STATE OF MICHIGAN

COURT OF APPEALS

JOHN HALEY and LINDA HALEY, Plaintiffs-Appellees, v FARM BUREAU INSURANCE COMPANY, Defendant-Appellant.	UNPUBLISHED August 27, 2013 No. 302158 Genesee Circuit Court LC No. 07-086758-CK

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Defendant Farm Bureau Insurance Company appeals as of right an order resolving post-judgment motions following a jury verdict in favor of plaintiffs John and Linda Haley. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL PROCEEDINGS

This case involves a homeowner's insurance coverage dispute arising from a fire that damaged plaintiffs' home and personal possessions. On the day of the fire, John had been using a heat gun to defrost a frozen pipe near his washing machine. Both the house and plaintiffs' personal possessions were damaged as a result of the fire.

After defendant refused to pay plaintiffs' insurance claim, plaintiffs filed a complaint alleging breach of the insurance contract. Subsequently, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiffs breached the insurance policy by making false statements and misrepresenting material facts regarding the events surrounding the fire and the value of their claim. The trial court denied defendant's motion and subsequently this matter proceeded to a jury trial. Following plaintiffs' presentation of their case-in-chief, defendant moved for a directed verdict, arguing that there was insufficient proof of damages and that plaintiffs' made material misrepresentations that breached the insurance policy. The trial court denied the motion for directed verdict, concluding that there was sufficient evidence on the record for a jury to determine the case.

Following the conclusion of trial, the jury returned a verdict in favor of plaintiffs. In particular, the jury found that plaintiffs did not have a guilty connection to the setting of the fire and that they did not commit fraud or false swearing or make a material misrepresentation with the intent to defraud defendant regarding the fire loss. Regarding damages, the jury found that

the repair cost of plaintiffs' dwelling was "[u]p to" $132,500 "but not to exceed" that amount, that the actual cash value loss for the dwelling was $132,500, and that the actual cash value of plaintiffs' contents loss was $50,978.38.

After a judgment was entered on the jury's verdict, defendant moved for JNOV or new trial, arguing that the verdict was clearly excessive in light of the damages evidence, that the court committed a palpable error of law in denying a directed verdict on damages, and that the jury's verdict was against the great weight of the evidence and contrary to law. The trial court denied defendant's motion for JNOV or new trial, stating:

> The issues raised in this motion are a compilation of the issues raised and decided during the trial. In essence, defendant is requesting reconsideration of previous rulings. The Court is not persuaded that palpable error occurred. Defendant must come to realize that despite its best efforts, and the defense of this case was formidable, the jurors were not persuaded that plaintiffs intentionally burned their home. Therefore, defendant's motion for a new trial and/or a judgment notwithstanding the verdict is denied.

Defendant now appeals as of right.

II. ANALYSIS

A. SUMMARY DISPOSITION

Defendant first argues that the trial court erred in denying its motion for summary disposition. "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Hackel v Macomb Co Comm*, 298 Mich App 311, 315; 826 NW2d 753 (2012). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Defendant argues that it was entitled to summary disposition because plaintiffs made material misrepresentations regarding the fire and the loss. Plaintiffs' insurance policy with defendant contained the following exclusion:

> 17. Concealment or Fraud.
>
> a. With respect to loss caused by fire, we do not provide coverage to the insured who has:
>
> (1) intentionally concealed or misrepresented any material fact or circumstance.

(2) engaged in fraudulent conduct; or

(3) made false statements;

relating to this insurance or to a loss to which this insurance applies. [Emphasis removed.]

In *Mina v Gen Star Indemnity Co*, 218 Mich App 678, 686; 555 NW2d 1 (1996) rev'd in part on other grounds 455 Mich 866 (1997), this Court explained the requirements for establishing fraud or false swearing:

> The insurer's defense of "false swearing" is an allegation that the insured submitted fraudulent proof of loss. Fraud or false swearing implies something more than mistake of fact or honest misstatements on the part of the insured. It may consist of knowingly and intentionally stating upon oath what is not true, or stating a fact to be true although the declarant does not know if it is true and has no grounds to believe that it is true. In order to prevail, the insurer must prove not only that the swearing was false, but also that it was done knowingly, willfully, and with intent to defraud. Fraud cannot be established from the mere fact that the loss was less than was claimed in the preliminary proofs furnished to the insurer.
>
> To void a policy because the insured has willfully misrepresented a material fact, an insurer must show that (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it. A statement is material if it is reasonably relevant to the insurer's investigation of a claim. [Citations omitted.]

Here, defendant argues that John made a material misrepresentation by making inconsistent statements regarding whether he saw flames. Defendant obtained multiple statements from John in the course of its investigation of the fire. In a statement to defendant's investigator, Lewis Draper, five days after the fire, John indicated that he never saw a flame. However, in a subsequent examination under oath by defense counsel, John stated that he "could see some little flames" on a burning furnace filter next to a wastebasket in the kitchen. And in his deposition in this lawsuit, John indicated that he saw the furnace filter on fire and that he could see some flames underneath the floor in the laundry room through a hole where he had earlier used a heat gun to defrost a frozen pipe.

After reviewing the relevant record testimony, and in looking at the evidence in the light most favorable to plaintiffs, reasonable minds could differ regarding whether John knowingly and willfully made false statements with the intent to defraud defendant. To be sure, John's various statements regarding whether and when he saw flames lacked clarity, and a jury could reasonably conclude that John deliberately altered his testimony regarding whether he saw flames. John initially told Draper that he "never saw a flame," but then later asserted in his examination under oath and at deposition that he saw flames on the furnace filter and through the

hole where the heat gun had been located. But reasonable minds could also conclude from the evidence that John simply made honest misstatements because he was confused or failed to express himself well. *Mina*, 218 Mich App at 686.

In particular, John's deposition testimony could be understood to suggest that his initial statement that he never saw a flame did not include what he called the "little flames" he saw under the floor or the two-inch flames on the furnace filter. In describing at deposition the flames he could see through the hole, John stated, "There wasn't flames. There were no flames, big flames. There were just little flames underneath [the floor]." And in explaining why he told Draper that he never saw flames even though he saw flames on the filter, John testified, "Well, I didn't know if he was talking about—I didn't know if he's talking about the—about through the house." This testimony suggests that John may have inarticulately conflated the term "flames" with "big flames" or flames "through the house," as distinguished from the "little flames" underneath the floor or the two-inch flames on the filter. This interpretation is supported by the fact that his initial statement about never having seen a flame was in response to a question from Draper that lacked temporal or spatial precision. We thus conclude that a genuine issue of material fact existed regarding whether these varying statements reflected that plaintiffs intended to defraud defendant.

Defendant also argues that summary disposition was appropriate because plaintiffs made false statements in their sworn statement in proof of loss and associated contents inventory itemizing their damages. In particular, defendant contends that the contents inventory includes four pages of items damaged or destroyed in an upstairs bedroom, totaling $12,110.82, but that John admitted in his deposition that items in that room were not damaged and that a claim for those items would be inappropriate.

Despite the concessions that defense counsel elicited from John, reasonable minds could differ regarding whether plaintiffs intended to defraud defendant when they submitted their claim that the items listed in the contents inventory were damaged or destroyed. The fact that John was able to clean a few items and that he took a couple shirts from an upstairs bedroom closet fails to establish as a matter of law that the items were entirely free from smoke or heat damage. That the items needed to be cleaned or had smoke on them reflected that some damage may have existed, or at least that plaintiffs arguably had reason to believe as much. Although defense counsel led John to say that a claim for the items in the bedroom would have been inappropriate, this fails to establish that plaintiffs knew the proof of loss was false and intended to defraud defendant when they submitted it. Also, "[f]raud cannot be established from the mere fact that the loss was less than was claimed in the preliminary proofs furnished to the insurer." *Mina*, 218 Mich App at 686. If defendant believed the loss was less than plaintiffs claimed, defendant was free to prepare its own estimate and negotiate with plaintiffs' public adjuster regarding the resolution of the claim, but defendant did not do so and instead denied the claim entirely. We conclude that a genuine issue of material fact existed regarding whether plaintiffs made material misrepresentations with the intent to defraud defendant regarding their claimed loss.

B. DIRECTED VERDICT

Defendant next argues that the trial court erred in denying its motion for a directed verdict regarding plaintiffs' purported material misrepresentations. A trial court's decision on a

motion for a directed verdict is reviewed de novo. *Genna v Jackson*, 286 Mich App 413, 416; 781 NW2d 124 (2009). This Court views the evidence in the light most favorable to the nonmoving party. *Id*. "A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ." *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008) aff'd 483 Mich 1089 (2009). "When reviewing a trial court's decision on a motion for a directed verdict, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the testimony." *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005) (quotation marks and citation omitted).

Defendant argues that plaintiffs made various material misrepresentations through John's inconsistent statements regarding whether and where he saw flames.[1] We conclude that reasonable minds could differ concerning whether plaintiffs intended to defraud defendant. Like his deposition testimony, John's trial testimony supports an inference that his differing statements reflected confusion or a lack of precise articulation when using the word "flames." When questioned by defense counsel regarding whether he made a false statement concerning the flames, John testified, "Depends—you know—said that I seen flames, I saw flames with the furnace filter. That was one set of flames." On questioning by his own attorney, John indicated that he was telling what he thought was the truth when he made the various statements and that he did not know why the statements differed. John denied that he intended to swear falsely or to make misrepresentations to defendant with the intent to deceive or defraud defendant. Viewing the testimony in the light most favorable to plaintiffs, we conclude that reasonable minds could differ regarding whether John intended to deceive defendant or merely made honest misstatements. *Mina*, 218 Mich App at 686.

Defendant also cites John's failure to reveal in his initial statement to Draper and in his examination under oath that there was an electric heater in the crawlspace at the time of the fire. At trial, John explained that he did not mention the electric heater to Draper because John thought Draper had asked him if anything had been "running," i.e., were any devices turned on under the house. Additionally, Linda testified that John may not have been aware that a light switch was available to turn on the electric heater in the crawlspace "because he never went down there. He never was the one that put it in there. He was never the one to turn it on. I was always the one[.]" According to Linda, there were "many switches" in the home: "So many of 'em, he don't know where they go." And as discussed, John testified that he did not intend to

[1] Defendant also asserts that it may void the policy without establishing intent to defraud because "the question of intent to deceive is not an element that must be proven under the law or in the Policy of Insurance." However, defendant's argument relies upon the analysis in *Mina*, and *Mina* itself states that "[i]n order to prevail, the insurer must prove not only that the swearing was false, but also that it was done knowingly, willfully, and with intent to defraud." *Mina*, 218 Mich App at 686. Defendant fails to develop an argument that the analysis in *Mina* is inapplicable to the insurance policy in this case, and thus, this argument is considered abandoned as insufficiently briefed. *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004).

deceive defendant and that he told what he thought was the truth when he made the various statements. We find no basis to interfere with the jury's role in determining whether plaintiffs' testimony on this point was credible. *Foreman*, 266 Mich App at 136.

Defendant also argues that plaintiffs made material misrepresentations regarding the proof of loss, given John's acknowledgement that he took a couple shirts from an upstairs bedroom closet, cleaned his guns, and took a television set out of the house. As we have discussed, however, reasonable minds could differ regarding whether plaintiffs intended to defraud defendant when they submitted their proof of loss. Even if the loss turned out to be less than initially claimed, this would not by itself establish fraud. *Mina*, 218 Mich App at 686. The fact that John cleaned some items does not preclude a finding that the items were damaged. Indeed, defendant's senior claims representative, Ann Jones, acknowledged that even items that are cleaned may still retain a smell of smoke and thus could be covered by the policy. Jones also acknowledged that the insurance policy covered fire damage, heat damage, water damage, and smoke damage; that she did not evaluate the television set or other appliances; that appliances may appear undamaged but sometimes not work because of water or heat; that water over time may cause wood to warp; and that cleaning an item may not be worthwhile if it is cheaper to replace it. Thus, an inference could fairly be drawn that plaintiffs honestly believed the items listed on the contents inventory suffered damage covered by the policy even though they cleaned or retrieved a few items from the house. Viewing the evidence in the light most favorable to plaintiffs, reasonable minds could disagree about whether plaintiffs intended to deceive or defraud defendant when they submitted the proof of loss.

C. ADMISSION OF EVIDENCE

Defendant asserts that the trial court abused its discretion when it admitted the testimony of various witnesses. "A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010) (citation omitted).

1. MRE 701

Defendant first contends that the trial court abused its discretion in permitting two firefighters, Kevin Bloss and James Finkbeiner, to testify regarding the cause and origin of the fire. We conclude that the trial court properly allowed the witnesses to offer their opinions as lay witnesses. MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

In *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455-456; 540 NW2d 696 (1995), this Court upheld the admission of police officers' lay opinions regarding the cause of a motor vehicle accident based on their observations of skid marks:

> The trial court allowed one officer to testify on the basis of his observations of photographs of skid marks, which were taken at the scene by [the driver of one of the vehicles involved in the accident, Jeffrey] Garlock. The second officer was permitted to testify on the basis of his observation of the skid marks at the scene. The officers testified that they believed that Garlock's truck encroached on the right eastbound lane in which plaintiffs' vehicle was traveling. The evidence belies defendants' assertion that the officers' opinions were premised on investigation of the vehicles days after the accident and were actually the result of a reconstruction of the accident.
>
> The opinions were rationally based on the officers' perceptions based on examining photographs and the scene. After examining the evidence, the officers gave their opinion that the skid marks led them to believe that a vehicle traveling in the left eastbound lane encroached upon the right eastbound lane. Garlock himself testified that the skid marks came from his truck. The officers' opinions were helpful to a clear understanding regarding whether Garlock's truck encroached on the right eastbound lane. Because these opinions were reliable conclusions that could be made by people in general on the basis of the evidence of the skid marks and were not overly dependent on scientific, technical, or specialized knowledge, we find that the trial court's decision to admit their testimony was not an abuse of discretion.

Further, in *Co-Jo, Inc v Strand*, 226 Mich App 108, 117; 572 NW2d 251 (1997) superseded on other grounds by MCR 7.208(I), this Court upheld under MRE 701 the admission of an off-duty firefighter's lay opinion testimony regarding the speed at which a building burned:

> Here, [the witness's] conclusions were based on observation of the fire for over thirty minutes. The opinion testimony was limited to describing the fire in relation to other building fires [the witness] had witnessed. The reliability of his conclusions was premised on his extensive experience in observing other building fires and investigating their causes. The testimony was of a general nature, without any reference to technical comparison or scientific analysis. Moreover, the trial court went to great lengths to avoid the admission of any evidence that could be construed as technical or scientific analysis. We conclude that the trial court did not abuse its discretion in allowing [the witness] to offer his opinion regarding the speed and intensity of the fire.

Here, the trial court properly allowed Bloss and Finkbeiner to testify about inferences they drew based on their perceptions during the firefight and based on their experience. Bloss, a battalion chief, had worked for the Clio Fire Department for 31 years, was trained to look for multiple origins of a fire that may suggest arson, and had taken one class in determining the cause and origin of fires. Finkbeiner had been a firefighter for 23 years. Finkbeiner had "very limited" education regarding the source of arson but had gained "[s]treet knowledge" on the subject. Both witnesses acknowledged, however, that they did not conduct a cause and origin analysis in this case and that the Clio Fire Department does not have a cause and origin investigator. Finkbeiner further conceded that the Clio Fire Department was "not qualified to put a cause to anything" and that if arson was suspected, the matter would be referred to the state

police. Also, Bloss testified that the "unintentional" box on the fire report was not checked as a result of a cause and origin investigation. In sum, both firefighters forthrightly disclaimed any suggestion of scientific or technical expertise regarding the cause and origin of the fire.

Bloss and Finkbeiner did testify, however, that they found nothing suspicious to suggest arson and that the fire was thus categorized as "unintentional" on the fire report. Bloss indicated that plaintiffs told him they were using a heat gun to defrost a pipe through a hole. Bloss found a heat gun and a hole in the side of the floor joist like John had told him. Thus, Bloss's investigation substantiated the truthfulness of what John had told him regarding what he thought caused the fire. None of the other firefighters at the scene reported anything suspicious to Bloss that suggested the fire was caused by something other than the heat gun. Based on his experience as a firefighter, Bloss believed the cause of the fire was the heat gun blowing heat underneath the floor and causing something to ignite under the floor.

Finkbeiner went into the fire himself and wrote the fire report in this case because he was the first officer on the first truck to arrive at the scene. On the fire report, Finkbeiner checked "unintentional" as the cause of ignition. None of the other firefighters gave Finkbeiner any information suggesting that the fire resulted from arson. According to the fire report and what Finkbeiner accumulated in the investigation, the fire was ignited by the heat gun, and it was an unintentional fire.

In short, both firefighters testified based on their perceptions gleaned in fighting the fire in this case and based on their experience. Neither witness proclaimed expertise but instead drew rational inferences that the fire was unintentionally caused by the heat gun. These inferences were based on their perceptions at the scene, including the fact that a heat gun was found near the hole in the wall, and the fact that nothing suspicious suggesting arson was found or reported during the firefight. The testimony was not "overly dependent on scientific, technical, or specialized knowledge[.]" *Richardson*, 213 Mich App at 456. The witnesses did not refer to or utilize technical or scientific analysis. *Co-Jo, Inc*, 226 Mich App at 117. Their opinions or inferences were helpful to a clear understanding of their testimony or the determination of a fact in issue, i.e., the manner in which the fire started. Thus, the trial court did not abuse its discretion in admitting this testimony.[2]

2. MRE 702

[2] We also note that after these firefighters testified, defense counsel suggested that the firefighters did *not* provide expert opinion testimony regarding the cause of the fire. A party cannot seek relief on appeal by taking a position that is inconsistent with what it argued in the trial court. *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). Additionally, we note that in cross-examining Bloss, defense counsel himself asked Bloss for his opinion regarding whether the heat gun caused the fire. Consequently, to the extent defendant now suggests it was improper to elicit an opinion from the firefighters regarding whether the heat gun caused the fire, it could be argued that defendant has waived the issue by contributing to the alleged error. *Farm Credit Servs of Mich's Heartland, PCA v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998).

Next, defendant argues that the trial court abused its discretion in permitting the deposition testimony of Dennis Smith, plaintiffs' cause and origin expert, to be read to the jury because the testimony was not based on sufficient facts or data and that the underlying facts were not in evidence. MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This rule "incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993)." *Edry*, 486 Mich at 639. The trial court must act as a gatekeeper to ensure that all expert opinion testimony is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780-781; 685 NW2d 391 (2004).

Defendant's challenge to Smith's testimony fails because it is based on an incorrect premise. Defendant asserts that there are no facts or data to support Smith's opinion that the fire started in what the parties refer to as joist space one, i.e., a section of the crawlspace delineated by the floor joists. However, defendant's argument that there are no facts or data to support Smith's opinion is premised on a mischaracterization of Smith's testimony. Smith identified an *area* of origin that included both joist space one and joist space two; Smith could not pinpoint an exact point of origin because of damage to the scene caused by the fire and by defendant's expert. Although Smith allowed the possibility that the fire could have started in joist space one if it contained more easily ignitable material or if air currents existed, he did not opine that this was more likely than the possibility that the fire started in joist space two. Smith explained repeatedly that his inability to determine the exact location of ignition was the reason why he identified an *area* of origin in lieu of a specific *point* of origin. Therefore, Smith's opinion did not hinge on the existence of facts or data establishing that joist space one contained material that differed from the material in joist space two. Rather, it was only defense counsel's hypothetical questions that postulated a theory premised on such facts or data. Defendant's appellate argument is thus unavailing because it proceeds from a false premise regarding the content of Smith's testimony.

The testimony of Gary Lappin, plaintiffs' public adjuster, regarding the values of the items listed in the contents inventory, was also properly admitted. Defendant argues that Lappin improperly took a flat 30 percent depreciation on every item in the contents inventory, even though Lappin acknowledged depreciation should be determined based on the age, use, and quality of the items. Also, defendant contends that the facts or data underlying the value determinations were not in evidence because Lappin did not personally prepare the contents inventory or determine the unit costs listed for each item; these were instead prepared by a former employee of Lappin's firm.

The insurance policy provides for an award of "actual cash value" for personal property losses. In determining what constitutes the "actual cash value" of an item at the time of loss, a trier of fact may consider "any evidence logically tending to the formation of a correct estimate of the value of the destroyed or damaged property[.]" *Davis v Nat'l American Ins Co*, 78 Mich App 225, 233; 259 NW2d 433 (1977) (quotation marks and citation omitted). Under this so-called "broad evidence rule, the courts have not abandoned consideration of either market or reproduction or replacement values in arriving at 'actual cash value,' but view them merely as guides in making that determination, rather than shackles compelling strict adherence thereto." *Id*. at 233-234 (quotations marks and citation omitted). "Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result [may] be only approximate." *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997) (citations omitted).

Here, Lappin, a licensed public adjuster for 27 years, testified that estimating the value of an item is not an exact science, and that people may differ regarding the value of an item. Lappin explained that there is no scientific method for determining actual cash value, but that he understands the term to mean "the replacement cost less physical and economic depreciation based on age and condition."[3] Lappin's office provided a contents inventory to plaintiffs and asked them to sign it. Lappin did not personally prepare the contents inventory. But after the inventory was submitted to defendant, Lappin met with plaintiffs, reviewed the actual cash value, and reviewed the inventory for correctness. Lappin also calculated the depreciation with his office manager. Each item on the contents inventory was depreciated by 30 percent. Lappin applied a 30 percent across-the-board depreciation for the inventory items because "we didn't have a lot of the ages. Mrs. Haley did not provide that." Lappin thus gave defendant the benefit of the doubt and used a 30 percent depreciation figure, which was "greater than usual in an attempt to resolve it. It was all subject to negotiation[.]" However, no negotiation ever occurred in this case, as there was no opportunity to go through the submitted inventory with defendant and arrive at a final settlement figure. For the contents of the house, the amount claimed was $50,978.38, which was less than the policy limits.

We conclude that there were sufficient facts and data to support Lappin's opinion regarding the values of the items listed in the contents inventory. Although Lappin did not personally prepare the contents inventory, he reviewed it for correctness with plaintiffs, and calculated the depreciation of the items with his office manager. Lappin's methodology was sufficiently reliable to admit his testimony. Lappin explained how depreciation is calculated; because plaintiffs could not provide the ages for all of the contents in the home, Lappin gave defendant the benefit of the doubt and used a 30 percent depreciation rate on all of the items, which Lappin believed was greater than usual. Although it was possible that some items had

[3] Case law has likewise noted that the definition of "actual cash value" is "replacement cost less depreciation." *Smith v Mich Basic Prop Ins Ass'n*, 441 Mich 181, 196 n 28; 490 NW2d 864 (1992) superseded on other grounds by MCL 500.2826. The policy itself did not define the term "actual cash value."

depreciated by more than this, Lappin did not believe that they had. Lappin's testimony regarding the application of his methodology was subject to challenge on cross-examination; his estimate of the value of the contents following his review of the inventory with plaintiffs for correctness was also subject to cross-examination. "Disagreements pertaining to an expert witness's interpretation of the facts are relevant to the weight of that testimony and not its admissibility." *Lenawee Co v Wagley*, __ Mich App __ ; __ NW2d __ (Docket No. 311255, issued May 21, 2013), slip op, p 18.

Defendant also challenges Lappin's testimony regarding the repair costs for the home on the ground that Lappin relied on estimates from a plumber and an electrician who did not testify at trial. However, Lappin explained that these estimates merely reinforced or affirmed Lappin's *own* opinions regarding the costs at issue. Although Lappin was not a licensed plumber or a licensed electrician, he was a licensed public adjuster with 27 years of experience that included estimating costs and damages. Defendant was free to challenge Lappin's testimony by cross-examining him regarding whether and how he formed the estimates on his own; indeed, the record reflects that defense counsel cross-examined Lappin on this matter.

D. EVIDENCE OF DAMAGES

Defendant's next argument is that the trial court erred in denying its motion for a directed verdict regarding damages. The party asserting a claim carries the burden of establishing its damages with reasonable certainty. *Berrios*, 226 Mich App at 478. "Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result [may] be only approximate." *Id*. (citations omitted). A lack of precise proof of damages does not preclude recovery. *Id*. "Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995).

With respect to the dwelling loss, the policy provided for an award of the actual cash value of the damage, unless actual repair or replacement is completed, in which case plaintiffs are entitled to the replacement cost. The trier of fact may determine the "actual cash value" of an item at the time of loss by considering "any evidence logically tending to the formation of a correct estimate of the value of the destroyed or damaged property[.]" *Davis*, 78 Mich App at 233 (quotation marks and citation omitted). Under this so-called "broad evidence rule, the courts have not abandoned consideration of either market or reproduction or replacement values in arriving at 'actual cash value,' but view them merely as guides in making that determination, rather than shackles compelling strict adherence thereto." *Id*. at 233-234 (quotations marks and citation omitted).

Viewed in the light most favorable to plaintiffs, there was sufficient evidence to establish plaintiffs' damages regarding the dwelling. Plaintiffs submitted a sworn statement in proof of loss, prepared by Lappin's firm, indicating that the actual cash value of the dwelling at the time of loss was $104,600, which was double the state equalized value of $52,300. The policy limit for the dwelling was $132,500. The total amount claimed for the dwelling in the proof of loss was $152,375. Lappin testified at trial that he believed the dwelling was a total loss and that the

damages were going to exceed the policy limits. Lappin also testified that he submitted a cover letter with the proof of loss, explaining that he believed the local building department officials would not allow the current structure to be repaired. Lappin believed the code upgrades would exceed $22,000, but the policy limit for the upgrades was $12,067. Two weeks before trial, Lappin went back through the house and wrote down the physical damages that he observed in order to prepare an estimate for the cost to repair the dwelling. Lappin's repair cost estimate was $120,670, which was less than the coverage available.

The *fact* of plaintiffs' damages was established because there was unquestionably a fire in plaintiffs' home that caused damage; hence, the certainty requirement is relaxed given that only the *amount* of damages was in dispute. *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 634; 769 NW2d 911 (2009); *Hofmann*, 211 Mich App at 108. The jury awarded plaintiffs $132,500 for the dwelling loss, for both the repair cost and the actual cash value. Lappin estimated that the actual cash value of the loss was at least $104,600, but opined that this estimate was low when taking into account repairs. Lappin further estimated that the repair cost would amount to $120,670, but that additional costs related to code upgrades would exceed $22,000. Thus, plaintiffs presented sufficient evidence to support their damages claim.

Although defendant questioned Lappin's methodology, defendant was free to, and did, introduce its own proofs regarding damages,[4] and the weight to be given to the evidence was a matter for the jury. *Unibar Maintenance Servs, Inc*, 283 Mich App at 635; *Strzelecki v Blaser's Lakeside Indus of Rice Lake, Inc*, 133 Mich App 191, 197-198; 348 NW2d 311 (1984). The lack of mathematical certainty in some of plaintiffs' proofs did not render their evidence of damages speculative. *Berrios*, 226 Mich App at 478; *Strzelecki*, 133 Mich App at 197. A reasonable basis for computation existed even if the amount was only approximate. *Hofmann*, 211 Mich App at 108.

Next, defendant argues that there was insufficient proof of damages related to the contents of the home. According to defendant, Lappin conceded that some of his numbers were inaccurate given that John had used some clothes and taken some guns out of the house. Defendant further argues that there was no evidence to support the list of items that plaintiffs believed were damaged or destroyed.

Lappin's firm prepared an inventory of the contents of the home that plaintiffs signed. After the inventory was submitted to defendant, Lappin met with plaintiffs, reviewed the actual cash value, and reviewed the inventory for correctness. Lappin also calculated the depreciation with his office manager. Each item on the contents inventory was depreciated by 30 percent. For the contents of the house, the amount claimed was $50,978.38, which was less than the policy limits. Although Lappin did not personally prepare the contents inventory, he reviewed it for correctness with plaintiffs, and calculated the depreciation of the items with his office manager. At trial, Lappin testified that some of the values "probably could go up and some could probably go down" given John's testimony that he had used some clothing and taken some

[4] Defendant presented the testimony of Randy Miller, the owner and general manager of a fire and water restoration company, who estimated it would cost $84,000 to repair plaintiffs' home.

guns; but Lappin stated that "by and large, the majority I would stand by." Because there is no question that the fire caused some damage to the contents of plaintiffs' home, the certainty requirement is relaxed as only the *amount* of damages was in dispute. *Unibar Maintenance Servs, Inc*, 283 Mich App at 634; *Hofmann*, 211 Mich App at 108. Defendant was free to present its own evidence challenging Lappin's valuation of the contents, and it was for the jury to determine the weight to be given to the evidence. *Unibar Maintenance Servs, Inc*, 283 Mich App at 635; *Strzelecki*, 133 Mich App at 197-198. Viewing it in the light most favorable to plaintiffs, the evidence was sufficient to support plaintiffs' damages claim with respect to the personal property loss.

E. REMITTITUR

Defendant's final argument is that the trial court abused its discretion in refusing to grant remittitur. This Court reviews for an abuse of discretion a trial court's decision whether to grant remittitur. *Local Emergency Fin Assistance Loan Bd v Blackwell*, 299 Mich App 727, 740; 832 NW2d 401 (2013). We hold that the trial court abused its discretion in refusing to grant remittitur with respect to the actual cash value of the dwelling loss, but the trial court properly denied remittitur regarding the remaining damages.

A party may move for a new trial on the ground that the verdict was clearly or grossly excessive. MCR 2.611(A)(1)(d). If the court determines that the verdict is clearly or grossly excessive, in lieu of granting a new trial, the court may grant the prevailing party an opportunity to consent to judgment in the highest amount the evidence will support. MCR 2.611(E)(1); *Heaton v Benton Constr Co*, 286 Mich App 528, 538-539; 780 NW2d 618 (2009).

> In determining whether remittitur is appropriate, a trial court must decide whether the jury award was supported by the evidence. This determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented. The power of remittitur should be exercised with restraint. If the award for economic damages falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the jury award should not be disturbed. . . . We review all the evidence in the light most favorable to the nonmoving party. [*Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008) (citations omitted).]

"A verdict should not be set aside simply because the method of computation used by the jury in assessing damages cannot be determined, unless it is not within the range of evidence presented at trial." *Diamond v Witherspoon*, 265 Mich App 673, 694; 696 NW2d 770 (2005).

Here, the jury awarded "up to" $132,500 as the repair cost of the dwelling, $132,500 for the actual cash value loss for the dwelling, $50,978.38 for the actual cash value of the contents loss, and $0 for additional living expenses. The jury's determination regarding the repair cost of the dwelling fell within the range of evidence presented at trial. As discussed, plaintiffs' public adjuster, Lappin, estimated that the repair cost for the dwelling would amount to $120,670, but that additional costs related to code upgrades would be at least $22,000. The jury's determination of the actual cash value of the contents loss also fell within the range of evidence, as Lappin testified in support of his estimate that the contents loss amounted to $50,978.38.

However, the jury's determination of the actual cash value of the dwelling loss exceeded the amount supported by the evidence at trial. Lappin estimated that the actual cash value of the dwelling loss was $104,600, which he calculated by doubling the state equalized value of $52,300. Although the state equalized value includes the value of the land, which was not damaged by the fire and was not insured, Lappin opined that $104,600 was "probably a low figure" when taking into account repairs. However, Lappin's testimony suggesting that repairs may render his estimate low was inapt because if repairs are actually completed, plaintiffs are entitled to recover repair or replacement costs in lieu of the actual cash value.[5] The actual cash value award for the dwelling is relevant only if repairs are not actually completed. Thus, the amount awarded by the jury for actual cash value of the dwelling loss, $132,500, did not fall within the range of evidence presented at trial. Indeed, the highest figure presented by plaintiffs was the $104,600 amount, and Lappin's own testimony establishes that this amount includes a valuation of the land on which the dwelling sat, which was neither damaged nor insured. Hence, even the $104,600 amount for just the dwelling is not supported by the evidence. We therefore vacate that award, and on remand the trial court shall follow the procedure for granting remittitur in MCR 2.611(E)(1).

Finally, defendant summarily asserts that it is entitled to a credit for its voluntary payment of $5,000 to plaintiffs for additional living expenses because the jury awarded plaintiffs $0 for additional living expenses. Defendant fails to cite authority or to develop an argument regarding why it should be entitled to a credit. Defendant cites nothing in the record indicating that the jury's award of $0 was meant to entitle defendant to a credit. A party may not merely announce its position and leave it to this Court to discover or rationalize the basis for its claims, elaborate its argument, or search for authority for its position. *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004). Accordingly, defendant's assertion that it is entitled to a $5,000 credit is deemed abandoned as insufficiently briefed. *Id.*

Affirmed in part, vacate in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Christopher M. Murray

[5] Indeed, plaintiffs' counsel conceded in closing argument that plaintiffs would not obtain the portion of damages constituting replacement costs "unless they spend it." The existing record does not indicate whether plaintiffs have completed actual repairs that cost up to $132,500.