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WASHINGTON STATE
SUPREME COURT

No. 75636-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

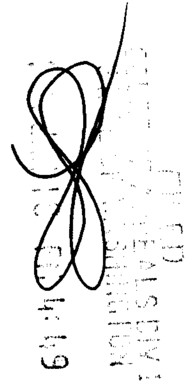
Petitioner,

v.

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

Respondents.

PETITION FOR REVIEW



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A. IDENTITY OF PETITIONER

Petitioner Shari Furnstahl, is Guardian ad Litem for her minor child C.F. who was the victim of sexual misconduct by Respondent Jonnie Barr when she was seven. Furnstahl was the prevailing party in a subsequent civil case against Barr and seeks costs under RCW 9.68A.130.

B. COURT OF APPEALS DECISION

Petitioner seeks review of a Published Opinion of Division I of the Court of Appeals: *Furnstahl v. Barr*, No. 75636-2-I which is the first Washington decision interpreting RCW 9.68A.130 – "No appellate opinion has previously specifically discussed the requirements of RCW 9.68A.130." Opinion at 5. The Opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether RCW 9.68A.130 provides a remedy for costs to all prevailing minor victims of sexual crime?

2. Whether pursuant to RCW 9.68A.130 and CR 54(d) the trial court determines a prevailing party's entitlement to costs through a post-trial motion, rather than through a jury trial?

3. Whether the right to jury trial under article I, section 21 of the Washington Constitution extends to determinations exclusively related to a party's entitlement to costs when those costs are not an element of damages and the statute does not provide any further relief?

D. STATEMENT OF THE CASE

C.F. was a student at Puyallup Basketball Academy ("PBA"), a business operated by Jonnie Barr. RP 67, 106. Barr started grooming C.F. through both words and conduct when she was seven-years-old by telling her he loved her and he wanted to marry her. RP 324-25, 676-77. His conduct progressed to kissing C.F. on the mouth, kissing her with his tongue in her mouth, kissing her while sexually aroused, and touching her private area (described as "her upper thigh private parts" RP 607). CP 414-439.

Jonnie Barr was charged with fourth degree assault with sexual motivation. CP 390-91. Later, the court entered a finding of guilt. CP 393-398. In his plea, Barr stated: "I plead guilty to the crime(s) of Assault 4 as charged in the complaint(s) or citation(s) and notice." CP 397. During his hearing, the prosecutor made an oral motion to remove the sexual motivation allegation, which the court granted without written memorization. CP 1371-79. There were also no findings as required by RCW 9.94A.835, which limits the withdraw of sexual motivation to cases where there is a judicial finding of an error in the initial charging or a finding of evidentiary problems making proof of the allegation "doubtful."

On April 18, 2014, C.F., filed a civil lawsuit. CP 1. Her lawsuit

alleged various causes of action, including assault, battery, invasion of privacy, negligence and outrage and requested an award of attorney fees and costs as allowed by Washington law. *Id.* The lawsuit proceeded to a jury trial where Barr admitted his "hugging and kissing" was "intentional offensive unpermitted contact." RP 925-26 ("The conduct I was admitting to was hugging and kissing"). Dr. Larry Arnholt, a phycologist, conducted multiple counseling sessions with Barr. RP 235. During their first session, Barr told Arnholt that "*his tongue went on her lips and went into her mouth as it did with his wife and referred to it as a Freudian slip.*" RP 236 (emphasis added). Barr further told Arnholt that "*he was aroused because the French kiss, as it was called, or Freudian slip, reminded him of how he and his wife kissed.*" RP 237 (emphasis added). Barr told Arnholt that this conduct occurred while C.F was "on his lap." *Id.* During the trial, C.F. also testified about what had happened. She explained that "he started saying that, 'I love you. I can't live without you. I love you so much.' And he kept on saying that countless times. And he hugged me and kissed me on the cheek. And he said, 'This will be our little secret.'" RP 676-77. C.F. testified "he started to pick me up and kissing me on the lips. And then he started putting his tongue in my mouth and started touching my private parts." RP 677. The jury found for C.F. on all claims against Barr, except false imprisonment. CP 322-325.

On November 24, 2015, C.F. filed a motion for costs, including reasonable attorney fees, under RCW 9.68A.130. CP 326. Barr opposed C.F.'s motion, arguing that without pleading RCW 9.68A.130 with specificity or having a jury determine whether Barr's conduct violated RCW 9.68A.090, the trial court was without authority to enter an award of costs. CP 611, 670. The trial court agreed with Barr. CP 1363.

After a transfer to Division I of the Court of Appeals, the Court issued a Published Opinion affirming the trial court's decision. In its Opinion, the Court of Appeals adopted the trial court's reasoning that RCW 9.68A.130 creates an independent cause of action: "Plaintiff did not sue or assert claims under Chapter RCW 9.68A." Opinion at 11.

Second, the Court of Appeals limited the conduct covered by RCW 9.68A.130, noting sexual crimes against children such as rape, molestation, or assault with sexual motivation were outside the statue's scope: "While it is true that chapter 9.68A RCW contains several provisions that set forth crimes against children, it is also true that other provisions of the Revised Code of Washington also make criminal the sexual abuse of children. [ ] Violations of these latter provisions are not referenced in RCW 9.68A.130 and are, therefore, not encompassed within its embrace." Opinion at 6 (footnote omitted).

Third, the Court of Appeals held that under the Washington

Constitution, a jury, not a judge, must make all factual determinations related to whether a party is entitled to costs: "Furnstahl asserts that the trial judge, not the jury, must determine, after the jury's verdict, whether the requesting party established the predicate for an entitlement to an award of attorney fees. . . . Rather, in keeping with the principles enshrined in Washington's Constitution, in a jury trial, it is the jury who must declare the facts found to be proved." Opinion at 8.

E. ARGUMENT

The Court of Appeals erroneously affirmed for four reasons: (1) all sexual assaults against minor children are covered by RCW 9.68A.130 when read in conjunction with RCW 9.68A.090 and *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999); (2) under CR 54(d) the judge, not the jury, decides whether costs are awarded to a prevailing party pursuant to a statutory provision; (3) RCW 9.68A.130 does not create an independent cause of action; and (4) there is no right to jury trial regarding the applicability of a cost statute, which does not provide any additional relief such as damages.

In deciding a petition for review, this Court considers four criteria:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the

> State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Here, the decision is in conflict with decisions from the Supreme Court, it is in conflict with decisions from the Court of Appeals, it raises significant questions under the Washington Constitution, and it also involves issues of substantial public interest that the Supreme Court should decide. Each of these reasons for review is discussed below.

A. The Court Of Appeals' Decision Is In Conflict With Decisions From This Court And Decisions From The Court Of Appeals.

The decision below is in conflict with decisions from this Court and the Court of Appeals. These issues are two-fold. First, the holding that a jury, rather than the Court, makes determinations necessary to entitle a party to costs stands in conflict with a number of Washington decisions. Second, holding RCW 9.68A.130 does not extend to protect all minor victims of sexual crimes is in conflict with this Court's precedent.

1. The Court Of Appeals' Decision Conflicts With CR 54(d) And Washington Decisions Holding That The Entitlement To Costs Is Determined Through Post-Trial Motion.

The Court of Appeals held that for Petitioner to be entitled to costs, a jury must make a factual determination beyond what was necessary for Petitioner to prevail on her civil causes of action. There is no civil cause of action that Furnstahl could have brought pursuant to chapter 9.68A

RCW. Beyond the statute at issue, which is limited to recovering costs as a result of prevailing on a different cause of action, chapter 9.68A RCW is exclusively criminal code. Beyond the Court of Appeals' holding, there is no similar Washington precedent where a jury is required to answer a special interrogatory establishing facts beyond what is required to prevail on the substantive claim in order to acquire litigation costs, including fees.

This Court has adopted the Superior Court Civil Rules (CR) to "govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81." CR 1. In turn, CR 81 explains that, "these rules supersede all procedural statutes and other rules that may be in conflict." CR 81(b). Thus, the Civil Rules control the court's procedural operations.

The rule adopted by this Court to govern a party's entitlement to costs or fees is CR 54(d). This rule explains that the Court, either through a cost bill or post-trial motion, will determine a prevailing party's entitlement, unless attorney's fees are an element of damages:

> (d) Costs, Disbursements, Attorneys' Fees, and Expenses.
>
> (1) Costs and Disbursements. Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

> (2) Attorneys' Fees and Expenses. Claims for attorneys' fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

When applying CR 54(d), this Court has held it is a question for the court to determine whether a particular statute authorizes an award of costs or fees. "Whether a statute authorizes an award of attorney fees is likewise a question of law reviewed *de novo*." *Niccum v. Enquist*, 175 Wn.2d 441, 446, 286 P.3d 966 (2012). The Court of Appeals has recognized this same principle. In *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn. App. 279, 325, 284 P.3d 749 (2012), the Court observed "we review *de novo* whether a statute, contract, or equitable theory authorizes the award." In *Deep Water Brewing, LLC v. Fairway Resources. Ltd.*, 152 Wn. App. 229, 277, 215 P.3d 990 (2009), the Court explained "[w]hether a specific statute, contract provision, or recognized ground in equity authorizes an award of fees is a question of law."

Washington has long recognized that costs are decided by post-trial motion rather ancillary jury determinations. *Lujan v. Santoya*, 41 Wn.2d 499, 501, 250 P.2d 543 (1953). In *Lujan*, the defendants "contend[ed] that the judgment should not have included plaintiffs' costs, because they were not prayed for in the complaint . . . ." *Id.* Rejecting the

argument, this Court reasoned: "The allowance of costs, on the other hand, is governed by statute. A prayer for them is unnecessary." *Id.*

Another example of where the judge, rather than jury, decides the entitlement to costs is *Firchau v. Gaskill*, 88 Wn.2d 109, 115, 558 P.2d 194 (1977). In *Firchau*, this Court was faced with a constitutional challenge to RCW 26.09.140, which granted the trial court the authority to award costs, in dissolution proceedings. There, this Court observed that:

> RCW 26.09.140 does not provide for a jury trial on the reasonableness of attorney fees. It grants the court the power to award the fees and costs. The power of the court to require one spouse to pay the attorney fees of the other spouse has existed since prior to the adoption of the constitution. [ ] Inherent in this grant of power is the discretion <u>to grant or deny the award</u> of attorney fees . . . .

Id. at 115 (emphasis added).

Similarly, RCW 4.84.185 provides for a procedural mechanism whereby a prevailing party files a post-trial motion and the trial court makes the factual determination of whether an action was frivolous thereby entitling a party to costs, including fees. RCW 4.84.185 (emphasis added) provides, in relevant part:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. <u>This</u>

> determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause.

This Court approved of the process explaining it applies an abuse of discretion review to the decision under RCW 4.84.185. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998). Multiple Court of Appeals decisions have affirmed the court's power to determine if an action is frivolous through motion practice. *See, e.g.*, *Timson v. Pierce Cty. Fire Dist. No. 15*, 136 Wn. App. 376, 386, 149 P.3d 427 (2006); *Reid v. Dalton*, 124 Wn. App. 113, 123, 100 P.3d 349 (2004).

Finally, "[w]here a Washington civil rule is identical to its federal counterpart, federal cases interpreting the federal rule are highly persuasive." *Casper v. Esteb Enter., Inc.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004). Comparing the relevant text of CR 54(d)(2) with its federal counterpart, Fed. R. Civ. P. 54, shows they are almost substantively identical except the federal rule grants a few more days to file a motion for fees than the state version. Under the federal rule, the entitlement to costs and fees is determined through a post-trial motion. *Riordan v. State Farm, Mut. Auto Ins. Co.*, 589 F.3d 999 (9th Cir. 2009). The federal procedure allows for fact finding similar to what is done under RCW 4.84.185. *Id.*

at 1006 ("State Farm's argument that it was prejudiced by lack of notice is not persuasive. Rule 54(d)(2) allows parties to submit evidence and arguments regarding attorney fees, and provides that the motion may be referred to a magistrate judge for disposition.").

In summary, the Court of Appeals decision holds a jury, and not the trial court, must make all factual determinations, even when those determinations are exclusively and only related to a party's entitlement to costs. This decision is not consistent with prior Washington law.

2. The Court Of Appeals' Decision Is In Conflict With *C.J.C. v. Corp. of Catholic Bishop of Yakima.*

The decision below incorrectly holds that not all sexual crimes against a minor child will fall within the scope of RCW 9.68A.130. The decision is inconsistent with the liberal construction provided to remedial statutes, particularly those enacted for important policy objectives. See Appellant's Br. at 14. Specifically, the Court concluded:

> The text of RCW 9.68A.130 expressly references "violation of this chapter." (Emphasis added.) While it is true that chapter 9.68A RCW contains several provisions that set forth crimes against children, it is also true that other provisions of the Revised Code of Washington also make criminal the sexual abuse of children. Violations of these latter provisions are not referenced in RCW 9.68A.130 and are, therefore, not encompassed within its embrace.
>
> Thus, Furnstahl's argument that RCW 9.68A.130 entitles any plaintiff who prevails in a case arising from any type of sexual abuse or assault against a minor to an award of attorney fees is not supported by the wording of the statute itself.

Opinion at 6 (footnote omitted).

This holding is in conflict with *C.J.C.*, 138 Wn.2d 699 where this Court held that the same underlying offense to which Furnstahl points, communications with a minor for immoral purposes, would capture a wide range of sexual misconduct, including fondling a child. In *C.J.C.*, the Court was called upon to interpret RCW 4.16.340, the statute that tolls causes of action for "childhood sexual abuse" a phrase defined in the statute as "an act committed by the defendant . . . which act would have been a violation of RCW 9A.44 or RCW 9.68A.040 or prior laws of similar effect at the time the act was committed." *Id.* (emphasis added). In particular, the Court was required to determine whether the conduct was based on "childhood sexual abuse." First, without jury involvement, the Court held the statute applies if the "*gravamen*" is childhood sexual abuse:

> [U]nder the facts presented here, intentional sexual abuse is the predicate conduct upon which all claims are based, including the negligence claims. The alleged sexual abuse is essentially an element of the plaintiffs' negligence claims. Absent the abuse, plaintiffs would not have suffered any injury and their negligence claims could not stand. Thus, the "*gravamen*" of plaintiffs' claims is that defendants are liable for injuries resulting from acts of intentional sexual abuse.

Id. at 709-710 (emphasis in original).

Next, specific to C.J.C.'s circumstances, the Court explained that it "must decide whether the alleged sexual misconduct of Fathers Scully and

Calhoun (the Priests) constitutes 'childhood sexual abuse' within the meaning of the statute." *Id.* at 714. There, "[t]he abuse consisted of fondling and masturbatory acts performed on C.J.C. by the priests." *Id.* at 705. Through this conduct, C.J.C. argued "the Priests communicated with him for an immoral purpose." *Id.* The Court agreed, reasoning communications for an immoral purpose "applied to misconduct of a sexual nature whether or not precisely defined within the statute itself." *Id.* at 715. Ultimately, the Court held: "We find the Priests' conduct meets the definition of 'childhood sexual abuse' as defined in RCW 4.16.340." *Id.* at 716. The *C.J.C.* Court explained:

> We gave the phrase "communication with a minor for immoral purposes" a "commonsense understanding," holding that "any spoken word or course of conduct with a minor for purpose of sexual misconduct is prohibited." . . . We upheld the conviction of a man who had merely attempted to entice young girls into the back of his van for sexual purposes. Here, defendants allegedly engaged in actual sexual misconduct.

Id. at 715-16 (citations omitted). Under Washington law, "[a] lesser included offense exists when all of the elements of the lesser offense are necessary elements of the greater offense." *State v. Bishop*, 90 Wn.2d 185, 191, 580 P.2d 259 (1978). Considering that communication with a minor for immoral purpose prohibits words and conduct, a party cannot commit the crimes of rape, molestation, or assault with sexual motivation without also communicating for an immoral purpose.

In reaching its decision, this Court should harmonize the minor sexual abuse tolling statute and the related costs statute. RCW 4.16.340 and RCW 9.68A.130 are textually analogous statutes and are both triggered by underlying conduct that violates RCW 9.68A.090. The only distinction is that the former uses the phrase "based on" while the later uses the term "arising." This is, however, a distinction without a difference. Webster's Third New International Dictionary defines "based on" as "that on which something rests or stands . . . ." *C.J.C.*, 138 Wn.2d at 709. The same dictionary defines "arising" as "to originate from a specified source." Webster's Third New International Dictionary 117 (1981). Both RCW 4.16.340 and RCW 9.68A.130 are triggered if the "based on" or "arising from" conduct is criminalized by RCW 9.68A.090.

Because C.F.'s causes of action would certainly fit within the parameters for tolling the statute of limitations under RCW 4.16.340, then they should also entitle her to costs under RCW 9.68A.130. Instead, the Court of Appeals in this case concluded that not all sexual misconduct with a minor triggers RCW 9.68A.130. This decision is in conflict with *C.J.C.* The decision also sets up the inconsistent situation where a claim would have the statute of limitations tolled for minor sexual abuse, but the analogous cost statute is not necessarily triggered after the plaintiff prevails on the underlying cause of action. This Court should accept

review and hold the same conduct satisfies both RCW 4.16.340 and RCW 9.68A.130.

B. The Decision Raises A Significant Constitutional Question.

The Court of Appeals determined that Barr had a constitutional right to have a jury determine a factual prerequisite tied only to granting costs. Opinion at 8. (holding that "in keeping with the principles enshrined in Washington's Constitution, in a jury trial, it is the jury who must declare the facts found to be proved."). Critical to this analysis, RCW 9.68A.130 does not provide any relief beyond costs. RCW 9.68A.130 does not independently provide for damages or any penalty. The Court of Appeals' holding is inconsistent with a number of decisions where the judge determines the factual prerequisites to an award of costs.

For example, RCW 4.84.185 is the frivolous claims statute and provides that the court, rather than a jury will determine if a claim advanced by a party is "frivolous" thereby entitling the adversely effected party to an award of costs. If the Court of Appeals was correct in this case, then a jury, not the Court should determine if a claim is "frivolous" which is certainly a factual determination. This, however, is not Washington law. *Davis v. Cox*, 183 Wn.2d 269, 292, 351 P.3d 862 (2015) ("we recognize that article I, section 21 of the Washington Constitution

does not encompass the right of jury trial on frivolous or sham claims."). Just as this Court recognized in *Davis* that there was no historic right to have the jury decide whether an action is frivolous, there is no historic right to have a jury determine the entitlement to costs of litigation.

Similarly, Washington Courts have previously uniformly held it is the Court's obligation to determine if a party prevailed in an action, thereby entitling the party to costs under a specific statute. *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 394, 325 P.3d 904 (2014) ("Whether an individual is a prevailing party after voluntary dismissal turns on whether the claimant meets the conditions of the specific statute that authorizes the fees."); *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 782, 275 P.3d 339 (2012) (although "[t]he question as to which party substantially prevailed is often subjective and difficult to assess[,]" "[w]hether a party is a prevailing party is a mixed question of law and fact that [Washington Courts] review under an error of law standard.") (internal quotation omitted); *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 706, 9 P.3d 898 (2000) (accord).

Former RCW 4.84.010 (1854) was enacted 35 years before Washington's Constitution and provided for shifting costs to the non-prevailing party. Appendix B. The statute expressly placed the role of determining eligibility for costs on the judge. *Id.* Importantly, neither

Barr nor the Court of Appeals cites to any case where a jury determined the eligibility for costs prior to the enactment of the Washington Constitution.

In reaching its conclusion, the Court of Appeals erred by primarily relying on the procedural discussion from *Kuhn v. Schnall*, 155 Wn. App. 560, 228 P.3d 828 (2010). Opinion at 8. In *Kuhn*, the parties and trial court embarked on a bifurcated trial with a second phase to determine the entitlement to costs under RCW 9.68A.130. On appeal, the decision did not discuss whether this was the correct procedure, but instead held only that there was misconduct requiring a new trial. *Id.* at 563.

The Court of Appeals' analysis failed to adequately focus on whether there was a constitutionally recognized right to jury trial on the entitlement to costs which existed prior to the adoption of the Washington Constitution. The Court of Appeals cited *Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 3, 163 P.2d 142 (1945) for the general proposition that juries decide questions of fact, Opinion at 7, but *Hastings* does not discuss article I, section 21 and also only relates to workers compensation benefits rather than who determines an entitlement to costs of litigation.

In *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 648, 771 P.2d 711 (1989), this Court explained that "the right attaches to actions in which a jury was available at common law as of 1889 and to actions created by

statutes in force at this same time allowing for a jury." In *Firchau v. Gaskill*, 88 Wn.2d 109, 115, 558 P.2d 194 (1977), this Court applied the same test recognizing "[t]he power of the court to require one spouse to pay the attorney fees of the other spouse has existed since prior to the adoption of the constitution." There, the Court reasoned that "[i]nherent in this grant of power is the discretion to grant or deny the award of attorney fees . . . ." *Id.* (emphasis added). Holding there was no recognized right, this Court determined there was no right to jury trial. *Id.*

Similarly, in *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 768, 287 P.3d 551 (2012), this Court considered RCW 4.22.060, which provides a procedural mechanism to determine the reasonableness of a covenant judgment stating "[a] determination by the court that the amount to be paid is reasonable must be secured." RCW 4.22.060(1) (emphasis added). On appeal, this Court held "Farmers does not have a right under article I, section 21 of our constitution to a jury determination of reasonableness either at the reasonableness hearing or the subsequent bad faith action." *Bird*, 175 Wn.2d at 773. There, this Court observed "*[t]here is also no right to a jury trial 'in statutorily created actions without common law analogues*.'" *Id.* at 769 (quoting *State v. State Credit Ass'n*, 33 Wn. App. 617, 621, 657 P.2d 327 (1983)(emphasis added). Here, RCW 9.68A.130 is solely a statutorily created remedy for costs.

Washington has not recognized a right to jury trial on a party's entitlement to costs prior to the decision below. In fact, as recognized by CR 54(d), it is the province of the trial court to make theses determinations. If review is accepted, this Court can address this conflict and the scope of the constitutionally-important right to trial by jury.

C. The Decision Presents Issues Of Substantial Public Interest.

The published decision presents several issues of substantial public importance. First, the legislative chapter itself a states the issue is of substantial public importance. The chapter provides: "The legislature finds that *the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance*." RCW 9.68A.001 (emphasis added).

Second, the federal courts, have long noted the need for an authoritative interpretation of RCW 9.68A.130: "Although 22 years have passed since the legislature enacted SECA, no court has construed the act's attorneys' fees provision." *J.C. v. Soc'y of Jesus*, 457 F. Supp. 2d 1201, 1205 (W.D. Wash. 2006). Moreover, at least one federal court has interpreted RCW 9.68A.130 differently noting it does not appear to create a cause of action - "*there seems no reason to assert this attorneys' fees provision as a separate cause of action*, neither party explains why this technical defect is of any consequence." *Id.* at 1204, n.4 (emphasis

added).

Third, the current interpretation of this statute will lead to more legal proceedings than if CR 54 (d) is followed. A jury will need to issue a declaratory ruling, either through a bifurcated trial or a subsequent follow-up lawsuit. If there is a cause of action under RCW 9.68A.130, then it does not accrue until after judgment on the underlying claim. *Gausvik v. Abbey*, 126 Wn. App. 868, 880, 107 P.3d 98 (2005) ("the statute of limitations begins to run when a party has a right to apply to a court for relief."). Lawsuits for costs are necessary in limited circumstances. *See e.g.*, *Arnold v. City of Seattle*, 185 Wn.2d 510, 531, 374 P.3d 111 (2016). However, the purpose of CR 54 (d) is, in part, to streamline the process for determining the entitlement to costs, including fees.

F. CONCLUSION

Petitioner requests this Court grant review of this important case.

Dated this 17th day of January, 2017.

Respectfully submitted

GORDON THOMAS HONEYWELL LLP

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CERTIFICATE OF SERVICE

I, Christine L. Scheall, declare under the penalty of perjury of the laws of the State of Washington that on January 17, 2017, I caused the **Petition for Review** to be served via email, pursuant to the parties' mutual consent for service by email:

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APPENDIX

DOCUMENT TITLE	Petitioner's Appendix Nos.
Published Opinion of Division I of the Court of Appeals: *Furnstahl v. Barr*, No. 75636-2-I	A
Former RCW 4.84.010 (1854)	B

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHARI FURNSTAHL, as Guardian ad Litem for C.F., a minor child, Appellant, v. JONNIE and SUE BARR, husband and wife; and PUYALLUP BASKETBALL ACADEMY, Respondents.	)	DIVISION ONE No. 75636-2-I PUBLISHED OPINION FILED: December 19, 2016

2016 DEC 19 AM 10:54
FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

DWYER, J. — 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, entitled "Sexual Exploitation of Children."

Shari Furnstahl brought this action as the guardian ad litem for her minor daughter C.F. She appeals from the trial court's ruling denying her request for an award of attorney fees pursuant to RCW 9.68A.130. After securing jury verdicts on tort claims brought on behalf of C.F., Furnstahl moved for an award of attorney fees pursuant to the cited provision. The trial court ruled that the jury's verdicts in her favor on the tort claims did not establish that Furnstahl had proved facts constituting a violation of a specific provision of chapter 9.68A RCW. Under these circumstances, the trial court properly denied the request. We affirm.

I

C.F. was a student at the Puyallup Basketball Academy (PBA), which was owned and operated by Jonnie and Sue Barr. Sometime between late 2010 and early 2011, Jonnie Barr began a series of inappropriate interactions with C.F. while she was attending the PBA. C.F. was seven years old at the time. In these interactions, Barr[1] asked C.F. to join him in a secluded place at the PBA and, when she did, he touched and kissed her while saying that he loved her and wanted to marry her. The touching by Barr included picking C.F. up off of the ground and hugging her, patting C.F.'s bottom with his hand, and placing his hand on her upper thigh near her "private area." The kissing by Barr included placing his lips on C.F.'s mouth and placing his tongue into her mouth.

One day in late 2011, Furnstahl arrived at the PBA gym and noticed Barr squeezing C.F.'s bottom while he was picking her up off of the ground in a hug. Furnstahl later spoke with her daughter about Barr's conduct, and C.F. told her mother about the incidents in which Barr had touched, kissed, and made comments to her. C.F.'s family notified the police.[2]

Furnstahl was appointed as guardian ad litem for C.F. and commenced this lawsuit against Jonnie Barr, Sue Barr, and the PBA (collectively the Defendants). Her amended complaint alleged causes of action for assault, battery, negligence, intentional infliction of emotional distress, false

[1] Although Jonnie and Sue Barr share a last name, when we refer to "Barr" we are referring to Jonnie Barr.

[2] After a criminal investigation, Barr was charged in district court with assault in the fourth degree, committed with sexual motivation. The sexual motivation allegation was dismissed and Barr entered a guilty plea to assault in the fourth degree.

imprisonment, and false light invasion of privacy. In her amended complaint, Furnstahl included a prayer for relief requesting "attorneys' fees, prejudgment interest, costs and exemplary damages as may be provided by law."

At trial, the parties presented evidence concerning claims of assault, battery, negligence, intentional infliction of emotional distress, false imprisonment, false light invasion of privacy, and outrage.[3] The jury instructions were tailored to the tort theories litigated at trial. The jury's verdict form was comprised of 13 questions that were also tailored to these tort theories.

The jury returned a verdict finding for Furnstahl against Jonnie Barr on six claims, with the exception of false imprisonment, against Sue Barr on the claim of false light invasion of privacy, and against the PBA on the negligence claim. The jury found for Sue Barr and the PBA on the remaining claims.

The jury awarded $225,000 in damages to C.F. The damage award was not segregated between defendants or claims.

Thereafter, Furnstahl moved for an award of costs and reasonable attorney fees. The trial court granted Furnstahl's request for an award of costs and a statutory attorney fee pursuant to RCW 4.84.010, .030 and .080.[4]

In addition, Furnstahl requested an award of reasonable attorney fees pursuant to RCW 9.68A.130, the cost and attorney fees provision of the "Sexual

[3] Although this cause of action was not pleaded in Furnstahl's amended complaint, her claim of outrage was submitted to the jury.

[4] RCW 4.84.010 establishes a nonexhaustive list of the costs allowed to a prevailing party incurred as a result of litigation. RCW 4.84.030 establishes a prevailing party's entitlement to an award of costs and disbursements pertaining to an action in the superior court. RCW 4.84.080 establishes a $200 statutory attorney fee, awarded to a prevailing party in actions wherein judgment is rendered.

Exploitation of Children Act" (SECA), codified at chapter 9.68A RCW. The applicability of SECA had not before been raised in this litigation. The Defendants opposed this request, contending that the statute required that the fact finder determine whether a violation of a specific provision of chapter 9.68A RCW was proved and noting that, in this case, that question was never raised, argued, or submitted to the jury for consideration. Furnstahl responded that the entitlement to such an award of attorney fees should be determined by the trial court after the jury's verdicts.

The trial court ruled that the jury, as fact finder, was responsible for making the determination required by statute. It then denied the request, concluding that the verdicts in Furnstahl's favor on the tort claims submitted to the jury did not establish that the jury had found facts proved that constituted a violation of a specific provision of chapter 9.68A RCW.

Furnstahl appeals from this ruling.

II

Furnstahl contends that the trial court erred by denying her motion for an award of attorney fees pursuant to RCW 9.68A.130. This is so, Furnstahl contends, because C.F. prevailed in a case concerning sexual abuse of a child. But the statute is not so general. Instead, it requires that a violation of a specific provision of chapter 9.68A RCW be established. And it is the jury, as fact finder, who must make that determination. Given the trial court's conclusion that the jury verdicts in Furnstahl's favor on the tort claims submitted to the jury did not

establish that the jury had found facts proved that constituted a violation of a specific provision of chapter 9.68A RCW, the trial court ruled correctly.

A

Furnstahl asserts that RCW 9.68A.130 is a "simple, one-sentence provision ensuring those who are subjected to childhood sexual abuse and who later prevail at trial on civil claims for such misconduct, are entitled to recover associated costs." Br. of Appellant at 18. In fact, the statue is neither so simple nor so broad.[5]

No appellate opinion has previously specifically discussed the requirements of RCW 9.68A.130.[6] The provision reads: "A minor prevailing in a civil action arising from violation of this chapter is entitled to recover the costs of the suit, including an award of reasonable attorneys' fees." The plain meaning of this language is that a minor is entitled to recover an award of costs and attorney fees when the minor prevails in a civil action arising from an act or acts constituting a violation of a specific provision of chapter 9.68A RCW.

Chapter 9.68A RCW establishes the crimes of sexually exploiting a minor, RCW 9.68A.040; possessing, dealing in, sending, bringing into the state, or viewing child pornography, RCW 9.68A.050-075; communicating with a minor for

[5] Whether a statute authorizes an award of attorney fees is a question of law that is reviewed de novo. Niccum v. Enquist, 175 Wn.2d 441, 446, 286 P.3d 966 (2012).

[6] We conducted a limited discussion of RCW 9.68A.130 in Kuhn v. Schnall, 155 Wn. App. 560, 228 P.3d 828 (2010).

Furnstahl cites to three federal district court decisions referencing RCW 9.68A.130. However, none of these cases directly address the issues before us. Instead, each merely references the possibility of accepting briefing on the matter at a later time. They are unhelpful to our analysis. See Boy 7 v. Boy Scouts of Am., 2011 WL 2415768, at *4 (E.D. Wash. 2011); Boy 1 v. Boy Scouts of Am., 832 F. Supp. 2d 1282, 1292 (W.D. Wash. 2011); J.C. v. Soc'y of Jesus, 457 F. Supp. 2d 1201, 1205 (W.D. Wash. 2006).

immoral purposes, RCW 9.68A.090; promoting or permitting child prostitution, RCW 9.68A.100-103; and allowing a minor on the premises of a live erotic performance, RCW 9.68A.150.[7]

The text of RCW 9.68A.130 expressly references "violation of *this* chapter." (Emphasis added.) While it is true that chapter 9.68A RCW contains several provisions that set forth crimes against children, it is also true that other provisions of the Revised Code of Washington also make criminal the sexual abuse of children.[8] Violations of these latter provisions are not referenced in RCW 9.68A.130 and are, therefore, not encompassed within its embrace.

Thus, Furnstahl's argument that RCW 9.68A.130 entitles any plaintiff who prevails in a case arising from *any* type of sexual abuse or assault against a minor to an award of attorney fees is not supported by the wording of the statute itself. Rather, to establish an entitlement to an award of attorney fees pursuant to RCW 9.68A.130, the plaintiff must first establish that he or she prevailed in a civil action arising from an act or acts constituting a violation of a specific provision of chapter 9.68A RCW.

B

Furnstahl next asserts that, when the case is tried to a jury, the determination of whether a violation of a specific provision of chapter 9.68A RCW

[7] Chapter 9.68A RCW also addresses a variety of procedural matters not pertinent to the resolution of this appeal.

[8] For instance, see generally chapter 9A.44 RCW (setting forth RCW 9A.44.073, .076, .079 (rape of a child in the first, second, and third degree); RCW 9A.44.083, .086, .089 (child molestation in the first, second, and third degree); RCW 9A.44.093, .096 (sexual misconduct with a minor in the first and second degree)).

has been proved is to be decided—as a factual matter—by the trial court, rather than by the jury. Furnstahl is wrong.

"Except in cases which fall peculiarly within equitable jurisdiction, or 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." Cox v. Charles Wright Acad., 70 Wn.2d 173, 176, 422 P.2d 515 (1967). "'The term "inviolate" connotes deserving of the highest protection' and 'indicates that the right must remain the essential component of our legal system that it has always been.'" Davis v. Cox, 183 Wn. 2d 269, 288-89, 351 P.3d 862 (2015) (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989)). "Where the question is doubtful, the right to a jury trial is always preserved." Bain v. Wallace, 167 Wash. 583, 587, 10 P.2d 226 (1932).

"At its core, the right of trial by jury guarantees litigants the right to have a jury resolve questions of disputed material facts." Davis, 183 Wn.2d at 289.

> [T]he province of the court—the trial judge—is to determine and decide questions of law presented at the trial and to state the law to the jury, while the province of the jury is to determine the facts of the case from the evidence adduced, in accordance with the instructions given by the court.

Hastings v. Dep't of Labor & Indus., 24 Wn.2d 1, 13, 163 P.2d 142 (1945). Such was the law of Washington at the time of our constitutional convention. Johnson v. Goodtime, 1 Wash. Terr. 484, 485 (1875).

Pursuant to RCW 9.68A.130, a minor is entitled to an award of attorney fees when he or she prevails in a civil action arising from a violation of a specific provision of chapter 9.68A RCW. Thus, 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. Therefore, fact-finding is necessary to determine whether such a violation was proved.

Furnstahl asserts that the trial judge, not the jury, must determine, after the jury's verdict, whether the requesting party established the predicate for an entitlement to an award of attorney fees. This amounts to a request that the trial judge either independently conduct fact-finding upon the testimony and evidence admitted at trial or, alternatively, conduct another fact-finding proceeding after the jury verdict, in which the judge acts as the finder of fact. Neither can be so.

Rather, in keeping with the principles enshrined in Washington's Constitution, in a jury trial, it is the jury who must declare the facts found to be proved. Our discussion in Kuhn v. Schnall, 155 Wn. App. 560, 228 P.3d 828 (2010), is instructive. In Kuhn, we noted that the trial court allowed the plaintiffs to amend their complaint "to assert claims for attorney fees under RCW 9.68A.130 based on allegations that Schnall had communicated for immoral purposes with the patient-plaintiffs while they were minors, in violation of RCW 9.68A.090." 155 Wn. App. at 565. The trial court then ordered that the deliberative phase of the trial be bifurcated. Kuhn, 155 Wn. App. at 565. This resulted in two stages of jury deliberation. First, the jury reached verdicts on the tort claims (negligence, battery, outrage, negligent infliction of emotional distress). Kuhn, 155 Wn. App. at 565. After the verdicts were rendered, counsel gave closing argument on the question of whether a violation of RCW 9.68A.090

(communication with a minor for immoral purposes) was proved. Kuhn, 155 Wn. App. at 566. Even though the jury had returned verdicts in favor of the plaintiffs on a number of their tort claims, it returned a verdict finding that no such unlawful communications were proved. Kuhn, 155 Wn. App. at 567. While a bifurcated procedure is not mandated, this fact-finding approach is in line with a proper understanding of the province of the jury and the requirements of RCW 9.68A.130.

Indeed, the Kuhn jury's decisions illustrate the danger of the fact-finding approach advocated by Barr. During the Kuhn trial, much evidence was adduced of defendant Schnall's inappropriate sexual conduct with several minors. The jury found for the minors on several of their tort claims. However, the jury declared, by its verdict, that the evidence it had credited in finding for the plaintiffs on the tort claims did not also support a finding that Schnall had communicated with the minors for immoral purposes.

Only the trial jury, through its verdict, could accurately make such a declaration. Had the trial judge been charged with rendering the fact-finding decision, it is entirely possible that the judge might have found the crucial facts at variance with the jury's determination. Such a finding by the trial judge would have then failed to correctly answer the key question: Did the minors prevail in their civil action (the tort claims) based on facts that also established a violation of a provision of chapter 9.68A RCW? In Kuhn, they did not. But we can be sure of this only because it was the jury (and not the judge) who declared it to be so.

Because only the jury can declare whether the facts it credited in rendering a verdict for the plaintiff on a civil cause of action also established a violation of a specific provision of chapter 9.68A RCW, whether the prevailing party proved that the opposing party engaged in an act or acts constituting a violation of chapter 9.68A RCW is a question of fact that must be determined by the jury.[9]

C

Furnstahl next asserts that the trial court erred by resorting solely to an examination of the jury's verdicts in ruling on her motion for an award of attorney fees pursuant to RCW 9.68A.130. We disagree.

At trial, Furnstahl litigated seven tort causes of action: assault, battery, negligence, intentional infliction of emotional distress, false light invasion of privacy, false imprisonment, and outrage. The jury instructions issued for these causes of action were typical instructions for each. The verdict form was comprised of 13 questions asking the jury to reach a determination regarding these seven claims. The jury verdict in favor of Furnstahl found against Jonnie Barr on six of the seven tort causes of action, Sue Barr on one of the tort causes of action, and the PBA on another.

In response to Furnstahl's postverdict request for an award of attorney fees pursuant to RCW 9.68A.130, the trial court stated:

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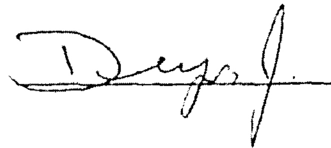
[9] Furnstahl relies on CR 54(d) in claimed support of her attempt to categorize her request for an award of attorney fees pursuant to RCW 9.68A.130 as merely a procedural request made after she prevailed in her action. However, in order to request an award of attorney fees pursuant to CR 54(d), Furnstahl first needed to establish that she had an *underlying right* for the trial court to grant her request. As discussed herein, Furnstahl did not do so.

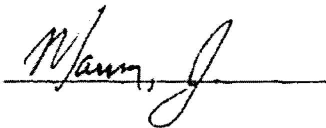
> Plaintiff did not sue or assert claims under Chapter RCW 9.68A. Plaintiff sued under different theories, but there was no assertion of a claim under 9.68A.
>
> The jury found against Mr. Barr on a number of claims, including civil assault and civil battery. So even if suing under Chapter RCW 9.68A is not a prerequisite of recovery of attorney's fees under RCW 9.68A.130, there were no specific findings by the jury as to the factual basis for the jury's verdict. . . .
>
> The jury instructions were general. There was no requested jury instruction on an [SECA] violation or request for inclusion of questions on a specific verdict form that asks the jury to consider an [SECA] violation.
>
> So the plaintiff is now asking the Court to interpret the special verdict form or speculate as to the factual basis for the jury's verdict, and this Court is not going to do that. The jury in this case was the trier of fact.

The trial court's reasoning was sound. No part of the jury verdict in favor of Furnstahl on any tort claim was necessarily based on facts having been proved that established a violation of a specific provision of chapter 9.68A RCW. Accordingly, Furnstahl failed to establish the statutorily required factual predicate authorizing an award of attorney fees pursuant to RCW 9.68A.130.[10]

Affirmed.



We concur:



[10] Because Furnstahl is not a prevailing party, her request for an award of costs and attorney fees on appeal is denied.

APPENDIX B

SEC. 364. To entitle a defendant to a set off, he must set the same forth in his answer.

SEC. 365. If the amount of the set off, duly established, be equal to the plaintiff's debt or demand, judgment shall be entered that the plaintiff take nothing by his action; if it be less than the plaintiff's debt or demand, the plaintiff shall have judgment for the residue only.

SEC. 366. If there be found a balance due from the plaintiff in the action to the defendant, judgment shall be rendered in favor of the defendant for the amount thereof, but no such judgment shall be rendered against the plaintiff, when the contract, which is the subject of the action, shall have been assigned before the commencement of such action, nor for any balance due from any other person than the plaintiff in the action.

XL. COSTS IN CIVIL ACTIONS.

SEC. 367. Compensation of attorneys left to the parties; costs.
368. To whom costs shall be allowed.
369. Plaintiff in certain cases not entitled to costs.
370. In certain cases the plaintiff entitled to no more costs than damages.
371. When several actions are joined in one, costs to be recovered in any one.
372. Where costs are not allowed to plaintiff, must be to defendant.
373. Costs to be awarded to such defendants as have judgment in their favor.
374. Amount of costs in each kind of action.
375. Costs allowed to the prevailing party.
376. Fees and rate of compensation of referees.
377. When application is made to postpone, the adverse party to be paid ten dollars and witnesses fees.
378. When a tender has been made the plaintiff must pay costs.
379. If a defendant deposit the amount claimed with the clerk and the plaintiff refuse it, he shall be liable for costs.
380. In cases of appeal the failing party to pay costs.
381. The person who appears for an infant to pay costs.
382. Executor, administrator or trustee to pay costs from the estate or property in trust.
383. Assignee of an action to be liable for costs.
384. County or territory liable for costs as other parties.
385. When costs to be awarded and collected as the court may direct.
386. When the costs of an appeal to be in the discretion of the court.
387. In all actions not provided for, costs left to the discretion of the court.
388. Relief of party aggrieved.
389. When and what security for costs may be demanded.

SEC. 367. The measure and mode of compensation of attorneys and counsellors shall be left to the agreement express or implied of the parties, but there may be allowed to the prevailing party upon the judgment, certain sums by way of indemnity for his expenses in the action, which allowances are termed costs.

SEC. 368. Costs shall be allowed the party in whose favor the judgment is rendered, except as is otherwise provided by law.

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SEC. 369. The plaintiff shall not be entitled to costs in any action within the jurisdiction of a justice of the peace, which shall be commenced in the district court, where the recovery is for a less amount than one hundred dollars.

SEC. 370. In an action for an assault or an assault and battery, or for false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recover less than ten dollars, he shall be entitled to no more costs or disbursements than the damages recovered.

SEC. 371. When several actions are brought on one bond, undertaking, promissory note, bill of exchange or other instrument in writing, or in any other case for the same cause of action against several parties, who might have been joined as defendants in the same action, no costs or disbursements shall be allowed to the plaintiff in more than one of such actions which may be at his election, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within this territory.

SEC. 372. In all cases where costs and disbursements are not allowed to the plaintiff, the defendant shall be entitled to have judgment in his favor for the same.

SEC. 373. In all actions where there are several defendants, not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of defendants as have judgment in their favor, or any of them.

SEC. 374. When allowed to either party, costs shall be as follows:

1st. In all actions settled before issue is joined, five dollars;

2d. In all actions where judgment is rendered without a jury, ten dollars;

3d. In all actions where judgment is rendered after impanneling a jury, fifteen dollars;

4th. In all actions removed to the supreme court and settled before argument, ten dollars;

5th. In all actions when judgment is rendered in the supreme court after argument, fifteen dollars.

SEC. 375. The prevailing party, in addition to the allowance for costs as provided in the last section, shall also be allowed for all necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the necessary expenses of taking depositions, by commission or otherwise, and the compensation of referees. The disbursements shall be stated in detail and verified by affidavit, which shall be filed with the clerk of the court.

SEC. 376. The fees of referees shall be four dollars to each, for every day spent in the business of the reference, but the parties may agree in

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writing upon any other rate of compensation, and thereupon such rate shall be allowed.

SEC. 377. When an application shall be made to a court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed as the condition of granting the postponement.

SEC. 378. When in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, in such specie as by agreement ought to be tendered, and thereupon brings into court, for the plaintiff, if in money, the amount so tendered, and the allegation be found true, the plaintiff shall not recover costs, but shall pay them to the defendant.

SEC. 379. If the defendant in any action pending shall at any time deposit with the clerk of the court, for the plaintiff, the amount which he admits to be due, together with all costs that have accrued, and notify the plaintiff thereof, and such plaintiff shall refuse to accept the same in discharge of the action, and shall not afterwards recover a larger amount than that deposited with the clerk, exclusive of interest and cost, he shall pay all costs that may accrue from the time such money was so deposited.

SEC. 380. In all civil actions tried before a justice of the peace, in which an appeal shall be taken to the district court, and the party appellant shall not recover a more favorable judgment in the district court than before the justice of the peace, such appellant shall pay all costs accruing after the appeal.

SEC. 381. When costs are adjudged against an infant plaintiff, the guardian or person by whom he appeared in the action, shall be responsible therefor, and payment may be enforced by execution.

SEC. 382. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by or against a person prosecuting or defending in his own right, but such costs shall be chargeable only upon or collected off the estate of the party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defense.

SEC. 383. When the cause of action after the commencement of the action by assignment, or in any other manner becomes the property of a person not a party thereto, and the prosecution or defense is thereafter continued, such person shall be liable to the costs in the same manner as if he were a party, and payment thereof may be enforced by attachment.

SEC. 384. In all actions prosecuted in the name and for the use of the territory, or in the name and for the use of any county, the territory or

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county shall be liable for costs in the same cases and to the same extent as private parties.

SEC. 385. When the decision of a court of inferior jurisdiction in an action or special proceeding is brought before the supreme court, or a district court, for review, such proceedings shall for purposes of costs be deemed an action at issue upon a question of law from the time the same is brought into the supreme court, or district court, and costs thereon may be awarded and collected in such manner as the court shall direct, according to the nature of the case.

SEC. 386. In the following cases the costs of an appeal to the supreme court shall be in the discretion of the court:

1st. When a new trial shall be ordered;

2d. When a judgment shall be affirmed in part and reversed in part.

SEC. 387. In all actions and proceedings than those mentioned in this chapter, where no provision is made for the recovery of costs, they may be allowed or not, and if allowed, may be apportioned between the parties in the discretion of the court.

SEC. 388. Any party aggrieved by the taxation of costs by the clerk of the court, may upon application have the same re-taxed by the court in which the action or proceedings is had.

SEC. 389. When the plaintiff in an action resides out of the county, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action shall be stayed until a bond executed by two or more persons be filed with the clerk, conditioned that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of two hundred dollars. A new or additional bond may be ordered by the court, or judge, upon proof that the original bond is insufficient security, and proceedings in the action stayed until such new or additional bond be executed and filed. The plaintiff may deposit with the clerk, the sum of two hundred dollars in lieu of a bond.

XLI. COMMISSIONER TO SELL REAL ESTATE.

390. District courts may appoint a commissioner.
391. What shall be the deed of the commissioner.
392. A sale in pursuance of a judgment, conveys the title of the parties ordered to sell.
393. Sale of the commissioner conveys the title of the parties to the action.
394. A conveyance of a court must be approved by the court.
395. Such conveyance to be signed by the court only.
396. Such conveyance to be recorded.
397. How judgment to compel a party to execute a conveyance shall be enforced.

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