

FILED
Court of Appeals
Division III
State of Washington
2/11/2019 3:16 PM
NO. 352625

96696-6

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

MARIA ESPINDOLA,

Appellant,

v.

APPLE KING, INC.,

Respondent.

APPLE KING'S REPLY MEMORANDUM
IN SUPPORT OF PETITION FOR
DISCRETIONARY REVIEW

(REPLY LIMITED TO ANSWERING ONLY
NEW ISSUES RAISED IN THE ANSWER)

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RAP 13.4(d) provides “if the party [filing an answer to a petition for review] wants to seek review of any issue that is not raised in the petition for review, including any issues raised but not decided in the Court of Appeals, the party must raise those issues in the answer...”

Here counsel urges this court to accept review of the Court of Appeals failure to award attorney fees and costs resulting from the proceedings before the Court of Appeals.

In the decision below the Court of Appeals held:

Ms. Espindola requests attorney fees and costs pursuant to RAP 18.1; 29 U.S.C. § 2617(A)(3); 29 C.F.R. § 825.400(c) and RCW 49.48.030. This request is premature because Ms. Espindola has not yet succeeded on her claim against Apple King, we are not in a position to award attorney fees. If after remanding Ms. Espindola prevails on her FMLA/WFLA claim, she will qualify as a prevailing party and may be awarded attorney fees, including fees generated during this appeal (citations omitted).

Espindola v. Apple King,
—Wn. App. 430 P.3d 663, 672-673 (Div. III, 2018)

The decision of the Court of Appeals to deny Ms. Espindola’s request for attorney’s fees because it is premature is correct. Each of the statutes and regulations upon which counsel relies allows such an award only if the claimant is the prevailing party. A prevailing party

for purposes of a statute allowing an award of attorney fees is one who receives an affirmative judgment in his or her favor. *Riss v. Angel*, 131 Wn.2d 612, 633 (1997); *Mikes Painting Inc. v. Carter Welsh Inc.*, 95 Wn. App. 64 (Div. III 1999). Ms. Espindola has not yet achieved an affirmative judgment.

Ms. Espindola presents no compelling reason to depart from precedent.

The Court should decline to accept review of that issue.

RESPECTFULLY SUBMITTED this 11th day of February, 2019.


s/Gary E. Lofland, WSBA No. 12150
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CERTIFICATE OF TRANSMITTAL

I certify under penalty of perjury under the laws of the state of Washington that I caused a copy of this document to be sent to the attorneys of record listed below as follows:

For Plaintiff: Favian Valencia 402 E. Yakima Ave., Ste. 730 Yakima, WA 98901	<input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via fax <input checked="" type="checkbox"/> via e-mail <input type="checkbox"/> via hand delivery
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DATED this 11 day of February, 2019, at Yakima, Washington.


Sandra Lepez, legal assistant
MEYER, FLUEGGE & TENNEY, P.S.

MEYER, FLUEGGE & TENNEY

February 11, 2019 - 3:16 PM

Transmittal Information

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Superior Court Case Number: 16-2-02725-2

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- 352625_Answer_Reply_to_Motion_20190211151528D3460669_7506.pdf
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