

NO. SC86699

IN THE MISSOURI SUPREME COURT

**NICHOLAS OLVERA, Respondent, and
TINA OLVERA, Respondent-Cross Appellant**

vs.

KELLY FRITTS, Appellant-Cross Respondent.

**Appeal from the Circuit Court of Bates County, Missouri
27th Judicial Circuit, CV199-228CC
Honorable William J. Roberts**

**SUBSTITUTE REPLY BRIEF
OF APPELLANT-CROSS RESPONDENT KELLY FRITTS
AND BRIEF OPPOSING THE CROSS-APPEAL**

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT	4
STATEMENT OF FACTS	5
POINTS RELIED ON	7
ARGUMENT	12
RESPONSE TO CROSS APPEAL	22
CONCLUSION	30
CERTIFICATE OF SERVICE	31
CERTIFICATION	32

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Anderson v. Mutert</u> , 619 S.W.2d 941, 945 (Mo. App. 1981)	26
<u>Bynote v. National Super Markets, Inc.</u> ,	
891 S.W.2d 117, 120 (Mo. banc 1995)	20
<u>Ferguson v. Boyd</u> , 448 S.W.2d 901, 903 (Mo. 1970)	27
<u>Finninger v. Johnson</u> , 692 S.W.2d 390 (Mo. App. E.D. 1985)	28, 29
<u>Hatch v. V.P. Fair Foundation, Inc.</u> , 990 S.W.2d 126 (Mo. App. 1999)	25, 27
<u>Johnson v. Hyster Company</u> , 777 S.W.2d 281 (Mo. App. W.D. 1989)	28
<u>Jones v. Jones</u> , 819 S.W.2d 773, 774 (Mo. App. 1991)	22
<u>Kline v. Casagrande</u> , 50 S.W.3d 357 (Mo. App. E.D. 2001)	27
<u>Lear v. Norfolk and Western Railway Co.</u> ,	
815 S.W.2d 12, 14 (Mo. App. W.D. 1991)	26, 27
<u>Lenhard v. Davis</u> , 841 S.W.2d 295 (Mo. App. E.D. 1992)	27
<u>Massey v. Rusche</u> , 594 S.W.2d 334 (Mo. App. W.D. 1980)	29
<u>Massman Construction Co. v. Missouri Highway & Transportation</u>	
<u>Commission</u> , 914 S.W.2d 801, 803 (Mo. banc 1996)	24
<u>Morgan Publications, Inc. v. Squire Publishers, Inc.</u> ,	
26 S.W.3d 164 (Mo. App. W.D. 2000)	23, 27
<u>State v. Hanway</u> , 973 S.W.2d 892, 895 (Mo. App. W.D. 1998)	19
<u>State v. Silvey</u> , 894 S.W.2d 662, 671 (Mo. banc 1995)	17

Vaughn v. Willard, 37 S.W.3d 413, 416 (Mo. App. S.D. 2001) 12

Weisbach v. Vargas, 656 S.W.2d 797, 802 (Mo. App. W.D. 1983) 26

Williams v. Jacobs, 972 S.W.2d 334, 340 (Mo. App. W.D. 1998) 14

Statutes and Rules

Missouri Supreme Court Rule 74.01(a) 12

Missouri Supreme Court Rule 84.04(b) 22

Missouri Supreme Court Rule 81.07 12

R.S.Mo. § 537.068 23

JURISDICTIONAL STATEMENT

Appellant relies on the Jurisdictional Statement contained in his original brief.

STATEMENT OF FACTS

Appellant Kelly Fritts will rely on the Statement of Facts set forth in his original brief, but also sets forth the following additional facts which are relevant to the plaintiffs' Cross-Appeal.

Plaintiffs' Cross-Appeal

The Verdict form contained a paragraph for the jury to complete on Tina Olvera's claim for loss of consortium. The paragraph read as follows:

On the claim of plaintiff Tina Olvera for damages due to injury to her husband, we, the undersigned jurors, find that plaintiff Tina Olvera _____ sustain damages "did" or "did not" as a direct result of injury to her husband. (LF 18).

The jury wrote the words "did not" in the blank line. (LF 18). There was a separate paragraph for damages, and the jury also wrote a zero in the blank line for the amount of damages. (LF 18).

After the trial was concluded, plaintiffs chose to file a Motion for Additur regarding the loss of consortium claim, rather than a motion for new trial. (LF 24). Defendant opposed the motion on several grounds, one of which was that a motion for additur was not the correct form of relief, because there was no verdict for the trial court to increase. (LF 79). At the hearing on post-trial motions, the trial court agreed with defendant, and denied plaintiffs' Motion for Additur. (Plaintiff-Appellant Olvera's Supplemental Record on Appeal- Transcript, p. 10). In addition, the trial court gave plaintiffs the opportunity to request a new trial on the verdict

against Tina Olvera, but plaintiffs declined the offer. (Plaintiff-Appellant Olvera's Supplemental Record on Appeal - Transcript, p. 8).

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR REMITTITUR BECAUSE THE VERDICT OF \$1,000,000 IN DAMAGES FOR PLAINTIFF NICHOLAS OLVERA WAS GROSSLY EXCESSIVE AND EXCEEDED FAIR AND REASONABLE COMPENSATION FOR THE PLAINTIFFS' INJURIES AND DAMAGES TO THE EXTENT THAT IT SHOCKED THE CONSCIENCE AND ESTABLISHED THAT BOTH THE COURT AND JURY ABUSED THEIR DISCRETION IN THAT THE MEDICAL AND OTHER EVIDENCE AT TRIAL ESTABLISHED CONCLUSIVELY THAT THE HORSE ACCIDENT ONLY CAUSED PLAINTIFF TO SUSTAIN AN AGGRAVATION OF A PREVIOUS BACK INJURY WHICH RESOLVED WITHIN ONE MONTH OF THE ACCIDENT, RESULTING IN ONLY \$2,548.13 IN MEDICAL BILLS, FIVE DOCTOR'S VISITS, TEN PHYSICAL THERAPY SESSIONS, AND APPROXIMATELY \$2,500 IN LOST WAGES, AND THAT PLAINTIFF WAS ABLE TO RETURN TO WORK THREE WEEKS AFTER THE ACCIDENT AND CONTINUED TO WORK FOR TWO MORE YEARS WITH LITTLE OR NO MEDICAL TREATMENT UNTIL HE RE-INJURED HIMSELF AT WORK IN AUGUST OF 2000, AND THIS SECOND INJURY IS WHAT CAUSED PLAINTIFF'S CURRENT DISABILITY.

Williams v. Jacobs, 972 S.W.2d 334, 340 (Mo.App. W.D. 1998)

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL BECAUSE THE VERDICT OF \$1,000,000 IN DAMAGES FOR PLAINTIFF NICHOLAS OLVERA WAS GROSSLY EXCESSIVE AND AGAINST THE WEIGHT OF THE EVIDENCE TO SUCH AN EXTENT THAT THE VERDICT ESTABLISHED JURY BIAS, PASSION OR PREJUDICE IN THAT THE MEDICAL AND OTHER EVIDENCE AT TRIAL PROVED CONCLUSIVELY THAT THE HORSE ACCIDENT ONLY CAUSED PLAINTIFF TO SUSTAIN AN AGGRAVATION OF A PREVIOUS BACK INJURY WHICH RESOLVED WITHIN ONE MONTH OF THE ACCIDENT, RESULTING IN ONLY \$2,548.13 IN MEDICAL BILLS, FIVE DOCTOR'S VISITS, TEN PHYSICAL THERAPY SESSIONS, AND APPROXIMATELY \$2,500 IN LOST WAGES, AND THAT PLAINTIFF WAS ABLE TO RETURN TO WORK THREE WEEKS AFTER THE ACCIDENT AND CONTINUED TO WORK FOR TWO MORE YEARS WITH LITTLE OR NO MEDICAL TREATMENT UNTIL HE RE-INJURED HIMSELF AT WORK IN AUGUST OF 2000, AND THIS SECOND INJURY IS WHAT CAUSED PLAINTIFF'S CURRENT DISABILITY.

Appellant does not cite any new authority in support of this point.

POINT III

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS AT TRIAL TO THE ADMISSION OF DEPUTY VAN BLACK'S INCIDENT REPORT BECAUSE THE INCIDENT REPORT WAS INADMISSIBLE HEARSAY IN THAT IT WAS A WRITTEN ASSERTION MADE BY DEPUTY VAN BLACK OUTSIDE THE COURTROOM, AND IN ADDITION, INCLUDED OPINIONS OF DEPUTY VAN BLACK THAT WERE MADE WITHOUT A SUFFICIENT FOUNDATION.

State v. Silvey, 894 S.W.2d 662, 671 (Mo. banc 1995)

State v. Hanway, 973 S.W.2d 892, 895 (Mo. App. W.D. 1998)

Bynote v. National Super Markets, Inc., 891 S.W.2d 117, 120 (Mo. banc 1995)

POINT IV

THE TRIAL COURT ERRED IN REJECTING DEFENDANT’S PROPOSED JURY INSTRUCTIONS “A” AND “B” BECAUSE THERE WAS SUBSTANTIAL EVIDENCE PRODUCED AT TRIAL TO SUPPORT DEFENDANT’S POSITION THAT PLAINTIFF NICHOLAS OLVERA FAILED TO YIELD THE RIGHT OF WAY IN THAT DEFENDANT TESTIFIED THAT THE COLLISION OCCURRED IN THE STREET AFTER PLAINTIFF STEPPED OUT FROM BETWEEN TWO CARS DIRECTLY INTO THE PATH OF DEFENDANT AND HIS HORSE, AND OTHER EVIDENCE ALSO SUPPORTED THAT SCENARIO, AND UNDER MISSOURI LAW A PERSON ON HORSEBACK IS NOT PROHIBITED FROM USING PUBLIC STREETS, AND SUCH A PERSON FITS WITHIN THE DEFINITION OF “TRAFFIC” UNDER R.S.Mo. § 300.010(38), AND THEREFORE, PLAINTIFF HAD THE DUTY TO YIELD THE RIGHT OF WAY TO DEFENDANT FRITTS.

Appellant does not cite any new authority in support of this point.

RESPONSE TO PLAINTIFFS' CROSS-APPEAL

POINT I

THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT PLAINTIFFS' MOTION FOR ADDITUR BECAUSE A MOTION FOR ADDITUR WAS NOT THE PROPER PROCEDURE FOR REVIEW BY THE TRIAL COURT IN THAT THE JURY SPECIFICALLY FOUND THAT PLAINTIFF TINA OLVERA "DID NOT" SUSTAIN ANY DAMAGES AS A RESULT OF HER HUSBAND'S INJURY AND THE CORRECT PROCEDURE WAS FOR PLAINTIFF TO FILE A MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR NEW TRIAL, AND THE TRIAL COURT'S DECISION SHOULD ALSO BE AFFIRMED BECAUSE THERE WAS EVIDENCE TO SUPPORT THE JURY'S FINDING THAT PLAINTIFF TINA OLVERA DID NOT SUSTAIN ANY DAMAGES AS A RESULT OF HER HUSBAND'S INJURY.

R.S.Mo. § 537.068

Morgan Publications, Inc. v. Squire Publishers, Inc., 26 S.W.3d 164 (Mo. App. W.D. 2000)

Lear v. Norfolk and Western Railway Co., 815 S.W.2d 12, 14 (Mo.App. W.D. 1991)

Hatch v. V.P. Fair Foundation, Inc., 990 S.W.2d 126 (Mo. App. 1999)

ARGUMENT

RESPONSE TO RESPONDENT'S INTRODUCTION

In response to respondent's Introduction, appellant incorporates the Jurisdictional Statement of his original Brief, in particular, the section relating to the date of the Judgment, which is set forth at pages 14 - 20 of Appellant's Substitute Brief. Appellant also points out that the first time respondents raised this issue regarding the date of the Judgment was in their Brief filed with the Missouri Court of Appeals, Western District. This issue was not raised in the pleadings filed by the Olvera's in opposition to defendant's motion for new trial. This issue was not raised in the subsequent Notice of Cross-Appeal filed by the Olvera's. Rather, the respondents waited until the six month period of time for filing a late notice of appeal, as set forth in Supreme Court Rule 81.07, had expired. Generally, issues raised for the first time on appeal are not preserved for review. Vaughn v. Willard, 37 S.W.3d 413, 416 (Mo. App. S.D. 2001). Regardless of the timeliness of this issue, respondents' argument fails because the trial court Judge's docket entry was not filed, was not denominated as a "Judgment", and did not otherwise meet the requirements of Missouri Supreme Court Rule 74.01(a). As set forth above, appellant incorporates the arguments made at pages 14-20 of his original Substitute Brief on this issue, as though fully set forth herein.

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR REMITTITUR BECAUSE THE VERDICT OF \$1,000,000 IN DAMAGES FOR PLAINTIFF NICHOLAS OLVERA WAS GROSSLY EXCESSIVE AND EXCEEDED FAIR AND REASONABLE COMPENSATION FOR THE PLAINTIFFS' INJURIES AND DAMAGES TO THE EXTENT THAT IT SHOCKED THE CONSCIENCE AND ESTABLISHED THAT BOTH THE COURT AND JURY ABUSED THEIR DISCRETION IN THAT THE MEDICAL AND OTHER EVIDENCE AT TRIAL ESTABLISHED CONCLUSIVELY THAT THE HORSE ACCIDENT ONLY CAUSED PLAINTIFF TO SUSTAIN AN AGGRAVATION OF A PREVIOUS BACK INJURY WHICH RESOLVED WITHIN ONE MONTH OF THE ACCIDENT, RESULTING IN ONLY \$2,548.13 IN MEDICAL BILLS, FIVE DOCTOR'S VISITS, TEN PHYSICAL THERAPY SESSIONS, AND APPROXIMATELY \$2,500 IN LOST WAGES, AND THAT PLAINTIFF WAS ABLE TO RETURN TO WORK THREE WEEKS AFTER THE ACCIDENT AND CONTINUED TO WORK FOR TWO MORE YEARS WITH LITTLE OR NO MEDICAL TREATMENT UNTIL HE RE-INJURED HIMSELF AT WORK IN AUGUST OF 2000, AND THIS SECOND INJURY IS WHAT CAUSED PLAINTIFF'S CURRENT DISABILITY.

Standard of Review

Defendant relies on the standard of review set forth in his original brief.

Argument

Appellant relies on his original substitute brief for his argument on this point. However, respondents did raise an additional issue which must be addressed. On pages 43 - 44 of their substitute brief, respondents argue that defendant should have retained a vocational rehabilitation expert to prove that plaintiff was not completely disabled. Such an argument flies in the face of the well established Missouri law that the plaintiffs have the burden to prove their case. Williams v. Jacobs, 972 S.W.2d 334, 340 (Mo. App. W.D. 1998). The point of appellant's argument was that plaintiffs failed in their burden of proof, because they had no competent and qualified expert testimony or other evidence to establish the plaintiff Nicholas Olvera was permanently and completely disabled. The factual evidence at trial supports defendant's position, because it established conclusively that plaintiff Nicholas Olvera sustained a minor injury in the horse accident, and had fully recovered within five weeks. Mr. Olvera returned to work on August 31, 1998, less than three weeks after the accident. As of September 15, 1998, about five weeks after the accident, plaintiff was working with no restrictions whatsoever. Plaintiff continued to work full time at his same job, with a short period where he quit and worked construction before going back to his old job, until August of 2000, slightly more than two years after the horse accident. On August 28, 2000, plaintiff re-injured his back at work. After that second injury, he continued with medical treatment for his back, and received work restrictions related to his back for the first time since the horse accident two years earlier, and eventually had to quit his job. These facts establish conclusively that plaintiff was not disabled as a result of the horse accident. Plaintiff worked for two years after the horse accident, until he sustained a second injury to his back while at

work. How could the horse accident have caused plaintiff's disability, if he returned to his job three weeks later, and worked for the next two years? The arguments in support of this point are set forth more fully in appellant's original substitute brief, and will not be repeated herein.

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL BECAUSE THE VERDICT OF \$1,000,000 IN DAMAGES FOR PLAINTIFF NICHOLAS OLVERA WAS GROSSLY EXCESSIVE AND AGAINST THE WEIGHT OF THE EVIDENCE TO SUCH AN EXTENT THAT THE VERDICT ESTABLISHED JURY BIAS, PASSION OR PREJUDICE IN THAT THE MEDICAL AND OTHER EVIDENCE AT TRIAL PROVED CONCLUSIVELY THAT THE HORSE ACCIDENT ONLY CAUSED PLAINTIFF TO SUSTAIN AN AGGRAVATION OF A PREVIOUS BACK INJURY WHICH RESOLVED WITHIN ONE MONTH OF THE ACCIDENT, RESULTING IN ONLY \$2,548.13 IN MEDICAL BILLS, FIVE DOCTOR'S VISITS, TEN PHYSICAL THERAPY SESSIONS, AND APPROXIMATELY \$2,500 IN LOST WAGES, AND THAT PLAINTIFF WAS ABLE TO RETURN TO WORK THREE WEEKS AFTER THE ACCIDENT AND CONTINUED TO WORK FOR TWO MORE YEARS WITH LITTLE OR NO MEDICAL TREATMENT UNTIL HE RE-INJURED HIMSELF AT WORK IN AUGUST OF 2000, AND THIS SECOND INJURY IS WHAT CAUSED PLAINTIFF'S CURRENT DISABILITY.

Appellant relies upon the standard of review and argument on this point as set forth in his original substitute brief.

POINT III

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS AT TRIAL TO THE ADMISSION OF DEPUTY VAN BLACK'S INCIDENT REPORT BECAUSE THE INCIDENT REPORT WAS INADMISSIBLE HEARSAY IN THAT IT WAS A WRITTEN ASSERTION MADE BY DEPUTY VAN BLACK OUTSIDE THE COURTROOM, AND IN ADDITION, THE INCIDENT REPORT INCLUDED OPINIONS OF DEPUTY VAN BLACK THAT WERE GIVEN WITHOUT A SUFFICIENT FOUNDATION.

Standard of Review

Respondents argue in their brief that defendant Kelly Fritts did not raise a timely objection to the portions of deputy Van Black's incident report in issue. Appellant Fritts maintains that he did make timely objections. However, in the alternative, and if the Court disagrees with appellant, then appellant requests that this issue be reviewed under the plain error rule. To be entitled to relief under the plain error rule, appellant must show that the error affected his rights so substantially that a miscarriage of justice or manifest injustice would occur if the error was not corrected. State v. Silvey, 894 S.W.2d 662, 671 (Mo. banc 1995).

Argument

Respondents argue that at the trial of this case, defendant Fritts failed to make timely objections to the incident report at issue. Defendant's hearsay objection is located at page 256 of the transcript. The court overruled the objection, but also stated:

(THE COURT) . . . We do not pass that to the Jury . . .

MR. JOURNEY: Okay.

THE COURT: – at this time. And there may be objections as to what's in it also.

MR. JOURNEY: Okay.

(Tr. 257). Despite the fact that plaintiffs' attorney agreed to the Court's instruction that there might be objections to the contents of the Incident Report, within moments he asked a question of the witness, *which included the most prejudicial portion of the Incident Report*. The question was as follows:

Q: It indicates that he dismounted his horse and *he appeared to be drunk*. Do you remember that?

A: As far as the drinking, I'm not sure. But I know he rode his horse up there. I don't know if he was intoxicated. I don't know. I don't know how much he had had to drink.

Q: The report indicates that VanBlack says he appeared to be drunk?

A. The report does state that.

(Tr. 257 - 58). As can be seen, counsel for plaintiffs violated the Court's admonition about the Incident Report, not just once, but twice. Since the prejudicial portion of the report was

included in the questions submitted by plaintiff's counsel, any objection would have been useless, and would have only served to emphasize the improper question. Furthermore, defendant had already made a hearsay objection, which was overruled. There was no reason to believe that the trial court would have sustained the objection a second time. Regardless of the reasons why no objection was made to these blatantly improper questions, defendant had already preserved his objections to the Incident Report, and all hearsay statements included therein. If the court disagrees, appellant requests that this issue be reviewed under the plain error rule. In State v. Hanway, 973 S.W.2d 892, 895 (Mo. App. W.D. 1998), this Court stated that plain errors affecting substantial rights may be considered in the Court's discretion, when the Court finds that manifest injustice or a miscarriage of justice has resulted therefrom. Id.

It is appellant's position that manifest injustice or a miscarriage of justice occurred as a result of the admission into evidence of the statement contained in the Incident Report. The author of the Incident Report was unavailable to testify at trial. He was a law enforcement officer, and obviously, his opinions carried substantial weight with the jury. Through the use of an improper question in direct violation of the trial court's ruling on defendant's objection, the jury was allowed to hear Deputy VanBlack's opinion that defendant Fritts appeared to be intoxicated, without hearing any evidence whatsoever as to why Deputy VanBlack held that opinion, and without hearing any evidence as to the facts, conduct, or other information upon which the opinion was based. Defendant could not possibly refute the evidence, or attack the opinion, because Deputy VanBlack was not present when his unsupported opinion was read. The hearsay evidence that was admitted was the worst possible example of hearsay that exists,

and was a perfect example of every single reason why hearsay evidence is improper. The purpose of the rule excluding hearsay is to ensure that documents admitted into evidence are trustworthy by giving the party against whom the documents are offered the opportunity to cross-examine the preparer of the document. Bynote v. National Super Markets, Inc., 891 S.W.2d 117, 120 (Mo. banc 1995). Defendant made a hearsay objection, which was overruled. The untrustworthy statement came into evidence, and defendant had no opportunity to cross-examine the preparer of the document. A manifest injustice and miscarriage of justice occurred, which should have been corrected by allowing defendant a new trial.

POINT IV

THE TRIAL COURT ERRED IN REJECTING DEFENDANT’S PROPOSED JURY INSTRUCTIONS “A” AND “B” BECAUSE THERE WAS SUBSTANTIAL EVIDENCE PRODUCED AT TRIAL TO SUPPORT DEFENDANT’S POSITION THAT PLAINTIFF NICHOLAS OLVERA FAILED TO YIELD THE RIGHT OF WAY IN THAT DEFENDANT TESTIFIED THAT THE COLLISION OCCURRED IN THE STREET AFTER PLAINTIFF STEPPED OUT FROM BETWEEN TWO CARS DIRECTLY INTO THE PATH OF DEFENDANT AND HIS HORSE, AND OTHER EVIDENCE ALSO SUPPORTED THAT SCENARIO, AND UNDER MISSOURI LAW A PERSON ON HORSEBACK IS NOT PROHIBITED FROM USING PUBLIC STREETS, AND SUCH A PERSON FITS WITHIN THE DEFINITION OF “TRAFFIC” UNDER R.S.Mo. § 300.010(38), AND THEREFORE, PLAINTIFF HAD THE DUTY TO YIELD THE RIGHT OF WAY TO DEFENDANT FRITTS.

Appellant relies upon the standard of review and argument on this point as set forth in his original substitute brief.

RESPONSE TO CROSS-APPEAL

POINT I

THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT PLAINTIFFS' MOTION FOR ADDITUR BECAUSE A MOTION FOR ADDITUR WAS NOT THE PROPER PROCEDURE FOR REVIEW BY THE TRIAL COURT IN THAT THE JURY SPECIFICALLY FOUND THAT PLAINTIFF TINA OLVERA "DID NOT" SUSTAIN ANY DAMAGES AS A RESULT OF HER HUSBAND'S INJURY AND THE CORRECT PROCEDURE WAS FOR PLAINTIFF TO FILE A MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR NEW TRIAL, AND THE TRIAL COURT'S DECISION SHOULD ALSO BE AFFIRMED BECAUSE THERE WAS EVIDENCE TO SUPPORT THE JURY'S FINDING THAT PLAINTIFF TINA OLVERA DID NOT SUSTAIN ANY DAMAGES AS A RESULT OF HER HUSBAND'S INJURY.

Standard of Review

Respondent/Cross-Appellant Tina Olvera did not set forth any Standard of Review in her Cross Appeal brief, and the brief therefore fails to comply with Missouri Supreme Court Rule 84.04(b). Respondent's failure to comply with Rule 84.04(b) is grounds for dismissal of the Cross-Appeal. Jones v. Jones, 819 S.W.2d 773, 774 (Mo. App. 1991). Appellant Kelly Fritts requests that the Cross-Appeal be dismissed.

Under R.S.Mo. § 537.068, a court can only grant additur if it finds that the verdict was less than fair and reasonable compensation, and an appellate court will reverse a denial of additur only if it finds that the verdict was so inadequate that it "shocks the court's conscience

and convinces the court that both the jury and the trial judge abused their discretion.” Morgan Publications, Inc. v. Squire Publishers, Inc., 26 S.W.3d 164 (Mo. App. W.D. 2000).

Argument

The trial court’s decision to deny plaintiffs’ Motion for Additur was correct for several reasons. First, the jury found that plaintiff Tina Olvera “did not” sustain any damages. Therefore, there was no judgment for the trial judge to increase. Second, there was evidence to support the jury’s verdict against Tina Olvera, and therefore, the trial court’s decision was correct.

1. A Motion for Additur was not the correct procedure.

The Verdict form contained a paragraph for the jury to complete on Tina Olvera’s claim for loss of consortium. The paragraph read as follows:

On the claim of plaintiff Tina Olvera for damages due to injury to her husband, we, the undersigned jurors, find that plaintiff Tina Olvera _____ sustain damages “did” or “did not” as a direct result of injury to her husband.

The jury wrote the words “did not” in the blank line. (LF 18). Therefore, they found against plaintiff Tina Olvera on her claim for loss of consortium. There was a separate paragraph for damages, and the jury also wrote a zero in the blank line for the amount of damages. Since the jury found against the plaintiff on her claim for damages, the proper motion for plaintiffs to file was a Motion for New Trial or a Motion for Judgment Notwithstanding the Verdict (JNOV), in which they should have argued that the jury’s decision on plaintiff Tina Olvera’s loss of consortium claim was against the weight of the evidence. A motion for additur was not

appropriate because there was no verdict to increase. That is the exact reason the trial court denied the motion. (Plaintiff-Appellant Olvera’s Supplemental Record on Appeal- Transcript, p. 10).

A motion for additur focuses on the adequacy of the verdict in terms of damages. Massman Construction Co. v. Missouri Highway & Transportation Commission, 914 S.W.2d 801, 803 (Mo. banc 1996). By contrast, a motion for new trial deals with all the prejudicial errors which occurred during trial, “including damages to the extent a verdict is the product of juror bias and prejudice . . .” Id. In this case, the jury entered a verdict *against* plaintiff Tina Olvera. The proper motion was a motion for new trial, or for JNOV.

Denying plaintiffs’ request for additur because of the technical reason that they failed to file the right motion, may seem to be unfair. However, the trial court gave the plaintiffs every opportunity to request the proper remedy. The following colloquy took place at the hearing on the post-trial motions:

THE COURT: And they found did not. And now that might – you know, do you want a new trial on that? I would say that is against the weight of the evidence in the case. And do you want a new trial? If I overrule their motions, do you want a new trial on that and await decisions on, you know, the appeal, which certainly will follow, if – if I overrule their motions.

MR. NORDYKE: Will, I haven’t –

THE COURT: I haven’t disposed of all the issues in the case. I’ve got another –

MR. NORDYKE: Well, I don't – ah, I frankly don't know since we filed a Motion for Additur and not a Motion for New Trial. We didn't file a Motion for a New Trial. So I don't know if you can do that just spontanea or on your own. I don't know the answer to that.

THE COURT: Well, I'm not – if you don't want it, I'm not going to do it.

As can be seen, the trial court gave plaintiffs every opportunity to request the proper remedy, but plaintiffs refused to do so. The trial court correctly denied plaintiffs' Motion for Additur because there was no damage award to increase.

2. The jury's verdict was supported by the evidence.

If a motion for additur was proper, the jury's verdict should still be upheld because it was supported by the evidence. It is well established that the assessment of damages is primarily the function of the jury. Hatch v. V.P. Fair Foundation, Inc., 990 S.W.2d 126 (Mo. App. 1999). The appellate court's review is limited to the evidence supporting the verdict. Id. at 141. With regard to a claim for loss of consortium, Missouri law is clear in holding that such a claim does not automatically follow the other spouse's injuries. Lear v. Norfolk and Western Railway Co., 815 S.W.2d 12, 14 (Mo. App. W.D. 1991); Weisbach v. Vargas, 656 S.W.2d 797, 802 (Mo. App. 1983). Rather, a loss of consortium claim is separate and distinct from the party's spouse suffering personal injury. Lear v. Norfolk and Western Railway Co., supra, 815 S.W.2d at 14. The spouse seeking compensation for loss of consortium must prove that she suffered damages arising out of the other spouse's injuries. Id.; Anderson v. Mutert, 619 S.W.2d 941, 945 (Mo. App. 1981).

The primary evidence on Tina Olvera's claim was through her own testimony. When asked if she tried to help her husband around the house after his injuries, she could only state "I tried." (Tr.527). Mrs. Olvera testified that she had a difficult time doing outdoor chores because she was allergic to the sun. (Tr. 527). In addition, Mrs. Olvera had her own health problems to contend with, and was unable to assist her husband after he stopped working in October of 2000. (Tr. 531-32). Mrs. Olvera also testified that her husband helped her with the cooking, the dishes, and he folded his clothes. (Tr. 536). The jury could easily have believed that Mrs. Olvera did not sustain compensable damages as a result of her husband's injury.

It is well established under Missouri law that a jury is free to believe all or none of the testimony of any witness. Anderson v. Mutert, supra, 619 S.W.2d at 945-46. In considering the oral evidence, a jury may find against a party, even on that party's own un-impeached and uncontradicted evidence. Lear v. Norfolk and Western Railway Co., supra, 815 S.W.2d at 14; Ferguson v. Boyd, 448 S.W.2d 901, 903 (Mo. 1970). In this case, Mrs. Olvera's testimony did not convince the jury that she sustained damages. Cross-examination of Mrs. Olvera wasn't even necessary. The jury heard her testify, and did not award her damages. Plaintiffs' obviously cannot argue that the jury was biased or prejudiced, because of the large amount of money awarded to Mr. Olvera. The jury decided against Mrs. Olvera's claim, and that decision should not be disturbed. Hatch v. V.P. Fair Foundation, Inc., 990 S.W.2d 126 (Mo. App. 1999). The jury's decision certainly does not "shock the conscience", and therefore, should not be reversed, which is essentially what plaintiffs are requesting. The standards required for additur

have not been met. Morgan Publications, Inc. v. Squire Publishers, Inc., 26 S.W.3d 164 (Mo. App. W.D. 2000).

There are many recorded cases in Missouri where a plaintiff received a personal injury verdict, and the injured plaintiff's spouse did not. Kline v. Casagrande, 50 S.W.3d 357 (Mo. App. E.D. 2001); Lenhard v. Davis, 841 S.W.2d 296 (Mo. App. E.D. 1992); Lear v. Norfolk and Western Railway Co., 815 S.W.2d 12 (Mo. App. W.D. 1991). In the Lenhard v. Davis case, the court stated: "The decision is the jury's. She argues that the jury, at the very least, should have awarded her nominal damages. By the authorities, it was not obliged to do so, and could award nothing if not satisfied that she had demonstrated financial loss." Lenhard v. Davis, supra, 815 S.W.2d at 297.

Cross appellant Tina Olvera argues that several Missouri cases have held that the situation where an injured plaintiff recovers damages, and the spouse does not, creates an inconsistent verdict. However, the cases relied upon by cross-appellant are not even remotely similar to the situation at hand, and do not support her argument whatsoever. The first case cited by cross appellant is Johnson v. Hyster Company, 777 S.W.2d 281 (Mo. App. W.D. 1989). However, the reason the verdicts were found to be inconsistent in that case was because the jury assessed different percentages of fault to the injured plaintiff in the main claim, and in the loss of consortium claim. The Court of Appeals held that the trial court "erred when it gave an instruction which allowed the jury to find percentages of fault in the verdict form on Bette's claim, because this allowed the jury to assess different percentages on the two claims." Id. at

285. In fact, the Johnson case did not even involve a claim that the wife's verdict was inadequate, and has no relevance whatsoever to the issues involved in this case.

The next case relied on by cross appellant is Finninger v. Johnson, 692 S.W.2d 390 (Mo. App. E.D. 1985). Again, that case does not stand for the proposition advanced by cross appellant, and in addition, involves a completely different set of facts. In Finninger, the jury did award money to the injured plaintiff, and in addition, it found in favor of the injured spouse's husband. However, the jury did not award the husband any damages. The court held that the verdict was inconsistent, but the reason was because "a verdict making a finding for a plaintiff but awarding no damages is invalid since there is no actionable negligence in the absence of injury resulting directly therefrom." Finninger v. Johnson, supra, 692 S.W.2d at 395. In this case, the jury found against Tina Olvera. Therefore, the finding of no damages is completely consistent with the verdict on Mrs. Olvera's loss of consortium claim. Cross appellant also relies on Massey v. Rusche, 594 S.W.2d 334 (Mo. App. W.D. 1980). However, in that case, there wasn't even a loss of consortium claim involved. Rather, the case involved a daughter who was injured, and a claim by her parents for payment of the daughter's medical bills. The jury found *against* the daughter, and in *favor* of her parents. Obviously, the jury's verdicts were inconsistent. That would be akin to the jury finding against Nicholas Olvera, and in favor of Tina Olvera on her loss of consortium claim. Clearly, the Massey v. Rusche decision has no bearing on the issues involved in this case.

Cross appellant Tina Olvera cannot present any authority whatsoever for her argument that a loss of consortium claim follows automatically from the verdict in favor of Mr. Olvera,

in fact, the overwhelming case law in Missouri holds exactly the opposite. The trial court's denial of plaintiffs' Motion for Additur should be affirmed.

CONCLUSION

Appellant Kelly Fritts requests that this case be remanded for remittitur, or in the alternative, that appellant be given a new trial, with instructions to the trial court that the Incident Report be excluded from evidence, and that defendant be allowed to submit failure to yield the right-of-way as comparative fault on the part of plaintiff Nicholas Olvera. Appellant also requests that the trial court's denial of plaintiffs' Motion for Additur be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Substitute Reply Brief of Respondent-Appellant Kelly Fritts and Brief Opposing the Cross-Appeal, along with a copy of this Certificate of Mailing, were mailed this 3rd day of June, 2005, to:

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RULE 84.06(c) CERTIFICATION

The undersigned counsel hereby certifies that this brief includes the information required by Rule 55.03, and that this reply brief complies with the limitations contained in Rule 84.06(b). This brief contains 5,519 words counted using Corel WordPerfect 10. Counsel also certifies that the attached floppy disk containing this brief has been scanned viruses and is virus-free.

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