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ATTORNEY FOR APPELLANT:

**C. RICHARD MARSHALL**  
Columbus, Indiana



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MELINDA ENGELKING,  
Appellant-Defendant,

vs.

JOHN T. COSBY,  
Appellee-Plaintiff.

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No. 03A01-1101-CC-17

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APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT  
The Honorable Jon W. Webster, Special Judge  
Cause No. 03D02-0809-CC-376

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**August 31, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary and Issue**

For many years, John T. Cosby grew and harvested hay on Melinda Engelking's farmland. In February 2007, Cosby seeded and fertilized the land in preparation for another hay season. In May 2007, Engelking left Cosby a telephone message that her son was going to cut the hay. Engelking's son harvested and sold all the hay that year. Cosby sued Engelking, alleging that Engelking breached their land use agreement by harvesting and selling the hay. The trial court rendered judgment in favor of Cosby and awarded him damages.

Engelking appeals, arguing that the trial court's findings of facts and conclusions thereon are unsupported by the evidence. Our review of the record reveals evidence that supports the findings and conclusions, and therefore we affirm the trial court's judgment.<sup>1</sup>

## **Facts and Procedural History**

The evidence most favorable to the trial court's judgment indicates that Cosby grows hay on approximately 200 to 250 acres of farmland, some of which he owns and some of which he rents from various individuals. Cosby has never had a written agreement with any of the owners from whom he has rented land. Engelking owns land in Bartholomew County and is one of the individuals with whom Cosby has had an agreement to farm land.

In the late 1960s, Engelking was married to Carl Prohaska, who owned farmland in Bartholomew County. In 1967 or 1968, with Engelking present, Cosby and Prohaska verbally agreed that Cosby could use about thirty-five acres of Prohaska's farmland to grow

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<sup>1</sup> By separate order, we deny Engelking's request for oral argument.

hay in exchange for a yearly payment of rent. Tr. at 27. Cosby dealt with Prohaska concerning the use of the farmland until 1980. In 1980, Engelking and Prohaska divorced, and as part of the divorce, Engelking received sole title to seventeen acres of the farmland. Also at that time, Prohaska gave written notice to Cosby that he was terminating their land use agreement. *Id.* at 9. Apparently, Prohaska gave or sold the remaining acres to his son, John Prohaska.

In 1980, Cosby approached Engelking and “asked her if she wanted to keep the *same* agreement *we’d* had all the years and she said yes.” *Id.* at 28 (emphases added). Thereafter, for the next twenty-five years, Cosby grew and harvested hay on Engelking’s seventeen acres and paid Engelking yearly rent, starting at \$650 and increasing at some point to \$750. Cosby seeded and fertilized Engelking’s land. Generally, Cosby cut hay in late June or July and again in September. He sold the majority of his hay in December and paid Engelking the rent at the end of the year. The hay Cosby grew on Engelking’s property was grown specifically to meet the requirements of a thoroughbred farm, with which Cosby had a contract to sell the hay.

On January 16 or 17, 2007, Engelking and Cosby met at his home, and he paid her the rent for 2006. *Id.* at 12. The rent payment was delayed because Cosby’s customer had wanted to wait until after January 1 to purchase the hay. Cosby had discussed the delay with Engelking, and she told Cosby that it was acceptable to pay the rent sometime in the first part of January. *Id.* At that meeting, Engelking did not tell Cosby that she did not want him to farm the fields in 2007. *Id.* at 13. However, they did discuss the upcoming summer, the

farmland, and its upkeep. Cosby asked Engelking about removing a tree that was leaning at a forty-five degree angle, and Engelking said “go ahead and cut it.” *Id.*

In the latter part of February 2007, Cosby put seed and fertilizer on Engelking’s land. Cosby lived nearby and checked on the land when he drove past it. Sometimes, he saw people riding through the fields on four wheelers and would “chase them down and catch them [and] tell them to stay off.” *Id.* at 16.

During the early part of 2007, Engelking called Cosby several times and left messages for him to call her, but she did not hear back from him. She also went to his house to talk to him, but he did not come to the door. Sometime during the week of May 20, 2007, Cosby received a message on his answering machine from Engelking informing him that her son, John, “needed the hay and was going to cut it.” *Id.* at 17. Cosby called Engelking and left a message on her answering machine that they “had a problem because that’s my hay.” *Id.* Cosby “waited around a little bit, not too long, and [] got in the truck and [] drove down to the field and John was just finishing up cutting the first field.” *Id.* Cosby said to John, “[W]hat the heck are you doing cutting my hay?” *Id.* John told Cosby that it was not his hay and he was cutting it. Cosby said, “[N]o I have this rented. I fertilized it and seeded it for this year and next year.” *Id.* at 17-18. Cosby then left because he was angry.

On September 22, 2008, Cosby filed a complaint against Engelking alleging as follows:

4. That in the late 1970’s, [Cosby] and [Engelking] entered into an oral agreement whereby [Cosby] would rent approximately 17 acres of farm ground from [Engelking] for the purpose of planting and growing crops and the

primary crop in question was hay. The parties acted pursuant to this agreement for all years since.

5. In early 2007, [Cosby] took all appropriate action for the normal and customary practice of renting this land for the 2007 growing season and took numerous actions to prepare the land for the 2007 growing season such as applying seed and various minerals and chemicals to the property.

6. As the time approached for the first cutting and harvest of hay from the land in the spring of 2007, [Engelking] and her agents entered the rented property and cut the hay, removed the same from the land and used and converted said hay to their own use in violation of the established practice and rental agreement between the parties. [Cosby] was prohibited from entering the property and to harvest and cut the hay which resulted from his investment and labor earlier in the year in the preparation of the ground for the 2007 season.

7. That [Engelking's] actions were in direct violation of the agreement between the parties and the established practice of the parties and was done without any prior notice to [Cosby].

8. As a result of [Engelking's] actions, the breach of the agreement and the deviation from the prior practice of the parties, [Cosby] suffered damages in the form of a loss of the investment made in early 2007 by applying seed and various chemicals and minerals to the land as well as the loss of the hay which was grown and the resulting profits from the sale of the hay. [Cosby], who operates a hay business, was forced to purchase hay from other sources to fulfill contracts with various buyers for the delivery of hay all of which was damaging to [Cosby's] business.

9. As a result of [Engelking's] actions, [Cosby] has suffered damages for which [Engelking] should be held responsible and [Engelking] should be required to compensate [Cosby] for his damages.

Appellant's App. at 2-3.

On August 10, 2010, a bench trial on Cosby's complaint was held. Engelking requested findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A). On August 31, 2010, the trial court issued its judgment, which provided in relevant part as follows:

## **II. Findings of Fact**

1. Sometime in 1967 or 1968, [Cosby] and [Engelking], then married to Carl Prohaska, entered into a verbal “agreement” whereby [Cosby] would plant, tend, and cut hay on real estate owned by [Engelking and Prohaska] [] in Bartholomew County, Indiana. There has never been any written agreement of any kind regarding this arrangement.

2. All was well through 2006 when [Cosby] paid [Engelking], divorced from Carl Prohaska since late 1980, the sum of seven hundred fifty dollars (\$750.00) on January 16, 2007 for the 2006 crop year. [Cosby] deferred paying [Engelking] until early 2007 because he had not sold some of the hay to one of his larger customers until the beginning of 2007.

3. In January, 2007, [Cosby] discussed with [Engelking], the need to remove a large tree which was leaning out over the hay [field].

4. In February, 2007, [Cosby] purchased seed and fertilizer and put it down on the snow covered ground in contemplation of the upcoming hay season. He checked the ground and the progress of his crop periodically thereafter. On occasion, he would see people riding four wheelers on the property and run them off.

5. In late May, 2007, [Engelking’s] son, John, cut the hay [Cosby] had planted. He got a total of four hundred twenty (420) bales. On the second cut in September, 2007, he got thirty-five (35) bales. John made the first cutting six (6) weeks early because the drought was ruining the growing grass and John wanted to salvage what he could.

6. [Cosby] claims damages of thirteen thousand eight hundred fifty-seven dollars and ninety-three cents (\$13, 857.93), as set forth on his Exhibit 1.

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11. [Engelking] contends she tried and tried, beginning in February 2007, to tell [Cosby] he could not cut hay in 2007. She tried repeatedly by telephone and personal visits, but never by personal letter or a letter from her attorney.

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### **III. Conclusions**

1. Clearly, from 1967 or 1968 through 2006, [Cosby] and [Engelking], or [Engelking's] former husband, by their course of dealing, custom, habit, and practice, engaged in an annual farm rental arrangement, where [Cosby] would pay [Engelking] a fixed sum of money to use [Engelking's] ground for the raising and cutting of hay. This occurred without a problem, for nearly thirty-eight (38) years.

2. Certainly, [Engelking] had the right to end the agreement at any time as did [Cosby], but after thirty-eight (38) years of doing things the same way, [Cosby] and [Engelking] could only assume if they heard nothing from the other, it was business as usual, a gentlemen's agreement if you will. [Engelking] could have provided written notice to [Cosby] so long as it was provided before he began to prepare the field for the 2007 season or if [Engelking] waited too long to do this, she could have allowed [Cosby] to harvest the 2007 hay and then end it in writing. She did neither, instead cutting and removing what was clearly [Cosby's] hay. [Engelking] is liable to [Cosby].

### **IV. Judgment**

Therefore, compensatory damages to [Cosby] are five thousand nine hundred seventy-four dollars and seventy-three cents (\$5,974.73) and [Cosby] is awarded a judgment for that sum plus court costs and post judgment interest as hereafter allowed by law.

*Id.* at 8-11 (footnote omitted). Engelking appeals.

### **Discussion and Decision**

#### ***Standard of Review***

Here, the trial court entered findings and conclusions as requested by Engelking.

When a party has requested specific findings of fact and conclusions thereon pursuant to Ind. Trial Rule 52(A), the reviewing court may affirm the judgment on any legal theory supported by the findings. In addition, before affirming on a legal theory supported by the findings but not espoused by the trial court, the appellate court should be confident that its affirmance is consistent with all of the trial court's findings of fact and the inferences drawn from the findings. In reviewing the judgment, we must first determine whether the evidence

supports the findings and second, whether the findings support the judgment. The judgment will be reversed only when clearly erroneous. Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. To determine whether the findings or judgment are clearly erroneous, *we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility.*

*Capps v. Abbott*, 897 N.E.2d 984, 986 (Ind. Ct. App. 2008) (quoting *Butler v. Shiphewana Auction, Inc.*, 697 N.E.2d 1285, 1287 (Ind. Ct. App. 1998)) (emphasis added).

In setting forth the standard for appellate review, *see* Appellant's Br. at 21-22, Engelking fails to acknowledge that the reviewing court must consider only the evidence favorable to the judgment, may not reweigh evidence, and is required to defer to "the opportunity of the trial court to judge the credibility of the witnesses." Ind. Trial Rule 52(A); *see also MacLafferty v. MacLafferty*, 829 N.E.2d 938, 941 (Ind. 2005) ("We recognize of course that trial courts must exercise judgment, particularly as to credibility of witnesses, and we defer to that judgment because the trial court views the evidence firsthand and we review a cold documentary record."). As will become apparent, this omission is significant because Engelking's arguments are based solely on the evidence favorable to her position.

Our standard of review is also affected by Cosby's failure to file an appellee's brief.

When the appellee has failed to submit an answer brief we need not undertake the burden of developing an argument on the appellee's behalf. Rather, we will reverse the trial court's judgment if the appellant's brief presents a case of prima facie error. Prima facie error in this context is defined as, "at first sight, on first appearance, or on the face of it." Where an appellant is unable to meet this burden, we will affirm.

*Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006).

### *I. Whether the Findings of Fact are Clearly Erroneous*

Engelking asserts that there is no evidence supporting findings 1 and 2. Finding 1 states that Engelking *and* her husband entered into a verbal agreement with Cosby in 1967 or 1968 whereby Cosby would plant, tend, and cut hay on their property. Finding 2 states that “[a]ll was well until 2006,” which Engelking contends erroneously links the time period before 1980 with that after. Engelking’s argument is essentially an invitation to judge witness credibility and reweigh the evidence. She dwells on the evidence that she presented at trial and draws our attention to what information Cosby did not provide, and she completely ignores the evidence that Cosby presented and the reasonable inferences arising therefrom.

Cosby testified that Engelking was present when the verbal land use agreement was adopted in 1967 or 1968. Tr. at 27. In addition, after Prohaska terminated the original agreement by providing Cosby with written notice, Cosby asked Engelking whether “she wanted to keep the *same* agreement *we’d* had all these years.” *Id.* at 28 (emphases added). This testimony supports a reasonable inference that Engelking was a party to the verbal land use agreement made in 1967 or 1968, was well acquainted with the terms of that agreement,

and agreed to extend the agreement on the same terms.<sup>2</sup> We conclude that findings 1 and 2 are not clearly erroneous.

## *II. Whether the Conclusions of Law are Clearly Erroneous*

Engelking next contends that the conclusions of law are clearly erroneous. Conclusion 1 states that Cosby and Engelking (or her former husband), “by their course of dealing, custom, habit, and practice, engaged in an annual farm rental arrangement” that “occurred without a problem, for nearly thirty-eight (38) years.” Appellant’s App. at 10. Engelking argues that the trial court failed to provide “its explanation of” the “annual farm rental arrangement.” Appellant’s Br. at 24. Engelking does not deny that, at least from 1981 onward, she and Cosby had an arrangement for Cosby to use the farmland to grow hay, nor does she deny that he cared for the land over those years by planting seed and fertilizing it and that there were no problems in carrying out their land use arrangement until 2006. As

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<sup>2</sup> In the section of her appellant’s brief titled “Understanding the Testimony and Evidence,” Engelking argues, “Had Cosby really thought that his pre-1981 relationship with Carl Prohaska automatically ‘rolled over’ each year, then, obviously and logically, he would not have even bothered to initiate contact and communications with Engelking!” Appellant’s Br. at 15. In making this statement, Engelking has completely overlooked the following facts: (1) she and Prohaska had divorced; (2) Prohaska was no longer an owner of the farmland; (2) Prohaska had given Cosby written notice that the pre-1981 lease was terminated; and (3) Engelking had become the sole owner of the farmland. Under the circumstances, Cosby had to and did initiate a new agreement with Engelking.

In addition, Engelking stresses the fact that Cosby did not assert that he had a “year-to-year farm lease” and focuses on the absence of evidence regarding the specific terms of the lease. *Id.* at 15-16. Engelking places too much emphasis on verbiage and disregards substance. Even if we were to ignore the years before 1980, Engelking and Cosby clearly had a land use agreement in effect for twenty-five years that worked well for them. Other than termination issues, the specific terms of the agreement were not in dispute at trial and are not relevant to the resolution of the issues on appeal.

such, the lack of a specific definition of “annual farm rental arrangement” does not make conclusion 1 clearly erroneous.<sup>3</sup>

Engelking also challenges the statement in conclusion 2 that “[Cosby] and [Engelking] could only assume if they heard nothing from the other, it was business as usual, a gentlemen’s agreement if you will.” Appellant’s App. at 10. She argues that the statement is conjecture and is unsupported by the evidence. We disagree.

We observe that Engelking does not challenge finding 3, which states that in January 2007, Cosby discussed with Engelking the necessity of removing a large tree from the field. She conveniently ignores the evidence that Cosby and Engelking met in January 2007 when he paid her the 2006 rent, and she did not tell him that she did not want him to farm the land in 2007. In fact, the evidence shows that they discussed Cosby’s request to cut down a tree in the field that upcoming summer and she gave him permission to do so. The only reasonable explanation for this discussion is that both parties expected that Cosby would be farming the land in 2007. If Engelking no longer wanted Cosby to use her land, then she would not have given him permission to cut down the tree, and there would have been no reason for Cosby to want to cut down a tree if he was not going to farm the land. After at least twenty-five years of doing business together, Engelking’s failure to inform Cosby at their January 2007 meeting that she did not want him use her land, in light of their discussion regarding the

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<sup>3</sup> Engelking also argues that Cosby’s complaint is “vague, nebulous, and non-specific in alleging or establishing any terms, details, and conditions of the alleged leasing agreement.” Appellant’s Br. at 16. Cosby’s complaint is sufficient to comply with Indiana’s notice pleading provision, which requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Ind. Trial Rule 8(A); *City of Clinton v. Goldner*, 885 N.E.2d 67, 74 (Ind. Ct. App. 2008).

land's upkeep, supports a reasonable inference that their agreement was to be continued or extended into 2007. Accordingly, the record contains supporting evidence and reasonable inferences arising therefrom, and we therefore conclude that conclusion 2 is not clearly erroneous.<sup>4</sup> Because Engelking presents no additional claims of error, we conclude that the trial court's judgment is not clearly erroneous.

Based on the foregoing, we affirm the trial court's judgment.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.

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<sup>4</sup> A substantial portion of Engelking's appellant's brief is devoted to statutory and case law regarding the principle that when a tenancy has an established term and expiration date, then no notice to quit is required to terminate it. *See* Appellant's Br. at 25-31. This principle is inapplicable to the facts of this case, where the parties had abided by an agreement over the course of *at least twenty-five years* and had actually discussed and agreed to certain aspects of the farmland's upkeep at the beginning of the year in question.