
United States Court of Appeals
for the
Third Circuit

Case No. 25-2274

CRAIG KIMMEL,

Plaintiff-Appellant,

– v. –

MASSACHUSETTS BAY INSURANCE CO,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY IN CASE NO. 1:21-CV-12743,
HONORABLE CHRISTINE P. O’HEARN, U.S. DISTRICT JUDGE

BRIEF FOR DEFENDANT-APPELLEE

JEREMIAH L. O’LEARY
FINAZZO COSSOLINI O’LEARY MEOLA
& HAGER, LLC
Attorneys for Defendant-Appellee
180 Park Avenue, Suite 202
Florham Park, New Jersey 07932
(973) 343-4960

CORPORATE DISCLOSURE STATEMENT

Massachusetts Bay Insurance Company, a New Hampshire and Massachusetts company, operates as a wholly-owned subsidiary of Hanover Insurance Company. Hanover Insurance Company is a wholly-owned subsidiary of Opus Investment Management, Inc., which is a wholly-owned subsidiary of The Hanover Insurance Group, Inc., which is a publicly traded company. No individual or corporation owns 10% or more of the stock of The Hanover Insurance Group, Inc.

TABLE OF CONTENTS

	PAGE
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
PRELIMINARY STATEMENT	1
JURISDICTIONAL STATEMENT	3
COUNTERSTATEMENT OF ISSUES.....	3
STATEMENT OF RELATED CASES AND PROCEEDINGS	3
STATEMENT OF THE CASE.....	4
I. Underlying Insurance Claim Investigation.....	5
II. The Lawsuit.....	10
SUMMARY OF THE ARGUMENT	14
LEGAL ARGUMENT.....	15
I. STANDARD OF REVIEW	15
II. THE DISTRICT COURT CORRECTLY HELD THAT THE POLICY UNAMBIGUOUSLY LIMITS APPELLANT TO ACV DAMAGES, TO THE EXTENT APPELLANT CAN ESTABLISH COVERAGE.....	18

III. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANT WAS OBLIGATED TO PROVIDE COMPETENT EVIDENCE OF ACV DAMAGES AS A BREACH OF CONTRACT CLAIMANT, WHICH APPELLANT UNDISPUTEDLY FAILED TO DO.23

IV. APPELLANT’S ARGUMENTS FOR REVERSAL ARE UNAVAILING.29

CONCLUSION.....37

COMBINED CERTIFICATIONS38

TABLE OF AUTHORITIES

<u>CASES</u>	PAGE
<i>Brenner v. Local 514, United Bhd. of Carpenters & Joiners</i> , 927 F.2d 1283 (3d Cir. 1991)	34
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	17
<i>Coda v. Constellation Energy Power Choice, LLC</i> , 409 F. Supp. 3d 296 (D.N.J. 2019).....	23
<i>Danzeisen v. Selective Ins. Co. of Am.</i> , 689 A.2d 798 (N.J. App. Div. 1997)	20
<i>Downey v. Pennsylvania Dept. of Corrections</i> , 968 F.3d 299 (3d Cir. 2020)	15
<i>Dunkerly v. Encompass Ins. Co.</i> , 296 F. Supp. 3d 681 (D.N.J. 2017).....	20, 22, 27
<i>Fletcher-Harlee Corp. v. Pote Concrete Contractors Corp.</i> , 482 F.3d 247 (3d Cir. 2007)	34
<i>Flomerfelt v. Cardiello</i> , 997 A.2d 991 (N.J. 2010)	19
<i>Giacobbe v. QBE Specialty Ins. Co.</i> , 2018 WL 2113266 (D.N.J. May 8, 2018), <i>reconsideration denied</i> , 2018 WL 4110924 (D.N.J. Aug. 28, 2018)....	<i>passim</i>
<i>Gibson v. Callaghan</i> , 730 A.2d 1278 (N.J. 1999)	19
<i>Hardy v. Shaikh</i> , 959 F.3d 578 (3d Cir. 2020)	15-16
<i>Integral Scrap & Recycling, Inc. v. Conifer Holdings, Inc.</i> , 2021 WL 826747 (W.D. Pa. Mar. 4, 2021).....	27

<i>Johnson v. The Hanover Ins. Group</i> , 2025 WL 1527444 (D.N.J. May 29, 2025).....	<i>passim</i>
<i>Kirschling v. Atlantic City Bd. of Educ.</i> , 10 F. Supp. 3d 587 (D.N.J. 2014).....	16, 17
<i>Lanning v. Southeastern Penn. Trans. Auth.</i> , 308 F.3d 286 (3d Cir. 2002)	16, 36
<i>Lightning Lube, Inc. v. Witco Corp.</i> , 802 F. Supp. 1180 (D.N.J. 1992), <i>aff'd</i> , 4 F.3d 1153 (3d Cir. 1993).....	24
<i>Maidenbaum v. Bally's Park Place, Inc.</i> , 870 F. Supp. 1254 (D.N.J. 1994).....	17
<i>Mall Chevrolet, Inc. v. General Motors LLC</i> , 99 F.4th 622 (3d Cir. 2024)	17
<i>Messing v. Reliance Ins. Co.</i> , 187 A.2d 49 (N.J. Law Div. 1962)	35
<i>New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff</i> , 669 F.3d 374 (3d Cir. 2012)	16, 35
<i>Nicini v. Morra</i> , 2012 F.3d 798 (3d Cir. 2000)	16
<i>Ortho McNeil Pharmaceutical, Inc. v. Barr Laboratories, Inc.</i> , 2006 WL 3019555 (D.N.J. Oct. 23, 2006)	17, 18
<i>Ortiz v. Yale Materials Handling Corp.</i> , 2005 WL 2044923 (D.N.J. Aug. 24, 2005).....	18
<i>Pizzullo v. N.J. Mfrs. Ins. Co.</i> , 952 A.2d 1077 (N.J. 2008)	19
<i>Predelus v. Atain Specialty Ins. Co.</i> , 2023 WL 1331229 (S.D. Fla. Jan. 31, 2023).....	28

<i>President v. Jenkins</i> , 853 A.2d 247 (N.J. 2004)	19
<i>Sandler v. Lawn-A-Mat Chem. & Equip. Corp.</i> , 358 A.2d 805 (N.J. App. Div. 1976), <i>holding modified by Ellmex Const. Co. v. Republic Ins. Co.</i> , 494 A.2d 339 (N.J. App. Div. 1985)	24
<i>Schoch v. First Fid. Bancorporation</i> , 912 F.2d 654 (3d Cir. 1990)	17
<i>Tessmar v. Grosner</i> , 182 A.2d 467 (N.J. 1957)	24
<i>Uddoh v. Selective Ins. Co. of Am.</i> , 2018 WL 2127733 (D.N.J. May 8, 2018), <i>aff'd</i> , 772 Fed. Appx. 29 (3d Cir. 2019)	25, 26
<i>Voorhees v. Preferred Mut. Ins. Co.</i> , 607 A.2d 1255 (N.J. 1992)	19
<i>Zacarias v. Allstate Ins. Co.</i> , 775 A.2d 1262 (N.J. 2001)	19

RULES

Fed. R. Civ. P. 56(a).....	16
----------------------------	----

PRELIMINARY STATEMENT

Massachusetts Bay Insurance Company (“MBIC”) respectfully submits this Opposition Brief in connection with the appeal of plaintiff/appellant Craig Kimmel (“Appellant”). Appellant appeals the District Court of New Jersey’s grant of summary judgment to MBIC at the conclusion of discovery. The basis for dismissal of Appellant’s Complaint was a fundamental lack of competent evidence regarding an essential element of Appellant’s breach of contract claim; namely, damages.

Appellant is a breach of contract claimant seeking benefits under a property insurance policy for a loss involving a fallen tree that fell near his home and allegedly caused damage to the home. MBIC disputed that the claimed damage resulted from the loss, instead determining that the damage was either pre-existing and/or the result of excluded perils under the policy.

Appellant, as a breach of contract litigant, must prove his damages with reasonable certainty and competent evidence. As is typical of property insurance policies, Appellant’s damages – if he were able to establish a covered claim – would be limited to “actual cash value” (or “ACV”) because repairs were never completed. ACV is generally understood to mean replacement cost less depreciation.

Based on policy valuation provisions that have been consistently interpreted by courts as unambiguous, the District Court agreed that Appellant’s available damages would be so limited to ACV. It further held that Appellant’s Complaint

should be dismissed because his damages expert provided no opinion nor cited any foundational evidence relative to the ACV analysis. Rather, Appellant's alleged damages proofs consisted solely of a replacement cost estimate, *i.e.*, a proposal for the repair work. As Appellant could not establish the essential element of damages relating to his breach of contract claim, summary dismissal was appropriate.

In support of its decision, the District Court relied upon several recent District of New Jersey cases that involved identical policy provisions interpreted under remarkably similar factual circumstances. These cases make clear that policyholder litigants seeking coverage under first-party property policies are treated like any other breach of contract litigant: they must support their alleged damages with competent, foundational evidence. A failure to do so appropriately results in dismissal, a consequence any other litigant would suffer for failing to meet an essential element of its claim.

Appellant's Opening Brief takes a "kitchen sink" approach by proffering any conjured argument, regardless of merit, to disturb the District Court's ruling. As demonstrated below, none of Appellant's arguments can detract from the inescapable conclusions that the policy limits the available damages to ACV, and Appellant has failed to provide competent, foundational evidence to support this required element of his breach of contract claim. Therefore, MBIC respectfully submits that the District Court's ruling should be affirmed.

JURISDICTIONAL STATEMENT

The Court has jurisdiction for the reasons stated in Appellant's Opening Brief.

COUNTERSTATEMENT OF ISSUES

MBIC respectfully submits that the following issues, properly framed, are presented for review:

1. Whether the District Court correctly held that, to the extent Appellant can establish a covered claim, the insurance policy at issue limits recovery to actual cash value of the claimed damage; and
2. Whether the District Court correctly held that Appellant failed to adduce competent evidence of actual cash value, constituting a failure of proof for an essential element of his breach of contract claim, thereby justifying summary dismissal.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Pursuant to Third Circuit Local Appellate Rule 28.1, the undersigned states that this matter has not been before this Court, nor is the undersigned aware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this Honorable Court or any other court or agency, state or federal. The undersigned is unaware of any previous or pending appeals before this Honorable Court arising out of the same case or proceeding.

STATEMENT OF THE CASE

This matter involves straightforward issues of policy interpretation in the context of a first-party property insurance claim. Stated simply, the issue is whether a property insurance policy issued by MBIC to Appellant limits the claimed damage to actual cash value in the absence of completed repairs to the alleged damage. If so, the second question is whether Appellant failed to meet his burden, as a matter of law, in establishing those damages as an “essential element” of his breach of contract claim against MBIC. MBIC submits that the answer to both these questions is “yes,” to which the District Court agreed, ultimately serving as the basis for dismissal of Appellant’s Complaint against MBIC.

The facts of the case are largely undisputed and uncomplicated. This lawsuit arises from Appellant’s claim that a fallen tree that struck the land around his home – but not the home itself – caused pervasive structural damage to the home. Joint Appendix (“JA”) 014-023; JA004-005. Although the tree had a full canopy of leaves to mitigate impact with the ground, Appellant contended that the impact with the ground caused seismic waves to travel through the ground, causing significant damage to the home. *See, e.g.*, JA379-381, JA118-120.

Appellant submitted an insurance claim to MBIC following the loss. JA005. MBIC determined that the claimed damage was demonstrative of pre-existing damage (*e.g.*, settlement cracks) and/or that several policy exclusions operated to

bar coverage for the claim. *Id.* It ultimately denied coverage, and Appellant subsequently filed suit. *Id.*

MBIC moved for summary judgment on several independent bases. One such basis was that, even if the policy provided coverage, the policy unambiguously limits recovery to ACV because no repairs had been undertaken (much less completed) by Appellant. *See, e.g.*, JA003-013. Further, because Appellant provided no expert opinion or evidence of ACV, there was a fundamental failure of proof to support his claim. *Id.*

MBIC relied on several cases decided by the District of New Jersey involving identical policy language and the identical legal issue. As discussed below, these cases are squarely on point and stand for the proposition that, where the policy limits the claimant to ACV damages, a claimant's failure to provide evidence of ACV is a fundamental failure of proof involving an essential element of a breach of contract claim, thereby requiring dismissal. The District Court agreed, and, finding that there were no disputed issues of fact, granted MBIC's motion for summary dismissal. JA009-012. MBIC respectfully submits that the District Court's ruling should be affirmed.

I. Underlying Insurance Claim Investigation

This matter arises from an insurance claim involving claimed damages to Appellant's dwelling, located at 5 Forage Lane, Cherry Hill, New Jersey 08003 (the

“Property”). JA014-023, Appellant’s Complaint. Appellant contends that a June 3, 2020 lightning event caused damage to a tree on the Property, which tree fell and struck the area next to the home (the “Loss”). JA004. Appellant claimed the Property sustained significant structural damage as a result of the Loss. *Id.*

Appellant submitted a claim to MBIC under an insurance policy issued by MBIC to Appellant bearing policy no. HVY 7989780, with an inception date of June 27, 2019 and an expiration date of June 27, 2020 (the “Policy”). JA005; JA386-470. Subject to its terms, conditions, exclusions and limitations, the Policy provided certain coverage for direct physical loss to property located at Appellant’s home. JA386-470.

The Policy contains a Homeowners 3 Special Form, HO 00 03 04 91, which provides, in pertinent part, as follows:

SECTION I – EXCLUSIONS

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing or in any sequence to the loss.

- b. **Earth Movement**, meaning earthquake including, land shock waves or tremors before, during or after a volcanic eruption; landslide; mine subsidence; mudflow; earth sinking, rising or shifting; unless direct loss by:

- (1) Fire;

- (2) Explosion; or
- (3) Breakage of glass or safety glazing material which is part of a building, storm door or storm window;

Ensues and then we will pay only for the ensuing loss.

This exclusion does not apply to loss by theft.

JA401.

The Homeowners 3 Special Form also includes the following Loss Settlement provision, stating in pertinent part as follows:

SECTION I – CONDITIONS

- 3. Loss Settlement. Covered property losses are settled as follows:

- b. Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:

- (1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:

- (a) The limit of liability under this policy that applies to the building;

(c) Underground flues, pipes, wiring and drains.

(4) *We will pay no more than the actual cash value of the damage until actual repair or replacement is complete.* Once actual repair or replacement is complete, we will settle the loss according to the provisions of **b.(1)** and **b.(2)** above.

However, if the cost to repair or replace the damage is both:

(a) Less than 5% of the amount of insurance in this policy on the building; and

(b) Less than \$2,500;

We will settle the loss according to the provisions of **b.(1)** and **b.(2)** above whether or not actual repair or replacement is complete.

JA403 (emphasis added).

Following its investigation, MBIC concluded that much of the claimed damage to the home was not Loss-related, but rather demonstrative of pre-existing damage resulting from long-term settlement of the home and other factors.¹ JA005. MBIC's determination was based, in part, upon the findings of its consulting professional engineer, Evgeny Nemirovsky of National Forensic Consultants. JA274-385. Appellant disagreed with MBIC's claim determination and subsequently filed suit. JA014-023.

¹ MBIC agreed to pay for certain portions of the claimed damage (*e.g.*, damage to a metal fence that was directly impacted by the fallen tree).

II. The Lawsuit

Appellant filed his Complaint in this matter on May 18, 2021 in the New Jersey Superior Court, Camden County, alleging causes of action in breach of contract and bad faith. JA014-023. The Complaint alleges that MBIC breached the Policy by failing to timely adjust the claim and pay Appellant the full measurement of damages relating to the Loss and acted in bad faith by failing to provide a reasonable basis for denying the claim. *Id.* MBIC removed the matter to New Jersey District Court based on diversity jurisdiction by Notice of Removal filed on June 18, 2021. JA007.

During expert discovery, Appellant relied upon a report prepared by Steven Feigeles of Premier Builders, a general contractor that Appellant retained shortly after the Loss to prepare a repair proposal. JA032-044. A version of Mr. Feigeles' report was initially produced on November 17, 2022, and was the subject of extensive motion practice due to deficiencies in the report itself, issues that arose during Mr. Feigeles' March 30, 2023 deposition, and Appellant's improper attempts to supplement the report with documents and information after the deadline for expert disclosures had expired.

Appellant ultimately produced an amended report dated January 19, 2024. JA032-044. The report contains a proposal for alleged repair work for a total cost of \$361,015.00. Critically, the proposal did not provide an actual cash value figure

or analysis, nor did the report attempt to calculate depreciation for the allegedly damaged property. *Id.* Mr. Feigeles testified at deposition that Appellant had not agreed to the contract terms set forth in the proposal and, therefore, none of the repairs had commenced. JA098 (Feigeles Transcript, Day 1, at T211:9-17); JA011 (District Court’s opinion finding that “Plaintiff does not dispute that repairs have not been completed”).

Mr. Feigeles admitted at his deposition that his report, referred to as a “bid proposal,” did not consider any “deductions for depreciation.” JA110 (Feigeles Transcript, Day 2, at T38:24-39:8). Mr. Feigeles testified that he did not create the architectural drawings that formed the basis of the bid documents that were sent to potential subcontractors and all but six values in the itemized proposal were received from subcontractors. JA110-111 (Feigeles Transcript, Day 2, at T39:18-41:18); JA107 (Feigeles Transcript at T 25:3-26:14). In other words, the values in the proposal were not calculated by Mr. Feigeles and he otherwise had no independent knowledge of how those subcontractors calculated their pricing. JA110-111 (Feigeles Transcript, Day 2, at T39:18-41:18); JA097 (Feigeles Transcript, Day 1, at T206:13-207:24). Indeed, Mr. Feigeles testified that he simply imported the individual line item pricing he received into a spreadsheet. *Id.*

On November 8, 2024, MBIC filed its summary judgment motion seeking dismissal of Appellant’s Complaint and all causes of action contained therein.

JA007. MBIC's motion contained multiple independent bases for dispositive relief, summarized as follows:

- **Appellant failed to establish an essential element (damages) of his breach of contract claim.** The Policy provides that, if he were to establish a covered claim, the most that Appellant would be entitled to is ACV. In this regard, the policy states that “[w]e will pay no more than the actual cash value of the damage until actual repair or replacement is complete.” “Actual cash value” is generally interpreted to mean replacement cost less depreciation. It was undisputed that Appellant had not completed any of the allegedly necessary repairs, nor had he provided any evidence of actual cash value by way of his damages expert or any other capacity. Pursuant to recent case law decided by the District of New Jersey involving virtually identical material facts, Appellant’s failure to establish the essential element of damages relative to his breach of contract claim was fatal. JA009-012.
- **Appellant failed to offer an expert report as to causation.** With respect to causation, Appellant identified Mina Mikaeel of Kiro Engineering as his expert. MBIC’s summary judgment motion contended that Mr. Mikaeel’s report does not adequately opine on causation. Rather, by its own terms, the report is an assessment of the structural stability of the home and a suggested scope of work to repair or otherwise remediate the issues that Mr. Mikaeel observed during his site inspections. The lack of expert opinion as to causation was a fatal flaw to Appellant’s claim. JA004, at n.2.
- **Even if deemed an expert opinion on causation, Mr. Mikaeel’s report is inadmissible net opinion.** MBIC contended that the established *Daubert* standards warranted striking of Mr. Mikaeel’s report as net opinion, leaving Appellant without any expert opinion relating to causation. JA007, at n.5.
- **Even if Mr. Mikaeel’s report was admissible as to causation, Appellant’s claim would be barred by the Policy’s “Earth Movement” exclusion.** Mr. Mikaeel’s deposition testimony included numerous references to soil disturbance and displacement as the cause of the alleged damage. This alleged cause falls squarely within the Policy exclusion for “loss caused directly or indirectly by...**Earth Movement**, meaning...earth sinking, rising or shifting...”. JA401. Thus, even if the other bases for MBIC’s motion were rejected, Appellant’s claim is barred by this policy exclusion. JA005 at n.4.

Ultimately, the District Court granted MBIC’s motion and ordered dismissal of Appellant’s Complaint. JA002-013. As evident from the Court’s written opinion (JA003-013), the Court premised its ruling entirely on the failure of evidence relating to actual cash value, finding that multiple recent cases decided by the District of New Jersey involving identical policy provisions and material facts were directly on point. JA008-012. Appellant’s failure to establish the essential element of damages in connection with his breach of contract claim was fatal and warranted summary judgment in MBIC’s favor.

The District Court also explained that, given its ruling on the ACV issue, it needed not address the alternative bases for MBIC’s motion relating to the sufficiency of Appellant’s causation expert and/or the “Earth Movement” exclusion. JA004 (n.2), JA005 (n.4), and JA007 (n.5). Indeed, Footnotes 2, 4, and 5 of the District Court’s opinion articulate that these other bases for MBIC’s motion were not discussed nor ruled upon by the Court considering its grant of MBIC’s motion on the actual cash value issue. *Id.*²

Appellant filed a timely Notice of Appeal on July 8, 2025. JA001.

² Appellant’s assertion throughout its brief that, with a reversal and remand, this matter is “ripe for trial” is patently incorrect. The District Court found it unnecessary to rule upon the other bases for MBIC’s summary judgment motion considering its ruling on the ACV/failure of proof issue. A reversal and remand would require the District Court to rule upon these other independent bases for dismissal.

SUMMARY OF THE ARGUMENT

The District Court's opinion and order properly analyzed the issues in a straightforward manner in accordance with longstanding principles of property insurance law and other cases decided in the District of New Jersey that are directly on point. The issues are two-fold: (i) to the extent Appellant could prove coverage under the Policy for the claimed damage, the Policy unambiguously limits Appellant to ACV damages because repairs have not been completed; and (ii) proof of ACV is an essential element of Appellant's breach of contract claim, which Appellant has failed to proffer.

Courts in the District of New Jersey have analyzed and interpreted identical policy provisions in factually similar scenarios. In these other matters, the courts have consistently ruled that the pertinent "Loss Settlement" provisions, some of which are identical to the provisions here, dictate that to the extent the claimant can establish a covered claim and where the claimant has not effectuated repairs or replacement of the damage, the damages are calculated at actual cash value (replacement cost less depreciation).

These same courts have also ruled upon the burdens of proof that a claimant bears in connection with prosecuting a breach of contract claim against its property insurer, as Appellant has done here. As demonstrated below, courts faced with this issue have consistently ruled that such plaintiffs must establish their damages as an

essential element of the breach of contract claim. Where those damages are calculated at ACV, the litigant *must* proffer competent foundational evidence to establish ACV damages. It is insufficient for a litigant simply to provide a replacement cost estimate (as Appellant has done here) and rely on the factfinder to extrapolate ACV damages without any foundational evidence whatsoever.

The District Court relied upon these prior cases in applying the same framework to Appellant's claim. The factual record demonstrates that it is undisputed that: (i) Appellant has not made any repairs to the allegedly damaged home; and (ii) Appellant's damages expert provided a replacement cost estimate only, without deduction for depreciation nor any other analysis to attempt to ascertain or opine on ACV damages. In line with the analyses and policy interpretations of the case law referenced above, the District Court properly granted summary judgment to MBIC and dismissed Appellant's Complaint. MBIC respectfully submits that the District Court's ruling should be affirmed.

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

The District Court's grant of summary judgment to MBIC is subject to a *de novo* standard of review. *Downey v. Pennsylvania Dept. of Corrections*, 968 F.3d 299, 304 (3d Cir. 2020). However, the District Court's factual conclusions should be accepted unless clearly erroneous. *Id.*, quoting *Hardy v. Shaikh*, 959 F.3d 578,

584-585 (3d Cir. 2020); *see also New Jersey Retail Merchants Ass’n v. Sidamon-Eristoff*, 669 F.3d 374, 385, 390 (3d Cir. 2012) (on appeal, factual findings are reviewed under the clear error standard, and the district court’s factual determinations are accepted unless they are “completely devoid of minimum evidentiary support” or “bears no rational relationship to the supportive evidentiary data.”); *Lanning v. Southeastern Penn. Trans. Auth.*, 308 F.3d 286, 289-290 (3d Cir. 2002) (relevant findings of fact reviewed under the clearly erroneous standard).

The Court may affirm the District Court’s judgment “on any grounds supported by the record.” *Nicini v. Morra*, 212 F.3d 798, 805 (3d Cir. 2000).

Pursuant to Fed. R. Civ. P. 56(a), summary judgment is properly granted where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Summary disposition is appropriate where the court is satisfied that the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” *Kirschling v. Atlantic City Bd. of Educ.*, 10 F. Supp. 3d 587, 592 (D.N.J. 2014).

The party moving for summary judgment “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a

genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A second, “closely related” method involves the moving party demonstrating that the nonmoving party has not made ““a showing sufficient to establish the existence of an element essential to that party’s case ... *on which that party will bear the burden of proof at trial.*”” *Mall Chevrolet, Inc. v. General Motors LLC*, 99 F.4th 622, 630 (3d Cir. 2024) (emphasis in original) (quoting *Celotex Corp.*, 477 U.S. at 322).

Upon meeting its initial showing, “the burden then shifts to the party opposing summary judgment to proffer ‘specific facts showing there is a genuine issue for trial.’” *Celotex Corp.*, 477 U.S. at 325. The non-moving party cannot merely rely on its pleadings and allegations to oppose this motion and must provide “admissible evidence establishing a genuine issue of fact.” *Maidenbaum v. Bally’s Park Place, Inc.*, 870 F. Supp. 1254, 1258 (D.N.J. 1994). “[U]nsupported allegations ... and pleadings are insufficient to repel summary judgment.” *Ortho McNeil Pharmaceutical, Inc. v. Barr Laboratories, Inc.*, 2006 WL 3019555, at *2 (D.N.J. Oct. 23, 2006) (quoting *Schoch v. First Fid. Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990)).

Indeed, the non-moving party must demonstrate “the existence of [every] element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Kirschling*, 10 F. Supp. 3d at 593 (citations omitted). “If the non-moving party’s evidence is merely colorable, or not significantly probative,

summary judgment may be granted.” *Ortiz v. Yale Materials Handling Corp.*, 2005 WL 2044923, at *2 (D.N.J. Aug. 24, 2005). Should the non-moving party fail to show the existence of an element essential to that party’s case, “there can be no genuine issue of material fact since the complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” *Ortho McNeil Pharmaceutical*, 2006 WL 3019555, at *2.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE POLICY UNAMBIGUOUSLY LIMITS APPELLANT TO ACV DAMAGES, TO THE EXTENT APPELLANT CAN ESTABLISH COVERAGE.

There can be no legitimate dispute that the Policy limits Appellant to ACV damages in the event he can establish coverage for the claimed damage to the home. At the time of the District Court’s ruling, Appellant had not yet established that the Policy provided coverage for the claimed damage. Indeed, the issue of coverage – including application of the Policy’s “Earth Movement” exclusion – was a prong of MBIC’s summary judgment motion. Given its ruling on the actual cash value issue, the District Court did not need to address the alternative bases for MBIC’s motion relating to appellant’s purported expert opinion and/or the “Earth Movement” exclusion. JA004 (n. 2), JA005 (n. 4), and JA007 (n. 5).

Assuming *arguendo* that Appellant *did* establish coverage under the Policy for the alleged damage to the home, the measurement of damage as prescribed by the Policy would be actual cash value. The Policy unambiguously provides: MBIC “*will*

pay no more than the actual cash value of the damage until actual repair or replacement is complete.” In other words, Appellant would not be entitled to compensation on a replacement cost value basis, unless and until the necessary repairs or replacement were completed.

Here, it is undisputed that Appellant has not made any repairs to or replacement of the allegedly damaged property that is the subject of this lawsuit. JA098 (Feigeles Transcript, Day 1, at T211:9-17); JA011 (District Court finding that “Plaintiff does not dispute that repairs have not been completed”). Therefore, even assuming that Appellant were entitled to coverage for the claimed damage, Appellant would be limited to the actual cash value of the allegedly damaged property.

The law regarding interpretation of insurance policies is well-established. Under New Jersey law, the terms of an insurance contract are to be interpreted in accordance with their “plain and ordinary meaning.” *Flomerfelt v. Cardiello*, 997 A.2d 991, 996 (N.J. 2010); *see also Pizzullo v. N.J. Mfrs. Ins. Co.*, 952 A.2d 1077, 1088 (N.J. 2008); *Zacarias v. Allstate Ins. Co.*, 775 A.2d 1262, 1264 (N.J. 2001); *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1260 (N.J. 1992). In interpreting insurance policies, the New Jersey Supreme Court has consistently held that “courts should interpret the policy as written and avoid writing a better insurance policy than the one purchased.” *President v. Jenkins*, 853 A.2d 247, 254 (N.J. 2004) (citing *Gibson v. Callaghan*, 730 A.2d 1278, 1282 (N.J. 1999)).

The specific language in the Policy conditioning compensation on a replacement cost value basis on the actual repair or replacement of the damaged property has been held to be “clear and unambiguous.” *Dunkerly v. Encompass Ins. Co.*, 296 F. Supp. 3d 681, 686 (D.N.J. 2017) (finding a provision of a homeowner’s stating an insurer “will pay no more than the actual cash value of the damage until actual repair or replacement is complete” to be “clear and non-technical” and clearly established that “unless and until the structure is rebuilt, the replacement cost would not be paid”).

In *Dunkerly*, which similarly involved a claim for insurance benefits under a homeowners’ property policy, the Court held that a substantively identical loss settlement provision “unambiguously bar[red] the [Plaintiff] from collecting the replacement value, since the insureds did not rebuild the structure, timely or otherwise.” *Id.* at 687. Because no repairs or rebuilding occurred, the plaintiff in *Dunkerly* was limited to the actual cash value measurement. *Id.* As part of its analysis, the Court specifically held that this provision was unambiguous and did not involve any special complexities that could not be understood by the average purchaser. *Id.*; see also *Danzeisen v. Selective Ins. Co. of Am.*, 689 A.2d 798, 799 (N.J. App. Div. 1997) (holding under a similar provision that a failure by the insured to repair or replace a structure prohibited compensation on a replacement cost basis).

Other recently decided cases out of the District of New Jersey have reached

the same conclusion. In *Giacobbe v. QBE Specialty Ins. Co.*, 2018 WL 2113266 (D.N.J. May 8, 2018) (JA471), *reconsideration denied*, 2018 WL 4110924 (D.N.J. Aug. 28, 2018), the Court was faced with the issue of the plaintiff's damages where no repairs or replacement were made following an allegedly covered claim. The Court reviewed the relevant valuation language of the policy, which was *identical* to the valuation language in the Policy issued by MBIC. The Court held that this language was unambiguous, and that "Plaintiffs' insured losses are limited to actual cash value prior to the completion of any repairs. Under the plain terms of the Policy, only after repairs are completed do the replacement cost procedures and coverages apply." *Id.* at *4.

In *Johnson v. The Hanover Ins. Group*, 2025 WL 1527444 (D.N.J. May 29, 2025), plaintiffs alleged hail damage to their home's roof, which their carrier, Hanover Insurance Company, disputed. *Id.* at *1. No repairs or replacement were ever made, and plaintiffs supported their claim in the lawsuit with an RCV estimate only. *Id.* at *3. The relevant policy valuation language was *identical* to the language in the Policy at bar. *Id.* at *4. Relying on *Giacobbe* and other cases cited by MBIC herein, the Court in *Johnson* granted Hanover's summary judgment motion and dismissed plaintiffs' complaint for lacking an ACV damages analysis. *Id.* at *4-6.

With respect to the Loss Settlement provisions of the policy, which are identical to the provisions in the Policy at bar, the Court in *Johnson* explained that

courts in the District of New Jersey have “consistently interpreted substantively identical policy language and found it to be clear, unambiguous, and enforceable.” *Id.* at *4, citing *Giacobbe*, 2018 WL 2113266, at *4, and *Dunkerly*, 296 F. Supp. 3d at 684. The Court in *Johnson* thus utilized the same framework used by the District Court here and espoused by MBIC: even assuming that the plaintiff suffered covered damage, it is only entitled to ACV and not replacement cost.

As in *Dunkerly*, *Giacobbe*, and *Johnson*, the Policy here conditions compensation on a replacement cost value basis on the repair or replacement of the damaged property. It is undisputed that Appellant has not made any repairs to or replacement of the allegedly damaged property. Though MBIC disputes that there was any covered damage to the home, any covered damage would be limited to compensation on an actual cash value basis.

The case law discussed above (and in the following section) demonstrates that “actual cash value” has been routinely interpreted to mean replacement cost less depreciation. The limitation to ACV damages is not merely an academic undertaking. Indeed, a depreciation figure relevant to an ACV measurement in this matter would likely be *substantial* given the age and condition of Appellant’s home. This is not a situation involving a new home in which minimal depreciation might be expected. Rather, this dispute involves a home built in 1964 with evidence of pre-existing damage and wear and tear. JA275; JA274-286. The necessity to

establish ACV, and Appellant's commensurate failure to do so as discussed below, is significant and cannot be overlooked.

III. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANT WAS OBLIGATED TO PROVIDE COMPETENT EVIDENCE OF ACV DAMAGES AS A BREACH OF CONTRACT CLAIMANT, WHICH APPELLANT UNDISPUTEDLY FAILED TO DO.

The District Court correctly ruled that, as a breach of contract claimant, Appellant bore the burden of establishing his damages. This is not a groundbreaking ruling; every claimant is obligated to support their quantum of damages with sufficient, competent evidence. Here, Appellant's damages were, at most, undeniably limited to ACV. However, because the damages report provided by Appellant's expert lacked any analysis of ACV whatsoever, Appellant lacked fundamental evidence for an essential element of his claim. Therefore, the District Court properly granted MBIC's motion for summary dismissal.

A breach of contract claim consists of four essential elements: "(1) the existence of the contract; (2) breach of the contract (3) *damages as a result of the breach*; and (4) that plaintiff performed its duties under the contract." *Coda v. Constellation Energy Power Choice, LLC*, 409 F. Supp. 3d 296, 303 (D.N.J. 2019) (emphasis added). "A plaintiff bringing a breach of contract claim under New Jersey law has the burden of proof for all elements of the claim, including damages." *Giacobbe*, 2018 WL 2113266, at *4 (collecting cases).

With respect to proof of damages, "[i]t is well settled in New Jersey that the

plaintiff bears the burden of proving beyond uncertainty that he has in fact been damaged, and once that has been established *the plaintiff bears the burden of proving the amount of such damages with a reasonable degree of certainty.*” *Lightning Lube, Inc. v. Witco Corp.*, 802 F. Supp. 1180, 1194 (D.N.J. 1992), *aff’d*, 4 F.3d 1153 (3d Cir. 1993) (emphasis added) (citing *Sandler v. Lawn-A-Mat Chem. & Equip. Corp.*, 358 A.2d 805, 814 (N.J. App. Div. 1976), *holding modified by Ellmex Const. Co. v. Republic Ins. Co.*, 494 A.2d 339 (N.J. App. Div. 1985), and *Tessmar v. Grosner*, 182 A.2d 467, 472 (N.J. 1957)).

In three recent cases decided in the last decade, courts in the District of New Jersey were faced with the identical issue of a plaintiff’s failure of proof relating to ACV damages. Each of these cases applied the same analysis and reached the same determination as the District Court in the matter at bar. First, in *Giacobbe*, 2018 WL 2113266 (D.N.J. May 8, 2018), *reconsideration denied*, 2018 WL 4110924 (D.N.J. Aug. 28, 2018), the Court was faced with the issue of the plaintiff’s damages where no repairs or replacement were made following an alleged covered claim. In that matter, the plaintiff homeowners sued their insurance company for wind damage to the home in connection with Superstorm Sandy. The defendant carrier sought summary judgment on the basis that: (i) the policy provided only for actual cash value where the insured did not complete repairs or replacement, and (ii) the plaintiffs had no evidence of actual cash value.

The Court granted summary judgment in favor of the carrier and dismissed plaintiffs' claims. As noted above, the Court reviewed the relevant valuation language of the policy, which was *identical* to the valuation language in the Policy issued by MBIC. The Court held that this language was unambiguous, and that "Plaintiffs' insured losses are limited to actual cash value prior to the completion of any repairs. Under the plain terms of the Policy, only after repairs are completed do the replacement cost procedures and coverages apply." *Id.* at *4.

The Court then dealt with the branch of the carrier's motion seeking dismissal of the breach of contract claim based on the plaintiffs' failure to prove an element of their claim: damages. The Court acknowledged longstanding New Jersey case law holding that proof of damages is an essential element of a breach of contract claim. *Id.* at *5. Noting that the plaintiffs offered no proof – including no expert opinion – on actual cash value, the Court ruled that plaintiffs "failed to offer sufficient evidence to create a dispute as to a material fact – i.e., the amount of actual cash value of damages to the insured property Defendant has failed to pay." *Id.* The Court granted the defendant carrier's summary judgment motion for dismissal of the complaint.

In another decision out of the District of New Jersey, *Uddoh v. Selective Ins. Co. of Am.*, 2018 WL 2127733, at *3 (D.N.J. May 8, 2018), *aff'd*, 772 Fed. Appx. 29 (3d Cir. 2019) (JA489), the Court similarly granted the defendant carrier's summary judgment motion based on the insured's failure of proof regarding actual cash value.

In *Uddoh*, the case involved a dispute over the plaintiff's flood insurance claim against its flood insurer, defendant Selective. Selective sought summary judgment on multiple grounds. *Id.* at *1. One basis was plaintiff's failure to offer evidence of actual cash value, which was required under the terms of the policy. *Id.*

The Court granted Selective's summary judgment motion, finding that because plaintiff "has no evidence of the value of physical depreciation for his losses, Plaintiff cannot prove the actual cash value of his losses." *Id.* at *3. Because the plaintiff could not prove the actual cash value of the alleged loss, Selective was "entitled to judgment as a matter of law on the breach of contract claim." *Id.*

Finally, the District of New Jersey issued another consistent ruling on this identical issue in May 2025 in *Johnson v. The Hanover Ins. Group*, 2025 WL 1527444 (D.N.J. May 29, 2025). In *Johnson*, plaintiffs alleged hail damage to their home's roof, which their carrier Hanover Insurance Company disputed. *Id.* at *1. No repairs or replacement were ever made, and plaintiffs supported their claim in the lawsuit with an RCV estimate only. *Id.* at *3. The relevant policy valuation language was identical to the language in the Policy at bar. *Id.* at *4. Relying on *Giacobbe* and other cases cited by MBIC herein, the Court in *Johnson* granted Hanover's summary judgment motion and dismissed plaintiffs' complaint for lacking an ACV damages analysis. *Id.* at *4-6.

With respect to the Loss Settlement provisions of the policy, which are

identical to the provisions in the Policy at bar, the Court in *Johnson* explained that courts in the District of New Jersey have “consistently interpreted substantively identical policy language and found it to be clear, unambiguous, and enforceable.” *Id.* at *4, citing *Giacobbe*, 2018 WL 2113266, at *4, and *Dunkerly*, 296 F. Supp. 3d at 684. The Court in *Johnson* thus utilized the same framework used by the District Court here and espoused by MBIC: even if the plaintiff suffered covered damage, it is only entitled to ACV and not replacement cost.

Like Appellant here, the Court in *Johnson* noted that the plaintiffs had not submitted any evidence establishing the ACV of the allegedly damaged roof. 2025 WL 1527444, at *6. Rather – again, like Appellant here – the only evidence of damages offered by the plaintiffs in *Johnson* was a replacement cost estimate prepared by their contractor. *Id.* The estimate “neither identified any depreciation nor assigned an ACV to the claimed damage.” *Id.* The Court also astutely observed that “[w]hile evidence of ACV is always essential to sustaining this type of breach of contract claim, its absence is particularly significant here given the condition of Plaintiffs’ roof prior to the alleged hailstorm,” which the Court explained was in deteriorated condition. *Id.*

These prior rulings are consistent with other courts in this circuit and other jurisdictions. *See, e.g., Integral Scrap & Recycling, Inc. v. Conifer Holdings, Inc.*, 2021 WL 826747, at *4 (W.D. Pa. Mar. 4, 2021) (granting motion to dismiss breach

of contract claim because the plaintiff did “not detail an actual cash value and amount of loss claimed. Therefore, without sufficient pleading as to the damage's element, Integral Scrap has not adequately pleaded a breach of contract claim”); *Predelus v. Atain Specialty Ins. Co.*, 2023 WL 1331229, at *6 (S.D. Fla. Jan. 31, 2023) (observing that “[w]hile it is true that actual cash value is calculated by subtracting depreciation from replacement cost value, there is no evidence in the record of depreciation. Accordingly, Plaintiff would be unable at trial to establish actual cash value. . . [a]ccordingly, the Court finds that Defendant has not breached the Policy.”).

These crystal-clear holdings are premised on sound reasoning and squarely apply here. As an essential element of his breach of contract claim, Appellant bears the burden of establishing the quantum of damages. This means that Appellant is required to offer evidence as to the actual cash value of the damage relating to his breach of contract claim.

As a matter of law, Appellant has undeniably not met this burden. The damages calculation that Appellant has offered is simply Mr. Feigeles’ full replacement cost bid proposal to perform the quoted repair work. Importantly, the proposal does not include any analysis or figures for depreciation (a point Mr. Feigeles admitted at his deposition) nor otherwise attempt to set forth an actual cash value for the allegedly damaged property, which is the scope of damages under the Policy if coverage were to be established.

It is undisputed that Mr. Feigeles did not attempt to provide an ACV figure for the alleged damage. He testified that, in issuing the proposal for work that was offered as Appellant's expert report on damages, he did not endeavor to provide a depreciation figure that would apply to any aspect of the allegedly damaged property. Therefore, Appellant's breach of contract claim fails as a matter of law because he has failed to offer competent evidence to establish a predicate element of the claim.

Further, as the Court in *Johnson* noted with respect to the aged property at issue in that case, the absence of ACV analysis is "particularly significant" here given the aged nature of the home. The home was built in 1964 with evidence of pre-existing damage and wear and tear. As a result, the difference between replacement cost and ACV would certainly be expected to be substantial.

Appellant has failed to present *any* evidence, much less competent evidence, identifying an actual cash value for the damages alleged in this action. In accordance with established case law, Appellant lacks sufficient evidence establishing an essential element of the breach of contract claim. For these reasons, Appellant's breach of contract claim fails as a matter of law, and the District Court's ruling should be affirmed.

IV. APPELLANT'S ARGUMENTS FOR REVERSAL ARE UNAVAILING.

Appellant's Opening Brief contains a handful of arguments that are either mischaracterizations or repackaging of arguments that have been consistently

rejected by courts analyzing the same issue.

First, Appellant consistently yet incorrectly argues in his brief that the District Court held that *the Policy* places the burden of proving ACV on the insured. The District Court did not reach its conclusion that Appellant was obligated to establish evidence of ACV damages in the way Appellant contends. Appellant shrewdly, but incorrectly, contends that “[t]he court ruled that [Appellant] did not comply with what the court held to be a requirement under the Policy that [Appellant] provide a damage claim under an ACV analysis.” App. Br., p. 10. The District Court never held that, and MBIC never argued that proposition, nor does it argue it herein.

Appellant’s obligation to provide sufficient evidence of his damages arises by operation of law as a breach of contract litigant, just as any other breach of contract claimant would be obligated to do. This is not a “requirement under the Policy.” That description is simply Appellant’s strategy to move the goalposts to improve his chances of a reversal. The Policy is only relevant because it dictates the scope of those potential damages; in this case, actual cash value. The Policy provides the scope of damage if coverage is established; it is Appellant’s burden as a litigant to support those damages with competent evidence, which he has not.

In fact, the District Court was quite clear in its ruling that “the Policy does not expressly require the insured to provide an ACV calculation.” JA010 (n.6). Yet for unexplained reasons, Appellant argues a point of law that is not (and has never been)

contested. The Policy identifies the scope of covered damages as ACV; case law establishes that, as a breach of contract litigant, Appellant must establish those damages with competent evidence.

Further to this point, Appellant hastily contends that the *Giacobbe* and *Johnson* decisions (and presumably the ruling by the District Court in the matter at bar) “improperly place a burden on the insured that has never been placed on any insured in any other New Jersey case.” App. Br., p. 11. This sweeping proposition is plainly inaccurate. *Every insured* that asserts a breach of contract claim in a litigation is obligated to support their damages with competent evidence, just as any other breach of contract claimant. Appellant should not be treated any differently. In fact, to release Appellant from the obligation to support his damages would run counter to this bedrock principle requiring claimants to establish their damages with reasonable certainty and competent evidence.

The District Court addressed this argument in footnote 8 of its opinion, observing that Appellant was “conflat[ing] the standards applicable during the claim adjustment process with those that govern a *prima facie* case of breach of contract in a litigation claim. At this stage, the question is not whether Defendant should have calculated and paid ACV benefits during the adjustment stage, but whether Plaintiff can carry his burden of proof on each element of his breach of contract claim – including damages.” JA011 (n.8).

Notwithstanding the clarity of the District Court’s ruling, Appellant’s “Conclusion” section (and elsewhere) of his brief *still* incorporates these subtle mischaracterizations, urging that “*the Policy* does not require Kimmel, the insured, to provide an ACV estimate to [MBIC] *when submitting his real property claim.*” App. Br., p. 28 (emphasis added). Again, this is plainly not the issue. The Policy is not the authority that obligates Appellant to prove his damages with competent evidence. As the District Court noted, this litigation is not about Appellant’s obligations during the claim submission process; rather, once Appellant filed a lawsuit for breach of contract, he carries obligations pertaining to proof of damages. The subtle attempts by Appellant to frame the issue as one of a “policy requirement” during the claim submission process should be flatly rejected.

Appellant also incorrectly contends that the Loss Settlement provisions of the Policy do not require depreciation deduction for “partial losses.” This argument involves a tortured reading of the Policy, as the Loss Settlement provisions at issue have nothing to do with partial or total losses. Rather, the valuation that would ordinarily be conducted for a covered claim during an adjustment would involve an analysis as to whether the total amount insurance was more or less than 80% of the full replacement cost of the home “immediately before the loss.” JA403.

These provisions are routinely understood as “coinsurance” provisions, which are commonly included in property policies to ensure that insured properties are not

significantly underinsured (below 80% of their value). If a home is significantly underinsured, it would be unfair to expect full replacement cost, where that replacement cost is significantly more costly than the amount for which the home is insured. The 80% benchmark identified in the Loss Settlement provisions unambiguously have no relevance to “partial” or “total” losses, and it is a fundamental misreading of the Policy to argue otherwise.

Appellant’s argument that partial losses are not subject to depreciation is further undercut by subsection b.(4) of the Loss Settlement provisions. That provision clearly states that the amount of recovery (for a covered claim) is ACV “*until actual repair or replacement is complete.*” The provision continues to explain that only once repair or replacement is completed are subsections b.(1) and b.(2) even relevant. JA403. Here, it is undisputed that no repairs have commenced, much less been completed.

Subsection b.(4) of the Loss Settlement provisions also eviscerates Appellant’s newly-raised argument that depreciation/ACV applies to personal property losses only. This contention is clearly refuted by subsection b.(4), which falls under the valuation provisions for “buildings” and expressly limits recovery to ACV until actual repairs are completed. Further, Appellant’s contention that depreciation/ACV only applies to personal property losses is contrary to the case law cited above (*Giacobbe, Johnson, etc.*), in which courts have consistently

interpreted the identical provisions to require depreciation deduction for ACV analyses pertinent to real property losses.³

Appellant also contends that even if he is obligated to support his ACV damages with competent evidence, his expert has provided “sufficient information” for ACV “to be determined” pursuant to the “broad evidence rule.” In its opinion granting MBIC’s motion, the District Court plainly rejected this argument as follows: “Plaintiff attempts to meet his burden by invoking the ‘broad evidence rule’ and relying on the Proposal’s replacement cost estimate. This is insufficient. As determined in *Giacobbe* and *Johnson*, a plaintiff cannot simply present a replacement cost figure and expect a factfinder to somehow extrapolate ACV without more. Rather, he must provide a developed evidentiary foundation—such as depreciation calculations, market value comparisons, or other reliable valuation metrics—from which ACV may reasonably be determined under the broad evidence rule.” JA011-012.

MBIC does not dispute that the “broad evidence rule” could have some

³ Appellant’s argument that depreciation applies to personal property losses only was not raised below, and pursuant to established law, it should not be considered in connection with this appeal. *Fletcher-Harlee Corp. v. Pote Concrete Contractors Corp.*, 482 F.3d 247, 253 (3d Cir. 2007) (“absent exceptional circumstances, issues not raised before the district court are waived on appeal.”), citing *Brenner v. Local 514, United Bhd. of Carpenters & Joiners*, 927 F.2d 1283 (3d Cir. 1991) (“It is well established that failure to raise an issue in the district court constitutes waiver of the argument.”). As evident from the District Court’s opinion (JA003-013), Appellant never contended that ACV applies to personal property losses only.

application where an expert’s opinion included foundational evidence pertinent to the ACV analysis, including the evidentiary examples provided by the District Court in the quote above. The problem for Appellant is that his expert clearly did not conduct any such analysis, consider any such evidence, nor provide any opinion on same. Indeed, the District Court’s factual findings (including as articulated above) were that Appellant’s expert simply presented a replacement cost estimate and left it to the factfinder to extrapolate an ACV figure. This clearly does not meet the burden of providing competent evidence under the “broad evidence” rule.⁴

The District Court’s factual findings in this regard (specifically, as to the lack of foundational evidence included in Appellant’s damages expert’s report) are owed deference under the “clear error” standard of review. *See, e.g., New Jersey Retail Merchants Ass’n v. Sidamon-Eristoff*, 669 F.3d 374, 385, 390 (3d Cir. 2012) (on appeal, factual findings are reviewed under the clear error standard, and the district court’s factual determinations are accepted unless they are “completely devoid of minimum evidentiary support” or “bears no rational relationship to the supportive

⁴ *Messing v. Reliance Ins. Co.*, 187 A.2d 49 (N.J. Law Div. 1962), a New Jersey Law Division decision from 1962 upon which Appellant relies, is entirely consistent with the District Court’s holding. The court in *Messing* identified some of the identical sources of foundational evidence that the District Court identified in relying on the broad evidence rule to support an ACV analysis. Appellant’s expert simply does not conduct such an analysis, nor does the report contain anything beyond a replacement cost estimate. To the extent *Messing* is contrary to *Giacobbe* (2018) and *Johnson* (2025), those later decisions should control the analysis.

evidentiary data.”); *Lanning v. Southeastern Penn. Trans. Auth.*, 308 F.3d 286, 289-290 (3d Cir. 2002) (relevant findings of fact reviewed under the clearly erroneous standard).

Curiously, Appellant’s brief on this issue goes through an exhaustive *Daubert* analysis, even though a challenge to his expert’s qualifications is not at issue in this appeal. Appellant’s argument focuses on the wrong issue. It is not the damages expert’s *qualifications* that are fatal to Appellant’s claim, but rather the clear fact that the report is simply a replacement cost proposal with no evidentiary foundation whatsoever – such as depreciation calculations, market value comparisons, or other reliable valuation metrics – from which ACV may reasonably be determined.

Finally, the notion that Appellant can meet his burden of establishing damages simply by leaving it up to the factfinder to extrapolate ACV would be antithetical to the litigation process at the heart of the civil judicial system. Expert opinion is often critical to establishing or refuting liability, and MBIC would be entitled to know Appellant’s position on ACV damages so that Appellant’s expert could be vetted at deposition and cross-examination. MBIC would also be entitled to obtain rebuttal expert opinion on that issue. Because Appellant’s damages report contains none of the evidentiary foundation for this analysis, there is no opportunity for MBIC to qualitatively refute Appellant’s position on ACV damages.

CONCLUSION

For the foregoing reasons, MBIC respectfully submits that the District Court correctly granted summary judgment in MBIC's favor and dismissed Appellant's Complaint with prejudice. MBIC further respectfully submits that the District Court's ruling should be affirmed.

Dated: January 7, 2026

By: /s/ Jeremiah L. O'Leary
JEREMIAH L. O'LEARY, ESQ.
(N.J. Atty. ID No. 039291996)
**FINAZZO COSSOLINI O'LEARY
MEOLA & HAGER, LLC**
180 Park Avenue, Suite 202
Florham Park, New Jersey 07932
(973) 343-4960
jeremiah.oleary@finazzolaw.com
*Attorney for Defendant/Appellee
Massachusetts Bay Insurance Company*

COMBINED CERTIFICATIONS

I, Jeremiah L. O’Leary, Esq., of full age, hereby certify as follows:

1. I am an attorney at law, admitted to practice in the State of New Jersey and am a member with the law firm Finazzo Cossolini O’Leary Meola & Hager, LLC, attorneys for Defendant/Appellee Massachusetts Bay Insurance Company.

2. I am a member in good standing of the bar of the United States Court of Appeals for the third Circuit, having been admitted in 2001.

3. The annexed brief (the “Brief”) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the Brief contained 8680 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

4. Pursuant to Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6), the Brief complies with the typeface and type style requirements because it was prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point type.

5. Pursuant to 3d Cir. L. App. R. 31.1(c), no viruses were detected when the electronic submissions were scanned by Vipre Virus Protection, version 3.1, which is, upon information and belief, regularly updated.

6. On January 7, 2026, I caused an original and seven (7) copies of the Brief to be sent for filing, via FedEx Overnight, addressed to:

The Clerk of the Court
Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

7. Also on January 7, 2026, I caused a PDF copy of the Brief to be electronically filed with the Court of Appeals for the Third Circuit via CM/ECF.

8. Pursuant to 3d Cir. L. App. R. 31.1(c), I certify that the electronic Brief was identical to the paper copies sent to the Court.

9. On January 7, 2026, I caused a copy of the Brief to be served on the below-listed counsel for Plaintiff/Appellant via FedEx Overnight, addressed as follows:

Alan C. Milstein, Esq.
Jeffrey P. Resnick, Esq.
Laura C. Laszewski, Esq.
**SHERMAN SILVERSTEIN KOHL
ROSE & PODOLSKY, P.A.**
308 Harper Drive, Suite 200
Moorestown, New Jersey 08057
(856) 662-0700
amilstein@shermansilverstein.com
jresnick@shermansilverstein.com
llaszewski@shermansilverstein.com
Attorneys for Plaintiff-Appellant

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: January 7, 2026

By: /s/ Jeremiah L. O'Leary
JEREMIAH L. O'LEARY, ESQ.
(N.J. Atty. ID No. 039291996)
**FINAZZO COSSOLINI O'LEARY
MEOLA & HAGER, LLC**
180 Park Avenue, Suite 202
Florham Park, New Jersey 07932
(973) 343-4960
jeremiah.oleary@finazzolaw.com
*Attorney for Defendant/Appellee
Massachusetts Bay Insurance Company*