STATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion in failing to find that the jury's finding of $4,900.00 in total damages was inadequate as a matter of law in light of proven and undisputed medical expenses of $21,558.98 as well as general damages?

2. Did the trial court abuse its discretion in failing to order additur and or grant a new trial given the undisputed evidence of medical expenses of $21,558.98 and of general damages in light of the jury's finding of $4,900.00 in total damages?

STATEMENT OF THE CASE

The present case involved a premises liability claim that arose when Plaintiff/Appellant, Robert Hicks ("Robert") tripped over a roll of construction wire left in the parking lot of a tavern owned by his brother, Defendant Arthur Hicks, Jr., ("Arthur"), on September 16, 1999. On October 6, 2003, this personal injury case was tried before a jury in the Delaware Circuit Court #1, Hon. Marianne Vorhees, presiding. Liability was vigorously contested by means of evidence, argument, and instructions given. Damages were not disputed, as Robert's injuries were all related to facial and sinus fractures suffered in the fall in Arthur's parking lot.

At trial, counsel agreed that the medical expenses incurred by Robert as a result of his fall at the 8th Street Crossing were $21,558.98, and these expenses were entered into evidence, without objection, as Exhibits 18 and 18A. (App 51-75). After the trial was completed, the jury returned a verdict finding Robert's total damages to be $4,900.00, distributed the fault at 50% each for Robert and Arthur, and calculated Robert's damage award at $2,450.00. (App 9). The trial court entered judgment on this verdict on October 8, 2003. (App 10-11).

On October 14, 2003, Robert timely filed a Motion to Correct Errors and Request for a New Trial or, In the Alternative, for Additur, and a supporting Memorandum of Law. (App 12-

27). The motion did not challenge the jury's 50-50 allocation of fault. Instead, it asked that the trial court correct the jury's error in finding total damages of just $4,900.00, when the proven, admitted, and undisputed medical expenses were $21,558.98. That motion argued that, because liability was contested at trial, a new trial on damages alone would be improper. It also argued that additur alone would be improper because merely granting additur to the amount of medical expenses would still exclude any award for pain and suffering, disfigurement, and loss of time–which were proven and uncontested at trial. Thus, although the motion sought, in the alternative, either additur, a new trial on damages, or a new trial, the crux of the motion was that an entire new trial was the only proper remedy. Arthur filed a response to the motion (App 28-31), to which Robert filed a reply (App 32-37).

Since the Motion was hand filed on October 14, 2003 (App at 12), and the trial court had not ruled on it by November 28, 2003 (App at 6), the motion was deemed denied. Ind. Trial Rule 53.3(A). On December 2, 2003, the trial court issued the following Order:

> Comes now the Court, having reviewed the Motion to Correct Errors and Request for a New Trial or, in the Alternative, for Additur, filed by Plaintiff, Robert Hicks, and being duly advised, now denies the same. The Court notes in the transcript, page 45, Plaintiff testified that Exhibit 18 contained $1,900.00 in unpaid medical bills and that those were the bills for which he was seeking damages. Plaintiff then testified his total medical expenses were $21,558.98, without explaining the difference in the two figures and exactly what he was seeking. Therefore, the jury had evidence upon which to base its $4,900.00 total verdict.
>
> SO ORDERED this 2nd day of December, 2003.
>
> /s/ Marianne L. Vorhees
> Marianne Lafferty Vorhees, Judge
> Delaware Circuit Court No. 1

(App at 8).

On December 23, 2003, Robert filed his Notice of Appeal from the Trial Court with both the trial court and court of appeals clerks. (App at 38-39). This filing was timely with regard to both the assumed denial date of November 28, 2003, and with regard to the trial court's subsequently entered order denying the motion. Ind. App. R. 9(A)(1). The Clerk of the Delaware County Circuit Court timely issued and filed her Notice of Completion of the Clerk's Record on January 16, 2004. Robert filed his Appellant's Case Summary with the Clerk of the Court of Appeals on January 21, 2004. The reporter from Delaware Circuit Court # 1 timely filed her Verified Motion for Extension of Time to File Transcript on March 12, 2004, and this Court granted that motion, giving her until April 20, 2004, to complete the transcript. The reporter filed her Notice of Completion of Transcript on April 20, 2004.

Plaintiff/Appellant Robert appeals from the denial of his Motion to Correct Errors and Request for a New Trial or, In the Alternative, for Additur.

STATEMENT OF THE FACTS

Arthur owned a tavern located in Muncie, Indiana. (App at 133, 13-18).[1] On September 16, 1999, that tavern was open for business (App 85, 4-6; 136, 25 to 137, 3; App 163, 8) as well as undergoing construction to enlarge the tavern (App 83, 20 to 24, 1; 134, 1-8; 135, 18-24). Arthur's brother, Robert (App 82, 11-14), was at the tavern as a patron. (App 86, 5-12). Robert left the tavern to retrieve something from his truck in the parking lot (App 87, 15-21; 90, 2-4) and had a conversation with acquaintance Mark Perry (App 89, 2-9). When Robert turned to walk to his truck, he took one step, stepped on a roll of concrete reinforcing wire that had been

[1] Citations to Appellant's Appendix shall be to "App ###, ###-##." The numbers before the comma are the page numbers and after the comma are the line numbers.

left in the parking lot (App 40; 99, 15 to 100, 19) and fell to the ground. (App 88, 2-4; 90, 5-12). Robert could not see the wire due to darkness. (App 91, 22-24; 92, 16-18; 161, 8-10).

As a result of striking his foot on the roll of wire, Robert fell face first to the ground, striking his forehead on the pavement without an opportunity to break his fall. (App 162, 16-21; 90, 13-15). The blow to his head was severe enough that it nearly knocked him out. (App 92, 23 to 93, 3). Robert was eventually taken to the emergency room (App 93, 19 to 94, 4) with a dent in his forehead large enough to insert a thumb and blood gushing from his face. (App 139, 21 to 140, 4). Robert was in a great deal of pain. (App 139, 23 to 140, 2). His pain was so severe that it caused Robert to become nauseous and vomit. (App 96, 11-14). He also suffered severe bruising on his arms. (Exhibits 9A, 10A; App 97, 3 to 98, 2-14).

After his emergency room treatment, Robert was referred to Muncie otolaryngologist Thomas Whiteman. (App 95, 12-25). Robert went home, where he continued to be in a great deal of pain. (App 140, 9-12). The next day, his pain and nausea caused him to return to the emergency room before seeing Dr. Whiteman. (App 140, 18-24). The next day he continued to be in severe pain. (App 141, 7-11).

Dr. Whiteman performed surgery to reconstruct Robert's numerous facial and sinus fractures. (App 96, 1-7). The surgery involved the placement of two plates and eleven screws (App 96). Not surprisingly, Robert remained in a great deal of pain after surgery. (App 105, 17 to 107, 7). As a result, Robert was unable to function normally for some weeks and had to be cared for by his girlfriend. (App 111, 22 to 112, 7; 143, 4-23). His pain and suffering and lost time related to that pain were substantial. (App 141, 12-21; 142, 3-6).

The injury and surgery left Robert with a scar running across most of his forehead. App 102, 10 to 103, 17; 41; 103, 18 to 104, 7; 42; 104, 12-20). Both the fractures and the recovery from the subsequent surgery caused Robert substantial pain.

Robert's medical expenses, totaling $21,558.98, were submitted via copies of the actual bills (App 51-74) and a summary of those bills (App 75). The bills (App 51-75), and the medical records that accompanied them (App 43-50), were offered into evidence by Robert's counsel without objection by Arthur's counsel. (App 101, 22 to 102, 2; 108, 20 to 110, 19). The medical records were stipulated to. (App 107, 21 to 108, 2). Arthur's counsel made no attempt to argue against, dispute, or impeach a witness with regard to any of the medical expenses, injuries, or medical treatment. His counsel did not challenge Robert's injuries or medical expenses via argument, cross-examination of witnesses, or the introduction of his own medical testimony. Arthur's counsel's opening statement contained no challenge to damages or medical expenses or any question as to Robert's injuries. (App 77, 20 to 81, 7).

In his cross examination of Robert, Arthur's counsel did not make any attempt to impeach Robert or otherwise challenge his injury or medical expense claims. (App 112, 22 to 130, 9). This cross examination was all about liability issues. The only question related to damages only confirmed Robert's earlier testimony that $1,900.00 of his medical bills remained unpaid. App 114, 23 to 115, 1). Similarly, the re-cross was entirely related to liability issues, without a suggestion of dispute concerning Robert's injuries or expenses. (App 131, 25 to 132, 25).

Although Sandra Davis answered several questions concerning Robert's injuries, symptoms, and recovery, Arthur's counsel did not cross examine her. (App 144, 25 to 145, 2).

In closing argument, Arthur's counsel discussed only liability issues, without any mention of damages–either general or special. (App 146, 11 to 154, 25).

The jury found Arthur and Robert each 50% at fault, found Robert's total damages to be $4,900.00, and calculated the verdict at $2,450.00 (App 146, 13 to 158, 2).[2]

SUMMARY OF THE ARGUMENT

The jury's award of $4,900.00 in total damages was outside the evidence presented at trial because Robert's medical expenses of $21,558.98 were properly proven and admitted into evidence. In addition, his general damages, including pain and suffering and loss of time were proven by evidence and undisputed.

Under Indiana law, a jury that awards a plaintiff total damages in an amount less than the plaintiff's undisputed medical expenses has erred by making a finding outside of the evidence at trial. Such a finding is proof that the jury has engaged in speculation, considered improper matters, or been motivated by prejudice, passion or bias. Therefore, the verdict in this case should have been reversed for its failure to include all of the undisputed medical expenses as well as some reasonable award for general damages. The trial court, therefore, abused its discretion in failing to order a new trial and reversal is required.

ARGUMENT

STANDARD OF REVIEW

Juries are afforded great latitude in making damage award determinations. *Precision Screen Machines, Inc. v. Hixson*, 711 N.E.2d 68, 70 (Ind. Ct. App. 1999). Therefore, jury awards

[2] Since Arthur's insurer advanced Robert $5,000.00 in medical expenses, counsel agreed the Court would credit that against a verdict, resulting in a $0 judgment. (App 158, 20 to 159, 9).

are upheld ***if*** they fall within the bounds of the evidence, *Ritter v. Stanton*, 745 N.E.2d 828, 845 (Ind. Ct. App. 2001), and the trial court may only reverse a jury verdict "when it is apparent from a review of the evidence that the amount of damages awarded by the jury is so small . . . as to clearly indicate that the jury was motivated by prejudice, passion, partiality, corruption or that it considered an improper element." *Dee v. Becker*, 636 N.E.2d 176, 177 (Ind. Ct. App. 1994). A jury's damage award is valid only if it is within the scope of the evidence presented to the jury. *Carbone*, 629 N.E.2d at 1261. When a jury has awarded damages of less than the uncontradicted medical expenses, Indiana law defines such awards as erroneous and inadequate.

Trial courts have wide discretion to correct jury error. *Dughaish v. Cobb*, 729 N.E.2d 159, 167 (Ind. Ct. App. 2000), *trans. denied*. Trial courts, in ruling on motions to correct such jury error "must only consider the evidence and reasonable inferences favorable to the non-moving party," *Carbone v. Schwarte*, 629 N.E.2d 1259, 1261 (Ind. Ct. App. 1994), and may not "weigh conflicting evidence or judge the credibility of witnesses." *Russell v. Neumann-Steadman*, 759 N.E.2d 234, 237 (Ind. Ct. App. 2001) (citing *Carbone*, 629 N.E.2d at 1261).

A motion to correct errors based upon a jury award that is inadequate is governed by Indiana Trial Rule 59(J)(5), which provides:

> The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including . . . (5) In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of proper damages, grant a new trial, or grant a new trial subject to additur or remittitur.

Ind. Trial Rule 59(J)(5). When this Court is asked to review a trial court's entry of final judgment on damages, it "will reverse this decision only for an abuse of discretion." *City of Carmel v. Leeper Electric*, 805 N.E.2d 389, 392 (Ind. Ct. App. 2004) (citing *Dughaish*, 729

N.E.2d at 167). "An abuse of discretion will be found when the trial court's action is against the logic and effect of the facts and circumstances before it and the inferences which may be drawn therefrom." *Id*. (citations omitted). Additionally, an abuse of discretion occurs "where a trial court's decision is without reason or is based upon impermissible reasons or considerations." *Id.* (citing *Dughaish,* 729 N.E.2d at 167).

In determining whether the trial court properly entered final judgment on the evidence, this Court employs the same standard of review as the trial court. *Russell v. Neumann-Steadman*, 759 N.E.2d. 234, 237 (Ind. Ct. App. 2001); *Carbone v. Schwarte*, 629 N.E.2d 1259, 1261 (Ind. Ct. App. 1994). This Court may only consider the evidence and reasonable inferences favorable to the non-moving party, *Russell*, 759 N.E.2d at 237, and may not weigh conflicting evidence or judge the credibility of witnesses. *Id*.

Despite this severe standard of review on appeals alleging inadequate damages, Indiana case law has long been that a jury's finding of special damages that is less than the admitted and uncontroverted special damages is not "within the bounds of the evidence" presented, *Ritter*, 745 N.E.2d at 845, and must be characterized as "so small . . . as to clearly indicate that the jury was motivated by prejudice, passion, partiality, corruption or . . . considered an improper element." *Dee*, 636 N.E.2d at 177. As the cases cited below will clarify, the trial court in such a case abuses its discretion in not correcting error.

I. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT FINDING THE FINDING OF $4,900 IN TOTAL DAMAGES OUTSIDE OF THE EVIDENCE.

In this case, Plaintiff submitted, without objection or contrary argument or evidence, proof of multiple facial and sinus fractures that required reconstruction with plating and screws

and led to medical expenses of $21,558.98. All of these injuries developed when Robert fell on his face in Arthur's parking lot. The jury's failure to award find that Robert's damages included all of these medical expenses was inconsistent with Indiana law.

> When the trier of fact has found in favor of the plaintiff on the issue of liability, and the evidence relating to injury is uncontroverted and establishes a substantial injury, proximately caused by the defendant's negligence, an assessment of damages inconsistent with the uncontroverted evidence is improper and ***will be reversed***.

McNall v. Farmers Ins. Group, 392 N.E.2d 520, 525 (Ind. Ct. App. 1979) (emphasis added).

A. A Jury's Award for Less Than Uncontradicted Medical Expenses is Erroneous as a Matter of Law.

As noted above, Indiana cases have long held to the principle that an award of damages that is for less than the undisputed special damages and/or medical expenses is outside the bounds of the evidence and, therefore, erroneous as a matter of law. A survey of several such cases will clarify this principle of law and its controlling effect on the present case.

1. *Russell v. Neumann-Steadman*. Numerous Indiana cases have held that a jury's finding of total damages is erroneous when that finding is for less than the undisputed medical expenses incurred by the injured plaintiff. In *Russell v. Neumann-Steadman*, 759 N.E.2d 234, 237 (Ind. Ct. App. 2001), the plaintiff was injured in a rear-end automobile accident. During the jury trial, the plaintiff submitted undisputed and uncontradicted medical expenses of $2,100.00. At the conclusion of the trial, the jury entered a verdict in favor of the plaintiff, but awarded zero damages. The trial judge granted plaintiff's Motion to Correct Error and awarded damages in the amount of $6,300.00 pursuant to Ind. T.R. 59(J)(5).

This Court affirmed the trial court's additur, agreeing that the damages award was erroneous, because of the "undisputed evidence of medical expenses for which the jury awarded no damages. Under these facts and circumstances, the jury's award was inadequate." *Russell*, 759 N.E.2d at 238 (citing *Manzo v. Estep*, 689 N.E.2d 474, 476-77 (Ind. Ct. App. 1997)).This is the same fact pattern found in the present case.

The court's reasoning was simple. Indiana "subscribes to the general principle of tort law ***that all damages directly attributable to the wrong done are recoverable***," and, in a personal injury case, that includes "***the reasonable cost of necessary medical expenses***." *Russell*, 759 N.E.2d at 237 (emphasis added) (citing *Dee,* 636 N.E.2d at 178).

2. *Manzo v. Estep*. *Russell* was not the first case to follow this principle. The jury in *Manzo v. Estep,* 689 N.E.2d 474, 475 (Ind. Ct. App. 1997), returned a verdict in favor of the plaintiff who suffered injuries after being rear-ended by the defendant, but also awarded zero damages. The plaintiff filed a motion to correct errors based upon the inadequate verdict, which the trial court denied.

When the plaintiff appealed the denial of the motion to correct errors, *Id*., this Court reversed and remanded for a new trial on damages,[3] holding that "***the award of zero damages was inadequate because [it] failed to compensate the plaintiff for actual, undisputed medical expenses directly attributable to the accident***." 689 N.E.2d at 476-77 (emphasis added).

Crucially, the jury's award was not erroneous because it was for zero dollars, but because it was for less than the undisputed medical expenses. The court noted that, although some of the medical expenses were disputed, it was an abuse of the trial court's discretion not to award at

[3] The new trial was limited to damages because liability had been stipulated. *Id*. at 477.

least the undisputed expenses. *Id*. at 476. Again, this is identical to the fact pattern in the present case. Thus, *Manzo* also supports the principle that, in a personal injury case involving undisputed medical expenses, a jury award must be corrected if it does not include, at a minimum, the undisputed medical expenses incurred.

3. *Sherman v. Kluba*. Decided after *Manzo* but before *Russell* was *Sherman v. Kluba*, 734 N.E.2d 701 (Ind. Ct. App. 2000), *trans. denied*. Far from the zero damage awards in those cases, the *Sherman* jury awarded damages of $555,542.00, although there was undisputed evidence of medical expenses of $672,331.55. *Id*. at 703. The trial court agreed the damages were inadequate as a matter of law, and this Court affirmed the trial court's grant of a new trial on the grounds that the damage award was for less than the undisputed medical expenses incurred by the plaintiff, concluding, "Because the jury's damage award . . . was well ***short of the undisputed medical expense evidence***, we must agree with the trial court that the jury's award was influenced by some improper element." *Id*. at 704 (emphasis added).

Again, *Sherman*'s facts are identical to those in the present case. Despite an award of over half a million dollars, the fact that the award was for ***less than the undisputed medical expenses*** made it inadequate and outside the bounds of the evidence.

4. *Owens v. Schoenberger*. Shortly before *Manzo*, this Court decided *Owens v. Schoenberger*, 681 N.E.2d 760 (Ind. Ct. App. 1997), a defamation action in which the jury returned a verdict for the plaintiff but awarded zero compensatory damages and $2,700.00 in punitive damages. *Id*. at 763. The plaintiff filed a motion to correct error arguing that the jury verdict was inadequate, which the trial court granted, awarding the plaintiff $5,400.00 in compensatory damages for emotional suffering, loss of community status, and humiliation. *Id*. at

763, 767. This Court affirmed the additur on the basis that the jury's award was not within the bounds of the evidence. *Id.* at 767.

5. *Mullins v. Qualkenbush*. Since *Russell*, this Court has decided at least two cases holding that a jury's finding of damages less than the plaintiff's undisputed medical expenses requires correction. The first of these, *Mullins v. Qualkenbush*, 777 N.E.2d 1177 (Ind. Ct. App. 2002), was factually identical to the cases above and to the present case. The *Mullins* plaintiffs were injured in a motor vehicle collision. At trial, the plaintiffs presented evidence that they had incurred $16,511.49 in special damages. Although the jury found Mullins 100% liable, it awarded only $5,000 in damages, $11,511.49 less than the plaintiffs' special damages.

The trial court in *Mullins* granted a new trial limited to the issue of damages. *Id*. at 1179. The Court of Appeals agreed that the damage award was outside the bounds of the evidence, thus necessitating a new trial on damages. *Id.* at 1180. For reasons that also control the present case, *infra* at II(B), this Court in *Mullins* ordered a new trial on both liability and damages.

6. *Childress v. Buckler*. This Court's most recent pronouncement in a personal injury case factually identical to the present case is *Childress v. Buckler*, 779 N.E.2d 546 (Ind. Ct. App. 2002). The plaintiff in *Childress* was injured in a motor vehicle collision, suffering injuries that caused him to incur total medical expenses of $2,649.00 and to lose wages of $1,500.00. Evidence of the medical expenses and wage loss was admitted at trial, *Id*. at 551, and neither disputed nor countered. *Id*. at 549, 551. Liability was decided against the defendant in a judgment on the evidence. *Id*. at 549. The jury then returned a verdict for $1,639.00--$2,510.00 less than the undisputed special damages. *Id*.

The trial court granted the plaintiff's motion for additur to the amount of undisputed special damages. *Id*. at 550. This Court affirmed, noting:

> ***Because all damages directly attributable to the wrong are recoverable by the victim, including reasonable costs of necessary medical expenses, the jury's award of $1,639.00 to Buckler was substantially inadequate***. Under these facts and circumstances, the trial court did not abuse its discretion when it granted Buckler's Motion to Correct Error and replaced the jury's inadequate award with one that fell within the bounds of uncontested evidence.

Id. at 552 (emphasis added).

7. *Burris v. Riester*. Several years before the prior cases, this Court decided *Burris v. Riester*, 506 N.E.2d 484 (Ind. Ct. App. 1987), *reh'g den*. The plaintiff in *Burris* was a passenger injured in a motor vehicle accident who brought suit against the driver of the other vehicle. The jury found for the plaintiff but awarded damages of just $800.00 despite plaintiff having suffered facial scarring, bruises, and pain and suffering and incurring undisputed medical expenses of $1,040.49 and lost wages of $209.00. *Id*. at 484. The *Burris* court began its analysis with the principle that "a victims's undisputed medical expenses are compensable." *Id*. at 484-85 (citing *Cox v. Winklepleck*, 149 Ind. App. 319, 271 N.E.2d 737 (1971) and *Wagner v. Riley*, 499 N.E.2d 1155 (Ind. Ct. App. 1986)).

Since the damage award was for less than the undisputed medical expenses, *Burris* held that "the damage award did not fully compensate Burris for even the actual, undisputed medical expenses which she incurred as a result of the injury." *Id*. at 485. The *Burris* court then noted that the jury's failure to award the plaintiff her undisputed medical expenses could only have resulted from improper speculation. "We think for a jury to disregard her expenses for her vision

problems, chiropractor, and orthopedic consultation would indicate the jury would have had to rely on speculation." *Id*. at 486.

Put succinctly, *Burris* held that the jury's award of damages was inadequate "because [it] failed to compensate Burris for actual undisputed medical expenses and for undisputed lost wages." *Id*. In addition, *Burris* noted that the jury's award failure to compensate Burris for her scarring and pain and suffering as additional reasons that the verdict was inadequate. *Id*. at 486, note 7. The *Burris* panel ordered a new trial. *Id.* at 487.

8. *Neher v. Hobbs*. Our state Supreme Court has also found that awards of damages that do not include undisputed medical expenses are inadequate and require correction in the form of a new trial. In *Neher v. Hobbs*, 760 N.E.2d 602 (Ind. 2002), the jury found for the plaintiff on liability but awarded zero damages. *Id*. at 604. The trial court granted a motion to correct errors and ordered a new trial. *Id*. Although this Court reversed the trial court, the Supreme Court reversed this Court and remanded for a new trial.

9. *City of Carmel v. Leeper Electric*. This case arose when the City of Carmel brought an eminent domain action resulting in a jury verdict of $675,000.00 for the landowner. The landowner's motion to correct error was granted and the trial court ordered additur to the amount of $1,120,000.00. The City appealed, arguing that additur was an abuse of the trial court's discretion. *City of Carmel v. Leeper Electric*, 805 N.E.2d 309 (Ind. Ct. App. 2004).

The evidence at trial consisted of several valuation experts, all of whom testified that the value of the land was between $1.12 and $1.7 million. This court affirmed the trial court's grant of additur, finding the jury's award was outside the bounds of the evidence.

Russell, *Manzo, Sherman, Owens*, *Mullins, Childress*, *Burris*, *Neher*, and *Leeper Electric*–are controlling authority in the present case. All stand for the proposition that a jury's failure to award at least the undisputed special damages is outside the bounds of the evidence. As we will see below, under this controlling authority, the trial court abused its discretion in failing to correct the jury's finding of $4,900.00 in total damages for Robert, given undisputed medical expenses of $21,558.98 and of general damages.

B. The Jury's Award Proves Jurors Engaged in Some Improper Consideration(s) or Speculation.

An award of damages for less than the undisputed medical specials is evidence that the jury "was motivated by prejudice, . . . partiality, . . . or that it considered an improper element." *Dee*, 636 N.E.2d at 177. *See McNall*, 392 N.E.2d at 526, *Sherman,* 734 N.E.2d at 704.

In fact, Arthur's counsel invited the jury to consider at least one improper element in its deliberations. Counsel opened his case with this invitation, noting in the opening seconds of his opening statement, "One thing you do know is that Robert Hicks is Junior Hicks' brother. They're brothers." (App 77, 23-24). This invitation was repeated in the opening words of defense counsel's closing argument, where he argued:

> Members of the Jury. You know, I know legally–I've thought about this case ever since it was filed. I know that legally you can do this and bring these actions. You know, I've got one (1) sister, and it just seems like–and maybe it's old school–maybe I'm old school. But, it just seems like, you know, it's just really–it would be really hard to bring an action for money for something against my brother or my sister. And, you know, I sit there and try to look at this and try and understand and sometimes I can't so let's talk a minute. And, you can do it, legally you can bring–we'll talk about the evidence in this case.

(App 146, 11-22). Counsel can hardly begin both his opening and closing with the invitation to consider the Hicks' brothers' filial relationship and then expect the jury not to consider this improper element when this was clearly his intent.

The exact improper element considered by the jury is, as always, difficult to pin down. During deliberations, the jury sent out a question to the court concerning a comment in Robert's medical records from Ball Hospital to the effect that Robert was working at the tavern—a fact all witnesses and parties deny (App 123, 7-12; Tr 111, 14-16[4])—suggesting that jurors could have inferred that this was a workers compensation claim and, based on Robert's testimony that all but $1,900.00 in medical bills had been paid (App 114, 23 to 115, 1), that all of the remaining medical expenses had already been paid by workers compensation.[5] Alternatively, since Robert testified that his only unpaid medical expenses were in the approximate amount of $1,900.00 App 114, 23 to 115, 1), jurors could have concluded that Robert had lost only $1,900.00 out of his own pocket, and decided to award him that $1,900.00 plus $3,000.00 in general damages.[6]

The jury's finding of damages could well have been a compromise verdict. Such verdicts occur when a "jury, in doubt as to the defendant's negligence or plaintiff's contributory negligence, returns a verdict for the plaintiff but in a lesser amount than it would have if these

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[4] Citations to the transcript, which are used only for materials not found in the Appellant's Appendix, shall be to "Tr ###, ##-##," with page and line numbers identified in the same manner as in citations to the Appellant's Appendix.

[5] This, of course, raises the issue of whether the jury, which was not given evidence or instruction on collateral source payments or subrogation rights, may have considered the possibility of a double recovery from an award of his total medical expenses.

[6] Jurors might have improperly considered the possibility of double recovery by Robert, unaware that the bulk of the bills were paid by Medicare–which has subrogation rights.

questions had been free from doubt." *Sherman v. Kluba,* 734 N.E.2d 701, 705 n. 2 (Ind. Ct. App. 2000), *trans. denied*. The jury's 50-50 comparative fault allocation suggests doubt, and the award of less than the undisputed medical expenses indicates that the jurors decided damages on some basis other than the evidence–suggesting a compromise verdict.

At least one panel of this Court has found that an award of damages for less than the undisputed medical expenses is itself evidence that the verdict is the result of a compromise. *McNall*, 392 N.E.2d at 526. Another panel has noted that a jury's award of damages of less than the undisputed medical expenses is proof that "the jury's award was influenced by some improper element." *Sherman,* 734 N.E.2d at 704.

Neither counsel nor this Court can ever know exactly how and why the jurors engaged in speculation or improper considerations, but it is clear that some improper considerations were part of the jury's reaching its erroneous finding of total damages. Under Indiana law, a verdict for less than the undisputed medical expenses evidences jury consideration of improper matters.

This Court's inability to divine the precise nature of the improper considerations or speculation is immaterial. "It is not necessary either that the appellant show, or that this court determine, the exact cause or nature of the error in assessment of the amount of recovery. Error in assessment is established if . . . it clearly appears from uncontroverted evidence that the amount of the verdict bears no reasonable relationship to the loss suffered by the plaintiff." *Thompson v. Town of Fort Branch*, 204 Ind. 152, 178 N.E. 440, 444 (1931) (quoted in *McNall*, 392 N.E.2d at 525). That is clearly the case here.

C. Robert's Proven and Undisputed Medical Expenses Were $21,558.98.

As a result of tripping over the roll of wire, Robert struck his forehead on the pavement. (App 162, 16-21; 90, 13-15), nearly knocking him out. (App 92, 23 to 93, 3). He was taken to the emergency room (App 93, 19 to 94, 4) with a dent in his forehead large enough for the insertion of a thumb and blood gushing from his face. App 138, 21 to 139, 4). He was in a great deal of pain (App 139, 23 to 140, 2), enough to cause nausea and to vomiting (App 96, 11-14). He also suffered severe arm bruising. (Exhibits 9A, 10A[7]; App 97, 3-24 and 98, 2-14).

Robert was referred to otolaryngologist Thomas Whiteman. (App 95, 12-25). Robert went home, where he continued to be in a great deal of pain. (App 140, 9-12). Pain and nausea caused him to return to the emergency room before going to see Dr. Whiteman. (App 140, 18-24). The next day he continued to be in severe pain. (App 141, 7-11).

Dr. Whiteman operated to reconstruct Robert's facial and sinus fractures. (App 96, 1-7). This involved placement of two plates and eleven screws (App 48-50). Robert remained in a great deal of pain after surgery (App 105, 17 to 107, 7), and was unable to function normally for some weeks, requiring care from his girlfriend. (App 111, 22 to 112, 7; 143, 4-23). His pain and suffering and lost time were substantial. (App 141, 12-21; 142, 3-6). The injury and surgery left Robert with a scar across most of his forehead. (App 102, 10 to 103, 17; 41; 103, 18 to 104, 7; 42; 104, 12-20).

Robert's medical expenses of $21,558.98 were proven by admission of his actual bills and a summary of those bills (App 51-75). The bills and the medical records that accompanied

[7] Citations to exhibits appearing in the Appellant's Appendix are to the Appendix. Those not found in the Appendix are cited by Plaintiff's Exhibit numbers at trial.

them (App 43-50), were entered into evidence without objection. (App 101, 22 to 102, 2; 108, 20 to 110, 19). The medical records were stipulated to. (App 107, 21 to 108, 2).

Arthur's counsel made no attempt to argue against, dispute, or impeach a witness with regard to any of the medical expenses, treatment or injuries. He did not challenge the injuries or medical expenses via argument, cross-examination, or introduction of contrary testimony. Arthur's counsel's opening statement contained no reference to injuries, damages or medical expenses. (App 77, 20 to 81, 7).

In his cross examination of Robert, Arthur's counsel made no attempt to impeach him or otherwise challenge his injury or medical expense claims. (App 112, 22 to 130, 9). The only question related to damages just reiterated earlier testimony that $1,900.00 of the medical bills were unpaid. (App114, 23 to 115, 1). The re-cross of Robert did not mention Robert's injuries or expenses. (App 131, 25 to 132, 25).

After Sandra Davis had answered a number of questions concerning Robert's injuries, symptoms, and recovery from surgery, Arthur's counsel did not cross examine her. (App 144, 25 to 145, 2). In closing, Arthur's counsel spent his entire argument on liability issues, without a single argument as to damages–special or general. (App 146, 11 to 154, 25).

The jury found Arthur and Robert each 50% at fault, found Robert's total damages to be $4,900.00, and calculated the verdict at $2,450.00 (App 157, 13 to 158, 2).[8] This was outside the bounds of the evidence under controlling Indiana authorities. *Supra* at I(A).

[8] Since Arthur's insurer had advanced $5,000.00 in medical expenses to Robert, counsel agreed that the Court would credit up to that amount against any verdict, so the Court entered a verdict for Robert in the amount of $0.00. (App 158, 20 to 159, 9).

II. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL.

A. A New Trial on Damages is Needed to Compensate Robert for Pain and Suffering and Other Undisputed General Damages.

Childress made it clear that medical expenses are not the only element of general damages on which additur is appropriate when a verdict is outside the bounds of the evidence. Since, at a bare minimum, Robert was entitled to $21,558.98 in special damages, two things are clear in the finding of $4,900.00 in special damages: (1) the jury did not award Robert most of his undisputed special damages; and (2) the jury failed to award anything to Robert for his undisputed general damages, including pain and suffering, loss of time, and disfigurement.

If the jury had awarded Robert's undisputed medical expenses ***and*** more than a nominal amount for general damages, its verdict would have been within the evidence. *Wagner v. Riley*, 499 N.E.2d 1155, 1159 (Ind. Ct. App. 1986). The lack of any award for Robert's undisputed general damages makes the verdict erroneous.

In *Green v. K-Mart*, 849 So.2d 814 (La. App. 2003), the Louisiana court of appeals was reviewing a case in which special damages had been awarded, but general damages were not. The court observed that finding a substantial injury and awarding special damages for that injury "is so inconsistent" with failing to award general damages as to constitute "an abuse of discretion by the factfinder." *Id*. at 332 (citing *Wainwright v. Fontenot*, 774 So.2d 70 (La. 2000)). *Green* also noted that the "general rule is that a jury commits legal error in awarding special damages while at the same time denying general damages." *Id*. (citing *Wainwright v. Fontenot*, 774 So.2d

70 (La. 2000)). Consistent with this principle, the *Green* court entered an additur of $500,000.00 in general damages to the jury's $0 in general damages.[9]

Testimony as to pain and suffering was provided by Plaintiff and Sandra Davis. (e.g., App 92, 23 to 93, 3; 96, 11-14; 97, 3-24; 98, 2-14; 105, 17 to 107, 7; 143, 4-11). This was supplemented by evidence of the pain medications he was prescribed (App 43-75), photographs depicting his post-surgery appearance and bruises (App 41-42; 44; Exhibits 9A, 10A), and x-rays showing the two plates and eleven screws in Plaintiff's forehead (App 44).

No reasonable juror could fail to find that pain and suffering accompanied Robert's multiple skull fractures, lengthy wait for surgery, surgery, and recovery. There was no contrary evidence, no witness impeachment, and no argument made to dispute this evidence. Evidence of time Robert lost while waiting for, undergoing, and recovering from surgery was also provided by his testimony, Sandra Davis' testimony, and the medical records. None of this evidence was countered, impeached, or argued at trial. Nor was there a dispute as to Robert's large facial scar.

Thus, there was ample evidence–admitted and undisputed–of substantial pain and suffering, substantial time lost to treatment and recovery, and disfigurement in the form of a long facial scar. Since the total damages found by the jury was less than the total medical expenses, Robert received no award for any of these undisputed elements of general damages. While trial courts ***can*** grant additur for such damages, a new trial on damages is the preferred remedy for such error, particularly when additur is sought for inadequate general damages.

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[9] Indiana is not alone in finding awards of less than undisputed medical expenses to be outside the bounds of the evidence, or in holding that a failure to award undisputed general damages is error. In *Green*, 849 So.2d at 832, the jury found total damages of $1 million. Given undisputed evidence of future medical expenses of $3,458,453.00, the trial court granted additur in that amount. *Id*.

This Court, in reversing a trial court's grant of a new trial limited to damages, remanded for a new trial on both liability ***and*** damages in *Russell.* In *Russell*, this Court noted that the trial court erred in that it "also awarded an additional $4,200 [above the $2,100.00 in medical expenses], presumably for pain and suffering." *Russell*, 759 N.E.2d at 238. The legal premise underlying *Russell* was that T.R. 59(J) "empowers the trial court to enter a final judgment fixing damages [only] when the evidence on the amount of damages is clear and unrebutted." *Id*. (citing *Sherman,* 734 N.E.2d at 704; quoting *Amos v. Keplinger,* 397 N.E.2d 1010, 1011 (Ind. Ct. App. 1979)). Since "awards for pain and suffering are particularly within the province of the jury because they involve the weighing of evidence and credibility of witnesses," *Russell*, 759 N.E.2d at 238 (citing *Ritter*, 745 N.E.2d at 845 (Ind. Ct. App. 2001)),[10] the trial court erred in entering such general damages.

B. Since Liability Was Contested, a Whole New Trial is Required.

An entire new trial, not just a new trial on damages, is required in the present case. While counsel for either side–or both sides–might prefer a new trial on the issue of damages alone, Indiana precedents make it clear that in a case where inadequate damages amount to error, a new trial on damages is also required. As the jury's 50-50 allocation of comparative fault in this case makes apparent (App 9), liability was hotly contested in this case (App 77-81; 146-54).

Only "[w]hen liability is admitted or clear and the sole remaining issue is the amount of damages," can a trial court "grant a new trial solely on the issue of damages." *Mullins*, 777 N.E.2d at 1180 (citing *Neher v. Hobbs,* 760 N.E.2d 602, 608 (Ind. 2002) and *Russell,* 759 N.E.2d

[10] Trial courts can grant additur of intangible damages. *See Owens,* 681 N.E.2d 760, *supra* at I(A)(4).

at 238). Thus, if "liability is hotly contested and the evidence could have supported a verdict for either party, or if the verdict on liability was possibly a result of a compromise, it is improper to grant a new trial limited solely to the issue of damages." *Id.* Similarly, "When an appellate court finds damages are inadequate, a new trial on damages alone is proper only when it is clear the jury verdict on liability is not the result of a compromise." *Burris*, 506 N.E.2d at 485.

Mullins involved a motor vehicle collision and an alleged sudden emergency defense. Although the issue was hotly contested, the jury eventually found the defendant 100% at fault. The trial court awarded a new trial on damages alone. This Court reversed and remanded for a new trial on liability and damages, providing the following reasoning.

> Furthermore, at least three of the six witnesses called at the two-day trial testified to the issue of liability. Therefore, because the issue of liability was hotly contested and could have supported a verdict for either party, especially in light of Mullins's sudden emergency defense, the trial court abused its discretion in granting a new trial limited solely to the issue of damages. We therefore reverse the trial court and remand for a new trial on the issues of liability and damages.

Mullins, 777 N.E.2d at 1181. Thus, under the authority of the Supreme Court and this Court in *Neher,* 760 N.E.2d 602 and *Mullins*, 777 N.E.2d at 1180, respectively, a new trial on damages alone is improper in this case, and the error can only be corrected by an entire new trial.

III. THE REASONS PROVIDED BY THE TRIAL COURT DO NOT JUSTIFY DENIAL OF THE MOTION TO CORRECT ERRORS.

Arthur's response to the Motion to Correct Errors offered no legal authority to counter the applicable legal principles argued in Robert's motion to correct errors–which are also argued above. Those legal authorities require a new trial in this case because, although the Plaintiff's total medical expenses of $21,558.98 were not disputed or controverted in any way, the jury found Plaintiff's total damages to be just $4,900.00. A multitude of Indiana cases have held that

a jury may not find damages of less than the uncontradicted medical expenses in a personal injury case and that doing so is outside the evidence and reversible.

Instead of disputing this principle, Arthur's counsel attempted to argue that the jury was free to make an improper finding of total damages by asserting that the medical bills went in ***without objection***, rather than as ***stipulated*** and that Robert's own testimony "disputed that he was entitled to $21,558.98 in medical expenses." The former is a distinction without a difference and the latter is a gross misinterpretation of the testimony in question.

A. Robert's Medical Expenses Were Admitted Without Objection.

First of all, in open court, Arthur's counsel and Robert's counsel agreed that Robert's medical records were admissible as reasonable and necessary treatment for his injuries. (App 101, 22 to 102, 2). Thus, without objection, Robert's medical records for the treatment reflected in his medical bills were admitted and his medical bills and a summary of those bills were also admitted. (App 107, 21 to 110, 19).

Thus, the medical expenses in Exhibits 18 and 18A (App 51-75) were for medical treatment reasonable and necessary as a result of Robert's injuries. Robert testified that the bills had been paid, except for approximately $1,900.00. (App 114, 32 to 115, 1). Robert's testimony concerning payment of the bills made those bills "prima facie evidence that the charges are reasonable." Ind. Evidence Rule 413. Since Arthur's counsel never challenged the reasonability of those bills, this testimony (App 92, 19-21) met Robert's burden of proof, and Arthur's counsel made no effort to overcome this prima facie showing.

B. Robert's Testimony Does Not Change His Entitlement to Damages.

No one present at the trial could have failed to notice that Robert had some difficulty communicating. At times he did not understand/hear questions, he had difficulty reading documents handed to him, and he was not a great communicator in trying to express himself. These problems are found in the testimony of Robert Hicks upon which Arthur and the trial court have relied below, which was as follows:

Q Now, Bob, I'm going to hand you what's been marked for identification as Plaintiff's Exhibit number 18 and ask you, have you had a chance to review that document with me?

A Yes, sir.

Q And can you identify what Exhibit 18 contains?

A It's the Nineteen Hundred Dollars ($1,900) of my unpaid bills.

Q Well, now, we're not asking about unpaid bills, I'm asking about the bills that you've got.

A Nineteen Hundred ($1,900) here.

Q Okay. Let me have you look through that -- don't just look at the first page. If you would, look through the whole document, if you would, Bob. Have you had a chance to look at more of the pages? Okay, so what does Exhibit 19 contain? Or 18, I'm sorry.

A Well, it's all these bills that just -- you know, medical bills that haven't been paid.

Q Okay. Have you paid -- let me go back. Are those the bills themselves right there, Bob?

A Yeah.

Q Are some of those bills paid?

A Some.

Q Okay. How much is not paid?

A About Nineteen Hundred Dollars ($1,900).

Q Okay. And are those the bills that you'd like the jury to award you damages for?

A Right.

PLAINTIFF'S COUNSEL: Move the admission of 18, Your Honor.

DEFENSE COUNSEL: No objection.

THE COURT: I'll show 18 admitted.

(Whereupon, Plaintiff's Exhibit 18, same being medical bills, was admitted into evidence.)

Q I'm going to hand you what's been marked as Exhibit 18-A, Bob, and ask you to tell us what that is.

A That's my medical expenses.

Q Okay, and is that a summary of what's in 18?

A Yes.

Q Okay. What is the total amount of medical expenses reflected in the summary, Bob?

A Twenty-one Thousand Five Hundred Fifty-eight Dollars and Ninety-eight Cents ($21,558.98).

PLAINTIFF'S COUNSEL: Move the admission of 18-A, Your Honor.

DEFENSE COUNSEL: No objection.

THE COURT: Okay. I'll show 18-A admitted.

(Whereupon, Plaintiff's Exhibit 18-A, same being a summary of medical expenses, was admitted into evidence.)

(App 108, 20 to 110, 19).

First, this part of Robert's testimony upon which Arthur relied below was all done to identify Exhibits 18 and 18A. (App 108, 20 to 110, 15). This testimony was ***foundational***. Pursuant to Ind. Evid. R. 901(b)(1), Robert authenticated the bills and the summary of bills (App 51-75). Pursuant to Ind. Evid. R. 413, he testified that all but $1,900.00 of those bills had been paid, making them prima facie reasonable.

Second, once the bills and summary were entered into evidence without objection (App at 109, 23 to 110, 19), the bills were evidence of the medical expenses Robert incurred. Pursuant to Ind. Evid. R. 1002, the contents of those bills could only be proved by the bills themselves, not by testimony about the contents of those bills. No reasonable jury could have rejected these bills once they were admitted and undisputed.

Third, although Robert clearly was confused in the initial part of his testimony as to whether Exhibit 18 contained all of his medical bills or just the $1,900.00 in unpaid medical bills, Exhibit 18 speaks for itself. That Exhibit contained the entire $21,558.98 in bills—as did its summary in Exhibit 18A. In a portion of Robert's testimony ignored by Arthur's counsel, Robert testified that Exhibit 18A contained "my medical expenses" (App 110, 4-6); that these medical expenses totaled $21,558.98 (App 110, 10-12); and that Exhibit 18A was "a summary of what's in 18." (App 110, 7-8).

Thus, in laying the foundation for admission of the bills as prima facie evidence of his medical expenses, Robert identified Exhibits 18 and 18A as his medical bills and a summary of same. With that foundation, the bills became prima facie evidence of the reasonable and necessary medical expenses to which he was entitled to an award of damages. The jury, then, was instructed that it was to award Robert—among other elements of damages—"The reasonable

expense of necessary medical care, treatment, and services." (App 155-56). The jury's failure to award these expenses was outside of the evidence.

In relying on this excerpt from Robert's testimony to support the jury's verdict, Arthur offered the trial court a strange twist on Indiana law. Medical expenses may not be awarded unless they are reasonable, and payment of those expenses is prima facie evidence of that reasonableness, Ind. Evid. R. 413. On the contrary, Arthur asked the trial court, and he asks this Court, to find Robert was entitled only to his ***unpaid*** medical expenses. Thus, he is arguing contrary to Indiana law and the court's instructions.

Arthur's argument below, although not clearly spelled out, appeared to be that Robert's testimony proved that he was entitled to only $1,900.00 in medical expenses. Even if the bills did not "speak for themselves" as prima facie proof of the undisputed medical expenses, Arthur's interpretation (which the trial court seemed to adopt) requires twisting Robert's words and ignoring those related parts of his testimony cited above.

Arthur's response below focused on Robert's testimony and on the question, "How much is not paid?" (App 109, 18), the answer, "About $1,900" (App 109, 19), the follow- up question, "Okay, and are those the bills that you'd like the jury to award you damages for?" (App 109, 20-21), and the answer, "Right" (App 109, 22). Arthur seemingly contends that Robert was testifying that he only wanted damages of $1,900 in medical expenses, rather than simply identifying his medical bills. No authority or analysis was provided for this interpretation.

An analysis of the questions and answers, in context, shows that Arthur's is a twisted reading. Initially, Robert confused Exhibit 18, testifying that it contained only his $1,900 in unpaid medical bills. (App 108, 20 to 109, 2). Eventually, after reviewing Exhibit 18, Robert

corrected himself, noting that Exhibit 18 contained the "bills themselves" (App 109, 13-15), some paid (App 109, 16-17) and some unpaid (App 109, 18-19).

The next question, also about Exhibit 18, was, "And are those the bills that you'd like the jury to award you damages for?" (App 109, 20-21). In context, this question did not refer only to the unpaid medical expenses. Exhibit 18 was identified as the subject of this question (App 108, 20-23). In follow-up questions, Exhibit 18 was again identified as the subject of the questioning (App 109, 9-10). Exhibit 18 contained all $21,585.98 in medical bills, both paid (App 109, 16-17) and unpaid (App 109, 18-19).

The only specific reference to Exhibit 18 in the questions referred to the "bills." App 109, 3-4). "Bills," of course, is a plural noun. A subsequent question (App 109, 20-21) also uses a plural pronoun, "bills," and the plural "those." In between these two questions, in questioning about the unpaid medical expenses, not "bills," Robert's counsel used the singular noun and verb. "How ***much is*** not paid?" (App 109, 18-19) "Much" is an adjective used to modify singular nouns, as opposed to "many," which would modify a plural noun.[11] "Is" is the singular form of the verb "to be," of which "are" is the plural form.[12] The grammar of the question is inconsistent with Arthur's suggestion that the $1,900.00 unpaid amount (singular) could refer to "the bills" (plural) Robert wanted the jury to award him. (App 109, 20-22).

[11] Merriam Webster defines "much" as "1**:** great in quantity, amount, extent, or degree." It defines "many" as "1: consisting of or amounting to a large but indefinite number." Found at http://www.m-w.com/cgi-bin/dictionary on May 13, 2004.

[12] Merriam Webster identifies "is" as the "present third singular" form, and "are" as the "present plural of" the verb "be." http://www.m-w.com/cgi-bin/ dictionary, May 13, 2004.

The context further clarified the meaning of the question and answer when, as soon as Robert testified that Exhibit 18 contained "the bills" he would like the jury to award him, counsel moved the admission of Exhibit 18, containing all of the medical bills. (App 109, 9-25).

If the jury misinterpreted this testimony and substituted its misinterpretation instead of following the law as instructed, the Court, sitting as the thirteenth juror, should have found this was an error requiring a new trial because the jury's award of damages are inconsistent with the undisputed medical expenses and the law as conveyed to the jury in instructions. (App 155-6).

CONCLUSION

The jury's finding of total damages was outside the bounds of the evidence at trial since it failed to include Robert's undisputed medical expenses, or any award for his proven and undisputed general damages. Therefore, the trial court's denial of a new trial was an abuse of discretion. Plaintiff/Appellant Robert Hicks prays that this Court reverse the trial court's denial and remand with instructions that a new trial be granted on all issues.

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