No. 91365-0

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 70746-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GEORGE LIGHTNER,

Respondent,

vs.

CHAD SHOEMAKER and BILLIE SHOEMAKER, husband and wife and the marital community comprised thereof,

Petitioners.

PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

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A. Identity of Petitioners.

Petitioners Chad and Billie Shoemaker were the respondents in the Court of Appeals and defendants in the trial court.

B. Decision Below.

The Shoemakers seek review of Division One of the Court of Appeals' decision remanding for further fact-finding to determine whether the Shoemakers' cedar trees were subject to a six-foot height restriction under Covenants that do not provide view protection. (Appendix A) The Court of Appeals denied the Shoemakers' timely motion for reconsideration on January 26, 2015. (Appendix B)

C. Issues Presented for Review.

1. Plaintiffs claiming violation of covenants bear the burden of proving the breach. Did Division One err in remanding for further fact-finding when the plaintiff failed to present any evidence that the Shoemakers' mature cedar trees are subject to a six-foot height restriction under the "Owner's plan of development"?

2. A decision made by a committee authorized by the covenants to make decisions on behalf of a self-governing homeowner's association is binding unless made unreasonably or in

bad faith. Does Division One's decision remanding for further fact-finding to determine whether the Shoemakers' trees are protected from removal by the Owner's plan of development fail to give appropriate deference to the Committee's previous unchallenged decision prohibiting removal of the Shoemakers' trees?

D. Statement of the Case.

1. The parties live in a community governed by Covenants that describe the "Owner's plan of development" as "preserv[ing] natural growth." The removal of trees is prohibited absent approval from the Homeowner Association's Architectural Committee.

Petitioners Chad and Billie Shoemaker ("the Shoemakers") are the adjacent downhill neighbors of George Lightner ("Lightner") in Birch Bay Village ("Birch Bay") in Whatcom County. (*See* RP 55, 103; Exs. 1, 3, 35; Finding of Fact (FF) 9, CP 124) The properties within Birch Bay are governed by a Declaration of Rights, Reservations, Restrictions and Covenants of Birch Bay Village ("the Covenants") recorded on June 27, 1966. (Ex. 4)

The Covenants prohibit the removal of "trees or natural shrubbery" unless approved in writing by the architectural control and maintenance committee. (Ex. 4, § 8(h)) However, the Covenants also provide that "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:"

> 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.

(Ex. 4, § 8(h))

The Covenants describe the "Owner's plan of development" as intending "to preserve natural growth." (Ex. 4, § 8(h)) Whether trees are protected from removal under the Owner's plan of development is determined by the architectural control and maintenance committee. (Ex. 4, § 8(h): "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.") The Owner's plan of development to "preserve natural growth" and vesting the authority in the architectural committee to determine which trees are protected from removal was restated in the original Architectural Rules and Regulations ("the architectural rules") adopted by Birch Bay's

Board of Directors in 1999,[1] which had as one of its objectives "to preserve the natural environment." (Ex. 32, §§ 1.4.2, 12.11; *see also* Ex. 5, §§ 1.1(e), 10.4)

The 1999 architectural rules distinguished between "natural growth" and "plantings" by providing that only "*planted* trees or shrubs that infringe upon neighbors' views should be reduced or removed." (Ex. 32, § 12.11, emphasis added) Consistent with the "Owner's plan of development" "to preserve natural growth," Birch Bay is described as a "beautiful wooded community" with "trees everywhere," hundreds of which are over 60 feet tall. (RP 115, 158; Exs. 26, 27, 28, 29, 36)

2. Lightner demanded the Shoemakers reduce their cedar trees to accommodate Lightner's views, citing a provision in the Covenants that limits the size of trees to six feet.

Lightner purchased his lot in 1987, but has never lived on the property. (RP 53, 55-56) According to Lightner, he believed his property was entitled to views under the Covenants. (RP 57) However, nothing in the Covenants describes view protection, provides for view preservation, or grants the right to a view. (*See* Ex. 4) The first reference to "views" is in the 1999 architectural rules adopted

[1] It is not clear from the record whether any architectural rules predated those adopted in 1999.

12 years after Lightner purchased his lot, which stated that only "*planted* trees or shrubs that infringe upon neighbors' *views* should be reduced or removed." (Ex. 32, § 12.11, emphasis added) The architectural rules adopt a "good neighbor/neighborhood policy," stating that tree trimming should be a matter "of good reason, judgment, and conscience, and is reciprocal between neighbors." (Ex. 32, § 12.11; *see also* Ex. 5, § 10.4.2)

The Shoemakers purchased and moved into their home in Birch Bay in 1999. (Ex. 3) There were forty-five trees on the Shoemaker lot that were mostly cedar trees that pre-existed their ownership. (*See* RP 118, 121; FF 10, CP 124) These trees "were all at least 20 feet tall" at the time the Shoemakers purchased the property. (RP 118) "Two big cedar trees" that existed on the parties' properties in 1987 when Lightner purchased his property were the "parent trees" to the Shoemakers' cedar trees. (RP 169)

Lightner began demanding that the Shoemakers "cut down" all of their trees to maintain "top dollar" for his property in 2002, when Lightner began construction on his lot. (RP 56, 73, 122-23) Citing the Covenants, Lightner demanded that the Shoemakers trim all their trees down to six feet. (RP 123, 136-37) The general manager for Birch Bay testified that the community has never

enforced the six-foot height limit for trees, and that until this dispute, no one had ever sought to enforce a six-foot height limit under the Covenants. (RP 152)

Both Lightner's expert and the Shoemakers' expert agreed that cutting the cedar trees down to six feet would either kill or severely impact the trees, leaving "a marginal probability of remaining alive and recovering." (*See* RP 33, 177-78; Ex. 34 at 2; *see also* RP 265-66) On appeal, Lightner also acknowledged that "topping [the trees] at six feet now would kill them." (App. Br. 10)

The Shoemakers declined to remove any of their trees or reduce them to six feet, but "trimmed several trees" to accommodate "view corridors" to the bay and mountains for Lightner. (RP 105-14; *see also* Ex. 35) The Shoemakers' efforts failed to satisfy Lightner. (RP 105)

3. The Committee refused permission for the removal of any trees on the Shoemaker property.

Because Lightner's demand to reduce their trees to six feet would kill them, the Shoemakers asked the Birch Bay Village Architectural Committee (the "Committee") whether removal of their trees was required under the Covenants and architectural rules. (*See* Exs. 16, 19) In January 2010, the Committee refused to

allow removal of the Shoemakers' trees, noting that "the long standing principle with the ACC and tree removal has been that the trees must be dead or dying, or be of a safety hazard to acquire ACC permission to remove." (Ex. 19) The general manager testified that the rules limiting removal of trees was designed to, among other things, protect the "natural growth" of trees for the benefits that trees provide, including "provid[ing] shade, soak[ing] up storm water, whatever." (RP 155)

Lightner was notified of the Committee's decision prohibiting the removal of the Shoemakers' trees on February 5, 2010. (Ex. 19) He did not appeal the decision to the Committee, to the Board of Directors, or to the trial court, as the Covenants and the architectural rules require. (Exs. 4, 5)

4. Lightner sued the Shoemakers under the Covenants, then waived his demand that the cedar trees be removed or reduced to six feet, arguing at trial that the trees be reduced to accommodate his views.

More than a year after the Committee refused to allow removal of the Shoemakers' trees, Lightner filed suit against the Shoemakers on February 15, 2011. (CP 4) Lightner sought injunctive relief "requiring the Defendants to top and trim their trees/shrubs in strict compliance with the Covenants, together with

a permanent injunction prohibiting the Defendants from allowing their trees, hedges, shrubs and/or plantings from growing to heights in excess of six feet in height, all per the terms of the Covenants." (CP 8)

By the time of trial, Lightner waived his demand that the Shoemakers trim their trees to six feet and his demand that the trees be removed. (*See* RP 9-10, 53, 88, 175-76, 265-66) Instead, Lightner sought a determination that he was entitled to a view under the Covenants and an order requiring the Shoemakers to reduce their trees to accommodate that view:

> Mr. Shoemaker told [the arborist] that we wanted everything down to six feet, and that's unfortunate because that has not been the, Mr. Lightner's request. Common sense would have told anybody that would adversely affect the health of the trees, and that's not the intended goal here. The intended goal here is to reach some type of reasonable height that allows for the view, and also protects the trees and the soils, and there is nothing within the covenants that protects or would contradict that request.

(RP 265-66)[2]

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[2] Lightner reiterated this position in the Court of Appeals:

> But trees are beautiful and important too. So, using good judgment, reason, and conscience, the court should not order 'topping' the trees at six feet, or at any other height. This is not what Lightner requested. Rather, case-by-case decisions can and should be made to accommodate the community.

(App. Br. 30; *see also* Reply Br. 1)

5. The trial court concluded that the Covenants did not entitle Lightner to a view, and that in any event, the Shoemaker's cedar trees were exempt from the six-foot height limitations as they were "naturally occurring."

After a two-day trial, the trial court rejected Lightner's contention that the Covenants guaranteed his property a view. (FF 16, CP 125; FF 21(f), CP 126) The trial court found that the operative Covenant does "not contain language requiring residents to maintain trees so as not to interfere with their neighbors' views. The Covenant does not provide for 'view protection,' 'view preservation' or 'view rights.' There is no mention of view in the Covenant whatsoever." (FF 16, CP 125; Conclusion of Law (CL) 3(a), CP 129)

Instead, the trial court found that the "clear intent of the Covenants is expressly stated in the first sentence of 8(h): "to preserve natural growth." (FF 16, CP 125) The trial court found that "the expression of the intent in the covenants [is] that the natural growth in the areas of Birch Bay Village needs to be preserved and is 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." (FF 21(b), CP 126-27; CL 3(a), CP 129)

The trial court found that "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 trees, and in some cases would kill them." (CL 4, CP 131) Accordingly, the trial court interpreted the Covenant "to mean that naturally occurring trees and shrubbery are to be preserved. Human-planted or placed items are limited to six feet at the inception, and they may not be allowed to become taller than six feet without approval." (FF 21(g), CP 127-28; CL 3(g), CP 131)

The trial court found that the Shoemakers' cedar trees are "natural trees," because 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." (FF 20, CP 125) Because the Shoemakers' trees were "naturally occurring," the trial court found that they were not subject to the six-foot height restriction. (FF 22, CP 128; CL 5, CP 131)

6. The Court of Appeals held that Lightner had no right to a view, but nevertheless remanded for further fact-finding to determine whether Shoemaker's cedar trees were subject to the six-foot height limitation.

The Court of Appeals rejected Lightner's argument that he was entitled to view protection under the Covenants, holding that the Covenants "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. 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." (Opinion at 9) It nevertheless reversed the trial court, adopting an interpretation of the Covenants that neither party advanced, that Lightner expressly disclaimed, and that the Birch Bay Village Architectural Committee had rejected.

The Court of Appeals held that 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." (Opinion at 1) The Court of Appeals remanded for further proceedings "to allow the parties an opportunity to establish

whether the cedar trees were part of the Owner's plan of development" and thus exempt from the covenant's six-foot height restriction. (Opinion at 8)

Because the Court of Appeals' decision was premised on an interpretation of the Covenants that neither party advanced, the Shoemakers moved for reconsideration pointing out that the general manager for Birch Bay had already testified that the only known Owner's plan of development was that which was stated in the Covenants – to preserve natural growth- and the Architectural Committee had already concluded that the Shoemakers' tree were protected from removal under the Owner's plan of development. The Court of Appeals denied the Shoemakers' timely motion for reconsideration on January 26, 2015. (Appendix B)

E. Argument Why This Court Should Accept Review.

1. The Court of Appeals should have affirmed rather than remand for additional fact-finding because Lightner as the plaintiff asserting a violation of the Covenants failed to prove any violation. (RAP 13.4(b)(1), (2))

Lightner had the burden of establishing the Shoemakers' breach of the Covenants. Because Lightner failed to meet his burden to prove that the Shoemakers' trees were not protected by the Owner's plan of development, the Court of Appeals should have

affirmed. Its decision thus conflicts with the established rule that in any civil action alleging the breach of a contractual or common law obligation, the plaintiff has the burden of proof. *See Bauman v. Turpen*, 139 Wn. App. 78, 94, ¶ 30, 160 P.3d 1050 (2007) (applying the law of contracts in an action to enforce restrictive covenants); *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 135, 769 P.2d 298 (1989) (placing burden on plaintiff in breach of contract cases "comports with general burden of proof rules requiring the plaintiff to prove all elements of the cause of action"); *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 83, ¶ 41, 248 P.3d 1067 (2011) (party alleging breach of contract bears burden of proof); *Accord, Strobl v. Lane,* 250 S.W.3d 843, 847 (Mo. App. 2008) (party seeking to enforce restrictive covenants, bears burden of proving defendants' noncompliance); *Marks v. Wingfield,* 229 Va. 573, 577, 331 S.E.2d. 463 (1985) ("[T]he party who seeks to enforce a restriction has the burden of proving that it proscribes the acts of which he complains"). RAP 13.4(b)(1), (2).

The Court of Appeals interpreted the restrictive covenants to "impose a six foot height limitation on all trees and shrubs not protected under the owners' plan of development." (Opinion at 1)

Acknowledging that no independent evidence of the Owner's plan of development was presented at trial, Division One remanded "to allow the parties an opportunity to establish whether [the Shoemakers'] cedar trees were part of the Owner's plan of development." (Opinion at 8) Despite it being his burden to prove the Shoemakers' breach of the Covenants, Lightner failed to present *any* evidence of an Owner's plan of development that was different from that expressed in the Covenants "to preserve natural growth." Because Lightner failed to prove that Shoemaker's trees violated the Covenants, the Court of Appeals should have affirmed the trial court's determination that Shoemaker's cedar trees were exempt from the six-foot height restriction.

By directing further fact-finding to allow Lightner to prove his case on remand, Division One's decision encourages the type of piecemeal litigation that this Court has consistently disfavored. *See Brown v. Gen. Motors Corp.*, 67 Wn.2d 278, 282, 407 P.2d 461 (1965) ("Piecemeal litigation is not to be encouraged"); *State ex rel. Lemon v. Coffin,* 52 Wn.2d 894, 898, 332 P.2d 1096 (1958) ("Piecemeal litigation is highly disfavored"); *see also e.g., West v. Gregoire,* 184 Wn. App. 164, ¶ 19, 336 P.3d 110 (Oct. 21, 2014 *as amended* Nov. 4, 2014) (requiring a PRA claimant to address all

PRA claims during show cause proceedings avoids disfavored piecemeal litigation and judicial inefficiency). This Court should grant review, RAP 13.4(b)(1), (2), reverse the Court of Appeals' decision and affirm the trial court's decision that the Shoemakers' cedar trees do not violate the Covenants.

2. The Court of Appeals' decision fails to grant the appropriate deference to the Committee's determination that the Shoemakers' trees fall within the Owner's plan of development and cannot be removed. (RAP 13.4(b)(1), (2), (4))

Review is also proper under RAP 13.4(b)(1), (2), (4) because the Court of Appeals' decision usurped the authority of Birch Bay's Architectural Control Committee. The Covenants and architectural rules vested the Committee with the responsibility of deciding whether trees may be removed, "it being the intention to preserve natural growth in accordance with the Owner's Plan of development." (Ex. 4, § 8(h); *see also* Ex. 5, § 10.4, Ex. 32, § 12.11) The Court of Appeals' decision acknowledged that 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 part of the owner's plan of development – not

to all natural growth on the property subject to the Covenants." (Opinion at 8)

The Court of Appeals' decision ignores (because only Lightner's right to a view was at issue) that the Committee already determined that the Shoemakers' trees are protected from removal and thus, in the Committee's view, part of the Owner's plan of development. (*See* Ex. 19) The Court of Appeals' interpretation that the Covenants do not protect views, as Lightner argued, but may nonetheless require the destruction and removal of the Shoemakers' cedar trees – a position advanced by neither party – directly contradicts, and would overturn, an unchallenged decision by the Committee charged with making that decision under the Covenants. (Exs. 4, 5, 19)

Lightner accepted the Committee's decision and did not appeal to the Board of Directors as the Covenants and the architectural rules require. (Exs. 4, 5, 19) Nor did Lightner challenge the Committee's decision prohibiting removal of the Shoemakers' trees in the trial court as the Covenants allow. (*See* Ex. 4, § 14 (allowing a lot owner to pursue enforcement of Covenants in court if Committee fails to do so) Thus, Lightner waived any claim that the Committee's decision prohibiting

removal of the Shoemakers' trees was unreasonable and made in bad faith – the only basis that would allow a court to overturn the Committee's decision. *See Heath v. Uraga*, 106 Wn. App. 506, 521, 24 P.3d 413 (2001) (lot owner appealing order enforcing court's order upholding committee's rejection of building plan waives any challenges not made in the trial court), *rev. denied*, 145 Wn.2d 1016 (2002).

Lightner conceded that the Committee is charged with making decisions under the Covenants "to accommodate the community." (App. Br. 30) The decision of a committee charged with enforcing the covenants may be overturned only if unreasonable and in bad faith. *See Riss v. Angel,* 131 Wn.2d 612, 624, 625, 934 P.2d 669 (1997) ("Covenants providing for consent before construction or remodeling have been widely upheld, even where they vest broad discretion in a homeowners association or a committee or board through which it acts, so long as the authority to consent is exercised reasonably and in good faith"); *Heath,* 106 Wn. App. at 516-17 (court reviews committee's rejection of homeowner's plan to build for whether the decision was made reasonably and in good faith); *Green v. Normandy Park,* 137 Wn. App. 665, 693, ¶ 66, 151 P.3d 1038 (2007) (covenants requiring

consent by homeowner's association before construction or removal will be upheld if "consent is exercised reasonably and in good faith"), *rev. denied*, 163 Wn.2d 1003 (2008). The Court of Appeals' decision, which adopted an interpretation of the Covenants that neither side advanced, conflicts with established law and undermines the self-governing authority of homeowner associations. RAP 13.4(b)(1), (2), and (4).

Further, Lightner expressly disclaimed the relief authorized by the Court of Appeals on remand by waiving his demand that Shoemaker's trees be trimmed to six feet or removed. (*See* RP 9-10, 53, 88, 175-76, 265-66) The Court of Appeals decision requires the parties to engage in needless litigation on remand unnecessarily increasing the parties' litigation costs and wasting judicial resources. *See State v. Myers,* 86 Wn.2d 419, 427, 545 P.2d 538 (1976) (affirming when "remand for a voluntariness hearing and the formal entry of finding would be an idle and useless procedure"); *Rao v. Board of County Commissioners,* 80 Wn.2d 695, 701, 497 P.2d 591 (affirming when "remand for further proceedings would be a useless act"), *cert. denied*, 409 U.S. 1017 (1972); *see also State v. Dunivin,* 65 Wn. App. 501, 506, 828 P.2d 1150 (affirming when "remand would be useless"), *rev. denied*, 120 Wn.2d 1002 (1992).

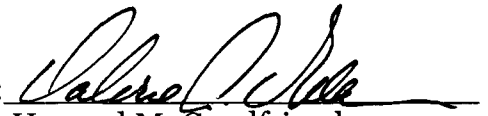
Because there has already been an unchallenged determination that the Shoemakers' cedar trees are protected from removal under the Owners' plan of development, a decision that was indisputably reasonable and made in good faith, and in any event, Lightner has waived the remedy available to him, remand for "further proceedings" is unnecessary. This Court should grant review of the Court of Appeals decision and affirm the trial court's decision.

F. Conclusion.

This Court should grant review of Division One's decision as it conflicts with decisions of this Court and the Court of Appeals placing the burden of proof on the plaintiff to prove a violation of the Covenants and requiring that decisions made by governing bodies reasonably and in good faith be upheld. RAP 13.4(b)(1), (2), (4).

Dated this 25th day of February, 2015.

SMITH GOODFRIEND, P.S.

By: 

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 25, 2015, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile X Messenger ___ U.S. Mail ___ E-File
Kenneth W. Masters Masters Law Group PLLC 241 Madison Avenue North Bainbridge Island, WA 98110	___ Facsimile ___ Messenger X U.S. Mail X E-Mail
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DATED at Seattle, Washington this 25th day of February, 2015.

V. Vigoren

Victoria K. Vigoren

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]

Appelwick, J.

WE CONCUR:

Leach, J.

Schindler, J.

[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.

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

GEORGE LIGHTNER, Appellant, v. CHAD SHOEMAKER and JANE DOE SHOEMAKER, husband and wife and the marital community composed thereof, Respondents.	No. 70746-9-I ORDER DENYING MOTION FOR RECONSIDERATION AND TO PUBLISH

Shoemaker having filed a motion for reconsideration and to publish herein, and a majority of the panel having determined that the motion should be denied;

Now, therefore, it is hereby

ORDERED that the motion for reconsideration and to publish is denied.

DATED this 26th day of January, 2015.

Judge