

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA LEMBERG and STEVEN
LEMBERG,

UNPUBLISHED
March 15, 2012

Plaintiffs-Appellees,

V

KOROTKIN-SCHLESINGER & ASSOCIATES,
INC., KOROTKIN INSURANCE GROUP, and
KENNETH KOROTKIN,

No. 301116
Oakland Circuit Court
LC No. 2008-092314-CK

Defendants-Appellants.

Before: MURPHY, C.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

In this negligence action, defendants appeal as of right the trial court's judgment in favor of plaintiffs against defendants following a jury trial. We affirm.

I. FACTS & PROCEEDINGS

This case arises from defendants' alleged failure to obtain adequate insurance coverage for a diamond engagement ring that was lost by plaintiffs in 2007. Defendant Kenneth Korotkin (Kenneth) was plaintiffs' insurance agent. Plaintiffs maintained that their agreement with defendants for insurance of the diamond engagement ring was for the replacement value of the ring. But after the ring was lost, plaintiffs discovered their policy covered only \$36,776, despite the fact that the ring's appraised value was \$107,000.

On June 17, 2008, plaintiffs filed a complaint against defendants alleging negligence. Plaintiffs essentially claimed that a special relationship was formed between them and Kenneth, and that in the context of their special relationship, Kenneth informed them that the ring was insured for full replacement value; that is if the value of the ring increased over time, the policy would account for any increase in value. Plaintiffs alleged that defendants negligently failed to accurately represent the nature and extent of the insurance coverage and failed to provide clear and accurate advice when plaintiffs made an ambiguous request that required a clarification. Defendants answered plaintiffs' complaint and denied all plaintiffs' allegations.

Subsequently, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants argued that there was no special relationship, and that any confusion regarding the policy was plaintiffs' fault because plaintiffs failed to read the terms of the policy.

A hearing was held regarding defendants' motion for summary disposition on July 15, 2009, and the trial court issued a written opinion denying defendants' motion on July 21, 2009. The trial court found that plaintiffs presented evidence demonstrating a genuine issue of material fact in regard to whether there was a special relationship between the parties. The trial court further found that any question regarding plaintiffs' comparative fault was a question for the jury.

The four-day jury trial began on September 27, 2010. Plaintiffs rested at the end of the second day, and defendants moved for a directed verdict. Defendants argued that plaintiffs failed to establish a special relationship. Defendants also argued that plaintiffs failed to establish a prima facie case of fraud or misrepresentation. In response, plaintiffs stated that they were not alleging fraud or misrepresentation, but were rather pursuing a negligence claim based on Kenneth's conduct and misrepresentations. The trial court denied defendants' motion and did not state its reasoning on the record. On October 1, 2010, the jury returned a verdict finding that defendants were negligent, that defendants' negligence was a proximate cause of plaintiffs' injury and damage, and finding that plaintiffs' damages totaled \$76,644.

Plaintiffs moved for case evaluation sanctions and for entry of judgment on October 22, 2010. On October 26, 2010, the trial court entered a judgment for plaintiffs in the amount of \$83,215.72. On February 2, 2011, the trial court awarded \$85,661 in case evaluation sanctions in favor of plaintiffs. On March 15, 2011, an amended judgment in favor of plaintiffs in the amount of \$169,370.39 was entered to reflect the original judgment amount, additional statutory interest, and case evaluation sanctions. Defendants now appeal as of right.

II. SUMMARY DISPOSITION

Defendants first argue that the trial court erred when it denied their motion for summary disposition pursuant to MCR 2.116(C)(10). Specifically defendants argue that because plaintiffs failed to read their insurance policy, they cannot claim entitlement to benefits that are different from those set forth in the policy. Defendants also argue that plaintiffs' claim is barred by the statute of limitations.

We review de novo a trial court's decision on a motion for summary disposition. *Davenport v HSBC Bank*, 275 Mich App 344, 345; 739 NW2d 383 (2007). "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).

Initially, we note that defendants' argument is premised on the erroneous assumption that plaintiffs were pursuing a misrepresentation or fraud claim rather than a negligence claim.

Plaintiffs' complaint alleged a single count of "negligence/professional malpractice/misrepresentation as to all defendants." Although the label of the count is arguably unclear regarding whether plaintiffs were alleging negligence or negligent misrepresentation, the complaint clearly asserted the traditional elements of a negligence claim: duty, breach of duty, causation, and damages. *Pressey Enterprises, Inc v Barnett-France Ins Agency*, 271 Mich App 685, 687; 724 NW2d 503 (2006). The complaint also alleged the existence of the type of special relationship between plaintiffs and defendants necessary to establish a duty in a negligence case against an insurance agent under *Harts v Farmers Ins Exch*, 461 Mich 1, 10; 597 NW2d 47 (1999). Defendants' brief in support of their motion for summary disposition itself recognized that plaintiffs were suing for negligence. Moreover, the case was tried as a negligence action, with the trial court instructing the jury regarding the elements of a negligence claim and the requirements for establishing a special relationship necessary to establish a duty on the part of an insurance agent under *Harts*. Further, the verdict form asked the jury to decide the elements of a negligence claim; it asked the jury to decide whether defendants were negligent, whether defendants' negligence was a proximate cause of plaintiffs' damages. After the jury was excused to deliberate, the trial court asked whether there were "[a]ny objections to anything that's occurred so far on the record in this case," and defense counsel answered negatively.¹ Therefore, defendants' contention that plaintiffs were suing them for misrepresentation rather than negligence lacks merit.

Accordingly, we address whether the trial court properly denied defendants' motion for summary disposition regarding plaintiffs' negligence claim. "In a negligence action, a plaintiff must show that the defendant owed the plaintiff a duty, that the defendant breached that duty, causation, and damages." *Pressey*, 271 Mich App at 687. An insurance agent generally does not owe a duty to a potential insured to advise regarding the adequacy of coverage. *Harts*, 461 Mich at 8. The agent's job is merely to present the insurer's product and to take orders from those who want to purchase the coverage offered. *Id.* "However, as with most general rules, the general no-duty-to-advise rule, where the agent functions as simply an order taker for the insurance company, is subject to change when an event occurs that alters the nature of the relationship between the agent and the insured." *Id.* at 9-10. In particular, a special relationship may arise between an insurance agent and an insured when:

- (1) the agent misrepresents the nature or extent of the coverage offered or provided,
- (2) an ambiguous request is made that requires a clarification,
- (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or
- (4) the agent assumes an additional duty by either express agreement with or promise to the insured. [*Id.* at 10-11 (footnotes omitted).]

¹ Defense counsel had, however, previously and unsuccessfully sought an instruction on the elements of misrepresentation.

“When a special relationship exists, an agent assumes a duty to advise the insured regarding the adequacy of insurance coverage.” *Zaremba Equip, Inc v Harco Nat’l Ins Co*, 280 Mich App 16, 28; 761 NW2d 151 (2008).

In this case, plaintiffs presented evidence at the summary disposition stage to establish that they had a special relationship with defendants under each of the four *Harts* factors. First, there is evidence that their insurance agent misrepresented the nature or extent of the coverage offered or provided. Plaintiffs testified at a deposition that when plaintiff Barbara Lemberg’s (Barbara) diamond engagement ring was added to their homeowners’ insurance policy, Kenneth represented that the ring was being insured for its replacement value. Further, plaintiffs presented evidence that Kenneth’s representation that the ring was insured for its replacement value was false. Kenneth testified at a deposition that guaranteed replacement coverage for jewelry is not available, that his best suggestion for insuring jewelry would be to get an appraisal every year, and that he never advised plaintiffs to get an appraisal every year. Further, Kenneth’s November 19, 2007, letter to the Office of Financial and Insurance Services stated that he represents no carrier that offers guaranteed replacement coverage for jewelry items. The insurer, Chubb Group of Insurance Companies (Chubb), paid plaintiffs only \$36,776 for the lost ring, even though it was appraised for \$107,000. Therefore, plaintiffs presented evidence that Kenneth misrepresented the nature or extent of the coverage offered or provided, thereby establishing a special relationship under the first *Harts* factor.

The same evidence establishes the second *Harts* factor for establishing a special relationship. In *Harts*, the Supreme Court indicated that “[a]n example of an ambiguous request that might in certain circumstances require clarification is the request for ‘full coverage.’” *Harts*, 461 Mich at 10 n 11. Here, plaintiffs’ request for replacement value coverage was ambiguous, given that it was for an inexact and, according to Kenneth, nonexistent type of coverage. Cf. *Pressey*, 271 Mich App at 689 (“Unlike the ambiguous request for ‘full coverage’ discussed in *Harts*, plaintiffs’ request for contents coverage was not a request for an inexact or nonexistent type of coverage.”). Kenneth’s own testimony suggests that plaintiffs’ request required clarification that yearly appraisals were required to update the value of the ring.

For the same reasons, the third *Harts* factor is satisfied. Plaintiffs’ evidence reflects that an inquiry was made that may have required advice and that Kenneth gave advice that was inaccurate. In particular, Kenneth incorrectly advised that plaintiffs’ coverage would pay the replacement value of the ring but failed to explain that yearly appraisals were required.

The fourth *Harts* factor is also satisfied. Plaintiffs presented evidence that an Agent of Record (AOR) letter was prepared by defendants and signed by plaintiff, Steven Lemberg (Steven); the letter reflects that defendants assumed an additional duty by either express agreement with or promise to plaintiffs. The AOR letter states: “We understand that [defendant, Korotkin-Schlesinger & Associates, Inc. (the Korotkin insurance agency or the insurance agency)] will not share responsibility for any deficiencies in the present insurance program to which this letter pertains until its review and is able to provide recommendations.” The clear implication of the letter is that, once the insurance agency had an opportunity to review plaintiffs’ insurance program and to make recommendations, it would share responsibility for any deficiencies in plaintiffs’ insurance program. Accordingly, the letter reflects the assumption of an additional duty by express agreement with or promise to plaintiffs.

Thus, because plaintiffs presented evidence that a special relationship existed under any of the four *Harts* factors, defendants owed a duty to advise plaintiffs regarding the adequacy of their insurance coverage. *Zaremba*, 280 Mich App at 28.

We conclude that plaintiffs also presented sufficient evidence to establish a genuine issue of material fact regarding the remaining elements of their negligence claim. Plaintiffs produced evidence that defendants breached the duty to advise plaintiffs regarding the adequacy of their insurance coverage by representing that the ring was insured for replacement value and by failing to tell plaintiffs that they must continually reappraise the ring to ensure it was adequately insured. Although Kenneth denied making the representations to which plaintiffs testified, he admitted on cross-examination that his alleged representations would breach the standard of care. In light of Kenneth's admissions that the alleged misrepresentations regarding replacement value coverage and the failure to offer advice regarding the need for continual reappraisals would breach the standard of care, plaintiffs have presented evidence that defendants breached their duty to advise plaintiffs regarding the adequacy of their coverage.

Plaintiffs also presented evidence of causation and damages. Chubb paid plaintiffs only \$36,776 for the lost ring, even though it was appraised for \$107,000. Plaintiffs thus suffered damages in that they were paid less than the replacement value of the ring. A factual issue existed regarding whether the shortfall in coverage resulted from Kenneth's negligence in representing to plaintiffs that they had replacement value coverage and in failing to advise them of the need to continually reappraise the ring.

Defendants further contend that they were entitled to summary disposition because plaintiffs had a duty to read the policy and thus could not reasonably or justifiably have relied on Kenneth's representations that the policy provided replacement value coverage. This argument lacks merit because, as discussed *supra*, plaintiffs claim was for negligence rather than fraud or misrepresentation. Reasonable or justifiable reliance is not among the elements of a negligence claim. See *Pressey*, 271 Mich App at 687. It is true that, "as a general rule, an insured must read his or her own policy." *Zaremba*, 280 Mich App at 29. However, in a negligence claim against an insurance agent, an insured's duty to read his or her policy is a matter for the jury to consider in the context of comparative negligence. *Id.* at 36. As the *Zaremba* Court explained:

In summary, we hold that when an insurance agent elects to provide advice regarding coverage and policy limits, the agent owes a duty to exercise reasonable care. The insured has a duty to read its insurance policy and to question the agent if concerns about coverage emerge. A jury should consider these corresponding duties in the crucible of comparative negligence. [*Id.*]

"The question of a plaintiff's negligence for failure to use due care is a question for the jury unless no reasonable minds could differ or the determination involves some ascertainable public policy considerations." *Id.* at 33.

Defendants have identified no ascertainable public policy considerations that would warrant removing the issue of comparative negligence from the jury's consideration. Moreover, reasonable minds could differ regarding whether plaintiffs negligently failed to read their policy and whether any such negligence proximately caused their damages. Plaintiffs did not testify

unequivocally at deposition that they failed entirely to read the policy. Also, it is not clear that reading the policy would have led plaintiffs inescapably to the conclusion that the policy failed to provide replacement value coverage.

Barbara testified on cross examination regarding the policy that, “Yes, I read my mail, but not every word of it.” She further explained, “I knew that when I flipped through what is the summary that I — the ring would stand out as something that had numbers written next to it.” When asked whether she read the policy so that she understood how the ring was being covered, she responded, “not really.” When later shown the 2006 coverage summary and asked if she remembered seeing it, Barbara stated that she did not recall seeing it in December 2006, but that “[s]omething very much like this, I have seen over many years.” She did not know whether she saw the 2006 summary when it arrived, but she testified that “I have seen this description of the jewelry before,” including before the date of the loss. Further, when asked to review a section of the policy stating that Chubb would increase the amount of coverage for each article of itemized jewelry annually by a percentage based on industry trends for jewelry values, Barbara testified that she believed in 2007 that the policy in effect at the time of the loss contained that language, reflecting her familiarity with policy provisions. In addition, Steven testified that he believed Chubb was updating the appraised value of the ring, based on what Kenneth told him and based on what the policy said, thus implying that he had read at least part of the policy.

It is also notable that the policy stated that (1) Chubb would annually increase the coverage for each article of itemized jewelry based on industry trends for jewelry values and (2) Chubb would pay up to 150 percent of the amount of itemized coverage for that article, but not more than the maximum amount of coverage. Given these provisions, it is not clear that reading the policy would have led plaintiffs ineluctably to the conclusion that it failed to provide replacement value coverage. A reasonable jury could find, based on plaintiffs’ testimony, that they mistakenly understood the policy to mean that Chubb’s annual increase in the itemized coverage based on industry trends rendered it unnecessary for plaintiffs to reappraise the ring themselves. Therefore, a factual question existed whether plaintiffs were negligent in failing to read the policy and, if so, whether such negligence proximately caused their damages.

Defendants also assert in connection with this issue that the statute of limitations bars plaintiffs’ claim. Generally, an issue must have been raised before, and addressed and decided by, the trial court to be preserved for appellate review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Here, defendants did not raise the statute of limitations issue in their motion for summary disposition or supporting brief. Although defendants’ reply brief in support of their summary disposition motion referred in passing to the statute of limitations, defendants did not present or develop any argument that summary disposition on the basis of the statute of limitations was appropriate. And although the statute of limitations was addressed at the motion hearing, defense counsel did not advance an argument that plaintiffs’ entire claim was barred by the statute of limitations. Further, the trial court did not address the statute of limitations in its written opinion and order denying defendants’ motion for summary disposition. We thus conclude that because the statute of limitation issue was not raised and decided below, it is not preserved for appellate review. Review of that issue is thus limited to plain error. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010). “Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or

obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings.” *Id.*

Defendants’ cursory argument regarding the statute of limitations fails to identify a clear or obvious error that affected the outcome of the lower court proceedings. *Duray*, 288 Mich App at 150. Defendants’ brief on appeal devotes only a short paragraph comprised of three sentences to this issue. The only authority cited is MCL 600.5805(10), which provides a three-year limitation period for all actions to recover damages for death or injury. “An appellant may not merely announce its position or assert an error and leave it to this court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position. Insufficiently briefed issues are deemed abandoned on appeal.” *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004) (quotations and citations omitted). In light of defendants’ cursory argument, they have abandoned this issue on appeal and we thus decline to address the issue further. *Id.*

III. JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants argue that they are entitled to judgment notwithstanding the verdict (JNOV) on the basis of four separate grounds.

Defendants failed to move for JNOV and failed to file any post-trial motions. Thus, the issue whether defendants were entitled to JNOV was not raised before or addressed and decided by the trial court, and is accordingly not properly preserved for appellate review. *Hines*, 265 Mich App at 443. Additionally, defendants argue that they are entitled to JNOV because the verdict is against the great weight of the evidence. To preserve such a claim, a party must raise the issue below in a motion for a new trial. *Sherman-Nadiv v Farm Bureau Gen Ins Co of Mich*, 282 Mich App 75, 80; 761 NW2d 872 (2009); *Brown v Swartz Creek VFW*, 214 Mich App 15, 27; 542 NW2d 588 (1995). Because defendants did not file in the trial court a motion for new trial arguing that the verdict was against the great weight of the evidence, the great weight of the evidence argument is not preserved.

Because defendants failed to preserve their argument that they are entitled to JNOV by filing a motion for JNOV below, review is limited to plain error affecting substantial rights. *Duray*, 288 Mich App at 150. “Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings.” *Id.* Because defendants failed to move for a new trial on the ground that the verdict is against the great weight of the evidence, review of that issue is required only if a miscarriage of justice will otherwise result. *Sherman-Nadiv*, 282 Mich App at 80. “When a party challenges a jury’s verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury’s verdict, we must defer our judgment regarding the credibility of the witnesses.” *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006).

“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).

Defendants' first basis on which they claim to be entitled to JNOV is that in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 60; 664 NW2d 776 (2003), our Supreme Court held that a contracting party's reasonable expectations cannot supersede the clear language of a contract. In *Wilkie*, the Court rejected the notion that a party's reasonable expectations should be considered when interpreting a contract, stating:

In sum, the rule of reasonable expectations clearly has no application when interpreting an unambiguous contract because a policyholder cannot be said to have reasonably expected something different from the clear language of the contract. Further, it is already well established that ambiguous language should be construed against the drafter, i.e., the insurer. Therefore, stating that ambiguous language should be interpreted in favor of the policyholder's reasonable expectations adds nothing to the way in which Michigan courts construe contracts, and thus the rule of reasonable expectations should be abolished. [*Id.* at 62.]

As the above quote reflects, the *Wilkie* Court was addressing the proper method of *interpreting a contract*. *Wilkie* did *not* address the elements of a negligence claim or the requirements for establishing a special relationship between an insured and an insurance agent under *Harts*. The jury's determination in this case regarding the elements of plaintiffs' negligence claim did not require any interpretation of the insurance policy and thus did not implicate the discredited interpretive doctrine of reasonable expectations. Therefore, defendants have failed to establish that they are entitled to JNOV on this basis.

The second ground on which defendants seek JNOV is that Kenneth's representation that plaintiffs' policy provided replacement value coverage pertained to a future event rather than a present or past fact. "[A]n action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute actionable fraud." *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). Defendants' argument on this matter is premised entirely on their erroneous view that plaintiffs were pursuing a fraud or misrepresentation claim. As discussed above, however, plaintiffs' claim was for negligence, as defendants themselves recognized at various points in this case. Kenneth's misrepresentation was relevant to plaintiffs' negligence claim in order to establish a special relationship between the parties and defendants' resulting duty to advise plaintiffs regarding the adequacy of coverage, under the first ground set forth in *Harts*, 461 Mich at 10. *Harts* provides that a special relationship may arise where "the agent misrepresents the nature or extent of the coverage *offered or provided*." *Id.* (emphasis added). Plaintiffs' testimony established that Kenneth's misrepresentation, that the policy provided replacement value coverage, occurred when the coverage was offered or provided, i.e., when plaintiffs presented the appraisal to Kenneth in order to obtain replacement value coverage for the ring. Accordingly, the evidence conformed to the requirements in *Harts*, and defendants were not entitled to JNOV on this basis. For the same reason, the trial court did not err in denying defendants' motion for a directed verdict on this ground.

The third ground on which defendants seek JNOV is that plaintiffs had the means to verify the truth of Kenneth's representation and that plaintiffs' trial testimony that they read the policy but misunderstood it is not compelling and should not be considered because it conflicts

with their deposition testimony. As discussed above, however, the trial court properly rejected defendants' argument on this issue at the summary disposition stage because whether plaintiffs failed to read their policy presented an issue of comparative negligence for the jury to resolve. *Zaremba*, 280 Mich App at 33, 36. Also, reasonable jurors could honestly reach differing conclusions regarding whether to credit plaintiffs' testimony that they read the policy but misunderstood it to provide replacement value coverage. A factual question existed regarding whether plaintiffs changed their deposition testimony at trial. As discussed, plaintiffs' deposition testimony can be understood to suggest that they read at least portions of the policy. In addition, as discussed more fully below, plaintiffs explained at trial what they meant in their deposition testimony. Because a factual question existed on which reasonable minds could differ, defendants were not entitled to JNOV on this basis, and the trial court did not err in denying defendants' motion for a directed verdict on this ground.

Finally, defendants have failed to establish that the verdict is against the great weight of the evidence. Defendants again assert that plaintiffs' trial testimony was unsupported and conflicted with their deposition testimony regarding whether they read the policy. However, as discussed, plaintiffs' deposition testimony can be read to mean that they read at least portions of the policy. Further, Barbara explained at trial what she had meant in her deposition, i.e., that she did not remember specifically reading the most recent policy issued but that she had become very familiar with the policy over the years. On cross-examination at trial, Barbara stated:

Q. Did you read that policy, the 2006 to 2007 policy? Did you read your declaration sheet when you paid the bill?

A. And what I testified to in my deposition and what I'm saying now is I can't specifically remember reading that policy that year. But if you want to know have I read the summaries over the year [sic] and the policies over the years, yes.

Q. You actually said you did not read the policy to see what was actually covered. Will you agree you made that statement, ma'am?

A. I will agree there's a sound bite that if you put together two particular statements it appears that I said that. But I will tell you that my testimony absolutely was that I was very familiar with this section of the policy, over a period of years I was very familiar with this policy and I know and I could find the page for you that I finally get to tell you I simply cannot say that in 2006, December, that I was standing there with the mail reading the particular page you wanted me to say I had read. I cannot remember exactly that year.

Q. Okay. You're finished with that answer then?

A. Yes.

Q. Okay. I'm going to read it for the jury.

“Did you ever read the policy, you know, so that you understood what was being covered, how the ring was being covered?”

“Not really.”

You did say that?

A. And the policy you kept insisting was the policy in 2006, December. You wanted me to go back to that moment in time and say do you remember reading that policy for that information. And I said not really.

Similarly, on cross-examination at trial, Steven explained what he meant in his deposition testimony regarding whether he had read the policy:

Q. The question is whether or not how — I asked you whether or not you read the policy concerning the jewelry coverage. You said no.

A. I didn't say no.

Q. Okay. Can I read it to the jury and let them decide?

A. Okay.

Q. Okay.

“But did you read the policy to see what was — what it said was replacement value?”

Let me read that again because I didn't do a very good job.

“But did you read the policy to what it — to see what it said was replacement value? If you did, I'm not suggesting you did.”

“No, I mean I looked at it, I didn't study it. I was led to believe that I had replacement insurance on — on my — on the ring. That's what I thought all along.”

Now I think what you want to say is you want to say, well, [Kenneth] told me I had replacement value; isn't that so?

A. No. I read and understood the policy. When I say I didn't study it, that means I didn't from the beginning of the policy to the end study it like I was taking a test. But I read it and I understood it.

Q. Okay. So you — it's your testimony today that you actually read this coverage?

A. Yes.

Q. And you read that coverage to say that you had guaranteed or replacement value?

A. Yes.

The jury was free to assess whether it believed plaintiffs' explanations of their deposition testimony. We can discern no basis to depart from the general rule requiring this Court to accord substantial deference to the jury's credibility determinations. *Allard*, 271 Mich App at 406-407.

Defendants also assert that there is no reason to believe Steven's testimony that the handwritten date on a second appraisal of the ring, July 18, 2007, nearly two months before the ring was lost, was a mistake. Defendants state that the appraiser testified that when Steven requested the appraisal, he never mentioned that the ring was lost. However, the appraiser testified as follows on this matter:

Q. Do you remember why [Steven] said he wanted the second appraisal done?

A. No. Probably update. A lot of people call and say I want to update an appraisal. We just do it automatically.

Q. Did he indicate to you at the time he asked you for the update that it had been lost and he wanted to know what it was worth?

A. I don't think so.

Q. If he had said that, do you remember it well enough to know one way or another or it's just one of those things you might not remember?

A. You know, I'm not that young. I can [sic] go back three years in my memory.

Thus, although the appraiser at one point indicated that Steven did not say the ring was lost, the appraiser's testimony could also be read to suggest that he simply could not remember whether Steven said it. Further, Steven unequivocally testified that he did not have the appraisal in July 2007, that the appraisal was done after the ring was lost, and that he could only attribute the date on the appraisal to human error. On cross-examination, Steven explained:

Q. And you'll agree that the date on [the appraisal] indicates it was a month and a half or so before the ring is lost; isn't that so?

A. The date — the date is mistaken.

Q. Isn't that what it says though?

A. That's what it says, yes. It's mistaken.

Q. So if the jury is to believe this particular date, would you agree that your testimony is incorrect as it pertains to that particular item?

A. Look, I can think of lots of situations like when you write a check sometimes and the year is just changed or the month is changed, you — you — you forget that we're now in 2010 and you make a mistake. [The appraiser] made a mistake. I asked for that after the ring was lost, a couple days later I got that and I sent it right to the insurance company. I know that's what happened. There's a mistake on the date. You're making much more out of that than it is. It's a mistake.

Again, the jury was free to decide for itself whether it found credible Steven's explanation of the date on the second appraisal. No basis exists for this Court to depart from the deference generally accorded to the jury's judgment on such matters. *Id.*

Accordingly, defendants are not entitled to JNOV on any of the grounds asserted on appeal. Thus, defendants have failed to establish a clear or obvious error warranting relief on this unpreserved issue. Further, the verdict is not against the great weight of the evidence, and no miscarriage of justice will result from the failure to review that unpreserved issue. Lastly, the trial court properly denied defendants' motion for directed verdict.

IV. NEW TRIAL

Defendants' final argument on appeal is that they are entitled to a new trial on three separate grounds. Defendants did not move for a new trial, accordingly, because the issues raised by defendants were not raised before or addressed and decided by the trial court, our review is limited to plain error affecting substantial rights. *Duray*, 288 Mich App at 150.

Defendants first assert that they are entitled to a new trial because the trial court erred in refusing to interpret the insurance policy, leaving the interpretation to the jury, and failing to instruct the jury that the policy provided stated value coverage.

The proper interpretation of a contract is ordinarily a question of law. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). The meaning of an ambiguous contract, however, is a question of fact to be decided by a jury. *Id.* at 469. In this case, the trial court did not submit the interpretation of the insurance policy to the jury. This case is not a breach of contract action against an insurer requiring interpretation of the policy. Rather, as discussed *supra*, plaintiffs brought a negligence claim against their insurance agent for the failure to advise them regarding the adequacy of coverage. Contractual interpretation was not essential to establishing the elements of plaintiffs' negligence claim.

Further, defendants mischaracterize what the trial court decided. The relevant portion of the transcript to which defendants cite pertains to the court's decision to sustain an objection to defense counsel's cross-examination of Steven. In ruling on the objection, the trial court did not state that it was submitting the interpretation of the policy to the jury. After repetitive questioning by defense counsel regarding Steven's understanding of the policy, plaintiffs' counsel objected, and the trial court sustained the objection, in the following exchange:

Q. Okay. And everybody said, look, that's what the policy clearly says except you; isn't that where we're at?

MR. PAIGE [plaintiffs' counsel]: Objection.

THE COURT: All right. Objection sustained. At this point —

MR. MONNICH [defense counsel]: Who else — I will ask the question.

THE COURT: All right.

MR. MONNICH: Sure, I'll rephrase it.

THE COURT: At this —

MR. MONNICH: All we're talking about —

THE COURT: No, no, we're not even rephrasing at this point. You've asked it 20 different ways, he's answered it however he's answered it. If you want to say what do those words mean, it's an exhibit, the jury can read it, they can see those words. And you keep asking him what do they mean —

MR. MONNICH: I believe words — I believe —

THE COURT: — to his —

MR. MONNICH: — the words mean what they say.

THE COURT: Pardon?

MR. MONNICH: I believe the words mean what they say.

THE COURT: And you will argue that to the jury.

MR. MONNICH: All right.

THE COURT: And the jury will read those words and they'll listen to the testimony and they'll make their own determination.

As this exchange reflects, the trial court was not stating a decision to submit the interpretation of the policy to the jury. The trial court was merely sustaining an objection to defense counsel's repeated questioning of Steven regarding what the policy said, and the trial court observed that the jury could read the policy, consider the testimony, and make a determination. In short, the trial court was merely explaining why it was sustaining the objection to defense counsel's continued questioning; it was not announcing a decision to submit the interpretation of the policy to the jury. Accordingly, defendants have not established plain error affecting substantial rights in regard to the trial court's "refusal" to interpret the insurance contract.

Defendants next assert that a new trial is necessary because the trial court erred in allowing plaintiffs' counsel to use unproven or contested facts in posing a hypothetical question to Kenneth regarding the standard of care.

“In order to be considered competent evidence, the hypothetical questions, through which testimony is elicited, must be in ‘substantial accord’ with the facts presented at trial.” *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 618; 769 NW2d 911 (2009). “Counsel, in propounding a hypothetical question to an expert witness, may assume any state of facts which the evidence tends to establish, and may vary the questions so as to cover and present the different theories of fact. But there must be evidence in the case tending to establish all the facts stated in the question.” *Federoff v Meyer Weingarden & Sons, Inc*, 60 Mich App 382, 387; 231 NW2d 417 (1975) (quotations and citation omitted). A hypothetical question is proper unless the record is entirely barren of facts forming a basis for the question. *Steinberg v Ford Motor Co*, 72 Mich App 520, 530; 250 NW2d 115 (1976); *Federoff*, 60 Mich App at 387.

In this case, plaintiffs’ counsel asked Kenneth if plaintiffs asked their agent whether they had replacement value coverage on their ring, and their agent said yes, if it’s lost or stolen, you will get replacement value, such advice would breach the agent’s duty. Kenneth responded that such a statement by an agent would be incorrect, but that whether it breached the agent’s duty was a legal question. When reminded that he testifies on such issues regularly as an expert, Kenneth stated he would say it is a breach but that he is not the lawyer in the case. The question was then repeated at various points, with plaintiffs’ counsel summarizing the same basic facts, i.e., that the agent told plaintiffs that they had replacement value coverage and that if they ever lost the ring, Chubb would pay the replacement value and had in some cases paid more than the replacement value to the agent’s clients. Kenneth then answered by denying that he made the statements assumed in the question but saying that such statements by an agent would be incorrect, without answering whether the standard of care would be breached.

The facts assumed in the hypothetical questions were supported by plaintiffs’ testimony. Plaintiffs testified that Kenneth told them they had replacement value coverage on the ring, that he did not need anything else from plaintiffs, that Chubb would pay whatever it cost to replace the ring, and that some of his clients had received more than they needed to replace their jewelry. Thus, the hypothetical questions propounded to Kenneth were proper because they were in substantial accord with the facts presented at trial. *Unibar*, 283 Mich App at 618. Although Kenneth denied making the statements plaintiffs attributed to him, case law does not require that the facts assumed in a hypothetical question be entirely uncontested. Accordingly, defendants have not demonstrated plain error affecting substantial rights and are not entitled to a new trial on this ground.

Defendants’ final argument for a new trial is that the trial court erred in instructing the jury on a negligence theory that did not exist and in failing to instruct the jury on negligent misrepresentation and the clear and convincing evidence standard.

“Jury instructions should include all the elements of the plaintiff’s claims and should not omit material issues, defenses, or theories if the evidence supports them.” *Freed v Salas*, 286 Mich App 300, 327; 780 NW2d 844 (2009) (quotation and citation omitted). Defendants’ argument fails to acknowledge that plaintiffs’ claim was for negligence rather than fraud or misrepresentation, as discussed *supra*. Thus, the trial court properly instructed the jury on the elements of negligence rather than the elements of misrepresentation. Further, because plaintiffs were not pursuing a fraud or misrepresentation claim, the trial court did not err in declining to

instruct on the clear and convincing evidence standard that applies to such claims. *Hi-Way*, 398 Mich at 336.

Accordingly, defendants are not entitled to a new trial on any of the grounds asserted on appeal because defendants have failed to establish a clear or obvious error warranting relief.

Affirmed.

/s/ William B. Murphy

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray