IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-2274

CRAIG KIMMEL,

Plaintiff-Appellant,

v.

MASSACHUSETTS BAY INSURANCE CO.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Case No. 1:21-cv-12743

OPENING BRIEF OF APPELLANT CRAIG KIMMEL

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Jersey had diversity of citizenship jurisdiction over this matter pursuant to 28 U.S.C. §1332, as Appellant Craig Kimmel ("Kimmel") was at all times a citizen of a different state than Respondent Massachusetts Bay Insurance Co. ("Massachusetts Bay"). The district court entered judgment on June 24, 2025. (See Joint Appendix JA002). Kimmel filed a timely notice of appeal on July 8, 2025. (See JA001). This appeal is from an Order granting summary judgment in favor of Massachusetts Bay, which constitutes final judgment disposing of all claims.

STATEMENT OF ISSUES

Whether the district court erred in granting Massachusetts Bay's summary judgment motion when Kimmel submitted sufficient evidence, through his expert witness' report and testimony, for a factfinder to determine the appropriate measure of damages for the loss sustained.

CERTIFICATION PURSUANT TO 5 U.S.C. § 706(2)

The undersigned hereby certifies that to the best of his knowledge and belief, this case has not been before this court previously, nor is he aware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this court or any other court or agency, state or federal, nor is he aware of any previous or pending appeals before this court arising out of the same case or proceeding.

STATEMENT OF THE CASE

This is a straightforward first party insurance claim, alleging breach of contract and bad faith. Kimmel owns Property located at 5 Forage Lane, Cherry Hill, New Jersey (the "Property"). On the Property, there is a single family residence (the "Dwelling"). Massachusetts Bay issued a homeowner's insurance policy ("Policy") to Kimmel insuring the Property and the Dwelling.

On June 3, 2020, lightning from a storm caused major damage to a tree located in the south-west corner of the Property, resulting in the tree falling and impacting the ground near the Dwelling. As a result of the impact of this tree on the soil surrounding Kimmel's Dwelling, the Dwelling suffered significant damages including cracks to the exterior, interior, basement, attic, and garage.

Kimmel has submitted expert reports and testimony which analyze the evidence and conclude that the tree fall impacted the soil, resulting in damage to the Dwelling. Additionally, Kimmel has submitted evidence of the replacement costs of his damages through expert reports and testimony. Massachusetts Bay, however, chose to ignore Kimmel's damages by introducing incorrect interpretations of the Policy, which are also counter to common insurance practice under New Jersey law. Further, Massachusetts Bay attacks Kimmel's experts' methodology and qualifications, not because the methodology is wrong, but because it disagrees with

Massachusetts Bay's findings. This presents a dispute of material fact, which precludes summary judgment.

Despite the fact that Kimmel satisfied his burden to show that he was damaged from the loss, the district court found that Kimmel did not perform under the Policy. The district court held that Kimmel's expert did not provide sufficient evidence to allow a factfinder to determine Actual Cash Value ("ACV" or "Actual Cash Value"), which the court determined Kimmel was required to provide per the Policy. The district court erred in making this determination. The Policy does not require Kimmel to provide an ACV analysis as a precondition to coverage. But even if the Policy had this requirement, Kimmel's expert provides sufficient information to allow a fact finder to determine ACV.

In making its decision to grant summary judgment, the district court relied almost exclusively on two unpublished cases, Giacobbe v. QBE Specialty Insurance Company[1] and Johnson v. Hanover Insurance Company,[2] both of which are non-precedential and were decided in direct contrast to the longstanding principles New Jersey courts have laid out in relation to interpretation of insurance contracts. Thus, the district court erred in its decision, and summary judgment should have been denied.

[1] 2018 WL 2113266 (U.S.D.C. D.N.J. May 8, 2018).
[2] 2025 WL 1527444 (U.S.D.C. D.N.J. May 29, 2025).

A. Statement of the Facts

Massachusetts Bay issued the Policy, Policy No. HVY 7989780, effective from June 27, 2019 through June 27, 2020. See Ja386-470. The Policy provided coverage for physical loss to the Property and the Dwelling, subject to its terms and conditions. Id.

Relevant to this appeal, the Policy includes several provisions. First, Section I – Property Coverages distinguishes between the types of property that is covered under the Policy. Coverage A relates to coverage for a Dwelling, Coverage B relates to coverage for Other Structures, and Coverage C relates to coverage for Personal Property. See Ja395. Additionally, the Policy contains "Your Duties After Loss" and "Loss Settlement" provisions, which provide in relevant part:

> **SECTION I – CONDITIONS**
>
> **…**
>
> 2. **Your Duties After Loss.** In case of a loss to covered property, you must see that the following are done:
>
> **…**
>
> **e.** Prepare an inventory of damaged personal property showing the quantity, description, **actual cash value** (emphasis added) and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory;
>
> **…**
>
> **g.** Send to us, within 60 days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:
>
> **…**
>
> 5) Specifications of damaged buildings and detailed repair estimates;
> 6) The inventory of damaged personal property

described in 2.e. above;

...

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

...

b. Buildings under Coverage A or B **at replacement cost** (emphasis added) without deduction for depreciation, subject to the following:

1) If at the time of loss, the amount of insurance in the 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 applies to the building;
   b. The replacement cost of that part of the building damaged for like construction and use on the same premises; or
   c. The necessary amount actually spent to repair or replace the damaged building.
2) If, at the time of loss, the amount of insurance in this policy on the damaged building is less than 80% of the full replacement cost of the building immediately before the loss, we will pay the greater of the following amounts, but not more than the limit of liability under this policy that applies to the building:
   a. The actual cash value of that part of the building damages; or
   b. The proportion of the cost to repair or replace, after application of deductible and without deduction for depreciation, that part of the building damaged, which the total amount of insurance in this policy on the damaged building bears to 80% of the replacement cost of the building.
3) To determine the amount of insurance required to equal 80% of the full replacement cost of the

building immediately before the loss, do not include the value of:

a. Excavations, foundations, piers or any supports which are below the undersurface of the lowest basement floor;
b. Those support in a) above which are below the surface of the ground inside the foundation walls, if there is no basement; and
c. Underground flues, pipes, wiring and drains.

4) We will pay no more than the actual cash value of the damage **until** (emphasis added) actual repair for 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.**

See Ja402-403.

On June 3, 2020, lightning from a storm caused major damage to a tree on the south-west corner of Kimmel's Property, causing the tree to fall onto the Property. See Ja015 at ¶¶ 4-6. The tree struck the Property, which caused significant damage to the Dwelling including:

a. damage to the exterior including the siding, window framing, gutters and downspouts; and
b. separation of the front porch from the main structure; and
c. sloping of front porch; and
d. cracking of foundation walls-exterior; and
e. structural cracks in the basement through the blocks and mortal joints; and
f. basement wall shifting, moderate wall bowing; and
g. in the attic, tension and compression closure gaps between the rafters, joints, and ridge beam; and
h. in the interior drywall and ceilings, vertical, diagonal, and step cracking in both the first and second floors; and
i. loss of personal property as defined under the policy; and
j. loss of use of the property as defined under the policy (collectively,

the "damages").

See Ja015 at ¶ 7; see also Ja215-273, Deposition of Mina Mikaeel, generally.

Kimmel reported the damage to Massachusetts Bay the very next day, and Massachusetts Bay has since declined to cover the loss, despite the express terms of the Policy. See Ja016 at ¶ 15 and Ja017 at ¶ 20. Kimmel thereafter filed suit.

Kimmel provided reports and testimony from two experts to support his claim. Mina Mikaeel ("Mr. Mikaeel") is an engineering expert who was retained to analyze the cause of the loss, and Steven R. Feigeles ("Mr. Feigeles") was retained to provide an estimate of the cost to repair and replace the damage to the Property and the Dwelling. See Ja118-207 for the Report of Mina Mikaeel; see also Ja032-044 for the Report of Steven R. Feigeles. Only Mr. Feigeles' role in the claim is relevant to this appeal.

Mr. Feigeles is the Vice President of Sales at Premier Builders and Remodeling, Inc. See Ja045. He holds a Master of Business Administration from Shelbourne University. Id. He has been designated as an expert twice in "construction procedures." See Transcript of Mr. Feigeles, Ja048 at 11:11-12:1. He has over 32 years of experience in the management and sales of home improvement projects and services, which includes every aspect of construction and involves working with clients, architects, code officials, inspectors, engineers, vendors, and

sub-contractors. See Ja045; see also Ja048 at 12:4-13. He has published a paper on communications with customers in construction. Ja049 at 16:15-21.

Mr. Feigeles submitted an amended report dated January 19, 2024 ("Feigeles Report" or "Report"). The Report is based on his visual inspections of the interior and exterior of the structure along with review of the architectural drawings. See Report of Mr. Feigeles, Ja032-044. The Report noted that the cause of the damage to the Property was the lightning from the June 3, 2020 storm, which caused major damage to the tree at the Southwest corner of the Dwelling, resulting in the tree causing a momentum impact force leading to ground displacement due to impact vibrations. Id. A description of all repairs necessary to complete in the exterior, basement, attic, interior, fireplace, and garage of the Dwelling was also included in the Report. Id. Mr. Feigeles created an itemized listing of the cost of work, totaling $361,015.00, and a description of the scope of work. Id.

Mr. Feigeles was deposed in this case, and testified that he prepared his report and estimates as if he would be retained as the contractor if and when Kimmel decides to go forward with the contract. See Ja058 at 52:8-11. He testified that the report and estimates which he compiled as general contractor conformed to the New Jersey Consumer Fraud Laws, and outlined what work would be performed based on the professional guidance of all involved professionals (engineers and architects), including through discussions with these professionals, and creating a cohesive

document for the customer. See Ja060 at 59:7-64:23; see also Ja064 at 76:9-77:4. To calculate the repair and replacement costs, he used actual material costs, takeoffs of material from vendors, and quotes from subcontractors. See Ja067 at 94:2-11. Mr. Feigeles testified that he also determined the costs based on information within the architectural drawings, determining the material needed, calculating waste and availability, and then arriving at the best price possible. See Ja076 at 121:16-122:6. Mr. Feigeles further testified that he visited the Property at least 5 times. See Ja089 at 174:12-14. The Feigeles Report, a second report similar to the original report, contains a compilation of numbers from subcontractors based on inspections by each. See Transcript of Mr. Feigeles, Ja016 at 22:11-12.

Massachusetts Bay has denied Kimmel's claim for coverage in full and refused to make any payment towards Kimmel's claim. See Ja030 at Interrogatory 23.

B. Procedural History

On May 18, 2021, Kimmel filed his Complaint in the New Jersey Superior Court in Camden County. See Kimmel's Complaint, Ja014-023. On June 18, 2021, Massachusetts Bay filed a Notice of Removal on the basis of diversity jurisdiction, removing the case to the United States District Court for the District of New Jersey.

On November 8, 2024, Massachusetts Bay filed its Motion for Summary Judgment. The Motion was extensively briefed. Kimmel filed his Opposition to the

Motion on December 3, 2024. Massachusetts Bay filed its Reply on December 9, 2024. Per the district court's orders, both parties filed Supplemental Memoranda of Law on May 23, 2025, and Responsive and Reply Supplemental Memoranda of Law on May 30, 2025.

The district court issued its Opinion and Order on June 24, 2025, granting Massachusetts Bay's Motion and dismissing Kimmel's claims with prejudice. The court ruled that Kimmel did not comply with what the court held to be a requirement under the Policy that Kimmel provide a damage claim under an ACV analysis.

SUMMARY OF ARGUMENT

The district court's Order granting Massachusetts Bay summary judgment should be reversed and this Court should remand the matter to the district court so that the litigation can be listed for trial.

The district court erred in finding that the Policy's Loss Settlement Provision requires Kimmel to provide an ACV claim, and further erred in finding that, if ACV is required to be shown, that Kimmel's expert, Mr. Feigeles, does not provide sufficient evidence to support an ACV under the broad evidence rule. In making this determination, the district court relied almost exclusively on two cases, both decided in the Camden Vicinage, whose rulings directly contradict long-standing New Jersey law relating to the interpretation of insurance contracts.

Kimmel agrees that the Loss Settlement Provisions at issue in Giaccobe and

Johnson are similar to the one at issue in this case. The cases were incorrectly decided as they improperly place a burden on the insured that has never been placed on an insured in any other New Jersey case. Further, at best for Massachusetts Bay, its Policy is ambiguous, and, as cases relating to insurance contracts acknowledge, such contracts are adhesion contracts, and in the face of ambiguity an insured's reasonable interpretation of a policy must control.

The court ignored other provisions in the Policy that show that the insured is not required to submit an ACV for damage to real property; the insured's obligation to submit an ACV damage report is for personal property claims only. The court also ignored the fact that an insured is unlikely to be able to understand phrases that are terms of art within the insurance industry without clear definitions, and the Policy never defines "actual cash value," an industry term of art. The court also ignored the fact that the broad evidence rule has been put forth in New Jersey for cases just like this one.

Based on all of this, it is clear that the district court erred in granting Massachusetts Bay's summary judgment motion, as that decision was made solely based on the court's reliance on two unpublished, non-evidentiary, and erroneously decided cases. This matter is appropriate and ripe for trial. Accordingly, the Order appealed from should be reversed and this Court should remand the matter to the district court so that the litigation can be listed for trial.

ARGUMENT

A. The District Court Erred as a Matter of Law in Granting Summary Judgment in Favor of Massachusetts Bay by Determining that Kimmel was Required to Provide an Actual Cash Value for His Real Property Damage Claim

1. Standard of Review

As this Court is aware, no deference is afforded a trial court's summary judgment ruling. De novo is the appropriate standard of review on a trial court's decision granting summary judgment. Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 743 (3d Cir. 1996). This is the "same standard as the district court." Id.

Summary judgment is proper where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating after adequate time for discovery the pleadings, depositions, interrogatories, admissions, and other affidavits show that the nonmoving party will be unable to prove an essential element of his or her case. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) ("complete failure of proof concerning an essential element . . . renders all other facts immaterial"). The facts are viewed in the light most favorable to the non-moving party. Pollock v. American Tel. & Tel. Long Lines, 794 F. 2d 860, 864 (3d Cir. 1986). In considering a motion for summary judgment, the role of this Court is not "to weigh the evidence and determine the truth of the matter, but to determine

whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242-43 (1986).

2. The Policy Does Not Require Kimmel to Prove Actual Cash Value for his Partial Loss Claim to be Approved

The district court erred in determining that the Policy requires Kimmel, the insured, to provide proof of ACV in order to have his claim approved and covered. The Policy, when read as a whole, does not place this burden on the insured, and any such requirement would go against the long-standing tenets of insurance contract law and interpretation in New Jersey.

a. Legal Standard for Interpretation of Insurance Contracts

The district court's interpretation of the Loss Settlement Provision in the Policy requiring the submission of Actual Cash Value simply reiterated the holding in the two recently unpublished prior decisions by the other judges in the district. But those decisions, like the decision here, missed the point of insurance coverage in these matters and were in error. First, as a matter of standard insurance practice, insurers cannot and do not apply depreciation to a partial loss such as Kimmel's absent explicit terms stating this in the policy. There is no dispute that Kimmel suffered a partial loss to his Property, not a total loss, as is reflected in his claim and expert reports. It is well established that deductions for depreciation should not occur for partial losses under a Policy unless provided for expressly in the insurance contract. See generally 8 A.L.R.4th 533 (Originally published in 1981).. The very

definition of "Actual Cash Value" is that it is a reduction of the replacement value by its depreciation. If an insurer cannot depreciate a partial loss, then why would an insured have to calculate the depreciation when submitting a claim?

Moreover, the reason insurers sometimes use Actual Cash Value in replacement cost policies is that they will hold back a portion of the replacement cost until the insured actually replaces the damage to the property. It is the insurer who is in the best position to determine how much it needs to hold back while the insured begins to replace the property. Insureds, like Mr. Kimmel cannot be expected to understand what this term of art means to insurers.

Additionally, an insurance carrier's interpretation of an insurance policy clause is irrelevant if there is a contrary reasonable interpretation of that same clause. If a provision of an insurance policy is ambiguous and subject to more than one interpretation, the insured need only prove that its interpretation was reasonable. Under New Jersey law, insurance policies are interpreted in accordance with the plain and ordinary language of the insurance policy. Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 272-72 (2001); Ambrosio v. Affordable Rental, Inc., 307 N.J. Super. 114, 120 (App. Div. 1998). When a policy is ambiguous or subject to more than one reasonable interpretation, all uncertainties must be construed against the insurer and in favor of the insured. Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 173–74 (1992); Sparks v. St. Paul Ins. Co., 100 N.J. 325, 335 (1985); Killeen

Trucking, Inc. v. Great American Surplus Lines Insurance Company, 211 N.J. Super. 712 (App. Div. 1986).

A policy provision is considered ambiguous when reasonably intelligent people could differ regarding its meaning and if the phrasing of the insurance policy is sufficiently confusing such that the average policyholder cannot make out the boundaries of coverage. Nunn v. Franklin Mutual Insurance Company, 274 N.J. Super. 543, 548-549 (App. Div. 1994); Ryan v. State Health Benefits Commission, 260 N.J. Super. 359 (App. Div. 1992); Aviation Charters Inc., v. Avemco Insurance Co., 335 N.J. Super. 591, 594 (App. Div. 2000). In the face of ambiguity, when an insured's interpretation of an insurance provision is reasonable, the court will adopt the insured's interpretation finding that coverage exists. Meeker Sharkey Associates, Inc. v. National Union Fire Insurance Company of Pittsburgh, 208 N.J. Super. 354 (App. Div. 1986).

The question before this Court is the same one that was before the district court. Does the Policy conclusively and unambiguously provide that Kimmel was required to provide an ACV report for his real property damage? On summary judgment, the question is not whether Massachusetts Bay's interpretation of the provisions in question is correct, and Kimmel's interpretation is incorrect. Nor is the question whether this Court or the district court believes that Kimmel's interpretation of the provision(s) is correct. Instead, the question is only whether

Kimmel's interpretation that he was not required to provide an ACV report is reasonable. Since it is, the decision of the district court must be reversed.

b. The Loss Settlement Provision Does Not Require Depreciation for a Partial Loss such as Kimmel's, nor does it Place the Burden to Prove Actual Cash Value on the Insured.

The Loss Settlement Provision, set forth in the Policy and provided in the Statement of Facts above, appears to provide three different areas of recovery. Section 3.b.1 of the Loss Settlement Provision appears to apply to total losses or at least losses of more than 80% of the property. See Ja403. In that case, the insurer will pay the less of the policy limits, the actual replacement cost, or the amount actually spent on repairs. Id.

Section 3.b.2 of the Loss Settlement Provision is considerably more difficult to understand. It applies to losses of less than 80% of the property or partial losses, but after that the language is almost indecipherable. Id. We will presume what the insurer means is that it will pay the greater of the actual cash value or the actual cost to repair the damaged portion of the property *without* applying any depreciation. Id.

Section 3.b.3 merely provides the insured limited instructions on what to, and what not to, include in its calculation figure. Id.

Section 3.b.4 is the provision upon which the district court relied in reaching its decision granting summary judgment. It provides: "We will pay no more than

the actual cash value of the damage until actual repair for 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." Id. This provision merely holds that the insurer will only pay the actual cash value of the loss until the insured repairs the property at an actual cost in excess of the actual cash value. It does not say the insured is the one to determine ACV, nor would that make any sense since, as stated above, insureds cannot be presumed to know what that insurance term of art even means. And, as also stated above, the provision merely provides that the insurer does not have to pay more than ACV until and unless the insured has paid more than that amount to replace the damage.

Despite the decision of the district court claiming differently, it is clear that none of the paragraphs within the Loss Settlement Provision, including 3.b.4, state that the insured must determine and calculate the ACV, or the "holdback", amount. In fact, the language throughout the provision provides that the insurer will do that by using the phrase (in 3.b.1) "**we** will pay the cost." Id. (emphasis added). In other words, the "we" in this sentence suggests that it is the insurer, Massachusetts Bay, who will apply the deductible without deduction for depreciation. Similarly, 3.b.2 states "**we** will pay the greater of the following amounts… a) the actual cash value of that part of the building damages or… b) the proportion of the cost to repair or replace, after application of deductible and without deduction for depreciation, that

part of the building damaged, which the total amount of insurance in this policy on the damaged building bears to 80% of the replacement cost of the building." Id. (emphasis added). Again, the "we" in this sentence provides that it is the insurer, Massachusetts Bay, who will make the determination of what calculations apply.

Most importantly, 3.b.4. states "**We** will pay no more than the actual cash value of the damage **until** (emphasis added) actual repair for 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."** Id. (emphasis added). This section, yet again, places the burden on the insurer, Massachusetts Bay, and not on the insured.

c. The Policy as a Whole Does Not Place the Burden of Proving Actual Cash Value for Physical Damage to the Property on the Insured.

There is no clause requiring an insured to present an ACV claim for its real property claim. But there is a requirement that the insured present an ACV claim for personal property damage. Section 2(e) of the "Your Duties After Loss" section of the Policy, found in Section I- Conditions, provides that an insured must "Prepare an inventory of **damaged personal property** showing the quantity, description, **actual cash value and amount of loss**. Attach all bills, receipts and related documents that justify the figures in the inventory." See Ja402 (emphasis

added). Thus, in a personal property claim, Massachusetts Bay explicitly requires its insured to provide both an actual cash value and amount of loss.

There is no concurrent clause requiring the insured to prepare an ACV report in support of a real property claim. If Massachusetts Bay required its insured to provide an ACV report on real property claim it would have added the language it included in its personal property section. However, instead of requiring an ACV report for a real property claim, the real property subsection of 2(g), found in subsection 5, requires an insured to provide Massachusetts Bay with "[s]pecifications of damaged buildings and **detailed repair estimates**." See Ja403 (emphasis added). Nowhere in this subsection – or anywhere in the Policy – does Massachusetts Bay require that the insured provide it with an ACV estimate for damage to real property like it does for personal property. In fact, "detailed repair estimates" suggests that Massachusetts Bay actually requires a replacement cost estimate, as that is the most complete form of estimate an insured can provide. It is then up to the insurer to determine under the broad evidence rule the exact ACV loss if it needs to do so pursuant to the terms of the Policy.

To further drive home Massachusetts Bay's policy requirement that different forms of analysis are required for personal property and real property claims, subsection 2.g.6 requires an insured to provide Massachusetts Bay with an "inventory of damaged personal property described in **2.e.** above." Id. 2.e., as noted

above, explicitly requires an insured to provide Massachusetts Bay with an ACV estimate for personal property. Thus, per its own language, Massachusetts Bay's Policy requires its insured to provide it with a detailed repair estimate for real property damage, and not an ACV report. Had it wanted an ACV estimate for real property, it could have (and would have) specifically stated so in its Policy the way it did with its requirements for a personal property claim.

Massachusetts Bay, who wrote the Policy, does not require the parties to submit dueling ACV figures for real property claims. It clearly knows the insurance company concept of ACV and could have inserted it in this provision, or any other relevant provision, if it intended to bind Kimmel to providing an ACV claim. But it did not.

In making its decision in this matter, the district court conflated the insured's duties under the Policy with the insurer's responsibilities. All Kimmel must do regarding the value of the damages to his house is what he did – submit an estimate to Massachusetts Bay. At that point, presuming an actual cash value payment is an option for Massachusetts Bay under the Policy, it then must pay Kimmel the actual cash value of his loss until repairs are complete. In other words, an ACV analysis only establishes how much of the actual cost of repair the carrier will "hold back" until the repairs are actually made, at which time the "hold back" will be paid. Only if the insured pockets the ACV amount and does not repair the damage is the carrier

permitted to limit its payment to the ACV amount. But, here, there is absolutely no requirement in the Policy that Kimmel has the burden of suggesting how much that "hold back" should be. This duty, time and again in the Policy, is placed on the insurer.

In deciding that the Loss Settlement provision requires the insured to provide proof of ACV to support his insurance claim, the district court, as well as the sister district courts in Giaccobe and Johnson, relied exclusively on that provision, while ignoring the remaining provisions of the Policy. New Jersey courts have recognized for decades that, "when interpreting an insurance contract, the basic rule is to determine the intention of the parties from the language of the policy, **giving effect to all parts so as to give a reasonable meaning to the terms**." Simonetti v. Selective Ins. Co, 372 N.J. Super. 421, 428 (App. Div. 2004) (emphasis added) referencing Stone v. Royal Ins. Co., 211 N.J. Super. 246, 248 (App.Div.1986) and Tooker v. Hartford Acc. & Indemn. Co., 128 N.J. Super. 217, 222–223 (App.Div.1974).[3] Thus, the district court, as well as the district courts in Giacobbe and Johnson, ignored longstanding and well-settled principles of insurance contract

[3] Kimmel acknowledges that these are New Jersey state court cases, but this is well accepted, and specifically cited, in many New Jersey federal court cases. See, for example, Nat'l Mfg. Co. v. Citizens Ins. Co. of Am., 2016 WL 7491805, at *5 (D.N.J. Dec. 30, 2016); Gemini Ins. Co. v. 33 E. Maint. Inc., 2019 WL 277602, at *3 (D.N.J. Jan. 22, 2019); Hanover Ins. Co. v. Retrofitness, LLC, 2017 WL 4330366, at *3 (D.N.J. Sept. 29, 2017); FYT Supplies, Inc. v. Nautilus Ins. Co., 2021 WL 321443, at *5 (D.N.J. Feb. 1, 2021).

interpretation by ignoring other parts of the contract which contradict the court's interpretation of the Loss Settlement provision, and therefore erred in making its determination.

d. Even if the Policy Required the Insured to Provide ACV (Which it Does Not), Kimmel's Expert Provides Sufficient Information for ACV to be Determined Pursuant to the Broad Evidence Rule.

"Actual cash value" is a term of art in the insurance industry, and is not defined in Massachusetts Bay's Policy. As an initial matter, it is patently unfair for Massachusetts Bay to seek to compel Kimmel to comply with an insurance provision which is not defined and is otherwise unfamiliar to the general public. Massachusetts could have defined ACV in its Policy, as many other insureds have. For example, in Dickler v. CIGNA Property and Cas. Co., 957 F.2d 1088, 1091 (3d Cir. 1992), the insured defined both replacement cost and ACV in the policy, and in Uddoh v. Selective Insurance Company of America, 2018 WL 2127733 (D.N.J. May 8, 2018), the policy not only defined ACV, but specifically provided that an insured under that policy is only entitled to an ACV amount. Id. at *3. In contrast, here, Massachusetts Bay did not define ACV anywhere in the policy, leaving laypeople like Kimmel to only guess as to its meaning.

"Actual cash value," depending on the jurisdiction, usually means replacement cost less depreciation or, in states like New Jersey, is calculated by using what is called the "broad evidence rule." Messing v. Reliance Insurance

Company, 77 N.J. Super. 531, 187 A.2d 49 (1962). The Messing court, which established this as the standard to be used in New Jersey, reasoned that the broad evidence rule "permits the consideration of all evidence logically related to the formation of an accurate estimate of the value of the destroyed or damaged property, for the purpose of ascertaining the 'actual cash value' at the time of the loss. In applying this rule, it is not necessary to abandon consideration of either market or reproduction values, but they must be viewed merely as guides and not the sole determinative in arriving at actual cash value." Id., quoting Pinet v. New Hampshire Fire Ins. Co., 100 N.H. 346, 348--349, 126 A.2d 262, 265, 61 A.L.R.2d 706 (Sup.Ct.1956).

The broad evidence rule in New Jersey cases applies in the absence of another method expressly set forth in the insurance policy. Elberon Bathing, Inc. v. Ambassador Insurance Company, 77 N.J. 1 (1978); Ward v. Merrimack Mut. Fire Ins. Co., 332 N.J. Super. at 528. Under the broad evidence rule, the factfinder is required to "consider all evidence that an expert would consider relevant to an evaluation and particularly fair market value and replacement cost less depreciation." Id. at 13. Under this analysis, replacement cost less depreciation does not bind the factfinder; it is merely a guideline to which the factfinder may disregard or apply other relevant evidence. Id. In other words, the determination of actual cash value is a question of fact, not law.

Kimmel's expert has presented sufficient replacement cost damages through his expert report and testimony from which an ACV amount can be extrapolated by a factfinder if it needs to be. Federal Rule of Evidence 702, which governs expert testimony in federal courts, provides that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.
> See Fed. R. Evid. 702.

The United States Supreme Court made clear that, whatever the area of expertise of an expert, Rule 702 requires the district court to fulfill a "gatekeeping" function. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). This gatekeeping function extends to determining the issues of "qualification, reliability and fit." See Schneider v. Fried, 320 F.3d 396, 401 (3d Cir. 2003) (citing Daubert). With regard to reliability, proposed expert testimony must be reliable; it "must be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation.'" See id. In other words, the expert must have 'good grounds' for his or her belief." See id. The ultimate goal "is to

make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999).

To accomplish this goal, the Supreme Court in Daubert established a two-prong relevance/reliability test. In re Paoli Railroad Yard PCB Litigation, 35 F.3d 717, 741 (1994). First, "a witness proffered to testify to specialized knowledge must be an expert." Id. Second, the opinions and testimony of the proposed expert must be reliable. Put another way, the proposed expert's testimony must be trustworthy. Id. (citations omitted). An expert's opinion is reliable if it is based in sound methodology and technique. Id. at 742.

A district court "must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." Dalton v. McCourt Elec. LLC, 112 F. Supp. 3d 320, 325 (E.D. Pa. 2015) (quoting Kumho at 152). The Supreme Court in Daubert emphasized that the "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." Daubert, 509 U.S. at 595. Notably, "the analysis of the conclusions themselves is for the trier of fact when the expert is subjected to cross-examination. Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 807 (3d Cir. 1997) (citing Paoli at 744). "The Third Circuit has emphasized that not only do the Rules of Evidence

generally 'embody a strong preference for admitting any evidence that may assist the trier of fact,' but Rule 702 specifically 'has a liberal policy of admissibility.'" Dalton v. McCourt Elec. LLC, 112 F. Supp. 3d 320, 325 (E.D. Pa. 2015) (citing Pineda v. Ford Motor Co., 520 F.3d 237, 243 (3d Cir.2008) (quoting Kannankeril, 128 F.3d at 806).

With these considerations in mind, it is clear that, in reaching his opinions, Mr. Feigeles relied upon his extensive experience, his own independent research, his on-site inspection of the Property as general contractor, and his review of reports and photographic evidence in this matter. Mr. Feigeles has 32 years of experience in the management of home improvement projects, oversees every aspect of construction and is an expert in "construction procedures." He has personal knowledge of the Property, as his report states that it is based on the visual inspections of the Dwelling as well as the architectural drawings provided by a contractor. Mr. Feigeles reviewed the reports of his subcontractors, and his company used such reports and calculations to compile the complete Feigeles Report. Id. 59:7-64:23; 76:9-77:4. Mr. Feigeles testified that he calculated the numbers for replacement costs by using the actual material costs, takeoffs of material from vendors/subcontractors as well as and quotes from subcontractors. Id. 94:2-11. Accordingly, Mr. Feigeles is qualified to testify regarding replacement

costs in this matter which, pursuant to the broad evidence rule, can be used as a baseline for a factfinder to extrapolate an ACV if it is required to do so.

In line with the holding in A-S Dev., Inc. v. W.R. Grace Land Corp., 537 F. Supp. 549, 588 (D.N.J. 1982), Kimmel's repair cost estimate, as laid out by Mr. Feigeles, establishes his actual damages with a "reasonable degree of certainty." The repair cost estimate is far more certain, while less certain is an ACV analysis in which a depreciation amount is unscientifically allotted.

As noted in A-S Dev., Inc., "where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery." Id. at 558. Otherwise, every insured will be compelled to have incurred the individual cost of performing repairs before an insurance carrier would be obligated to pay back the insured. This is clearly inherently unworkable for the overwhelming majority of insureds. And as noted by the A-S Dev., Inc. court, any other holding would allow an insurer "to profit from his breach." Id. The repair estimate provided by Kimmel allows Massachusetts Bay to set an actual cash value amount if it so desires, which could also have been set by Massachusetts Bay independently of the repair claim provided by Kimmel.

Finally, requiring an ACV estimate for real property would also leave an insured far from indemnified, which is the purpose of acquiring insurance. As the Messing court reasoned, "[g]uided by the principle of indemnity, the inquiry as to

actual cash value should be directed toward ascertaining what amount of money will place the insured in the same position he would have been in had no fire occurred." Messing, citing Harper v. Penn Mut. Fire Ins. Co., 199 F.Supp. 663 (1961); McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176 (1928); Castoldi v. Hartford County Mut. Fire Ins., 21 Conn. Supp. 265, 154 A.2d 247 (Super.Ct.1959).

Considering these principles, an insured would be hard pressed to understand how an ACV estimate would be different than the replacement value. For instance, if one wall of a house is damaged and it would require $10,000.00 to repair, no insured would believe a carrier could estimate that wall had depreciated in value and its insurance loss should be valued at only $7,500.00. This would leave the insured far from indemnified, as it clearly would not leave them in the same position they would have been in prior to the loss.

CONCLUSION

Based on the above, it is clear that the Policy does not require Kimmel, the insured, to provide an ACV estimate to Massachusetts Bay when submitting his real property claim. Even if it did, Kimmel's expert report provides sufficient detail as to replacement cost that would allow Massachusetts Bay, or a factfinder, to extrapolate an ACV to pay out until repairs are completed. The district court's decision to the contrary, putting an unreasonable and unclear burden on the insured and ignoring the insured's reasonable interpretation of an ambiguous policy, goes

against at least a century of New Jersey case law in this field. Thus, Massachusetts Bay's motion for summary judgment should have been denied. For the foregoing reasons, this Court should reverse the Order of the District Court and remand the matter with express instructions that this litigation be listed for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Third Circuit Rule 46.1 that the undersigned was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit, and is presently a member in good standing at the bar of said court.

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that the foregoing Brief complies with the type-volume limitation of the above referenced Rule because it contains **6,984** words of text in Times New Roman, 14 point font from the introductory paragraph through the conclusion. The word count was obtained from the word count tool contained in Microsoft Word® 2003.

Pursuant to Third Circuit Rule 31.1(c), I hereby certify that the text of the electronic version of the Brief of Appellees is identical to the text in the paper copies of the Brief of Appellees. I also certify that a virus detection program, Symantec Norton Anti-Virus Security, has been run on the electronic version of the Brief of Appellees and that no virus was detected.

Respectfully submitted,

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