NO. 23-60546

IN THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

SINJEL, LLC,

PLAINTIFF-APPELLANT

v.

OHIO CASUALTY INSURANCE COMPANY,

DEFENDANT-APPELLEE

On Appeal From

United States District Court For The Southern District Of Mississippi

3:22-CV-419

BRIEF OF APPELLANT SINJEL, LLC

SUBMITTED BY:
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th CIR Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellees:	**Counsel for Appellees:**
Ohio Casualty Insurance Company	Clifford Bailey of Wells, Marble & Hurst, P.L.L.C. Ridgeland, MS
Ohio Casualty Insurance Company	Gregg Caraway of Wells, Marble & Hurst, P.L.L.C. Ridgeland, MS

Appellants:	**Counsel for Appellants:**
Sinjel, LLC	Cecil Heidelberg of Heidelberg Patterson Welch Wright Ridgeland, MS
Sinjel, LLC	Chadwick Welch of Heidelberg Patterson Welch Wright Ridgeland, MS

Other Interested Parties:	**Counsel for Interested Parties:**
Honorable Tom Lee	United States District Judge

s/ *Chadwick M. Welch*
Attorney of record for Sinjel LLC

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellant Sinjel, LLC respectfully suggests that oral argument is not necessary because the material facts are not complex and not in dispute. This appeal requires application of law (namely, principles of "waiver") to these undisputed and straightforward facts. Accordingly, Sinjel believes a decision can be rendered on the papers.

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JURISDICTIONAL STATEMENT

Sinjel, LLC ("Sinjel") asserted state-law claims against Ohio Casualty Insurance Company ("Ohio") in a Mississippi state court, and Ohio timely and properly removed the action to the United States District Court for the Southern District of Mississippi. Subject matter jurisdiction exists under 28 U.S.C. § 1332 because there is complete diversity among the parties and the amount in controversy exceeds $75,000, exclusive of interest and costs. Sinjel timely noticed its appeal.

STATEMENT OF THE ISSUE

Did the district court err by ruling that Ohio's renewal of an insurance policy and acceptance of premiums did not 'waive' Sinjel's non-compliance with forfeiture provisions in the original policy, when Ohio renewed the policy and accepted premiums for months with full knowledge of Sinjel's non-compliance?

STATEMENT OF THE CASE

Sinjel owned a commercial building on Highway 80 in Jackson, Mississippi. Ohio insured Sinjel's building. Sinjel's policy, which contained a builder's risk endorsement, required it to secure building permits and begin renovations within 60 days of the policy's effective date. Failure to do so would result in a denial of coverage for otherwise covered losses and cancellation of the policy.

Sinjel, for reasons not relevant here, failed to obtain building permits and begin renovations within 60 days. Later, Sinjel's building suffered extensive

damage from a fire and the local fire department's response. Sinjel notified Ohio of the loss, but Ohio denied the claim because Sinjel had failed to obtain building permits and begin renovations within 60 days.

Notwithstanding its denial of Sinjel's claim, Ohio renewed the policy (along with the builder's risk requirements, with which Sinjel could not possibly satisfy) and accepted Sinjel's premiums for approximately five (5) months. After accepting Sinjel's premiums for months, Ohio canceled the policy.

Sinjel sued Ohio for denying its insurance claim or—more precisely—for not reversing its coverage position and accepting Sinjel's claim after it renewed the policy and collected Sinjel's premiums. Sinjel argued below that the builder's risk endorsement contained "forfeiture provisions" subject to waiver and, by accepting Sinjel's premiums with full knowledge of Sinjel's non-compliance with the builder's risk endorsement, Ohio waived the right to deny Sinjel's claim on that basis.

The district court express its agreement with Sinjel that the builder's risk endorsement did contain "forfeiture provisions" subject to waiver, but it held no waiver occurred because Ohio continued collecting premiums under a renewal policy, not the original policy.

That holding was erroneous. There is nothing in the summary judgment record suggesting that the renewal policy contained any terms different (let alone materially different) than those in the original policy. As the district judge himself

held in a case twenty-five years ago, a renewal policy is a *continuation of the original policy* unless the renewal policy contains different terms.

Stated another way, Starr renewed a policy with forfeiture provisions that Sinjel failed to satisfy and never could satisfy since the initial 60-day period had elapsed without compliance. Ohio could have denied Sinjel's claim and voided the policy, since Sinjel's compliance with the builder's risk endorsement was no longer possible. It did not do that. It instead renewed the very policy under which it denied Sinjel's claim, and it accepted Sinjel's premium payments for months. Properly construed in Sinjel's favor, Ohio's renewal of a voidable policy and its acceptance of premiums constitutes waiver. Having waived its right to deny the claim and rescind the policy, Ohio must now be compelled to accept Sinjel's claim for fire loss.

Undisputed/Incontrovertible Material Facts

Sinjel owns a building located on Highway 80 in Jackson, Mississippi. On April 15, 2020, Ohio[1] insured Sinjel's building under policy number BMO 2160763563 with a policy period of April 15, 2020 to April 15, 2021. *See* Policy [ROA 1317-1324]. The policy contained a builder's risk endorsement, which stated, in relevant part:

> We only cover a vacant existing building for 60 consecutive days from the inception date of this policy unless building permits have been

[1] The policy refers to (and the denial letter issued from) Liberty Mutual, but Sinjel voluntarily dismissed without prejudice Liberty Mutual on counsel's representation that the proper party was Ohio, not Liberty Mutual.

> obtained and rehabilitation or renovation work has begun on the existing building.

See Builder's Risk Endorsement, Policy at pp. 18 & 19 of 52 [ROA 1320-1321].

Under that builder's risk endorsement, Ohio had the right to deny coverage or cancel the policy if Sinjel failed to occupy the building by obtaining building permits and commencing renovations by no later than June 15, 2020 (60 days from policy issuance). If Sinjel had not complied with those requirements before the 60-day deadline, Sinjel could never comply, and future compliance would be impossible.

For reasons not relevant to this appeal, Sinjel could not obtain building permits and did not begin renovations within the 60-day period.

On or about November 23, 2020, Sinjel's building was severely damaged by fire and by the local fire department's response to the fire. Sinjel reported the loss to Ohio, which then investigated the claim. *See* [ROA 1278-1285].

On March 10, 2021, Ohio (through Liberty Mutual) denied Sinjel's claim because Sinjel had not complied with the builder's risk endorsement, stating in pertinent part: "at the time of loss no renovations had commenced nor had a building permit been obtained….More than 60 days has passed since the policy took effect. Per the above there is no coverage for the damage…". *See* Denial Letter (Mar. 10, 2021) [ROA 1358-1361]. Although Ohio had the right to cancel Sinjel's policy, it did not do that. Ohio instead renewed the policy even though Sinjel did not comply and could never possibly comply with the builder's risk endorsement. For the next

five months, Ohio accepted Sinjel's premium payments on the renewal policy, which was a continuation of the same policy under which Ohio had denied Sinjel's claim. Ohio apparently refunded a portion of Sinjel's premiums for September but retained the remainder. *See* Ohio Resp. to Req. for Admissions [ROA 1432-1436].

Stated another way, having full knowledge of Sinjel's non-compliance with the builder's risk endorsement, Ohio ratified and excused Sinjel's non-compliance by renewing the policy (with a condition that Sinjel could never satisfy) and by accepting Sinjel's premium payments (which according to Ohio's denial, could not conceivably confer any benefit on Sinjel).

On cross-motions for summary judgment, the district court accepted Sinjel's argument that the builder's risk endorsement contained forfeiture provisions subject to waiver, but it held Ohio's acceptance of premiums did not constitute waiver because those premiums related to the renewal policy, not the original policy. *See* ROA.1485. (The district court did not rule on whether Ohio's renewal of an otherwise voidable policy, particularly where compliance with a material term was impossible, constituted waiver.) The district court's ruling that Ohio did not commit waiver is the subject of this appeal.

SUMMARY OF THE ARGUMENT

The district court granted summary judgment in favor of Ohio Casualty Insurance Company ("Ohio") despite: (i) its finding that Sinjel, LLC ("Sinjel") had "the better…argument" that Ohio's denial of coverage related to "forfeiture" (not "coverage") provisions; and (ii) Ohio's continued acceptance and retention of Sinjel's premium payments for months with full knowledge Sinjel's non-compliance with those forfeiture provisions, which Sinjel could never satisfy.

The district court held Ohio's acceptance and retention of Sinjel's premium payments did not constitute waiver because those payments related to a renewal policy, not to the original policy. That was error. The renewal policy—as the term suggests—was a renewal of the very same policy, with the very same forfeiture provisions. Just as the district court itself has explained, a renewal policy is a "continuation of the original contract" unless the policy states otherwise. *Oates v. Equitable Assur. Soc. of the U.S.*, 717 F.Supp. 449, 452 (S.D. Miss. 1988) (Lee, J.) (citation and quotation omitted).

Because a forfeiture provision in the original policy required compliance within 60 days of policy issuance, and because Sinjel failed to comply by that deadline, Sinjel could never comply, and the policy became voidable at Ohio's election. But Ohio did not cancel the policy. It denied Sinjel's claim for casualty loss, renewed the policy (which, but for Ohio's waiver, conferred nothing of value

on Sinjel), and accepted Sinjel's premiums.

Ohio's renewal of the policy and acceptance and retention of Sinjel's premiums constitutes waiver. Because Sinjel failed to comply with a 60-day deadline to obtain permits and begin renovation work on building, a renewal policy—especially issued after Ohio denied Sinjel's claim for failing to comply with that provision—conferred no benefit on Sinjel because no claim, real or hypothetical, could ever be covered. Nevertheless, Ohio issued the renewal and accepted Sinjel's premiums for at least five months until it canceled Sinjel's renewal policy. Stated another way, Ohio accepted the benefits of a contract while rejecting its burdens.

Ohio could have canceled the policy and refused to renew it when it denied Sinjel's claim. It chose instead to renew Sinjel's policy and accept its premium payments for months. Consequently, Ohio excused and ratified Sinjel's non-compliance with the forfeiture provisions in the policy and waived its rights to enforce them, to deny coverage, or to cancel the policy.

The caselaw establishes that insurers (like Ohio) waive forfeiture provisions by collecting and retaining premiums with full knowledge of an insured's (like Sinjel's) non-compliance with those provisions. Consistent with that precedent, Sinjel respectfully requests this Court find waiver, reverse and render in Sinjel's favor as to liability, and remand to the district court for a determination of damages.

ARGUMENT

I. Applicable Law

A. Summary Judgment Standard

This Court reviews *de novo* "a district court's grant of summary judgment" and views "all facts and evidence in the light most favorable to the nonmoving party." *Nall v. BNSF Railway Co.*, 917 F.3d 335, 340 (5th Cir. 2019) (citation omitted). "Summary judgment is only appropriate if the movant has shown that there is no genuine issue as to any material fact such that the movant is entitled to judgment as a matter of law." *Id*. (quotation and citation omitted). "On cross-motions for summary judgment, [the Court] review[s] each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Un. Pac. R.R. Co. v. City of Palestine, TX*, 41 F.4th 696, 703 (5th Cir. 2022) (citation and quotation omitted).

B. Waiver of Forfeiture Clauses in Insurance Contracts

In the insurance context, "waiver is a voluntary and intentional relinquishment of a known right or conduct that warrants an inference of such a relinquishment." *Highlands Ins. Co. v. Allstate Ins. Co.*, 688 F.2d 398, 404 (5th Cir. 1982) (citation omitted). "Waiver is usually a question of fact to be determined by the jury or, in a bench trial, by the court. When the facts are undisputed, however, waiver is a question of law." *Id*. "Even 'slight circumstances' will support a finding that an

insurer has waived a forfeiture clause in an insurance policy, for 'courts liberally construe in favor of an insured acts or circumstances by the insurer indicating an intention to waive a forfeiture.'" *Id*. (citation omitted). "Under Mississippi law an insurer may waive its right to forfeit or rescind an insurance policy by continuing the policy in force after learning of facts that would permit it to avoid the policy." *Id*. (citation omitted).

II. Argument

A. The Builder's Risk Endorsement and Vacancy Clause were "Forfeiture" Provisions Subject to Waiver.

"[T]he distinction between a forfeiture provision and a coverage provision [is] the difference between risk that has been accepted subject to provisions of forfeiture, and risk that has been excepted or excluded entirely from the policy." *Estate of Farese*, 530 F.Supp. 3d 655, 671 (S.D. Miss. 2021) (citation and quotation omitted).

"The Mississippi Supreme Court has construed conditions precedent as forfeiture provisions." *Provident Life and Acc. Ins. Co. v. Goel*, 274 F.3d 984, 996 (5th Cir. 2001). In *Southern United Life Insurance Co. v. Caves*, 481 So. 2d 764 (Miss. 1985), a life insurance applicant had a heart condition at the time of application, and the insurance agent knew that. As a condition precedent to coverage, the insured had to be in insurable health. The insured later died of a heart attack, and the insurer denied coverage because the insured did not satisfy a condition precedent to coverage. The Mississippi Supreme Court held that condition

precedent was a forfeiture provision, the enforcement of which was waived through the acceptance of premiums with knowledge of the failure to satisfy the condition.

The builder's risk endorsement and vacancy clauses required Sinjel to obtain permits and begin renovations no later than 60 days after policy issuance. Sinjel's compliance with those requirements constituted a condition precedent to coverage beyond the 60th day of policy issuance. Sinjel's failure to comply with those requirements placed it at risk of forfeiting coverage for any loss thereafter occurring, even for losses that otherwise fell squarely within the definitions of coverage. Thus, under *Estate of Farese*, *Goel*, and *Caves*, the builder's risk endorsement and vacancy clause are properly construed as forfeiture provisions.

Mississippi courts have long held that forfeiture provisions in insurance policies are subject to waiver. *See Morris v. American Fidelity Fire Insurance Co*., 173 So. 2d 618, 622 (Miss. 1965) (expressly recognized and held that forfeiture clauses in insurance policies are subject to waiver).[2] "[A] forfeiture provision may be waived." *Pongetti v. First Continental Life and Accident Co*., 688 F.Supp. 245,

[2] In so holding, *Morris* cited with approval cases from around the country. *See, e.g*., *Am. Ins. Co. v. Dean*, 243 S.W. 415, 417 (Mo. App. 1922) ("the policy provision which annulled the policy in the event of a transfer of the title was for the benefit of the company and could be waived by it"); *Thompson v. Patrons Mut. Fire Ins. Ass'n*, 300 N.W. 642 (Iowa 1941) ("Though by terms of fire policy it is provided that change of ownership of insured property will defeat rights of insured…insurer may consent to carry risk notwithstanding change of title."); *Fuessler v. Chautauqua Cnty. Patrons' Fire Relief Ass'n*, 23 N.Y.S. 2d 288 (N.Y. App. Div. 1940) ("company could waive condition making fire policy void because insured's interest was not unconditional and sole ownership").

248 (N.D. Miss. 1988) (citing *Morris*, 173 So. 2d 618). In *Employers Fire Insurance Co. v. Speed*, 133 So. 2d 627, 629 (Miss. 1961), described as the "seminal case" by *Pongetti*, the Mississippi Supreme Court held that "[a]n insurer may be estopped by its conduct or knowledge from insisting on a forfeiture of a policy."

Legal commentators, having surveyed the law, offer an explanation precisely on point.

> The general rule is if enforcement of a condition in existing insurance policies would work a forfeiture of coverage, such conditions may be waived by an insurer, or when appropriate the insurer may be estopped from asserting that condition. For example, an occupancy provision in a homeowner's policy may be waived—*even though the result of the waiver is that the insurer is forced to provide coverage for an unoccupied dwelling*. In such circumstances the waiver is not viewed as 'creating or extending coverage.' Instead, the insurer in such circumstances is viewed as waiving a condition—occupancy—on a dwelling it already insures.

Jeffrey Jackson and D. Jason Childress, Miss. Ins. L. and Prac. § 7.5 (Jun. 2023) (emphasis added).

Based on the foregoing, the builder's risk endorsement and vacancy clause in Sinjel's policy were "forfeiture provisions" subject to waiver (or estoppel). The district court held Sinjel had "the better" of this argument.

B. The Renewal Policy was a Continuation of the Original Policy, with the Same Forfeiture Provisions (for which Sinjel's compliance could never be possible).

"Whether the renewal of a policy of insurance constitutes a new and independent contract or whether it is instead a continuation of the original contract

primarily depends upon the intention of the parties as ascertained from the instrument itself." *Oates v. Equitable Assur. Soc. of the U.S.*, 717 F.Supp. 449, 452 (S.D. Miss. 1988) (Lee, J.) (citation and quotation omitted); *see also Moore v. Metropolitan Life Ins. Co.*, 307 N.E.2d 554 (1973) (renewal by premium payment merely continued in force pre-existing policy where insured could not terminate or alter its terms without consent).

When an original insurance policy expires, the insurer and insured have the right to "renew the previously existing policy." *Krebs By and Through Krebs v. Strange*, 419 So. 2d 178, 182 (Miss. 1982). "Under Mississippi law, renewal" includes "the issuance and delivery of a certificate of notice extending the term of a policy beyond its policy period or term." *Lynch v. Miss. Farm Bureau Cas. Ins. Co.*, 880 So. 2d 1065, 1068 (Miss. Ct. App. 2004) (Southwick, J.) (citation and quotation omitted).

A renewed policy "is a continuous policy rather than a sequence of independent policies." *Gurley v. Carpenter*, 855 F.2d 194, 195 (5th Cir. 1988). This is especially true where the renewed policy does not contain "new or modified terms." *In re Smith*, 2017 WL 2791390, *3 (N.D. Miss. Bankr. Jun. 27, 2017). "The majority of published caselaw holds that renewals of insurance contracts are generally viewed as extensions of the original policies, not new contracts." *In re Smith*, 2017 WL 2791390, *3 (collecting cases).

Ohio adduced no evidence in the summary judgment record that the renewal policy was anything other than a continuation of the very same policy Ohio determined did not provide coverage due to Sinjel's non-compliance with the builder's risk endorsement. Nor did Ohio explain why it renewed a policy that conferred no benefit on Sinjel and contained forfeiture provisions with which Sinjel could not possibly comply. For purposes of this appeal, therefore, the original and renewal policies should be construed as a single policy.

C. Ohio Waived Its Right to Enforce or Rely on the Builder's Risk Endorsement and Vacancy Clause by Accepting Sinjel's Premium Payments After Learning of Sinjel's Non-Compliance with Those Forfeiture Provisions.

Waiver of forfeiture provisions in insurance contracts is commonplace and occurs when an insurer has knowledge of the insured's non-compliance but accepts premium payments on the policy regardless. The cases are legion. *See, e.g., Pitts v. American Security Life Ins. Co.*, 931 F.2d 351 (5th Cir. 1991) (waiver of rights when insurer "accepted premiums knowing the insured was ineligible"); *New York Life Ins. Co. v. Dumler*, 282 F. 969 (5th Cir. 1922) (insurer estopped from taking advantage of forfeiture after acquiring knowledge of facts entitling it to treat policy as no longer in force but collecting premiums regardless); *Lamb v. Provident Ins. Co.*, 1994 WL 1890828, *4 (N.D. Miss. Oct. 4, 1994) (insurer can waive age limit provision by accepting premiums with knowledge the age limit was reached); *Southern United Life Insurance Co. v. Caves*, 481 So. 2d 764 (Miss. 1985) (condition

precedent—a forfeiture provision—waived when insurer knew of failure to satisfy the condition but collected premiums anyway); *cf. Snyder v. Foremost Ins. Co.*, 2018 WL 6050600, *6 (S.D. Miss. Nov. 19, 2018) ("retention of the insurance premium cannot constitute a waiver when the insurer is *not aware* of the misrepresentations when accepting the premium payments.") (emphasis added); *Standard Life Ins. Co. v. Baldwin*, 24 So. 2d 360, 361 (Miss. 1946) ("The intimation that the insurer was estopped to set up its defense because of its acceptance of premiums, finds no support in this record especially since there is *no showing that the insurer had knowledge* of the insured's physical condition.") (emphasis added). This line of cases is entirely consistent with hornbook contract law: a party to a contract cannot accept the benefits of the contract (*i.e.*, premiums) while rejecting its burdens (*i.e.*, obligation to cover a loss). *Weible v. Univ. of S. Miss.*, 89 So. 3d 51, 67 (Miss. Ct. App. 2011).

Ohio's waiver is clear. As of March 10, 2021, Ohio knew Sinjel had not complied with the forfeiture provisions—the builder's risk endorsement and vacancy clause—in its policy. It therefore denied Sinjel's claim on that basis, and only on that basis. At that point, Ohio could have voided the policy, since it would be impossible to comply with deadlines that had already elapsed. Stated another way, based on Ohio's reasons for its denial, no future claim, no matter its character or cause, could ever be covered. Thus, Sinjel's policy was voidable at Ohio's

election.

But Ohio did not void and terminate the policy. Instead, for months it continued collecting and retaining premiums (that otherwise it had no legal right to collect and retain). Under the foregoing lines of cases, Ohio's conduct amounts to legal waiver of its right to enforce forfeiture provisions against Sinjel. In other words, Ohio excused and ratified Sinjel's non-compliance with the forfeiture provisions in its policy. The policy remained in effect, Sinjel's non-compliance with the forfeiture provisions could not justify a denial of coverage, and Ohio became obligated to indemnify Sinjel's loss, which would have plainly been covered but for the non-compliance with the forfeiture provisions.

Even "'slight circumstances' will support a finding that an insurer has waived a forfeiture clause in an insurance policy." *Highlands Ins.*, 688 F.2d at 404. The circumstances here are more than slight; Ohio had full knowledge of Sinjel's non-compliance, it renewed the voidable policy, and it accepted and retained Sinjel's premiums under a policy that—according to Ohio—could never provide coverage for any claim. Ohio should not be granted a windfall, and Sinjel respectfully requests this Court reverse and render in its favor as to liability.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Sinjel respectfully requests this Court REVERSE the district court's order granting summary judgment, RENDER judgment as to

liability in Sinjel's favor, and REMAND to the district court for a determination of damages.

Dated: December 21, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Chadwick M. Welch, the undersigned counsel for Plaintiff/Appellant Sinjel, LLC, do hereby certify that, on this date, a true and correct copy of the foregoing document was served via the Court's electronic filing system on the following counsel of record:

Dated: December 21, 2023

/s/ Chadwick M Welch
Chadwick M. Welch

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3609 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman style font. Case names have been italicized.

This the 21st day of December, 2023.

/s/ Chadwick M Welch
Chadwick M. Welch