



Melissa Ungar appeals a trial court judgment denying her claims for monetary and injunctive relief against her neighbors, Don and Jean Hitchcock, for the alleged encroachment of their deck on her property. The dispositive issue is whether the trial court erred in concluding that Ungar failed to meet her burden of establishing that the Hitchcocks encroached on her property by constructing their deck in violation of the local zoning ordinance.<sup>1</sup> We affirm.

In May 1989, the Hitchcocks acquired title to property located at 412 West Meridian Street in Sharpsville (“Hitchcock property”). At that time, the Hitchcock property had a cement patio and a fence on its east side. Subsequently, the Town of Sharpsville (“Town”) passed a zoning ordinance requiring a six-foot setback. In April 1995, Ungar acquired title to adjacent property located at 102 North Grayson Street in Sharpsville (“Ungar property”). The Ungar property abuts the east side of the Hitchcock property.

In 2006, the Hitchcocks decided to replace the patio and fence with a deck. On April 19, 2006, the Hitchcocks applied to the town board for a building permit for “[d]eck connect[ing] to front porch and over existing patio.” Plaintiff’s Ex. 2. The application further specified that the deck would be “covering existing patio.” *Id.* A member of the

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<sup>1</sup> To the extent Ungar challenges as inconsistent the trial court’s conclusion that the Hitchcocks met the burden of proving adverse possession, we note that the trial court specifically phrased this conclusion in the alternative. *See* Appellant’s App. at 210 (“Even if this Court had found the existence of an encroachment, there is sufficient evidence to establish that the Hitchcocks had established title to the property in question by adverse possession”). Because we find no error in the trial court’s conclusion regarding encroachment, we need not address this issue.

Sharpsville Board of Zoning Appeals (“Zoning Board”), Roger Fouch, visited the property, and on April 25, 2006, the Town approved the Hitchcocks’ application. The Hitchcocks began construction on their deck. They placed the posts for the deck in the same holes as the posts for the preexisting fence. Tr. at 142.

On November 3, 2006, Ungar sent a written complaint to the Zoning Board, alleging that the Hitchcocks violated the minimum setback requirements in constructing their deck and demanding that the Zoning Board order the Hitchcocks to remove and relocate the deck. Defendant’s Ex. A. The Zoning Board heard Ungar’s complaint at its November 9, 2006 meeting. On November 10, 2006, the Zoning Board, acting through counsel Laura Clouser, issued a written response to Ungar concluding that “[t]here are no violations concerning the Zoning Board and therefore no action to be taken by the Board.” Plaintiff’s Ex. 3. Ungar did not appeal the Zoning Board’s decision.

The property line was surveyed in 1995, and Ungar did not seek to have it surveyed in 2006. Instead, she contacted Wyatt Johnson, the surveyor who had prepared the 1995 survey, in an effort to re-establish existing markers. Johnson stated that the 1995 survey had a one-to one-and-a-half-foot margin of error. Plaintiff’s Ex. 10; Tr. at 105. Tipton County Surveyor Jason Henderson reviewed Johnson’s survey and confirmed Johnson’s conclusion that the survey stakes could be off by one foot. *Id.* at 125.

On March 27, 2007, Ungar filed a complaint alleging that the Hitchcocks constructed their deck in violation of the zoning ordinance and that, as such, the deck encroaches on her property. She sought both monetary and injunctive relief for trespass and conversion. A

bench trial ensued on November 6, 2008, and both parties filed motions for findings of fact and conclusions thereon. On January 13, 2009, the trial court issued its findings and conclusions, ruling in favor of the Hitchcocks. Ungar filed a motion to correct error, which the trial court denied. This appeal ensued.

Ungar appeals a negative judgment, contending that the record does not support the trial court's findings and ensuing conclusion that she failed to meet her burden of establishing encroachment. A party appealing a negative judgment resulting from a bench trial "must establish that the evidence is without conflict and leads to but one conclusion and that the trial court did not reach that conclusion." *Krieg v. Hieber*, 802 N.E.2d 938, 943 (Ind. Ct. App. 2004). "The findings and judgment are not to be set aside unless clearly erroneous, and due regard is to be given to the trial court's ability to assess the credibility of the witnesses." *Fraley v. Minger*, 829 N.E.2d 476, 482 (Ind. 2005). Thus, we neither reweigh evidence nor judge witness credibility; rather, we consider only the evidence and reasonable inferences favorable to the judgment. *Bussing v. Ind. Dep't of Transp.*, 779 N.E.2d 98, 103 (Ind. Ct. App. 2002), *trans. denied* (2003). A judgment is clearly erroneous if the evidence fails to support the findings, the findings fail to support the judgment, or the trial court applies the wrong legal standard to properly found facts.<sup>2</sup> *Fraley*, 829 N.E.2d at 482.

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<sup>2</sup> We note that many of the trial court's findings state that witnesses testified to certain matters. As such, they are not proper findings of fact. *See Parks v. Delaware County Dep't of Child Servs.*, 862 N.E.2d 1275, 1279 (Ind. Ct. App. 2007) (stating that a finding of fact must indicate, not what someone said is true, but what is determined to be true, therefore requiring the trier of fact to adopt the witness's testimony before the content of such testimony is properly considered a finding of fact). However, as neither party has challenged the form of the findings, we address this issue no further.

First, Ungar challenges the trial court's findings concerning statements made to and by Zoning Board counsel Clouser. She cites finding number 18 as erroneously stating that board member Fouch told Clouser that "the setback requirements were inapplicable because the Hitchcock's patio meant the deck was grandfathered." Appellant's App. at 197-98. Clouser's testimony both implicitly and explicitly supports the trial court's finding. First, on cross examination, Clouser implicitly addressed the grandfathering issue when she stated that Fouch told her the "existing patio was already in place before the zoning ordinance was passed by the Town Board and that he had given [the Hitchcocks] permission to cover it with the deck." Tr. at 35. Moreover, when the Hitchcocks' counsel specifically asked Clouser if the term "grandfathering ... tailors with what you understand you were told" to constitute the basis for granting the Hitchcocks permission to build the deck over the existing patio, she responded affirmatively. *Id.* Finally, in her November 3, 2006 letter to the Zoning Board, Ungar herself admitted that Fouch and Smeltzer mentioned that the "grandfathering" of the deck meant the Hitchcocks were authorized to build all the way out to the property line. Defendant's Ex. A. The record indicates that because the patio existed prior to the ordinance, the setback requirement did not apply to the patio. Because the deck was built over the patio using the same post holes as the preexisting fence, it too was grandfathered and not subject to the setback requirement. Thus, the evidence supports these findings.

Ungar claims that the trial court engaged in "selective reading" in entering finding number 22, which incorporates portions of Clouser's November 10, 2006 response letter to Ungar. The entire letter, a mere seven lines in length, is incorporated as Plaintiff's Exhibit 3.

The only sentence redacted from finding number 22 is, “It is my opinion after reviewing the information that this matter is an entirely civil matter that you need to pursue on your own with a private attorney.” *Id.* Seemingly, Ungar argues that the redacted language contains a legal opinion that she has a valid claim against the Hitchcocks and that the trial court selectively edited it from finding number 22. We disagree and note the following: (1) the concluding language of Clouser’s letter plainly states that there are no violations concerning the Zoning Board and that they will therefore be taking no action; (2) Clouser testified that her investigation into the matter alleviated her initial concern that a zoning violation might have occurred; (3) Ungar’s own letter addresses other issues that would support Clouser’s statement that Ungar might pursue civil litigation, i.e., the Hitchcocks’ allegedly “rude and violent behavior including repeated harassment towards [her]self and family,” Defendant’s Ex. A; and (4) Ungar did not appeal the Zoning Board’s negative decision but chose instead to pursue civil litigation. Thus, the trial court did not ignore evidence in the record when it entered this finding.

To the extent Ungar challenges finding number 48, which addresses 1995 surveyor Johnson’s uncertainty as to the exact margin of error in pinpointing the property line, she asks us to reweigh evidence. Likewise, her challenges to findings 78, 82, 92, 98, and 102 are mere invitations to judge witness credibility.<sup>3</sup> We may do neither. Rather, the record supports the trial court’s conclusion that

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<sup>3</sup> These findings address evidence from various Hitchcock family members that encroachment did not occur.

[Ungar] received an unequivocal response from the [zoning] Board's counsel finding that there were no zoning violations .... [a]nd that since the Zoning Board has addressed this issued repeatedly (i.e. at the time of the Hitchcocks' application, at a hearing at the request of [Ungar], and in the written response of Ms. Clouser) and has never wavered from its position that there is no zoning violation, the Hitchcocks have never been afforded the opportunity to seek a variance from said Board, since no violation has ever been noted.<sup>4</sup>

Appellant's App. at 208.

In sum, the evidence and inferences most favorable to the judgment support the trial court's conclusion that Ungar failed to meet her burden of establishing that the Hitchcocks encroached on her property by constructing their deck in violation of the zoning ordinance. Accordingly, the judgment is affirmed.

Affirmed.

MAY, J., and BROWN, J., concur.

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<sup>4</sup> Because no encroachment occurred, the Hitchcocks neither trespassed nor committed conversion, and Ungar is entitled to neither monetary damages nor an injunction. Thus, we need not address these issues.