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Supreme Court No. 94074-6
Court of Appeals No. 75636-2-I

**SUPREME COURT
OF THE STATE OF WASHINGTON**

SHARI FURNSTAHL, as guardian ad litem for C.F., a minor child,

Plaintiff-Petitioner,

v.

JONNIE BARR and SUE BARR, husband and wife, and PUYALLUP
BASKETBALL ACADEMY,

Defendants-Respondents.

ANSWER OF DEFENDANT/RESPONDENT JONNIE BARR
TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION1

II. COUNTERSTATEMENT OF ISSUES FOR REVIEW 1

III. COUNTERSTATEMENT OF THE CASE2

IV. C.F.’S PETITION FOR REVIEW SHOULD BE DENIED4

 A. The Court of Appeals’ Decision is not in Conflict with
 Decisions from the Court of Appeals or the Washington State
 Supreme Court.....4

 1. The decision is not in conflict with Washington authority
 on CR 54(d).....5

 2. Without a predicate showing of a violation of RCW
 9.68A.130, the trial court never reaches a CR 54(d)
 motion for costs under RCW 9.68A.1306

 3. The decision is not in conflict with *C.J.C. v. Corp. of
 Catholic Bishop of Yakima* because C.F. failed to ask the
 jury to find a violation of RCW 9.68A.7

 B. The Court of Appeals’ Decision Does Not Raise a Significant
 Constitutional Question12

 C. The Court of Appeals’ Decision Does Not Present Issues of
 Substantial Public Interest13

V. CONCLUSION14

TABLE OF AUTHORITIES

Cases

<i>Butler v. State</i> , 34 Wn.App. 835, 663 P.2d 1390 (1983)	10
<i>C.J.C. v. Corp. of Catholic Bishop of Yakima</i> , 138 Wn.2d 699, 985 P.2d 262 (1999)	7, 8, 9, 11
<i>Furnstahl v. Barr</i> No. 75636-2-1, (2016 WL 7468221 (2016))	1, 5, 11, 12, 13
<i>J.C. v. Society of Jesus</i> , 457 F.Supp.2d 1201 (2006)	4
<i>Kuhn v. Schnall</i> , 155 Wn.App. 560, 228 P.3d 828 (2010)	11, 12
<i>Ohnemus v. State</i> , 195 Wash.App. 135, 379 P.3d 142 (2016).....	4
<i>State v. McNallie</i> , 120 Wn.2d 925, 846 P.2d 1358 (1993)	10
<i>State v. Schimmelpfenning</i> , 92 Wn.2d 95, 594 P.2d 442 (1979)	11
<i>State v. Watson</i> , 155 Wash.2d 574, 122 P.3d 903 (2005).....	13

Statutes

RCW 4.16.340	8, 9
RCW 4.64.030	6
RCW 4.84.010	3, 6, 7

RCW 4.84.185	5
RCW 9.A.44.....	9
RCW 9.68A et seq.	1, 2, 5, 7, 8, 12
RCW 9.68A.040.....	9
RCW 9.68A.050.....	10
RCW 9.68A.060.....	10
RCW 9.68A.070.....	10
RCW 9.68A.075.....	10
RCW 9.68A.080.....	10
RCW 9.68A.090.....	9, 10
RCW 9.68A.100.....	4, 10
RCW 9.68A.101.....	10
RCW 9.68A.102.....	10
RCW 9.68A.103.....	10
RCW 9.68A.130.....	1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14

Rules

CR 54(d).....3, 5, 6, 7, 13

RAP 13.4.....1, 5, 14

I. INTRODUCTION

C.F. petitions this Court to review and reverse the December 19, 2016 published opinion from the Court of Appeals holding that an award of attorney fees pursuant to RCW 9.68A.130 is contingent upon a fact finder's determination that the party seeking the award prevailed in an action arising from conduct constituting a violation of a provision of chapter 9.68A RCW. Respondent Jonnie Barr, by and through his attorneys of record, respectfully requests this Court deny review of the December 19, 2016 published Court of Appeals opinion in the case of *Furnstahl v. Barr*, No. 75636-2-1, (2016 WL 7468221 (2016)). The Court of Appeals decision confirmed the trial court's order denying C.F.'s request for an award of attorney fees pursuant to RCW 9.68A.130 on December 18, 2015.

II. COUNTERSTATEMENT OF ISSUES FOR REVIEW

Respondent Jonnie Barr submits there is no basis for this Court's review of the Court of Appeals' decision pursuant to RAP 13.4. The decision by the Court of Appeals is not in conflict with a decision of the Supreme Court; the decision by the Court of Appeals is not in conflict with a published decision of the Court of Appeals; there is no significant question of law under the Constitution of the State of Washington or under the Constitution of the United States; and, the petition does not involve an

issue of substantial public interest that should be determined by the Supreme Court.

If this Court chooses to accept review, the proper issue for review is whether an award of attorneys' fees and costs under RCW 9.68A.130 is contingent on a determination by the finder of fact that a SECA violation occurred.

III. COUNTERSTATEMENT OF CASE

On April 18, 2014, C.F. filed a civil action against Jonnie Barr, Sue Barr, and Puyallup Basketball Academy (hereinafter "PBA"). CP 1-4. C.F.'s Complaint alleged civil claims of negligence, false light invasion of privacy, battery, assault, intentional infliction of emotional distress, and false imprisonment. *Id.* C.F.'s Complaint failed to assert a claim under RCW 9.68A (hereinafter "SECA") or to seek attorneys' fees under RCW 9.68A.130. *Id.* Her Complaint contained a request for "attorneys' fees, prejudgment interest, costs and exemplary damages as may be provided by law." *Id.*

At trial, the parties presented evidence concerning claims of civil assault, civil battery, negligence, intentional infliction of emotional distress, and false light invasion of privacy. Opinion at 3. The parties then submitted a special verdict form to the jury regarding these tort theories. CP 322-325. The jury returned a verdict finding Mr. Barr and

PBA negligent, finding Mr. Barr and Mrs. Barr liable for false light invasion of privacy, and finding Mr. Barr liable for intentional infliction of emotional distress/outrage, civil assault and battery.¹ *Id.* The jury found in favor of Mr. Barr on the false imprisonment claim. *Id.* The special jury verdict form did not ask the jury to find a violation of SECA. *Id.* The jury awarded C.F. \$225,000 in damages. CP 325, Opinion at 3. The damage award was not segregated between defendants or claims. *Id.* C.F. failed to prove a violation of SECA at trial. CP 322-325, 1207-1238.

Despite her failure to plead a SECA violation, to ask the jury to find a SECA violation, or to prove a violation of SECA at trial, C.F. filed a CR 54(d) motion for attorney fees, seeking both prevailing party fees and costs under RCW 4.84.010 and attorney fees pursuant to RCW 9.68A.130. CP 326-378. On December 18, 2015, the trial court denied C.F.'s request for attorney fees under RCW 9.68A. CP 1368-1369, Opinion at 3-4. C.F. failed to raise the applicability of SECA prior to her motion for fees and the verdicts in C.F.'s favor did not establish that the jury had found facts proved that constituted a violation of a specific provision of RCW 9.68A. Opinion at 4. The Trial Court granted C.F.'s request for prevailing party fees and costs under RCW 4.84.010. CP

¹ The jury was asked 13 questions on a special verdict form. The questions were related to the conduct and claims against all three defendants and did not mention sexual motivation, sexual intent, sexual conduct, or communication with a minor for immoral purposes. The verdict did not segregate C.F.'s damages by claim or by defendant.

1368-1369, Opinion at 3. On December 22, 2015, C.F. filed her Notice of Appeal of the Court's December 18, 2015 order denying her motion. CP 1369.

On December 19, 2016, Division I of the Court of Appeals issued a Published Opinion affirming the Trial Court's December 18, 2015 Order. Opinion at 1, 11. The Court of Appeals affirmed that the jury verdict did not establish that C.F. proved facts constituting a violation of a specific provision of RCW 9.68A. *Id.* at 1.

IV. C.F.'S PETITION FOR REVIEW SHOULD BE DENIED

A. The Court of Appeals' Decision is not in Conflict with Decisions from the Court of Appeals or the Washington State Supreme Court.

Determining the requirements of RCW 9.68A.130 is an area of first impression. Opinion at 5. No court has construed SECA's attorneys' fee provision since the time the legislature enacted SECA. *J.C. v. Society of Jesus*, 457 F.Supp.2d 1201, 1205 (2006). The Court in *Ohnemus v. State*, indirectly addressed the attorneys' fee provision when it ruled that "Ohnemus is not entitled to the costs and fees under RCW 9.68A.130 because her cause of action brought under RCW 9.68A.100 fails as a matter of law." *Ohnemus v. State*, 195 Wash.App. 135, 142, 379 P.3d 142

(2016). *Furnstahl v. Barr* is a case of first impression and does not give rise to the need for a review under RAP 13.4.

1. The decision is not in conflict with Washington authority on CR 54(d).

C.F. misconstrues the Court of Appeals ruling in *Furnstahl*. She further misinterprets the role of the jury in establishing whether attorneys' fees and costs are allowed under RCW 9.68A.130.² The holding of the Court of Appeals was not that the jury was entitled to decide the amount and reasonableness of attorneys' fees and costs in lieu of a CR 54(d) motion. Rather, the Court of Appeals held that to establish an entitlement to an award of attorney fees pursuant to RCW 9.68A.130, C.F. had to first establish that she prevailed in a civil action arising from an act or acts constituting a violation of a specific provision of RCW 9.68A. Opinion at 6. After a violation has been established, a CR 54(d) motion can be brought to claim the attorneys' fees and expenses under RCW 9.68A.130.

The jury must make the determination that a provision of RCW 9.68A was violated. Opinion at 4. The jury verdict failed to establish that the jury had found facts constituting a violation of a provision of RCW 9.68A. Opinion at 4-5. C.F. failed to establish, or even ask the jury to

² C.F. references RCW 4.84.185 for the first time in her petition. It is unclear whether she is now seeking an award of attorney fees under this statute, asserting Respondents presented a frivolous position at trial. This RCW was not a basis for her CR 54(d) motion for attorneys' fees and costs and should not be considered for the first time in a petition for review to the Supreme Court.

find, an act or acts constituting a violation of a specific provision of RCW 9.68A. Therefore, C.F.'s CR 54(d) motion for fees under RCW 9.68A.130 was premature and the Appellate Court was proper in affirming the Trial Court's decision. The Court of Appeals ruling is not in conflict with any Washington authority on CR 54(d).

2. Without a predicate showing of a violation of RCW 9.68A.130, the trial court never reaches a CR 54(d) motion for costs under RCW 9.68A.130.

Under CR 54(d) the judge, not the jury, decides the amount and reasonableness of attorneys' fees and costs pursuant to a prevailing party's CR 54(d) motion and corresponding cost bill. CR 54; RCW 4.64.030. In her post-trial CR 54(d) motion, C.F. requested both prevailing party fees and costs under RCW 4.84.010, as well as attorneys' fees under RCW 9.68A.130. At trial, the jury deliberated and reached a verdict finding C.F. had prevailed on five of her six tort claims. C.F.'s CR 54(d) motion for prevailing party fees and costs under RCW 4.84.010 was appropriate. The jury did not, nor was it ever asked to, find a violation of SECA. Therefore, C.F. never met the threshold requirement to request attorney fees under RCW 9.68A.130 requested in her CR 54(d) motion.

Despite her argument that the trial court failed to award her fees pursuant to her CR 54(d) motion, C.F. was awarded prevailing party fees and costs under RCW 4.84.010. She was only denied attorneys' fees

under RCW 9.68A because she failed to make the predicate showing of a SECA violation. Only after a jury finds a violation of SECA would a party be entitled to attorneys' fees under RCW 9.68A.130.

It is not the amount of attorney fees to be determined by the jury, but rather the predicate showing of a violation of SECA before a CR 54(d) motion can be brought to recover attorney fees under RCW 9.68A.130. The Court of Appeals decision is not in conflict with CR 54(d) or any Washington decisions discussing or interpreting CR 54(d) because C.F. never established the predicate showing entitling her to attorney fees under RCW 9.68A.130. C.F. did prevail on five of her six civil tort claims and brought a CR 54(d) motion for fees. She was awarded prevailing party fees under RCW 4.84.010.

3. The decision is not in conflict with *C.J.C. v. Corp. of Catholic Bishop of Yakima* because C.F. failed to ask the jury to find a violation of RCW 9.68A.

C.F. argues the Court of Appeals decision is in conflict with *C.J.C.* However, this case is distinguishable from *C.J.C.* First, in *C.J.C.* the defendants admitted to the conduct at issue.³ *Id.* at 705, 706. At trial, Mr. Barr disputed the allegations as alleged by Plaintiff. CP 673-374. Because the jury was not asked to disclose the facts upon which it based

³ In CJC the acknowledged conduct included: Fathers Scully and Calhoun sexually molested altar boy, including fondling and masturbatory acts; Sisters sexually molested on multiple occasions by Deacon Wilson when they were children; Pastor Shaw fondled and performed oral sex on young boy.

its verdict, it is impossible for C.F. to know what facts the jury relied upon in reaching its verdict and whether those facts would support a finding of a violation of SECA.

Second, *C.J.C.* asked the Court to determine the scope of RCW 4.16.340, the statute of limitations applicable to civil claims “based on” intentional childhood sexual abuse. *C.J.C.* at 704. C.F. now asks this Court to treat RCW 9.68A.130 exactly as it would RCW 4.16.340. The statutes are not analogous.

RCW 9.68A.130 states that “a minor prevailing in a civil action *arising from a violation of this chapter* is entitled to recover the costs of the suit, including an award of reasonable attorneys’ fees.” (emphasis added). RCW 9.68A.130 requires a violation of a specific provision of RCW 9.68A be established prior to an award of attorney fees. Opinion at 4.

SECA is a criminal statute enacted to protect against child pornography and the sexual exploitation of children. The legislative history of SECA discusses the importance of creating a statute that not only criminalizes distribution of child pornography, but also criminalizes the possession of child pornography. CP 777-1072. RCW 9.68A sets forth specific crimes of sexual exploitation of children. If the Act intended to cover all sexual assaults, as suggested by C.F. in her

comparison to *C.J.C.*, the Act would have specifically stated so. At the very least it would be clear from the legislative history. C.F. asks this Court to read requirements into the statute that are not there.

By contrast, RCW 4.16.340 is statute for tolling the statute of limitations for minor sexual abuse claims. The statute defines childhood sexual abuse as “any act committed by the defendant against a complainant who was less than eighteen years of age at the time of the act and which act would have been a violation of chapter 9.A.44 RCW or RCW 9.68A.040 or prior laws of similar effect at the time the act was committed.” This argument would fail for the same reason C.F.’s argument for attorneys’ fees under RCW 9.68A.130 failed: C.F. has not shown a violation of RCW 9.68A.040. RCW 9.68A.040 finds a person guilty of sexual exploitation of a minor if the person:

- (a) compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;
- (b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;
- or
- (c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.

C.F. asks this Court to harmonize these statutes because they are “both triggered by underlying conduct that violates RCW 9.68A.090.”

Petition at 14. C.F. argues that Mr. Barr's conduct would qualify as a communication with a minor for an immoral purpose.

SECA defines criminal violations in two primary areas: 1) physical depictions (e.g. photographs) of minors engaged in sexually explicit conduct (*see* 9.68A.050, 9.68A.060, 9.68A.070, 9.68A.075, and 9.68A.080); and 2) commercial sexual abuse of minors (*see* 9.68A.090, 9.68A.100, 9.68A.101, 9.68A.102, and 9.68A.103). RCW 9.68A.090 prohibits communication with a minor for immoral purposes. The statute does not define "communication." Courts that have interpreted RCW 9.68A.090 have found that the prohibition in this section includes not only participation by minors in sexual acts for fees or appearances on film or in live performance while engaged in sexually explicit conduct, but also communication with children for predatory purpose of promoting their exposure to and involvement in sexual misconduct. *State v. McNallie*, 120 Wn.2d 925, 846 P.2d 1358 (1993).

C.F. suggests that because communication for an immoral purpose can encompass various forms of sexual misconduct, the trial court should have inferred Mr. Barr committed a SECA violation by interpreting the jury verdict. "It is axiomatic that jury verdicts are invested with a degree of sanctity" and cannot be questioned lightly. *Butler v. State*, 34 Wn.App. 835, 837, 663 P.2d 1390 (1983). C.F. did not request an instruction to the

jury on a SECA violation or request inclusion of questions on the special verdict form that asked the jury to consider a SECA violation, including whether Mr. Barr communicated with a minor for an immoral purpose. Asking the trial judge to interpret the jury's basis for its verdict without asking the jury to determine if Mr. Barr communicated with C.F. for an immoral purpose creates a very slippery slope and denies the parties the ability to have a jury determine whether any alleged SECA violation occurred.

In *State v. Schimmelpfennig*, the Court provided instructions defining the terms “communicate” and “immoral purposes” to assist in jury deliberations as to whether the defendant was guilty of communicating with a minor for immoral purposes. *Schimmelpfennig*, 92 Wn.2d at 100. In *Kuhn*, the court instructed the jury that it had to find the communications were “for immoral purposes of a sexual nature.” *Kuhn*, 155 Wn.App. at 566. Here, by contrast, the jury was never instructed to find a SECA violation, including communications with a minor for an immoral purpose, and there is no reference to prohibited conduct in the jury instructions. The *Furnstahl* holding is not in conflict with *C.J.C.*

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B. The Court of Appeals' Decision Does Not Raise a Significant Constitutional Question.

C.F. argues there is no right to a jury trial on a party's entitlement to costs. (Petition at 19.) This is a misinterpretation of the *Furnstahl* ruling. C.F. seeks recovery of attorney fees pursuant to a specific statute, RCW 9.68A.130. To establish this entitlement to attorney fees, RCW 9.68A.130 requires a finding of a *violation* of a specific provision of RCW 9.68A. Opinion at 7. It is this finding of a violation which must be determined by the jury. "The core determination is whether the prevailing party established the predicate for entitlement – that an act or acts constituting a violation of a specific provision of chapter 9.68A RCW was proved." *Id.* at 8.

Whether a violation of RCW 9.68A has been established should be determined by the fact-finding of the jury. To allow the trial judge to conduct such fact-finding after a jury verdict could result in a finding not intended by the jury. In *Furnstahl*, Division I of the Court of Appeals discussed this in detail when discussing the bifurcated trial in *Kuhn*.⁴ Opinion at 8-9.

Fact finding is necessary to determine whether a violation occurs. "Except in cases which fall peculiarly within equitable jurisdiction, or

⁴ The *Furnstahl* Court discussed *Kuhn* in detail so Mr. Barr will not restate it here.

where remedies and defenses are made available by statute without a jury, the right of trial by jury shall be inviolate.” Const., art.1, § 21. The jury was the proper fact finder to make this determination. If the jury had made such a determination, the amount and reasonableness of attorney fees would be determined by the judge in a post-trial CR 54(d) motion. The trial judge should not be engaging in an independent fact-finding based on the evidence and testimony presented at trial. Nor should the trial judge engage in fact finding following the jury verdict. Allowing the jury to make fact-finding determinations does not raise a constitutional question. Fact-finding is the very role of the jury. The *Furnstahl* opinion does not raise a significant constitutional question.

C. The Court of Appeals’ Decision Does Not Present Issues of Substantial Public Interest.

A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue. *State v. Watson*, 155 Wash.2d 574, 577, 122 P.3d 903 (2005). The *Furnstahl* ruling is not one that will create unnecessary litigation nor is it one that will create confusion on a common issue. The ruling in *Furnstahl* is very clear and is more likely to decrease litigation on the issue of attorney fees under RCW 9.68A.130. Given that *Furnstahl*

addresses an area of first impression, it will actually reduce confusion on the issue of attorney fees under RCW 9.68A.130.

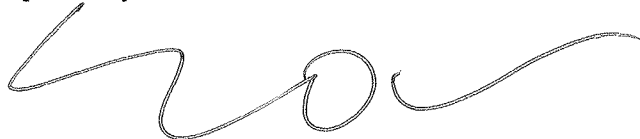
The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance; however, whether C.F. met the requisite finding of a violation of SECA entitling her to attorney fees is not of substantial public interest.

V. CONCLUSION

RAP 13.4 provides four specific instances where a petition for review will be accepted by the Supreme Court. As detailed above, C.F. has failed to show her petition for review meets any of these four situations. C.F.'s petition for review should be denied.

DATED THIS 16th day of February 2017.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify under penalty of perjury and the laws of the State of Washington that on the below date, I caused a true and correct copy of RESPONDENT JONNIE BARR'S ANSWER TO PETITION FOR REVIEW to be delivered via the method indicated below to the following party(ies):

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DATED February 16, 2017.



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