STATEMENT OF THE ISSUES

Robert believes his initial statement of the issues was more precise than Arthur's attempted restatement of them, but sees no substantive difference between the two statements.

STATEMENT OF THE CASE

Arthur's statement begins with the audacious assertion that Robert "has inappropriately resulted [*sic*] to arguing evidence within his statement of the case." The audacity of the statement arises from the fact that Robert's Brief did not argue evidence in its statement of the case and Arthur failed to identify a single instance of any "argument" in Appellant's statement. While evidence of record was cited, it was not argued. Citations are required by Ind. App. Rule 46(A)(6).

STATEMENT OF THE FACTS

Although Arthur did not identify any deficiency or disagreement with Robert's statement of the facts, he included his own statement, despite Ind. App. R. 46(B)(1). This decision becomes explicable when one examines the highly selective and irrelevant facts included in this statement.

Arthur's opening paragraph repeats the date and location of injury and filial relationship of Robert and Arthur Hicks noted in Robert's Brief. It also repeats that Arthur owned the premises where Robert was injured and then adds that Robert is 70 years old, unmarried and retired. None of these facts are relevant to the propriety of the damages award in this case, which Appellee's own issue statement shows to be the only issue in this case.

The litany of irrelevancies continues. Arthur's second and third paragraphs mention how often Robert visited Arthur's bar and his observation of the construction. Similarly, the fourth paragraph mentions the length of Robert's visit the day he fell and his multiple exits and reentries. The fifth paragraph reiterates facts leading to Robert's fall that were stated in Robert's statement.

These irrelevancies were offered in an attempt to prejudice this Court.[1] These facts were all argued by Arthur at trial on the issue of liability. Since this appeal does not include the issue of liability. Hence, these facts are anything but those "Relevant to the Issues for Review"–Arthur's inartful mistitling of these facts.

Not satisfied with this painfully obvious effort to prejudice the Court, Appellee's statement of the facts then quotes from Robert's testimony, in violation of Ind. App. Rule 46(A)(6)(c) since it is not a summary in narrative form. The quotation is highly selective in that it excludes some of Robert's testimony about his medical expenses and fails to mention the accompanying medical expense exhibits admitted without objection (the actual bills and a summary of those bills).

The omitted evidence was required to present the evidence in accordance with the standard of review relevant to the issue on appeal, Ind. App. R. 46(A)(6)(b), because the evidence of medical expenses was entered without objection and, under Indiana law, a finding of special damages of less than the undisputed and uncontroverted special damages is not "within

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[1] Appellee felt compelled to repeat that Arthur and Robert were brothers, perhaps unable to resist the temptation to try to prejudice the Court with the same irrelevancy with which he attempted to circumvent the jury's deliberations. Counsel is surprised only that Appellee failed to mention that the unmarried Robert was "living in sin" with his girlfriend.

the bounds of the evidence" presented, *Ritter v. Stanton*, 745 N.E.2d 828, 845 (Ind. Ct. App. 2001) 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 v. Becker*, 636 N.E.2d 176 , 177 (Ind. Ct. App. 1994). *See* Appellant's Brief Argument I.

ARGUMENT

INTRODUCTION

Arthur's Brief notes that Robert testified that all but $1,900.00 in his medical expenses were paid, and that there was "**no evidence**" as to who paid the bills[2] or of Robert's obligation to repay any of the paid medical. (Arthur's Brief p. 7). While true, this is all irrelevant to this appeal.

I. THE COLLATERAL SOURCE PAYMENTS WERE INADMISSIBLE AND IRRELEVANT TO THIS APPEAL.

First, as was noted in the Brief of Appellant (Argument I), the jury's award was for less than the proven and undisputed medical specials–making it inadequate as a matter of law in Indiana. Appellee does not dispute that Plaintiff admitted, either by stipulation or without objection, Exhibits 18 and 18A (App. 51-75), proving total medical expenses of $21,558.98.

Payment of the bills by a collateral source was not proven because, under the collateral source rule, Medicare payments are an inadmissible collateral source, as Robert demonstrated in his Memorandum of Law Concerning Inadmissibility of Medicare Charges and Write-offs, to

[2] Curiously, Arthur later tries to assert that Robert's testimony was evidence of collateral source payments. He cannot have it both ways. If there was "**no evidence** as to the entity that paid his medical expenses," there was no evidence of collateral source payments.

which Appellee did not file a response and which caused the trial court to exclude evidence of collateral source payments by Medicare. Since there was no evidence that collateral payments had been made, there clearly was no relevance to any evidence of an obligation to repay.

II. ARTHUR WAIVED THIS ARGUMENT BY MAKING NO SUBSTANTIVE ARGUMENT AND CITING NO AUTHORITIES SUPPORTING HIS POSITION ON COLLATERAL SOURCE PAYMENTS.

Arthur's Brief asserts that all of the cases cited on pages 9-14 of Robert's Brief (those holding that failure to award undisputed medical expenses is erroneous as a matter of law) "would be applicable and controlling **if** the only evidence at trial was Robert [*sic*] had $21,558.98 in medical expenses and there had been **no evidence** any of these medical expenses were paid, or conversely had Robert submitted evidence as to the **payor of** his medical expenses and that the payor possesses **subrogation** rights, however, this was not the evidence that was submitted to the jury." (Arthur's Brief 7-8). This illogical and naked assertion, unsurprisingly, was made without benefit of any substantive argument or citation to legal authority. Thus, this argument has been waived. Ind. App. Rule 46(A)(8).

Arthur's position is that Robert had two choices at trial that would have permitted him to recover his medical expenses. Robert either had to: (1) present no evidence that his bills had been paid, or (2) produce evidence that the bills had been paid, the collateral source that paid them, ***and*** the subrogation rights of the collateral source. Neither of these alternatives is viable and neither was required for Robert to prevail in this appeal. Thus, we cannot be surprised that Arthur cites no authority for this preposterous assertion. There is no law that would support this statement.

A. The Bills Would Be Inadmissible If Not Proven to be Paid.

Robert was obliged to testify that his medical bills had been paid because he is only entitled to compensation for reasonable medical expenses and, under Ind. Evidence Rule 413, his testimony that the bills had been paid made a "prima facie evidence that the charges are reasonable." Evid. R. 413. Thus, had Robert chosen the first alternative posited by Arthur–not testifying that the bills had been paid–none of the bills would have been admissible and Robert could not have been awarded any of his medical expenses at trial. The appeal before this Court would have been very different had Robert made this choice.

Further, as noted above, Arthur cited no authorities and made no argument that Robert was forced to make this choice. Arthur failed to show that any of cases cited by either party contained any ruling or holding that required the medical expenses be unpaid to be collected. As was noted in Robert's Brief (at 28). Any case with such a holding would fly in the face of Evid. R. 413.

B. Robert Could Not Testify That He Had Paid the Bills.

To make the charges on his medical bills "reasonable" and, therefore, admissible under Evid. R. 413, Robert was required to testify that the bills had been paid. He could not testify that he paid them, for to do so would have constituted perjury–Medicare had paid them. Thus, his only choice was to testify that the bills had been paid. As Arthur agreed, Robert did so.

C. Evidence of Collateral Source Payments Is Irrelevant and Prejudicial.

Arthur's original and creative position is that, since Robert testified that his bills had been paid, he was ***also*** required to testify as to the identity of the collateral source that had paid his

bills and to its subrogation rights. No authority for this argument was cited. Thus, the argument was waived. App. Rule 46(A)(8).

In fact, under both the common law and the statutory collateral source rules, Robert's testimony concerning the identity of the collateral source and the subrogation rights of the collateral source would be inadmissible as irrelevant and prejudicial to Robert on both the 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." *Koger v. Reid*, 417 N.E.2d 1142, 1144 (Ind. Ct. App. 1981) (citing *Brindle v. Harter*, 138 Ind.App. 692, 211 N.E.2d 513 (1965)). Since Medicare payments are not made admissible under the collateral source statute, they remain inadmissible under the common law rule.

The fact that Robert's bills were paid by a collateral source was inadmissible under the common law, and the statute has codified rather than altered the common law rule excluding evidence of collateral source payments from Medicare. Ind. Code § 34-44-1-2.[3] (See Memorandum of Law Concerning Inadmissibility of Evidence of Medicare Charges and Write-Offs at 2-4; *Koger*, 417 N.E.2d at 1144.

Conclusion.

It is Kafkaesque to assert that a plaintiff can recover his medical expenses only by refusing to offer the very testimony needed to make them admissible–evidence that they have been paid. It is even more bizarre to say that, once one has made the "mistake" of proving the bills have been paid, one becomes obliged to also offer evidence of the identity of the collateral

[3] *See*, *e.g.*, *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).

source that paid the bills and evidence of the source's subrogation right–despite the fact that such evidence is inadmissible under the common law and statutory collateral source rules and despite the obvious and long recognized risk that such evidence will prejudice the plaintiff's case on both the liability and damages issues. Nonetheless, this is what Arthur advocates–all without citation to authority or substantive argument as to why this should be the law.

III. ARTHUR'S POSITION IS INCONSISTENT & UNSUPPORTED BY EVIDENCE.

After asserting that "there was no evidence . . . as to the entity that paid his medical expenses," and that there was "no evidence presented" concerning any subrogation right (Arthur's Brief at 7), Arthur goes on to note, with no apparent awareness of the contradiction, that "the jury was given evidence as to collateral source payments." (*Id*. at 8). If there was no evidence as to who paid the bills or as to any subrogation rights, there was no evidence that the payments had been made by a collateral source. Again, Arthur cites no evidence of Record to show the jury received evidence of collateral source payments. Robert never testified as to who paid the bills, to subrogation rights, or to the fact that anyone other than he had paid the bills. Thus, Appellee has misrepresented the Record in this case.

IV. ARTHUR'S POSITION IS TO PERMIT JURORS TO SPECULATE ON MATTERS NOT IN EVIDENCE AND WITHOUT INSTRUCTIONS.

In connection with the false statement that the jury was provided evidence of collateral source payments, Arthur asserts that "the jury ***could properly consider*** the possibility of a double recovery of his medical bills." (Arthur's Brief at 8) (emphasis added). Appellee once again makes a naked assertion without reasonable argument or citation to authorities.

Indiana authorities cannot be found that would support the right of jurors, lacking evidence of collateral source payments inadmissible under the common law and statutory collateral source rules and without any instructions from the court, to speculate as to the existence of first party insurance, the benefits available under such insurance, and/or the subrogation rights that might exist in the case., and to decide how to avoid double recovery pursuant to a statute jurors have never heard of. To the contrary, when a jury engages in such speculation and ends up awarding a plaintiff damages of less than the undisputed medical expenses, the inadequacy of the award is evidence that a jury has, in fact, engaged in improper speculation. (*See* Brief of Appellant, Arguments I(A)-(B)).

Appellee asserts that the purpose of the collateral source statute is to enable the trier of fact to determine actual loss and avoid double recovery for damages. While this may be true, it is irrelevant because the collateral source payments in this case–from Medicare–are specifically excluded from the coverage of the collateral source statute. Thus, the purpose of the statute does not matter because the collateral payments in question are outside the scope of the statute. If Arthur wanted the jury to consider collateral payments and subrogation, he would have responded to the motion in limine regarding collateral source payments from Medicare, attempted to admit this evidence at trial to preserve the error, and submitted jury instructions concerning the proper use of such evidence in deliberations. He did not.

V. SOME OF ARTHUR'S ARGUMENTS ARE INCOMPREHENSIBLE.

Without resorting to the use of either reason or authority, Arthur asserts that "Robert, by testifying that $1,900.00 of his medical bills were unpaid and that the rest were paid, waives any argument that this is not proper proof of collateral source payments pursuant to I.C. § 34-44-1-2."

(Arthur's Brief at 8). This incredible *non sequitur* defies comprehension. First of all, as the trial court ruled in granting the motion in limine, the collateral source payments in this case–from Medicare–were inadmissible under § 34-44-1-2 and, therefore, not in any way "pursuant to" the statute. Second, Arthur failed to cite any evidence of Record that the medical expenses were paid by a collateral source. This, of course, is because there was no such evidence. Third, Arthur fails to explain how it is that a plaintiff's testimony that his bills have been paid waives any argument, nor does he cite any authority to support this untenable position. Thus, the argument is waived.

The second impossible "argument" to follow is the argument that begins by noting that "Robert's failure to apprise the jury of the payor of his medical expenses was intentional and calculating." (Arthur's Brief at 8-9). Since such evidence was intentionally made inadmissible under the common law and intentionally kept that way in the collateral source statute, Robert's intentional use of law intended to avoid prejudice to him on the issues of liability and damages surely does not affect the outcome of this appeal.

After making this apparently pointless assertion concerning the intentionality of Robert's strategy to avail himself of evidence rules intended to protect him from prejudice, Arthur goes on to assert that if Robert had identified Medicare as the payor, he would have opened the door to the defense showing that Medicare had paid those bills for substantial discounts. Arthur gives no explanation as to why Robert should be forced to forego evidence rules designed to protect him from prejudice. Further, although Arthur raised Robert's supposed fear that he would open the door to evidence of the actual amounts paid by Medicare, Arthur failed to note that Robert filed

an extensive Memorandum of Law that demonstrated the inadmissibility of such evidence, which resulted in Arthur making no effort to admit such evidence at trial. Robert had no such fear.[4]

The next incomprehensible assertion by Arthur is that the jury could have concluded from Robert's testimony that he was requesting the jury to award him only $1,900.00. (Arthur's Brief at 9). To support this argument, Arthur cites 7 lines from Roberts testimony (App 109, 16-22), grossly out of context. As was argued at length in Appellant's Brief (pp. 25-30; discussing App 108, 20 to 109, 19), placing that testimony in its context utterly repudiates this interpretation of Robert's testimony. This interpretation was made further untenable by the introduction of Exhibits 18 and 18A (App 51-75), which showed the total medical expenses incurred. (Appellant's Brief at 27-30).

Other portions of the Record make such an interpretation impossible. For example, counsel made it clear in his opening that Robert wanted to recover his total medical expenses of $22,000.00 (*e.g.* App 77, 13-17). Robert's counsel also argued for the award of the total medical special damages of nearly $22,000.00 in his closing argument, and "blackboarded" that number for the jury. (Tr at ___).

Arthur suggests that asking the Court to examine the testimony in its context, and in conjunction with the medical bills and summary, is to ask the Court to "weight the conflicting evidence and/or judge the credibility of witnesses." (Arthur's Brief at 9). There is no conflicting

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[4] Of equally dubious relevance was Arthur's assertion (footnote 2) that Robert's decision not to identify the collateral source was motivated by the 7th Circuit's "holding in *Evanston Hospital v. Hauck*, F3d. 540, 544 (7th Cir. 1883) cert. denied. 620 U.S. 1091 (1994) [sic]." Since Arthur's argument here was undeveloped, Robert will merely note that *Hauck* contains no holding regarding Medicare's subrogation rights. The issue of subrogation rights was not before the court there, and the language questioning Medicare's subrogation right was, therefore, *dicta*.

evidence to weigh–the total medical expenses were proven to be $21,558.98–without objection or contradiction by Arthur. Thus, the jury had to award these damages in order to follow the final instructions that it should award plaintiff "The reasonable expense of necessary medical care, treatment, and services." (App 191).

Similarly, there is no credibility to be weighed. There was no contrary witness whose credibility on the damages the jury could have found greater. Arthur's counsel stipulated and/or failed to object to admission of the medical records and bills and made no effort to impeach Robert's testimony on damages. Thus, there is no credibility to be weighed in finding that the verdict's failure to award the full amount of the undisputed medical expenses was outside of the evidence.

Finally, on this issue, Arthur fails to cite authorities or offer arguments to show that a jury may treat a misunderstanding of a witness's alleged request for damages as evidence of the medical expenses to which the plaintiff is entitled under Indiana law as embodied in the jury instructions.

Similarly, Arthur says that when "evidence concerning the injury and damage is conflicting, the jury is in the best position to assess the damages." (Arthur's Brief at 10). This principle of law might be relevant if Arthur had identified any conflicting evidence on the issues of injury or damages, but he did not. Thus, the principle does not affect the outcome of this appeal.

VI. ROBERT DOES NOT CITE ANY STATEMENT BY COUNSEL AS A BASIS FOR REVERSAL.

Arthur's Brief (at 11) asserts that Robert "alleges the jury's award was premised upon statement of Arthur's counsel during final argument." This statement is inaccurate because the truth is that Robert suggested that statements of Arthur's counsel were one potential explanation for the jury's failure to award damages consistent with the evidence and its instructions. Secondly, Robert suggested that statement of Arthur's counsel in both opening statement and closing argument might explain the jurors' confusion.

Arthur then notes that "the first problem" with this is that Robert "failed to object to the statement during trial" and that failure to timely object fails to preserve counsel statements as an issue on appeal. Robert has made no such argument. The mention of Arthur's counsel's efforts to move the jury to disregard its instructions was not offered as error or as the grounds for reversal, but merely as one explanation of the jury's conduct and the prejudice and/or speculation that gave rise to that conduct. Other explanation were also offered in Robert's Brief.

More than not seeking reversal for the improper statements of Arthur's counsel, and more than arguing that counsel's improper statements were merely offered as one of multiple explanations for the jury's improper award of damages, Robert's Brief also noted that the actual reason for the jury's improper award of damages ultimately does not matter. This court need not determine why the jury acted as it did–only that its action was improper. (*See* Appellant's Brief at 17).

CONCLUSION

Under Indiana law, a jury's damage award is valid only if it is within the scope of the evidence presented to the jury. When a jury's award of damages is for less than the uncontradicted medical expenses, Indiana law defines such awards as erroneous and inadequate.

Nothing argued in Arthur's Brief denies that the total medical expenses in this case were proven to be nearly $22,000.00 and that these bills and the related records of treatment were admitted by stipulation and/or without objection. Nothing in Arthur's Brief contradicts the simple fact that the jury's award of $4,900.00 in total damages is less than the undisputed medical expenses. Thus, under black letter Indiana law, the verdict was inadequate.

Arthur has failed to dispute the governing legal principles concerning the inadequacy of such verdicts as a matter of law or to dispute that this verdict was such a verdict. Further, he has failed to cite any legal authority showing that there are any exceptions to this principle of law, or that such exceptions would apply to this case. Nor has he offered any substantive legal argument as to why these principles of law should not govern this case, should be changed, or should have some exceptions grafted on to them that would govern the present case. Thus, all of these arguments have been waived.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Appellant's Reply Brief was mailed on June _____, 2004 to Donald K. McClellan, McCLELLAN, McCLELLAN & ARNOLD, Suite 200 400 North High Street, Muncie, IN 47305-1643

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