70746-9

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No. 70746-9-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

GEORGE LIGHTNER,

Appellant,

v.

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

Respondents.

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

When George Lightner bought his property back in 1987, he had unobstructed, glorious Marina and Birch Bay views. He also had a covenant that said no one could plant, maintain, or grow any trees or other plants above six feet. It was perfectly reasonable for him to rely on that covenant to protect his beautiful views. It did so for nearly 20 years.

Then the Shoemakers refused to continue trimming the trees to protect his views. He tried every reasonable means short of a lawsuit to get his view back. But the ACC failed him. Then the trial court failed him – even though the Judge said that he wanted to help and that the Shoemakers could easily accommodate his views.

This Court can and should restore Lightner's views. There is no other rational reading of these covenants than that the six-foot height limitation is intended to protect views. Lightner has never asked anyone to cut all the trees down to six feet. He just wants his view back. He wants everyone to use good judgment, reason, and conscience, like the ACC rules say.

He would also appreciate an attorney fee award.

REPLY RE STATEMENT OF THE CASE

Lightner's opening statement of the case relied primarily on the trial court's unchallenged Findings of Fact, supported by numerous admitted Exhibits. BA 4-13. By contrast, aside from simply quoting the Findings at BR 13-17, the Shoemakers cite only one Finding. BR 6, citing F/F 10. The trial court did not agree with their version of the facts, which is irrelevant here. The trial court's unchallenged findings strongly support Lightner.

The Shoemakers nonetheless attempt to turn this into a "factual appeal," and even argue (in a footnote to their facts) that because Lightner prepared the Findings and Conclusions, he should not be heard to "complain" about them. BR 14 n.5. That, of course, is not and never has been the law. *See, e.g.*, ***Finnemore v. Alaska S.S. Co.***, 13 Wn.2d 276, 281, 124 P.2d 956 (1942) (citing and discussing ***Hughes v. Boundary Gold Placers, Inc.***, 193 Wash. 564, 76 P.2d 611 (1938) ("We do not think it can be said to be invited error for an unsuccessful litigant to present findings in accord with a previously announced decision of the court")). The Shoemakers fail to cite any authority supporting their position. BR 14 n.5. Controlling law is to the contrary.

REPLY ARGUMENT

A. The standard of review is *de novo*.

Covenant interpretation is a question of law reviewed *de novo*. BA 14-17. The Shoemakers fail to address this argument, tacitly conceding the point. BR 17-33. Review is *de novo*.

B. The trial court failed to apply the correct legal analysis in its covenant interpretation.

The trial court's covenant interpretation violates the most basic cannons of construction. BA 17-28. The trial court's legal analysis essentially disregards 99.99% of the covenants, reducing their entire purpose to a sentence fragment. *Id.* Its "Findings" 15, 16, 21 and 22, are actually erroneous conclusions of law. *Id.* The view covenant unambiguously forbids "trees . . . of any kind whatsoever in excess of six feet" from being "maintained" or "allowed to grow in excess of such height" without ACC permission. BA App. A. The ACC thus expressly forbids view infringement. BA App. C ("Lot owners should keep their trees and shrubs trimmed, de-limbed or topped so as not to infringe on neighbors[']] views"). The trial court failed to "place special emphasis on arriving at an interpretation that protects the homeowners collective interests.'" ***Riss v. Angel***, 131 Wn.2d 612, 623-24, 934 P.2d 669 (1997) (internal quote marks and citation omitted).

The Shoemakers' first response is apparently to concede (if tacitly) that the covenants are not "unclear and ambiguous." BR 19-20. They do so by noting that the "context rule" applies equally to clear and unambiguous covenants, citing ***Roats v. Blakely Island Maint. Com'n, Inc.***, 169 Wn. App. 263, 274, 279 P.3d 943 (2012). *Id.* Based on this truism, they argue that "extrinsic evidence" supports the trial court's interpretation of the covenants. *Id.*

But the trial court made no findings supporting the Shoemakers' factual allegations regarding "intent." Indeed, as the Shoemakers correctly note, this Court reviews *the findings* from a bench trial for substantial evidence. BA 18 (citing ***Day v. Santorsola***, 118 Wn. App. 746, 755, 76 P.3d 1190 (2003), *rev. denied*, 151 Wn.2d 1018 (2004)). It does not make new findings. The Shoemakers cite no findings supporting their assertions.

Beyond that, simply repeating the trial court's untenable reading of the covenants – limiting their entire meaning to a sentence fragment – does not render that reading tenable. BR 20. The Shoemakers fail to address Lightner's key point that the trial court's covenant interpretation is legally incorrect. BA 17-28.

The Shoemakers assert a *non sequitur*: "Lightner assigns error to these findings and conclusions, but provides no meaningful

challenge to the substantial evidence supporting them." BR 21 (citing ***Norcon Builders, LLC v. GMP Homes VG, LLC***, 161 Wn. App. 474, 497, ¶ 36, 254 P.3d 835 (2011) (re: waiving challenges to findings)). One cannot challenge legal conclusions by arguing about substantial evidence. Literally *none* of Lightner's challenges are to findings *qua* findings, as the opening brief plainly states. *See, e.g.*, BA 17-18. The Findings support Lightner.

The Shoemakers contend that the trial court "found that the term 'maintained' in the covenant was 'questionable' in light of the expressed objective of fostering natural growth," "so the court has to figure out what was the intent at the time that was created." BR 21 (citing 7/26 RP 9). No such written finding exists. Here is what the Judge actually said orally:

> The questionable language ***or that which is difficult to deal with*** is where it says "or maintained." Does that mean only the maintenance and maintaining [*sic*] of placed and planted shrubs, or does it mean the maintenance of anything that exists on the lot? And so the Court has to figure out what was the intent at the time that that was created.

7/26 RP 9 (emphasis added).

Lightner's point is that courts do not "deal with" "difficult" language by ignoring it. Nor do they re-write covenants. *See, e.g.*, BA 14-17 (citing, *inter alia*, ***Jensen v. Lake Jane Estates***, 165 Wn.

App. 100, 105, 267 P.3d 435 (2011) (unless covenants clearly demonstrate a contrary intent, courts give words their ordinary, usual, and popular meaning); ***Viking Props, Inc. v. Holm***, 155 Wn.2d 112, 120, 118 P.3d 322 (2005) (courts will not interpret covenants to defeat their plain and obvious meaning); ***Green v. Normandy Park Riviera Section Cmty. Club, Inc.***, 137 Wn. App. 665, 683, 151 P.3d 1038 (2007) (courts favor covenant interpretations that avoid frustrating owners' reasonable expectations); ***Hollis v. Garwall, Inc.***, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999) (court may not vary, contradict, or modify the written covenant). The Shoemakers ignore this key point.

The Shoemakers attempt to turn the tables, claiming that Lightner asks this Court to look solely at one sentence (instead of looking at just a sentence fragment, as the trial court did). BR 22. That is not now and never has been Lightner's argument. On the contrary, Lightner has always asserted that paragraph 8(h), read in its proper context, plainly and unambiguously says that "No trees . . . of any kind whatsoever in excess of six feet in height shall be . . . maintained on any of the said property, nor shall any such tree . . . be allowed to grow in excess of such height, ***without written***

permission" of the ACC. BA App. A (Ex 4 at 10) (emphasis added). Nothing in the covenants contradicts this plain language.

But the emphasized portion of this plain language contradicts the Shoemakers' ongoing attempts to re-cast Lightner's action as an all-or-nothing, top-every-tree-at-six-feet demand, which Lightner did not ask for at trial, and does not ask for here. BA 9-11, 28-31. Nothing in the covenants remotely suggests that this is an either/or proposition. Rather, they expressly give the ACC the power to permit growth above six feet as it sees fit, which it plainly has done. BA App. A. The very fact that the covenants recognize the ACC's power to make such decisions belies the Shoemakers' claims.

The Shoemakers again argue that "the homeowners' collective interests" are fully expressed in the phrase, "to preserve the natural growth." BR 22. But that is not what the covenant says. Rather, it says that trees and natural shrubbery shall not be *removed*, so as to "preserve natural growth." BA App. A. Thus, the intent to preserve natural growth is limited to prohibiting removal. And even that limited intent is not absolute, as the ACC can give written approval to remove even natural growth. *Id.* Indeed, the ACC expressly requires owners to "keep their trees and shrubs trimmed,

de-limbed or topped so as not to infringe on neighbors[']] views." BA App. C. There is no evidence of an intent to allow unlimited growth.

Although the Shoemakers have expressly waived their cross-appeal, they nonetheless attempt to challenge the trial court's ruling that the covenant has not been abandoned, in the guise of raising an alternative ground to affirm. BR 23-24; CP 131 (C/L 7, "The Covenants have not been abandoned"). Of course, they prove too much: if the covenant had been abandoned, the Shoemakers could not assert their "natural growth" claim.

In any event, there are no *findings* suggesting that the trial court's non-abandonment *conclusion* is incorrect. As noted above, the Shoemakers make assertions about the facts with which the trial court simply did not agree. And in light of the ACC's express regulation requiring homeowners to "keep their trees and shrubs trimmed, de-limbed or topped so as not to infringe on neighbors[']] views" (BA App. C) the owners plainly have not abandoned this covenant. The trial court correctly rejected this claim.

The Shoemakers also defend the trial court's erroneous conclusion that the covenants do not protect views. BR 24-29. But

they do. *See, e.g.*, BA 20-24.[1] In particular, this Court has noted that "there is no apparent reason to impose restrictions on trees except to protect views." ***Saunders v. Meyers***, 175 Wn. App. 427, 442, 306 P.3d 978 (2013). The trial court's finding that the numerous height restrictions throughout the covenants do not protect views simply because they do not use the word "view" defies legal precedent and common sense.

The Shoemakers attempt to distinguish ***Saunders*** on the ground that the "stated intent of the covenant in *Saunders* was to 'protect views'." BR 25 (citing ***Saunders***, 175 Wn. App. at 442, ¶ 34). But the ***Saunders*** covenants said no such thing. BA 23. While the word "view" appeared in that ambiguous covenant, protecting views was the only possible reason for restricting tree height, so its intent was to protect views. 175 Wn. App. at 442, ¶34. Here, no one has provided another reason for these height restrictions. The trial court erred in finding that the height-restricting covenants do not protect views, essentially rendering the restrictions meaningless.

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[1] Citing and discussing various portions of the covenants protecting views, and ***Bauman v. Turpen***, 139 Wn. App. 78, 88-89, 160 P.3d 1050 (2007); ***Foster v. Nehls***, 15 Wn. App. 749, 551 P.2d 768 (1976); ***Jensen***, 165 Wn. App. at 105; and ***Lakes at Mercer Island Homeowners Ass'n v. Witrak***, 61 Wn. App. 177, 179, 810 P.2d 27 (1991).

See, e.g., ***Mayer v. Pierce Cnty. Med. Bureau***, 80 Wn. App. 416, 423, 909 P.2d 1323 (1995) (courts disfavor interpretations that render any provision meaningless (citing ***Newsom v. Miller***, 42 Wn.2d 727, 731, 258 P.2d 812 (1953))).

The Shoemakers instead argue that restrictions on the height of buildings may serve other purposes. BR 26-27 (discussing ***Day***, 118 Wn. App. 746). This may be true, but it is irrelevant. ***Day*** did not involve a finding like the one the trial court entered in this case:

> [Lightner] enjoys a territorial view of the Birch Bay Village, the Birch Bay Village marina, and Birch Bay. When [he] purchased his property, he enjoyed a virtually unobstructed view. [Lightner] 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 [Shoemakers'] property near the boundary line common to the two properties. Before [Shoemakers'] purchase of Lot 29, [their] predecessor in title either topped these trees or granted permission to [Lightner] to do so in order to preserve the view possessed by [Lightner] from [his] property.

CP 124 (paragraphing altered for readability). There is no reason to disrupt Lightner's vested interests that had been honored for nearly 20 years before the Shoemakers destroyed them. The height restrictions in these covenants protect Lightner's views.

The Shoemakers also try to distinguish ***Foster v. Nehls***, *supra*, but on an odd ground. BA 28 (citing 15 Wn. App. 749). They suggest that ***Foster*** "is questionable authority" because it rests on "evidence from the original planner and developer" that the height restrictions were intended to protect views, which the Shoemakers claim is contrary to ***Hollis***, *supra.* BR 28. They misread both ***Foster*** and ***Hollis***. A drafter's own testimony about the intent he expressed in the covenants is admissible extrinsic evidence where, as here, it explains, but does not alter or add to the words used in the covenant. *See, e.g.*, ***Hollis***, 137 Wn.2d at 695-97 (emphasis added):

> Under *Berg* . . . extrinsic evidence may be relevant in discerning that intent, where the evidence gives meaning to words used in the contract.[2]
>
> ...
>
> [But the] interpretation suggested by Garwall would require this court to redraft or add to the language of the covenant. Under *Berg*, the extrinsic evidence offered would not be admissible ***for this purpose***. Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written.

Nothing in ***Hollis*** renders ***Foster*** questionable authority.

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[2] Citing ***Nationwide Mut. Fire Ins. Co. v. Watson***, 120 Wn.2d 178, 189, 840 P.2d 851 (1992).

Lightners' (and other owners') testimony about purchasing property in reliance upon view covenants, and about other neighbors' respect for those view covenants, was admissible for purposes of showing the intent of the owners.[3] This is relevant because the trial court was required to "place special emphasis on arriving at an interpretation that protects the homeowners' collective interests." ***Riss***, 131 Wn.2d at 623-24. Nothing in that testimony attempted to redraft or alter anything in the covenants. The covenants expressly limit the height of all types of trees, and the ACC properly reads those restrictions to require view protection. BA App. A & C. Any other reading renders the tree-height restrictions meaningless.

C. A legally correct interpretation would enforce the view covenants and rules, using good judgment, reason, and conscience.

In sum, a fair reading of the covenants is that natural growth cannot be removed without permission and that no trees may be permitted to grow or maintained above six feet without permission. BA App. A. Relying on this plain language, the ACC has promulgated several relevant rules (BA App. C):

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[3] To the extent that the Shoemakers are attempting to challenge the trial court's findings at BR 28-29, they did not object to the admission of this testimony at trial, and have waived their cross appeal. Their challenge is unpreserved, and the unchallenged findings are verities here.

encouraging planting and maintaining trees and shrubs;

prohibiting removing a tree with a trunk greater than 19 inches in circumference (six inches in diameter) without permission;

allowing removal of certain types of trees without permission (including willows, alders, and arborvitae);

imposing fines for unauthorized removals;

prohibiting "**VIEW INFRINGEMENT**";

encouraging neighbors to use good reason, judgment, and conscience regarding their trees; and

requiring owners to "keep their trees and shrubs trimmed, de-limbed or topped so as not to infringe on neighbors[']views."

These sound rules are firmly grounded in the covenants. BA 28-31.

Yet the Shoemakers argue that the architectural rules "cannot and do not grant view protections that do not exist in the covenants." BR 29-32. Lightner might agree about the architectural rules, which do not purport to grant new view protections, but rather enforce view protections long granted in the covenants. But he cannot agree about the covenants, which created a Community Club charged to enforce the owners' rights and responsibilities "for the purpose of maintaining the desirability" of Birch Bay Village, "and to establish suitable use and architectural design." Ex 4 at 1-2, ¶¶ b. & c. The Club therefore created the ACC, charging it to "create and maintain an aesthetically desirable community," including (among other

things) "[p]reservation of the natural environment." Ex 5 at 6. Pursuant to this charge, the ACC promulgated the rules discussed above, including that owners should "keep their trees and shrubs trimmed, de-limbed or topped so as not to infringe on neighbors[']views." BA App. C. The Shoemakers just misread the covenants.

The Shoemakers falsely assert that the trial court "found that the architectural rules cannot support an interpretation that adds view protection." BR 29. No such finding exists. Rather, the court briefly quoted one rule in its findings (CP 126, F/F 17) and then discussed the rules in a single, lengthy conclusion (CP 130-31, C/L 3.f.). The trial court correctly concluded that the "interpretation of Birch Bay Village Community Club provides guidance in interpreting the Covenants." CP 130, C/L 3.f. But rather than taking the ACC's rule prohibiting view infringement at face value, the court concluded that, while in both "versions of the architectural rules and regulations, views should be preserved," this "is not mandatory; it is advisory." CP 131, C/L 3.f.

Yet there can be no doubt that the rules promulgated by the homeowners' representatives are relevant and admissible on questions of covenant interpretation: they demonstrate the homeowners' subsequent behavior based on the covenants, as this

Court recently explained in a case the Shoemakers cite in a different context, ***Roats***, 169 Wn. App. 263. There, similar to the Shoemakers' claim that the covenants do not protect views because they do not use the word "view," the Roats argued that their homeowners association did not have the authority to run a marina because the covenants (and the correlated Bylaws and Articles of Incorporation) did not use the word "marina." 169 Wn. App. at 277-78, ¶ 29. Rejecting that claim, this Court noted that the covenants – which, like the ACC rules at issue here, were adopted long after the founding documents – are relevant, "correlated documents" because they show the subsequent conduct of the owners in reliance on the enabling founding documents. *Id.* at 278-83 ("we interpret [the] governing documents collectively as 'correlated documents' and consider extrinsic evidence in determining the parties' intent as demonstrated by those documents"). The ACC rules – like the behavior of the many Birch Bay Village homeowners who trim their trees to protect their neighbors' views – plainly show that the homeowners interpret the covenants to protect views.

The Shoemakers falsely assert that the covenants can be amended to "change (but not increase) the requirements or burdens thereof," only "with the written consent of 66-2/3% of the owners."

BR 30 (citing Ex 4, § 15). Again, the Shoemakers misread the covenants (Ex 4, § 15 at 17)):

> The Owner reserves the right to amend this Declaration of Rights, Reservations, Restrictions and Covenants for any purpose that may change (but not increase) the requirements or burdens thereof with respect to any purchaser or his assignee,

This portion of § 15 says that *the Owner itself* may amend the Covenants at any time, if it does not increase the burdens. *Id.* Then there is a proviso:

> provided that such amendment may be made with respect to any provision, term or condition, without limitation, provided 66-2/3% of all of the then purchasers of any lot . . . consent thereto in writing . . . .

Id. Contrary to the Shoemakers' assertion, this portion says that 66-2/3% of the then-owners can make any sort of change, including increasing the burdens. Nothing in this provision – or anywhere else in this record – says that the owners cannot increase their burdens.

More importantly, nothing in the record says that now – after authority has been handed over to the Community Club under covenant § 14 (*see* Ex 4) – a 66-2/3% vote is still required to change the covenants, much less to promulgate a rule based on the covenants. Because the Shoemakers never argued to the trial court that the ACC lacked authority to promulgate rules prohibiting view infringement, there are no findings or conclusions on the subject, and

it simply was not litigated. While this Court may affirm on alternative grounds, that ground must be supported by the record. *See, e.g.*, RAP 2.5(a) ("A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground"). There is no record supporting the Shoemakers' argument.

In any event, their argument is irrelevant: the ACC rules prohibiting view infringement are directly and appropriately based on the covenant prohibiting maintaining trees above six feet. These rules proffer a moderate approach based on good reason, judgment, and conscience. This Court may and should enforce them.

D. The Court should reverse, permit the trial court to award Lightner fees as the prevailing party, award him fees on appeal, and deny the Shoemakers' fee request.

The Shoemakers agree that the prevailing party is entitled to fees under the covenants. BR 32 (citing Ex 4). Since they should not prevail, they should not receive a fee award. Moreover, the trial court concluded that there was no prevailing party, so if this Court simply affirms, it should not award fees to either party. *See, e.g.*, ***In re Estates of Jones***, 170 Wn. App. 594, 612-13, 287 P.3d 610 (2012) (no prevailing party = no fees).

The Shoemakers assert (in a footnote) that Lightner's request for fees in the trial court is "inadequately briefed" because it is "a one-line statement." BR 32 n.7. But Lightner devoted a section of his opening brief to his request for fees, citing – and even quoting – the applicable attorney fees provision, and citing relevant authority. BA 32. Nothing more is required. RAP 18.1(b). Indeed, the Shoemakers concede that the prevailing party is entitled to fees. BR 32 (citing ***Wiley v. Rehak***, 143 Wn.2d 339, 348, 20 P.3d 404 (2001)). Lightner's request is not inadequate simply because it does not state the obvious: if we win, we prevail. This Court should award Lightner fees, here and in the trial court.

CONCLUSION

For the reasons stated, this Court should reverse and remand for entry of an injunction enforcing the covenants and rules and awarding Lightner fees as the prevailing party. It should also award Lightner fees on appeal.

RESPECTFULLY SUBMITTED this 30th day of June, 2014.

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CERTIFICATE OF SERVICE BY MAIL

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