

**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 RESPONDENT/CROSS-APPELLANT TINA OLVERA**

---

**STEPHEN K. NORDYKE #30661  
15 West Dakota  
Butler, Missouri 64730  
(660) 679-3161  
(660) 679-3162 fax**

**JAMES K. JOURNEY #25650  
119 West Franklin  
Clinton, Missouri 64735  
(660) 885-6128  
(660) 885-6120 fax**

**Attorneys for Respondent Nicholas Olvera  
and Respondent Cross-Appellant Tina  
Olvera**

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....	1
TABLE OF AUTHORITIES .....	2
ARGUMENT .....	3
CONCLUSION .....	5
CERTIFICATE OF SERVICE .....	6
CERTIFICATION .....	6

## TABLE OF AUTHORITIES

### Cases

<u>Kline v. Casagrande</u> , 50 S.W.3d 357 (Mo. App. E.D. 2001) .....	4
<u>Lear v. Norfolk and Western Railway Co.</u> , 815 S.W.2d 12 (Mo. App. W.D. 1991) ...	4
<u>Lenahrd v. Davis</u> , 841 S.W.2d 296 (Mo. App. E.D. 1992) .....	4

## **ARGUMENT**

### **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.**

The standard of review of a decision to grant or deny additur is generally the same as that for the decision to grant or deny remittitur: an abuse of discretion standard, as appellant notes in his brief responding to respondent-cross appellant Tina Olvera's cross appeal. Reply Brief of Appellant, p. 23. However, as cross-appellant noted in her initial brief, it is not clear that this is the proper standard to apply in this case because the trial judge indicated that he would have, if he believed he could do so under the law, granted her motion for additur. Thus, it appears that the trial court's decision was based purely upon a misapprehension as to the law, not on the basis of the trial court's discretion. Hence, the standard of review on this issue should be de novo since it presents only a

question of law: can a trial court grant additur when the jury awards a party no damages as opposed to some positive amount?

The cases that appellant relies on for the proposition that a jury can award a spouse no damages even where the jury finds in favor of the injured spouse are inapposite for two reasons. First, as noted above, the trial court in its discretion determined that the jury's finding of no damages in this case was erroneous. Second, none of the cases that appellant relies on involves a permanent injury to a spouse like that involved in this case. In Kline v. Casagrande, 50 S.W.3d 357 (Mo. App. E.D. 2001), the jury awarded the injured spouse \$12,000.00 and nothing to the appellant spouse. In Lenahrd v. Davis, 841 S.W.2d 296 (Mo. App. E.D. 1992), the jury found the husband's damages to be \$5,000.00, which was reduced by 10% for his comparative fault, for a net verdict of \$4,500.00. In Lear v. Norfolk and Western Railway Co., 815 S.W.2d 12 (Mo. App. W.D. 1991), the jury found the injured spouse's damages to be \$80,000.00, which was reduced by 70% (to \$24,000.00) for comparative fault. None of these cases in which the Courts of Appeals found that it was appropriate for the jury to find that the spouse suffered no damages involve the type of permanent, life-altering injury that plaintiff Nicholas Olvera suffered in this case. Tina Olvera testified regarding the chores that her husband can no longer perform and that she must do instead. She testified to the stress his injuries have placed on her home life and how she has had to change her long range plans for the family. It is simply inconsistent for the jury to have found that Nicholas Olvera suffered a

permanent injury that resulted in damages of \$1,000,000.00 (reduced by 20%) while his wife Tina Olvera suffered absolutely no damages as a result of that catastrophic injury. The trial court did not believe that she suffered no damages, and would have awarded her damages if the court had been convinced it had the authority to do so. This Court should hold that the trial court had such authority and that additur may be used to correct the jury's mistake in failing to award damages on Tina Olvera's claim.

### **CONCLUSION**

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,

---

STEPHEN K. NORDYKE #30661  
15 West Dakota  
Butler, Missouri 64730  
(660) 679-3161  
(660) 679-3162 fax

JAMES K. JOURNEY #25650  
119 West Franklin  
Clinton, Missouri 64735  
(660) 885-6128  
(660) 885-6120 fax

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of the Brief of Respondent Nicholas Olvera along with a diskette of same, scanned for virus and found to be virus-free, were mailed this 15<sup>th</sup> day of June, 2005 to:

Ryan E. Karaim  
Commerce Tower - 21<sup>st</sup> Floor  
911 Main Street  
Kansas City, MO 64105

---

Counsel for Respondent/Cross-Appellant  
Tina Olvera

**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 1,222 words counted using Microsoft Word 2000. Counsel also certifies that the attached floppy disk containing this brief has been scanned for viruses and is virus-free.

---

Stephen K. Nordyke #30661