No. 91365-0

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

GEORGE LIGHTNER,

Respondent,

v.

CHAD SHOEMAKER and "JANE DOE" SHOEMAKER, husband and wife and the marital community comprised thereof,

Petitioners.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

When Respondent George Lightner bought his property back in 1987, he had unobstructed Marina and Birch Bay views. He also had covenants that unambiguously forbid maintaining trees of any kind above six feet absent permission from the Architectural Control Committee (ACC). With the cooperation of his neighbors, Lightner reasonably relied on those covenants to protect his beautiful views for nearly 20 years.

But then his most recent neighbors – contrary to the practice of every prior and surrounding neighbor – refused to trim their trees or otherwise continue accommodating Lightner's views. The ACC then failed to enforce its own rule that "owners should keep their trees and shrubs trimmed, de-limbed or topped so as not to infringe on neighbors[']] views." And the trial court found the covenants "unclear and ambiguous," failing to enforce them. Yet the trial judge also said that he would like to give Lightner relief, if only he could.

As the Unpublished Opinion correctly holds, the trial court failed to place special emphasis on an interpretation that protects the homeowners' collective interests. The covenants are clear and unambiguous. This Court should deny review, allowing the trial court to properly consider the facts under a correct covenant interpretation.

STATEMENT OF THE CASE

A. The Unpublished Opinion correctly states the facts.

The facts are correctly stated in the Unpublished Opinion (copy attached). It should be emphasized here, however, that the trial court entered extensive findings highly favorable to Lightner. *See* BA 4-13; CP 122-28 (copy attached). It should also be emphasized that George Lightner did not seek, at trial or on appeal, to have all of the Shoemakers' trees cut down to six feet. *See, e.g.*, BA 9-10. The Shoemakers' own expert testified that Lightner's views can be restored without damaging their trees. BA 10-11. And the trial judge wanted to rule for the Lightners, but thought he was not "empowered" to do so. BA 31 (quoting 7/26/12 RP 15-16).

B. The Unpublished Opinion correctly determined that the covenants are unambiguous, remanding for a hearing on whether the Shoemakers' trees are maintained in accordance with the original Owner's plan of development.

The Court of Appeals' Unpublished Opinion correctly holds that the following covenant paragraph is unambiguous:

> h) **Trees, shrubs.** No trees or natural shrubbery shall be removed unless approved in writing by the architectural control and maintenance committee, it being the intention to preserve natural growth, in accordance with the Owner's plan of development. No trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be placed, planted or maintained on any of the said property, nor shall any

> such tree, hedge, shrub or planting be allowed to grow in excess of such height, without written permission of the architectural control and maintenance committee.

Unpub. Op. at 6 (quoting Ex 4 at 10). Specifically (as relevant here) the first sentence provides that, in order to preserve the natural growth in accordance with the Owner's plan of development (the "Owner" being the original grantor) no trees may be *removed* without the ACC's written permission. *Id.* Thus, contrary to the Shoemakers' arguments, preserving natural growth "is not absolute," where trees must be maintained only in accordance with the original Owner's plan of development, and they may be removed with ACC permission. *Id.*

The Owner's plan of development was not introduced at trial. The appellate court therefore remanded to consider it, where "the reference to the owner's plan of development would have no purpose and would have been omitted if the intention was to preserve all natural growth everywhere on the property." Unpub. Op. at 7 (citing ***Ross v. Bennett***, 148 Wn. App. 40, 49, 203 P.2d 383 (2008); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.1 (2000)). This holding is consistent with a long line authority from this and other courts providing that no language should be rendered ineffective.

The second sentence – involving height restrictions – "is absolute," "applies to all plants," and is not restricted to placed or

planted trees, as the appellate court correctly glossed it (Unpub. Op. at 7):

> Trees, hedges, shrubbery, or plantings of any kind whatsoever in excess of six feet in height shall not be placed, planted, or maintained on any of the said property. Trees, hedges, shrubbery or plantings of any kind whatsoever whether placed, planted or maintained shall not be allowed to grow in excess of six feet in height. The architectural control and maintenance committee may waive these restrictions by written permission.

The trial court thus erred in accepting the Shoemakers' interpretation that "or maintained" applies only to placed or planted trees. *Id.* at 8. It plainly applies to all vegetation. *Id.* at 7. No other reading of this provision is reasonable. *Id.* at 7 n.6.

WHY THE COURT SHOULD DENY REVIEW

A. The appellate court properly remanded for consideration of whether the Shoemakers' obstructing trees are protected in the Owner's plan of development.

The Shoemakers try a novel approach to this appeal for the first time in their Petition: even though they never argued about the Owner's plan of development, and even though the trial court never saw or considered the Owner's plan of development, and even though the trial court erroneously misinterpreted an unambiguous covenant as "unclear and ambiguous," the Court of Appeals should have affirmed because Lightner failed to prove that their trees were *not* protected by the Owner's plan of development. Pet. at 12-15.

Aside from the obvious problems with requiring Lightner to prove a negative, the Shoemakers simply miss the point of appellate review: the appellate court reviewed the trial court's interpretation of the covenant *de novo* and found it in error *as a matter of law*. *See* Unpub. Op. at 5-8. This requires reversal, not affirmance.

Simply put, this Court cannot "affirm the trial court's decision that the Shoemakers' cedar trees do not violate the Covenants," where that ruling was based on a legal error in interpreting the covenants. Nor does the Shoemaker's primary argument cite, much less meet, any of this Court's review criteria. Review is unnecessary.

B. The Unpublished Opinion does not "usurp the authority" of the ACC or otherwise err.

The Court of appeals also did not "usurp" the ACC's authority. Petition at 15-19. As the Shoemakers are well aware, the Covenants specifically provide that an owner may bring a lawsuit where, as here, the ACC fails or refuses to take appropriate action (Ex 4 at 17):

> [I]n the event that the community club fails to take appropriate action for the enforcement of the covenants and restrictions hereof within a reasonable time after a violation or threatened or attempted violation is brought to its attention in writing, any person or persons then owning lots within the said property may take such steps in law or in equity as may be necessary for such enforcement. . . . The party prevailing in such enforcement proceeding whether in law or in equity shall have from his opponent such attorneys' fees as the court may deem reasonable.

Thus, Lightner had the express right to sue where, as here, he asked the ACC to act, and it told the Shoemakers to obey its rule:

> Trees or shrubs that infringe upon neighbors['] views are to be dealt with between neighbors. This is matter of good reason, judgment, and conscience, and is reciprocal between neighbors. **Lot owners should keep their trees and shrubs trimmed, de-limbed or topped so as not to infringe on neighbors['] views**.

Ex 5 at 21 (emphasis added); *see also* BA 7-8.

But when the Shoemakers rejected good reason, judgment, and conscience, the ACC did not – contrary to the Shoemakers' claim – make a "decision" that their trees do not violate the covenants. Petition at 16. Rather, *the Shoemakers sought permission to cut down all of their trees*, and the ACC refused to countenance their intemperate tactics. BA 8; Exs 16, 19, 20. Lightner again asked for ACC help, but received none. RP 91; Ex 21. He was thus free to sue the Shoemakers under the covenants. Ex 4 at 17.

The Shoemakers' claim that the ACC has ruled in their favor is as false as it is troubling. So are several of their other assertions at Petition 16-19. Suffice it to say here that the Shoemakers did not contend that the *trial court* had usurped the ACC's authority, so their claim that the appellate court did so is baseless at best. It also meets no review criterion. The Court should deny review.

RAP 18.1(j) REQUEST FOR ATTORNEY FEES

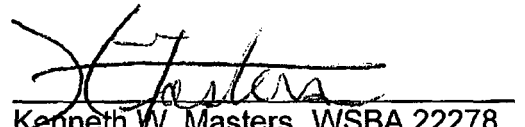
The appellate court held that neither party had yet prevailed due to the remand, but that "the attorney fee awards for trial and on appeal shall be made by the trial court upon resolution of the case on remand." (Unpub. Op. at 20 (citing ***Stieneke v. Russi***, 145 Wn. App. 544, 571, 190 P.3d 60 (2008); RAP 18.1(i) (appellate court may direct trial court to determine appellate fees)). Where the Court of Appeals awards fees and the petition is denied, this Court may award fees for answering the Petition. RAP 18.1(j). Lightner therefore asks this Court to permit the trial court to determine and award fees for answering the Petition if he prevails on remand.

CONCLUSION

The Shoemakers show no reason why this Court should grant review of the Unpublished Opinion. None of the review criteria is met. The trial court erred as a matter of law in finding the unambiguous covenants ambiguous. Remand is required. Review is unnecessary.

RESPECTFULLY SUBMITTED this 11th day of May, 2015.

MASTERS LAW GROUP, P.L.L.C.



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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **ANSWER TO PETITION FOR REVIEW**, postage prepaid, via U.S. mail on the 11th day of May 2015, to the following counsel of record at the following addresses:

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SCANNED 11

FILED IN OPEN COURT
6-7 2013
WHATCOM COUNTY CLERK
By Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHATCOM

GEORGE LIGHTNER,

Plaintiff,

vs.

CHAD SHOEMAKER & "JANE DOE" SHOEMAKER, husband and wife and the marital community comprised thereof,

Defendants.

NO. 11-2-00411-9

FINDINGS OF FACT & CONCLUSIONS OF LAW

THIS MATTER having come before the above-entitled Court for trial on July 24, 25 & 26, 2012; and the Court, having heard the testimony of the parties and their witnesses, having reviewed and considered the Exhibits admitted at trial, and having heard and considered the statements and arguments of counsel; now makes the following

FINDINGS OF FACT

1. The Court has Jurisdiction over the parties and over the subject matter of this suit.

2. Plaintiff GEORGE LIGHTNER, is a married individual who owns real property situated in WHATCOM County, Washington, which has a common street address of 8096 Comox Road, Blaine, Washington, 98230. Plaintiff and his wife acquired this property on April 15, 1987 by virtue of a Statutory Warranty Deed. This

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Deed was recorded in the office of the Whatcom County Auditor on May 5, 1987 under recording number 1571435. The legal description of the Property is as follows:

> LOT 31, Birch Bay Village, Division No. 15, as recorded in Volume 14 of Plats, Pages 124 and 125, Records of Whatcom County, Washington.

3. The legal description to Plaintiff's Statutory Warranty Deed specifically references that the title in and to the property was being granted subject to certain "Covenants, conditions, restrictions, easements and assessments," which included the following:

   (1) Those contained on the face of the said Plat of Birch Bay Village, Division No. 15; and

   (2) The Declaration of Protective and Restrictive Covenants, Recorded June 27, 1966, under Auditor's Recording No. 1009345

4. Defendant CHAD SHOEMAKER is the owner of certain real property situated in Blaine, Whatcom County, Washington which has a common street address of 8105 Chehalis Road, Blaine, Washington, 98230. Defendant acquired this property on February 4, 1999 by virtue of a Statutory Warranty Deed. This Deed was recorded in the office of the Whatcom County Auditor on February 8, 1999 under recording number 1990201220. The legal description of the Property is as follows:

> LOT 29, Birch Bay Village, Division No. 15, as as per the Map thereof, recorded in Volume 14 of Plats, Pages 124 and 125, Records of Whatcom County, Washington.

5. The legal description to Defendant's Statutory Warranty Deed specifically references that the title in and to the property was being granted subject to certain

> Covenants, conditions, restrictions, easements and assessments recorded under Auditor's file Nos. 1009345 and 920415029; Covenants, conditions and restrictions recorded file No. 1404207 . . ."

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5. There are certain "covenants, conditions and restrictions" (thereinafter referred to as "the Covenants") which impose certain restrictions on Plaintiff's and Defendants' properties. The instrument recorded under Auditor's file No. 1009345 is entitled "Declaration of Rights, Reservations, Restrictions and Covenants of Birch Bay Village."

6. The Covenants apply to both Plaintiff's and Defendants' properties, and the necessary privity has been demonstrated through documents and by admissions made in the context of this litigation.

7. Defendants were placed on notice that the Covenants did exist, and he should have been aware of the Covenants and know the content of the Covenants.

8. The Birch Bay Village Community Club is not a necessary party to this case as it has no stake in the outcome of this litigation.

9. Defendants' property is adjacent to Plaintiff's and situated to the Southeast. Plaintiff's property enjoys a territorial view of the Birch Bay Village, the Birch Bay Village marina, and Birch Bay. When the Plaintiff purchased his property, he enjoyed a virtually unobstructed view. Plaintiff and his wife purchased the property with the understanding that their view would be protected by the Covenants, and they relied upon what they believed the Covenants meant in their decision to purchase and develop their property. There are trees which grew on the Defendants' property near the boundary line common to the two properties. Before Defendants' purchase of Lot 29, Defendants' predecessor in title either topped these trees or granted permission to the Plaintiff to do so in order to preserve the view possessed by Plaintiff from Plaintiff's property.

10. The subject trees consist of (1) a row of Arborvitaes on the property line between the Lightner and Shoemaker properties; (2) an apple tree; (3) two Douglas firs; and (4) forty-two cedar trees.

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11. Since the date of Defendants' ownership, Defendants planted the Arborvitae along the common boundary line and have allowed the Arborvitae to grow in excess of six feet in height.

12. Defendants have also allowed the Cedar trees situated near the common boundary line and other trees planted on their property to grow in excess of six feet in height which obscure the Plaintiff's view.

13. Defendants have refused the requests from the Plaintiff that they trim the trees and shrubbery. Plaintiff's requests began in 2005. Plaintiff made these requests directly to Defendant and also requested assistance through the Birch Bay Village Homeowner's Association.

14. Paragraph 8(h) of the Covenants, located on page 10, sets forth certain restrictions as to the height of trees, hedges, shrubbery and plantings on Plaintiff's and Defendants' properties. This paragraph provides as follows:

> No trees or natural shrubbery shall be removed unless approved in writing by the architectural control committee, it being the intention to preserve the natural growth, in accordance with the owner's plan of development. No trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be placed, planted or maintained on any of the said property, nor shall such tree, hedge, shrub or planting be allowed to grow in excess of such height, without written permission of the architectural control and maintenance committee.

15. The terms of the Covenant are unclear and ambiguous.

16. The Covenant does not contain language requiring residents to maintain trees so as not to interfere with their neighbor's views. The Covenant does not provide for "view protection," "view preservation" or "view rights." There is no mention of view in the Covenant whatsoever. The clear intent of the Covenants is expressly stated in the first sentence of 8(h): "to preserve natural growth."

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17. The Architectural Rules and Regulations for Birch Bay Village were amended on or about December 17, 2009, to additionally provide that

> Trees or shrubs that infringe upon neighbors' views should be reduced or removed. This is a matter of good reason, judgment, and conscience, and is reciprocal between neighbors.

18. Paragraph 14 of the Covenants provides that in the event the Community Club fails or refuses to enforce violations of the Covenants, "any person or persons then owning lots within the said property may take such steps in law or equity as may be necessary for such enforcement." Said paragraph also provides that the prevailing party in such enforcement proceeding "shall have from his opponent such attorneys' fees as the court may deem reasonable."

19. The Covenants are legally enforceable and allow for suits for such enforcement between private individuals such as the Plaintiff and Defendant in this suit.

20. The Cedar trees that are growing into and obstructing Plaintiff's view are "naturally occurring trees" in the sense that they were not planted by humans, and are a natural species. The trees are common and it is the finding of the Court that the trees came from the parent trees or the larger trees which were already on the site.

21. Paragraph 8(h) of the Covenants provides as follows:

    a. The paragraph begins with the "No trees or natural shrubbery shall be removed unless approved in writing by the architectural control and maintenance committee . . ." The Court finds that this language is not relevant to the legal rights of the parties.

    b. The next phrase is important. "It being the intention to preserve natural growth." That is the expression of intent in the covenant, that the natural growth in the areas of Birch Bay Village need to be preserved and is to be preserved in accordance with the owner's

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plans of development, which is intended to preserve natural growth that exists independently of the construction work and improvements done on the property.

c. The operative sentence is "No trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be placed, planted, or maintained on any of said property." With respect to the words "placed or planted," while a homeowner may place or plant a shrub or a tree on the property, such shrub/tree may not be in excess of six feet in height or be allowed to grow in excess of six feet height.

d. With respect to the words "or maintained" in this sentence, the Court concludes that the reading of the Covenants that makes the Covenants most consistent internally is that the term "maintain" in paragraph 8(h) refers to the maintenance of planted or placed items.

e. There is no language regarding view preservation or view rights. The reading of the Covenants that makes the Covenants most consistent internally is that the term "maintain" in the Covenants in paragraph 8(h) refers to the maintenance of planted or placed items.

f. The Covenants do not provide for or even mention the issue of view protection and there is no enforceable right under the covenant to protect views, as the language is ambiguous.

g. Given the above, the Court interprets the paragraph 8(h) to mean that naturally occurring trees and shrubbery are to be preserved. Human-planted or placed items are limited to six feet at the

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inception, and they may not be allowed to become taller than six feet without approval. The term "maintenance" or determining "maintained" as in the Covenants addresses those planted and placed trees and shrubs, not those which are naturally occurring.

22. The Cedar trees that are at issue are natural trees. There is no credible evidence that anybody planted these trees. Those cedar trees are not subject to the six-foot limitation of the Covenants.

23. Defendants have allowed some of the Arborvitae to grow in excess of six feet in height.

24. The parties have incurred costs and attorney fees in this matter. Each side has requested attorneys fees based upon Paragraph 14 of the Covenants which provides, in part, that the prevailing party in such enforcement proceeding "shall have from his opponent such attorneys' fees as the court may deem reasonable." The Court has not granted injunctive relief with respect to the Cedar trees but has granted an Order with respect to the Arborvitae requiring the Arborvitae to be kept trimmed to no more than six feet in height. As a result, neither party has substantially prevailed and neither is entitled to an award of attorney's fees and costs.

HAVING MADE AND ENTERED its FINDINGS of FACT, the Court now makes and enters the following

CONCLUSIONS OF LAW

1. The Birch Bay Village Community Club is not a necessary party to this case.

2. The Covenants are legally enforceable and allow for suits for such enforcement between private individuals such as the Plaintiff and Defendants in this suit.

3. Paragraph 8(h) of the Covenants is the only paragraph that is relevant to this case. The Court interprets paragraph 8(h) of the Covenants and concludes as follows:

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a. The clear intent of the Covenants is expressly stated ub the first sentence of paragraph 8(h). The Court concludes that the phrase "It being the intention to preserve natural growth" is the expression of intent in the covenant, that the natural growth in the areas of Birch Bay Village to be preserved in accordance with the owner's plans of development which is intended to preserve natural growth that exists independently of the construction work and improvements done on the property.

b. The operative sentence is "No trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be placed, planted, or maintained on any of said property." With respect to the words "placed or planted," while a homeowner may place or plant a shrub or a tree on the property, such shrub/tree may not be in excess of six feet in height or be allowed to grow in excess of six feet height.

c. With respect to the words "or maintained" in this sentence, the Court concludes that the reading of the Covenants that makes the Covenant most consistent internally is that the term "maintain" in paragraph 8(h) refers to the maintenance of planted or placed items.

d. There is no language regarding view preservation or view rights. The reading of the covenants that makes the Covenants most consistent internally is that the term "maintain" in the Covenants in paragraph 8(h) refers to the maintenance of planted or placed items.

e. The Covenants do not provide for or even mention the issue of

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view protection and there is no enforceable right under the Covenants to protect views, as the language is ambiguous.

f. In making its interpretation, the Court has reviewed the Birch Bay Village Architectural Rules and Regulations. The interpretation of Birch Bay Village Community Club provides guidance in interpreting the Covenants. Birch Bay Village Community Club has never enforced the six foot height restriction for trees because it would be too difficult to differentiate between plantings and natural growth. Birch Bay Village Community Club therefore took the position is that protection of views is not mandatory, it is advisory. The Architectural Rules adopted by Birch Bay Village Community Club, anticipate that, consistent with the covenants, views may be infringed upon. There are two versions before the Court as exhibits. The 2006 version addresses views as follows: It again reiterates the intention is to preserve natural growth within the Village when it discusses trees, shrubs, et cetera, and removal of those trees and shrubs. It also provides that "Planted trees or shrubs that infringe upon neighbor's views may be reduced or removed," and then they fall back on, "This is a matter of good judgment, reason and conscience, and is reciprocal between the neighbors." The 2010 version is somewhat different. In this version, 2010, there is a specific paragraph for view infringement, which reads "Trees and shrubs that," interfere or "that infringe upon neighbor's views are to be dealt with between neighbors. This is a matter of good reason, judgment, conscience, and reciprocal between neighbors. Lot owners should keep their trees

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and shrubs trimmed, limbed or topped so as not to infringe upon neighbor's views." In both of these versions of the architectural rules and regulations, views should be preserved. It is not mandatory; it is advisory.

g. Given the above, the Court concludes paragraph 8(h) to mean that naturally occurring trees and shrubbery are to be preserved. Human-planted or placed items are to be limited to six feet at the inception, and they may not be allowed to become taller than six feet without approval. The term "maintenance" or determining "maintained" as in the Covenants addresses those planted and placed trees and shrubs, not those which are naturally occurring.

4. Six feet is not a reasonable height for natural growth, including cedar trees. Maintaining natural growth, such as cedar trees, at six feet would not be practical. In contrast to the expressed intent "to preserve natural growth," maintaining natural growth at six feet is harmful to the trees, and in some cases would kill them.

5. The Cedar trees that are at issue are not subject to the six-foot limitation of the Covenants.

6. This interpretation is consistent with the remainder of the covenants.

7. The Covenants have not been abandoned.

9. The Arborvitae planted by the Defendants are subject to the six-foot limitation of the Covenants and the Defendants must keep the Arborvitae trimmed at no more than six feet in height.

10. Neither party has substantially prevailed in this litigation. No attorney's fees award to ether party is reasonable. Their requests for attorney's fees shall be

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denied.

DONE IN OPEN COURT this 7th day of June, 2013

CHARLES R. SNYDER
Superior Court Judge

Presented By:

Law Offices of STEPHEN M. HANSEN, P.S.

STEPHEN M. HANSEN, WSBA #15642
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GEORGE LIGHTNER, Appellant, v. CHAD SHOEMAKER and JANE DOE SHOEMAKER, husband and wife and the marital community composed thereof, Respondent.	No. 70746-9-I DIVISION ONE UNPUBLISHED OPINION FILED: December 22, 2014

APPELWICK, J. — Lightner sued Shoemaker for injunctive relief when he refused to trim cedar and arborvitae trees on his property that obstruct Lightner's view. Both properties are subject to a covenant that restricts the removal of certain plants and trees and limits certain plants and trees to six feet in height. The trial court found this covenant ambiguous, interpreted it not to apply to naturally occurring growth, and applied the six foot limitation to Shoemaker's artificially planted arborvitae trees but not to his naturally occurring cedar trees. We conclude that the trial court erred in finding the covenant ambiguous. The covenant proscribes removal of only natural growth that was consistent with the owner's plan of development. It imposes a six foot height limitation on all trees and shrubs not protected under the owner's plan of development. No evidence was presented as to whether Shoemaker's trees were part of the owner's plan of development. We reverse and remand for further proceedings.

FACTS

George Lightner and Chad Shoemaker live in Birch Bay Village (Birch Bay). Birch Bay is a residential community with a golf course, a marina, lakes, community streets, and other common property. The marina is at the bottom of a hill, and there are several houses on the surrounding hillside. Several of the community's properties have sweeping views of the mountains and other community amenities. The community has many tall trees, some over 60 feet tall.

In 1966, Birch Bay Investors recorded the "Declaration of Rights, Reservations, Restrictions and Covenants of Birch Bay Village" (Covenants) applicable to every lot or parcel in the community. In addition to establishing covenants on all of the land, this document created the Birch Bay Village Community Club Inc. (BBVCC)[1] and the Architectural Control and Maintenance Committee (ACC).

Lightner purchased his property, lot 31, on April 15, 1987. At the time Lightner purchased the property, he was aware of covenants on the land. In fact, Lightner contends he would not have purchased the land without a covenant protecting his views. Lightner began construction on a home in 2002.

Shoemaker purchased his property, lot 29, on February 4, 1999. His property is adjacent to and downhill from Lightner's property. The Covenants apply to both the Lightner property and the Shoemaker property.

The primary subject of this appeal is paragraph 8(h) of the Covenants. Paragraph 8(h) imposes two distinct restrictions: one on the removal of certain trees or natural shrubbery, the other a six foot height limitation on some trees, hedges, shrubbery, or

[1] The BBVCC is essentially a homeowner association.

plantings in the community. It provides the ACC the authority to waive either of these restrictions in writing.[2]

When Lightner purchased his property, he enjoyed a virtually unobstructed view. The lot had a view of Birch Bay, the Strait of Georgia, the Birch Bay Marina, and Mount Baker. At the time of the purchase, there were trees growing on the neighboring property near the common boundary line. Many of these trees were well above six feet tall. The Shoemakers' predecessor in title either topped the trees on the boundary line or granted Lightner permission to do so in order to preserve Lightner's view.

The trees at issue consist of a row of arborvitaes on the property line between the Lightner and Shoemaker properties and an apple tree, two Douglas firs, and 42 cedar trees on the Shoemaker property. When Shoemaker purchased the property, all of the cedar trees at issue were already there. But, Shoemaker planted the row of arborvitae trees along the back property line himself, and the trees have grown to be over six feet tall. The cedar trees on the property have also grown in excess of six feet in height, obscuring Lightner's view.

Lightner made requests to trim the trees directly to Shoemaker and also requested assistance from the BBVCC. Since 2005, Shoemaker has denied the requests to trim the trees to six feet[3] or cut them down altogether. The BBVCC contacted Shoemaker

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[2] The Covenants can be amended by official action and approval of the lot owners. Paragraph 12 of the Covenants stipulates that the Covenants enumerated in paragraph 8 were to run with the land for 25 years and thereafter be automatically extended for successive periods of 10 years unless a majority of the then owners agree to extinguish or change the covenants and restrictions in whole or in part.

[3] The parties disagree as to whether Lightner always wanted Shoemaker to trim the trees to six feet or instead just to the Shoemakers' roof line. This dispute is immaterial to the interpretation of paragraph 8(h).

informing him of Lightner's wishes, but ultimately said, "This issue is between you and your neighbors." The BBVCC's position is that if the parties could not work it out as "good neighbors," the homeowners should take their dispute to court as the Covenants provide.[4] After another of Lightner's requests, BBVCC's general manager wrote Lightner informing him that paragraph 8(h) had never been used in deciding a tree issue in the history of Birch Bay. Further, he informed Lightner that the height of plantings and maintenance of trees, shrubs, and other vegetation is a matter of "'good neighbor/neighborhood'" policy and is strongly encouraged.

On February 15, 2011, Lightner sued Shoemaker for injunctive relief and enforcement of paragraph 8(h). Lightner sought a permanent injunction prohibiting Shoemaker from allowing any of his trees, hedges, shrubs, and/or plantings to grow to heights in excess of six feet per the terms of paragraph 8(h). Additionally, Lightner sought attorney fees and costs.

The trial court found that the Covenants had not been abandoned, a finding not challenged on appeal. It found that the Covenants were unclear and ambiguous. Construing the two restrictions together, the court found that the Covenants' clear intent was to preserve the natural growth. It concluded that the restrictions did not require the protection of views.

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[4] Paragraph 14 of the Covenants states, "[I]n the event that the community club fails to take appropriate action for the enforcement of the covenants and restrictions hereof within a reasonable time after a violation or threatened or attempted violation is brought to its attention in writing, any person or persons then owning lots within the said property may take such steps in law or in equity as may be necessary for such enforcement."

Based on those conclusions, the trial court interpreted paragraph 8(h) to require trimming of only "human-planted" trees or shrubs to six feet in height. Thus, it concluded that the arborvitae Shoemaker planted were subject to the six foot limitation. It determined that the cedar trees on Shoemaker's property were naturally occurring and were therefore not subject to the limitation in the Covenant.[5] Further, it concluded that neither party substantially prevailed in the litigation and that no attorney fee award to either party was reasonable. The trial court entered an order the same day memorializing its conclusions. That order did not address the merits of Lightner's request for injunctive relief.

Lightner filed a motion for reconsideration on June 17, 2013, arguing that one of the purposes of paragraph 8(h) is to preserve views in the community and that the Shoemakers' cedar trees are also subject to the Covenant's height restrictions. The trial court denied Lightner's motion. Lightner appeals the findings of fact and conclusions of law, the superior court's June 7, 2013 order, and the order denying his motion for reconsideration.

DISCUSSION

I. Plain Meaning of Paragraph 8(h)

The interpretation of the language in restrictive covenants is a question of law. Day v. Santorsola, 118 Wn. App. 746, 756, 76 P.3d 1190 (2003). Questions of law are subject to de novo review. Mariners Cove Beach Club, Inc. v. Kairez, 93 Wn. App. 886, 890, 970 P.2d 825 (1999). We must give effect to all the words, not read some out of the covenant.

[5] The trial court does not appear to have entered an order with respect to the apple tree or the Douglas fir trees.

See Ross v. Bennett, 148 Wn. App. 40, 49, 203 P.2d 383 (2008) (courts examine the language of the covenant and consider the instrument in its entirety); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.1 (2000) (a servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument).

Paragraph 8(h) provides two distinct restrictions, each of which is subject to waiver:

> Trees, shrubs. No trees or natural shrubbery shall be removed unless approved in writing by the architectural control and maintenance committee, it being the intention to preserve natural growth, in accordance with the Owner's plan of development. No trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be placed, planted or maintained on any of the said property, nor shall any such tree, hedge, shrub or planting be allowed to grow in excess of such height, without written permission of the architectural control and maintenance committee.

Though not a model of clarity, we do not find the restrictions to be ambiguous.

The first limitation, the removal restriction, restricts removal of natural growth. This sentence is perhaps more easily understood by considering its statement of intent ahead of its directive:

> It being the intention to preserve natural growth, in accordance with the Owner's plan of development, no trees or natural shrubbery shall be removed unless approved in writing by the architectural control and maintenance committee.

The sentence clearly states the drafter's intent. The intention to preserve natural growth is not absolute. Rather, it is conditioned by the next clause, "in accordance with the Owner's plan of development."

The record contains no evidence pertaining to the owner's plan of development. We thus cannot say whether the removal restriction protected only vegetation in existence at the time the Covenants were written, or whether it also protected natural growth—not yet in existence but contemplated to occur in the future—in designated areas of the

development. However, we can say that the reference to the owner's plan of development would have no purpose and would have been omitted if the intention was to preserve all natural growth everywhere on the property. See Ross, 148 Wn. App. at 49; RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.1 (2000). Consequently, we reject that reading of the removal restriction.

The second sentence, the height restriction, is a distinct restriction with three components:

> No trees, hedges, shrubbery or plantings of any kind whatsoever in excess of six feet in height shall be placed, planted or maintained on any of the said property, nor shall any such tree, hedge, shrub or planting be allowed to grow in excess of such height, without written permission of the architectural control and maintenance committee.

This sentence may be more easily understood by moving the negatives from the nouns to the verbs, replacing "such" with the specific vegetation to which it refers,[6] and stating the three propositions as separate sentences:

> Trees, hedges, shrubbery, or plantings of any kind whatsoever in excess of six feet in height shall not be placed, planted, or maintained on any of the said property. Trees, hedges, shrubbery or plantings of any kind whatsoever whether placed, planted or maintained shall not be allowed to grow in excess of six feet in height. The architectural control and maintenance committee may waive these restrictions by written permission.

In contrast to the removal restriction, this restriction is absolute. It applies to all plants. It does not state an exception for naturally growing plants. In fact, the word natural does not appear in this sentence.

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[6] In the second clause of paragraph 8(h), if the term "such" was read to include the phrase "in excess of six feet in height," the restriction on allowing trees to grow to over six feet would add nothing. If "such" was read to exclude the terms "placed, planted or maintained" the clause would still apply to natural as well as placed or planted trees and shrubs. No other reading of the language appears reasonable.

The trial court found that the words "or maintained" must apply to only "placed or planted" trees and shrubs. It then concluded that the height restriction applied to only placed or planted trees and had no application to natural growth. But, this interpretation is without merit. Retaining a naturally growing tree or shrub on one's property is maintaining that tree or shrub, just as much as is keeping a tree or shrub that a previous owner may have artificially placed or planted. It was error to read the words "or maintained" out of the covenant as a means to exempt natural growth from the height restriction.

Imposing the six foot height restriction might threaten the lives of the trees at issue here and necessitate their removal. But, the protection against removal of natural vegetation attaches to only the natural vegetation that was a part of the owner's plan of development—not to all natural growth on the property subject to the Covenants. The testimony suggested the cedar trees at issue were 29-37 years old.[7] Based on this testimony, these trees did not exist when the Covenants were recorded. Whether these trees are subject to protection under the removal restriction depends on the contents of the owner's development plan.

The plan is not in the record before us. Nonetheless, it is not inconceivable that the Owner's plan of development designated certain areas where natural vegetation—even natural vegetation not yet in existence but contemplated to occur in the future—was to be protected. Remand is necessary to allow the parties an opportunity to establish whether the cedar trees were part of the Owner's plan of development.

[7] This testimony was offered by Shoemaker's expert arborist. It was offered to prove that the cedar trees resulted from natural seeding rather than artificial planting. The ages of the trees were otherwise not specifically at issue at trial.

Based on our interpretation of paragraph 8(h), we find no error as to the conclusion that the arborvitae are subject to the six foot height limitation. Nor do we find any error as to the conclusion that paragraph 8(h) did not create view rights. The restrictions address vegetation and never mention views. The rules adopted by the ACC make it clear that everyone understands that trees may impair views and that views are important.[8] However, the fact that the Covenants grant the committee unfettered discretion to waive the restrictions in paragraph 8(h) is convincing evidence that no absolute view rights or easements were intended.

In light of the need for remand, we decline to consider whether the trial court erred when it failed to address the issue of a permanent injunction enforcing the Covenants between the parties. Lightner will have an opportunity to address the issue below.

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[8] Paragraph 8(h) is devoid of explicit "view protection" language, but the BBVCC acknowledged that the height of trees affects views within the community. On February 18, 1999 the BBVCC adopted the Architectural Rules and Regulations. Rule 12.11 governs "trees and shrubs." It states:

> No trees or shrubs, except natural willows, alders and cottonwoods, shall be removed unless approved in writing by the ACC. The intention is to preserve natural growth within the Village.
>
> . . . [T]he height of plantings and maintenance of trees, shrubs, and other vegetation is a matter of "good neighbor/neighborhood" policy and is strongly encouraged. . . . Planted trees or shrubs that infringe upon neighbors' views should be reduced or removed. This is a matter of good reason, judgment, and conscience, and is reciprocal between neighbors.

In July 2010, the architectural rules were revised. Those architectural rules include a similar provision for "view infringement." Rule 10.4.2 provides:

> Trees or shrubs that infringe upon neighbors [sic] views are to be dealt with between neighbors. This is a matter of good reason, judgment, and conscience, and is reciprocal between neighbors. Lot owners should keep their trees and shrubs trimmed, de-limbed or topped so as not to infringe on neighbors [sic] views.

II. Attorney Fees

A prevailing party may recover attorney fees if they are authorized by statute, equitable principles, or agreement between the parties. Wiley v. Rehak, 143 Wn.2d 339, 348, 20 P.3d 404 (2001). If neither party wholly prevails, then the party who substantially prevails is the prevailing party, a determination that turns on the extent of the relief afforded the parties. Transpac Dev., Inc. v. Oh, 132 Wn. App. 212, 217, 130 P.3d 892 (2006).

Paragraph 14 of the Covenants provides for attorney fees to the prevailing party in any action taken to enforce the Covenants and its restrictions. Based on its interpretation of paragraph 8(h), the trial court concluded that neither party substantially prevailed in the litigation. Consequently, it denied both parties' requests for attorney fees.

Both Lightner and Shoemaker argue that they are entitled to attorney fees on appeal under RAP 18.1. Lightner also argues that he is entitled to costs on appeal under RAP 14.2 and on remand.[9] RAP 18.1(i) authorizes this court to direct that the amount of fees and expenses be determined by the trial court after remand.

Neither party is the prevailing party on appeal. As a result, the attorney fee awards for trial and on appeal shall be made by the trial court upon resolution of the case on remand. See Stieneke v. Russi, 145 Wn. App. 544, 571, 190 P.3d 60 (2008) (finding that because the prevailing party was not yet determined, the court of appeals need not yet address the issue of fees); RAP 18.1(i).

[9] Paragraph 14 of the Covenant clearly provides that the prevailing party is entitled to attorney fees, but it does not say anything about costs. Lightner has provided no additional authority indicating that he would be entitled to costs below.

We reverse the trial court's application of the Covenants as to the cedar trees on the Shoemakers' property and remand to the trial court for further proceedings.[10]

WE CONCUR:

[10] Lightner assigns error to several conclusions of law and findings of fact. Additionally, he assigns error to portions of the findings of fact that he claims were mischaracterized and should have been conclusions of law. Because we reverse, we need not address these challenged findings and conclusions individually.

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ANSWER TO PETITION FOR REVIEW

Case: Lightner v. Shoemaker

Case Number: 91365-0

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THANK YOU.

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