A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040 IT IS SO ORDERED.

CHIEF JUDGE

FILE
IN CLERKS OFFICE
COURT OF APPEALS
STATE OF WASHINGTON - DIVISION I
DATE JUL 18 1994
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

INNIS ARDEN CLUB, INC., a Washington nonprofit corporation; DAVID L. WELLS and MARY WELLS, husband and wife; ROBERT BLAIR and SARA BLAIR, husband and wife; BETTY WOODS; JOHN S. WARD and BETTY WARD, husband and wife; RICHARD WOLF and HELEN WOLF, husband and wife; MERLE K. EIDSVOOG and JOYCE EIDSVOOG, husband and wife; F. W. PRIESTLY and IRIS PRIESTLY, husband and wife; CORNELIUS J. JENSEN and IRENE JENSEN, husband and wife; JOHN A. MARDESICH and EUNICE MARDESICH, husband and wife; SVEIN NYHAMMER and EVA NYHAMMER, husband and wife; MARTIN GOLDEN and ANGELA GOLDEN, husband and wife; TOM DEGAN and MARILYN DEGAN, husband and wife; DAVID WIGHT and HOLLY WIGHT, husband and wife; CHARLES F. LILL and ELEONORE M. LILL, husband and wife; RONALD SALVINO, a single person; C. W. McKNIGHT and MARY ANN McKNIGHT, husband and wife; JACK L. DIERDORFF and WANDA DIERDORFF, husband and wife; THERON COMPTON and FLORENCE COMPTON, husband and wife; THOMAS W. AVERILL and LINDA AVERILL, husband and wife; ERNEST MICHAEL and ERIKA MICHAEL, husband and wife; PAMELA FOSTER

No. 31872-1-I

DIVISION ONE

and SHIRLEY MASER; and JAMES M. SHEA and CATHLEEN SHEA, husband and wife,

Plaintiffs,

v.

HOWARD ALMQUIST and SONIA ALMQUIST, husband and wife; RUSSELL CASTNER and PATTI CASTNER, husband and wife; HARLEY WAHL and MELINDA WAHL, husband and wife; EDWARD FLICK and IRENE FLICK, husband and wife; KEITH RIELY and MARY ANN RIELY, husband and wife; RICHARD E. RUST and NANCY RUST, husband and wife; JAN I. PRAUDINS and TONINA PRAUDINS, husband and wife; THOMAS G. MAHAN and BETTY JEAN MAHAN, husband and wife; ROBERT DRURY and DOROTHY DRURY, husband and wife; ALAN KOHN and MARION KOHN, husband and wife; JAMES TATE and JUDY TATE, husband and wife; GEORGE E. ADKINS and DORIS ADKINS, husband and wife; HELEN R. SCHERWIN; ALICE POBST; WOLFGANG KLUGE and ILSE KLUGE, husband and wife; and WILLIAM LUNDH and VICKY LUNDH, husband and wife,

Defendants,

HENRY C. WEBER and EVA WEBER, husband and wife,

Appellants,

v.

ROBERT TILLMAN; GILBERT KOLLER and HELEN KOLLER, husband and wife; JON McCARTHY and LYNN McCARTHY, husband and wife,

Respondents.

FILED: JUL 18 1994

AGID, J. -- Pursuant to restrictive covenants which apply to property in the Innis Arden neighborhood, the trial court ordered Eva and Henry Weber to top or remove a tree from their property because it blocked neighbors' views. The Webers appeal, arguing that the trial court's order was based on an erroneous finding that the tree was not a "grandfather tree." We have carefully reviewed the record and find no error. Accordingly, we affirm the trial court.

I. FACTS

This case is an outgrowth of a lawsuit which was filed to compel compliance with view-preserving covenants in Innis Arden. This court upheld the validity of the covenants and the use of a special master to review requests for relief from application of the restrictions in Innis Arden Club, Inc. v. Binns, No. 20497-1-I (March 14, 1988).

Appellants (the Webers) and respondents (the Tillmans, the Kollers, and the McCarthys, collectively, the Tillmans) all live in Innis Arden No. 3. The relevant portion of the covenant restricting the height of vegetation in Innis Arden No. 3 states:

> In order to preserve views of Puget Sound and the Olympic Mountains from lots in said subdivision, all trees, shrubs, brush and landscaping, whether native or planted, on residential lots in said subdivision shall be kept to a height no higher than the highest point of the roof surface nor higher than the height of the house on each lot, whichever is lower. For this purpose, the height of a house shall be measured from the highest point of the roof surface to the lot grade which shall be the average

> of the highest and lowest ground elevations at exterior walls of the house. This amendment shall apply only to those trees, shrubs and brush which in any way obstruct the view of the sound and Olympics from a neighboring lot or lots. . . .
>
> This instrument may be recorded when the owners of 150 lots in Innis Arden #3 have executed counterparts thereof. Upon execution and recording of counterparts by at least that number of lot owners, the Restrictive Mutual Easements for Innis Arden #3 shall thereupon be amended and shall be binding and effective as to all residential lots in Innis Arden #3.

The special master protocol established by the trial court permitted five grounds for relief from application of these restrictions: (1) the tree existed prior to the subdivision and trimming or topping to comply with the covenant would have significant adverse effect on the overall health of the tree; (2) the tree is necessary for soil stability and there is no reasonable alternative method of soil stabilization, and trimming or topping would have a significant adverse effect on the overall health of the tree; (3) the tree provides a habitat for an endangered species and trimming or topping would have a significant adverse effect on the habitat; (4) the view obstruction is de minimis; or (5) the special master finds other compelling grounds. In this case, the Webers sought relief under exemption 1, the "grandfather tree" provision, by demonstrating that their trees existed and were view-blocking prior to 1951, when the covenants became effective.

The special master found that there were two view-blocking cedar trees on the Webers' property but that they were both

grandfather trees which were exempt from the covenants. The Tillmans filed objections to the special master's findings and conclusions, and the trial court conducted a de novo hearing. At the hearing, the Webers testified that they had wanted to purchase a lot with trees on it. In February 1951, they purchased lot 9 because it had four trees on it, including two with double trunks. Mr. Weber testified that one tree was removed during construction of the house and another was destroyed by a freeze in 1955. Mrs. Weber testified that the three trees currently on their property were there at the time they bought the lot.

The Tillmans live across the street from the Webers and bought their house from a previous owner in early 1955. Mr. Tillman testified that, at that time, there were no trees on the opposite side of the street that were higher than any of the houses on the Webers' side of the street.

The Webers also presented the testimony of an expert witness, James Barborinas, a certified arborist. Barborinas testified that he examined three cedar trees on the Webers' property to determine their ages. He stated that all three trees displayed characteristics of native, rather than planted, ornamental trees. In particular, he testified that trees 1 and 2 (what the special master referred to as a single tree) are only about 2 to 3 feet apart, a distance common in nature but unusual for ornamental planting, and that the trees' branch growth

directly out of the ground is consistent with native, not planted, trees. He estimated that tree 1 is 81 feet tall and at least 51 years old and tree 2 is 73 feet tall and at least 48 years old. In photographs of this tree, they appear to be one tree, having grown into a single crown. Tree 3 is located some distance from trees 1 and 2.

After the hearing, the trial court found that trees 1 and 3 are grandfather trees, that tree 2 is not a grandfather tree, and that tree 3 has two sprouts. It ordered that: (1) trees 1 and 3 be pruned to the extent that the pruning would not significantly adversely affect the health of those trees, (2) that tree 2 be removed or trimmed to rooftop height, and (3) that tree 3's sprouts be removed or trimmed to rooftop height.

The Webers moved for reconsideration of the order to top tree 2. At the same time, they also requested an order that no further thinning of trees 1 and 3 be required because of the potential damage to those trees' health. They submitted a letter from Barborinas in which he assessed the impact of the trial court's findings and conclusions. The motion for reconsideration was denied, and the Webers appeal only the finding that tree 2 is not a grandfather tree.

II. DISCUSSION

The Webers challenge finding of fact 2.3, which states: "Tree No. 2 is not established as a grandfather tree." Findings of fact are reviewed to determine whether the findings are

supported by substantial evidence, which is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. Holland v. Boeing Co., 90 Wn.2d 384, 390-391, 583 P.2d 621 (1978). An appellate court reviewing findings based on conflicting evidence need not consider evidence contrary to the findings and cannot weigh the evidence. Rather, it must determine whether the evidence most favorable to the prevailing party supports the challenged findings. Structurals Northwest, Ltd. v. Fifth & Park Place, Inc., 33 Wn. App. 710, 716, 658 P.2d 679 (1983).

In this case, the record contains conflicting evidence about tree 2, but there is substantial evidence to support the trial court's finding that it is not a grandfather tree. Barborinas gave his opinion that tree 2 is old enough to be grandfathered and supported his opinion with credible observations, but the trial court was not required to accept that opinion in light of conflicting evidence. This is especially true because Barborinas' opinion as to the age of tree 2 was only an estimate based on the sum of a ring count of a branch plus the estimated age of the tree at the time that the branch grew from the trunk. Also, the photographs of the lot at the time the Webers constructed their home do not show any double trunk trees or even any trees that are physically close to each other. In addition, Mr. Tillman testified that, at the time he purchased his home in 1955, there were no view-blocking trees on the

Webers' property. The parties clearly have different recollections of their neighborhood in the 1950s. Under these circumstances, the trial court properly relied on the photographic evidence to resolve the dispute.

Thus, there was substantial evidence from which the trial court could reasonably find that trees 1 and 3 existed on the lot before the Webers bought it but that tree 2 was planted or sprouted later. This finding of fact, and the order based upon it, will therefore not be disturbed on review.

The trial court is affirmed.

Agid, J.

WE CONCUR:

Coleman, J.

Schindler, J.