IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

SINJEL, LLC — PLAINTIFF

vs. — CIVIL ACTION NO. 3:22-cv-419-TSL-MTP

THE OHIO CASUALTY INSURANCE COMPANY, ET AL. — DEFENDANTS

THE OHIO CASUALTY INSURANCE COMPANY'S COMBINED MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

This suit arose out of the denial of the Plaintiff's claim for a fire loss under a property insurance policy. **(Dkt. #1-1 at 6, ¶9)**. The material facts relating to the Plaintiff's claim against the Defendant, The Ohio Casualty Insurance Company ("Ohio"), are undisputed. Under the terms and provisions of the policy and the applicable Mississippi law, the Plaintiff's Motion for Partial Judgment on the Pleadings **(Dkt. #70)** should be denied, and summary judgment should be entered for Ohio.

FACTS

In December 2019, the Plaintiff, Sinjel, LLC ("Sinjel"), purchased the old K-Mart building located at 3750 Highway 80 West in Jackson, Mississippi ("the building"), with the intention of renovating it. **(Dkt. #24 at 1 – Memor. Opinion and Order)** After initially obtaining a policy covering the building from Nautilus Insurance Company, Sinjel replaced this coverage with a Commercial Inland Marine policy from Ohio, bearing policy number BMO 60763563 ("the policy"), which provided Builders' Risk – Rehabilitation and Renovation Coverage. **(*Id.* at 1-2; Ex. A at 21)**[1] Ohio issued the policy effective April 15, 2020, for the 4/15/20 – 4/15/21 policy period.

Consistent with the nature and rate structure of builder's risk insurance,[2] the policy's "Builders' Risk Coverage – Rehabilitation and Renovation Form" provides limited coverage:

> **PROPERTY COVERED**
>
> "We" cover the following property unless the property is excluded or subject to limitations.
>
> **Rehabilitation And Renovation --** "We" cover buildings or structures <u>while in the course of rehabilitation or renovation as described below</u>.

[1] All cites herein to exhibits refer to the exhibits attached to Ohio's Motion for Summary Judgment.
[2] The annual premium for the policy was only $1,471.00. **(Ex. A at 18)**

> 1. **Coverage –**
>
> a. **Existing Building –**
>
> If coverage for Existing Building is indicated on the "schedule of coverages," "we" cover direct physical loss caused by a covered peril to an "existing building" while in the course of rehabilitation or renovation.
>
> * * *
>
> 2. **Coverage Limitations –**
>
> * * *
>
> b. **Vacant Building –** Refer to the "schedule of coverages" for a description of the limitation on a vacant "existing building".

(Ex. A at 35)(Emphasis added.)

The Schedule of Coverages includes a "Description of Project," which states: "Replace roof, upgrade electrical and plumbing to handle modern retail needs, update/replace awnings/walkways, update and paint the façade." **(Ex. A at 21)** The Schedule of Coverages also includes a subsection titled "Coverage Limitation," which states:

> **COVERAGE LIMITATION**:
>
> (X) **Vacant Building** – "We" only cover a vacant "existing building" for 60 consecutive days from the inception date of this policy unless building permits have been obtained and rehabilitation or renovation work has begun on the "existing building".
>
> ( ) **Vacant Building Limitation Waived**

(Ex. A at 22) As shown, the Vacant Building limitation was marked with an X in the parentheses, while the parentheses next to "Vacant Building Limitation Waived" was blank.

The policy contains the following definition of "existing building":

> 3. "Existing building" means a building or structure that was constructed and standing prior to the inception of this policy and that will undergo renovation or rehabilitation.
>
> An "existing building" only includes those parts of a standing building or structure that are intended to become a permanent part of the building or structure during renovation or rehabilitation.

(Ex. A at 48)

On February 24, 2021, Ohio received notice for the first time from Sinjel's owner, Ahmad Kayed ("Kayed"), that the building had been damaged by fire three months earlier on November 23, 2020. **(Ex. B)** On February 25, 2021, the Property Adjuster assigned to the claim, James Timothy Stephens ("Stephens"), spoke with Kayed about the loss. According to Kayed, nobody was working in the building, it had been vacant since Sinjel bought it, and no building permits had been obtained. **(Ex. B)**

Based on Ohio's investigation of Sinjel's claim, it denied his claim for benefits under the terms and provisions of the policy. **(Ex. C)**[3]

The Plaintiff's responses to Ohio's Requests for Admission contain the following admissions:

> REQUEST NO. 4: Please admit that for the 60 days following April 15, 2020, you and/or your representatives did not obtain building permits for or begin rehabilitation or renovation work on the building in question.
>
> RESPONSE: Admitted.
>
> REQUEST NO. 6: Please admit that from April 15, 2020, until the fire in question, you and/or your representatives did not obtain building permits for or begin rehabilitation or renovation work on the building in question.
>
> RESPONSE: Admitted.

[3] A copy of Ohio's letter to Sinjel is also attached to the Plaintiff's Complaint. **(Dkt. #1-1 at 81-84)**

REQUEST NO. 16: Please admit that from April 15, 2020, until the fire in question neither you nor your representatives informed The Ohio Casualty Insurance Company or its representatives that you had not obtained building permits for or begun rehabilitation or renovation work on the building in question.

RESPONSE: Admitted.

REQUEST NO. 17: Please admit that for the 60 days following April 15, 2020, neither you nor your representatives informed The Ohio Casualty Insurance Company or its representatives that you had not obtained building permits for or begun rehabilitation or renovation work on the building in question.

RESPONSE: Admitted.

(Ex. D)

The Plaintiff's answers to Ohio's Interrogatories contain the following response:

INTERROGATORY NO. 17: In the year 2020, prior to the fire in question, did anyone enter the building in question? If so, please identify each person who entered the building and specify the date and purpose for entering the building.

RESPONSE: To Plaintiff's knowledge, no.

(Ex. E)

LAW AND ARGUMENT

A. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(a), summary judgment is required when "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." Typically, on a summary judgment motion, the moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). If the moving party demonstrates an absence of evidence supporting the nonmovant's case, then the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial does

exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

In considering the Plaintiff's motion under Fed.R.Civ.P. 12(c), the standard is the same as a Rule 12(b)(6) motion. *Nationwide Property & Cas. Ins. Co. v. Polk*, 2015 WL 6442290, *2 (S.D. Miss. Oct. 23, 2015). Under Rule 12(c), "The Court construes the pleadings in the light most favorable to the non-moving party, accepting all well-pleaded facts as true, and asks whether Defendants in this case would be able 'to prevail under any set of facts or any possible theory that could be proven consistent with its denials in the Answer and the affirmative defenses therein.'" *Id.* (citation omitted.)

B. Burden of Proof

In diversity cases, the court applies the substantive law of the forum state. *State Farm Mut. Auto. Ins. Co. v. LogistiCare Solutions, LLC*, 751 F.3d 684, 688 (5th Cir. 2014). Therefore, Mississippi substantive law and federal procedural law applies to this action. *Lyda Swinerton Builders, Inc. v. Oklahoma Surety Co.*, 903 F.3d 435, 444 (5th Cir. 2018).

"'Under Mississippi law a plaintiff has the burden of proving a right to recover under the insurance policy sued on,' and this basic burden never shifts from the plaintiff." *Broussard v. State Farm Fire & Cas. Co.*, 523 F.3d 618, 625 (5th Cir. 2008) (quoting *Britt v. Travelers Ins. Co.*, 566 F.2d 1020, 1022 (5th Cir. 1978)).

C. Rules of Construction

"The interpretation of insurance policy language is a question of law." *Robichaux v. Nationwide Mut. Fire Ins. Co.*, 81 So. 3d 1030, 1035 (Miss. 2011); *Garrison Property and Cas. Co. v. Silva*, 652 Fed.Appx. 240, 241 (5th Cir. 2016)(same).

Under Mississippi law, insurance policies are contracts which "are to be enforced according to their provisions." *Noxubee County School Dist. v. United National Ins. Co.,* 883 So. 2d 1159, 166 (Miss. 2004) Mississippi courts give effect to the plain meaning of an insurance policy's clear and unambiguous language. *Robley v. Blue Cross/Blue Shield of Miss.*, 935 So.2d 990, 996 (Miss.2006). "No rule of construction requires or permits [Mississippi courts] to make a contract differing from that made by the parties themselves, or to enlarge an insurance company's obligations where the provisions of its policy are clear." *State Auto. Mut. Ins. Co. of Columbus v. Glover*, 253 Miss. 477, 176 So.2d 256, 258 (1965). Nor will a court resort to extrinsic evidence or rules of contract construction if policy provisions are unambiguous. *Jackson v. Daley*, 739 So.2d 1031, 1041 (Miss. 1999). "[I]n interpreting an insurance policy, [the] court should look at the policy as a whole, consider all relevant portions together and, whenever possible, give operative effect to every provision in order to reach a reasonable overall result." *Miss. Farm Bureau Cas. Ins. Co. v. Powell*, 2022 WL 1042722, *4 (¶10)(Miss. April 7, 2022)(quoting *J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So. 2d 550, 552 (Miss. 1998)) "[I]f a contract is clear and unambiguous, then it must be interpreted as written." *U.S. Fidelity & Guar. Co. v. Martin*, 998 So.2d 956, 963 (Miss. 2008). "[A] court must refrain from altering or changing a policy where terms are unambiguous, despite resulting hardship on the insured." *Titan Ind. Co. v. Estes*, 825 So.2d 651, 656 (Miss.2002).

D. The Parties' Rights and Responsibilities Under the Policy Vested at the Time of the Fire

Since the Plaintiff's argument for coverage relies, at least in part, on its payment of premiums after the fire, it should be noted that the parties' rights and responsibilities under the policy vested at the time of the fire. As the Mississippi Supreme Court stated:

> An insurer cannot avoid its obligation to indemnify the insured based upon an event which occurs subsequent to the covered loss. The insured's right to be indemnified for a covered loss vests at time of loss. Once the duty to indemnify arises, it cannot be extinguished by a successive cause or event. The same principle applies in reverse. In the case of a loss caused by an excluded peril, that particular loss is not changed by any subsequent covered peril or event. Nor can that excluded loss become a covered loss, after it has been suffered.

Corban v. United Services Auto Ass'n, 20 So.3d 601, 613 (¶32) (Miss. 2009)(internal citations omitted). *See also Century Ins. Co. v. First National Bank*, 133 F.2d 789, 791 (5th Cir. 1943)("The rights of the parties must be determined as of the date of the fire.").

Therefore, Sinjel's alleged right to recover under the Ohio policy is determined as of the date of the fire. Anything that occurred thereafter is irrelevant to the coverage issue.

E. The Fire Was Not Covered According to the Terms and Provisions of Ohio's Policy and Ohio Properly Denied Sinjel's Claim

The policy plainly states, "'We' only cover a vacant 'existing building' for 60 consecutive days from the inception date of this policy unless building permits have been obtained and rehabilitation or renovation work has begun on the "'existing building'." By the Plaintiff's own admission, the building was vacant from the time it was purchased in December 2019, until the fire on November 23, 2020. **(Ex. B)** Therefore, it was vacant for 60 consecutive days from the inception date of the policy on April 15, 2020. To the Plaintiff's knowledge, no one even entered the building in 2020. By the express terms of the policy there was no coverage for the building unless Sinjel obtained building permits **and** began rehabilitation or renovation work during that 60-day period. The evidence is undisputed that he did neither – not during the first 60 days after the inception of the policy or at any time thereafter. Therefore, there was no coverage on the building at the time of the fire, and Ohio properly denied Sinjel's claim.

If the terms of an insurance policy are clear and unambiguous, it must be enforced as written. *Miss. Farm Bureau Cas. Ins. Co. v. Powell*, 336 So.3d 1079, 1084 (¶10) (Miss. 2022)

In *Boston Ins. Co. v. Johness Realty Co.*, 254 Miss. 512, 183 So.2d 180 (1966), the Mississippi Supreme Court construed a provision very similar to the one in Ohio's policy. A building, which was used as a restaurant and bar, was totally destroyed by fire. At the time of the fire, it contained furniture, fixtures, and other equipment incidental and necessary to the operation of a restaurant. 254 Miss. at 514, 519. The building was fully equipped to be operated as a restaurant. *Id.* at 515. However, no business had been operated in the building for several years, and it had not been occupied during that time by anyone for any express purpose. *Id.* at 518. The policy provided that the insurance company was not liable for a loss occurring while the building was vacant or unoccupied beyond a period of 60 consecutive days. *Id.* at 514. The Supreme Court held that the terms of the policy were "clear and unambiguous" and that there was no coverage for the fire loss. *Id.* at 522.

This Court addressed a comparable situation involving a 60-day vacancy clause in *Future Realty, Inc. v. Fireman's Fund Ins. Co.*, 315 F. Supp. 1109 (S.D. Miss. 1970). At the time the policy was issued, the building was used partly as a bar and partly as living quarters or apartments. *Id.* at 1110. The policy provided that coverage was suspended if the building was "vacant or unoccupied beyond a period of sixty consecutive days." *Id.* It was subsequently damaged by fire. *Id.* At the time of the fire, the building had been vacated and not used or occupied by anyone for approximately five months, although there was evidence that "tramps or vagrants" had been in and out of the building. *Id.* at 1110-1111. The only furnishings in the building were a bar or counter, a bandstand, and a few old chairs. *Id.* at 1111. The court held the evidence was overwhelming that the building

was unoccupied or vacant for approximately five months prior to the fire, thus suspending coverage under the terms and provisions of the policy. *Id.* at 1115.

In reaching its decision in *Future Realty*, the court relied on *Asher v. Birmingham Fire Ins. Co.*, 239 Miss. 883, 125 So.2d 824 (1961) and *Asher v. Old Colony Ins. Co.*, 240 Miss. 166, 126 So.2d 255 (1961). The *Asher* cases involved a fire that destroyed a single-family dwelling. No one was living in the house at the time of the fire. The insured contended the house was not vacant because some furniture and other personal property was stored in the house and a caretaker spent at least two nights in the house during the sixty days preceding the fire. The supreme court held that the house was unoccupied or vacant for more than sixty days prior to the fire, and the insured was not entitled to a recovery under either policy. *Asher v. Old Colony,* 240 Miss. at 174-75 (affirming a chancellor's judgment for insurer); *Asher v. Birmingham Fire*, 239 Miss. 883 at 886-87 (affirming judgment on jury verdict for insurer but holding the insurer was entitled to a peremptory instruction). *See also, Travelers Fire Ins. Co. v. Bank of New Albany,* 146 So. 2d 351 (Miss. 1962) (former mill with intact equipment that had not operated for two years was considered vacant under policy language); *Home Ins. Co. v Scales,* 15 So. 134 (Miss. 1894) (upholding vacancy exclusion for store containing a few barrels and boxes that were occasionally sold by the insured).

The specific Coverage Limitation in Ohio's policy was construed in *AN Properties LLC v. The Ohio Casualty Ins. Co.*, 2022 WL 3700047 (N.D. Tex. July 18, 2022); *Faraj v. Ohio Cas. Ins. Co.*, 543 F. Supp. 3d 552 (N.D. Ohio 2021); and *Dririte USA Inc. v. Prosperitas Leadership Academy, Inc.*, 2023 WL 344210 (Fla.Cir.Ct. Jan. 4, 2023). In all three cases, the court applied the Coverage Limitation as written and granted summary judgment for the Defendant.

Sinjel's claim was properly denied. First, the policy only "cover[s] direct physical loss caused by a covered peril to an "existing building" while in the course of rehabilitation or renovation. **(Ex. A at 35)** There is no question that the fire did not occur while Sinjel's building was "in the course of rehabilitation or renovation." According to Sinjel, no one even entered the building during 2020. Second, the policy "only cover[s] a vacant 'existing building' for 60 consecutive days from the inception date of this policy unless building permits have been obtained and rehabilitation or renovation work has begun on the 'existing building'." The Plaintiff had done neither. It is undisputed that the Plaintiff had not obtained building permits or commenced rehabilitation or renovation work on the building in the 60-day period following the inception of the policy. Therefore, there is no coverage for the fire under the terms and provisions of Ohio's policy, and Sinjel's claim was properly denied.

F. The Doctrines of Waiver and Estoppel Are Not Applicable to Prevent Ohio from Denying Coverage for the Fire

"The party claiming the waiver of an important policy provision must prove it by clear and convincing evidence." *Charter Oak Fire Ins. Co. v. B.J. Enterprises*, 156 So.3d 357, 361 (¶18)(Miss. Ct. App. 2014)(citing *New Hampshire Ins. Co. v. Smith*, 357 So.2d 119, 121 (Miss.1978). Therefore, the Plaintiff not only has the burden to prove that it is entitled to recover under the policy, but it also has the burden of proving its contention that Ohio waived its coverage defense by accepting premium payments for the policy.

Sinjel's contention that Ohio waived its right to deny coverage for the fire – or is estopped to deny coverage - by accepting Sinjel's premiums ignores one critical fact and one important distinction between the authorities cited in its memorandum and the decisions that control the issue in our case. In the Plaintiff's cases, the insurer accepted the premiums with knowledge of the

fact that it later relied on to deny coverage. Whereas in our case, Ohio had no knowledge that Sinjel had not obtained building permits or commenced rehabilitation or renovation of the building until Sinjel submitted a claim three months after the fire.

"Waiver and estoppel are distinct doctrines." *American National Prop. and Cas. Co. v. Estate of Farese*, 530 F. Supp. 3d 655, 669 (S.D. Miss. 2021). "Waiver is the intentional relinquishment of a known right; '[t]o establish a waiver, there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived.'" *Id.* (citation omitted) "Estoppel, on the other hand, 'exists when the conduct of one party has induced the other party to take a position that would result in harm if the first party's act were repudiated.'" *Id.* (citation omitted) "In contrast to waiver, then, estoppel involves some element of reliance or prejudice on the part of the insured before an insurer is foreclosed from raising a ground for denial of liability that was known at an earlier date." *Id.*

Neither waiver nor estoppel is applicable to the present case. There is no evidence to support a contention that Ohio intentionally relinquished its right to deny coverage of Sinjel's claim. Nor is there any evidence that Sinjel was misled and, as a result, injured or prejudiced by any conduct or representation of Ohio.

In *Wilson v. State Farm Fire and Cas. Co.*, 761 So. 2d 913 (Miss. Ct. App. 2000), the insurer learned that the insured's application for insurance contained misrepresentations regarding his claim history and the fact that coverage on his house had been non-renewed by another insurer due to his claim history. The house was subsequently damaged by fire. State Farm learned of the misrepresentations during its investigation of the fire claim and denied the claim based in part on

the "Concealment and Fraud" provision of the policy. The plaintiff asserted that State Farm was prevented from denying coverage by the doctrines of estoppel and waiver. The Court of Appeals rejected the plaintiff's argument, as follows:

> [E]stoppel arises when the person claiming the benefit of estoppel has been misled to his detriment. *Casualty Reciprocal Exch. v. Wooley*, 217 So.2d 632, 636 (Miss.1969). We cannot find that there are facts upon which an estoppel could arise in this case. The retention of a premium after knowledge of a breach of condition will not estop the insurer from denying liability, where such knowledge is not acquired until after a loss has occurred. 16A Appleman Insurance Law & Practice, §§ 9253 and 9303 (1968). An insurer may waive the right to forfeit or rescind a policy of insurance when the elements of estoppel are not present by recognizing the validity of the policy and continuing it in force after knowledge of circumstances entitling it to avoid the policy. *Stonewall Life Ins. Co. v. Cooke*, 165 Miss. 619, 144 So. 217 (1932). The court held in *Casualty Reciprocal Exchange*, 217 So.2d at 636, that retention of the premium by the insurance company did not constitute a waiver since the company was not at the time aware of the fact that several questions on the insurance application had been falsely answered. Since the facts are undisputed that State Farm was not aware of the misrepresentations in the application until after the fire loss, its retention of the premiums and renewal of the policy each year until 1996 does not constitute a waiver.

Id. at 920 (¶18)

Similarly, in *Allgood v. Metropolitan Life Ins. Co.*, 543 F.Supp. 2d 591 (S.D. Miss. 2008), Judge Starrett addressed a waiver argument involving a policy that provided it would cease in the event of divorce. After the plaintiff's ex-husband died, she made a claim on a policy that she had carried on his life. Unknown to her, the policy contained a "termination of marriage" provision that caused it to lapse when she divorced him less than six months prior to his death. *Id.* Ms. Allgood continued making premium payments, and MetLife continued crediting the payments to her account. *Id.* at 592. MetLife had no knowledge of the divorce until it received the death certificate after Mr. Allgood died. *Id.* It subsequently denied her claim based on the termination of marriage clause. The court held that although MetLife continued accepting

premiums from Ms. Allgood, there was no evidence that it knew the couple had divorced and that the termination of marriage clause was triggered. *Id.* at 593. Therefore, accepting premiums did not constitute a waiver of its defense to coverage.

Like Sinjel, Allgood relied on *Pitts v. American Security Life Ins. Co.*, 931 F.2d 351 (5th Cir. 1991) In *Pitts*, the Fifth Circuit held that the insurer waived its right to cancel the policy when it accepted premiums knowing that the insured was ineligible. Therefore, it could not cancel the policy after the insured suffered a compensable injury. 931 F.2d at 357. However, Judge Starrett distinguished *Pitts* because the insurer knew the insureds were not eligible for coverage but continued accepting premiums before acting to deny their claim, whereas MetLife had no such knowledge. *Allgood*, 543 F.Supp.2d at 593. *See also 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.); *Standard Life Ins. Co. v. Baldwin*, 199 Miss. 302, 308, 24 So.2d 360, 361 (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.")

The other cases relied on by the Plaintiff to support its waiver and estoppel argument, *New York Life Ins. Co. v. Dumler*, 282 F. 969 (5th Cir. 1922) and *Lamb v. Provident Ins. Co.*, 1994 WK 1890828 (N.D. Miss. Oct. 4, 1994), are distinguishable on the same grounds.

In *Dumler,* the policy contained a "delivery in good health" provision, which stated that it would not take effect unless the first premium was paid and the policy was delivered to and received by the insured during his lifetime and good health. The insured in fact was not in good health.

When the company's soliciting agent went to the insured's residence to deliver the policy, he was to ascertain if the insured was in good health physically and deliver the policy or return the policy to the company. When the agent went to deliver the policy, he was informed of the insured's illness, but nevertheless collected the premium and delivered the policy. The company continued to accept the premiums with knowledge that the insured was not in good health. Ohio had no such knowledge in our case.

Lamb is an ERISA case decided under principles of federal substantive law. 1994 WL 1890828, *3. It involved a health insurance policy that provided coverage for dependent children between the ages of 19 and 24 who are full time students. The plaintiff's son was injured when he was 19 and not a full-time student. *Id.* at *1. The insurer accepted premiums for two years with knowledge that he had reached the age limit. Again, Ohio had no comparable knowledge in the present case.

The Plaintiff's cases, *Pitts*, *Dumler* and *Lamb* are distinguishable and not applicable to our case.

G. The Coverage of Ohio's Policy Cannot Be Extended by the Doctrines of Waiver and Estoppel

Sinjel's waiver and estoppel argument also fails because these doctrines cannot be used to expand the coverage of the policy. In *Employers Fire Ins. Co. v. Speed*, 242 Miss. 341, 346, 133 So.2d 627, 629 (1961), the Mississippi Supreme Court stated:

> This Court follows the general rule that waiver or estoppel can have a field of operation only when the subject matter is within the terms of the policy, and they cannot operate radically to change the terms of the policy so as to cover additional subject matter. Waiver or estoppel cannot operate so as to bring within the coverage of the policy property, or a loss, or a risk, which by the terms of the policy is expressly excepted or otherwise excluded. An insurer may be estopped by its conduct or knowledge from insisting on a forfeiture of a policy, but the coverage or

> restrictions on the coverage cannot be extended by the doctrines of waiver or estoppel.

In *Estate of Farese*, this Court discussed at length the difference between a forfeiture provision and a coverage provision. 530 F.Supp.3d at 670-71. That case involved a tragic plane crash. The policy required that the pilot have a current and valid flight review and receive ten hours training in the insured plane with an FAA-certified flight instructor. *Id.* at 671. This Court held:

> [These requirements] were not merely forfeiture provisions but conditions precedent to coverage for any flight as to which he was the sole pilot in command. As Dr. Farese did not fulfill these conditions, coverage never arose for him to pilot the plane as sole pilot in command. *See Austin v. Carpenter*, 3 So. 3d 147, 149–50 (Miss. Ct. App. 2009) (quoting *Turnbough v. Steere Broad. Corp.*, 681 So. 2d 1325, 1327 (Miss. 1996))(a condition precedent is a "'condition which must be performed before the agreement of the parties shall become a binding contract or ... a condition which must be fulfilled before the duty to perform an existing contract arises.'"). ANPAC never "accepted" the risk of Dr. Farese's piloting the plane as sole pilot in command without having first undergone the required training.

Id. The Court emphasized:

> [T]he rule expressed by the Mississippi Supreme Court in *Speed* is that waiver or estoppel "cannot operate so as to bring within the coverage of the policy property, or a loss, *or a risk*, which by the terms of the policy is expressly excepted or otherwise excluded." *Speed*, 133 So. 2d at 629 (emphasis added). The *risk* from Dr. Farese flying the subject plane as sole pilot in command without having first received the required training is not a *risk* that ANPAC agreed to cover.

Id. (Emphasis in original.)

Likewise, in the present case, Ohio's policy expressly only covered an existing building "while in the course of rehabilitation or renovation." **(Ex. A at 35)** The policy only provided coverage to "a vacant 'existing building' for 60 days from the inception date of this policy unless building permits have been obtained and rehabilitation or renovation work has begun on the 'existing building.'" **(Ex. A at 22)**

As in *Estate of Farese,* these were not forfeiture provisions, these were conditions precedent to coverage – conditions that must be performed before Ohio's duty to perform arises. By issuing the policy, Ohio agreed to provide coverage for "builders' risks," as set forth in the policy. It did not agree to provide coverage for the increased risk of a long-term vacant building in which there was no activity. The Plaintiff's waiver and estoppel argument is without merit.

CONCLUSION

For the reasons discussed above, the Plaintiff's Motion for Partial Judgment on the Pleadings should be denied, and Ohio's Motion for Summary Judgment on all of the Plaintiff's claims should be granted.

This the 1st day of June 2023.

Respectfully submitted,

THE OHIO CASUALTY INSURANCE COMPANY

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