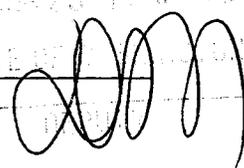


No. 39372-7-II

CO. MAR 25 PM 10:16  
STATE OF WASHINGTON  
BY 

---

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

---

James Omsa, an individual

Respondent,

v.

Joseph and Bertha Martin, husband and wife

Appellant,

v.

Barbara Rosenthal, an individual

Third-Party Defendant.

---

BRIEF OF APPELLANT MARTIN

---

Kevin T. Steinacker, WSBA # 35475  
Shane L. Yelish, WSBA # 37838  
Attorneys for Appellant  
Dickson Steinacker PS  
1401 Wells Fargo Plaza  
1201 Pacific Avenue  
Tacoma, WA 98402  
Telephone: 253-572-1000  
Facsimile: 253-572-1300

P.M. 824-09

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

ASSIGNMENT OF ERROR ..... 1

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR..... 1

STATEMENT OF THE CASE..... 1

ARGUMENT ..... 6

    I.    An Award of Costs and Reasonable Attorney Fees is Mandatory  
        When Mr. Omsha Appealed the Mandatory Arbitration Award and  
        Failed to Improve His Position..... 7

    II.   Dismissal of Omsha’s Trial De Novo Request was Not a Voluntary  
        Withdrawal..... 13

    III.  An Award of Attorney Fees to Martin Conforms to the  
        Legislature’s Goal of the Mandatory Arbitration Rules..... 14

    IV.  The Attorney Fees Incurred After Omsha’s Request for a Trial  
        De Novo Are Reasonable..... 16

    V.   Martin is Entitled to Costs and Attorney Fees on Appeal Pursuant  
        to RAP 18.1..... 17

CONCLUSION..... 17

## TABLE OF AUTHORITIES

### CASES

<i>Brandenberg v. Cloutier</i> , 103 Wn. App. 483, 486, 12 P.2d 664 (2000).....	8, 16, 17
<i>Do v. Farmer</i> , 127 Wn. App. 180, 110 P.3d 840 (2005).....	8, 11
<i>Hudson v. Hapner</i> , 146 Wn. App. 280, 187 P.3d 311 (2008).....	8, 9, 14
<i>In re Kovacs</i> , 121 Wn.2d 795, 854 P.2d 629 (1993) .....	6
<i>Kim v. Pham</i> , 95 Wn. App. 439, 975 P.2d 544 (1999) .....	10, 11
<i>Malted Mousse, Inc. v. Steinmetz</i> , 150 Wn.2d 518, 79 P.3d 1154 (2004).....	14
<i>Nevers v. Fireside, Inc.</i> , 133 Wn.2d 804, 947 P.2d 721 (1997).....	14
<i>Ortblad v. State</i> , 88 Wn.2d 380, 561 P.2d 201 (1977) .....	15
<i>Our Lady of Lourdes Hosp. v. Franklin County</i> , 120 Wn.2d 439, 842 P.2d 956 (1993).....	8
<i>Perkins Coie v. Williams</i> , 84 Wn. App. 733, 929 P.2d 1215 (1997) .....	6
<i>Puget Sound Bank v. Richardson</i> , 54 Wn. App. 295, 773 P.2d 429 (1989).....	10
<i>Simpson Inv. Co. v. Dep't of Revenue</i> , 141 Wn.2d 139, 3 P.3d 741 (2000).....	14
<i>State v. Wittenbarger</i> , 124 Wn.2d 467, 880 P.2d 517 (1994).....	6
<i>Walji v. Candyco, Inc.</i> , 57 Wn. App. 284, 787 P.2d 946 (1990) .....	13, 14
<i>Waste Mgmt. of Seattle, Inc. v. Utils. &amp; Transp. Comm'n</i> , 123 Wn.2d 621, 869 P.2d 1034 (1994).....	8

*Wiley v. Rehak*, 143 Wn.2d 339, 20 P.3d 404 (2001)..... passim

**RULES**

MAR 7.3 ..... 7, 8

RAP 18.1..... 17

**STATUTES**

RCW 7.06.060 ..... 7

## **ASSIGNMENT OF ERROR**

1. The trial court erred in denying the Martins costs and reasonable attorney fees under MAR 7.3 in its judgment dated May 1, 2009, after dismissing Mr. Omsa's Request for Trial De Novo.

## **ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the Martins were entitled to an award of costs and reasonable attorney fees under MAR 7.3 when they prevailed on their motion to dismiss Mr. Omsa's request for trial de novo and Mr. Omsa did not improve his position from the arbitration?

## **STATEMENT OF THE CASE**

### **A. Factual Background**

The Martins are the legal owners of Lot 13 of Claremont at Westgate Division, commonly known as 3102 North Viewmont, in Tacoma, Pierce County, Washington (the "Martin Property"). CP 2. Respondent, James Omsa, is the legal owner of Lot 14 of Claremont at Westgate Division, commonly known as 3112 North Viewmont, in Tacoma, Pierce County, Washington (the "Omsa Property"). CP 1. The Omsa Property is located to the northwest of the Martin Property. *Id.* Along the boundary line between the Omsa and Martin Properties sits a hedge of arborvitae trees. *Id.*

In preparation to build a fence on their property, the Martins trimmed the hedge of arborvitaes very short. Mr. Omsa claimed an interest in this hedge of arborvitaes and filed a lawsuit against Martin. CP 1-4; 9-13.

**B. Proceedings Below**

Mr. Omsa filed a complaint against the Martins on October 10, 2007, alleging causes of action for adverse possession and damages in an amount to be proven at trial for Martins' alleged trespass, timber trespass, and destruction and damage to property. CP 1-4. Mr. Omsa amended his complaint on March 7, 2008 to add additional claims against the Martins for private nuisance. CP 9-13.

On July 10, 2008, the Martins amended their answer to name Barbara Rosenthal, their predecessor in interest, as a third-party defendant. CP 18-23. The Martins and Barbara Rosenthal subsequently settled and Rosenthal was dismissed from this action on February 5, 2009. CP 24-26. Rosenthal is not party to this appeal.

After the trial court's denial of both parties' cross-motions for summary judgment, the parties stipulated to engage in binding arbitration. On September 15, 2008, pursuant to the parties' agreement, the case was transferred to binding arbitration to be conducted, for convenience of the parties, pursuant to the Mandatory Arbitration Rules. CP 79-80.

On January 21, 2009 and February 4, 2009, the Martins and Mr. Omsa engaged in the binding arbitration. Prior to engaging in the binding arbitration, and again at the arbitration hearing itself, the Martins and Mr. Omsa agreed the arbitration would be binding and the parties waived their right to request a trial de novo. CP 79-80.

After conclusion of the binding arbitration, and contrary to the parties' agreement, Mr. Omsa appealed the arbitration award by filing a request for a trial de novo and request for 12 person jury trial with the clerk of the Superior Court on February 26, 2009. CP 29-30. Mr. Omsa denied the existence of an agreement to engage in binding arbitration pursuant to the MARs and to waive the right to request a trial de novo.

On March 19, 2009, the Martins moved to dismiss the request for trial de novo and to amend the arbitration award. CP 38-49. The trial court denied the motion to dismiss and granted the Martins' motion to amend the arbitration award. CP 60-62.

With leave of the court, the arbitration award was amended by the arbitrator on April 6, 2009, to include the following:

I issued the arbitration award with the understanding that the arbitration was final and binding upon all parties and that all parties waived their right to appeal to the Superior Court for a trial de novo. During the arbitration hearing I was told by David Britton, counsel for Mr. Omsa, and Shane Yelish, counsel for Mr. and Mrs. Martin, that the decision I made at the conclusion of the

arbitration was final and binding upon all parties and all parties waived their right to appeal to the Superior Court for a trial de novo. Mr. Omsa and Mr. and Mrs. Martin were present at the time their counsel and I discussed this, and the parties indicated that they were aware of the binding arbitration agreement and assented to it. The final and binding nature of this arbitration was undisputed by either party at the arbitration hearing.

During the arbitration, it was my understanding that the parties agreed to perform the arbitration pursuant to the Mandatory Arbitration Rules (MAR) for convenience purposes only. I understood the agreement to conduct the arbitration pursuant to the MAR in no way affected the parties' agreement that the arbitration was final and binding and that all parties waived their right to appeal to the Superior Court for a trial de novo. This agreement by the parties may have been confirmed multiple times throughout the closing argument in addition to during the arbitration hearing itself. The arbitration award is final and binding.

*Id.*

On April 6, 2009, the Martins filed a motion for reconsideration of the trial court's March 27, 2009, denial of their motion to dismiss the request for trial de novo. CP 63-73. The court granted the Martins' motion for reconsideration on April 17, 2009, striking Mr. Omsa's trial de novo request. CP 81-82.

On April 23, 2009, the Martins filed a motion for costs and reasonable attorney fees pursuant to MAR 7.3. CP 83-88. The Martins supported their motion for costs and reasonable attorney fees with the following declarations and supporting exhibits: Declaration of Counsel

Thomas L. Dickson, CP 89-98; Declaration of Counsel Shane L. Yelish, CP 99-108; Martins' Reply, CP 152-155; Supplemental Declaration of Counsel Thomas L. Dickson, CP 135-145; and Supplemental Declaration of Counsel Shane L. Yelish, CP 146-151. Omsa's Response was supported by the Declaration of Samuel Meyler, CP 109-119.

The trial court denied the Martins' motion for costs and reasonable attorney fees by judgment dated May 1, 2009. CP 156-58. The Martins timely filed their notice of appeal May 29, 2009. CP 159-164.

## ARGUMENT

The decision denying an award of attorney fees to the Martins must be reversed. The Mandatory Arbitration Rules, like any other court rules, are interpreted as though they were drafted by the Legislature and are construed consistent with their purpose. *State v. Wittenbarger*, 124 Wn.2d 467, 484, 880 P.2d 517 (1994). Application of the Mandatory Arbitration Rules to the facts is a question of law subject to de novo review on appeal. *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001). The principles to be applied by the court when interpreting a statute have been summarized as follows:

First, a statute that is clear on its face is not subject to judicial interpretation. Second, an ambiguity will be deemed to exist if the statute is subject to more than one reasonable interpretation. Third, if a statute is subject to judicial interpretation, it will be construed in the manner that best fulfills the legislative purpose and intent.

*Perkins Coie v. Williams*, 84 Wn. App. 733, 736, 929 P.2d 1215 (1997) (citing *In re Kovacs*, 121 Wn.2d 795, 804, 854 P.2d 629 (1993)).

The only issue on this appeal is whether the Martins were entitled to an award of costs and reasonable attorney fees under MAR 7.3. Based upon the plain language of MAR 7.3, the Martins were entitled to costs and reasonable attorney fees when Mr. Omsa failed to improve his position after filing a request for trial de novo. Dismissal of his request by

the trial court was not a voluntary withdrawal, and costs and attorney fees should have been awarded to the Martins. This result is also consistent with the purpose of the Mandatory Arbitration Rules. The decision below should be reversed, and the Martins should recover costs and attorney fees incurred both below and on appeal.

**I. An Award of Costs and Reasonable Attorney Fees is Mandatory When Mr. Omsa Appealed the Mandatory Arbitration Award and Failed to Improve His Position.**

An award of costs and reasonable attorney fees is mandatory when Mr. Omsa's request for trial de novo was involuntarily dismissed. The Mandatory Arbitration Rules require an award of costs and reasonable attorney fees incurred when a party fails to improve its position after requesting a trial de novo. In Washington, attorney fees may be recovered when authorized by statute, a recognized ground of equity, or agreement of the parties. *Wiley*, 143 Wn.2d at 348. In this case, the statutory basis for recovery of costs and attorney fees is RCW 7.06.060. MAR 7.3, which mirrors RCW 7.06.060, provides as follows:

The court **shall** assess costs and reasonable attorney fees against a party who appeals the award and *fails to improve the party's position on the trial de novo*. The court **may** assess costs and reasonable attorney fees against a party who *voluntarily withdraws* a request for a trial de novo. "Costs" means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

MAR 7.3 (emphasis added). The word “shall” in the MARs makes the stated requirement mandatory. *Wiley*, 143 Wn.2d at 345; *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994) (citing *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 446, 842 P.2d 956 (1993)). This court recently quoted a helpful metaphor from Division One’s interpretation of MAR 7.3:

MAR 7.3 uses both a stick and a carrot to accomplish its goal: First, the rule threatens mandatory attorney fees for any party who requests a trial de novo but does not improve its position. Next, it offers the party an incentive to withdraw its request, with the possibility of avoiding attorney fees at the discretion of the [trial] court. Both the stick and the carrot are directed at the party requesting the trial de novo, attempting to influence its choices in the hope of reducing court congestion.

*Hudson v. Hapner*, 146 Wn. App. 280, 285, 187 P.3d 311 (2008) (citing *Do v. Farmer*, 127 Wn. App. 180, 187, 110 P.3d 840 (2005)). Fees are mandatory, not discretionary, when “the party that requested the trial de novo was not responsible for ending the proceeding.” *Do*, 127 Wn. App. at 187.

MAR 7.3 creates two distinct classes of cases when dictating whether an award of costs and attorney fees is justified. The award of costs and attorney fees is mandatory where the party fails to improve its position at trial de novo. *See e.g., Brandenburg v. Cloutier*, 103 Wn. App.

482, 486, 12 P.3d 664 (2000). Conversely, where the party voluntarily withdraws its request for trial de novo, the award of costs and attorney fees is discretionary. *See e.g., Hudson*, 146 Wn. App. at 286.

Cases where the lawsuit terminates without adjudication at a trial de novo and without voluntary dismissal by the party requesting the trial de novo fall into the first class of cases under MAR 7.3 where the award of costs and attorney fees is mandatory. *See e.g., Wiley*, 143 Wn.2d at 348. While MAR 7.3 does not directly address cases that have neither been adjudicated at trial de novo or voluntarily dismissed, the party requesting trial de novo cannot improve their position following the arbitration when the case is dismissed by the court prior to being adjudicated at a trial. Likewise, Washington Courts have interpreted MAR 7.3 as requiring a mandatory award of attorney fees when one requesting a trial de novo does not improve their position at trial because they failed to proceed to trial de novo.

If a trial de novo request is dismissed involuntarily before conducting the trial de novo, an award of attorney fees is mandatory. Contrary to Mr. Omsa's arguments below, compliance with MAR 7.1's service and filing requirements when requesting a trial de novo is not the proper consideration when determining whether an award of costs and fees under MAR 7.3 is mandatory. Rather, the proper analysis is whether the

requesting party improved their post-arbitration position at the trial de novo.

In *Puget Sound Bank v. Richardson*, 54 Wn. App. 295, 773 P.2d 429 (1989), after losing at arbitration the defendant requested a trial de novo. Prior to going to trial, the trial court dismissed the defendant's request for trial de novo on summary judgment and awarded the plaintiff attorney fees. *Id.* The trial court's award of attorney fees was affirmed on appeal, noting that summary judgment is indistinguishable from a trial de novo for purposes of MAR 7.3 because both are "judicial examination[s] and determination[s] of legal and factual [or possible factual] issues between parties to an action." *Id.* at 299.

Likewise, in *Kim v. Pham*, 95 Wn. App. 439, 975 P.2d 544 (1999), the defendant failed to file written proof of service within 20 days following request of a trial de novo as required by MAR 7.1(a). 95 Wn. App. at 442-43. The court struck the request for trial de novo. *Id.* at 441. Division I interpreted "MAR 7.3 as requiring a mandatory award of attorney fees when one requests a trial de novo and does not improve their position at trial because they failed to comply with the requirements for proceeding to a trial de novo *such as MAR 7.1(a).*"<sup>1</sup> *Id.* at 446-47 (emphasis added). Failure to comply with MAR 7.1's requirements was

---

<sup>1</sup> The holding in *Kim* was adopted by this court in *Wiley v. Rehak*, 101 Wn. App. 198, 205, 2 P.3d 497 (2000), *affirmed* 143 Wn.2d 339, 20 P.3d 404 (2001).

the reason the party was prevented from proceeding to trial de novo, but it was the failure to improve their position at the trial de novo which mandated the award of attorney fees. *Id.*

Though the requesting parties in *Richardson* and *Kim* were prevented from proceeding to their requested trial de novo for differing reasons, it is the failure to improve their position from arbitration which mandates the award of costs and attorney fees. This premise is confirmed in *Do*, the court framed the issue as “whether a CR 68 offer of judgment is sufficiently like a voluntary withdrawal to qualify for discretionary attorney fees instead of mandatory ones.” 127 Wn. App. at 186. There, following mandatory arbitration, a defendant requested a trial de novo, but later made a CR 68 offer of judgment which was accepted by the plaintiffs. *Id.* at 185. Acceptance of the offer of judgment resulted in the party requesting the trial de novo to fail to improve his position following arbitration. *Id.* After examining the facts of *Richardson* and *Kim*, the *Do* court determined that fees were mandatory, and not discretionary, because “the party that requested the trial de novo was not responsible for ending the proceeding.” *Id.* at 187.

In *Wiley*, under similar facts to *Kim*, the Washington Supreme Court affirmed an award of attorney fees when the party requesting trial de

novo failed to improve his position from the arbitration. 143 Wn.2d at 349.

Similarly to the cases discussed above, Mr. Omsa failed to improve his position after requesting a trial de novo based upon the parties' agreement to engage in a binding arbitration and waive any right to a trial de novo. Mr. Omsa's trial de novo request was subsequently dismissed by the court upon the Martins' motion and judgment entered on the arbitration award. CP 81-82; 156-58. Mr. Omsa was not responsible for ending the proceeding.

Mr. Omsa had the choice of the stick or the carrot. Mr. Omsa elected to forego his right to the carrot and avoid a mandatory award of attorney fees when he declined to voluntarily dismiss the trial de novo request. Because the trial de novo request was thereafter dismissed by the court upon the Martins' motion, and judgment on the arbitration award entered, Mr. Omsa undeniably failed to improve his position from arbitration.

As a result of Mr. Omsa's decision to refuse the carrot and gamble on whether the trial court would enforce the binding arbitration agreement, he gets the stick. Involuntary dismissal of the trial de novo results in a mandatory award of attorney fees. The Martins are entitled to their costs and reasonable attorney fees incurred from Mr. Omsa's

February 26, 2009 request for trial de novo until the May 1, 2009 entry of judgment on the arbitration award.

**II. Dismissal of Mr. Omsa's Trial De Novo Request was Not a Voluntary Withdrawal.**

The dismissal of Mr. Omsa's request for trial de novo clearly did not fall under the second class of cases where voluntary dismissal results in a discretionary award of costs and attorney fees. MAR 7.3 provides that assessment of costs and attorney fees after voluntary withdrawal of the request for trial de novo is within the discretion of the trial court. *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 289, 787 P.2d 946 (1990).

Below, Mr. Omsa argued that the Martins are not entitled to an award of reasonable costs and attorney fees because Mr. Omsa did not voluntarily dismiss the case. CP 125:24-26:7. As discussed above, this argument is contrary to case law, court rule, and the intent of the MARs.

It is undisputed that Mr. Omsa failed to voluntarily withdraw his request for trial de novo. It is further undisputed Mr. Omsa failed to improve his position at trial de novo because his request for trial de novo was dismissed before it could occur. The only remaining result under MAR 7.3 is the mandatory award of attorney fees as discussed above.

**III. An Award of Attorney Fees to Martin Conforms to the Legislature's Goal of the Mandatory Arbitration Rules.**

Award of attorney fees to the Martins complies with the intent of the Mandatory Arbitration Rules. When interpreting statutory language, the goal is to carry out the legislature's intent. *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 148, 3 P.3d 741 (2000). The court construes the mandatory arbitration rules in accord with their purpose. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997). The purpose of MAR 7.3 is to promote the finality of disputes, discourage meritless appeals from arbitration awards, and reduce court congestion. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 526, 79 P.3d 1154 (2004); *Nevers*, 133 Wn.2d at 809. Specifically, MAR 7.3 is intended to encourage parties to accept the arbitrator's award by penalizing unsuccessful appeals from the award. *Hudson*, 146 Wn. App. at 285 (citing *Walji*, 57 Wn. App. at 290).

Mr. Omsa filed his request for trial de novo despite full knowledge that the arbitration agreement was binding. Mr. Omsa simply attempted to avoid the agreement previously made because it was not favorable to him. The Amendment to Arbitration Award confirms Mr. Omsa's knowledge of the binding nature of the arbitration agreement where it provides in pertinent part, the following:

Mr. Omsa and Mr. and Mrs. Martin were present at the time their counsel and I discussed [the arbitration was final and binding upon all parties and all parties waived their right to appeal to the Superior Court for a trial de novo], and the parties indicated that they were aware of the binding arbitration agreement and assented to it. The final and binding nature of the arbitration was undisputed by either party at the arbitration hearing.

CP 80. Mr. Omsa has not appealed the order granting leave to amend the arbitration award, nor has he appealed the dismissal of his request for trial de novo<sup>2</sup>. These two issues are not before the court.

The request for trial de novo was dismissed without Mr. Omsa improving his position from arbitration. The Martins were forced to incur unnecessary attorney fees in defense of this improper request for a trial de novo. Additional court resources were expended as a result of the request for trial de novo. Mr. Omsa's attempt to disregard the parties' binding arbitration agreement and force a trial de novo contravenes the legislature's stated intent: finality of disputes and reduced court congestion. The legislature's goal of reducing court congestion through less costly arbitration clearly has not been met in a case where a litigant is permitted to appeal a binding arbitration award, thereby contributing to further court congestion, and then once the appeal is dismissed as a result

---

<sup>2</sup> A party must seek review of a court's order before the appellate court will entertain an appeal arising from that order. *Ortblad v. State*, 88 Wn.2d 380, 385, 561 P.2d 201 (1977).

of the binding agreement, not be punished with the “stick” of MAR 7.3 with an award of attorney fees.

Mr. Omsa’s conduct abused the judicial system in entering into an agreement to conduct a binding arbitration and then attempt to back out of that agreement when it was no longer to his benefit. Permitting such abuse on a gamble that the superior court would not enforce the binding agreement or not award attorney fees against him is improper and is in direct contravention to the Washington Supreme Court’s holding in *Wiley*. The Martins should be awarded the attorney fees they were forced to incur as a result of Mr. Omsa’s filing of the request for trial de novo.

**IV. The Attorney Fees Incurred After Omsa’s Request for a Trial De Novo Are Reasonable.**

The Martins’ costs and attorney fees are reasonable. Fees reasonably incurred after a request for a trial de novo are “(a) those needed to prepare and present a motion to dismiss, and (b) those needed to resolve any other matters that cannot reasonably wait until after the motion to dismiss has been decided.” *Brandenberg v. Cloutier*, 103 Wn. App. 483, 486, 12 P.2d 664 (2000). The costs and attorney fees requested by the Martins below comply with this standard.

**V. Martin is Entitled to Costs and Attorney Fees on Appeal Pursuant to RAP 18.1.**

Pursuant to RAP 18.1, the Martins requests their costs and attorney fees incurred on appeal. As set forth in RAP 18.1(a), if applicable law grants to a party the right to recover attorney fees or expenses on review, the party must request the fees and expenses as provided in this rule.

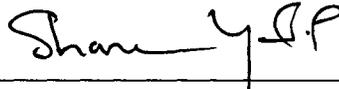
Mr. Omsa did not improve his position after filing a request for trial de novo. As discussed above, MAR 7.3 provides for a mandatory award of costs and reasonable attorney fees against a party who appeals the arbitration award and fails to improve the party's position on the trial de novo. MAR 7.3 allows for an award of costs and fees on subsequent appeals of the trial court's decision. *Brandenberg*, 103 Wn. App. at 485. Fees incurred in the appellate court are indistinguishable from fees incurred in the trial court. *Id.*, 103 Wn. App. at 485 FN 7. Martin requests costs and fees on appeal.

**CONCLUSION**

For the foregoing reasons, the Martins respectfully requests that this Court reverse the trial court's judgment denying attorney fees dated May 1, 2009. The Martins also requests costs and reasonable attorney fees incurred during this appeal.

Respectfully submitted this 24<sup>th</sup> day of August, 2009.

DICKSON STEINACKER PS

A handwritten signature in black ink, appearing to read "Shane L. Yelish". The signature is written in a cursive style with a vertical line extending downwards from the end of the signature.

---

KEVIN T. STEINACKER, WSBA #35475  
SHANE L. YELISH, WSBA #37838  
Attorneys for Appellant Martin

STATE OF WASHINGTON  
COUNTY OF KING  
BY: *DN*

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

JAMES OMSHA,  
  
Respondent,  
  
vs.  
  
JOSEPH MARTIN and BERTHA  
MARTIN, husband and wife.  
  
Appellant.

No. 39372-7-II

CERTIFICATE OF  
SERVICE

I hereby certify that on this 24<sup>th</sup> day of August, 2009, I caused a true and correct copy of the Brief of Appellant Martin, to be served on the following in the manner indicated below:

***Via US Mail***  
Nathan Neiman  
Samuel M. Meyler  
Law Offices of Nathan Neiman  
2018 156<sup>th</sup> Avenue N.E.  
Bellevue, Washington 98007-3825

I hereby certify that on this 24<sup>th</sup> day of August, 2009, I caused a true and correct original plus one copy of the Brief of Appellant Martin, to be served on the following in the manner indicated below:

*Via US Mail*  
Court of Appeals Division II  
950 Broadway  
Ste 300, MS TB-06  
Tacoma, Washington 98402-4454

DATED this 24<sup>th</sup> day of August, 2009.

Respectfully submitted,

DICKSON STEINACKER PS

  
\_\_\_\_\_  
Desirae Jones, Paralegal