

68131-1

68131-1

No. 68131-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

CHRIS KIRSCHBAUM and BETH KIRSCHBAUM,

*Plaintiffs/Respondents,*

v.

AMIR BHUTTO and KULJIT KAUR,

*Defendants/Appellants,*

and

H & M ARBOR CARE, a Washington sole proprietorship, and  
MICHAEL ADAM BOUNDS and JANE DOE BOUNDS, and JOHN  
DOES 1-10,

*Defendants.*

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 APR 23 PM 1:09

---

**OPENING BRIEF OF APPELLANTS**

---

Andrew J. Kinstler, WSBA #12703  
Polly K. Becker, WSBA #19822  
Matthew V. Pierce, WSBA #42197  
HELSELL FETTERMAN LLP  
1001 Fourth Avenue, Suite 4200  
Seattle, Washington 98154  
(206) 292-1144  
Attorneys for Appellants

TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. ASSIGNMENTS OF ERROR..... 1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

IV. STATEMENT OF THE CASE ..... 3

V. ARGUMENT ..... 5

    A. Standard of Review..... 5

    B. The Trial Court Erred When It Measured Damages Based on Replacement Costs Because the Kirschbaums Presented No Evidence That the Trees Were “Ornamental” ..... 7

        1. By Operation of Law the Trees Are Not “Ornamental” ..... 10

        2. The Trial Court Record Does Not Support an Implied Finding of Fact That the Trees Were “Ornamental” ..... 11

    C. The Kirschbaums Failed to Prove That They Were Entitled to the Award of Any Actual Damages..... 13

    D. The Trial Court Erred When It Provisionally Awarded Attorney Fees ..... 15

VI. CONCLUSION..... 17

## TABLE OF AUTHORITIES

### **Cases**

<i>Allyn v. Boe</i> , 87 Wn. App. 722, 943 P.2d 364 (1997).....	9
<i>Birchler v. Castello Land Co., Inc.</i> , 81 Wn. App. 603, 915 P.2d 564 (1996).....	9
<i>Bloedel Timberlands Dev., Inc. v. Timber Indus., Inc.</i> 28 Wn. App. 669, 626 P.2d 30 (1981) .....	7
<i>Bremerton Cent. Lions Club, Inc. v. Manke Lumber Co.</i> , 25 Wn. App. 1, 604 P.2d 1325 (1979) .....	8
<i>Guay v. Wash. Nat. Gas Co.</i> , 62 Wn.2d 473, 383 P.2d 296 (1963) .....	15
<i>Haase v. Helgeson</i> , 57 Wn.2d 863, 360 P.2d 339 (1961).....	14
<i>Happy Bunch, LLC v. Grandview N., LLC</i> , 142 Wn. App. 81, 173 P.3d 959 (2007).....	6
<i>Ingle v. Ingle</i> , 183 Wash. 234, 48 P.2d 576 (1935).....	10
<i>Jemo v. Tourist Hotel Co.</i> , 55 Wash. 595, 104 P. 820 (1909) .....	13
<i>Jones v. Hogan</i> , 56 Wn.2d 23, 351 P.2d 153 (1960).....	12
<i>Keesling v. City of Seattle</i> , 52 Wn.2d 247, 324 P.2d 806 (1958) .....	14
<i>Mason v. McLean</i> , 6 Wash. 31, 32 P. 1006 (1893) .....	16
<i>McCutcheon v. Brownfield</i> , 2 Wn. App. 348, 467 P.2d 868 (1970) .....	10
<i>Meeker v. Howard</i> , 7 Wn. App. 169, 499 P.2d 53 (1972) .....	7
<i>Seattle W. Indus., Inc. v. David A. Mowat Co.</i> , 110 Wn.2d 1, 750 P.2d 245 (1988).....	13, 14
<i>Seattle-First Nat'l Bank v. Brommers</i> , 89 Wn.2d 190, 570 P.2d 1035 (1977).....	7, 8, 14
<i>Sherman v. Kissinger</i> , 146 Wn. App. 855, 195 P.3d 539 (2008) .....	6, 14
<i>Sherrell v. Selfors</i> , 73 Wn. App. 596, 871 P.2d 168 (1994) ...	6, 9, 11

<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003).....	6
<i>Tatum v. R &amp; R Cable, Inc.</i> , 30 Wn. App. 580, 636 P.2d 508 (1981) .....	6
<i>Unifund CCR Partners v. Sunde</i> , 163 Wn. App. 473, 260 P.3d 915 (2011).....	15
<i>Womack v. Von Rardon</i> , 133 Wn. App. 254, 135 P.3d 542 (2006) .....	11

**Statutes**

RCW 4.24.630.....	16
RCW 64.12.020.....	16
RCW 64.12.030.....	passim
RCW 64.12.040.....	8

**Other Authorities**

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY.....	12
---	----

## **I. INTRODUCTION**

Four trees on Chris and Beth Kirschbaum's property were cut down on October 15, 2009. After a two-day bench trial, the Kirschbaums were awarded, pursuant to RCW 64.12.030, treble damages measured by the cost to replace one maple tree and three fir trees. The trial court awarded these damages despite failing to find the necessary prerequisites to measuring damages based on the cost of replacement. Specifically, the trial court failed to find that the trees were "ornamental." As there is no evidence in the record that would support a finding that the trees were "ornamental," the trial court's award must be reversed and the matter remanded for dismissal with prejudice because the Kirschbaums failed to prove an essential element of their timber trespass claim: their actual and specific damages.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred when it awarded damages measured by the cost to replace the Kirschbaums' trees and entered a Judgment based on this measure of damages (Judgment and Conclusion of Law No. 8). Clerk's Papers ("CP") at 175, 184, 188.

2. The trial court erred in entering Finding of Fact No. 7 (“cost to replace the four trees”) to the extent that it implies a finding that the trees were “ornamental.” CP at 179.

3. The trial court erred in entering Finding of Fact No. 8 (“restoration costs for each of the four trees”) to the extent that it implies a finding that the trees were “ornamental.” CP at 179.

4. The trial court erred in concluding that the Kirschbaums had proven single damages recoverable under RCW 64.12.030. (Conclusion of Law No. 6). CP at 183-84.

5. The trial court erred in concluding that the Kirschbaums were entitled to an award of treble damages. (Conclusion of Law No. 7). CP at 184.

6. The trial court erred in concluding that the Kirschbaums were the prevailing party. (Conclusion of Law No. 9). CP at 184.

7. The trial court erred in entering a Judgment that included a provisional award of Attorney Fees to be assessed by later order of the Court. CP at 175.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err when it awarded damages based on replacement costs without entering a finding of fact that

the Kirschbaums' trees were "ornamental"? (Assignment of Error Nos. 1, 2, 3).

2. Is there substantial evidence in the record to support a finding that the Kirschbaums' trees were "ornamental"? (Assignment of Error Nos. 1, 2, 3).

3. Did the Kirschbaums fail to prove all of the elements of their timber trespass claim? (Assignment of Error No. 4).

4. Is the award of treble damages authorized when the Kirschbaums failed to establish their right to single damages? (Assignment of Error No. 5).

5. Is the proper remedy for this Court to vacate the Judgment and Findings of Fact and Conclusions of Law and to reverse and remand for dismissal of this case based on the Kirschbaums' failure to prove their timber trespass claim? (Assignment of Error No. 6).

6. Are attorney fees available pursuant to RCW 64.12.030? (Assignment of Error No. 7).

#### **IV. STATEMENT OF THE CASE**

Amir Bhutto and Kuljit Kaur (the "Bhuttos"), husband and wife, own a home in Shoreline next to property owned by Chris and Beth Kirschbaum (the "Kirschbaums"), brother and sister. CP

at 177-78. On October 15, 2009, four trees were cut down on or near the property line between the Bhutto and Kirschbaum property. CP at 178. Three of the trees—two firs and a maple—were on the property line, and one of the trees—a fir—was entirely on the Kirschbaums' property. CP at 178-79; *see* CP at 15. The Kirschbaums filed a Complaint in King County Superior Court, alleging that the Bhuttos and others<sup>1</sup> were liable for the cutting of the trees. CP at 1; *see* CP at 9 (Amended Complaint). After a two-day bench trial, the trial court entered findings and conclusions that the Bhuttos had committed timber trespass. CP at 184, 188. The trial court found that the cost to replace the four trees was \$38,656.00. CP at 179; *see* Report of Proceedings (“RP”) at 71. The cost to replace the trees was trebled pursuant to RCW 64.12.030. CP at 184. The trial court then entered judgment against the Bhuttos and the others for \$115,968.00 in damages with attorney fees to be awarded “[b]y later order of the Court.” CP at 174-75.

---

<sup>1</sup> The Kirschbaums also included a tree service and its owners as defendants in the Complaint. CP at 1, 9, 176-77. These other named defendants did not appear and an Order of Default was entered and was reduced to judgment after trial. CP at 26-27, 174-75. The trial court did not find that the other named defendants were the tree cutters. *See* CP at 176-84.

## V. ARGUMENT

The trial court's award of treble damages, measured by the cost to replace the trees, must be reversed and the matter remanded for dismissal with prejudice. The trial court failed to enter a finding of fact that the trees were "ornamental," which is a necessary prerequisite to measuring damages based on replacement cost. Furthermore, the record at trial does not contain evidence that could support a finding that the trees were "ornamental." As the Kirschbaums presented no evidence about any other measure of damage, they have failed to prove an essential element of their timber trespass claim: single damages that would allow them to recover a money judgment.

Furthermore, treble damages are unavailable without proof of single damages, and the Kirschbaums' claim must be dismissed. Finally, an ambiguous award of attorney fees should be clarified on remand because the trial court only awarded damages based on RCW 64.12.030 and that statute does not authorize an award of attorney fees.

### A. Standard of Review

Courts "review questions of statutory interpretation and claimed errors of law de novo." *Happy Bunch, LLC v. Grandview*

*N., LLC*, 142 Wn. App. 81, 88, 173 P.3d 959 (2007). The measure of damages available to a plaintiff is a question of law while the amount of damages is a question of fact. *Sherman v. Kissinger*, 146 Wn. App. 855, 873, 195 P.3d 539 (2008).

Findings of fact are reviewed for substantial evidence in the record. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003); *see, e.g., Sherrell v. Selfors*, 73 Wn. App. 596, 600-01, 871 P.2d 168 (1994) (“There is substantial, competent evidence to support the finding that 14 trees and shrubs were needed to replace the cut trees.”); *Tatum v. R & R Cable, Inc.*, 30 Wn. App. 580, 584, 636 P.2d 508 (1981) (“The court’s findings are supported by substantial evidence, the replacement value was within the evidence, and the trebling of the damages proper.”), *overruled on other grounds by Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 790, 733 P.2d 960 (1987). Substantial evidence is the “quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true.” *Sunnyside Valley Irrigation Dist.*, 149 Wn.2d at 879. “It is the function of findings to be responsive to the issues raised. It is the function of conclusions to apply the law to the facts with a view to stating the

relief required in the particular case.” *Meeker v. Howard*, 7 Wn. App. 169, 174-75, 499 P.2d 53 (1972).

**B. The Trial Court Erred When It Measured Damages Based on Replacement Costs Because the Kirschbaums Presented No Evidence That the Trees Were “Ornamental.”**

To prove a cause of action for timber trespass under RCW 64.12.030<sup>2</sup> the plaintiff must “prove[] the trespass and the damages.” *Seattle-First Nat’l Bank v. Brommers*, 89 Wn.2d 190, 197, 570 P.2d 1035 (1977). To establish the trespass, a plaintiff must prove his right to possess the property at issue. *See Bloedel Timberlands Dev., Inc. v. Timber Indus., Inc.* 28 Wn. App. 669, 679, 626 P.2d 30 (1981) (explaining that to make out a *prima facie* case in trespass to timber and conversion, the burden is on the plaintiffs to prove their right to possess the property at issue); RCW 64.12.030 (timber trespass statute requiring that the tree or shrub at issue be “of another person”). The plaintiff must also

---

<sup>2</sup> “Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, including a Christmas tree as defined in RCW 76.48.020, timber, or shrub on the land of another person, or on the street or highway in front of any person’s house, city or town lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, in an action by the person, city, or town against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.” RCW 64.12.030.

show that the cutting occurred “without lawful authority.” RCW 64.12.030. And to obtain treble damages,<sup>3</sup> the plaintiff must also present evidence that the defendant acted willfully or recklessly. *Seattle-First Nat’l Bank*, 89 Wn.2d at 197.

Only once the trespass and damages are proven by the plaintiff does “the burden shift[] to the defendant to show the trespass was casual or involuntary or was done with probable cause to believe the land was his own or that of the person in whose service or by whose direction the act was done.” *Seattle-First Nat’l Bank*, 89 Wn.2d at 197-98.

Washington law “provide[s] a statutory measure of damage for conversion of timber. These statutes have been construed to award the damaged party the stumpage value of the timber unless some other, greater, fair market value can be proven.” *Bremerton Cent. Lions Club, Inc. v. Manke Lumber Co.*, 25 Wn. App. 1, 7, 604 P.2d 1325 (1979), *review denied*, 93 Wn.2d 1016 (1980). There are

---

<sup>3</sup> “If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodlands, for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for single damages.” RCW 64.12.040.

several other measures of damage available for timber trespass besides stumpage value, if the plaintiffs prove they are entitled to a different measure: (1) production value for fruit trees, (2) lost profits for trees usually sold at market (e.g., Christmas trees), (3) restoration and replacement costs for “ornamental greenery on residential or recreational property,” and (4) “the difference in the value of the land before and after the cutting.” *Allyn v. Boe*, 87 Wn. App. 722, 732-33, 943 P.2d 364 (1997); *Sherrell*, 73 Wn. App. at 602.

Washington’s courts have held that, “[w]hen trees are cut from recreational and residential property, damages based on stumpage value, production value, lost profits, and the before-and-after property value may be inappropriate.” *Sherrell*, 73 Wn. App. at 602-03. Specifically, restoration and replacement costs are potentially available when “damage is to ornamental greenery on residential property.” *Birchler v. Castello Land Co., Inc.*, 81 Wn. App. 603, 607, 915 P.2d 564 (1996).

Here, the trial court measured the Kirschbaums’ damages based on the cost to replace the trees that were cut down. CP at 179 (Finding of Fact Nos. 7 and 8); CP at 184 (Conclusion of Law Nos. 7 and 8); see CP at 175 (Judgment). The trial court accepted

the appraisal of the Kirschbaums' expert that the cost to replace the four trees would be \$48,540, and then the court discounted the replacement cost by the percentage of the trees on the Bhuttos' property. CP at 179 (Finding of Fact Nos. 7 and 8).

But the trial court did not enter a finding that the trees were "ornamental." See CP at 176-84. Without a finding that the trees were "ornamental," the trial court's award of damages measured by replacement cost is unsupported.

1. By Operation of Law the Trees Are Not "Ornamental."

"[I]f there is no express finding upon a material fact, the fact is deemed to have been found against the party having the burden of proof." *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356, 467 P.2d 868 (1970); see *Ingle v. Ingle*, 183 Wash. 234, 236, 48 P.2d 576 (1935) ("The rule supported by the weight of authority is that, where the findings of fact are silent upon a material point, it is deemed to be found against the one having the burden of proof.").

Whether a tree is "ornamental" is a material fact for which the trial court failed to enter a necessary finding. As the trial court did not enter a finding that the trees were "ornamental," the lack of this finding must be deemed to have been found against

the Kirschbaums. Thus, this Court must reverse the trial court's award of damages because the trial court effectively found that the trees were not "ornamental."

2. The Trial Court Record Does Not Support an Implied Finding of Fact That the Trees Were "Ornamental."

In some circumstances, a finding of fact can be implicitly contained within other findings or conclusions that require such a finding. See *Womack v. Von Rardon*, 133 Wn. App. 254, 263, 135 P.3d 542 (2006) (analyzing the appropriate measure of damage for malicious injury to a pet and concluding that, in the absence of an explicit finding of fact, "evidence supports the implicit finding of malicious injury to Ms. Womack's pet"). But even if this Court treated the trial court's findings and conclusions as implicitly containing all of the necessary findings of material facts—which this Court should not do—those findings and conclusions would still be unsupported by evidence in the record.

Here, unlike in *Womack*, there is no testimony in the record that would support an implicit finding of fact that the trees were "ornamental." Washington Courts have held that "ornamental" trees include a tree that "serves to 'adorn', 'embellish', or 'decorate'." *Sherrell*, 73 Wn. App. at 603. There is no testimony

about the characteristics of these trees or anything about their purpose—in fact, the only testimony remotely related to the trees themselves was that there was a maple and there were three firs on the Kirschbaums’ property; the trees were between 20 to 35 years old; and the trees were “big.” RP at 66-67, 111. Fir trees and maple trees are not, by definition, “ornamental,”<sup>4</sup> so the Kirschbaums cannot merely rely on the types of tree cut down to establish replacement costs as the measure of their damages. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 854, 1379. And the only other qualitative description of the trees came from Ms. Kaur, one of the defendants, who testified that the trees were “dangerous.” RP at 207. Therefore the record contains insufficient evidence<sup>5</sup> to support an explicit or implicit finding that the trees were “ornamental.”

---

<sup>4</sup> In contrast to fir trees and maple trees, a number of trees prefaced by the adjective “flowering” or “japanese” are by definition “ornamental.” See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 876, 1209-10. Another tree that is, by definition, “ornamental” is the weeping cypress. *Id.* at 2592.

<sup>5</sup> In closing, the Kirschbaums’ attorney argued that “Washington is called the Evergreen State in part because of our admiration for trees. . . . They provide a lot of privacy and beauty to the Kirschbaums.” RP at 348. Of course, the arguments of counsel are not evidence. See *Jones v. Hogan*, 56 Wn.2d 23, 31-32, 351 P.2d 153 (1960). And there was no testimony about the

Given the Kirschbaums' failure to present any evidence that the trees were "ornamental," the trial court erred when it measured damages based on the cost to replace the trees.

C. **The Kirschbaums Failed to Prove That They Were Entitled to the Award of Any Actual Damages.**

Because the Kirschbaums failed to prove the essential damage element of their timber trespass claim, the trial court's Findings of Fact and Conclusions of Law and the Judgment must be vacated and the case reversed and remanded for dismissal with prejudice.

Damages are compensation for a legal injury. *Jemo v. Tourist Hotel Co.*, 55 Wash. 595, 604, 104 P. 820 (1909). There are two important aspects that are necessary before a trial court may award damages: First the plaintiff must prove "damage as a necessary element of the plaintiff's case" and the plaintiff must then produce "the best evidence available which will afford the [trier of fact] a reasonable basis for estimating the dollar amount of [plaintiff's] loss." *Seattle W. Indus., Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 6, 750 P.2d 245 (1988). Only "[o]nce the fact of damage has been established by a preponderance" does evidence

---

trees or the qualities of the trees that the Kirschbaums may or may not have admired or appreciated.

about the amount of damages become relevant. *Seattle W. Indus., Inc.*, 110 Wn.2d at 6. In a timber trespass case, like in any trespass case, a defendant can only be held liable for actual damages that are specific and proven and that were proximately caused by the defendant's conduct. *Haase v. Helgeson*, 57 Wn.2d 863, 867, 360 P.2d 339 (1961); see *Keesling v. City of Seattle*, 52 Wn.2d 247, 254, 324 P.2d 806 (1958) (requiring proof of both "actuality" and "extent" of damages before "the trier of the fact can with reasonable certainty determine the amount"); see also *Seattle-First Nat'l Bank*, 89 Wn.2d at 197 ("Once the plaintiff has proven the trespass and the damages, the burden shifts to the defendant . . ."). Therefore, it is the plaintiff who ultimately "bears the burden of producing evidence to show which measure of damages applies." *Sherman*, 146 Wn. App. at 873.

The Kirschbaums supplied evidence about how much it would cost to replace three firs and a maple. See CP at 179. But the Kirschbaums put the cart before the horse when they focused their case on the amount of replacement costs without supplying evidence that would demonstrate they were entitled to replacement costs as their measure of damages. The Kirschbaums, thus, failed to prove that they were entitled to an

award of damages based on the cost to replace the trees. And at trial the Kirschbaums chose not to present evidence about any other measure of damages. Therefore, the Kirschbaums failed to prove the essential element of damages. And without proof to support an award of single damages, the trial court erred in its award of treble damages. *Guay v. Wash. Nat. Gas Co.*, 62 Wn.2d 473, 478 383 P.2d 296 (1963) (“Zero multiplied by three would still be zero. *De minimis non curat lex.*”); see CP at 175, 184, 188.

As the Kirschbaums failed at trial to prove their right to replacement costs as the appropriate measure of damages and the Kirschbaums presented no evidence about any other measure of damage, this Court must reverse the trial court’s Judgment and Findings and Conclusions and remand for dismissal of the Kirschbaums’ claims with prejudice.

**D. The Trial Court Erred When It Provisionally Awarded Attorney Fees.**

The threshold question of whether there is a statutory, contractual, or equitable ground for an award of attorney fees is a question of law reviewed de novo. See *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 483-84, 260 P.3d 915 (2011). Where an award of attorney fees is not authorized by law, on appeal it may

be “disallowed and stricken out” from the Judgment. *Mason v. McLean*, 6 Wash. 31, 37-38, 32 P. 1006 (1893).

The Kirschbaums’ Amended Complaint requested “reasonable attorney’s fees, pursuant to RCW 64.12.030 and/or RCW 4.24.630,” and they reserved “the right to present evidence as to the reasonable value of attorney’s fees following the presentation of all evidence on both sides with respect to the matters at issue.” CP at 13-14. The Judgment awarded the Kirschbaums “\$115,968.00, plus statutory costs and attorneys’ fees” and, in the summary, the trial court noted “Attorney Fees: \$ (By later order of the Court).” CP at 175.

Here, there is no legal or equitable basis for an award of attorney fees. The trial court explicitly awarded damages based on RCW 64.12.030, which does not authorize attorney fees.<sup>6</sup> See CP at 184 (Conclusion of Law Nos. 6, 7, and 8). Furthermore, RCW 4.24.630 specifically “does not apply in any case where liability for damages is provided under RCW 64.12.030.” RCW 4.24.630(2).

---

<sup>6</sup> In contrast to Section .030, in an action for waste by a guardian or tenant “[t]he judgment, in any event, shall include as part of the costs of the prevailing party, a reasonable attorney’s fee to be fixed by the court.” RCW 64.12.020.

Although the Kirschbaums have not brought a motion for attorney fees and the trial court may have only intended to award statutory attorney fees, the trial court's lack of authority to award attorney fees should be clarified on remand.

## VI. CONCLUSION

It is respectfully requested that the trial court's Findings of Fact and Conclusions of Law and Judgment be vacated and this matter be reversed and remanded for dismissal with prejudice. The Kirschbaums failed to prove that the trees that were cut down were "ornamental" and, as the Kirschbaums only presented evidence to the trial court about the amount of their damages measured by replacement cost, they have failed to prove the damages element of their timber trespass claim. Finally, the trial court erred when it provisionally awarded attorney fees and the attorney fees issue should be clarified on remand.

DATED this 23<sup>d</sup> day of April, 2012.

HELSELL FETTERMAN LLP

  
\_\_\_\_\_  
Andrew J. Kinstler, WSBA #12703  
Polly K. Becker, WSBA #19822  
Matthew V. Pierce, WSBA # 42197  
Attorneys for Appellants Bhutto and Kaur

**CERTIFICATE OF SERVICE**

I, KYNA GONZALEZ, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman, LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. In the appellate matter of *Kirschbaum v. Bhutto and Kaur, et al.*, I did on the date listed below cause (1) to be filed with this Court the Opening Brief of Appellant; and (2) to be delivered a copy of the same via messenger to Nicholas Corning, 1833 Northing 105th Street, Suite 200, Seattle, WA 98133, who is counsel of record of Respondent.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: April 23, 2012

  
KYNA GONZALEZ