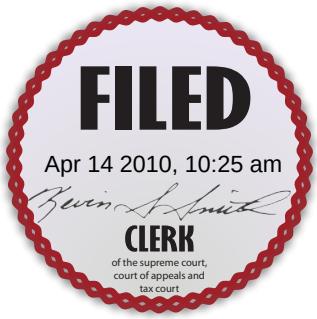

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IN THE
COURT OF APPEALS OF INDIANA

JEANETTE WEST, As the Personal Representative of the ESTATE OF DANIEL CULLISON,	)	
Appellant-Defendant,	)	
vs.	)	No. 28A01-0909-CV-464
INDIANA FARMERS MUTUAL INSURANCE COMPANY,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GREENE CIRCUIT COURT
The Honorable Erik C. Allen, Judge
Cause No. 28C01-0702-CC-91

APRIL 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

Appellant Jeanette West, as personal representative of the Estate of Daniel Cullison ("West"), appeals from the trial court's grant of summary judgment to Appellee Indiana Farmers Mutual Insurance Company ("Indiana Farmers"). We affirm.

ISSUES

West raises two issues, one of which we find dispositive and restate as whether the trial court erred by granting summary judgment to Indiana Farmers on its complaint for declaratory judgment.[1]

FACTS AND PROCEDURAL HISTORY

On April 22, 2004, Daniel Cullison entered into a Lease with Option to Purchase ("the Lease") for land in Greene County that was owned by Tooger and Nancy Smith ("the Smiths"). The Lease was for a five-year term, with options to extend the lease and for Cullison to purchase the property from the Smiths. Cullison built a pole barn on the property and lived there. He intended to open a flea market in the pole barn, but he encountered financial difficulties. As a result, Cullison was unable to pay for the materials used to build the pole barn. In addition, Cullison paid rent to the Smiths for only three months over the next two years following the signing of the lease.

On September 8, 2005, Cullison purchased insurance from Indiana Farmers. The policy covered the pole barn and his personal property. The policy period was from September 8, 2005 to September 8, 2006.

[1] West also claims that she had standing to bring her counterclaim for payment of insurance proceeds, but we do not reach this claim due to our resolution of the issue described above.

On October 13, 2005, Cullison filed a *pro se* Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of Indiana. In his bankruptcy filings, Cullison did not list the pole barn or the insurance policy as assets. The bankruptcy court determined that Cullison's petition presented a "No Asset Case" and discharged him from bankruptcy on March 21, 2006. Appellant's App. pp. 316-317.

Meanwhile, Tooger Smith ("Smith") had sent Cullison several letters demanding payment of rent. On April 17, 2006, Smith sent Cullison a letter memorializing an oral agreement they had made that morning. The letter stated, in part, "[y]ou are to be gone by May 15, 2006 and leave the improvements intact." Appellant's App. p. 330.

The pole barn was destroyed by fire on April 25, 2006. Cullison filed a claim with Indiana Farmers, and Indiana Farmers paid Cullison $29,407.84 for loss of personal property and for living expenses.

Subsequently, Indiana Farmers filed a declaratory judgment action against Cullison and Smith, seeking a determination that Indiana Farmers was not obligated to pay for the loss of the pole barn. Cullison filed a counterclaim seeking payment under the policy for the pole barn. Cullison passed away during the lawsuit, and his estate, by West, was substituted as a party.

Indiana Farmers filed a motion for summary judgment. The trial court granted summary judgment in favor of Indiana Farmers and against Smith and West on Indiana Farmers' complaint for declaratory judgment. The trial court also entered judgment in favor of Indiana Farmers on West's counterclaim. This appeal followed.

DISCUSSION AND DECISION

On appeal from a grant or denial of summary judgment, our standard of review is identical to that of the trial court: whether there exists a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *The Winterton, LLC v. Winterton Investors, LLC*, 900 N.E.2d 754, 758 (Ind. Ct. App. 2009), *transfer denied*. Appellate review of a summary judgment motion is limited to those materials designated to the trial court. *Id.* All facts and reasonable inferences drawn therefrom are construed in favor of the nonmovant. *Id.* Here, the trial court entered specific findings of fact and conclusions thereon. Although such findings and conclusions facilitate appellate review by offering insight into the trial court's reasons for granting summary judgment, they do not alter our standard of review and are not binding upon this Court. *Id.* We are not limited to reviewing the trial court's reasons for granting or denying summary judgment but rather may affirm a grant of summary judgment upon any theory supported by the evidence. *Keaton & Keaton v. Keaton*, 842 N.E.2d 816, 821 (Ind. 2006).

As an initial matter, Indiana Farmers asserts for the first time on appeal that West is judicially estopped from claiming an insurable interest in the pole barn at the time of the fire because Cullison failed to list the pole barn as an asset in his bankruptcy case. Estoppel is an affirmative defense and must be set forth in a response to a complaint. *See* Ind. Appellate Rule 8(C). Indiana Farmers did not present its claim of judicial estoppel to the trial court, so it is waived for appeal. *See Wallace v. State*, 836 N.E.2d 985, 1001 (Ind. Ct. App. 2005) (determining that appellant had waived a claim of judicial estoppel for appellate review by failing to present the claim to the post-conviction court). Therefore, we proceed to the merits of West's appeal.

West contends that the trial court erred by granting summary judgment to Indiana Farmers because Cullison had an insurable interest in the pole barn at the time that it was destroyed by fire. Therefore, West concludes, under the terms of the policy Cullison's estate is entitled to compensation for the loss of the pole barn.

In order to maintain a valid insurance policy, the insured must have an insurable interest in the property. *Erie-Haven, Inc. v. Tippman Refrigeration Constr.*, 486 N.E.2d 646, 649-650 (Ind. Ct. App. 1984). An insurable interest exists when one derives a benefit from the existence of the property or would suffer a loss from its destruction, regardless of whether or not he or she has title or a secured interest in the property. *See Ebert v. Grain Dealers Mut. Ins. Co.*, 158 Ind.App. 379, 303 N.E.2d 693, 697 (Ind. Ct. App. 1973). A right of property is not essential. *Id*.

Both a lessor and a lessee have an insurable interest in the property which is the subject of the lease. *See Erie-Haven*, 486 N.E.2d at 650. A lessee has an interest in the property only to the extent of the unexpired term of the lease. *Id.* The extent of the interest of lessor and lessee and thus the right to insurance proceeds is determined as of the time of the fire. *Id.*

Based on the foregoing discussion, in order to determine whether Cullison had an insurable interest in the pole barn pursuant to the lease at the time the barn was destroyed by fire on April 25, 2006, we must first determine whether the Lease was in effect on that date.

Cullison and the Smiths' Lease, which they signed on April 22, 2004, had a five-year term, so it had not yet expired due to the passage of time. However, due to

Cullison's failure to pay rent, Smith and Cullison made a "verbal agreement" memorialized in a letter from Smith to Cullison pursuant to which Cullison would leave the property by May 15, 2006. Appellant's App. p. 330. The question is whether the new agreement effectively terminated the Lease.

A surrender of tenancy is a yielding of the tenancy to the owner of the reversion or remainder, wherein the tenancy is submerged and extinguished by agreement. *Mileusnich v. Novogroder Co., Inc.*, 643 N.E.2d 937, 939 (Ind. Ct. App. 1994). In order that there be a surrender and acceptance of a lease, there must be some form of mutual agreement between the parties to the effect that the lease should cease to be binding on them. *Northern Indiana Steel Supply Co., Inc. v. Chrisman*, 139 Ind.App. 27, 204 N.E.2d 668, 671 (Ind. Ct. App. 1965), *reh'g denied*. The acts of the parties must be so inconsistent with the subsisting relationship of landlord and tenant that it may be implied that both lessor and lessee have agreed to consider the lease as ended. *Id.* The agreement may be expressed in writing or implied by operation of law. *Id.* Surrender and acceptance will be determined on a case-by-case basis by examining the acts of the respective parties in each case. *Mileusnich*, 643 N.E.2d at 939.

In this case, the evidence, when viewed in the light most favorable to West, indicates that the parties had agreed prior to the fire that the Lease had expired and the new agreement was necessary to set forth the circumstances under which Cullison was to leave the property. On April 17, 2006, in a letter from Smith to Cullison memorializing the parties' agreement, Smith stated:

> This is to verify in writing the verbal agreement we shook hands on this morning at the Courthouse at 9:30.
> You are to be gone by May 15, 2006 and leave the improvements intact.
> You have been in control of the property for two years.
> You have paid essentially no money, neither the taxes. However, you have left me owing at least $20,000 for dozer work and materials.

Appellant's App. p. 330.

After the fire, Cullison described to an Indiana Farmers' employee how the agreement was reached, as follows:

> I talked to [Smith] at the courthouse over here and he told me I said well I can pick up the payments if you want me to and uh you know uh he insisted I pay him a little bitta money. I said well I'm gonna pay the money and he said no I don't I just want you to leave and give me a certain amount of time to leave.

Appellant's App. p. 129. Cullison also told the Indiana Farmers' employee, "[a]ccording to our agreement, I don't owe him anything. I just have to give him back the property." Appellant's App. p. 131.

Thus, on April 17, 2006, Cullison agreed to depart from the property by May 15, 2006, prior to the original termination date of the Lease, leaving the pole barn intact for Smith. Smith agreed that Cullison would not be obligated to pay any rent through May 15, 2006, and Smith further agreed to release any claim for back rent and other expenses. This new agreement was inconsistent with Smith and Cullison's rights and responsibilities under the Lease, so the parties appear to have agreed to consider the Lease as no longer being binding upon them. West points to no evidence that would indicate that Smith or Cullison believed or acted as if the Lease was still binding upon them after April 17, 2006.

It may appear that Cullison's agreement to leave all improvements, including the pole barn, intact constituted consideration for Smith's agreement to permit Cullison to remain on the real estate after April 17, 2006, and to forego collection of the approximately $30,000 in rent monies that Cullison owed to Smith. Had that been the case, the lease would not have terminated on April 17; instead, it would have been amended and extended until May 15. The original written Lease, however, provides that if Cullison failed to make timely rent payments—and it is undisputed that he did fail to do so—then Smith unequivocally had the right to retake possession of the premises and sell or store any property, including improvements, for his own benefit. Appellant's App. p. 111. As such, when Cullison "agreed" to leave all improvements, including the pole barn, intact for Smith's later use, he was merely complying with the terms of the original Lease rather than adding newly agreed upon consideration into the pot. Therefore, there was no consideration supporting Smith's agreement to permit Cullison to remain on the property and the trial court properly determined that the Lease expired on April 17. Consequently, Cullison had no insurable interest in the pole barn at the time of the fire pursuant to the Lease. *Cf. Erie-Haven, Inc.*, 486 N.E.2d at 650 (determining that a lessee had an insurable interest in improvements to the leased property where the lease was unexpired and an option to purchase remained in effect).

Although the Lease had expired at the time of the April 25, 2006 fire, we must still determine whether Cullison retained an insurable interest in the pole barn based on his continued occupation of the property pursuant to the parties' April 17, 2006 agreement. Cullison was staying on the property rent-free with a May 15, 2006 deadline to move out.

If a person is using or living on another's land with permission but is not paying rent, the relationship is, at best, a tenancy at sufferance. *Wallace v. Rogier*, 182 Ind. App. 303, 395 N.E.2d 297, 299 (Ind. Ct. App. 1979). A tenant at sufferance has only naked possession; he or she has no privity with the landlord. *Roth v. Dillavou*, 359 Ill.App.3d 1023, 835 N.E.2d 425, 429 (Ill. App. Ct. 2005). Furthermore, Cullison had agreed that the pole barn was to remain with the property after the Lease terminated. Under these circumstances, it appears that on the date of the fire, Cullison was not receiving a benefit from the pole barn because he had ceded it to Smith. Furthermore, Cullison did not suffer a loss from the barn's destruction other than the loss of personal property and a place to live, for which Indiana Farmers compensated him pursuant to the policy. Therefore, Cullison did not retain an insurable interest in the pole barn, and the trial court did not err in concluding that Indiana Farmers was entitled to summary judgment.

CONCLUSION

For these reasons, we affirm the trial court's grant of Indiana Farmers' motion for summary judgment.

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.