QUESTIONS PRESENTED ON TRANSFER

1. Did the Court of Appeals' memorandum opinion and denial of the petition for rehearing sanction or constitute a significant departure from law or practice because they were based upon a material misstatement of the record?

2. 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?[1]

[1] Because the court of appeals' opinion relied upon nonexistent evidence of "un-reimbursed medical expenses," that panel did not reach most of Appellant's arguments on appeal, so they must be raised again before this Court. (*Infra*, Argument II).

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BACKGROUND & PRIOR TREATMENT OF ISSUES ON TRANSFER

This case arose when Plaintiff/Appellant, Robert Hicks ("Robert") tripped and fell on premises owned by his brother, Defendant/Appellee Arthur Hicks, Jr., ("Arthur"). The case was tried before a jury on October 6, 2003, in the Delaware Circuit Court #1, Hon. Marianne Vorhees, presiding. Liability was contested. Damages were not. Counsel agreed at trial that Robert incurred medical expenses of $21,558.98 as a result of his fall, and these expenses were entered into evidence, without objection. (Exhibits 18, 18A; App 51-75). The jury returned a verdict finding total damages of $4,900.00, attributed 50% comparative fault to 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).

Robert timely filed a Motion to Correct Errors and Request for a New Trial or, in the Alternative, for Additur, and supporting memorandum of law. (App 12-27). The motion asked the trial court to correct the jury's error in finding total damages of $4,900.00 since the undisputed medical expenses were $21,558.98, and argued that a new trial on damages alone would be improper because liability was contested at trial and that additur would be improper because additur in the amount of medical expenses would exclude any award for the undisputed general damages, including pain and suffering, disfigurement, and loss of time. The crux of the motion was that a new trial was the proper remedy.

The motion was deemed denied when the trial court had not ruled on it by November 28, 2003. Ind. Trial Rule 53.3(A) (Unpublished Opinion ("Op") at 2). The trial court subsequently entered an order denying the motion. (App at 8). Robert timely filed his Notice of Appeal (App at 38-39), and took an appeal to the Indiana court of appeals. The court of appeals affirmed the trial court in an unpublished opinion on July 19, 2004. (Op). Alleging that the court of appeals'

decision was based upon a material misstatement of the evidence, Robert filed a Petition for Rehearing on August 5, 2004, that was denied on September 22, 2004.

ARGUMENT

The July 19, 2004, court of appeals opinion affirmed the trial court solely on the basis that the verdict was purportedly within the evidence "because in this case there is evidence that [Robert] incurred only $1,900.00 in ***unreimbursed medical expenses***, and the jury's verdict provided recovery for this amount." (Op p. 6) (emphasis added). That materially misstated the record at trial. The petition for rehearing, subsequently denied, raised this issue. The court of appeals' affirmation solely on the basis of a material misstatement of the trial evidence is a significant departure from law or practice as well as in conflict with a decision of the Supreme Court that requires correction by this Court. Ind. App. R. 57(H)(2), (6).

While this Court properly views itself as a law-making court not normally in the business of correcting factual errors, *Tyson v. State*, 593 N.E.2d 175, 180 (Ind. 1992), the court of appeals' resolution of this case on the basis of "evidence" not admitted at trial is a legal practice this Court cannot countenance and must correct. As this Court has noted, it is "proper advocacy" before this Court to argue that a court of appeals decision is "factually or legally inaccurate." *In re Wilkins*, 782 N.E.2d 985, 986 (Ind. 2003); *also see* former Ind. App. R. 11(B)(2)(f). Failure to correct a decision that decides a case on "facts" not in evidence at trial would be an injustice and would approve a significant departure from proper practice by the court of appeals.

I. THE COURT OF APPEALS VIOLATED PRECEDENT AND DEPARTED SIGNIFICANTLY FROM PROPER PRACTICE BY DECIDING THE CASE ON "FACTS" NOT IN THE TRIAL RECORD.

Like all American appellate courts, Indiana appellate tribunals may affirm or reverse a jury verdict only on the basis of the evidence admitted at trial. *Creamery Package Mfg. Co. v. Hotsenpiller*, 159 Ind. 99, 102-03, 64 N.E. 600, 601 (1902); *Coonan v. State*, 269 Ind. 578, 382

N.E.2d 157 (1978); *Beall v. Mooring Tax Asset Group*, 813 N.E.2d 778, 781 (Ind. Ct. App. 2004). This standard is more than precedent and more than the definition of proper practice. It is the cornerstone of appellate review. When the evidence of record does not support the verdict, the verdict is erroneous as a matter of law and this court cannot permit a lower appellate court to affirm such a verdict on the same invalid grounds.

This standard was violated by the court of appeals' decision, which affirmed a jury award of $4,900.00 in total damages despite ***undisputed*** evidence that Robert's total medical expenses were $21,558.98, had ***one and only one rationale***: "[I]n this case there is evidence that [Robert] incurred only $1,900.00 in unreimbursed medical expenses, and the jury's verdict provided recovery for this amount." (Unpublished Opinion ("Op") p. 6). This rationale relies upon no evidence of record. There was absolutely no evidence of reimbursement of medical expenses.

Even if there had been such evidence in the record, there is no rationale for reversing on this basis. (*see* Robert's Reply Brief p. 11). The jury was obliged to award all of the reasonable and necessary medical expenses, not just un-reimbursed ones. The jury was instructed, without objection, to award Robert "The reasonable expense of necessary medical care, treatment, and services." (App 191). The court of appeals' opinion offers no citation to any authority that permits awarding only unreimbursed medical expenses even if evidence of reimbursement were admitted at trial. (Op at 6).

A. The Transcript Confirms the Lack of Such Evidence.

The court of appeals' opinion cited to the Record where such evidence allegedly could be found. (Op pp. 4-5). That portion of the record (Tr at 64-65) contains no evidence concerning the reimbursement of medical expenses. Nor do any other parts of the Transcript. (Tr *passim*).

Arthur has admitted there was no evidence of reimbursement by third party payors. (Arthur's Brief, p. 7; noting there was "**no evidence** as to the entity that paid his medical expenses").[2]

Those pages of the Transcript (64-65) repeatedly refer to whether the bills were "unpaid" or "paid." They do not mention whether Robert was (un)reimbursed for any of the bills. There is no such evidence anywhere in the Transcript. In fact, as noted in Robert's Reply Brief (Argument I), any evidence of collateral source reimbursements was irrelevant and inadmissible at trial. The evidence at trial, then, was only that there was $21,558.98 in medical bills and that about $1,900.00 of those bills had not been "paid." (*Id.*).

The payment of the bills made them admissible as being for medical treatment reasonable and necessary as a result of injuries. *Smith v. Syd's, Inc.,* 598 N.E.2d 1065, 1066 (Ind. 1992) (quoted in *Sikora v. Fromm*, 782 N.E.2d 355, 359 (Ind. Ct. App. 2002). Although proof of reasonableness and necessity once required expert testimony, that was changed by Ind. Evid. R. 413, which provides, "Statements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence. Such statements shall constitute prima facie evidence that the charges are reasonable." As this Court has said,

> In order to recover an award of damages for medical expenses, the party seeking to recover these damages must prove that the expenses were both reasonable and necessary. This was traditionally proven by expert testimony. The purpose of Rule 413 is to provide a simpler method of proving amount of medical expenses when there is no substantial issue that they are reasonable and were caused by the

[2] The Court can confirm this statement only be reading the entire Transcript. However, Arthur's failure to cite the Court to any such evidence in his prior briefs–which will be duplicated in any response to this Petition–is more than a little suggestive.

> tort. If there is a dispute, of course the party opposing them may offer evidence to the contrary, including expert opinion.[3]

Cook v. Whitsell-Sherman, 796 N.E.2d 271 (Ind. 2003). Medical expenses are proven reasonable by the bills, and their reasonability and necessity are proven by their payment. Robert's testimony as to payment of his bills, then, was purely foundational.

B. This Misstatement of the Record Was Material and Prejudicial.

When the court of appeals misstated the record by holding that Robert had been reimbursed for all but $1,900.00 of his medical bills, this was a material misstatement that prejudiced him. This is because there is no other basis upon which the court of appeals affirmed, or could have affirmed, a finding of total damages of about 20% of the undisputed medical expenses incurred by Robert as a result of Arthur's negligence.[4] Removing this non-existent evidence from the court of appeals' opinion, there is no legal or factual basis for affirming the trial court's denial of the Motion to Correct Errors/Request for New Trial. Thus, the departure from practice and failure to follow precedent was clearly prejudicial to Robert.

C. The Court of Appeals Has Affirmed Juror Speculation.

Robert's testimony that the bills had been paid was foundational. It made them admissible over Arthur's potential objection. Robert could not testify that ***he*** had paid the bills, because Medicare had paid most of them. *See* Plaintiff's Memorandum of Law Concerning

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[3] In the present case, Arthur never challenged any of the medical expenses as reasonable, necessary, or caused by the trip and fall–either by use of evidence or argument. (*See* Brief of Appellant, arguments I(B)-(C) and III(A)-(B).

[4] The reasons for this were briefed fully in the Memorandum in Support of Robert's Motion to Correct Errors (App 14-27), Appellant's Brief, Appellant's Reply Brief, and the Petition for Rehearing, and that will not be repeated here.

Inadmissibility of Medicare Charges and Write-Offs.[5] ("Medicare Memo") (App. p. 5). Additionally, Medicare payments are inadmissible under the collateral source rule, Ind. Code § 34-44-1-2; *Shirley v. Russell*, 69 F.3d 839 (7th Cir. 1995), which excludes evidence of "payments made by the state or the United States; or (ii) any agency, instrumentality, or subdivision of the state or the United States; that have been made before trial to a plaintiff as compensation for the loss or injury." Ind. Code § 34-44-1-2(1)(C); *also see*, *Town of Highland v. Zerkel*, 659 N.E.2d 1113 (Ind. Ct. App. 1995), *Hagerman Const., Inc. v. Copeland*, 697 N.E.2d 948 (Ind. Ct. App. 1998), and *Knowles v. Murray*, 712 N.E.2d 1 (Ind. Ct. App. 1999). (Medicare Memo pp. 2-3).

Thus, Robert testified that all but about $1,900.00 of his $21,558.98 in medical bills had been "paid," not that any amount had been reimbursed or had not been reimbursed. The court of appeals' decision validates a jury speculating, without evidence, that "paid" means "reimbursed." Juror speculation that bills have been reimbursed inevitably prejudices injured plaintiffs on both liability and damages issues. "'[A]dmission of evidence of benefits from a collateral source tends to prejudice the jury and influence their verdict, not only as to damages, but also as to liability.' Thus, any evidence that Medicare paid Mr. Hicks' medical bills would be prejudicial on the issues of both liability and damages." (Medicare Memo p. 4, quoting *Koger v. Reid*, 417 N.E.2d 1142, 1144 (Ind. Ct. App. 1981) and citing *Brindle v. Harter*, 138 Ind. App. 692, 211 N.E.2d 513 (1965)). If evidence of collateral source payments is prejudicial, speculation as to such payments is also prejudicial and cannot justify affirming the jury's erroneous finding of total damages.

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[5] The reason for that memo was that "defense counsel indicated his intent to offer into evidence . . . the actual amounts paid to Plaintiff's medical providers by Medicare, and of the 'write-offs' by the providers under the Medicare law. These amounts are substantially below the amounts billed to Robert, and the remainder is purportedly "'written off.'" (Medicare Memo p. 2). Arthur's counsel responded by withdrawing his plan to offer this evidence. (App at 5).

In determining whether a verdict is within the scope of the evidence, this Court has held that "The jury is not permitted to indulge in speculation." (Op p. 4). Since there was no evidence that any of Robert's medical bills had been reimbursed, any jury conclusion as to unreimbursed amounts could only result from speculation, and the court of appeals could not affirm such proscribed speculation. In reviewing a denial of a request for judgment on the evidence, this Court has noted that a jury's verdict is sustainable only if there is "any reasonable evidence supporting the claim" and if so, "whether the inference supporting the claim can be drawn without undue speculation." *Kristoff v. Glasson*, 778 N.E.2d 465, 474 (Ind. 2002). Neither prong of this helpful test is met here–there was no evidence of (un)reimbursed medical expenses and any inference drawn from non-existent evidence is speculative. Further, the jury's finding of total damages of less than Robert's undisputed medical expenses is evidence that it engaged in just such improper speculation. (Brief of Appellant, Argument I(B)).

While the court of appeals and the trial court were both made aware that most of Robert's bills had been paid by Medicare, the jury was not. While the court of appeals' inference about reimbursement was understandable given that it knew from the briefing and the pre-trial record that Medicare had paid these bills, that inference is an "impermissible reason[ ] or consideration" (Op p. 4) by the jury that cannot be affirmed because there is no evidence of record to support it.

There ***was not*** any evidence of "unreimbursed medical expenses" (Op p. 6), or of reimbursed ones. Thus, affirming the jury's verdict on the basis of reimbursement of medical bills–or the amount of such reimbursement–is not based upon the evidence at trial and can only be described as pure speculation. This Court cannot affirm a baseless speculative inference about

reimbursement simply because it knows about such reimbursement from documents not admitted at trial.

Since the verdict can only be explained by reliance on jury speculation as to matters outside the record at trial, this is a clear case of an award outside of the undisputed evidence of the damages caused by defendant's negligence. In such cases, this Court has said, "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).

The court of appeals' failure to reverse and order a new trial, therefore, both violated precedent and was a significant departure from established law and practice. This Court must correct such serious error.

II. SINCE THERE WAS NO EVIDENCE OF UNREIMBURSED MEDICAL EXPENSES, THE COURT OF APPEALS SHOULD HAVE REVERSED FOR THE REASONS STATED IN THE BRIEF OF APPELLANT AND REPLY BRIEF.

In substantial prior briefing in his Motion to Correct Errors (App at 14-27), Brief and Reply Brief, Robert argued that it is always an abuse of discretion for a trial court not to find that the jury has erred when it finds total damages outside the evidence–specifically in finding damages less than the undisputed medical expenses. (Brief of Appellant, Argument I(A)). The court of appeals did not dispute that this was the law but, instead, attempted to distinguish the numerous authorities cited by Robert by noting that those cases did not involve evidence

concerning reimbursement of medical expenses. (Op at 6). Since that distinction was a false one–based upon facts not in the record–that distinction cannot resolve the appeal.[6]

Further, the court of appeals' opinion failed to cite any authorities to support the proposition that a jury that has been instructed to award "The reasonable expense of necessary medical care, treatment, and services" (App 191) could be affirmed for awarding only the unreimbursed medical expenses. As Robert previously argued (Reply Brief, Arguments II, IV), Arthur waived this argument (Ind. App. Rule 46(A)(8)) by failing to cite any authority or substantive argument to support the view that this is or should be the law.

Robert has also argued that the jury's award of less than the undisputed medical expenses was proof that its verdict was based on speculation or some other improper consideration, meeting the standard for reversal of a jury verdict. (Brief of Appellant, Argument I(B)). Again, the court of appeals' only rationale for rejecting this argument was the alleged evidence of medical expense reimbursement. This cannot justify affirmation.

Robert has argued that the procedural posture of the case, undisputed medical expenses, and lack of any award for undisputed general damages required a new trial rather than additur. (Brief of Appellant, Argument II). Since the court of appeals affirmed as it did, it failed to reach this issue of whether a new trial was required to correct the jury's error. This Court must do so.

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

[6] The court of appeals also did not reject Robert's argument that his $21,558.98 in medical expenses were proven and undisputed. (Brief of Appellant, Arguments I(C) and III), but affirmed on the same nonexistent evidence of reimbursement.

undisputed general damages. The court of appeals characterized the verdict as within the evidence by asserting–incorrectly–that there was evidence of the amount of unreimbursed medical expenses incurred by Robert. Since there was no such evidence, the verdict remains outside the evidence and the court of appeals' affirmation of the verdict by affirming the trial court's denial of the motion to correct errors presents a significant departure from practice and violates precedent requiring cases to be decided on the basis of the evidence.

Plaintiff, Robert Hicks, prays that this Court reverse the court of appeals decision and remand this matter to the trial court for a new trial. In the alternative, this Court could remand to the court of appeals with instructions to reconsider the appeal, properly, without reliance upon any alleged evidence concerning reimbursement of medical expenses.

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CERTIFICATION OF WORD COUNT

I verify that this Brief, excluding those parts identified in Ind. App. Rule 44(C), contains 3,176 words as counted by WordPerfect 10, the word processing package used to create it.

_____
Ralph E. Dowling
Attorney # 17702-49
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Rehearing was mailed on October _____, 2004, to: Donald K. McClellan, McCLELLAN, McCLELLAN & ARNOLD, Suite 200, 400 North High Street, Muncie, IN 47305-1643.

_____
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