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SC Court of Appeals

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

Joseph Williams,.....Appellant,

v.

Marie Wilson,.....Respondent.

FINAL APPELLANT'S BRIEF

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I. Did the trial court error in issuing a new trial *nisi remittitur* reducing the Appellant's verdict award from $50,000.00 to $24,000.00 where the trial court did not show substantial deference to the jury's determination of damages and where the trial court did not offer compelling reasons for invading the jury's province?

II. Did the trial court error in issuing two Orders for a new trial *nisi remittitur* where the trial court did not give the Appellant notice or an opportunity to be heard on the matter?

STATEMENT OF THE CASE

Appellant Joseph Williams and Shawn Delaine were pedestrians walking on the correct side of the road on January 28, 2011, when they were both struck from behind by a vehicle owned and operated by Marie Wilson.

Appellant Joseph Williams and Shawn Delaine filed a Summons and Complaint on September 16, 2011. [R. pp. 006-009.] The Complaint set forth one cause of action against the Respondent for negligence by the Appellant and Shawn Delaine. [R. pp. 007-009.] The Respondent filed an Answer on December 8, 2011. [R. pp. 010-013.]

A trial involving the Appellant, Shawn Delaine and Respondent was held in a Richland County court on the week of November 5, 2012, before the Honorable James R. Barber, III. Both the Respondent and counsel for Shawn Delaine filed Motions in Limine regarding the criminal history of both the Respondent and Shawn Delaine. [R. pp. 014-022.] The trial court heard oral arguments from the parties regarding the introduction of prior criminal records into evidence and determined that the Respondent's criminal history was not admissible while some of Shawn Delaine's

criminal history was admissible. [R. p. 027, line 3 - p. 034, line 8.] The Appellant made a motion to bifurcate the trial based upon the admission of Shawn Delaine's criminal history into evidence; however, the trial court denied this motion. [R. p. 034, line 10 - p. 035, line 17.]

The Appellant and Shawn Delaine presented evidence at trial of the accident details and their injuries, their pain and suffering, and their loss of enjoyment of life. [R. pp. 036-073.] At the conclusion of the Appellant's and Shawn Delaine's case, the Respondent made no motions. [R. p. 080, lines 11-23.]

The Respondent presented facts as to what she alleged happened at the time of the automobile accident. [R. p. 081- p. 088, line 9.] Counsel for the Respondent made a directed verdict motion at the conclusion of the Respondent's case and the motion was denied by the trial court. [R. p. 108, line 15 - p. 110, line 9.]

One cause of action was submitted to the jury for negligence on behalf of the Appellant and Shawn Delaine. In addition, the jury also had the option to award punitive damages against the Respondent in this case. The jury was charged on the law of negligence, damages, and punitive damages; furthermore, the jury requested and was recharged on the law of damages and punitive damages during the early course of their deliberations. [R. p. 115, line 12 - p. 132; R. p. 138.] The jury returned a damage award verdict for the Appellant in the amount of $50,000.00, on $6322.01 in out of pocket medical expenses. The jury returned a $0.00 punitive damage award to the Appellant. [R. pp. 003-004.] The jury returned a damage award verdict for Shawn Delaine in the amount of $10,000.00, on $4289.01in out of pocket medical expenses for Shawn Delaine. The jury returned a $0.00 punitive damage award to Shawn Delaine.

[R. pp. 003; 005.] The jury was polled as to their verdict and as to their award; and their verdict and award remained unanimous and the same. [R. pp. 133-135.]

Counsel for the Respondent did not make a motion for a new trial promptly after the jury was discharged nor did counsel for the Respondent seek leave of the Court to file any post trial motions at a later time and/or date after the jury was discharged. [R. pp. 136-137.] Counsel for the Respondent did file a post trial motion several hours after the jury was discharged; however, neither counsel for the Appellant or counsel for Shawn Delaine or the trial court was present at the time counsel for the Respondent filed his motion. [R. p. 023.] There is no further record after the close of the trial. [R. p. 137.]

The Appellant, by letter dated November 9, 2012, timely filed a Motion for Costs which was entered into the Clerk of Court records on November 14, 2012.

On or about Friday, November 9, 2012, counsel for the Appellant received a message from the trial court requesting a conference in judge's chamber for Monday, November 13, 2012. Counsel for the Appellant appeared in person along with counsel for the Respondent while counsel for Shawn Delaine appeared by telephone. Neither counsel for the Appellant or counsel for the Respondent or counsel for Shawn Delaine were aware of the purpose of the meeting before arriving for the meeting in chambers. The trial court advised the parties of the following at this meeting: 1) Counsel for the Respondent's motions for new trial would be denied by a Form 4 for not being timely filed; 2) The parties should attempt to come to an agreement on the damage awards; and 3) The parties must resolve the matter and provide the trial court with a resolution within twenty-four (24) hours. Shawn Delaine entered into an agreement with counsel

for the Respondent to resolve their case for $8000.00. [R. p. 154.] The Appellant and Respondent did not reach an agreement on settling the damage award for less than the verdict award. There is no transcribed record of the events which occurred on November 9, 2012, or November 13, 2012.

The trial court, in the Appellant's case and on its own initiative, entered a final Order on November 14, 2012, ordering a new trial *nisi remittitur* to the amount of $24,000.00. [R. p. 001.] The trial court filed a supplemental order on November 15, 2012, again ordering a new trial *nisi remittitur* to the amount of $24,000.00, and stating that the Appellant had ten (10) days to either elect a new trial or accept the *remittitur.* [R. p. 002.] The Appellant filed his Notice of Appeal on November 20, 2012. [R. p. 024.] The Respondent filed no additional Rule 59 motions or appeals of any kind of the trial court's rulings and/or decisions and/or the jury verdict.

STATEMENT OF THE FACTS

The Appellant and Shawn Delaine were pedestrians walking westbound on Liberty Street, Columbia, South Carolina, on the correct side of the road facing oncoming traffic. [R. p. 047, lines 2-15; pp. 051-052, line 24; pp. 148-150.] The Appellant and Shawn Delaine were walking to a mutual friend's apartment which was located on the same left side of the road as the Appellant and Shawn Delaine were walking at the time of the accident. [R. p. 050, lines 18-22.] The Respondent was travelling westbound in a vehicle owned and operated by the Respondent. [R. p. 144 1.] The speed limit was fifteen (15) miles per hour where the accident occurred. [R. p. 151.] There was a passenger in the front seat of the Respondent's vehicle. [R. p. 072, lines 16-24; p. 082, lines 2-24.] The Respondent's vehicle travelled left of the center of

the road and struck the Appellant from behind causing the following: 1) The Appellant's head to strike the windshield of the Respondent's vehicle; 2) The Appellant's lower back area and body to strike the hood of the Respondent's vehicle; and 3) The Appellant to be thrown off of the Respondent's vehicle and striking the roadway. [R. p. 052; p. 057; pp. 059-060, line 17.] The Appellant also struck Shawn Delaine (who was also grazed by the Respondent's vehicle) as the Appellant was catapulted on top of the Respondent's vehicle after the Appellant was struck by the Respondent's vehicle. [R. pp. 037-039.] The Appellant never saw the Respondent's vehicle before being struck and had no warnings of the imminent impact. [R. p. 052, line 23 - p. 053, line 8; p. 061, lines 3-7.] The Appellant was walking on the left side of the road and was not walking in the roadway. [R. p. 057, lines 8-20.] The Appellant had no reason to cross over to the other side of the road. [R. p. 051; p. 058, line 16 - p. 059, line 1.] The weather was clear and there were no obstructions to the Respondent's view of either the Appellant or Shawn Delaine. [R. p. 055, lines 12-14.]

The Respondent provided several versions of the accident details. The Respondent told Shawn Delaine after the accident that she had taken her eyes off the road for a moment. [R. p. 038, lines 2-18.] The Respondent told the responding officer that the Appellant darted in front of her vehicle from her left side and was struck. [R. p. 103, lines 17-25; p. 105, lines 4-17; p. 106, lines 15-21.] The Respondent never told the responding officer that the Appellant jumped on her hood or that she felt the Appellant's conduct was intentional. [R. p. 104, lines 19-25; p. 106, lines 5-14.] Furthermore, Respondent never told the responding officer about Shawn Delaine also being struck by her vehicle or that he was also a witness to the accident. [R. p. 104, lines 1-18. p. 105,

lines 1-3.] The Appellant entered into a stipulation where she admitted that she had told a representative of the Respondent that she could have avoided the accident. [R. p. 153.] In another version of the accident details, the Respondent testified at trial that the Appellant intentionally jumped on top of her hood causing the accident to "scam'" her. [R. pp. 081-088, line 9; pp. 090-100, line 18.] The Respondent testified at trial that she was not paying attention to the Appellant or Shawn Delaine as they were walking on the side of the road. [R. p. 088, lines 17 - p. 090, line 3; p. 100, line 19 - p. 101, line 7.] The Respondent also testified that she never saw the Appellant or Shawn Delaine cross the road. [R. p. 092, line 17 - p. 092, line 6; p. 102, lines 3-10.]

The Appellant sustained injuries to his neck, back, left middle finger, left knee, and right hip as a result of being struck by the Respondent's vehicle. [R. p. 061, line 17 - p. 065.] The Appellant was transported from the accident scene by Richland County EMS to Palmetto Health Richland Hospital. [R. p. 062, line 3 - p. 063, line 8.] 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 underwent physical therapy for his injuries. [R. p. 067 - p. 069, line 6.] The Appellant incurred the following medical expenses: 1) Palmetto Health Richland - $3042.00; 2) Richland County EMS - $504.00; 3) Palmetto Health ER Physicians - $198.01; 4) Pitts Radiology - $113.00; and 5) A Healing Touch -$2465.00, for total medical expenses of $6322.01. [R. pp. 066 - p. 069, line 17; p. 152.] The Appellant had to withdraw from college; Furthermore, 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. [R. p. 065, lines 12-14; p. 069-071, line 9.]

The responding EMS worker testified about the Appellant's condition at the scene of the accident and in transport to the hospital; he also testified to statements made by the Appellant while under the stress and pain of the accident. The EMS worker further testified that the Appellant was in a great deal of pain while he was laying on the ground. [R. pp. 074-079, line 15.] Finally, the EMS worker testified about the Respondent's windshield "spidering" from the impact when the Appellant's head struck the windshield. [R. p. 076, lines 8-23; pp. 144-147.]

ARGUMENT

I.

THE TRIAL COURT ERRED IN ISSUING A NEW TRIAL *NISI REMITTITUR* WHERE THE TRIAL COURT DID NOT SHOW SUBSTANTIAL DEFERENCE TO THE JURY'S DETERMINATION OF DAMAGES AND WHERE THE TRIAL COURT DID NOT OFFER COMPELLING REASONS FOR INVADING THE JURY'S PROVINCE.

Substantial deference must be afforded to the jury's determination of damages and the trial court must offer compelling reasons for invading the jury's province. *Todd v. Joyner*, 385 S.C. 509, 685 S.E.2d 613 (Ct. App. 2008). The trial court did not show substantial deference to the jury's damage award and abused its discretion by not offering compelling reasons for issuing a new trial *nisi remittitur*.

A trial court may grant a new trial *nisi remittitur* whenever it finds the amount of the verdict to be merely inadequate or excessive. *Waring v. Johnson* , 341 S.C. 248, 533 S.E.2d 906 (Ct.App. 2000). 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, supra*. The trial court committed an error of law by not considering the weight and adequacy of the evidence presented by the Appellant to the jury which enabled the jury to make its award.

The Appellant testified that he was struck from behind by the Respondent's vehicle as he was walking on foot. The Appellant sustained a direct hit to his lower body when the Respondent struck him. The force of the impact was such that the Respondent's windshield "spidered" or smashed when the Appellant's head struck it. The Appellant sustained an injury to his left middle finger which required stitches and immobilization over an extended period of time. The cut to the middle finger was of such a nature that there was the initial belief that the Appellant has sustained tendon damage. The Appellant described pain to his hip, leg, left middle finger, back, and knee just shortly after the accident. The responding emergency medical provider to the scene described how the Appellant was in a great deal of pain while on the ground. The Appellant described continued pain to his neck, back, knee, left middle finger, and body for some time after this accident. The Appellant further described injuries of such a nature that required him to take pain medication and to seek physical therapy. The Appellant had total out of pocket expenses of $6322.01 from this accident with the Respondent.

The Appellant testified that he continues to this day to have occasional pain to his back associated from this accident. The Appellant testified further that the accident with the Respondent affected his quality of life and relationship with his wife, affected his relationship with his son, and also affected his education. The Appellant testified

that he had to withdraw from college because of his injuries and that this withdrawal set him back from graduating on time.

It is overwhelmingly clear that the jury was thoughtful and conscientious during the course of its deliberations. The jury was presented with substantial evidence that supported their damage award to the Appellant. There was no evidence that the jury's verdict or damage award was reached as a result of any external or internal influence nor was there any evidence that the award was reached as a result of passion, caprice, prejudice, partiality, corruption, or any other improper motives. The jury requested and was recharged on the law of damages and punitive damages. Since the trial court was presented with substantial evidence to support the jury's award to the Appellant, then the burden shifted to the trial court to first show deference to the jury determination; then, second, to offer compelling reasons if the trial court decided to disturb the jury's award. Our Supreme court has held that compelling reasons must be given to justify invading the jury's province of determining a damage award. *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995). The record reflects that the trial court never attempted to meet its burden.

The jury awarded the Appellant $50,000.00 in damages while only awarding Shawn Delaine $10,000.00 in damages, although the Appellant's and Shawn Delaine's medical expenses were only separated by $2033.00. The jury's damage award was unanimous and remained so after the trial court polled the jury. The difference in awards illustrates the jury's specific analysis of the evidence regarding the Appellant's injuries and the jury's specific intent to award the Appellant a significantly higher amount than Shawn Delaine. The lack of a punitive award to either the Appellant or Shawn

Delaine also shows the calculated nature of the jury's deliberations and understanding regarding the damage awards. The jurors were charged twice on the law of damages and punitive damages, so they had a full understanding that they were the sole determiners of the facts and the sole determiners of the amount of the damage award. The trial court's jury charges enumerated the law that there is no definitive standard in determining an exact award amount and that the jury had the authority to determine the amount. [R. p. 124, lines 2-22.] The trial court abused its discretion by not showing any substantial deference to the jury's determination of the damage amount. Substantial deference must be given to the jury's determination of damages. *Joyner, supra*. The trial court is not allowed to impose its will on a party by substituting its judgment for that of the jury. This trial court committed reversible error by imposing its will with the nisi remittitur without showing substantial deference to the jury's determination of the award amount. *Waring, supra*. The trial court's orders should not stand as the orders are wholly unsupported by the evidence presented by the Appellant at trial. The Appellant contends that there is substantial evidence in the record to support the amount of the jury award. The trial court's orders and the court record do not reflect any analysis by the trial court of what weight or deference, if any, it afforded to the jury's determination of the damage amount for the Appellant.

The Appellant acknowledges that the trial court has the discretion to issue a new trial nisi remittitur of its own initiative; however, the trial court abused its discretion by never offering compelling reasons in its orders or on the record as to why the trial court was invading the jury's decision about the Appellant's award amount. The court record ends shortly after the jury was discharged. The trial court was required to give

compelling reasons if the trial court decided to invade the jury's province by changing the award amount. The trial court's failure state compelling reasons in its orders or on the record was an error of law. *Joyner, supra.*

The specific language articulated in *Joyner* uses the word "must;" and, this Court has held that this type of language should be given its plain and ordinary meaning. *State v. Brannon*, 379 S.C. 487, 666 S.E.2d 272 (S.C.App. 2008). The word "must" illustrates this Court's requirement that the trial court first give substantial deference to the jury's determination of the award amount and then, second, offer compelling reasons if the court decides to disturb the jury's damage award. The trial court's failure to engage in a full analysis of the jury's damage award to the Appellant was an error of law.

The trial court abused its discretion in granting a new trial *nisi remittitur* without showing substantial deference to the jury's determination of the damage award amount. Furthermore, the trial court abused its discretion by not offering compelling reasons for invading the jury's province to determine the damage award amount. The trial court's orders should be reversed and the jury's verdict reinstated.

ARGUMENT

II.

THE TRIAL COURT ERRED IN ISSUING TWO FINAL ORDERS WITHOUT GIVING THE APPELLANT PROPER NOTICE AND AN OPPORTUNITY TO BE HEARD ON THE MATTER.

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.

The record is absent of any transcribed notice by the trial court to the Appellant concerning granting a new trial in this civil action; furthermore, the Appellant was not given an opportunity to be heard on the matter before the trial court on its own initiative granted a new trial *nisi remittitur*. The Appellant was prejudiced when he did not receive notice and an opportunity to be heard in a transcribed hearing in this matter before the trial court issued its final orders. The Appellant was awarded $50,000.00 in damages by the jury and the trial court's orders reduced the jury's award to $24,000.00; therefore, the Appellant was prejudiced by a loss of $26,000.00 (or a reduction of approximately fifty-one (51) percent) from the jury's award without notice and opportunity to be heard. By contrast, Shawn Delaine's award was reduced from $10,000.00 to $8000.00, which is a difference of $2000.00 or reduction by twenty (20) percent. The prejudice is further illustrated by the lack of a transcribed court record for this appellate court to consider in determining whether the trial court abused its discretion by issuing a *nisi remittitur*.

The Respondent made no motions after the jury returned its verdict and after the trial court inquired as to whether there were any motions. The trial court made no comments or gave any indications on the record that it was either concerned about the damage awards or that the trial court would schedule any post trial hearings in the matter. The record of this trial ended on November 6, 2012, before 1:00 p.m. [R. p. 137, line 24.] The Judgment for the Appellant was entered at approximately 1:11 p.m., on November 6, 2012. A motion for new trial was entered on behalf of the Respondent on that same day at approximately 3:29 p.m.

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

> The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered.

In this case, it is clear that the Respondent did not make a motion for a new trial or any motions after the jury was discharged. It is also clear that there is no record of the trial court exercising its discretion and allowing the Respondent up to (ten)10 days to file any post trial motions. The Appellant therefore contends the following:

1) The Respondent failed to timely file any post trial motions, thereby, waiving the Respondent's right to appeal any final judgment;
2) The Respondent failed to file a Rule 59 (e) motion to address the trial court's failure to formally rule on the record to the Respondent's Rule 59 (b) motion in the trial court's two final orders of November 14, 2012, and November 15, 2012; therefore, the issue of whether or not the trial court could still grant the Respondent's Rule 59 (b) motion is not preserved for appellate review; and
3) The trial court lacks the authority to now order a new trial beyond ten (10) days after the entry of judgment in favor of the Appellant on November 6, 2012, regardless of the pendency of the Respondent's Rule 59 (b) motion. *C & S National Bank v. Easton,* 310 S.C. 458, 427 S.E.2d 640 (1993).

The Respondent lost her unconditional right to have a motion for a new trial when the Respondent failed to make any motions at the discharge of the jury and when the

trial court never exercised any discretion to hear the motion not later than ten (10) days after entry of the judgment.

Since there is no evidence or record that the trial court exercised its discretion to hear the Respondent's motion within ten (10) days, then the issue before this Court is whether the trial court complied with the strict requirements of Rule 59 (d) whereby: 1) notice must be given to the parties, 2) an opportunity to be heard must be given to the parties, and 3) if the trial court is going to order a new trial, it must do so within ten (10) days after entry of the judgment.

In *C & S National Bank v. Easton*, the Supreme Court addressed a similar issue regarding Rule 59 (d) motions. The action arose through a collection action by C & S against the Eastons, and a counterclaim by the Eastons against C & S. A verdict was returned for the Eastons in the amount of $300,000.00; however, the trial court ordered a new trial two-hundred and twenty-nine (229) days after entry of the judgment and with no notice to the parties. Our Supreme Court found that the trial court committed an error by ordering a new trial after the trial court did not strictly comply with the ten (10) day requirement; furthermore, our Supreme Court found error in the trial court issuing a final order without giving notice to the parties. Our Supreme Court cites *Buxton v. Thompson Dental Co.,* 307 S.C. 523, 415 S.E.2d 844 (S.C.App. 1992), which clearly affirms our law that a trial court may order a new trial upon its own initiative no later than ten (10) days after the entry of judgment; in addition, both *C&S* and *Buxton* further hold that the trial court may order a new trial only after giving the parties notice and an opportunity to be heard on the matter.

The Appellant does not the dispute the notion that the trial court may act by its own initiative and order a new trial. In this case, like the case in *C & S National Bank*, the trial court failed to give transcribed notice to the parties; furthermore, the trial court did not provide an opportunity to be heard before ordering a new trial in this matter. It is clear that our law contemplates and requires notice and an opportunity to be heard before the trial court issues an order for a new trial of its own initiative. The trial court failed to give transcribed notice to either the Appellant or Respondent and failed to provide an opportunity to be heard in this case and those errors were not harmless. The trial court's errors warrant a reversal of the trial court's orders and a reinstatement of the jury's verdict which is what our Supreme Court determined in the *C & S National Bank* case.

The Appellant contends that neither the phone call message of November 9, 2012, nor the meeting in the trial court's chambers on November 13, 2012, constituted transcribed notice to either the Appellant or Respondent that the court would issue two orders for a new trial on November 14, 2012, or November 15, 2012 without a hearing. The November 13, 2012, meeting in chambers was not an opportunity to be heard on any matter as none of the parties knew the purpose of the meeting before arriving there. Furthermore and more importantly, this Court should not consider either the phone message of November 9, 2012, or this November 13, 2012, meeting in chambers as there is no transcribed record of this call or this brief meeting. This Court's jurisprudence history is long and clear that this appellate court will not consider any matters that do not appear on the record. Rule 210 (h), South Carolina Appellate Court Rules.

The Appellant was prejudiced by not having a transcribed record of this November 13, 2012, meeting for this appellate court to consider whether the Appellant received proper notice and an opportunity to be heard under Rule 59 (d). The lack of a transcribed record of this November 13, 2012, meeting means that there is no record of any kind of post trial hearings or notices in this case. At a hearing, the Appellant would have had an opportunity to provide the trial court with oral arguments and a memorandum of case law opposing the granting of a new trial for any reason. The trial court's failure to provide notice and an opportunity to be heard denied the Appellant that fundamental right to make any arguments against reducing the damage award. Furthermore, since this appellate court would be precluded from considering the November 9, 2012, phone message or November 13, 2012, meeting, then it is clear that there was no notice or opportunity to be heard that satisfies the requirements of Rule 59 (d). The trial court abused its discretion in ordering a *nisi remittitur* without notice and an opportunity to be heard.

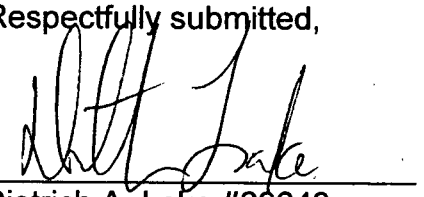
The trial court committed erred in issuing a new trial without providing the Appellant with notice and an opportunity to be heard on the matter. The error was not harmless and the client was prejudiced by the fact that no transcribed record of any notices or hearings exist after the jury was discharged. The Respondent did not timely file any post trial motions nor is there any record that the trial court exercised any discretion in giving the Respondent additional time to file post trial motions. Furthermore, the Respondent did not file any Rule 59 (e) motion requesting the trial court to rule on the Respondent's Rule 59 (b) motion; therefore, the Respondent has lost the right to appeal the final judgment to the Appellant. The trial court's orders

should be reversed, the jury's verdict reinstated, and this Court should determine that the trial court no longer has the authority to order a new trial under Rule 59 (d) since more than ten (10) days have elapsed since entry of the judgment.

CONCLUSION

For the reasons stated above, this Court should reverse both orders by the trial court, reinstate the jury's verdict, and determine that the trial court no longer has the authority to order a new trial.

Respectfully submitted,



July 15, 2013

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant hereby certifies that this Final Appellant's Brief is identical to the Initial Appellant's Brief, except for inclusion of references to the Record and correction of typographical errors and/or misspellings, and it otherwise complies with Rule 211 (b) SCACR.

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PROOF OF SERVICE

The undersigned counsel for the Appellant hereby certifies that the Appellant's Final Brief and the Appellant's Final Reply Brief was served and delivered upon counsel for the Respondent by U.S. mail to: Curtis L. Ott and Laura W. Jordan, Gallivan White & Boyd, PO Box 7368, Columbia, SC 29202.

July 17, 2013

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