

**NO. 86699**

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**IN THE MISSOURI SUPREME COURT**

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

**vs.**

**KELLY FRITTS, Appellant/Cross-Respondent.**

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

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**SUBSTITUTE BRIEF OF RESPONDENT NICHOLAS OLVERA  
AND RESPONDENT/CROSS-APPELLANT TINA OLVERA**

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## **JURISDICTIONAL STATEMENT**

Plaintiffs cannot concur with defendant-appellant that this court has jurisdiction of the instant appeal. The record in the instant case raises a question whether the defendant filed a timely notice of appeal.<sup>1</sup>

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<sup>1</sup>Defendant insinuates that plaintiffs somehow sand-bagged him by not raising any issue about the appellate court's jurisdiction until after the time had passed for defendant to seek leave to file a late notice of appeal. No such thing happened. The question regarding the sufficiency of defendant's filing fee did not become apparent to plaintiffs until counsel for plaintiffs reviewed the trial court's docket entries in connection with the argument on

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the timeliness of defendant's motion for new trial, at which time counsel discovered the discourse between the circuit clerk's office and counsel for defendant regarding the sufficiency of the defendant's filing fee. Of course, this discourse makes it clear that defendant was aware of the fact that he had not timely paid the full amount of the required filing fee and that he was aware of this well within the time to have filed a request for leave to file a late notice of appeal. Plaintiffs did nothing to prevent him from doing so.

The parties' post-trial motions<sup>2</sup> were denied by the trial judge in an order signed and dated December 19, 2003. (L.F. 123). Pursuant to Rule 81.04(a), defendant's notice of appeal was required to be filed within ten (10) days of that date, i.e., by December 29, 2003. Although defendant lodged a purported notice of appeal with the clerk of the circuit court on December 29, 2003, and paid \$50.00 to the clerk at that time, that is not the effective date of filing under the rules. At the time defendant tendered its notice of appeal, the filing fee was \$70.00, which included the \$20.00 additional charge for filing such a notice of appeal as provided by Section 488.031 R.S.Mo. Defendant did not pay this additional amount until January 8, 2004. (L.F. 121)<sup>3</sup>, beyond the time for filing a notice of appeal.

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<sup>2</sup>As discussed in the standard of review portion of plaintiffs' Argument, plaintiffs do not believe that defendant's post-trial motion was timely filed either.

<sup>3</sup>The docket entries reflect that defendant paid an additional \$13.00 toward the filing fee on January 8, 2004, and the circuit clerk forwarded its receipt to the Court of Appeals that date.

Rule 81.04(c) requires that a party pay the docket fee for an appeal to the circuit clerk at the time it files a notice of appeal. The rule prohibits the clerk from accepting the notice of appeal for filing unless and until the filing fee is paid. When a party fails to pay the docket fee with the notice of appeal, there is no valid notice of appeal. Bussell v. Tri-Counties Humane Society, 125 S.W.3d 348, 350 (Mo. App. E.D. 2004); Moore ex rel Moore v. Bi-State Dev. Agency, 87 S.W.3d 279, 296 (Mo. App. E.D. 2002). Under such circumstances, the appellate court is without jurisdiction. Such jurisdiction cannot be conferred by consent nor can a party “waive” an objection or question as to the appellate court’s jurisdiction.<sup>4</sup> Kelch v. Kelch, 450 S.W.2d 202, 204 (Mo. 1970).

If the additional \$20.00 filing fee is considered to be jurisdictional, then defendant’s notice of appeal must be deemed to have been filed on January 8, 2004, when he paid the full amount of the required docket fee. Plaintiffs raised this issue in the jurisdictional statement of their opening brief in the Court of Appeals because at that time no Court had addressed the question whether payment of the additional surcharge was jurisdictional. See Bussell v. Tri-Counties Humane Society, 125 S.W.3d at 350. After plaintiffs filed their brief in the Court of Appeal, the Southern District handed down its opinion in Deever v. Karsch & Sons, Inc., 144 S.W.3d 370, 372 (Mo. App. S.D. 2004), holding that there is no

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<sup>4</sup>Hemphill v. City of Morehouse, 142 S.W.2d 817 (Mo. App. 1912), cited by defendant to support its waiver argument does not involve a question as to the appellate court’s jurisdiction and is therefore inapposite here.

reason to distinguish between the filing fee set forth in Rule 81.04 and the additional surcharge required by §488.031 R.S.Mo.

Although defendant contends that only the docket fee required by Rule 81.04 can be considered a jurisdictional requirement, this Court in Kattering v. Franz, 231 S.W.2d 148 (Mo. 1950) held that payment of a docket fee established by statute was jurisdictional. Similar to Rule 81.04(c), Rule 3.28 at issue in Kattering provided that the clerk of the trial court should not accept for filing a notice of appeal that was not accompanied by the requisite filing fee. The filing fee at issue in Kattering was one established by statute, Section 129, Civil Code of Missouri, Laws of Missouri, 1943, p. 353 at pages 390-391, Mo. R.S.A. § 847.129, not by Court rule. Hence, there is no basis to distinguish, as defendant tries to urge, between a filing fee established by Court rule and one established by statute.

## **STATEMENT OF FACTS**

Plaintiffs-Respondents do not accept the Statement of Facts of Defendant-Appellant Kelly Fritts because it is argumentative and fails to set forth a fair recitation of the relevant facts. Rule 84.04(c). For example, nowhere in defendant's statement of facts does he even mention Dr. Ellefsen's testimony concerning plaintiff's disability and inability to work or Dr. Krueger's testimony regarding plaintiff's loss of future income. Therefore, pursuant to Rule 84.04(c), plaintiffs will set forth a resume of the testimony presented at trial below.

The jury in this case found in favor of plaintiff Nicholas Olvera and found damages in the amount of \$1,000,000.00. (L.F. 18). The jury found defendant to be 80% at fault and plaintiff Nicholas Olvera 20% at fault for a net verdict and judgment in the amount of \$800,000.00. (L.F. 23).

The jury found that plaintiff Tina Olvera did not suffer any damage as a result of the injuries to Nicholas Olvera and assessed her damages at -0-. (L.F. 18). Tina Olvera filed a timely motion for additur (L.F. 24-25), which was denied by the trial court. (L.F. 120; Supp. Tr. 10). In denying plaintiff Tina Olvera's motion, the trial court stated that it found that she did in fact sustain damages as a result of Nicholas Olvera's injuries; however, the court expressed the view that the additur statute, §537.068 R.S.Mo., did not allow him to increase a party's damages when the jury had awarded that party no damages. (Supp. Tr. 10-11).

### **Resume of Testimony**

#### **Nicholas Olvera**

Plaintiff Nicholas Olvera testified that he lived with his wife Tina and their two children, Nicky Joe and Christine. (Tr. 359). Plaintiff testified that he did not graduate from high school and had always worked jobs doing physical labor. (Tr. 360-361). At the time of the accident involved in this case, he worked at Murphy Farms, a hog farm. (Tr. 362). His duties required lifting, bending and twisting his back. (Tr. 369).

Plaintiff had experienced a back injury in 1993 when he worked for the City of Kansas City, but this was treated with physical therapy and he had not had any problems with it since. (Tr. 364-365, 368; Exh. 23). He was examined in February, 1998, for pain in his back that resulted when he broke up a fight, but it did not require any treatment. (Tr. 373). He was not having any problems with his back at the time he went to the Rockville festival in August, 1998. (Tr. 363-364, 370).

On the evening of August 8, 1998, plaintiff went to the Rockville festival with his wife Tina, his wife's aunt and another individual. (Tr. 375). Plaintiff was the designated driver and did not drink any alcoholic beverages that night because he was taking an antibiotic at the time. (Tr. 374-375). They arrived approximately 7 or 8 o'clock in the evening, after dark. (Tr. 377). They walked around the festival grounds, visited with other people and ate dinner. (Tr. 378).

At some point during the evening, plaintiff decided to go to his truck and get a bottle of water. (Tr. 381). There were people walking all around the area. (Tr. 383). As he was returning, he heard a clanking noise, he turned toward the direction of the noise and was

struck by the horse defendant was riding. (Tr. 381-382). He could not see the horse before that because it was dark. (Tr. 501). Prior to that, he did not hear any sound or warning, but saw the horse just as he turned. (Tr. 382). He recalled being knocked unconscious. (Id.). The next thing he remembered was a lady with a towel was next to him because his face was bleeding. (Id.). Exhibits 3, 4 and 5 show the area where plaintiff was walking when he was struck. (Tr. 384-387). Plaintiff stated that he was walking on the sidewalk, or a dirt and gravel path adjacent to the road, at the time he was hit because the street was barricaded. (Tr. 387-388, 454). But after he was hit, he was laying in the street when he regained consciousness. (Tr. 388). After he wiped the blood off his face, he stood up to look for his hat and found the water bottle he had been carrying standing straight up on the sidewalk where he had been walking. (Tr. 392-393). At that point, the defendant walked up accompanied by sheriff's deputies. (Id.). Plaintiff was still dizzy and bleeding. (Tr. Tr. 393). Plaintiff told defendant he had hit him with his horse. (Id.). The deputies instructed him to sit down near a pole and asked if he wanted an ambulance. (T. 395-397). He declined the ambulance but said he would drive to the emergency room on his own. (Tr. 396-397). Plaintiff's wife's aunt, who was with plaintiff, then went to find Tina Olvera to tell her what had happened so plaintiff could go to the hospital. (Tr. 397-398).

Plaintiff drove to Cedar County Memorial Hospital because he was the only one who had not been drinking. (Id.). At the hospital, plaintiff told Dr. Rick Casey that he had been hit by a horse. (Tr. 399; Ech. 7). Plaintiff received stitches in his lip and also complained about pain in his elbow and chest. (Tr. 399).

Plaintiff sought medical treatment at Cedar County Medical Mall on August 10, 1998, complaining of back pain, numbness in his feet, and pain in his hip. (Tr. 400). He was seen by Dr. Sistosa. (Id.) The next day, August 11<sup>th</sup>, he was seen by Dr. Garwood who ordered X-rays that revealed a possible fracture of the L-4 vertebra with compression fractures of L-4 and possibly L-3. (Tr. 402). A bone scan performed on August 28, 1998, revealed no fracture. (Tr. 403). He was placed on physical therapy which helped for awhile, but he still had pain and limited range of motion. (Tr. 404, 411-412).

Plaintiff missed approximately a month from work after the accident and then part time thereafter because of continued back pain and for physical therapy visits. (Tr. 403-406). During this period, he lost wages in the amount of \$2,539.20. (Tr. 405; Exh. 26).

When plaintiff returned to Murphy Farms, he experience problems with his back hurting all the time. (Tr. 404-405). He returned to Dr. Garwood in February, 1999, complaining of back pain and inquired about disability. (Tr. 412-413).

He then saw Dr. Casey again in July, 1999, because of continued back pain. (Tr. 413). By this time, plaintiff had taken a different job at Excel doing construction, but if he worked hard, his back would hurt for days and he would not be able to do much of anything. (Tr. 416-417). He returned to Murphy Farms in August, 1999, where they tried to accommodate his condition. (Tr. 418).

Plaintiff saw Dr. Brian Ellefsen in December, 1999.<sup>5</sup> (Tr. 419). He explained to Dr. Ellefsen about his back pain, that the more he did, the worse it got. (Id.). Dr. Ellefsen placed plaintiff on restrictions for lifting and bending. (Tr. 420). Plaintiff was then assigned to work with a power washer, but the vibrations from this equipment made his back even worse. (Id.). Plaintiff's back pain got progressively worse up through the summer of 2000. (Id.). While at work on August 28, 2000, plaintiff bent over to pick up a water filter and could not straighten up. (Tr. 421-422). The water filter weighed only one and a half to two pounds. (Id.). His co-employees had to bring a cart to transport him so he could be taken to the hospital. (Tr.422-423). At the hospital, he related his history involving the horse accident. (Tr. 423-424). He returned to work after this incident doing light duty work. (Tr. 425-426).

By October, 2000, Murphy Farms could no longer provide plaintiff with light duty work so he was let go. (Tr. 426-427). That was the last time plaintiff has been able to work. (Id.). He was told by his doctors that he should not try to go back to work because it may injure his back further. (Tr. 434-435). Plaintiff testified that his condition has gotten worse since October, 2000, and that he is in constant pain. (Tr. 427-428). He takes OxyContin for

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<sup>5</sup>Plaintiff had seen Dr. Ellefsen originally in August, 1998. Deposition of Dr. Brian Ellefsen, pp. 10, 11. (Admitted at trial as Exh. 13).

pain and Valium for spasms several times a day. (Tr. 432-433). Plaintiff's medical bills totaled \$21,908.27 to the date of trial, of which \$6,472.99 were for prescription drugs. (Tr. 439; Exhs. 8, 25). The costs for prescription drugs will continue in the future. (Id.).

Plaintiff testified that prior to the accident, he use to go hunting, mow the lawn, work in the garden and help with house work. (Tr. 430-432). He no longer mows the grass and is now limited in other things he can do. (Id.). He can no longer ride in his boat because the vibrations hurt his back. (Tr. 505).

### **Sharon Schichting**

Sharon Schichting, Tina Olvera's mother testified concerning plaintiff's condition before and after the accident. (Tr. 274-275). According to Ms. Schichting, plaintiff was not limited in his activities by back problems prior to the injury from the horse accident. (Tr. 280). He never complained prior to that time that he was not able to work. (Tr. 280-281). She testified that he changed dramatically after the accident and that he no longer engaged in regular activities like playing horseshoes, volleyball or other games with his children. (Tr. 281-282). She testified that the pain he was experiencing had put a strain on his marriage and that he became impatient and more short-tempered. (Tr. 282-283). After the accident, plaintiff was able to perform only about 25% of the household and yard work he had previously performed. (Tr. 285).

### **Cindy Parks**

Cindy Parks, a friend and fellow employee of plaintiff at Murphy Farms, testified concerning the difference between plaintiff's activities before and after the accident. (Tr.

289, 292). The job that plaintiff performed at Murphy Farms required frequent bending and stooping. (Tr. 293). The accident affected his ability to do these activities. (Tr. 293).

Prior to the accident, he had no difficulty performing his job. (Id.). Immediately after the accident, plaintiff was off work for three weeks to a month. (Tr. 294).

After plaintiff had left Murphy Farms and then returned, plaintiff was injured at work when he tried to pick up a water filter that weighed a pound and a half. (Tr. 295-296). His employer tried to make accommodations for him by giving him light duty, but eventually they had to let him go. (Tr. 296).

Ms. Parks also testified regarding changes in plaintiff's home life. She testified that their families were friends and visited each others houses. (Tr. 297). Plaintiff had previously enjoyed hunting, fishing, and playing with his children. (Id.). Since the accident, he does not do many of the things he formerly did, and is quicker to yell at the children. (Id.).

### **Tina Olvera**

Plaintiff Tina Olvera testified that she and Nicholas Olvera have been married since 1991. (Tr. 510-511). As of the date of trial, they had two children were, Nicky Joe, age 10, and Christine, age 2. (Tr. 510).

Tina Olvera testified that prior to the August 8, 1998, accident, her husband never had any serious problems with his back. (Tr. 511). He had always worked and never been

off for any extended period, usually working 10 hour days. (Tr. 515, 524). He use to enjoy playing volleyball and baseball, and going hunting, fishing and playing with his son. (Tr. 516).

On the night of August 8, 1998, Tina Olvera, her aunt, and another friend wanted to go to the Rockville festival. (Tr. 517). Nicholas Olvera went along in order to be the designated driver since he could not drink because he was taking medication. (Id.). There were people everywhere around where the festival was being held. (Tr. 522). She did not see anyone riding horses there as it was nighttime. (Tr. 522-523). At some point during the evening, Tina's aunt and another person approached her and told her that Nick had been run over by a horse. (Tr. 517-518). When she arrived at the scene, her husband was sitting down leaning against a pole and was covered with blood. (Tr. 518-519). She accompanied her husband to the hospital that evening. (Tr. 521).

After Nicholas Olvera was struck by the horse, Tina noticed that his condition grew steadily worse. (Tr. 523-524). From that point to the point where he could no longer work, he had major back pains that never went away. (Tr. 525). He would come home from work in a bad mood, sit on a couch or chair, and not help around the house. (Tr. 525). She noticed that he had difficulty getting out of bed, putting on his shoes, or bending over to take out the trash. (Tr. 527).

Prior to the horse injury, Nick had always assisted with household chores, like the dishes, laundry, major cleaning, dusting and vacuuming. (Tr. 534). After the injury, he gradually did less and less, and Tina had to do more and more. (Tr. 535). By October 2000,

Nick was no longer able to work. (Tr. 528). In December of that year, the couple's second child, Christine, was born. (Tr. 529). This created a financial problem because they had no income at the time since she was not working.(Tr. 529). She also had medical problems that kept her in the hospital for two weeks after the baby was born. (Tr.53-531). When she was released, her mother had to help out because Nick was not able to. (Tr. 531-532). Their daughter had to spend six weeks with her mother because neither of the plaintiffs could take care of her. (Tr. 533).

Ms. Olvera testified that her husband's injuries have effected his emotional stability and that he feels that he is useless. (Tr. 536). He is less tolerant with the children, is irritable and subject to mood swings. (Tr. 539-340). She finds it best to just leave him alone when he is really hurting. (Tr. 540).

When she and her husband moved to the country from Kansas City, they planned to eventually have a large farm and raise livestock and have a garden to grow their own food. (Tr. 540). Because of the injuries to her husband, they have had to abandon their plans for the future. (Id.)

### **Gary Martin**

Gary Martin, Chief Deputy testified about the evening of August 8, 1998 at the Rockville festival. He stated that the street where the festival took place was closed off to traffic. (Tr. 251-253). During the course of his testimony, Deputy Martin was questioned about an incident report (Plaintiffs' Exh. 1) involving the accident between plaintiff and the horse ridden by defendant. Deputy Martin testified that he could be considered one of the

custodians of the report along with the Sheriff and another individual (Chris) and that part of his duties were to take charge of such reports. (Tr. 254-255). He testified that the report was written by another deputy, Don Van Black, who was at the time of trial serving military duty in Iraq. (Tr. 255). The report was written the day after the incident, which had occurred approximately midnight on the evening of August 8<sup>th</sup>. (Id.). Deputy Martin was also present at the time and place of the events related in the report. (Id.).

Defendant objected to the admission of this report on the basis of hearsay. (Tr. 256). The trial court overruled the objection, stating that there may be additional objections to matters in the report and that it should not be passed to the jury. (Tr. 256-257).

Deputy Martin acknowledged that in the report Deputy Van Black observed that defendant appeared to be intoxicated when he rode up on his horse to request assistance with his injured companions. (Tr. 257-258). Deputy Martin stated that Deputy Van Black was a trained officer and he (Martin) would not quarrel with Van Black's observation. (Tr. 269).

When Deputy Martin was questioned concerning other portions of the report in which Deputy Van Black recounted what some of defendant's companions had said, defendant's hearsay objection to those portions of the report were sustained by the trial court. (Tr. 260, 261).

From his own recollection, Deputy Martin recalled that defendant was in a hurry as he approached. (Tr. 258). During his initial discussions with the deputies, defendant did not say anything about having hit plaintiff as he rode to get help. (Id.). But shortly thereafter,

plaintiff walked up and informed them that he had been run over by the defendant riding a horse. (Tr. 267).

**Dr. Rick Casey**

The videotaped deposition of Dr. Rick Casey (Pl. Exh.10) was played for the jury. (Tr. 273-274)(The transcript of the deposition was admitted as Exh. 11).

**Dr. Gerald R. Hale**

Dr. Gerald R. Hale testified by video taped deposition admitted as Exh. 21. (Tr. 358)(The transcript of Dr. Hale's deposition was admitted as Exh. 22). Dr. Hale is an osteopathic physician, board certified in anesthesiology and pain management. (Hale Deposition, pp. 3, 6). Dr. Hale examined plaintiff on October 26, 2000, at the request of Dr. Brian Ellefsen, to perform a diskogram and to evaluate plaintiff as a possible candidate for thermal anaplasty, a procedure Dr. Hale had performed in the past. (Id., p. 9). When he examined him in October, 2000, plaintiff was complaining of back pain that did not radiate into the legs, but with some numbness in his feet, but primarily back pain and spasms.(Id., p. 11). Dr. Hale performed a diskogram on plaintiff November 2, 2000. (Id., p. 13; Deposition Exh. 3). The procedures involves injecting die into the nucleus of a patient's disks under pressure, and observing when the patient experiences pain. (Id., p. 14). The procedure performed on plaintiff revealed four disks that produced pain. (Id., p. 15). De. Hale stated that the results of the test were extraordinary in that were tears in both the anterior as well and the posterior portion of some of the discs. (Id.). Dr. Hale said this finding would be consistent with a traumatic injury. (Id., p. 19).

As part of his examination of plaintiff, a CT scan was performed after the diskogram. (Id., p. 25). The CT scan showed annular tears, both anteriorly and posteriorly at L4-5 and L5-S1, with a diffuse circumferential bulge at L5-S1, and anterior annular tears at L3-4. (Id., p. 26).

After reviewing the results of the diskogram, Dr. Hale referred plaintiff to Dr. Mark Hayes, an orthopedic surgeon, for evaluation for possible surgery. (Id., p. 23). Dr. Hayes concluded that plaintiff would not be a good candidate for surgery because of the multiple levels of the lumbar spine that were involved. (Id., p. 24). Dr. Hale explained that if more than two levels are fused, you reduce the patient's ability to move and to function. (Id.). As part of his report (Hale Deposition Exh. 4), Dr. Hayes recommended that plaintiff not try to work. (Id., p. 25).

Dr. Hale testified to a reasonable degree of medical certainty, that the horse incident of August 9, 1998, affected the discs in plaintiff's back to the extent that they could no longer support his back, absorb shock or allow him to lift, bend and do things without a significant amount of pain. (Id., pp. 35-36). Dr. Hale could not offer any other treatment that would substantially improve plaintiff's ability to function as a result of his disc injuries. (Id., p. 38). All that could be done was to offer medication that would not correct the problem, but would help to improve the patient's quality of life. (Id., pp. 38-39).

### **Dr. Brian Ellefsen**

Dr. Brian Ellefsen testified by video taped deposition, admitted as Exhs. 12A and 12B. (Tr. 286-287)(The transcript of Dr. Ellefsen's deposition was admitted as Exh. 13).

Dr. Ellefsen is a board certified orthopedic surgeon who treated plaintiff over a period of several years. (Ellefsen Deposition pp. 7, 10; Deposition Exh. 2). In preparation for his testimony, Dr. Ellefsen also reviewed plaintiff's medical records from other providers. (Id., p. 12; Depo. Exh. 3).

Dr. Ellefsen first saw plaintiff in August, 1998, for back injuries that resulted from a horse injury. (Id., pp. 10-11). Plaintiff reported that his pain worsened with increase in activity. (Id., p. 11). Dr. Ellefsen prescribed anti-inflammatories, muscle relaxers, and pain medication. (Id., p. 12).

Dr. Ellefsen next saw plaintiff in December, 1999. Plaintiff had previously undergone a series of physical therapy sessions that helped some, but he had pain on the day following activities, particularly after bending or twisting. (Id., pp. 13-14). Dr. Ellefsen gave plaintiff injections for his back pain and gave him oral medication as well. (Id., p. 14). Dr. Ellefsen attributed plaintiff's continued pain, particularly the aggravation from bending and twisting, to the horse accident in August of 1998. (Id., pp. 15-16).

Plaintiff returned to Dr. Ellefsen in June, 2000, after he had called complaining of continued pain and been sent for an MRI. (Id., p.16). He was continuing to have increased pain with less activity. (Id., p. 17). Dr. Ellefsen placed plaintiff on permanent restrictions and discussed the possibility of plaintiff changing jobs. (Id., pp. 17-18). Plaintiff stated that he wanted to continue working. (Id., p. 18). In reviewing plaintiff's MRI, Dr. Ellefsen concluded that plaintiff suffered from degenerative disc disease which would be consistent with an acute injury. (Id., pp. 19-20). Dr. Ellefsen stated that this condition was caused at

least in part by the August, 1998 accident based upon the fact that plaintiff did not have any significant back problems prior to that date, but from that point forward up to the day of his deposition, plaintiff consistently had back problems. (Id., pp. 20-21). He did not feel that plaintiff's 1993 work-related injury was a contributing factor to his current condition. (Id., pp. 21-23). If not for the horse accident in 1998, plaintiff would not have been experiencing the type of constant discomfort from his back injury that he displayed when he visited Dr. Ellefsen in June, 2000. (Id., p. 23).

Dr. Ellefsen saw plaintiff again in September, 2000. (Id., p. 25). Plaintiff had called to set up an appointment in advance of his previously scheduled appointment because his symptoms had worsened to the point where his back bothered him even when he was not doing any activity and he was having trouble sleeping. (Id.). Dr. Ellefsen arranged for plaintiff to receive an epidural injection, increased the strength of his regular prescription, and placed additional restrictions on plaintiff to eliminate repetitive bending and twisting at work. (Id., pp. 25-26). Dr. Ellefsen did not consider plaintiff's work-injury in August, 2000 - in which he bent over to pick up a filter and was unable to straighten up - to be a new injury, but simply an exacerbation of his existing injury. (Id., pp. 28-29).

Plaintiff returned to Dr. Ellefsen's office on September 27, 2000, after undergoing two epidural injections. (Id., p. 32). Plaintiff reported that the injections helped for 3 or 4 days, but then his symptoms returned. (Id.). Dr. Ellefsen made plaintiff's restrictions on bending and twisting permanent and gave added restrictions on no prolonged standing or walking on concrete. He also referred plaintiff to Dr. Gerald Hale in Tulsa, Oklahoma to

perform a diskogram and possibly an intradiscal electro-thermoplasty (IDET), a procedure used with disc injuries that are not herniated. (Id., p. 33). A diskogram is a procedure in which dye is injected into the disc with the patient awake, so the patient can tell when the painful disc is injected, and the dye will indicate where there are fissures or tears. (Id., pp. 35-36).

Dr. Ellefsen saw plaintiff again on December 6, 2000. (Id., p. 36). By this time, plaintiff had been terminated from his employment because of the medication he was required to take. (Id.). He had undergone tests with Dr. Hale in Tulsa and the results were forwarded to Dr. Ellefsen. (Id., p. 38). The tests revealed tears of the discs at multiple levels, and positive pain response at L-4,5 and L-5, S-1. (Id., p. 39). According to Dr. Ellefsen, 80% of plaintiff's lumbar spine was involved in his problems. (Id., p. 47). In his opinion, based upon a reasonable degree of scientific certainty, Dr. Ellefsen believed that the tears found in plaintiff's spine were the result of the August, 1998, collision with the horse (Id., p. 41). During the course of his December 6, 2000, visit, Dr. Ellefsen told plaintiff that he should not be working. (Id., p. 43). Dr. Ellefsen did not feel that plaintiff could keep any type of regular work schedule because he would not be able to sit for more than five to ten minutes at a time, and would then have to stand and then recline. (Id., p. 45).

Plaintiff saw Dr. Ellefsen on May 9, 2001, for his scheduled follow-up visit. (Id., p. 48). Since his previous visit, plaintiff had been seen again by Dr. Hale and by a surgeon, Dr. Hayes. (Id.). Dr. Hayes had concluded that plaintiff was not a candidate for surgery so Dr.

Hale recommended that plaintiff undergo the IDET procedure. (Id.). Since his May, 2001, visit, Dr. Ellefsen has continued to see plaintiff every three to four months and treats plaintiff with daily medication of OxyContin and Valium. (Id., pp. 50-51).

Dr. Ellefsen testified, based on a reasonable degree of medical certainty, that plaintiff suffered injuries to the discs of his lumbar spine, particularly L-4,5 and L-5,S-1 as a result of being struck by the horse on August 9, 1998. (Id., p. 55). Dr. Ellefsen further testified that plaintiff's injuries sustained in that incident were permanent and irreversible. (Id., p. 56). As a result of those injuries, plaintiff lost all functions and abilities beyond the task of daily living, i.e., anything beyond personal hygiene, light housework, or driving a car. (Id., pp. 56-57). He can sit for only 15 to 20 minutes at a time, and can stand or walk for similar periods. (Id., p. 57). Dr. Ellefsen testified that as a result of his injuries from the August 9, 1998, incident and the limitations that resulted from those injuries, plaintiff is unable to work, is not competitive at all in the open job market, and is unemployable. (Id., pp. 57-58).

Dr. Ellefsen testified that the medical treatment received by plaintiff as shown on Plaintiff's Exh. 3 were reasonable and necessary to treat plaintiff's injuries resulting from the August 9, 1998, incident with the horse. (Id., pp. 58-59). He further testified that plaintiff's medical bills for such treatment as shown on Exh. 5 were reasonable and customary charges for such services. (Id., p. 61). His only qualification of that opinion was that a charge of \$83.00 for an injection to plaintiff's shoulder for an unrelated problem should not be included. (Id., pp. 62-63). Dr. Ellefsen testified that aside from possibly

having the IDET procedure performed at some point in the future, the only further treatment available to plaintiff was continued medication for pain and spasms. (Id., pp 64-65).

**Dr. Kurt V. Krueger**

Dr. Kurt V. Krueger, Ph.D., an economist, performed an earnings analysis of plaintiff's future wage loss from October, 2000, forward resulting from the accident. (Tr. 307-311; Exh. 20). Dr. Krueger performed three separate sets of calculations of plaintiff's future wage loss: one using plaintiff's 2000 wages as a basis (Exh. 16); one using his 1993-2000 wages as a basis (Exh. 17); and one using his hourly earnings as of the date of his injury as a basis.(Exh. 18). These analyses yielded future wage loss computations, reduced to present day value, of \$565, 785, \$485,555, and \$619,917 respectively. (Tr. 331-332). Dr. Krueger stated that based upon a reasonable degree of certainty, plaintiff's wage loss, reduced to present day value, was between \$485,000 and \$619,000, with an average of \$557,000. (Tr. 335; Exh. 19).

**Dr. Theodore L. Sandow**

Dr. Theodore L. Sandow, M.D., testified by video taped deposition, Plaintiff's Exh. 28. (L.F. 306)(The printed transcript was admitted as Exh. 29). Dr. Sandow, a board certified orthopedic surgeon, examined plaintiff on behalf of defendant on October 29, 2002. (Sandow Deposition, pp. 3-4, 6). During his examination of plaintiff, Dr. Sandow had plaintiff perform a straight leg raise test which revealed that plaintiff had pain at 30 degrees on the right leg test and at 60 degrees on the left. (Id., pp. 10-11). According to Dr.

Sadow, this indicated that plaintiff had a nerve pinch problem, particularly on the right side. (Id., p. 23).

Dr. Sadow was aware of plaintiff's employment at Murphy Farms prior to the accident, which he considered to be heavy work that someone with significant back problems would not have been able to perform. (Id., p. 26).

According to Dr. Sadow, plaintiff's problems are due to degenerative joint and disk disease. (Id., p. 20). Degenerative disk disease is something everyone experiences as they get older. (Id., p. 27). Dr. Sadow agreed that degenerative disk disease could be significantly exacerbated by a major trauma, such as being run over by a horse as plaintiff was. (Id., p. 28). The greater the trauma, the greater the likelihood of worsening the condition. (Id., p. 34). He agreed that plaintiff's accident with the horse worsened plaintiff's degenerative disk disease. (Id., pp. 34-35). He further stated that plaintiff's activity in continuing to work at his job after the accident aggravated plaintiff's condition even further. (Id., p. 35). Plaintiff's complaints of constant back pain, numbness in his right foot, aggravation of his pain by coughing, sneezing are all consistent with his back being aggravated by the injury from the horse accident. (Id., pp. 30-31).

Dr. Sadow stated that surgery would not help plaintiff because of the extent of damage to his lumbar spine. (Id., pp. 19-20). He did not question that plaintiff has significant back problems, but he did not believe that anything could be done to rectify those problems. (Id., pp. 25-26).

**Kelly Fritts**

Defendant Kelly Fritts attended the Rockville festival after setting up a campsite, barbequing and drinking 2 or 3 beers. (Tr. 575). He and his companions, Wendy Bradley and Bill Smith went to the festival by horse and tied them up behind a building while they attended the festival. (Tr. 581-582). While at the festival, defendant drank another 4 or 5 beers. (Tr. 582). Around 11:30 in the evening, defendant and his friends left the festival to return to their camp. (Tr. 580-581). While in route, the horse that his two friends were riding bucked or was spooked, and the two riders were thrown off. (Tr. 584). When defendant got to where they were, Wendy was unconscious. (Id.). Defendant grabbed one of the horses and headed back to the festival at a gallop. (Tr. 585-587). According to defendant, he was galloping on the horse in the street when plaintiff walked out from between two cars and was struck. (Tr. 587). Defendant stated that he was aware that there were many people around and that the street was being used by people just as much as it was for cars. (Tr. 595-596). It was dark at the time. (Tr. 596). He stated that he was not intoxicated at the time, and that it would take 12 beers before he would be impaired. (Tr. 594).

Defendant stated in his deposition, which was read at trial, that he did not shout any type or warning nor did the horse he was riding have any bells or noise makers on as he approached the area where the collision occurred. (Tr. 547-548). He stated that he did not see plaintiff until the collision. (Tr. 548). He knew he had hit plaintiff and knocked him down, but he kept on going and never looked back. (Tr. 549). The horse he was riding weighed approximately 1200 to 1300 pounds. (Tr. 598). When asked what he thought about

plaintiff that night, defendant responded: “I just remember apologizing to him, like I said, pretty much shrugged him off. He looked like he had a bloody nose. He was a drunk that stepped out in front of me. That’s what it seemed like to me. I could have give a sh\*\* less.” (Tr. 616).

**POINTS RELIED ON**

**I**

**THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR REMITTITUR BECAUSE THE VERDICT OF \$1,000,000 IN DAMAGES FOR PLAINTIFF NICHOLAS OLVERA WAS NOT GROSSLY EXCESSIVE NOR DID IT EXCEED FAIR AND REASONABLE COMPENSATION FOR PLAINTIFF NICHOLAS OLVERA'S INJURIES AND DAMAGES SO AS TO SHOCK THE CONSCIENCE AND ESTABLISH THAT THE TRIAL COURT ABUSED ITS DISCRETION IN THAT THE MEDICAL AND OTHER EVIDENCE AT TRIAL ESTABLISHED THAT THE HORSE ACCIDENT CAUSED PLAINTIFF TO SUSTAIN A PERMANENT INJURY TO HIS BACK WHICH PREVENTED HIM FROM ENGAGING IN GAINFUL EMPLOYMENT AND PARTICIPATING IN EVERYDAY ACTIVITIES.**

EMERY V. WAL-MART STORES, INC., 976 S.W.2D 439 (MO. BANC 1998)

CALLAHAN V. CARDINAL GLENNON HOSPITAL, 863 S.W.2D 852

(MO. BANC 1993)

## II

**THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL BECAUSE THE VERDICT OF \$1,000,000 IN DAMAGES FOR PLAINTIFF NICHOLAS OLVERA WAS NOT GROSSLY EXCESSIVE AND AGAINST THE WEIGHT OF THE EVIDENCE SO AS TO ESTABLISH JURY BIAS, PASSION OR PREJUDICE IN THAT THE MEDICAL AND OTHER EVIDENCE AT TRIAL ESTABLISHED THAT THE HORSE ACCIDENT CAUSED PLAINTIFF TO SUSTAIN A PERMANENT INJURY TO HIS BACK WHICH PREVENTED HIM FROM ENGAGING IN GAINFUL EMPLOYMENT AND PARTICIPATING IN EVERYDAY ACTIVITIES.**

EMERY V. WAL-MART STORES, INC., 976 S.W.2D 439 (MO. BANC 1998)

CALLAHAN V. CARDINAL GLENNON HOSPITAL, 863 S.W.2D 852

(MO. BANC 1993)

### III

**THE TRIAL COURT DID NOT ERR IN OVERRULING DEFENDANT'S OBJECTIONS AT TRIAL TO THE ADMISSION OF DEPUTY VAN BLACK'S INCIDENT REPORT BECAUSE THE INCIDENT REPORT WAS NOT INADMISSIBLE AS HEARSAY BECAUSE SAID EXHIBIT WAS PROPERLY ADMITTED AS A BUSINESS RECORD IN THAT BATES COUNTY CHIEF DEPUTY GARY MARTIN TESTIFIED THAT HE WAS A CUSTODIAN OF THE REPORT, THAT THE REPORT WAS MADE IN THE ORDINARY COURSE OF THE BUSINESS OF THE BATES COUNTY SHERIFF'S OFFICE AND THE ENTRIES WERE MADE ON THE DAY FOLLOWING THE NIGHT OF THE INCIDENT REPORTED THEREIN AND DEFENDANT DID NOT MAKE ANY FURTHER OBJECTION TO ANY SPECIFIC PORTION OF THE REPORT ONCE IT WAS ADMITTED.**

FINKEL V. HOEL-STEFFEN CONSTR. CO., 631 S.W.2D 645

(MO. APP. E.D. 1981)

FRIESE V. MALLON, 940 S.W.2D 37 (MO. APP. E.D. 1997)

IV

**THE TRIAL COURT DID NOT ERR IN REJECTING DEFENDANT’S PROPOSED JURY INSTRUCTIONS “A” AND “B” BECAUSE (1) EVEN IF A PERSON ON HORSEBACK FITS WITHIN THE DEFINITION OF “TRAFFIC” UNDER R.S.Mo. § 300.010(38), THAT STATUTE IS PART OF THE MODEL TRAFFIC ORDINANCE WHICH MUNICIPALITIES ARE FREE TO ADOPT OR NOT, AND THERE WAS NO EVIDENCE PRESENTED THAT THE CITY OF ROCKVILLE EVER ADOPTED THE PROVISIONS OF THE MODEL TRAFFIC ORDINANCE CONTAINED IN CHAPTER 300 R.S.MO. AND (2) EVEN IF THE MODEL TRAFFIC ORDINANCE APPLIES, SECTIONS 300.375 AND 300.390 R.S.MO., WHICH DEFENDANT CLAIMS REQUIRE PLAINTIFF TO YIELD RIGHT OF WAY, APPLY ONLY TO VEHICLES, WHICH DOES NOT INCLUDE A HORSE.**

ERDMAN V. CONDAIRE, INC., 97 S.W.3D 85 (MO. APP. E.D. 2002)

LINTON V. MO. HIGHWAY & TRANSP. COMM’N., 980 S.W.2D 4

(MO. APP. E.D. 1998)

**CROSS-APPEAL**

**V**

**THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF TINA OLVERA'S  
MOTION FOR ADDITUR BECAUSE THE JURY'S ASSESSMENT OF NO  
DAMAGES ON HER CLAIM WAS THE RESULT OF AN HONEST MISTAKE IN  
THAT THE JURY AWARDED HER HUSBAND PLAINTIFF NICHOLAS OLVERA  
DAMAGES IN THE AMOUNT OF \$1,000,000.00 AND A FINDING THAT TINA  
OLVERA SUFFERED NO DAMAGES AS A RESULT OF HER HUSBAND'S  
INJURIES IS INCONSISTENT WITH THE VERDICT IN FAVOR OF HER  
HUSBAND.**

MASSMAN CONSTRUCTION CO. V. MO. HIGHWAY COMMISSION,

914 S.W.2D 801 (MO. BANC 1996)

## ARGUMENT

### Introduction

Plaintiffs do not agree with the standard of review as set forth by defendant in his brief. Plaintiffs contend that defendant waived the right to raise the issues set forth in his brief by his failure to file a timely post-trial motion in this case. Although he states in his Jurisdictional Statement that he filed a timely motion for remittitur or for new trial, which was denied (Brief of Appellant, p. 7), the record reveals otherwise as to the timeliness of that motion.

Defendant's post-trial motion was filed on December 8, 2003. (L.F. 29-78). Such a motion must, under Rule 78.04, be filed within thirty (30) days after the entry of judgment. In this case, judgment was entered on October 31, 2003, not on November 7, 2003 as defendant's Notice of Appeal indicates. (L.F. 89-97). The docket entries included by defendant in the Legal File includes the following **hand written** entry at p.117:

10/31/03      Same appearances. Defendant continues evidence and rests. No rebuttal evidence. Instruction conference held. Instructions 2 through 11 read to jury. Plaintiff makes closing argument. Defendant makes closing argument. Plaintiff makes reply argument. Bailiff sworn. Jury retires at 11:55 to deliberate and returns at 1:40 P.M. On plaintiff Nick Olvera's claim they find Fritts 80% at fault and Olvera 20% at fault. Nick Olvera's damages assessed at \$1,000,000\00. On Tina Olvera's claim they find she did not sustain damages as a result of injuries to Nick Olvera. Verdict accepted and

recorded. Jury discharged. **Judgment for Nicholas Olvera and against Kelly Fritts in the sum of \$800,000\00 plus taxable costs. William J. Roberts, C.J.** (emphasis added).

Kessinger v. Kessinger, 935 S.W.2d 347 (Mo. App. S.D. 1996) is a case that presented an almost identical situation to the instant case. In that case, the trial judge made a minute entry on May 11, 1995, that recited that judgment was entered for the defendant and the judge signed it. The plaintiff filed a motion for new trial on June 30, 1995, 49 days later. On September 15, 1995, 75 days after the motion for new trial was filed, the trial court signed a formal document styled “Judgment”. The trial court then overruled the plaintiff’s motion for new trial on September 29, 1995. On October 16, 1995, the plaintiff filed his notice of appeal. On appeal, the defendant argued that the plaintiff’s notice of appeal was untimely. As the opinion noted, if the formal document signed on September 15<sup>th</sup> constituted the judgment, then the notice of appeal would have been timely filed. If the May 11<sup>th</sup> docket entry constituted the judgment, then it would not be timely.

The Court in Kessinger held that the original docket entry of May 11<sup>th</sup> constituted the judgment and rendered the plaintiff’s appeal untimely. In reaching this conclusion, the Court noted that because the entry was “denominated” as a judgment - because it said that judgment was rendered in favor of defendant - it met the requirement of Rule 74.01(a) to constitute a judgment. The Court observed that nothing in the rule requires that the word “judgment” or “decree” appear in the heading of a document or docket entry in order to meet the “denominated” requirement. 935 S.W.2d at 349. It should be pointed out that the

Court in its opinion noted that the trial court had also announced that this was its judgment in open court at the same time. The Court of Appeals stated that the trial judge's intent as to whether or not a docket entry is intended to be the judgment is an important factor. *Id.* One way that such intent can be gleaned, according to the Court of Appeals, would be if the trial judge expressed an intention in the docket entry that it not be considered the judgment, for example if the trial judge indicated that a formal judgment would be entered subsequently or if there was a simultaneous request for a formal order, even if that request is not found in the docket entry itself. I.c. 350. In Kessinger, the Court of Appeals held that there was nothing in the record that indicated that the docket entry was not intended to be the judgment of the trial court.

It is important to note that in Kessinger, a more formal document was in fact later signed by the judge. However, the Court of Appeals did find that fact supported the plaintiff's argument that the docket entry was not intended to be the judgment. Rule 74.01(a) has been amended since the decision in Kessinger to include the following as part of the Rule: "A docket sheet entry complying with these requirements is a judgment unless the docket sheet entry indicates that the court will enter the judgment in a separate document. The separate document shall be the judgment when entered." In the present case, there is nothing in the docket entries of October 31, 2003, that indicate that a separate document should be deemed to constitute the trial court's judgment. Hence, under the plain reading of Rule 74.01(a), the docket entry of October 31st should constitute the judgment

in the case: it recites that it is a judgment and it is signed by the trial judge. Defendant failed to file any type of timely post-trial motion in this case.

Rule 78.07(a)(1) provides: “In jury tried cases, other than cases tried with an advisory jury, allegations of error to be preserved for appellate review must be included in a motion for new trial...” Court have held on a number of occasions that “[t]he failure to file a motion for new trial preserves nothing for appellate review.” Calarosa v. Stowell, 32 S.W.3d 138, 142 (Mo. App. W.D. 2000), quoting Messick v. Atchison Topeka & Santa Fe Railway Co., 924 S.W.2d 620, 621 (Mo. App. W.D. 1996). Thus, any review by this Court is limited to review for plain error under Rule 84.13(c). Such review is discretionary and is employed only upon a showing that manifest injustice or a miscarriage of justice has occurred. Ludwig v. Ludwig, 126 S.W.3d 466, 472 (Mo. App. W.D. 2004). Plain error review "should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review." Messina v. Prather, 42 S.W.3d 753, 763 (Mo. App. W.D. 2001) (quoting State v. Valentine, 646 S.W.2d 729, 731 (Mo. 1983)). The propriety of granting plain error review is fact-specific. *Id.* Unless a claim facially establishes substantial grounds for believing that a "manifest injustice or a miscarriage of justice" would result if left uncorrected, the court will decline to review for plain error. Coleman v. Gilyard, 969 S.W.2d 271, 274 (Mo. App. W.D. 1998) (quoting Brown v. Mercantile Bank of Poplar Bluff, 820 S.W.2d 327, 335 (Mo. App. S.D. 1991)).

None of the arguments set forth in defendant's brief rise to this level: hence, this Court should summarily affirm the judgment below. However plaintiffs will proceed in the following sections address the merits of defendant's arguments as if they had been properly preserved.

**I**

**THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR REMITTITUR BECAUSE THE VERDICT OF \$1,000,000 IN DAMAGES FOR PLAINTIFF NICHOLAS OLVERA WAS NOT GROSSLY EXCESSIVE NOR DID IT EXCEED FAIR AND REASONABLE COMPENSATION FOR PLAINTIFF NICHOLAS OLVERA'S INJURIES AND DAMAGES SO AS TO SHOCK THE CONSCIENCE AND ESTABLISH THAT THE TRIAL COURT ABUSED ITS DISCRETION IN THAT THE MEDICAL AND OTHER EVIDENCE AT TRIAL ESTABLISHED THAT THE HORSE ACCIDENT CAUSED PLAINTIFF TO SUSTAIN A PERMANENT INJURY TO HIS BACK WHICH PREVENTED HIM FROM ENGAGING IN GAINFUL EMPLOYMENT AND PARTICIPATING IN EVERYDAY ACTIVITIES.**

R.S.Mo. §537.068 states in part:

A court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages.

As defendant acknowledges in his brief, p. 21, the assessment of damages is primarily the function of the jury, Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439, 448 (Mo. banc 1998). A trial court is given broad discretion in ruling on a motion for remittitur and a court on review will reverse the trial court's ruling only where the verdict is so excessive that it

shocks the conscience and convinces the court on review that both the jury and the trial court abused their discretion. Id. In reviewing whether a verdict is excessive, the appellate court review is limited to the evidence supporting the verdict. Hatch v. V.P. Fair Foundation, Inc., 990 S.W.2d 126, 141 (Mo. App. E.D. 1999); Wright v. Fox-Stanley Photo Prods., Inc., 639 S.W.2d 407, 410 (Mo. App. E.D. 1982). Hence, defendant's reliance in his brief upon only that evidence which might discredit the verdict is misplaced. This Court should focus its attention on that evidence that supports the award.

There is no precise formula for determining whether a verdict is excessive. In determining whether an award is excessive, a court on review must examine a number of factors, including: (1) plaintiff's loss of income, both present and future; (2) medical expenses; (3) plaintiff's age; (4) the nature and extent of plaintiff's injuries; (5) economic considerations; (6) awards approved in similar cases; and (7) the superior ability of the jury and the trial court to evaluate the plaintiff's injuries and other damages. Emery v. Wal-Mart Stores, Inc., 976 S.W.2d at 448; Willman v. Wall, 13 S.W.3d 694, 699 (Mo. App. W.D. 2000). Examination of these factors in the instant case reveals that the jury's verdict is well within reason and that the trial court properly denied defendant's motion for remittitur.

### **Plaintiff's Loss of Income**

Plaintiff testified that he had lost \$2,539.20 in wages during the time he continued working after the accident, up until his last day of work in October, 2000. (Tr. 405-406; Exh. 26).

Plaintiff also presented the testimony of Dr. Kurt Krueger, Ph.D., an economist who performed an analysis of plaintiff's wage loss from October, 2000, forward. He performed calculations using three different approaches, which yielded wage loss estimates, reduced to present day value, of between \$485,555.00 and \$619,917.00. (Tr. 331-332; Exhs. 16, 17, 18). He averaged the estimates derived from these three approaches to yield a net estimated future wage loss calculation of \$557,000.00. (Tr. 335; Exh. 19). Defendant presented no contrary evidence. Instead, defendant argues only that there was no evidence that plaintiff was totally disabled: defendant contends that plaintiff was required to present evidence of a vocational rehabilitation expert in order to establish that plaintiff could not be gainfully employed. Defendant cites no case that supports this proposition. Numerous cases uphold findings of total disability based upon medical evidence similar to that presented in this case. See, e.g., *Emery v. Wal-Mart Stores, Inc.*, supra. Of course, if defendant believed that a vocational rehabilitation expert might have concluded that there was some type of gainful employment plaintiff could engage in - notwithstanding the fact that Dr. Ellefsen testified that he could not stand or sit for more than 15-20 minutes at a time (Ellefsen Deposition, p. 57) - defendant was free to present such evidence. But he did not.

Substantial evidence was presented that plaintiff's wage loss, past and future, resulting from the accident of August 8, 1998, was \$559,539.20.

### **Medical Expenses**

Plaintiff presented medical bills in the amount of \$21,908.27, which Dr. Ellefsen testified were reasonable and customary charges for the services provided (omitting a charge of \$83.00 for an unrelated injection to plaintiff's shoulder). (Ellefsen Deposition, pp., 61-63; Depo. Exh. 5). In addition, Dr. Ellefsen testified that plaintiff would need pain medication indefinitely. (Id., pp. 64-65).

### **Plaintiff's Age**

At the time of the injury, plaintiff was in his early 30's. (Ellefsen Deposition, pp., 20-21). Hence, he would normally have had decades of active lifetime ahead of him if not for this accident. He could have worked for an additional 30 years or more. He could have enjoyed the future with his wife and children. Instead, plaintiff has before him a lifetime of pain that can be controlled only by medication.

### **The Nature and Extent of Plaintiff's Injuries**

Plaintiff testified that his back began hurting shortly after the horse accident of August 8, 1998, and that it steadily got worse, particularly as he attempted to maintain his employment thereafter. (Tr. 400, 404-405, 419-420).

Dr. Gerald R. Hale, one of plaintiff's treating physicians, testified that tests conducted on plaintiff's back revealed extraordinary results, particularly tearing in both the anterior and posterior portion of the discs at L4-5 and L5-S1. (Hale Deposition, pp. 15, 26). Dr. Hale testified that this finding was consistent with a traumatic injury. (Id., p. 19). Dr. Hale stated that, to a reasonable degree of medical certainty, the horse accident of August 8, 1998, injured the discs in plaintiff's back to the point that they can no longer

support his back, absorb shock, or allow him to lift or bend without significant pain. (Id., pp. 35-36). Dr. Hale testified that no surgical procedure would help plaintiff because of the multiple levels of injury involved. (Id., p. 24).

Dr. Brian Ellefsen, another of plaintiff's treating physicians, testified that to a reasonable degree of medical certainty, the horse accident of August 8, 1998, resulted in plaintiff suffering permanent injuries to his back at multiple levels, particularly L-4,5 and L-5, S-1. (Ellefsen Deposition, p. 55). According to Dr. Ellefsen, plaintiff has lost all functions and abilities beyond the tasks of everyday living. (Id., pp. 56-57). Dr. Ellefsen testified that as a result of his injuries, plaintiff is unable to perform the tasks that would be required to hold a job and is therefore unemployable. (Id., pp. 57-58).

Indeed, there seems to be no dispute in this case that plaintiff Nicholas Olvera is permanently disabled. Even defendant's expert Dr. Sandow testified that there was no surgery or other treatment that would improve plaintiff's condition. (Sandow Deposition, pp. 19-20, 25-26).

### **Economic Considerations**

Court have not addressed specifically what constitutes economic considerations that the Court should consider on review. Plaintiff has already discussed his wage loss, both past and future, and his actual medical bills. But in addition, the evidence was clear that plaintiff would need medication for pain and spasms for the remainder of his life. (Ellefsen Deposition, pp. 64-65; Exh. 13). It is also clear that plaintiff will be unable in the future to do many of the tasks that healthy people normally do for themselves. It should be

anticipated that he will incur costs, at this point unknown, in order to pay others to do things he would normally do for himself.

### **Awards in Similar Cases**

Defendant's argument in this case that plaintiff's medical bills and lost wages are insufficient to support an award in the amount of \$1,000,000.00 is identical to that made by the defendant in Emery v. Wal-Mart, supra., a case with many similarities to the instant case. In Emery, the defendant argued that the trial court's verdict was excessive where the plaintiff's lost wage evidence was \$852.48 past wages, \$389,000.00 future wage loss, and his medical bills were \$7,957.93. The jury awarded \$660,000.00 (reduced by 20% for plaintiff's fault) for a total of \$528,000.00. The defendant argued, as defendant does here, that the plaintiff's medical bills were insufficient to support an award in that amount. But the Court held that this was not the only factor that should be considered: indeed, the Court approved the award by reciting other factors that are strikingly similar to those involved in this case: plaintiff was a laborer with only a high school education; he had to abandon his former means of employment; his doctor advised him to limit his physical activity, including his employment activities which would result in a reduced earning capacity; plaintiff was unable to engage in many every day activities that he was able to do prior to the injury; and the fact that plaintiff was only 36 at the time of the injury; he took painkillers for his back and future surgery might be required. 976 S.W.2d at 448. And like the instant case, the defendant's own expert in Emery conceded that the plaintiff was disabled. Id. The facts in Emery are strikingly similar to those in the instant case. The jury in that case found the

plaintiff's damages to be \$660,000.00 (for an injury that occurred in 1990) while the jury in the instant case found plaintiff's damages to be \$1,000,000.00 for an injury that occurred in 1998). In both cases, the jury reduced the plaintiff's recovery by 20%.

Emery is not a unique case. Numerous cases uphold substantial awards even without substantial medical bills. See, e.g., Lester v. Sayles, 850 S.W.2d 858, 871 (Mo. banc 1993) (award of \$1,674,000 was not excessive even though plaintiff's medical expenses were approximately \$86,000 considering the evidence indicated future surgeries and therapy, and plaintiff needed full-time care); Patrick v. Alphin, 825 S.W.2d 11, 14 (Mo. App. E.D. 1992) (finding award of \$750,000 to car driver and \$400,000 to his wife for loss of consortium was not grossly excessive as to shock the conscience considering driver's condition prohibited him from working or participating in normal family and social activities); Ruzicka v. Ryder Student Trans. Serv., 145 S.W.3d 1 (Mo. App. S.D. 2004)(affirming denial of remittitur of \$2,400,000.00 verdict where plaintiff presented \$43,732.03 in past medical bills and \$302,206.00 projected loss wages). These cases recognize that a plaintiff may be significantly impaired in his/her daily activities even though they have not expended large sums for medical care. As Emery notes, that is but one of a number of factors to be considered.

### **Superior Ability of the Jury and the Trial Court**

The range between an inadequate verdict and an excessive one is large, and the jury is allowed nearly unfettered discretion if the damages are within that range. Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 872 (Mo. Banc 1993). Competent and

substantial evidence was presented that plaintiff was disabled as a result of the horse accident. The jury's award in this case was well within the range of permissible awards.

## II

**THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL BECAUSE THE VERDICT OF \$1,000,000 IN DAMAGES FOR PLAINTIFF NICHOLAS OLVERA WAS NOT GROSSLY EXCESSIVE AND AGAINST THE WEIGHT OF THE EVIDENCE SO AS TO ESTABLISH JURY BIAS, PASSION OR PREJUDICE IN THAT THE MEDICAL AND OTHER EVIDENCE AT TRIAL ESTABLISHED THAT THE HORSE ACCIDENT CAUSED PLAINTIFF TO SUSTAIN A PERMANENT INJURY TO HIS BACK WHICH PREVENTED HIM FROM ENGAGING IN GAINFUL EMPLOYMENT AND PARTICIPATING IN EVERYDAY ACTIVITIES.**

The trial court has broad discretion in determining whether to grant a new trial and its decision will not be disturbed on appeal unless it abused its discretion. McCormack v. Capital Electric Construction Company, Inc., 35 S.W.3d 410, 413 (Mo. App. W.D. 2000). The trial court's decision will be reversed only where its ruling is clearly against the logic of the circumstances before the court, and the decision is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Id. at 414. There is no abuse of discretion where substantial evidence exists to support the verdict. Id. Such is the case here.

As plaintiffs have argued in point I hereof, there was ample evidence adduced that supports the verdict in favor of plaintiff Nicholas Olvera. Plaintiffs will not repeat those arguments herein but respectfully incorporates them herein.

### III

**THE TRIAL COURT DID NOT ERR IN OVERRULING DEFENDANT'S OBJECTIONS AT TRIAL TO THE ADMISSION OF DEPUTY VAN BLACK'S INCIDENT REPORT BECAUSE THE INCIDENT REPORT WAS NOT INADMISSIBLE AS HEARSAY BECAUSE SAID EXHIBIT WAS PROPERLY ADMITTED AS A BUSINESS RECORD IN THAT BATES COUNTY CHIEF DEPUTY GARY MARTIN TESTIFIED THAT HE WAS A CUSTODIAN OF THE REPORT, THAT THE REPORT WAS MADE IN THE ORDINARY COURSE OF THE BUSINESS OF THE BATES COUNTY SHERIFF'S OFFICE AND THE THE ENTRIES WERE MADE ON THE DAY FOLLOWING THE NIGHT OF THE INCIDENT REPORTED THEREIN AND DEFENDANT DID NOT MAKE ANY FURTHER OBJECTION TO ANY SPECIFIC PORTION OF THE REPORT ONCE IT WAS ADMITTED.**

In his brief, defendant argues that the trial court improperly admitted Plaintiff's Exhibit 1, an incident report regarding the accident between plaintiff and the horse defendant was riding. Defendant complains that evidence that the author of the report, Deputy Don Van Black observed defendant to be intoxicated should not have been admitted. As defendant acknowledges in his brief, p. 39, this Court reviews the decision of the trial court of the admission of evidence under an abuse of discretion standard. In re the Estate of Daly, et al. v. Hill Haven Corp., 907 S.W.2d 200, 204 (Mo. App. W.D. 1995). Defendant fails to show how the trial court abused its discretion in this case in any manner.

The trial court admitted Plaintiff's Exh.1 under the business records exception to the hearsay rule, as provided in §490.680 R.S.Mo. That statute provides:

**490.680. Records, competent evidence, when**

A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information method and time of preparation were such as to justify its admission.

In his brief, defendant argues that there was insufficient evidence adduced to qualify the Incident Report as a business record. He states that the sponsoring witness, Bates County Chief Deputy Sheriff Gary Martin, testified that he was not the custodian of this report. (Brief of Appellant, p. 37). That is not an accurate representation of Deputy Martin's testimony, which is set forth verbatim:

Q: And are you the custodian of this report?

A: Ah. I'm in the chain of command in the Sheriff's Department. Actually, I have access to all the reports throughout the Sheriff's Department. I wouldn't say custodian. Could be me of the Sheriff or Chris.

Q: Well, I understand as a part of your regular and customary duties to take charge and be in custody of those reports?

A: Yes.

(Tr.254-255). In fact, Deputy Martin indicated that he was the custodian of this report, or at least one of them. But note that the statute, §490.680 R.S.Mo., does not limit the sponsoring witness only to a custodian: it may also be some “other qualified witness”. Deputy Martin’s testimony established that he was a qualified witness to testify regarding the report regardless of whether he was technically the custodian of the document.

Deputy Martin testified that the report was made on the day following the horse collision incident, which had occurred approximately midnight. (Tr. 255). It was compiled in the normal course of the Bates County Sheriff’s Office business and it is part of Deputy Martin’s duties with that Office to be in charge of such reports. (Id.).

It should be noted that although the report was admitted as an exhibit, the trial court specifically stated that it was not to be passed to the jury. (Tr. 256-257). At the time of its ruling, the trial court noted that there might be additional objections to specific parts of the report. (Id.).

Defendant’s complaint is not really the report as an exhibit, but simply one passage of the report: the part in which Deputy VanBlack states that defendant appeared to be intoxicated. But defendant raised no objection to this passage or testimony concerning it. The only objection ever advanced was a hearsay objection to the report as a whole. Certainly, defendant made no objection - either as to the report as a whole or to this section of the report in particular- based on lack of foundation. Once again, defendant seeks to raise an issue which was not preserved.

When blanket objection is made to a business record, if any part of exhibit is admissible then the entire exhibit is admissible. Finkel v. Hoel-Steffen Const. Co., 631 S.W.2d 645 (Mo. App. E.D. 1981); Friese v. Mallon, 940 S.W.2d 37 (Mo. App. E.D. 1997). If a proper and legal objection is made to parts of a business record, those parts are properly excluded. Allen v. St. Louis Public Service Co., 285 S.W.2d 663 (Mo. 1956); Friese v. Mallon, supra. In this case, defendant did in fact object on the basis of hearsay to other portions of the exhibit which related what third parties had told Deputy Van Black. (Tr. 260) The trial court sustained those specific objection to portions of the report. (Tr. 260, 261). But defendant did not raise a similar timely objection to the evidence regarding Deputy Van Black's observation that defendant was intoxicated. He should not be heard to complain of it now before this Court.

Even if defendant had made a timely objection to this portion of the report, his foundation objection would not have been well-taken. Chief Deputy Martin, in connection with questioning regarding Deputy Van Black's observation, testified that he (Van Black) was a trained officer. (Tr. 269). Opinions of one trained in a profession and contained in a document otherwise admissible as a business record are properly admitted See, e.g., Smith v. Wal-Mart Stores, Inc. 967 S.W.2d 198, 205 (Mo. App. E.D. 1998). But before leaving this issue, it should be pointed out that even if Chief Deputy Martin's testimony was insufficient to provide a foundation for the admission of Deputy Van Black's observation, defendant should not be able to complain about it at this point. He did not object at trial, as

noted above. Had he done so, plaintiff could have adduced additional evidence concerning Deputy Van Black's background and qualifications if the trial court deemed it necessary.

Defendant also notes that prior to trial, he made a motion in limine to exclude the use of the Incident Report at trial, but that motion was overruled. (L.F. 14-16). The law is settled that a party may not simply rely on the denial of a motion in limine to preserve for appeal an objection to the admission of evidence: a timely objection must be made at trial. See, e.g., Lindsey Masonry Co. v. Jenkins & Associates, 897 S.W.2d 6, 17-18 (Mo. App. W.D. 1995); Brewer v. Raynor Manufacturing Co., 23 S.W.3d 915, 917 n. 3 (Mo. App. S.D. 2000).

Finally, defendant fails to demonstrate that he was prejudiced by this evidence even if it was improperly admitted, which it was not. He testified himself that he had as many as 8 beers on the evening of the accident. (Tr. 575, 582). No objection was made to this evidence either. (Id.).

#### IV

**THE TRIAL COURT DID NOT ERR IN REJECTING DEFENDANT’S PROPOSED JURY INSTRUCTIONS “A” AND “B” BECAUSE (1) EVEN IF A PERSON ON HORSEBACK FITS WITHIN THE DEFINITION OF “TRAFFIC” UNDER R.S.Mo. § 300.010(38), THAT STATUTE IS PART OF THE MODEL TRAFFIC ORDINANCE WHICH MUNICIPALITIES ARE FREE TO ADOPT OR NOT, AND THERE WAS NO EVIDENCE PRESENTED THAT THE CITY OF ROCKVILLE EVER ADOPTED THE PROVISIONS OF THE MODEL TRAFFIC ORDINANCE CONTAINED IN CHAPTER 300 R.S.MO. AND (2) EVEN IF THE MODEL TRAFFIC ORDINANCE APPLIES, SECTIONS 300.375 AND 300.390 R.S.MO., WHICH DEFENDANT CLAIMS REQUIRE PLAINTIFF TO YIELD RIGHT OF WAY, APPLY ONLY TO VEHICLES, WHICH DOES NOT INCLUDE A HORSE.**

This court’s review of a trial court’s refusal to give jury instructions is under an abuse of discretion standard. Erdman v. Condaire, Inc., 97 S.W.3d 85, 95 (Mo. App. E.D. 2002); Linton v. Mo. Highway & Transp. Comm’n, 980 S.W.2d 4, 10 (Mo. App. E.D. 1998); A court on review will not reverse a verdict due to instructional error unless the error was prejudicial. Id.

Defendant submitted two jury instructions that were rejected by the trial court. The first, Instruction “A” was defendant’s verdict director, submitting fault on the part of

plaintiff for plaintiff's failure to keep a careful lookout, and plaintiff's failure to yield.<sup>6</sup>

Instruction "B" was the definition of "yield the right of way" in the following form:

**INSTRUCTION NO. B**

The phrase "yield the right-of-way as used in these instructions means that a pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection is required to yield to all traffic upon the roadway.

Not in M.A.I. § 4-17

As counsel for defendant explained at the instruction conference, this instruction is actually a modification of Not in M.A.I. §4-17. Not in M.A.I. §4-17 provides that a pedestrian "is required to yield to all **vehicles** upon the roadway." Counsel for defendant conceded that a horse is not a vehicle as used in the instruction, so he modified it to include the word "traffic" instead, and then argued that "traffic" includes a rider on a horse. (Tr. 619-620).

There are a host of problems with this argument.

First, not surprisingly, defendant cites not a single case that has approved such an instruction in a case like, or unlike, this one.

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<sup>6</sup>The trial court allowed defendant to submit the issue of plaintiff Nicholas Olvera's failure to keep a careful lookout to the jury. (Tr. 621-622).

Second, to support his argument that substituting “traffic” for “vehicle” in the instruction was proper, defendant contends that “[t]he applicable statutes are set forth at R.S.Mo. § 300.010 et. seq.” (Brief of Appellant, p. 42). This is simply wrong. Chapter 300 R.S.Mo. is the Model Traffic Ordinance. It is not a law that applies generally throughout the state or even in all cities. As Section 300.600 R.S.Mo. states, the provisions of Chapter 300 R.S.Mo. or parts thereof may be adopted by a city by ordinance. See, e.g., City of Kansas City v. Klammer, 941 S.W.2d 531, 532 (Mo. App. W.D. 1997)(noting that Kansas City has not adopted the Model Traffic Ordinance); Hyman v. Robinson, 713 S.W.2d 300, 301-302 (Mo. App. E.D. 1986)(noting that courts may not take judicial notice of ordinances and that no evidence was presented that St. Louis had adopted Model Traffic Ordinance.). There is absolutely nothing in the record in this case that indicates that the City of Rockville ever adopted the Model Traffic Ordinance or any part thereof. Hence, defendant’s reliance on §300.010(38) R.S.Mo. to provide a definition of “traffic” that would include a horse is misplaced.

Third, defendant’s argument suffers from yet another defect. He claims that plaintiff’s duty to yield to defendant’s horse stems for the provisions of §§300.375.2 and §300.390 R.S.Mo., both of which refer to pedestrians and “vehicles”. The statute itself, §300.010(41) R.S.Mo., defines “vehicle” in such a way as to exclude animals: “any mechanical devise on wheels ...”

Fourth, defendant seeks to take advantage of the provisions of Chapter 300 R.S.Mo. that purportedly require a pedestrian to yield to a “vehicles” or “traffic”, while at the same

time ignoring any traffic laws that apply to him. For example, §300.410 R.S.Mo. provides in part that “every driver of a vehicle shall exercise the highest degree of care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary...” Defendant testified that he had no warning devices on the horse he was riding and that he did not shout any type of warning as he galloped toward plaintiff. (Tr. 547-548). Even though it was nighttime, he had no lights. He testified that he knew that there were many people around, and that the road at that point was for use by pedestrians just as much as it was for vehicles. (Tr. 595-596). He should not be able to claim that his horse is entitled to be considered a “vehicle” or “traffic” for one purpose, but not another.

Defendant has failed to demonstrate that its proffered instructions were proper under the law. He was, as he concedes, allowed to submit a separate instruction on plaintiff’s failure to keep a careful lookout. (Brief of Appellant, p. 41). The jury attributed fault to plaintiff based upon that instruction and reduced the judgment amount by 20%. Defendant was not prejudiced at all by the trial court’s refusal to give the jury this novel instruction.

## CROSS-APPEAL

### V

**THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF TINA OLVERA'S MOTION FOR ADDITUR BECAUSE THE JURY'S ASSESSMENT OF NO DAMAGES ON HER CLAIM WAS THE RESULT OF AN HONEST MISTAKE IN THAT THE JURY AWARDED HER HUSBAND PLAINTIFF NICHOLAS OLVERA DAMAGES IN THE AMOUNT OF \$1,000,000.00 AND A FINDING THAT TINA OLVERA SUFFERED NO DAMAGES AS A RESULT OF HER HUSBAND'S INJURIES IS INCONSISTENT WITH THE VERDICT IN FAVOR OF HER HUSBAND.**

In its verdict below, the jury found in favor of plaintiff Nicholas Olvera and found that he had sustained damages in the amount of \$1,000,000.00, yet they found that his wife, plaintiff Tina Olvera suffered no damages. (L.F. 18). Tina Olvera then filed a motion for additur. (L.F. 24-25). She did not file a motion for new trial.

In Massman Construction Co. v. Mo. Highway Commission, 914 S.W.2d 801, 803 (Mo. banc 1996) the Supreme Court stated:

A new trial is one potential outcome of the motion for additur. Nonetheless, a motion for additur significantly differs from an ordinary motion for new trial in terms of issues covered and in terms of the potential outcome. The purpose of additur, like remittitur, is not to correct juror bias and prejudice, but to correct a jury's honest mistake in fixing damages. Skadal v. Brown, 351

S.W.2d 684, 689 (Mo.1961); Knox v. Simmons, 838 S.W.2d 21, 23 (Mo. App.1992). By contrast, an ordinary motion for a new trial deals with all prejudicial errors occurring during trial, including damages to the extent a verdict is the product of juror bias and prejudice, and is remedied by the grant of a new trial. Deaner v. Bi-State Dev. Agency, 484 S.W.2d 232, 233 (Mo.1972); Day v. Union Pacific R.R. Co., 276 S.W.2d 212, 216 (Mo.1955).

Here, plaintiff Tina Olvera did not request the trial court to grant her a new trial because her contention was that the jury made an honest mistake in fixing damages and that additur is the proper device for the trial court to correct that error. She does not claim that there was juror bias or prejudice, but merely a honest mistake concerning the nature of the consortium claim. Perhaps they felt that since she presented no quantifiable damages - as her husband did in the form of lost wages, loss of future earnings, and medical bills - that she therefore was not damaged. But such a finding would be contrary to the nature of a consortium claim: to compensate a spouse for the loss of services, society, companionship, assistance with housework, care, affection and conjugal rights that would normally be available. Novak v. Kansas City Transit, Inc., 365 S.W. 2d 539 (Mo. 1963).

Here, Tina Olvera testified that prior to her husband's injury, the couple shared the household duties equally. (Tr. 534). After the accident, her husband was gradually able to do less and less, requiring that she do more and more. (Tr. 535). She testified that they used to do everything together, but now when he is hurting, he becomes irritable and she finds it best to leave him alone. (Tr. 534, 540). When she was hospitalized and later

convalescing after their second child was born, her husband was unable to help her or to take care of their newborn, so she had to rely on her mother for assistance instead. (Tr. 531-533). These examples show that Tina Olvera did in fact suffer real damages as a result of her husband's injuries, but the jury simply failed to recognize it.

In ruling on her motion for additur, the trial court agreed that Tina Olvera had sustained damages, but expressed the view that he was not authorized to grant additur under the statute when the jury had assessed damages at -0-, instead of some greater "amount." (Supp. L.F. 10-11). Hence, it is not clear that an abuse of discretion standard is appropriate with respect to this issue: the trial court indicated it would have exercised his discretion to award her damages, it just ruled as a matter of law that it was not authorized to do so. The Court in Massman held that additur is proper to correct a jury's error in fixing damages. 914 S.W.2d at 803.

Although a few cases have held that it is permissible for a jury to award no damages to the spouse of an injured party who recovers, e.g., Kline v. Casagrande, 50 S.W.3d 357 (Mo. App. E.D. 2001); Lenhard v. Davis, 841 S.W.2d 296, 297 (Mo. App. E.D. 1992), other cases have held that this situation creates inconsistent verdicts. Johnson v. Hyster Co., 777 S.W.2d 281, 285, n. 7 (Mo. App. W.D. 1989); Finninger v. Johnson, 692 S.W.2d 390, 395 (Mo. App. E.D. 1985). In such cases, where the verdict in favor of the injured party is upheld, husband, the verdict against the spouse on the consortium claim must be reversed for a new trial on damages only. Massey v. Rusche, 594 S.W.2d 334, 338-339 (Mo. App. W.D. 1981); Kaelin v. Nuelle, 537 S.W.2d 226, 237 (Mo. App. E.D. 1976). Here, the

verdicts are plainly inconsistent. The trial court expressly noted that this was the case. This Court should hold that additur may be used to correct the jury's mistake in such a case and reverse the judgment on Tina Olvera's claim. **CONCLUSION**

Plaintiff Nicholas Olvera requests that the judgment entered below in his favor and against defendant Kelly Fritts be affirmed. Plaintiff Tina Olvera requests that the judgment rendered in favor of defendant and against her be reversed and remanded to the trial court to grant her motion for additur.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of the Substitute Brief of Respondent Nicholas Olvera along with a diskette of same, scanned for virus and found to be virus-free, were mailed this \_\_\_ day of May, 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 brief complies with the limitations contained in Rule 84.06(b). This brief contains 13948 words counted using Corel WordPerfect 8.0. Counsel also certifies that the attached floppy disk containing this brief has been scanned viruses and is virus-free.

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