THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No: 2011-CP-40-6156
Court of Appeals Case No.: 2012-213449

Joseph Williams, ...Appellant,

v.

Marie Wilson, ... Respondent.

FINAL BRIEF OF RESPONDENT MARIE WILSON

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INTRODUCTION

Appellant Joseph Williams ("Williams") challenges the trial court's *sua sponte* grant of a new trial *nisi remittitur* because he believes that the trial court's reasons were not compelling and that he did not have an opportunity to address the merits of remittitur before the decision was made. But Williams never presented those arguments to the trial court nor preserved them for appellate review. Instead of seeking reconsideration by the trial court of its remittitur order in accordance with Rule 59(e), SCRCP, Williams initiated this appeal. The issue preservation rules endeavor to avoid this very situation. Williams never afforded the trial court an opportunity to consider his arguments, which is fatal to his appeal.

For the first time, Williams now reveals in this appeal his challenges to the remittitur decision – the proverbial "ace cards up his sleeve:" (1) he believes he was entitled to "transcribed notice" and a "transcribed hearing" before issuance of the *sua sponte* order, although South Carolina law requires neither; and (2) he disagrees with the trial court's reduction of a jury verdict that exceeded the damages requested by his own counsel at trial. Even if this Court reaches the merits of these unpreserved arguments, they are baseless. The trial court's remittitur order comports with the requirements of Rule 59(d), SCRCP, and it was not an abuse of discretion amounting to an error of law that warrants reversal.

STATEMENT OF THE CASE

This action originated with the September 16, 2011 filing of a Complaint by Williams and Shawn Delaine, who is not a party to this appeal, alleging that Respondent Marie Wilson ("Wilson") negligently drove her car into them as they walked down the street. (R. pp. 006-009). Wilson answered the Complaint on December 8, 2011, denying liability and asserting, among other things, that comparative negligence should bar all or part of the plaintiffs' recovery. (R. pp. 010-013).

A jury trial commenced on November 5, 2012. Williams presented evidence of medical expenses in the amount of $6063.00,[1] and he also sought actual damages for pain and suffering. (R. p. 63, ll. 21-25; p. 66, ll. 1-7; p. 67, ll. 11-15; p. 69, ll. 7-14; p. 70, ll. 16-24; p. 71, ll. 11-25; p. 111, l. 2 - p. 114, l. 7; p. 152). At trial, Williams testified that as a result of the accident, he received stiches in his left middle finger, (R. p. 64, ll. 6-13), suffered pain in his hip, back, and knee, (R. p. 64, ll. 18-21), was given prescription pain medicine, (R. p. 64, l. 24 – p. 65, l. 22; p. 68, l. 21 – p. 69, l. 6), and received treatment from a chiropractor, (R. p. 67, l. 19 – p. 68, l. 20). Williams also testified to "still feel[ing] some type of pain" which is a "sharp . . . . [but] not an everyday pain." (R. p. 70, ll. 18-24; *see also* R. p. 113, ll. 13-25). Williams did not seek lost wages. (R. p. 113, ll. 6-12).

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[1] Appellant's Brief inexplicably states that Williams' medical expenses were $6,322.01. (Appellant Brief, pp. 2, 6). Throughout trial, Williams represented that his medical expenses totaled $6063.00. Williams not only testified to medical expenditures in the amount of $6,063.00, (R. p. 63, l. 21 – p. 69, l. 17), but $6063.00 is the total reflected on the summary of medical expenses admitted into evidence, (R. p. 152). Moreover, $6,063.00 is the amount that Williams' counsel asked the jury to award during closing argument. (R. p. 111, ll. 2-4; p. 111, l. 7 – p. 112, l. 13). For purposes of this appeal, the $259.01 difference between the two amounts does not significantly impact the analysis.

During closing argument, Williams' counsel emphasized to the jury that Williams only "ask[ed] you to compensate him for his medical expenses and for his pain and suffering." (R. p. 113, ll. 10-12). Williams requested that the jury award medical expenses in the amount of "roughly about $6,063." (R. p. 111, l. 4). Williams also suggested that the jury could "take the medicals . . . [and] multiply by five to come up with – and whatever that difference is can be pain and suffering." (R. p. 114, ll. 4-7).

After submission of the sole claim of negligence, (R. p. 119, ll. 4-15), the jury requested during deliberations that the trial court repeat the charges related to damages. (R. p. 131, l. 19 – p. 132, l. 9).

On November 6, 2012, the jury returned a verdict in favor of Williams in the amount of $50,000.00 in actual damages and "Zero Dollars" in punitive damages. (R. p. 004).[2] Later that afternoon, Wilson filed a Rule 59 Motion for New Trial, which was deemed untimely.

On November 14, 2012, the trial court *sua sponte* ordered a new trial *nisi remittitur* of the $50,000.00 verdict for Williams to $24,000.00. (R. p. 001). The order was issued "[p]ursuant to Rule 59(d) . . . of [the court's] own initiative" on the grounds that the jury's verdict was "unduly liberal" and the amount of the verdict was "merely excessive." (R. p. 001). On November 15, 2012, the trial court issued a supplemental order providing Williams "10 days to elect either a new trial or . . . accept[] the

[2] Although not on appeal, the jury also returned a verdict in favor of Shawn Delaine for $10,000 in actual damages and "Zero Dollars" in punitive damages. (R. p. 005).

remittitur" of $24,000.00. (R. p. 002).[3]

Williams received written notice of both the November 14 and November 15 Orders on November 19, 2012, (R. p. 024), but he did not seek reconsideration of the Orders in the trial court. Instead, Williams served his Notice of Appeal of those decisions on November 20, 2012. (R. p. 024).

[3] The only decisions on appeal are the trial court's new trial *nisi remittitur* orders. (R. p. 024). Although Williams' Statement of the Case recounts the trial court's earlier rulings on motions in limine addressed to criminal history, a motion for bifurcation, and motions for directed verdict, (Appellant Brief, pp. 1-2), those rulings are not related to the jury's damages verdict or the trial court's reduction thereof and do not "throw light upon the questions involved in the appeal" as required by Rule 208(b)(1)(C), SCACR. Similarly, Williams' Statement of Facts describes evidence presented at trial regarding Wilson's liability, (Appellant Brief, pp. 5-6), that is not "relevant to the [remittitur] issues presented for review" as required by Rule 208(b)(1)(D), SCACR. The damages calculation is at issue in this appeal, not the propriety of the jury's finding that Wilson was liable.

Because the facts relevant to the issues on appeal are uncontested, Wilson sets forth all relevant facts in her Statement of the Case and does not include the "separate statement of facts . . . [of] contested matters" that Rules 208(b)(1)(D) and (b)(2), SCACR, permit but do not require. The intentional omission of a separate statement of contested facts, however, should not be construed as an agreement to be bound by Williams' factual recitation.

ARGUMENT

I. Williams Did Not Preserve His Issues For Appellate Review And He Cannot Challenge The Trial Court's Remittitur Decision For The First Time On Appeal When He Failed To Present Those Arguments To The Trial Court.

Williams' failure to seek reconsideration of the trial court's new trial *nisi remittitur* order is fatal to his appeal. The Issues on Appeal outlined in Williams' Appellant Brief challenge both the manner in which the trial court issued its remittitur order and the order's substance – arguments that Williams was obligated to present to the trial court *first* to enable it to reconsider its ruling. Instead, Williams has kept not one, but two "ace card[s] up his sleeve - intentionally or by chance - in the hope that an appellate court will accept th[ose] ace card[s] and, via a reversal, give him another opportunity to prove his case." *I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000). The issues presented by Williams on appeal were not preserved for consideration by this Court and cannot be considered on their merits.

A. To Be Appealable, Issues Must Have Been Both Presented To, And Ruled Upon By, The Trial Court.

South Carolina law is clear that arguments may not be presented on appeal unless they "have been fairly and properly raised to the lower court and passed upon by that court." *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011)(internal quotations omitted). The process is equally apparent: "The losing party must *first* try to convince the lower court it has ruled wrongly and *then*, if that effort fails, convince the appellate court that the lower court erred." *I'On,* 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added). This requirement of issue preservation ensures that the trial court has the opportunity "to rule properly after it has considered all relevant facts, law, and arguments," *I'On,* 338 S.C. at 422, 526 S.E.2d at 724, providing this Court "with a

platform for meaningful appellate review," *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011).

B. Williams Was Obligated To Seek Reconsideration Of The Remittitur Order In The Trial Court Before Filing This Appeal.

Although Williams had the means and ability to present his arguments against remittitur to the trial court, he chose not to do so. Rule 59(e), SCRCP, provides the vehicle by which a losing party can preserve his arguments for appeal by requesting that the trial court reconsider its decision. *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993)("We note that Rule 59(e), SCRCP, provides for a motion to alter or amend judgment and preserve the record for appeal."). As this Court recently emphasized, seeking Rule 59(e) reconsideration from the trial court is required for preservation of appellate issues. *Caldwell v. Wiquist*, 406 S.C. 565, 576-77, 741 S.E.2d 583, 589 (Ct. App. 2013)(finding that Wiquist was procedurally barred on appeal from arguing that evidence of fraud or collusion required reversal of the circuit court's decision because she failed to seek Rule 59(e) reconsideration of the circuit court's decision).

The trial court undoubtedly had jurisdiction to consider a motion to reconsider by any party at any time within the ten-day limitation set by Rule 59(e). *See* SCRCP 59(e)("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."). The South Carolina Supreme Court has made clear that even the filing of a Notice of Appeal does not deprive the trial court of jurisdiction to hear a timely-filed Rule 59(e) motion. *Hudson v. Hudson*, 290 S.C. 215, 216, 349 S.E.2d 341, 341-42 (1986)("We now hold that the service and filing of a Notice of Appeal before the filing of timely post-trial motions under Rule 59 by any

party does not deprive the lower court of jurisdiction to consider the motions."). Williams cannot excuse his failure to seek Rule 59(e) reconsideration because the trial court lacked jurisdiction to consider such a motion.

Nor can Williams contend that he simply did not have time to file a Rule 59(e) motion. First, the ten-day time allotment for filing a Rule 59(e) motion began to run when Williams *received* the orders on November 19, 2012, not when the orders were issued on November 14 and 15.[4] *See* Rule 59(e), SCRCP ("[The] motion . . . shall be served not later than 10 days *after receipt of written notice* of the entry of the order")(emphasis added). S*ee also USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651-52, 661 S.E.2d 791, 795-96 (2008)(reaffirming that the ten-day period for filing a motion to reconsider did not begin to run until insurer learned of the court's order when the insurer found out about the order after the insured's attorney contacted her). Williams suggested in other filings that such a motion would have been "moot" after the expiration of the term of court. (Williams' Return to Motion to Dismiss, pp. 7-8)(citing *Doran v. Doran*, 288 S.C. 477, 478 n.1, 343 S.E.2d 618, 619 n.1 (1986), a case "heard prior to the adoption of the SCRCP"). But that interpretation is contrary to the plain language of Rule 59, SCRCP, which allots ten days after judgment for amendment/alteration or an order of new trial – regardless of when the term of court

[4] Notably, it is the date that Williams received the remittitur order - not the date of the jury verdict - that dictated the time period for Williams to file the requisite Rule 59(e) motion. *See High v. High*, 389 S.C. 226, 247-248, 697 S.E.2d 690, 701 (Ct. App. 2010)(finding that the trial court could consider father's motion to alter or amend the court's judgment, even though father filed his motion more than a month after the first judgment was mailed to the parties; a supplemental order was entered after the first "final" judgment, the supplemental order stated the original order was "rescinded ab initio," and thus it was as if the original order had never existed, and father timely filed his motion after the supplemental order was entered).

ends. *See* Rule 59(f), SCRCP ("The time within which to make the motions under this Rule shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the trial judge shall retain jurisdiction of the action for the purpose of hearing and disposing of such motion if not heard and disposed during the term."); *see also* Rules 59(d) and (e), SCRCP (allotting ten days after judgment for the court to order a new trial or alter/amend order).

Williams admittedly did not ask the trial court to reconsider its decision, nor did the parties present argument regarding remittitur prior to the issuance of the *sua sponte* ruling. (Appellant Brief, pp. 3-4, 16). In a case like this, "where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal." *Pelican*, 311 S.C. at 60-61, 427 S.E.2d at 675; *see also I'On*, 338 S.C. at 422, 526 S.E.2d at 724 (holding "that the losing party generally must *both* present his issues and arguments to the lower court *and* obtain a ruling before an appellate court will review those issues and arguments"(emphasis added)).

C. *Sua Sponte* Rulings Are Not Exempt From Preservation Requirements.

That the trial court in this case ordered remittitur on its own initiative does not excuse Williams' failure to seek reconsideration before appealing that decision.[5] The issue preservation rule applies equally when issues were raised to the trial court but not ruled upon *and* when the trial court ruled *sua sponte* on issues not raised at all. *Oxner*,

[5] Williams repeatedly acknowledges that the trial court had discretion to order a new trial *nisi remittitur* of its own accord under Rule 59(d), SCRCP, (Appellant Brief, pp. 10, 15), and the eight-day span between the jury's verdict and the trial court's remittitur falls within the ten-day window allotted by the Rule for a *sua sponte* ruling, *see* Rule 59(d), SCRCP.

391 S.C. at 134, 705 S.E.2d at 52 (affirming dismissal of the appeal because the appellant failed to move for reconsideration of a *sua sponte* ruling in the trial court before appealing the ruling and thus "failed to preserve any issue related to that ruling for our appellate review"). "There is no error preservation exception allowing a party to bypass calling an erroneous ruling to the attention of the tribunal making it before appealing that ruling to a higher court." *Id.*

As this Court has long recognized, "[w]hen a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." *In re Timmerman*, 331 S.C. 455, 502 S.E.2d 920, 922 (Ct. App. 1998). *See also Godfrey v. Heller*, 311 S.C. 516, 520, 429 S.E.2d 859, 862 (Ct. App. 1993) (holding that where theory of relief was first raised in lower court's order, appellant must challenge this theory with a Rule 59(e) motion before appeal); *State v. Bailey,* 368 S.C. 39, 43-44, 626 S.E.2d 898, 900-01 (Ct. App. 2006)(holding that the circuit court's appellate error must be called to its attention by petition for rehearing in order to be preserved for further appellate review).[6]

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[6] Other filings by Williams in this appeal reveal his misapprehension of when a Rule 59(e) motion is required: Williams has suggested that the purpose of a Rule 59(e) motion should be limited to preservation of "issues raised at trial and not ruled upon" and "arguments that were or could have been presented before judgment." (Williams' Return to Motion to Dismiss, p. 6). Although Williams correctly has observed that a 59(e) motion cannot resurrect issues that a litigant *failed* to raise prior to judgment, (Williams' Return to Motion to Dismiss, p. 6), that prohibition is not applicable when the trial court *sua sponte* issues an order *on a ground raised by neither party*. When the latter occurs, as in this case, the obligation to seek reconsideration before appeal is triggered. The filing of a Rule 59(e) motion is an indispensable step in the preservation of a party's challenge to a *sua sponte* order. This rule is also consistent with other tenets of issue preservation. An issue not raised by the appellant at trial cannot form the basis of an appeal, regardless of whether the trial court addressed the issue. *Mize v. Blue Ridge Ry.*

Williams cannot justify his decision to bypass Rule 59(e) in favor of initiating this appeal because he was unaware of, or surprised by, a *sua sponte* remittitur decision. *Pelican*, 311 S.C. at 60, 427 S.E.2d at 675 (rejecting the appellant's assertion that his failure to object in the circuit court was due to the fact that he was unaware until he received the written order that the respondent would be granted a new trial as to damages only if appellant failed to accept the additur). Even when the court's ruling was not previously contemplated by the parties, Rule 59(e), SCRCP, provides the appropriate recourse to challenge that ruling. *Id.* Failing a motion to reconsider, even a ruling that caught the parties unaware is not appealable.

D. Williams Cannot Bypass The Issue Preservation Rules By Disagreeing With The Trial Court's Authority To Rule *Sua Sponte* Without Giving Him Notice and An Opportunity To Be Heard.

As outlined in more detail below, there is no merit to Williams' claim that reversal of the remittitur decision is warranted because he was denied "notice and an opportunity to be heard." *See* Argument, Section II, *infra.* But regardless, Williams' disagreement with the trial court's authority to issue the ruling in the first instance does not excuse his issue preservation errors. There can be no doubt after the South Carolina Supreme Court's ruling in *Pelican* that even objections to the propriety of a new trial order or the manner of its issuance must first be raised to the trial court before those issues can be considered on appeal. *Pelican*, 311 S.C. at 60, 427 S.E.2d at 675 (finding that appellant waived the issue of nonconformity between the trial court's oral new trial *nisi additur* order and subsequent written order by failing to raise issue below, which

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Co., 219 S.C. 119, 129-130, 64 S.E.2d 253, 258 (1951)(discussing the failure to object at trial). Neither can an appellant rely on an issue raised by another party at trial, but on which appellant advanced no arguments to the trial court. *Thomasko v. Poole,* 349 S.C. 7, 10, 561 S.E.2d 597, 598 (2002).

could have been raised through Rule 59(e) motion after receipt of allegedly nonconforming written order).

Williams cannot bypass the preservation rule by claiming that the trial judge should never have entered the order that he would have challenged pursuant to the Rule 59(e) motion. *See, e.g., Van Ness v. Eckerd Corp.*, 350 S.C. 399, 402-403, 566 S.E.2d 193, 195-196 (Ct. App. 2002)(finding that appellant was required to file Rule 59(e) motion to challenge the trial judge's *sua sponte* recusal before attacking the decision on appeal even though that recusal occurred after the trial judge also erroneously decided *sua sponte* to vacate one of his previous orders outside of the ten-day time period); *Wogan v. Kunze*, 366 S.C. 583, 608, 623 S.E.2d 107, 120 (Ct. App. 2005), *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008)(finding that appellant did not preserve argument that trial court lacked authority to make factual findings in judgment on an issue not raised by the parties because the appellant only mentioned the error and failed to present "argument or authority [in her Rule 59(e) motion to the trial court] to show this was error"). If that were the rule, any appellant contending that the trial court abused its discretion when entering an order would be permitted to leapfrog over the preservation requirement.

This Court has made clear that the proper mechanism for challenging a *sua sponte* order is a Rule 59(e) motion to reconsider and that the filing of such a motion *must occur* before attacking the decision on appeal. This Court "will not consider issues on appeal which have not been preserved for appellate review." *Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006). Williams' appeal should be no exception.

II. Regardless, The Trial Court Properly Issued Its *Sua Sponte* Order Of A New Trial *Nisi Remittitur* Pursuant To Rule 59(d), And That Decision Was Not An Abuse Of Discretion Amounting To An Error Of Law.

Despite Williams' utter failure to inform the trial court of any reason why it should reconsider or alter its remittitur order, he now seeks reversal of that decision because: (1) he believes he was entitled to "transcribed notice" and a "transcribed hearing," although South Carolina law requires neither; and (2) he disagrees with the trial court's remittitur of the jury verdict that exceeded the damages his counsel sought at trial. Although this Court need not reach the substance of Williams' improperly preserved issues, his arguments are nevertheless meritless and the trial court's remittitur decision is due to be affirmed.

A. A *Sua Sponte* New Trial Order Under Rule 59(d) Issued Without A Pending New Trial Motion Does Not Require Notice Or A Hearing, Much Less *Transcribed* Proceedings.

Rule 59(d) authorizes the trial court to order a new trial on its own initiative "for any reason for which it might have granted a new trial on motion of a party" with only one caveat: the order must be issued "[n]ot later than 10 days after entry of judgment." Rule 59(d), SCRCP. Williams repeatedly acknowledges in this appeal that the trial court had discretion to order a new trial *nisi remittitur* of its own accord under Rule 59(d), SCRCP, (Appellant Brief, pp. 10, 15), and the eight-day span between the jury's verdict and the trial court's remittitur falls within the ten-day window allotted by the Rule.[7]

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[7] It is this admission that makes Williams' citation to *Citizens & S. Nat. Bank of S. Carolina v. Easton,* 310 S.C. 458, 427 S.E.2d 640 (1993), perplexing. (Appellant Brief, pp. 13-15). In *Easton*, the South Carolina Supreme Court held that the trial court did not have the authority to order a new trial on its own initiative 229 days after judgment, even though there was a pending motion for judgment notwithstanding the verdict, since Rule 59(d), SCRCP, provides a 10-day limitation that may not be extended. In essence, the trial judge's grant of a new trial under Rule 59(d) was reversed in *Easton*

Nevertheless, Williams seeks to invalidate the trial court's remittitur decision because he claims that the court should have given him "transcribed notice" and a "transcribed hearing" before issuing its ruling. (Appellant Brief, pp. 12-16).

Williams' position is flawed on several levels. First, as noted above, Rule 59(d) contains no such requirement. Although the second sentence of Rule 59(d) contemplates that "notice and an opportunity to be heard" will be provided *when there has been a "timely served" new trial motion* and the court desires to grant the motion for a reason not stated therein, that provision is not applicable here. As Williams repeatedly emphasizes, there was no timely filed motion for new trial in this case that could have prompted an order under sentence two. (Appellant Brief, pp. 12-14).

Rather, the new trial *nisi remittitur* order was authorized by the first sentence of Rule 59(d), *for which notice is not a stated prerequisite.* The distinction is apparent in the plain language of the Rule: A "sentence two" order issues when a party *has moved* for new trial but the court grants a new trial for a reason not stated in the motion, while a "sentence one" order issues when the court decides to grant a new trial in the absence of a motion for a reason for which it *hypothetically* could have granted a party's motion. *See* Rule 59(d), SCRCP.[8] Here, the trial court's order makes clear that the remittitur decision was "of [the court's] own initiative" and not in response to a motion from either party. Indeed, that is the very nature of a *sua sponte* order; it is issued by the court for a reason

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because it was issued *229 days* after entry of the judgment. *Easton*, 310 S.C. at 460, 427 S.E.2d at 641. Here, the trial court's order undisputedly was issued within the ten-day time frame, and *Easton* is not instructive.

[8] Although the quoted portion of Rule 59(d) in the *Easton* opinion combines the first and second sentences utilizing an ellipsis, *Easton,* 310 S.C. at 460, 427 S.E.2d at 641, that does not diminish the distinction between sentence one and sentence two in a complete rendition of the Rule.

conceived by the court without input from the parties. (November 14, 2012 Order). Williams' argument is fatally flawed because it reads a requirement into the first sentence of Rule 59(d) that is not applicable to that provision.

In any event, even the second sentence of Rule 59(d) does not require the "transcribed notice" and "transcribed hearing" to which Williams claims he was entitled. In another case analyzing the standard for notice required prior to dismissal of an action, this Court found that the due process requirement of "notice and an opportunity to be heard" was satisfied merely by "written notice of the order" and "an opportunity to timely move for reconsideration." *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183-84, 561 S.E.2d 659, 661-62 (Ct. App. 2002). In other words, even for a drastic remedy like dismissal, neither transcribed notice nor a transcribed hearing is required. There is simply no legal basis for Williams' claimed entitlement, and the failure to provide that which is not legally required is not grounds for reversal of the remittitur decision.

B. Williams Cannot Seek Reversal Of The Remittitur Decision Due To A Lack Of Transcribed Proceedings Because It Is His Burden To Provide And Preserve The Appellate Record.

Moreover, to the extent Williams challenges the failure to make a transcribed "record of any kind of post-trial hearings or notices in this case," (Appellant Brief, p. 16), it was attributable to *his own error.* As Appellant, it was his burden – not the trial court's burden - to provide a record sufficient for review of the issues he raises. *Harkins v. Greenville County,* 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000). Nor can Williams blame the trial court for an inadequate record below because that argument was not raised to the trial court nor preserved for appeal. A litigant is entitled to appeal the trial court's failure to transcribe certain proceedings *only if* the litigant requested the record or

objected to the failure to make a record, neither of which occurred here. *Ferguson v. Ferguson*, 300 S.C. 1, 7, 386 S.E.2d 267, 270 (Ct. App. 1989)("The [appellant] has not shown us in the record where he requested the proceedings be transcribed or objected to the failure to transcribe the proceedings."). *See also Zaman v. S.C. State Bd. of Medical Examiners*, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991) ("We need not address this issue since there is no record of what, if anything, appellant requested, whether it was refused, and if so, why."); *Benton v. Davis*, 248 S.C. 402, 410, 150 S.E.2d 235, 238-39 (1966) (holding that objections to a jury charge raised at an informal conference but not made a part of the record preserve no issue for appeal).

It was Williams' responsibility to provide a record sufficient for appeal and to preserve any arguments that the trial court hindered those efforts. Williams failed on both counts here. To the extent Williams believes the record to be insufficient to support his arguments on appeal due to a lack of transcription, he has no one to blame but himself.

C. The Trial Court's Remittitur Decision Is Entitled To Great Deference And Is Supported By Ample Evidence.

Regardless, the trial court's remittitur decision should not be disturbed on appeal because it is entitled to great deference and is supported by ample evidence. The jury's verdict exceeded the damages requested by Williams' counsel during closing argument, and the trial court was well within its discretion to order a new trial *nisi remittitur*. The standard for reversal is high: unless the trial court's decision to reduce the excessive verdict was an abuse of discretion amounting to an error of law, it is due to be affirmed.

The law is well-established that "the trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive" and that

decision "will not be disturbed unless it clearly appears that the exercise of discretion was controlled by a manifest error of law." *Rush v. Blanchard*, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993). As this Court has recognized, the "trial court alone has the power to grant a new trial *nisi* when he finds the amount of the verdict to be merely . . . excessive," *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006), and rightly so:

> The trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this Court. Accordingly, great deference is given to the trial judge, especially in the area of intangible elements of damages, as were presented in this case.

Rush, 310 S.C. at 381, 426 S.E.2d at 806 (internal citations omitted). When contemplating a new trial *nisi,* the trial court must "consider the adequacy of the verdict in light of the evidence presented," "distinguish between awards that are merely unduly liberal" and those that require a new trial absolute, and provide compelling reasons for the decision. *Proctor,* 368 S.C. at 319-21, 628 S.E.2d at 518.

In this case, the trial court reasoned that a new trial *nisi remittitur* was warranted because the jury verdict was "unduly liberal" and "merely excessive." (R. p. 001).[9] "[A]mple evidence" presented at trial supports the trial court's decision and warrants a finding that the trial court did not abuse its discretion. *Patterson v. Reid*, 318 S.C. 183, 187, 456 S.E.2d 436, 438 (Ct. App. 1995). After presenting evidence of medical

[9] Williams' contention that the trial court failed to present compelling reasons for its decision, (Appellant Brief, pp. 7-11), only highlights Williams' failure to preserve his arguments by presenting them to the trial court in the first instance. Rule 59(e) is the first – and indispensable – rung of a litigant's challenge to the trial court's order, both for clarification of, and lodging a disagreement with, the trial court's reasoning. When the trial court is not afforded this threshold opportunity to correct or amend a decision, this Court is denied the platform for meaningful review.

expenses, Williams' counsel asked the jury during closing argument to award $6,063.00 in "medicals." (R. p. 111, ll. 2-4; p. 111, l. 7 – p. 112, l. 13). Williams did not seek lost wages, (R. p. 113, ll. 6-12), a point emphasized by counsel during closing argument when he reiterated that Williams "*only* . . . ask[ed that the jury] compensate him for his medical expenses and for his pain and suffering." (R. p. 113, ll. 10-12)(emphasis added). Williams' counsel suggested that the jury calculate pain and suffering by "multiply[ing the $6,063 in medical expenses] *by five* to come up with – and whatever that difference is can be pain and suffering." (R. p. 114, ll. 4-7)(emphasis added). Nevertheless, the jury's $50,000 verdict exceeded that amount which Williams' counsel suggested would be "fair and reasonable." (R. p. 114, ll. 1-11).

The trial court, after receiving testimony and evidence, viewing the demeanor of witnesses, and experiencing the general trial atmosphere, was in the best position to evaluate the verdict, and it was well within the trial court's discretion to declare the jury verdict of $50,000 "unduly liberal" and "merely excessive." Because the trial court's remittitur decision was not an abuse of discretion amounting to an error of law, it must be affirmed.

CONCLUSION

When the trial court *sua sponte* ordered remittitur in this case, it was incumbent upon Williams to file a Rule 59(e) motion for reconsideration to preserve his objections for challenge on appeal. Having neglected to do so, Williams failed to preserve his right to appeal on those grounds. Regardless, the trial court's remittitur decision is due to be affirmed because it was properly issued under the provisions of Rule 59(d) and is supported by ample evidence.

Respectfully submitted,

July 24, 2013 By: _____

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ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No: 2011-CP-40-6156
Court of Appeals Case No.: 2012-213449

Joseph Williams, ... Appellant,

v.

Marie Wilson, ... Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Respondent's Final Brief complies with Rule 211(b), SCACR and the August 13, 2007, Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in the Appellate Court Filings."

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PROOF OF SERVICE

I, Sandy Moore, the undersigned employee of Gallivan White & Boyd, attorneys for Respondent Marie Wilson, do hereby certify that I have served a copy of the foregoing **Respondent's Final Brief**, in connection with the above-referenced case by mailing a copy of the same on July 24, 2013, by United States Mail, postage prepaid, to the following address:

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