AMANDA MILLER, JOSEPH MILLER, AMANDA MILLER, as Parent and Next Best Friend of BRENDAN MILLER and JAMIE MILLER, Minors, Plaintiffs-Appellants, vs. BRADLEY DAYTON GREENLEE, PEPSI-COLA GENERAL BOTTLERS, INC., and PEPSI-COLA GENERAL BOTTLERS OF IOWA, INC., Defendants-Appellees, and AMCO INSURANCE COMPANY and/or NATIONWIDE MUTUAL INSURANCE COMPANY, Defendants.

No. 5-455 / 04-1857

COURT OF APPEALS OF IOWA

2005 Iowa App. LEXIS 1228

October 12, 2005, Filed

NOTICE:

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY.

SUBSEQUENT HISTORY: Reported at *Miller v. Greenlee, 707 N.W.2d 336, 2005 Iowa App. LEXIS 1567 (Iowa Ct. App., Oct. 12, 2005)*

PRIOR HISTORY: Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge. Plaintiffs appeal from the district court's denial of their motion for a new trial on damages.

DISPOSITION: AFFIRMED.

COUNSEL: Donald G. Beattie of the Beattie Law Firm, Des Moines, for appellants.

Mark A. Schultheis and Hannah M. Rogers of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, for appellees.

Kenneth H. Munro of Bradshaw, Proctor, Fowler & Fairgrave, P.C., Des Moines, for defendants.

JUDGES: Heard by Huitink, P.J., Hecht, J., and Nelson, S.J.*

* Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

OPINION BY: HUITINK

OPINION

HUITINK, P.J.

The plaintiffs in this personal injury case appeal the district court's denial of their motion for new trial. They argue the verdict was inconsistent. After reviewing the trial court record made available to us and [*2] the arguments of the parties, we affirm the judgment of the district court.

On April 26, 2001, Amanda Miller and her two children were in a vehicle that was rear-ended by a delivery truck owned by Pepsi Cola General Bottlers and driven by its employee, Bradley Greenlee. On April 21, 2003, the plaintiffs filed this action. The defendants admitted fault, but denied causation and damages. At trial, plaintiffs introduced the following medical bills as exhibits at trial: $ 8852.42 for Amanda Miller, $ 1162.00 for one child, and $ 1102.00 for the other child. The plaintiffs also introduced a summary of Amanda Miller's claim that she lost $ 2075 in wages. Although no trial transcript was prepared, in their brief the defendants state Ms. Miller testified that she received $ 5000 from her insurance carrier, that the insurance carrier had a subrogation interest in any recovery she received, and that she would have to repay that amount.

The jury awarded the following damages to Amanda Miller: $ 3000 in past medical expenses, $ 5000 in past pain and suffering, $ 1050 in past loss of function of the body, and $ 950 for past lost wages, for a total of $ 10,000. The jury awarded each of her children [*3] $ 52 for past medical expenses and $ 150 for past pain and suffering. The judgment totaled $ 10,404. The jury also found, based on special interrogatories submitted pursuant to *Iowa Code section 668.14* (2003), that the Millers had received money from their insurance carrier, that the Millers needed to refund that money to the insurance carrier, and that the amount to be refunded was $ 5000.

The Millers filed a motion for new trial, alleging inconsistency of the verdict. After a hearing, the court denied the motion on November 8, 2004. The Millers appeal.

Issues Presented for Review

We set forth, verbatim, the following issues as stated on page one of the Millers' brief:

> I. ARE THE APPELLANTS ENTITLED TO A NEW TRIAL ON DAMAGES ONLY WHEN THE MEDICAL BILLS INTRODUCED INTO EVIDENCE TOTALED $ 11,116.42, BUT THE JURY AWARDED PLAINTIFFS ONLY $ 3,104, WHILE FINDING THE AMOUNT TO BE REFUNDED TO ANY INSURANCE COMPANY WAS $ 5,000?
>
> II. ARE THE APPELLANTS ENTITLED TO A NEW TRIAL ON DAMAGES ONLY WHEN THE TRIAL COURT RULED THAT THE PARTIES[,] INCLUDING THE PLAINTIFFS, AND THE INSURANCE COMPANY ARE NOT BOUND BY THE JURY'S DECISION CONCERNING THE AMOUNT TO BE [*4] REFUNDED AND FREE TO NEGOTIATE DIFFERENT AMOUNTS?

Standard of Review

Our scope of review in this law action is for the correction of errors at law. *Iowa R. App. P. 6.4.*

The standard of review applicable to motions for new trial depends on the nature of the ground asserted and ruled on by the district court. *Hansen v. Central Iowa Hosp. Corp., 686 N.W.2d 476, 480 (Iowa 2004).* If the ground alleged is

a question of law, such as sufficiency of the evidence, review is for the correction of errors at law. *Estate of Hagedorn v. Peterson, 690 N.W.2d 84, 87 (Iowa 2004)*. If the motion seeks relief based on a matter committed to the trial court's discretion, review is for abuse of that discretion. *Id. at 87-88*; *see also Hansen, 686 N.W.2d at 480*.

The standard of review applicable to a district court's interpretation and construction of statutes is for the correction of errors at law. *Schneider Leasing, Inc. v. United States Aviation Underwriters, Inc., 555 N.W.2d 838, 840 (Iowa 1996)*.

Discussion

I. Absence of Trial Transcript. Before discussing the issues presented for our review, [*5] we must address the Millers' failure to provide us with a trial transcript. We may consider this issue on our own motion. *Top of Iowa Coop. v. Sime Farms, Inc., 608 N.W.2d 454, 470 (Iowa 2000)*. Aside from trial court papers, the only record presented for our review is the transcript of the hearing on the new trial motion and the trial exhibits. The absence of a trial transcript seriously hinders our consideration of the Millers' arguments.

The test for whether a new trial is required based on inconsistent verdicts is simply stated: a new trial is not required if "the verdicts can be reconciled in any reasonable manner consistent with the evidence and its fair inferences, and in light of the instructions of the court." *Hoffman v. National Med. Enters., Inc., 442 N.W.2d 123, 126-27 (Iowa 1989)*. Here, there is very little for us to review and reconcile, aside from the trial exhibits. We are required to make an attempt to harmonize the verdict with the record, the overwhelming majority of which is inaccessible to us. The absence of a transcript has made our review highly speculative. The failure to order a trial transcript has arguably left us with nothing [*6] to review. *Alvarez v. IBP, Inc., 696 N.W.2d 1, 3 (Iowa 2005)*; *see also In re F.W.S., 698 N.W.2d 134, 136 (Iowa 2005)*. Moreover, the factual assertions made by the parties in their briefs, to the extent that they relate to trial testimony and even if not contested, have no support in any record properly before us. *Alvarez, 696 N.W.2d at 3* (citing Iowa R. App. P. 6.14(1)(*d*)).

At oral argument, counsel for the Millers argued the record transmitted on appeal is sufficient for our review. In certain cases, a transcript is not necessary if the issue presented is a purely legal question. *In re Richardson's Estate, 250 Iowa 275, 285, 93 N.W.2d 777, 783 (1958)*. We have serious doubts about whether such is the case here; however and in the interest of thoroughness, we give the Millers every benefit of the doubt and address the merits of their appeal. Nevertheless, they should realize that this issue may provide an adequate and independent reason to affirm the district court's judgment. *Alvarez, 696 N.W.2d at 3*.

II. The Millers' Issue One: Inconsistency of Verdict. The Millers argue the jury was inconsistent [*7] when it awarded them only $ 3104 in medical damages but required them to repay $ 5000 to their insurance carrier. We cannot say that reversal is required for this reason.

The appellees argue the Millers did not preserve error because they did not request an instruction that the repayments made to the Millers' insurance company could not exceed their damages. We conclude error was adequately preserved. The verdict form submitted was from the uniform instructions. We cannot say that counsel is required to anticipate every conceivable way in which a jury's verdict may be inconsistent. If that were the case, jury instruction conferences would become endurance events and jury instructions would become ponderous and unwieldy. Here, the Millers raised jury verdict inconsistency in their motion for a new trial, and the district court addressed the issue in its ruling. We conclude error was preserved. *See Otterberg v. Farm Bureau Mut. Ins. Co., 696 N.W.2d 24, 27-28 (Iowa 2005)*.

Turning to the merits, the Millers argue the verdict is susceptible to two interpretations, both of which require a new trial in their view. First, they assert the jury could have concluded their damages [*8] were actually $ 15,404, but reduced the damages by the amount of the insurance payments. In that case, the Millers argue they sustained an impermissible "double reduction" in their damages. *See Loftsgard v. Dorrian, 476 N.W.2d 730, 735 (Iowa Ct. App.*

1991). Second, they argue the jury could have concluded they sustained $ 10,404 in damages and concluded they were to repay $ 5000. If that is the case, then the jury's verdict is confusing, according to the Millers, for there is no indication "as to what element of damages insurance subrogation could be paid from."

The appellees argue the verdict is easily reconcilable with the jury instructions and the evidence introduced at trial. In their brief and at oral argument, they point to their recollection of Amanda Miller's testimony that her family had received $ 5000 from their insurance carrier and that they would have to pay that amount back from any judgment received. They also note that the jury was not required to uncritically adopt the Millers' claims of medical damages, and was within its rights to reject many of the Millers' medical bills for lack of a causal connection between the care provided and the accident.

[*9] We agree with the appellees. The verdict is reasonably reconcilable with the evidence and the instructions. *Hoffman, 442 N.W.2d at 126-27*. Accepting the appellees' recollection of Amanda Miller's testimony as accurate, the jury could have permissibly found that the Millers were required to repay $ 5000 to their insurance carrier, for there was no evidence otherwise. Additionally, we conclude the jury was well within its rights to award the Millers less medical damages than they sought. Even without a trial transcript, we can easily discern that the issues of causation and damages were hotly contested, and these issues are the particular province of the jury. Finally, we conclude the jury's verdict was not inconsistent with the instructions it received, for the instructions did not require the jury to limit its answers to the special interrogatories to the amount of past medical damages awarded. [1]

1 The nature of the jury instructions actually given relates both to error preservation and the substantive standard for granting a new trial. While we conclude the Millers need not have raised the particular issue they now raise at the jury instruction conference to preserve the issue for our review, their failure to do limits this court's ability to grant them relief. The substantive standard for granting a new trial based on verdict inconsistency is heavily dependant on the jury instructions actually given. *Hoffman, 442 N.W.2d at 126-27*. Here, we conclude the verdict was consistent with the instructions the jury received. Had the Millers raised the issue at the jury instruction conference that they now raised, they would have had a stronger substantive argument.

[*10] The Millers are not entitled to a new trial based on verdict inconsistency.

III. The Millers' Issue Two: Binding Nature of the Jury's Answers to the Special Interrogatories on Subrogation. The Millers argue the district court erred in concluding the jury's special interrogatory answers were not binding on the parties and the Millers' insurance carrier. We disagree.

We first address the appellees' contention that the Millers did not preserve error on this issue. We cannot agree with the appellees, and reach the merits of this issue. The appellees argue the Millers did not preserve this issue because (1) they did not raise it in their motion for new trial and (2) the district court did not address it in its written ruling disposing of their new trial motion. We conclude the written motion for new trial sufficiently called the court's attention to the supposed binding nature of the jury's answers to the special interrogatories. We further note the district court addressed the issue in its ruling from the bench following the hearing on the Millers' motion for new trial. We also conclude it would be improper to allow the appellees to take advantage of the absence of any discussion [*11] of this issue in the written ruling, as the district court directed the appellees to draft the written ruling at the close of the hearing. As the issue was raised in and addressed by the district court, we conclude error was preserved. *Otterberg, 696 N.W.2d at 27-28*.

Turning to the merits, we conclude no new trial is required. While it is true that the jury's answers to the special interrogatories constituted special findings, *see Cowan v. Flannery, 461 N.W.2d 155, 158 (Iowa 1990)*, special findings are not judgments. We must consider them in light of the applicable law. Here, *Iowa Code section 668.14* provides that an insurer's subrogation interests include only "actual economic losses . . . for necessary medical care." Applying this law to the facts of this case, including the special interrogatories, we conclude the insurer's subrogation interest is

capped at $ 3104, the amount of past medical expenses awarded by the jury. The $ 5000 answer (an amount apparently consistent with Amanda Miller's trial testimony), although a special finding by the jury, cannot be used by the Millers' insurer to compel them to pay an amount greater [*12] than $ 3104. [2]

2 We are aware that the Millers' insurance carrier may raise issue preclusion in any action to enforce their subrogation interest. We do not consider this issue because the Millers did not discuss the four elements of issue preclusion in their brief. *See Cornell v. State, 529 N.W.2d 606, 610 (Iowa Ct. App. 1994)*. In any event, the four elements of issue preclusion were arguably not satisfied here. If they were, the preclusive effect of the jury's special interrogatory answer appears to be quite narrow, given the cap on the insurer's subrogation interests contained in *§ 668.14*.

We conclude the Millers are not entitled to a new trial on this basis.

Conclusion

After considering the record and the arguments of counsel, we affirm the judgment of the district court.

AFFIRMED.