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

REPLY BRIEF OF APPELLANT CRAIG KIMMEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

The overwhelming majority of Respondent's brief in opposition to Appellant's appeal is focused on the holdings in Giacobbe v. QBE Specialty Insurance Company[1] and Johnson v. Hanover Insurance Company,[2] the two non-precedential cases relied upon by the District Court. Respondent does not address Appellant's contentions of why those cases were incorrectly decided. Instead, it simply points to those cases as settled law. Those cases are not settled law. They are not precedential and just as important, they are incorrectly decided.

Nor does Respondent adequately address Appellant's position that Respondent's Policy does not require Appellant to provide a titled "ACV" report which would include a specific depreciation amount. Respondent instead tries to redirect this Court by engaging in an analysis of black letter contract law. But any discussion of contract law must be applied to the Policy provisions cited by Appellant. These provisions show that Appellant complied with all of his obligations.

Respondent's inability to address Appellant's claims is fatal to its opposition to the Appellant's appeal. Appellant's appeal should be granted and the matter returned to the District Court.

While Appellant relies upon his opening filing, he shall also briefly address

[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).

the case law relied upon heavily by Respondent. Respondent first cites Dunkerly v. Encompass Ins. Co., 296 F.Supp. 381 (D.N.J. 2017) for the proposition that an insured is limited to an ACV payment until repairs are made. But that is not the issue here. Appellant is not claiming that Respondent cannot provide him with an ACV payment until, and unless, the repairs are fully made. Rather, the issue is if Respondent is to make a payment less than the replacement cost, which party should determine the proper amount of depreciation, if any. In Dunkerly, there is no specific mention who made the determination of the ACV amount.

Similarly, in Danzeisen v Selective Ins. Co. of America, 298 N.J. Super. 383 (App. Div. 1997), the issue was whether the carrier was liable for an ACV or replacement cost payment. Again, that is not the dispute here. In fact, in Danzeisen, the court remanded the case to the trial court "for a determination of the actual cash value of the property as of the time of the fire, when the loss occurred." Id.at 389. There is no suggestion in Danzeisen that it is the insured's burden to present an ACV figure.

Giacobbe and Johnson were referenced in Appellant's brief and that discussion need not be reiterated here. Note only that in Giacobbe and Johnson the insurers provided the ACV figure. Giacobbe at *1 and Johnson at *2. Here, however, Respondent failed to provide an ACV estimate of damages. Its failure to do so is important in understanding the reason behind its opposition to the appeal.

There is no dispute that Appellant did not allocate depreciation in its damage submission. That does not make its submission deficient. What sets this matter apart from Giacobbe, Johnson, and Respondent's opposition is that Appellant can prove his damages without a depreciation allocation. The amount of depreciation, if any, is a fact issue. Appellant produced a damage report. If Appellant has no depreciation allocated in that report, then Respondent, should it wish to depreciate Appellant's claim, is free to do so by assigning a depreciation amount. It then becomes up to a fact finder to determine which party's submission is more appropriate.

In other words, there is no basis under any case law or the Policy that Appellant must insert a depreciation amount. We all agree that until repairs are completed, Appellant is entitled to an ACV amount, which is replacement cost less depreciation. But that depreciation figure can be anywhere from 0 to some number. By submission of his damage report, Appellant believes the depreciation amount is 0. No case law nor the Policy compels a minimum depreciation figure to be inserted into the claim. If Respondent believes that there is a depreciation figure to be calculated then it is the one that must produce it.

Second, and alternatively, Respondent fails to address Appellant's contention that the Policy is at best confusing, and at worst misleading. If this Court is to find that generally under this type of insurance policy an insured is required to insert a depreciation figure of a value greater than 0, this specific Policy does not include

that requirement. As stated in Appellant's original submission, an insured under this Policy is required to submit an ACV claim for damage to personal property only. Had Respondent intended for Appellant to provide an ACV analysis in its claim submission for damage to real property, it would have included the language found in the personal property section of the Policy. Sections 2b and 2c of Appellant's brief addresses this issue in more detail and is incorporated herein.

Importantly, in its submission, Respondent does not address this issue in any significant way. The failure to address this point is purposeful. There is no adequate defense to Appellant's argument. Respondent is unlawfully seeking to put a burden on Appellant that its Policy does not require.

CONCLUSION

Based on the above and his initial submission, Appellant asks this Court to reverse the Order of the District Court and remand the matter for further proceedings.

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 **884** 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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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 21, 2026, I filed the Reply Brief of Appellant with the Clerk of the Court, United States Court of Appeals for the Third Circuit via ECF, and served copies of the same, via ECF, on the following persons in the matter shown:

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