Rule 59 (d).

One word that is significant in Rule 59 (d) addressing the use *sua sponte* action by the Court is the word "After." *See Rule 59.* Black's Law Dictionary defines "after" as being later, succeeding, subsequent to, inferior in point of time or of priority or preference. Black's Law Dictionary, 38, (6th ed. 1991). It is clear in the language of Rule 59 (d) that the rule contemplates that court initiated action granting a new trial should only occur later than the notice and opportunity to be heard requirements. Rule 59 (d) puts a higher priority on the notice and opportunity to be heard requirements than the *sua sponte* action of the court. The trial court had jurisdiction to issue *sua sponte* orders from November 6, 2012 until November 16, 2012; however, the trial court's *sua sponte* powers ordering a new trial were secondary to the Appellant's primary and substantial right to timely notice and an opportunity to be heard regarding the trial court granting any new trial.

The trial court's failure to provide the Appellant notice and an opportunity to be heard regarding the trial court granting any new trial within ten (10) days before issuing its two orders was fatal to the trial court's orders and fatal to the trial court retaining jurisdiction after November 16, 2012. The trial court's orders were void when the court acted without jurisdiction in issuing the two orders before providing the Appellant notice and an opportunity to be heard within the ten (10) day jurisdictional time frame after the initial judgment on November 6, 2012, in which the trial court retained jurisdiction to act

on its own initiative. *Ross v. Richland Co.,* 270 S.C. 100, 240 S.E.2d 649 (1978). While opposing counsel correctly points out that the Appellant had ten (10) days after receipt of the trial court orders to file a Rule 59 (e), opposing counsel fails to address the true issue concerning this appeal of whether the trial court had jurisdiction to hear a Rule 59 (e) motion or any type of motion after November 16, 2012.

Counsel for the Respondent incorrectly asserts that there is no notice requirement authorized by Rule 59 (d); however, our Supreme Court disagrees with the this assertion and did so in two cases. The Supreme Court held that trial court may order a new trial only after giving the parties notice and an opportunity to be heard on the matter in *Buxton v. Thompson Dental Co.,* 307 S.C. 523, 415 S.E.2d 844 (S.C.App. 1992) and *C & S National Bank v. Easton,* 310 S.C. 458, 427 S.E.2d 640 (1993). The specific language of *C& S* states, "clearly, the order for a new trial, 229 days after judgment and without notice to the parties, was in error." Therefore, it is clear that our appellate courts interprets that our laws require notice before issuing final orders for new trials. It is uncontested by the Respondent that the trial court failed to provide notice and an opportunity to be heard before issuing its two *sua sponte* orders. The trial court had many ways it could have communicated notice to the Appellant before issuing the two orders with the advent of email, facsimile, telephone, etc. The trial court failed to utilize any of those means of notifying the Appellant although the trial court had all of the contact information for counsel for the Appellant. Unlike the Plaintiff in *Buxton* who received "short and informal" notice of the *sua sponte* new trial motion and whose counsel had an opportunity to present an argument at the hearing before issuing an order for a new trial, the Appellant in this case received neither and was further

prejudiced by the eight (8) and nine (9) day delay before the trial court acted on its own initiative and the thirteen (13) day delay before the Appellant received the two *sua sponte* orders. While counsel for the Respondent chooses to focus on the word "transcribed" notice, the Appellant would direct this appellate courts attention to the fact that the Appellant received "no" kind of notice before the two *sua sponte* orders were issued. The fact that there was no kind of notice, written or verbal, is what gives rise to prejudice and which affected a substantial right of the Appellant to address the trial court before it issued its two *sua sponte* orders.

The Appellant contends that the trial court orders on November 14, 2012 and November 15, 2012 were void, which meant that the judgment of November 6, 2012 was still in effect on November 16, 2012 based upon the trial court's failure to comply with the strict requirements of Rule 59 (d) concerning notice and opportunity to be heard first before issuing its' orders. Therefore, the trial court did not have or maintain jurisdiction to hear a Rule 59 (e) motion or any other motions after November 16, 2012.

The Appellant is not seeking to challenge the power of the court to issue *sua sponte* orders nor is the Appellant seeking to challenge the raised and ruled upon rule as the Respondent asserts. The Appellant is clearly stating that he was denied due process by not receiving notice and an opportunity to be heard before the two *sua sponte* orders were issued and the Appellant is challenging the trial court's jurisdiction to hear any motion after November 16, 2012, thereby making any motion after November 16, 2012, moot, and this appeal therefore timely and proper.

II. **The trial court erred by first failing to show substantial deference to the jury determination of a damages award and erred secondly by failing to offer compelling reasons for invading the jury's province before the trial court issued its sua sponte orders.**

The consideration of a motion for a new trial nisi remittitur requires the court to consider the adequacy of the verdict in light of the evidence presented. *Waring v. Johnson* , 341 S.C. 248, 533 S.E.2d 906 (Ct.App. 2000). The trial court abused its discretion by failing to consider the weight and adequacy of the evidence presented by the Appellant in the light most favorable to the Appellant; this evidence is what enabled the jury to make its award.

The Respondent asks this appellate court to consider counsel for the Appellant's closing arguments, which are not evidence, to assert that the jury award was either liberal or excessive. Counsel for the Respondent incorrectly states that the Appellant valued the case at about five (5) times the medicals or that counsel for the Appellant requested a specific verdict amount in the Appellant's closing argument. A more complete and accurate representation of the Appellant's argument was that there were many factors to consider when coming up with a damage award and that the decision was in their control to determine what was fair and reasonable. [Tr. pp. 229-231.] Counsel for the Appellant clearly uses the words, "for example," in his argument to the jury that there were many ways and factors by which the jury could arrive at a damage amount if they determined that the Respondent was negligent.

The jury weighed the following evidence in determining the damage amount: 1) That the Appellant sustained injuries to neck, back, left middle finger, left knee, and right hip as a result of being struck by the Respondent's vehicle. [Transcript, pp. 117-121.]; 2) That as a result of his injuries, the Appellant's middle left finger was placed in a splint

for several weeks, the Appellant was required to take pain medication, and the Appellant also underwent physical therapy for his injuries. [Transcript, pp. 123-125.]; 3) That the Appellant had to withdraw from college and his quality of life and his marriage was effected by this accident; the Appellant continues to this day to still experience periodic pain in the back from this accident where he was stuck by the Respondent's vehicle. [Transcript, pp. 121; 125-127.]; 4) That the EMS worker testified that the Appellant was in a great deal of pain while he was laying on the ground. [Transcript, pp. 152-157.]; and 5) That the Appellant had approximately $6322.01 medical expenses. [Transcript, pp. 122-125. Appellant Exhibit 21.]

The trial court issued its first *sua sponte* order eight (8) days after the initial judgment was rendered by the jury. The Appellant asserts prejudice in the trial court's delay because the facts and circumstances surrounding the evidence and trial were not fresh in the mind of the trial judge. The trial courts two *sua sponte* orders do not address what deference the trial court showed to the jury's determination of the damage amount nor do the orders offer any compelling reasons why the trial court invaded the jury's province. The failure to show deference and offer compelling reasons before ordering a new trial nisi remittitur was a manifest error in law requiring this court to reverse the trial court's decision and orders and to reinstate the verdict amount on behalf of the Appellant. *Todd v. Joyner*, 385 S.C. 509, 685 S.E.2d 613 (Ct. App. 2008).

CONCLUSION

For all of the above-stated reasons and the reasons stated in the Appellant's primary brief, this court should reverse the result below and remand with instructions to enter judgment in the Appellant's favor in the amount of $50,000.00.

Respectfully submitted,

June 11, 2013

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