

NO. 46944-8-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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Tasha Ohnemus, Respondent/Cross-Appellant,

v.

State of Washington, Appellant/Cross-Respondent.

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**REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT**

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## I. INTRODUCTION

In 1984, the Washington Legislature enacted the criminal Sexual Exploitation of Children Act (SECA, RCW 9.68A) to “prevent[] sexual exploitation and abuse of children” and to protect children from “those who seek commercial gain or personal gratification based on the[ir] exploitation.” RCW 9.68A.001, *as enacted in* Laws of 1984, c. 262, § 1. The Legislature later clarified its intent “to hold those who pay to engage in the sexual abuse of children accountable for the trauma they inflict on children.” RCW 9.68A.001, *as amended by* Laws of 2007, c. 368, § 1.

Consistent with that intent, one SECA provision allows victims of childhood sexual exploitation to recover costs and reasonable attorneys’ fees when they prevail in civil actions arising from violation of SECA.

A minor prevailing in a civil action arising from violation of [RCW 9.68A] is entitled to recover the costs of the suit, including an award of reasonable attorneys’ fees.

RCW 9.68A.130 (emphasis added).

Ms. Ohnemus contends that RCW 9.68A.130 allows her to recover costs and fees if she prevails in her negligent investigation claim against the State of Washington (State). Her contention is contrary to the provision’s plain language, the Legislature’s intent, and sound public policy. This Court should hold that no cognizable claim under SECA can



be made against the State and, accordingly, that RCW 9.68A.130 does not allow recovery of costs and fees against the State.

## II. ARGUMENT IN REPLY

### A. **Whether the State Can Be Liable Under RCW 9.68A or Subject to Costs and Fees Under RCW 9.68A.130 Is Ripe for Review**

The State's cross-appeal issues are ripe for review and this Court should reject the various and conflicting arguments Ms. Ohnemus raises to the contrary. First, Ms. Ohnemus stipulated below that the case was ripe for review. Second, although she asserts the State's cross-appeal is not ripe because the trial court made no final decision regarding it, she also appears to concede that the court's time-bar ruling disposed of her RCW 9.68A claims. Reply Brief of Respondent/Cross-Appellant (Ohnemus Reply Br.) at 13-14. Finally, regardless of which position Ms. Ohnemus espouses, the State's appeal is ripe for review by this Court.

First, as Ms. Ohnemus stipulated below that this case was ripe for appeal, she should not now be heard to take the opposite position. After the trial court dismissed Ms. Ohnemus' claims based on sexual abuse and non-sexual physical abuse on summary judgment and reconsideration, the parties understood the only claim remaining to be her claim under RCW 9.68A.100. Clerk's Papers (CP) at 655-56. The parties jointly moved to certify the case for appellate review under CR 54(b) and RAP 2.3(b)(4).

CP at 655-60. The parties' joint brief explained that "being allowed to appeal the Court's grant and denial of summary judgment at this time will allow the parties to resolve the statute of limitations issue the Plaintiff wants to have addressed by the appellate court and also the RCW 9.68A.100 issue the Defendant wants to have addressed by the appellate court." CP at 659. For those reasons "the parties stipulate that this case is ripe for appellate review." CP at 660. The trial court certified the case for appeal. CP at 661-64. Ms. Ohnemus' assertion that the State's cross-appeal is not ripe contradicts her stipulation to the trial court.

Second, while Ms. Ohnemus argues that the "attorney fees issue which the State purports to cross-appeal is not ripe because the trial court made no final decision," her explanation of this statement appears to concede that the trial court's time-bar ruling was a final disposition of her RCW 9.68A claim. Ohnemus Reply Br. at 13. Ms. Ohnemus characterizes the fees issue as "a potential claim for fees in the event that the dismissal on statute of limitations grounds is reversed and plaintiff ultimately prevails at trial." Ohnemus Reply Br. at 13-14 (emphasis added). This characterization necessarily concedes that her claims under RCW 9.68A are viable only if this Court reverses the trial court's statute of limitations ruling. If the trial court's time-bar ruling effectively dismissed her

RCW 9.68A claims, then the trial court did make a final decision regarding those claims, and appeal is proper.

Finally, regardless of these inconsistent arguments, the State's appeal is ripe for review. "Whether a claim is ripe depends on whether the issues raised are 'primarily legal, and do not require further factual development, and if the challenged action is final.'" *Lewis Cnty. v. State*, 178 Wn. App. 431, 440, 315 P.3d 550 (2013) (quoting *Jafar v. Webb*, 177 Wn.2d 520, 525, 303 P.3d 1042 (2013)), *review denied*, 180 Wn.2d 1010, 325 P.3d 914 (2014). Courts "also consider the hardship to the parties of withholding court consideration." *Lewis Cnty*, 178 Wn. App. at 440 (citing *Jafar*, 177 Wn.2d at 525).

The issues raised in the State's appeal present pure questions of law requiring no further factual development: (1) can no cognizable claim be brought against the State under SECA, and (2) accordingly, can there be no recovery of costs and fees against the State under RCW 9.68A.130?<sup>1</sup> Finality is sufficient for review purposes, based on the parties' stipulation and the superior court's certification that the issues involve a controlling question of law on which there is a substantial ground for a difference of

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<sup>1</sup> Washington court rules promote early resolution of claims that are not cognizable. RAP 2.5(a)(2) allows appellate courts to reach the issue of failure to state a cognizable claim at any time, even if raised for the first time on appeal (which the State's issue was not). Since the gravamen of the State's issues on appeal is whether Ms. Ohnemus has failed to state a claim under RCW 9.68A on which relief can be granted, this Court could alternatively reach the State's issues based on RAP 2.5(a)(2).

opinion and immediate review may materially advance the ultimate termination of litigation. RAP 2.4(b)(4); CP at 661-64. Withholding court consideration would trigger the very hardship the parties agreed to avoid by seeking certification under CR 54(b) and RAP 2.4(b)(4).

Repeating an argument she made below, Ms. Ohnemus urges this Court to “defer the issues that arise regarding application of [RCW 9.68A.130] until after [she] prevails on the underlying claim of sexual exploitation.”<sup>2</sup> Ohnemus Reply Br. at 15. Notably, Ms. Ohnemus raised no argument in response to the State’s position that it cannot be held liable under RCW 9.68A.100 or SECA. *See infra* Section II.B. Thus, arguably, Ms. Ohnemus has no remaining “underlying claim of sexual exploitation” on which she can prevail.

Regardless, deferral is inappropriate for the same reasons that the State’s appeal is not moot. Contrary to Ms. Ohnemus’s suggestion, the State’s appeal does not “present[] ‘purely academic issues’ [on which] it is ‘not possible for the court to provide effective relief.’” Ohnemus Reply Br. at 14 (quoting *Gorden v. Lloyd Ward & Assoc.’s, P.C.*, 180 Wn. App. 552, 560, 323 P.3d 1074 (2014)).

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<sup>2</sup> What Ms. Ohnemus describes in her argument, without citation, as the “consensus” of trial court cases to defer the RCW 9.68A.130 issue consists entirely of federal district court rulings, wherein federal judges have appropriately declined to reach this state law issue of first impression. Only two of the rulings are reported. *See, e.g., Boy I v. Boy Scouts of America*, 832 F. Supp. 2d 1282 (W.D. Wash. 2011); *J.C. v. Society of Jesus, Oregon Province*, 457 F. Supp. 2d 1201 (W.D. Wash. 2006).

Rather, the question of liability for costs and fees under RCW 9.68A.130 is of continuing and substantial importance. From the outset of litigation, a party's potential exposure to attorneys' fees liability influences the party's strategic approach to the case. Entities that are not perpetrators of child sexual exploitation and yet face claims under RCW 9.68A.130 need to know whether they have what can amount to substantial liability for attorneys' fees. As this Court may note, in many cases attorneys' fees far exceed liability for damages. Whether the State is subject to liability under SECA for costs and fees has an ongoing effect on the State because it affects the State's defense of every case in which such a claim is made. This issue will continue to influence the State's litigation position in such cases until the issue is judicially resolved.

Thus, even if the issue were moot, which it is not, this Court should still address it. "A court may decide a technically moot case if it involves 'matters of continuing and substantial public interest.'" *In re Mines*, 146 Wn.2d 279, 285, 45 P.3d 535 (2002) (quoting *In re Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983)). When determining the requisite degree of public interest, courts "consider (1) 'the public or private nature of the question presented,' (2) 'the desirability of an authoritative determination for the future guidance of public officers,' and (3) 'the likelihood of future recurrence of the question.'" *Mines*, 146 Wn.2d at 285

(quoting *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). This issue of statutory interpretation is public in nature, the State is requesting an authoritative determination for its future guidance, and the question will certainly continue to recur until such a determination is rendered. Thus, as the issue constitutes a matter of continuing and substantial public interest this Court can—and should—decide it.

**B. Because the State is Incapable of Violating RCW 9.68A, Any Claim Against the State Under That Chapter Must be Dismissed as Not Cognizable**

The State argued in its opening brief on appeal that no cognizable claim can be maintained against it under RCW 9.68A.100, or more generally under SECA. Brief of Appellant/Cross-Respondent (State's Opening Br.) at 34-40. In her response brief, Ms. Ohnemus fails to address at all the State's arguments disputing her claim that the State is liable to her under RCW 9.68A.100. Perhaps that is because no reasoned rebuttal is possible.

Ms. Ohnemus does inform the Court, without explanation or argument, that a different provision of RCW 9.68A “prohibits communication with a minor for immoral purposes.” Ohnemus Reply Br. at 16 (citing 9.68A.090(1)). However, Ms. Ohnemus did not claim below that the State violated this provision, did not offer any evidence that

would support such a claim, and does not now so argue.<sup>3</sup> And, of course, the State is just as incapable of violating this provision of SECA as it is incapable of violating any other.

As the State explained at length in its opening brief, it cannot violate RCW 9.68A or RCW 9.68A.100 for at least three reasons: the State is not a “person” subject to the crimes defined by RCW 9.68A; the State is incapable of forming the criminal intent required to commit a criminal offense, including those defined by RCW 9.68A; and the State is incapable of engaging in sexual conduct, an element of the crime defined in RCW 9.68A.100. *See* State’s Opening Br. at 34-40. Accordingly, there can be no cognizable claim against the State under RCW 9.68A. The State’s argument on this issue stands unrebutted for this Court’s consideration.

**C. RCW 9.68A.130 Does Not Allow Recovery of Costs and Fees Against the State**

RCW 9.68A.130 provides that “[a] minor prevailing in a civil action arising from violation of [RCW 9.68A] is entitled to recover the costs of the suit, including an award of reasonable attorneys’ fees.” Ms. Ohnemus asserts “the plain language of RCW 9.68A.130 shows that it

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<sup>3</sup> In August of 2014, Ms. Ohnemus indicated in briefing to the trial court that she would “file an amended complaint alleging violation of RCW 9.68A (not 9.68A.100).” CP at 366; *see also* State’s Opening Br. at 34 n.9. As of this brief’s filing, she has not done so.

applies to this case and no contrary intent is evidenced by the wording of the statute (or by its legislative history).” Ohnemus Reply Br. at 15. But the arguments with which Ms. Ohnemus supports this assertion are superficial and conclusory. The provision’s plain language, the available indicators of legislative intent, and sound public policy all support the conclusion that RCW 9.68A.130 does not allow recovery of costs and fees against the State.

- 1. By its plain language RCW 9.68A.130, which applies to civil actions “arising from violation” of RCW 9.68A, does not apply to claims against the State**

The fundamental objective in construing a statute is to ascertain and carry out the Legislature’s intent—if the statute’s meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). “[T]hat meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Id.* at 11. The plain language of RCW 9.68A.130, in its context, shows that the Legislature intended the provision to allow child victims of commercial sexual exploitation to recover their litigation costs and fees when they prevail in civil actions against those who have exploited them.



- a. **A civil action does not *arise from* violation of RCW 9.68A unless *but for* the violation, the action cannot be brought**

In a scant single paragraph, Ms. Ohnemus argues that RCW 9.68A.130 applies because her claims “arise from the sexual abuse by her stepfather.” Ohnemus Reply Br. at 16. “If that sexual abuse had not occurred, there would be no conduct from which the plaintiffs’ [sic] claims could arise.” Ohnemus Reply Br. at 16.

This is patently incorrect. The claims Ms. Ohnemus makes against the State *arise from* her allegations about the State’s conduct, not from the sexual abuse perpetrated by her stepfather. Ms. Ohnemus’ principle claim against the State is “negligent investigation” pursuant to RCW 26.44.050. CP at 5. A claim for negligent investigation requires allegations that the State (1) conducted a biased or incomplete investigation (2) of a report of child abuse or neglect (3) that resulted in a harmful placement decision. *M.W. v. Dep’t of Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003). Sexual abuse is not a required element of Ms. Ohnemus’ negligent investigation claim against the State.

Likewise, Ms. Ohnemus’s other claim against the State—for “Sexual Exploitation pursuant to RCW 9.68A.100” (CP at 5)—would also require conduct by the State, which is one reason the claim is not cognizable. RCW 9.68A.100 defines the criminal offense of engaging in

sexual conduct with a minor for a fee, or soliciting such conduct. *See* RCW 9.68A.100 (1999) (patronizing a juvenile prostitute); RCW 9.68A.100 (2002) (commercial sexual abuse of a minor). The provision does not support a cognizable claim against the State because, *inter alia*, the State is incapable of engaging in sexual conduct.<sup>4</sup> *See supra* Section II.B; *see also* State’s Opening Br. at 39-40 (Section VII.C.1.c).

As the State explained in its opening brief, the plain meaning of “arising from” is: “to come about,” “to stem (from),” “to result (from).” State’s Opening Br. at 45-46 (quoting *Webster’s Third New International Dictionary* 117 (2002) and *Black’s Law Dictionary* 129 (10th ed. 2009)). Also, our Supreme Court has held that the statutory language “causes of action *arising from* acts” means that the cause of action could not have arisen “but for” the act. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 772, 783 P.2d 78 (1989) (construing the State’s long arm statute and holding “but for” defendant’s action within the state, plaintiff would not have been injured, therefore plaintiff’s claim “arises from” defendant’s action). The same causal connection is required by the RCW 9.68A.130 language “civil action *arising from* violation” of RCW 9.68A, that “but for” the violation, the civil action could not be brought. *See* State’s Opening Br. at 45-46.

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<sup>4</sup> Ms. Ohnemus did not appeal the trial court’s dismissal of her 18 U.S.C. § 2252 and § 2255 claims and consequently those claims are not before the Court.

**b. The civil action must arise from “violation” of RCW 9.68A, but the State is incapable of such a violation**

Ms. Ohnemus also argues that RCW 9.68A.130 only requires that claims “arise from a ‘violation’ of RCW 9.68A – under the plain language of the statute, no criminal conviction is required.” Ohnemus Reply Br. at 17 (emphasis in original). The State agrees that “[a] violation of a statute and a conviction for a violation of a statute are two very distinct things.” Ohnemus Reply Br. at 17. As the State’s opening brief explained, a “violation” is an “infraction or breach of the law.” *Black’s* 1800. Thus, a “violation” of RCW 9.68A, a chapter defining criminal offenses involving the sexual exploitation of children, means engaging in conduct that constitutes one of the crimes defined. *See* State’s Opening Br. at 44. On its face, RCW 9.68A.130 only requires the conduct. It does not require a criminal conviction, nor does the State argue that one is necessary.

Rather, consistent with the statute’s plain language, the State argues that (1) RCW 9.68A.130 requires violation of RCW 9.68A, (2) the State is incapable of violating RCW 9.68A, and therefore (3) RCW 9.68A.130 cannot apply to the State. State’s Opening Br. at 42-48.

Nor does *J.C. v. Society of Jesus, Oregon Province*, 457 F. Supp. 2d 1201 (W.D. Wash. 2006), offer persuasive authority to the contrary. Ms. Ohnemus claims that *J.C.*, “the first published decision to address

[RCW 9.68A.130,] rejected the arguments raised by the State.”<sup>5</sup> Ohnemus Reply Br. at 18. While this claim is superficially accurate, it omits at least four relevant considerations that collectively negate *J.C.*’s value to this Court’s analysis.

First, the *J.C.* decision, a federal district court order on summary judgment, has no precedential value. In *J.C.*, the court denied summary judgment to Defendant Society of Jesus, Oregon Province (Province), finding there were material issues of fact whether the Province had been on notice of a deceased priest’s 1968 sexual abuse of Plaintiff J.C. and had failed to disclose what it knew. In addition to claims sounding in negligence, Plaintiff J.C. had asserted a claim under SECA and sought attorneys’ fees under RCW 9.68A.130. *J.C.*, 457 F. Supp. 2d at 1204.

Second, the *J.C.* court’s consideration of RCW 9.68A.130 is dicta. The court expressly “decline[d] to decide . . . whether SECA’s attorneys’ fees provision applie[d],” “reserving ruling” on that question. *J.C.*, 457 F. Supp. 2d at 1205.

Third, the court’s consideration is without analysis. The Province had argued that RCW 9.68A.130 permits a fees award ““only where the person who violated [SECA] is the defendant in the action.”” Ohnemus

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<sup>5</sup> The *J.C.* court also rejected two other arguments raised by the Province: that its liability turned on whether it was vicariously guilty of the priest’s crimes, and that civil liability can arise only after a conviction under SECA. *J.C.*, 457 F. Supp. 2d at 1204. The State makes neither of these arguments.

Reply Br. at 18 (quoting *J.C.*, 457 F. Supp. 2d at 1204). Ms. Ohnemus quotes the court’s decision on this point in part: “The court rejected this argument because ‘it conflicts with the text of the statute[.]’” *Id.* The remainder of the *J.C.* court’s decision on this point was “and the Province presents no authority to support it.” *J.C.*, 457 F. Supp. 2d at 1204. Because the *J.C.* court did not provide any analysis to support its conclusion, there is no analysis available for this Court’s consideration.

Finally, the *J.C.* court made it abundantly clear that it found the parties’ briefing on the RCW 9.68A.130 issue to be inadequate:

The question before the court is a state law question of first impression, and the court declines to decide it on the sparse briefing the parties have presented. . . . Should [Plaintiff] prevail, the court will require the parties to submit more detailed briefing on the applicability of RCW § 9.68A.130.

*J.C.*, 457 F. Supp. 2d at 1205. The *J.C.* ruling offers no basis to reject the State’s reasoned argument, or to adopt the result urged by Ms. Ohnemus.

- c. **Because RCW 9.68A.130 is a criminal statute, to hold it applies to the State would require this Court to consider the rule of lenity and other rules applicable to criminal statutes**

RCW 9.68A.130 by its plain language applies to “a civil action arising from violation” of RCW 9.68A. The State asks this Court to hold that RCW 9.68A.130 does not apply to the State because the State is

incapable of violating RCW 9.68A. The Court can rule in the State's favor on this basis without going further.

In contrast, Ms. Ohnemus asks this Court to hold that RCW 9.68A.130 does apply to the State, seemingly because her stepfather's conduct could have violated SECA, although she does not articulate her legal theory for why and how the State should become liable for her stepfather's intentional criminal conduct. What she argues instead is that "the legislature clearly intended RCW 9.68A.130 to apply much more broadly than only claims against a criminal defendant, after the defendant was convicted." Ohnemus Reply Br. at 17. The State does not argue that RCW 9.68A.130 applies only to criminal defendants convicted of SECA crimes. But Ms. Ohnemus indirectly raises a significant point—because RCW 9.68A.130 is a criminal statute, a decision that it applies to the State must perforce address the ramifications of that status.

RCW 9.68A.130 is a criminal statute, despite Ms. Ohnemus suggesting otherwise. Ohnemus Reply Br. at 21 ("Although other provisions of RCW 9.68A may address criminal conduct, RCW 9.68A.130 does nothing more than award attorney's fees and costs."). When RCW 9.68A.130 was enacted, the Legislature expressly directed the provision be placed in RCW Title 9, crimes and punishments. Laws of 1984, c. 262, § 14 (directing that sections 1 through 12 of the session law

be each added to chapter 9.68A RCW, whereupon section 12 was codified as RCW 9.68A.130). A court may look to a statute's location in the criminal code as an indication of the Legislature's intent. *State v. Arth*, 121 Wn. App. 205, 212 n.14, 87 P.3d 1206 (2004) (citing *In re Percer*, 150 Wn.2d 41, 50, 75 P.3d 488 (2003)).

As a criminal statute, RCW 9.68A.130 is subject to the directives applicable to all criminal provisions set forth in chapters RCW 9A.04 through 9A.28. RCW 9A.04.090; *see also* State's Opening Br. at 36. These directives include principles of construction, RCW 9A.04.020; principles of criminal culpability and liability for the conduct of another, RCW 9A.08; and provisions of the common law relating to the commission of crime and the punishment thereof, RCW 9A.04.060. Additionally, the rule of lenity provides that if upon plain language analysis a provision is still subject to more than one reasonable interpretation, the court must "interpret the statute in favor of the defendant absent legislative intent to the contrary." *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

To adopt Ms. Ohnemus' position that RCW 9.68A.130 applies to the State would require the Court to grapple with complexities inherent in applying a criminal statute to the State, including issues of criminal culpability and the rule of lenity. By contrast, adopting the State's theory

is simple: RCW 9.68A.130 requires violation of RCW 9.68A, the State is incapable of violating RCW 9.68A, and therefore RCW 9.68A.130 cannot apply to the State.

**2. Available evidence corroborates the Legislature did *not* intend for RCW 9.68A.130 to apply to the State**

Beyond her sparse plain language analysis, Ms. Ohnemus claims it is the Legislature’s intent that RCW 9.68A.130 apply to the State. But in support, she offers only conclusory statements without authority regarding legislative findings and an unarticulated analogy to the Supreme Court’s inapposite decision in *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999). Neither avail her.

**a. Legislative findings and history demonstrate no intent for RCW 9.68A.130 to apply to the State**

Without relevant authority or reasoned argument, Ms. Ohnemus contends “the legislative findings [show] the legislature clearly intended RCW 9.68A.130 to apply” in cases like hers against the State. Ohnemus Reply Br. at 17. Ms. Ohnemus leaves to the Court’s imagination how the legislative finding show this alleged clear intent—she makes no other reference to legislative findings in her response briefing.

This is perhaps not surprising, given that the Legislature’s findings explicitly focus on holding exploiters of children accountable, and say



nothing that would support the intent to levy costs and fees against the

State in tort actions like this. In relevant part, those findings state:

- “[T]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”
- Children “should not be abused by those who seek commercial gain or personal gratification based on the[ir] exploitation.”
- “It is the intent of the legislature . . . to hold those who pay to engage in the sexual abuse of children accountable for the trauma they inflict on children.”

RCW 9.68A.001. These legislative findings do not show any intent by the Legislature that RCW 9.68A.130 should apply to the State.

Equally unsupported is Ms. Ohnemus’ claim that RCW 9.68A.130 applies to this case “and no contrary intent is evidenced . . . by its legislative history.” Ohnemus Reply Br. at 15. While the legislative history reveals little regarding the intent behind RCW 9.68A.130, what evidence there is supports the State’s theory, not that of Ms. Ohnemus.

First, the bill reports convey no indication of the Legislature’s intent—once the costs and fees provision was added by House amendment, the reports simply paraphrase the provision’s language.<sup>6</sup>

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<sup>6</sup> See H.B. Rep. on Engrossed S.B. 4309, at 2, 48th Leg., Reg. Sess. (Wash. 1984) (reporting addition to Engrossed Senate Bill 4309 of provision “that entitles exploited minors to attorneys’ fees if they prevail in a civil action arising out of a violation of this act”); Senate Comm. on Judiciary, Memorandum on Engrossed S.B. 4309, at 2 (Mar. 3, 1984), 48th Leg., Reg. Sess. (Wash. 1984) (reporting Senate did concur in same); Final Bill Report on S.B. 4309, 48th Leg., Reg. Sess. (Wash. 1984) (providing “Exploited minors are entitled to attorneys fees if they prevail in a civil action arising out of a violation of the sexual exploitation act.”).

What the legislative history does include is a State Legislative Report titled “*Sexual Exploitation of Children and Youth*” that recommends, as an option for strengthening laws: “Allow victims to sue perpetrators for damages and attorneys’ fees.” Friend, Shelly A., *State Legislative Report: Human Resources Series, Sexual Exploitation of Children and Youth*, Vol. 8, No. 6 (October 1983) at 6 (emphasis added).

Second, notably, the Legislature requested no fiscal note on the bill. *See* H.B. Rep. on Engrossed S.B. 4309, at 2, 48th Leg., Reg. Sess. (Wash. 1984) (stating no Fiscal Note requested). If the Legislature had intended RCW 9.68A.130 to impose liability on the State, a fiscal note would have been required to capture the potential new state fiscal liability, in compliance with the Legislature’s obligation to enact a balanced budget. *Wash. State Legislature v. Lowry*, 131 Wn.2d 309, 316, 931 P.2d 885 (1997) (noting “requirement in the Budget and Accounting Act, RCW 43.88, that the Governor submit and the Legislature enact a balanced biennial operating budget”). Washington courts consider fiscal notes in analyzing legislative history.<sup>7</sup>

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<sup>7</sup> *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 367, 166 P.3d 667 (2007) (citing local government fiscal note in analysis of legislative history); *Sebastian v. State, Dep’t of Labor & Indus.*, 142 Wn.2d 280, 295, 12 P.3d 594 (2000) (quoting fiscal note in support of conclusion that “pertinent [legislative] history clearly shows fiscal concerns dr[o]ve the Legislature’s implementation and oversight” of act in question); *Baker v. Tri-Mountain Res., Inc.*, 94 Wn. App. 849, 854, 973 P.2d 1078 (1999) (noting at least three Washington cases have cited to fiscal notes and listing cases).

**b. The Supreme Court's construction of RCW 4.16.340 in *C.J.C.* does *not* demonstrate intent for RCW 9.68A.130 to apply to the State**

Ms. Ohnemus finally contends that our Supreme Court “has acknowledged that RCW 9.68A and RCW 4.16.340 [the statute of limitations applicable to civil claims ‘based on’ intentional childhood sexual abuse] are a combined effort to further” “the legislature’s strong public policy of providing abuse victims full access to the courts.” Ohnemus Reply Br. at 19 (emphasis added). Ms. Ohnemus cites no authority for her assertion that the Supreme Court has acknowledged RCW 9.68A and RCW 4.16.340 to be such “a combined effort.”

Instead, Ms. Ohnemus discusses *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999). Ohnemus Reply Br. at 19-20. *C.J.C.* held that the civil statute of limitations, RCW 4.16.340, extends to negligence claims against entities who allegedly failed to protect child victims of intentional sexual abuse, overruling a decision that held the provision only applied to claims against the abuser. *C.J.C.*, 138 Wn.2d at 704, 714. Ignoring the extensive statutory analysis through which the *C.J.C.* court reached that holding, Ms. Ohnemus reduces it to the following: “even though RCW 4.16.340 refers to intentional, criminal conduct, the Court found that victims could pursue negligent supervision claims against entities who failed to prevent

the criminal conduct because those claims are ‘based on’ the criminal conduct.” Ohnemus Reply Br. at 20. While apparently Ms. Ohnemus would like this Court to ‘follow’ *C.J.C.*, she does not explain why that analysis of RCW 4.16.340 should govern this Court’s analysis of RCW 9.68A.130. And plainly it does not, for at least five reasons.

First, the *C.J.C.* court began by recognizing that the “language control[ling] the scope of [RCW 4.16.340’s] applicability . . . is expansive.” *C.J.C.*, 138 Wn.2d at 708-09. “It permits ‘all claims or causes of action’ brought by ‘any person’ provided only that claims be ‘based on intentional conduct’ involving ‘childhood sexual abuse.’” *Id.* at 709 (quoting RCW 4.16.340(1)) (emphasis added). The language controlling the scope of RCW 9.68A.130 is not similarly expansive, applying only to “[a] minor prevailing in a civil action arising from violation of [RCW 9.68A].”

Second, the *C.J.C.* court examined the term “based on,” observed that a “‘base’ [i]s ‘that on which something rests or stands,’” and determined that “an action is ‘based on intentional conduct’ if intentional sexual abuse is the starting point or foundation of the claim.” *C.J.C.*, 138 Wn.2d at 709 (quoting *Webster’s Third New International Dictionary* 180 (1986)). In RCW 9.68A.130, the Legislature used different language, “arising from.” As discussed earlier, “arising from” means “results from”

and requires that “but for” the violation, the civil action could not be brought. *See supra* Section II.C.1.a; *see also* State’s Opening Br. at 45-46.

Third, the *C.J.C.* court explained that when the Legislature enacted RCW 4.16.340 it simultaneously amended RCW 4.16.350 to “expressly provide[] that RCW 4.16.340 applies to the *negligence* of a health care provider where the claim is based on injuries suffered as a result of childhood sexual abuse.” *C.J.C.*, 138 Wn.2d at 710 (emphasis in original). There is no such strong indicator of the Legislature’s intent regarding RCW 9.68A.130.

Fourth, RCW 4.16.340 is a civil statute of limitations. By contrast, RCW 9.68A.130 is a criminal statute subject to the principles of strict construction applicable to criminal statutes. *See supra* Section II.C.1.c.

Fifth, when the Legislature enacted RCW 4.16.340, it “specifically provided for a broad and generous application of the discovery rule to civil actions for injuries caused by childhood sexual abuse.” *C.J.C.*, 138 Wn.2d at 712 (describing Laws of 1991, chapter 212, section 1(6) as “amending RCW 4.16.340 in part to clarify the Legislature’s original intent in enacting the statute.”). The Legislature “adopted ‘findings and intent,’ which make clear that its primary concern [with RCW 4.16.340] was to provide a broad avenue of redress for victims of childhood sexual abuse who too often were left without a remedy under previous statutes of

limitation.” *C.J.C.*, 138 Wn.2d at 712. By contrast, with RCW 9.68A.130 the Legislature adopted findings and intent which make clear its concern “to hold those who pay to engage in the sexual abuse of children accountable for the trauma they inflict on children.” RCW 9.68A.001.

For all of the above reasons, the *C.J.C.* court’s holding—that RCW 4.16.340 applies to negligence actions against entities that allegedly have failed to prevent child sexual abuse—in no way supports the position espoused by Ms. Ohnemus that RCW 9.68A.130 applies to the State.

**3. Sound public policy weighs against applying RCW 9.68A.130 to the State**

RCW 9.68A.130 is a criminal statute in an act that targets the predators who sexually exploit children. The provision allows child victims of commercial sexual exploitation to recover their litigation costs and fees when they prevail in civil actions against those who have exploited them. It is both just and reasonable that these predators, who pay for or profit from the sexual exploitation of children, should be held liable for costs and fees of their victims’ civil actions, in addition to damages.

The Legislature has clearly expressed its intent “to hold those who pay to engage in the sexual abuse of children accountable for the trauma they inflict on children.” RCW 9.68A.001. This sound public policy of holding perpetrators accountable is advanced by imposing the remedy of

RCW 9.68A.130 against the perpetrators of SECA crimes. Doing so forces perpetrators to disgorge ill-gotten profits and facilitates civil actions by victims of commercial sexual exploitation against their exploiters.

By the same token, it is neither just nor reasonable that RCW 9.68A.130 apply against the State. The State does not engage in the commercial sexual exploitation of children. To the contrary, the State devotes extensive resources to protecting children from exploitation and prosecuting the exploiters. Levying costs and fees against the State in civil tort actions, such as Ms. Ohnemus' negligent investigation claim, would fly in the face of the public policy reflected in RCW 9.68A.130—to hold those who sexually exploit children accountable for their actions.

### **III. CONCLUSION**

No cognizable claim can be brought against the State under RCW 9.68A, and accordingly, there can be no recovery of costs and fees against the State under RCW 9.68A.130. These issues are ripe for review—they present pure questions of law, require no further factual development, and, on the parties' stipulation, were duly certified. Moreover, in particular, the question of the State's liability for costs and fees under RCW 9.68A.130 is one of continuing and substantial public interest. Even if it were moot, which it is not, this Court can—and should—decide it.

The State is not liable under RCW 9.68A. The State is not a “person” who is subject to the crimes defined by RCW 9.68A; is incapable of forming the criminal intent required to commit a criminal offense; and is incapable of engaging in sexual conduct, an element of the crime defined in RCW 9.68A.100. No cognizable claim can be brought against the State under RCW 9.68A.

Finally, with respect to the State’s liability for costs and fees under RCW 9.68A.130, the provision’s plain language, the available indicators of legislative intent, and sound public policy all support the conclusion that RCW 9.68A.130 does not allow recovery of costs and fees against the State. This Court should hold that no cognizable claim under RCW 9.68A can be made against the State and, accordingly, that RCW 9.68A.130 does not allow recovery of costs and fees against the State.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of July, 2015.

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DECLARATION OF SERVICE

I declare that I sent for service a true and correct copy of the foregoing document on all parties or their counsel of record via electronic mail and first class mail, postage prepaid, as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27<sup>th</sup> day of July, 2015, at Tumwater, WA.



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LISA SAVOIA, Legal Assistant

**WASHINGTON STATE ATTORNEY GENERAL**

**July 27, 2015 - 3:46 PM**

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