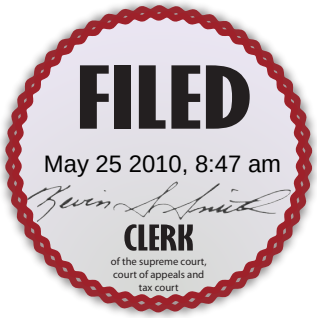

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IN THE
COURT OF APPEALS OF INDIANA

DAVID SMITH,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 36A01-0912-CV-574
	)	
FIRST FARM MUTUAL INSURANCE COMPANY,	)	
	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE JACKSON CIRCUIT COURT
The Honorable William E. Vance, Judge
Cause No. 36C01-0904-PL-3

May 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

David Smith appeals the trial court's entry of summary judgment in favor of First Farm Mutual Insurance Company ("First Farm") on Smith's claim for breach of insurance contract. We reverse and remand.

Issues

I. Does a genuine issue of material fact exist regarding whether Smith's house was vacant or unoccupied for more than sixty consecutive days before it was destroyed by fire, which would preclude coverage under his insurance policy with First Farm?

II. Does a genuine issue of material fact exist regarding whether First Farm waived the coverage defense?

Facts and Procedural History

The designated evidence most favorable to Smith, as the party opposing First Farm's summary judgment motion, indicates that he owned a house on West Main Street in Crothersville. In November 2007, Smith obtained an insurance policy ("the Policy") on the house from First Farm. The Policy reads in pertinent part as follows:

> **Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring:**
>
> …
>
> (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days[.]
>
> ….
>
> No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto.

Appellant's App. at 21.

On August 14, 2008, Debra Caudill signed an agreement with Smith to lease the house for one year. Sometime between the end of October 2008 and the middle of November 2008 – the precise date is a matter of dispute – Caudill had the utilities turned off and vacated the house. On November 8, 2008, Smith paid his annual premium of $271.25 to First Farm. On January 1, 2009, the house was destroyed by fire. A State Fire Marshal investigator determined that the fire had been intentionally set. On March 9, 2009, Crothersville Police Chief Vurlin McIntosh advised Smith that he was not a suspect but asked if he would be willing to take "a poly-graph or voice stress test" in "order to help clear him[.]" *Id*. at 107. According to Chief McIntosh, Smith never contacted him, had "refused to speak with the Fire Marshal and the Crothersville Fire chief[,]" and had "refused to cooperate with [the] investigation." *Id*.

According to First Farm adjuster Richard Lambring, First Farm "like[s] to get a check out to everybody within two (2) weeks after a loss[,]" but it was "waiting for the Crothersville Police and the arson investigators to finish their investigation" before paying Smith any proceeds under the Policy. *Id*. at 89, 93. Chief McIntosh told Lambring that Smith "just need[ed] to come in and clear himself[,]" and Lambring relayed this message to Smith. *Id*. at 93; *see also id*. at 90 ("We was [sic] ready to pay David, if he would have just came [sic] in … and talked to the Chief."). Lambring also told Smith that "if arson is involved, we've got to wait on arson first before we pay." *Id*. at 98.

The arson investigation remained open on April 23, 2009, when Smith filed a complaint against First Farm. The complaint alleged that the destruction of the house by fire was a covered loss under the Policy, that Smith had "reasonably complied with all conditions" of the Policy, and that First Farm had breached the Policy "by failing to pay him for his loss[.]" *Id*. at 5. In its answer to Smith's complaint, First Farm asserted as affirmative defenses that Smith had "failed to comply with all of the requirements of [the Policy], which was a condition precedent to filing suit for the recovery of any claim[,]" and that the alleged damages "may have been caused in whole or in part by [Smith's] own fault[.]" *Id*. at 12. In his answer to First Farm's first set of interrogatories, Smith stated that Caudill "left [the house] about November 5, 2008, the date she had the water turned off" and that "she left many personal items" behind. *Id*. at 29.

On June 24, 2009, First Farm filed a motion for summary judgment, in which it asserted for the first time that Smith was not entitled to coverage under the Policy because Caudill had vacated the house "on or before October 29, 2008[,]" and thus the house had been vacant or unoccupied for more than sixty consecutive days before the fire. *Id*. at 15. In support of its summary judgment motion, First Farm designated an affidavit signed by Caudill, who stated that she "had both the electric and water utilities turned off" on October 29, 2008, and that she vacated the house "on or before" that date and "left no personal belongings." *Id*. at 48. First Farm also designated Smith's answer to its first set of interrogatories, as well as Chief McIntosh's report on the fire, in which he stated that "[t]he electric, gas and water were turned off since the middle of November." *Id*. at 26.

On August 17, 2009, Smith filed a response to First Farm's summary judgment motion, in which he argued that First Farm had waived or should be estopped from raising the sixty-day vacancy defense because it had failed either to raise the defense or tender the unearned portion of his premium within a reasonable time.[1] In support of his response, Smith designated an affidavit in which he stated that Caudill never advised him that she was moving out of the house, and therefore he did not know "the exact point in time in which she left. However, in early November, 2008, as part of the inspection of the [house], [he had taken] photographs of the premises that depict that Debra Caudill had left numerous personal items and household goods in the premises." *Id*. at 63.[2] Smith further stated that First Farm had never declined coverage on the loss and that he had "never refused to speak to anyone regarding" the loss. *Id*. at 64-65. Finally, Smith stated that, at Lambring's urging, he had "obtained statements from witnesses who could verify [his] whereabouts on the evening and morning of December 31, 2008 and January 1, 2009[,]" but that his counsel in the arson

[1] In *American Standard Insurance Co. of Wisconsin v. Rogers*, we noted that "[t]he term 'estoppel' has a meaning distinct from 'waiver' but the terms are often used synonymously with respect to insurance matters." 788 N.E.2d 873, 877 (Ind. Ct. App. 2003) (citation and quotation marks omitted). We explained that

> [a] waiver is an intentional relinquishment of a known right involving both knowledge of the existence of the right and the intent to relinquish it. The elements of estoppel are the misleading of a party entitled to rely on the acts or statements in question and a consequent change of position to that party's detriment.

Id. at n.4 (citation omitted). Because Smith does not specifically contend that he changed his position to his detriment based on any misleading acts or statements by First Farm, we address only the issue of waiver below.

[2] Smith stated that he "took the photographs in anticipation of litigation against Debra Caudill for lease payments and damages." Appellant's App. at 63. Smith attached the photographs as exhibits to his affidavit.

investigation had failed to "pass these statements on to the police and the arson investigators." *Id*. at 65.

On October 24, 2009, First Farm filed a motion to amend designation of evidentiary matters in support of its summary judgment motion, to which was attached a copy of a check issued by First Farm to Smith for $233.30. The check is dated August 17, 2009, and bears the memo "Premium Refund." *Id*. at 125.[3]

The trial court held a summary judgment hearing on October 26, 2009. At the hearing, Smith's counsel stated that he "immediately" returned the aforementioned check to First Farm's counsel, "saying whether it's tendered in a reasonable period of time is a question of fact." Tr. at 6. On November 2, 2009, the trial court issued a judgment that reads in pertinent part as follows:

> The Court has determined that there is no genuine issue that the subject premises were unoccupied on or before October 29, 2008 and remained unoccupied for more than sixty consecutive days prior to the fire on January 1, 2009. Summary Judgment is, therefore, appropriate for the Defendant, First Farm Mutual Insurance Co.

Appellant's App. at 3. Smith now appeals.

Discussion and Decision

In reviewing a grant of summary judgment, our standard is the same as it was for the trial court:

> We must determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. We must

[3] First Farm states that the amount "represents Smith's unearned premium beginning December 29, 2008, the date Smith's policy terminated due to the 60-day vacancy provision, to November 7, 2009." Appellee's Br. at 4.

> consider the pleadings and evidence designated pursuant to Ind. Trial Rule 56(C) without deciding their weight or credibility. Summary judgment should be granted only if such evidence shows there is no genuine issue of material fact and judgment is warranted as a matter of law.
>
> The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Once the moving party meets these two requirements, the burden then shifts to the non-moving party to show the existence of a genuine issue by setting forth specifically designated facts. Any doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party.

McClain v. Chem-Lube Corp., 759 N.E.2d 1096, 1100-01 (Ind. Ct. App. 2001) (citations omitted), *trans. denied* (2002).

I. Was House Vacant or Unoccupied for More Than Sixty Consecutive Days Prior to Fire?

Smith first contends that "[t]he evidence designated by the parties at summary judgment below demonstrated a conflict as to whether [the house] had been vacant or unoccupied for a period of sixty days prior to the fire in this case." Appellant's Br. at 5. We agree.

As mentioned *supra*, both First Farm and Smith designated evidence indicating that Caudill "left" the house on November 5, 2008, that "numerous" personal belongings were still in the house in early November, and that the utilities were not turned off until the middle of November. Viewed most favorably to Smith, this evidence tends to show that the house was not vacant or unoccupied for more than sixty consecutive days before the fire.[4] It is true, as First Farm states, that "[t]here is only <u>one</u> person who truly knows when Caudill moved

[4] In his response to First Farm's summary judgment motion, Smith suggested that the terms "vacant" and "unoccupied" were ambiguous and should be construed against First Farm. Appellant's App. at 56-57. Smith does not raise this argument on appeal, and we do not address it.

out, and that is Caudill, herself." Appellee's Br. at 7. For precisely that reason, however, we conclude that summary judgment for First Farm is inappropriate. "'[S]ummary judgment is inappropriate if a reasonable trier of fact could choose to disbelieve the movant's account of the facts.'" *Insuremax Ins. Co. v. Bice*, 879 N.E.2d 1187, 1190 (Ind. Ct. App. 2008) (quoting *McCullough v. Allen*, 449 N.E.2d 1168, 1172 (Ind. Ct. App. 1983)) (alteration in *Insuremax*), *trans. denied*. "When the facts are peculiarly in the knowledge of the movant's witnesses, there should be an opportunity to impeach them at trial, and their demeanor may be the most effective impeachment." *Id.* (citing *Blinn v. City of Marion*, 181 Ind. App. 87, 92, 390 N.E.2d 1066, 1069 (1979)). In other words, a jury should be given the opportunity to determine, based on Caudill's testimony and demeanor at trial, whether she actually vacated the house on or before October 29, 2008, as she averred in her affidavit. Therefore, we reverse the trial court's grant of summary judgment in favor of First Farm and remand for further proceedings.

II. Did First Farm Waive Its Sixty-Day Vacancy Defense?

Smith also contends that a genuine issue of material fact exists regarding whether First Farm has waived the sixty-day vacancy defense under the Policy. Because this issue will likely arise on remand, we address it here.

Smith correctly notes that "[w]aiver is generally a question of fact"; that "[t]he existence of waiver may be implied by the acts, omissions, or conduct of one of the parties to the contract"; and that "[t]he conduct of an insurer inconsistent with an intention to rely on the requirements of the policy that leads the insured to believe that those requirements will

not be insisted upon is sufficient to constitute waiver." Appellant's Br. at 8 (citing *Am. Standard Ins. Co. of Wis. v. Rogers*, 788 N.E.2d 873, 877 (Ind. Ct. App. 2003). Smith also cites our opinion in *Farmers Conservative Mutual Insurance Co. v. Neddo* for the following proposition: "The rule is firmly established that an insurer is precluded from asserting a forfeiture, where, after acquiring knowledge of the facts constituting a breach of a condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness." 111 Ind. App. 1, 11, 40 N.E.2d 401, 405 (1942).

Smith notes that First Farm "never sent [him] any written communications declining coverage for any reason"; that "[t]he only communications made to [him] were that First Farm was waiting on the cause of fire as determined by an arson investigation"; that First Farm did not raise the sixty-day vacancy defense "until it filed for summary judgment"; and that First Farm retained the unearned portion of his premium until he "responded to the summary judgment motion with the waiver defense." Appellant's Br. at 8-9.[5] In conclusion, Smith asserts that First Farm's conduct "demonstrates at least an issue of fact" as to whether it waived "its ability to claim the sixty day provision as a defense." *Id.* at 9.

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[5] Smith notes that pursuant to Indiana Code Section 27-2-13-5,

> An authorized agency that is investigating a fire believed to have been caused by arson may, in writing, order an insurer to withhold payment of the proceeds of an insurance policy on the damaged or destroyed property for up to thirty (30) days from the date of the order. The insurer may not make a payment during that time, except for payments:
> (1) for emergency living expenses;
> (2) for emergency action necessary to secure the premises;
> (3) necessary to prevent further damage to the premises; or
> (4) to a mortgagee who is not the target of investigation by the authorized agency.

Smith observes that First Farm "has neither asked for, nor received, such a written order." Appellant's Br. at 9.

In response, First Farm points to the Policy's requirement that any waiver of its provisions be granted in writing and notes that "[n]o such writing was designated as evidence at summary judgment." Appellee's Br. at 8. First Farm also observes that the policy in *Neddo* did not include a nonwaiver provision and argues that *Neddo* is therefore "factually distinguishable and inapplicable to the material issue involved in this case." *Id*. We disagree.

The year before we decided *Neddo*, we observed that "a nonwaiver clause may itself be waived." *Travelers Ins. Co. v. Eviston*, 110 Ind. App. 143, 156, 37 N.E.2d 310, 315 (1941). The burden to prove waiver is on the party who claims it. *Rogers*, 788 N.E.2d at 877. Given that First Farm failed to raise the sixty-day vacancy defense until its summary judgment motion and failed to tender the unearned portion of Smith's premium until he raised the issue of waiver in response thereto, we believe that a jury could reasonably find that First Farm waived its defense under the Policy. That said, in light of the designated evidence suggesting that Smith failed to cooperate fully with the arson investigation and thereby hampered First Farm's efforts to timely assess and assert its available defenses under

the Policy, we believe that a jury could reasonably reach the opposite conclusion. Therefore, the issue of waiver should be decided by the jury on remand.[6]

Reversed and remanded.

BAKER, C.J., and DARDEN, J., concur.

[6] First Farm complains that Smith "refused to accept the very check he alleged was not sent within a reasonable period of time." Appellee's Br. at 9. We note that First Farm could have (and perhaps should have) paid the money into court upon Smith's refusal. *See Sofnas v. John Hancock Mut. Life Ins. Co.*, 107 Ind. App. 539, 542-43, 21 N.E.2d 425, 426 (1939) ("It is the law in Indiana that in all cases of rescission of a contract the party rescinding must restore or offer to restore everything of value which he has received under the contract. It is further the law that where a tender back is necessary in order to effect a rescission of a contract of insurance, such tender to be sufficient must first be offered to the beneficiary named in the policy. It is further the law that a tender of money to be sufficient must first be offered to the party entitled to receive it and, if refused, the money must then be paid into court for his use and benefit.") (citations omitted). Because the parties do not address this issue, we do not consider it further.