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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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

Appellant,

v.

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

Respondents.

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. ARGUMENT.....4

    A. Because The Costs Requested In This Case Are Not An Element Of Damages, The Court Determines Their Availability By Motion.....4

    B. The Barrs’ Reliance On The *Kuhn* Facts, Which Are Unrelated To Any Holding, Is Misleading And Unpersuasive. ....10

    C. Respondents Had Notice Of The Facts Giving Rise To Liability Under RCW 9.68A.130 Over A Month Before Answering.....13

    D. RCW 9.68A.10 Is A Broadly Construed Remedial Statute.....15

    E. The Facts Of C.F.’s Case Even Satisfy Barr’s Proposed Test.....15

    F. This Court Should Apply The Test Used To Determine If A Cause Of Action Based On Childhood Sexual Abuse Is Tolled. ....19

    G. The Barrs Ignore The Plain Language Of RCW 9.94A.835.....22

    H. Should This Court Determine That A Cause Of Action Exists For A Violation Of RCW Chapter 9.68A, C.F. Should Now Be Allowed To Pursue That Claim. ....23

    I. Jonnie Barr’s Criticism Of C.F.’s Request For Costs and Attorneys’ Fees On Appeal Is Without Merit.....24

III. CONCLUSION.....25

## TABLE OF AUTHORITIES

### Cases

<i>Arnold v. City of Seattle</i> , ___ Wn.2d ___, 2016 WL 2586691 (May 5, 2016).....	24
<i>Beckmann v. Spokane Transit Auth.</i> , 107 Wn.2d 785, 733 P.2d 960 (1987).....	13
<i>Boy 1 v. Boy Scouts of Am.</i> , 832 F. Supp. 2d 1281 (W.D. Wash. 2011).....	11
<i>Boy 7 v. Boy Scouts of Am.</i> , No. CV-10-449-RHW, 2011 WL 2415768 (E.D. Wash. June 12, 2011).....	10
<i>C.J.C. v. Corp. of Catholic Bishop of Yakima</i> , 138 Wn.2d 699, 985 P.2d 262 (1999).....	passim
<i>Casper v. Esteb Enterprises, Inc.</i> , 119 Wn. App. 759, 82 P.3d 1223 (2004).....	7
<i>DeYoung v. Providence Med. Ctr.</i> , 136 Wn.2d 136, 960 P.2d 919 (1998).....	20
<i>Doerflinger v. New York Life Ins. Co.</i> , 88 Wn.2d 878, 567 P.2d 230 (1977).....	7
<i>Firchau v. Gaskill</i> , 88 Wn.2d 109, 558 P.2d 194 (1977).....	6
<i>J.C. v. Soc'y of Jesus</i> , 457 F. Supp. 2d 1201 (W.D. Wash. 2006).....	10, 11
<i>Jacob's Meadow Owners Ass'n v Plateau 44 II, LLC</i> , 139 Wn. App. 743, 162 P.3d 1153 (2007).....	5
<i>Jafar v. Webb</i> , 177 Wn.2d 520, 303 P.3d 1042 (2013).....	5

**Cases (Continued)**

*Kuhn v. Schnell*,  
155 Wn. App. 560, 228 P.3d 828 (2010)..... 10, 11, 12

*Lujan v. Santoya*,  
41 Wn.2d 499, 250 P.2d 543 (1953)..... 1

*Mehlenbacher v. DeMont*,  
103 Wn. App. 240, 11 P.3d 871 (2000)..... 10

*North Coast Electrical Co. v. Signal Electrical, Inc.*,  
\_\_\_ Wn. App. \_\_\_, 2016 WL 2343172 (April 26, 2016)..... 1, 5

*Ohwell v. Nyc & Nissen Co.*,  
26 Wn.2d 282, 173 P.2d 652 (1946)..... 1

*Port of Stockton v. W. Bulk Carriers KS*,  
371 F.3d 1119 (9th Cir. 2004) ..... 8, 9, 11, 12

*Riordan v. State Farm Mut. Auto Ins. Co.*,  
589 F.3d 99 (9th Cir. 2009) ..... passim

*Warren v. Glascam Builders, Inc.*,  
40 Wn. App. 229, 698 P.2d 565 (1985)..... 13

*West Virginia Univ. Hosp. v. Casey*,  
499 U.S. 83 (1991)..... 9

**Statutes**

42 U.S.C. § 1988..... 9

RCW 4.16.340 ..... 19, 20, 21, 22

RCW 4.28.360 ..... 13

RCW 4.84.250 ..... 13

RCW 4.84.280 ..... 13

**Statutes (Continued)**

RCW 4.84.330 ..... 13

RCW 9A.44.110..... 21

RCW 9.68A.040..... 20

RCW 9.68A.090..... 4, 22

RCW 9.68A.10..... 15

RCW 9.68A.130..... passim

RCW 9.94A.835..... 22, 23

RCW 26.09.140 ..... 6

RCW 49.48.030 ..... 13

**Rules**

CR 54 ..... passim

Fed. R. Civ. P. 8..... 1, 8

Fed. R. Civ. P. 9..... 1, 8

Fed. R. Civ. P. 54..... 7, 8, 10

RAP 18.1..... 24

**Treatises**

Charles Alan Wright & Arthur R. Miller  
*Federal Practice and Procedure* (3d ed.) ..... 9

**Other Authorities**

Webster’s Third New International Dictionary (1981)..... 21, 22

## I. INTRODUCTION

The procedure for requesting costs and attorneys' fees is governed by Civil Rule 54(d). This rule explains that unless attorneys' fees are an element of damages for the underlying cause of action, which is not the case here, then the court determines the availability of costs and fees and the amount through motion practice. This is not a new practice under Washington law. *Lujan v. Santoya*, 41 Wn.2d 499, 250 P.2d 543 (1953).<sup>1</sup> Federal Courts also follow this approach under the analogous Federal Rules of Civil Procedure, holding that the pleading requirements of Rules 8 and 9 do not apply to fee requests as they are resolved by motion. *Riordan v. State Farm Mut. Auto Ins. Co.*, 589 F.3d 99, 1004-1005 (9th Cir. 2009). This Court's recent decision in *North Coast Electrical Co. v. Signal Electrical, Inc.*, \_\_\_ Wn. App. \_\_\_, 2016 WL 2343172 (April 26, 2016) is consistent with this approach, emphasizing that motion practice under Rule 54(d) controls the process.

Here, there is no question that C.F. followed the requirements of Rule 54(d) and timely filed a motion requesting costs, including reasonable attorneys' fees. Instead of deciding whether or not C.F. was

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<sup>1</sup> In relevant part, the Court in *Lujan* reasoned "Defendants contend that the judgment should not have included plaintiffs' costs, because they were not prayed for in the complaint, and rely upon *Ohwell v. Nye & Nissen Co.*, 26 Wn.2d 282, 173 P.2d 652, 169 A.L.R. 139. The citation is not in point, because it involved a judgment in excess of the prayer for compensatory damages. The allowance of costs, on the other hand, is governed by statute. A prayer for them is unnecessary." 41 Wn.2d at 501.

entitled to this relief, the trial court denied her request on procedural grounds, determining that C.F. should have included a cause of action in her complaint for costs under RCW 9.68A and concluding that the jury, not the trial court, decides whether C.F. is entitled to costs.

In their briefs, the Barrs both agree that there is no need to plead a specific statute for an award of costs. S. Barr Br. at 11;<sup>2</sup> J. Barr Br. at 9. Instead, Jonnie Barr makes the inaccurate argument that he was not made aware during the case of the factual basis “for attorney’s fees, whether in pleading or otherwise.” J. Barr Br. at 9. This assertion is objectively untrue considering C.F. moved for a writ of attachment over a month before either of the Barrs even answered the underlying lawsuit, setting forth the exact factual basis for her claims, explaining that they all arose from Jonnie Barr’s inappropriate sexual interactions with C.F., a minor child. C.F.’s preliminary court filings described Jonnie Barr’s tortious conduct as “he grabbed me, touched me in private area and put his tounge [sic] in my

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<sup>2</sup> Sue Barr argues that there should be no award against her. While C.F. did not request this relief, she certainly could have done so. Sue Barr’s liability arises from the conduct of her husband, who was her business partner. Her tortious conduct is linked to his. C.F. notes this point because in the majority of cases cited by the parties, the criminally offending party is not the named defendant. Instead it is some other entity, such as a business or church, which may be responsible for costs following a successful adjudication. Holding parties like Sue Barr accountable for costs is consistent with how the statute of limitations is tolled for minor victims of sexual abuse even when they are suing someone other than the perpetrator. *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999) (holding that tolling applies to all causes of action and all parties, and explaining “we must then decide whether the definition of “childhood sexual abuse” contained in subsection (5) nevertheless limits the act’s applicability only to claims brought by a victim against the actual perpetrator of the abuse.”) Nevertheless, whether costs should be awarded against Sue Barr is not at issue.

mouth” and “I was molested at Puyallup Basketball Academy, in Jon’s home and behind a slide at a hotel after we won Hoopfest in Spokane.” CP 705-6 (emphasis added). Jonnie Barr was on notice from the outset that C.F. was asserting causes of action predicated on his sexual misconduct.

Just as Jonnie Barr ignores the factual record concerning his sexual misconduct toward C.F., the Barrs equally fail to address why CR 54(d)’s placement of the obligation to determine costs on the trial court does not control this appeal. The Barrs fail to address why Washington would interpret its Civil Rule differently than the similar federal counterpart. In fact, neither response brief ever addresses the Ninth Circuit’s *Riordan* decision despite C.F.’s dedicated discussion of it.

RCW 9.68A.130 is undeniably a remedial statute that should be interpreted broadly to make whole minor victims of sexual abuse. The Barrs do not challenge this fact. Jonnie Barr pled guilty to assaulting C.F. predicated on what he admitted was a result of his hugging and kissing a minor child. RP 925-26 (“The conduct I was admitting to was hugging and kissing”). A civil jury found in favor of C.F., after presented with the testimony of an eye witness who saw Jonnie Barr kissed C.F. on the lips (RP 54), the testimony of Jonnie Barr’s own psychologist relating how Jonnie Barr admitted that he put his tongue into seven-year-old C.F.’s



mouth and was sexually aroused in the process (RP 235-37), and C.F.'s testimony that Jonnie Barr's conduct was sexual (RP 676-77). Based on this evidence, Jonnie Barr was held liable under almost every tort that could apply in a case of this nature, including outrage, assault, battery and negligence, CP 322-325. There is no doubt that Jonnie Barr's conduct is prohibited by RCW 9.68A.090, yet RCW 9.68A does not include any civil causes of action – it is a criminal chapter with a single civil cost recovery statute. Here, the trial court erred by failing to examine the evidence presented and declining to make a legal determination, instead deciding that it was the jury's responsibility to determine the availability of costs. Because C.F. appropriately requested this post-trial relief, she should be awarded her costs, including reasonable attorneys' fees and expenses, for the underlying trial and for this appeal.

## II. ARGUMENT

### A. **Because The Costs Requested In This Case Are Not An Element Of Damages, The Court Determines Their Availability By Motion.**

This case involves the procedural denial of costs, including reasonable attorneys' fees. Because CR 54(d) is the procedural rule that governs requests for costs, it is the beginning and end of the analysis. "Court rules are interpreted in the same manner as statutes. If the rule's meaning is plain on its face, we must give effect to that meaning as an

expression of the drafter's intent." *North Coast Electrical Co.*, 2016 WL 2343172, at \*2 (quoting *Jufar v. Webb*, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013)). Under the plain text of CR 54(d), costs and attorneys' fees are sought by motion rather than pleadings, which must be brought within ten days after entry of judgment. CR 54(d). The only circumstances where a jury decides an issue for attorneys' fees or costs is when the fees are an element of damages. *Id.* The Court of Appeals has explained that there is a "distinction between attorney fees awardable as costs of maintaining or defending an action against an adverse party, and attorney fees recoverable as damages, generally incurred as a result of prior actions by the adverse party which have exposed the claimant to litigation with a third party." *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 758, 162 P.3d 1153 (2007). For example, unlike C.F.'s circumstances, "[a]ttorney fees recoverable pursuant to a contractual indemnity provision are an element of damages, rather than costs of suit." *Id.* at 760. Here, the Barrs do not claim that C.F.'s requested costs and fees are an element of damages.<sup>3</sup>

Although the Washington Constitution provides for the right to trial by jury on many issues, since territorial days, Washington's trial courts

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<sup>3</sup> Although Jonnie Barr does not claim that C.F.'s requested costs are damages, he criticizes C.F. for not listing RCW 9.68A.130 in response to his request for a statement of "damages" J. Barr Br. at 5. This argument, however, is circular because the costs sought in this case are not damages, so there is no reason to list these costs or fees as damages.

were empowered to determine liability for costs and fees. For instance, in *Firehau v Gaskill*, 88 Wn.2d 109, 115, 558 P.2d 194 (1977), the Washington Supreme Court was called upon to evaluate RCW 26.09.140, which authorized the trial court to award costs and fees in a dissolution action. There, the Court held that:

[The statute] 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. See Code of 1881, s 2006.[ ] **Inherent in this grant of power is the discretion to grant or deny the award of attorney fees** and to determine the amount of the attorney fees after considering the financial resources of the parties. . . . Thus, appellants were not entitled to a jury trial.

*Id.* (emphasis added).

Here, C.F. is not suggesting that she incurred attorneys' fees that the jury should have awarded her as damages, but instead seeks fees as an operation of law because she prevailed in a civil cause of action arising from the sexually motivated wrongful conduct of her basketball coach. The statute affords C.F. a make-whole remedy - including reasonable attorneys' fees. The Barrs' briefing barely discusses the text of CR 54(d) and nowhere explains how they leap to the conclusion that a jury must determine the entitlement to costs and fees regardless of whether they are an element of damages. Certainly, the interpretation requested by the Barrs runs counter to the plain text of CR 54(d).

Although the text of CR 54(d) is clear, federal decisions interpreting the analogous federal rule are instructive. As recently held by this Court, “[w]here a Washington civil rule is identical to its federal counterpart, federal cases interpreting the federal rule are highly persuasive.” *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004). See also, *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 880, 567 P.2d 230 (1977) (“Civil Rule 54(b), with but a minor and here irrelevant addition, is identical to Federal Rule of Civil Procedure 54(b). . . . We concur with the approach of the federal courts.”). Comparing the relevant text of CR 54(d)(2) with its federal counterpart shows they are substantively identical except the federal rule grants a few more days to file a motion for fees than the state version:

CR 54(d)(2)

(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.

Fed. R. Civ. Pro. 54(d)(2)(A)-(B)

(2) Attorney’s Fees. (A) Claim to Be by Motion. A claim for attorney’s fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. (B) Timing and Contents of the Motion. Unless a statute

or a court order provides otherwise, the motion must:  
(i) be filed no later than 14 days after the entry of judgment. . . .

*Riordan v. State Farm. Mut. Auto Ins. Co.*, 589 F.3d 99 (9th Cir. 2009) illustrates these principles applied in a similar scenario. There, the underlying defendant made the same complaints as the Barrs, arguing that the pleading requirements of Rules 8 and 9 should govern cost motions, and claiming it was surprised by the request for attorneys' fees. Because the fee issue was not pled with specificity, the defendant argued that the trial court did not have authority to award the relief. *Id.* at 1004-5. The Barrs make no effort to explain or distinguish *Riordan*. Likely, the Barrs decided to ignore this directly analogous federal precedent because case law and the Advisory Committee Notes regarding federal rule 54(d) definitively answer the issues raised by the Barrs in C.F.'s favor.

The Barrs' principal argument is that they were "surprised" by the request for fees despite acknowledging that C.F.'s Complaint and Amended Complaint both included a request for costs and attorney fees. As noted in *Riordan*, "State Farm's argument that it was prejudiced by lack of notice is not persuasive." 589 F.3d at 1006.

Our examination of the text of Rule 54(d)(2) leads us to conclude that *Riordan* properly raised the claim for attorney fees by motion. *Port of Stockton* also undermines State Farm's argument that *Riordan* should have included his claim for attorney fees both in his complaint and again

by motion. As explained in *Port of Stockton*, pleadings and motions are distinct, and there is no requirement that the fees claim be first raised in the complaint, then again by motion.

*Id.* at 1005-06.

Regarding the issues of notice and surprise, the short timeframe set forth by Civil Rule 54(d) dictates the requirements for notice. As explained by leading commentators addressing the federal rule, “[o]ne purpose [of the Rule 54(d) timeframe] is to ensure that the opposing party has notice of the claim before the time for appeal has elapsed.” 10 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2690 (3d ed.). The Advisory Committee’s note further explains that the abbreviated timeframe to file a fee motion, 14 days in the federal system (as compared to 10 days under CR 54(d)), is in place so that the opposing party will have notice of the intent to seek fees before the time to appeal the underlying judgment has lapsed.

This new paragraph establishes a procedure for presenting claims for attorneys’ fees, whether or not denominated as “costs.” It applies also to requests for reimbursement of expenses, not taxable as costs, when recoverable under governing law incident to the award of fees. Cf. *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83 (1991), holding, prior to the Civil Rights Act of 1991, that expert witness fees were not recoverable under 42 U.S.C. § 1988. As noted in subparagraph (A), it does not, however, apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages

typically are to be claimed in a pleading and may involve issues to be resolved by a jury. . . .

Subparagraph (B) provides a deadline for motions for attorneys' fees—14 days after final judgment unless the court or a statute specifies some other time. One purpose of this provision is to assure that the opposing party is informed of the claim before the time for appeal has elapsed.

Fed. R. Civ. P. 54(d) advisory committee's note (1993).

The Barrs provide no legal authority supporting their contention that the jury, rather than the court, determines whether a party is allowed costs, including reasonable attorneys' fees, when those fees are not an element of damages but simply requested as a statutory entitlement. To the contrary, Washington courts have long held that: "A trial court's decision to award fees and costs is a question of law and reviewed to determine if the relevant statute or contract provides for an award of fees." *Mehlenbacher v. DeMont*, 103 Wn. App. 240, 244, 11 P.3d 871 (2000).

**B. The Barrs' Reliance On The *Kuhn* Facts, Which Are Unrelated To Any Holding, Is Misleading And Unpersuasive.**

Every federal decision interpreting RCW 9.68A.130 has concluded that the entitlement to costs, including reasonable attorneys' fees, is a matter to be determined by the court if the underlying plaintiff is successful through the cause of action brought. *J.C. v Soc'y of Jesus*, 457 F. Supp. 2d 1201 (W.D. Wash. 2006); *Boy 7 v. Boy Scouts of Am.*, No. CV-10-449-RHW, 2011 WL 2415768 (E.D. Wash. June 12, 2011);

and *Boy I v. Boy Scouts of Am.*, 832 F. Supp. 2d 1281 (W.D. Wash. 2011). Instead of attempting to effectively distinguish these cases, the Barrs cite to a number of lawsuits brought by other lawyers incorrectly listing RCW 9.68A.130 as a “cause of action” as well as relying heavily on the facts, but no part of the reasoning or holding, in *Kuhn v. Schnall*, 155 Wn. App. 560, 228 P.3d 828 (2010). The fact that the parties in *Kuhn* apparently agreed to a bifurcated trial with two phases - without objection or discussion by any court as to whether this was an appropriate procedure - makes the case irrelevant to the issues raised in this appeal. Interestingly, in *J.C. v. Soc’y of Jesus*, the court expressly recognized that both of the parties mistakenly believed that RCW 9.68A.130 created a “cause of action” when in reality it is merely a cost statute. There, the court explained that pleading RCW 9.68A.130 as a cause of action created a “defect” but found no harm: “Although 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.” 457 F. Supp. 2d at 1204 (emphasis added). In similar fashion, both parties in *Port of Stockton v. W. Bulk Carriers KS*, 371 F.3d 1119, 1120-21 (9th Cir. 2004), relied upon heavily in *Riordan*, also incorrectly assumed the initial pleadings were the appropriate location to raise a request for fees or costs. *Riordan*, 589 F.3d at 1005. In *Port of Stockton*, the court stated that



“[e]ach party has assumed that some form of initial pleading -either a complaint or a counterclaim - is the appropriate manner by which the Port should seek its costs. Yet, such is not generally the case in our federal system.” *Port of Stockton*, 371 F.3d at 1120 (emphasis added). The court went on to correct this misunderstanding, explaining that motion practice, rather than the pleadings, is the appropriate mechanism to raise a request for costs and fees, unless the fees are an element of damages. *Id.*

From these cases, it is plain that practitioners often confuse the proper procedural mechanism for requesting costs and fees. For this reason it is no surprise that the Barrs were able to locate lawsuits where practitioners incorrectly labeled RCW 9.68A.130 as a cause of action and where the parties stipulated to a bifurcated trial. However, the Barrs’ reliance on the mistaken actions of the lawyers in *Kuhn* and other cases, rather than a robust discussion of the actual requirements of CR 54(d), and analysis of case law addressing this issue does little to assist this Court in evaluating the correct procedural mechanism for requesting costs. For instance, there is no discussion in *Kuhn* about why a bifurcated trial was necessary, whether it was required, and why the reviewing court would create a new category of costs and fees that a jury must determine, outside the text of CR 54(d).

**C. Respondents Had Notice Of The Facts Giving Rise To Liability Under RCW 9.68A.130 Over A Month Before Answering.**

The Barrs both agree that there is no need to cite a specific statute in a complaint for the award of costs or fees. S. Barr Br. at 11;<sup>4</sup> J. Barr Br. at 9. Sue Barr's brief states that "[w]hile Washington appellate courts have long held that parties need *not* specifically plead other attorneys' fees statutes (e.g., see RCW §§ 4.84.250, 4.84.280, 4.84.330), the courts have never abandoned the requirement that parties must be placed on *notice* of the basis for attorneys' fees." S. Barr Br. at 11 (emphasis in original). Responding to this same argument, Jonnie Barr asserts that he had no knowledge of the factual basis "for attorney's fees, whether in pleading or otherwise." J. Barr Br. at 9. The record contradicts Respondents' assertion.

On June 4, 2014, C.F. filed a motion seeking a writ of attachment and explaining the basis for her causes of action. CP 704-713. C.F. explained in her "STATEMENT OF FACTS": "I am ten years old." CP 705. Regarding Jonnie Barr's conduct, she said:

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<sup>4</sup> Inconsistent with her concession that pleading a cost statute is unnecessary, Sue Barr relies upon the overruled case of *Warren v. Glascam Builders, Inc.*, 40 Wn. App. 229, 698 P.2d 565 (1985), which the Washington Supreme Court summarized its erroneous holding in the act of overruling it as "analogizing attorney fee provisions in RCW 49.48.030 to RCW 4.84.250 and holding that the initial pleadings must contain reference to the statute granting fees." *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 788, 733 P.2d 960 (1987). The Washington Supreme Court specifically overruled *Warren* on the precise point for which Sue Barr cites it: "while a plaintiff could be required to plead RCW 4.84.250 in his or her complaint, this makes little sense in personal injuries when pursuant to RCW 4.28.360 the complaint will not state the actual amount of damages plaintiff seeks. We therefore decline to follow the Court of Appeals narrow construction of the pleading requirement in RCW 4.84.250. Insofar as *Tatum* and *Warren* are inconsistent with this holding, they are hereby overruled." *Id.* at 790 (emphasis added).

- “It started out like this, he would call me behind a wall to go to a huge cabinet that held candy and basketball cards. At first he said, ‘Give me a hug.’ As time passed I was asked to go behind the wall where he was waiting for me inside the doors of that huge cabinet. At first he allowed me to stand on the ground. Then it progressed to him picking me up and hugging me. He would grab at my body, say bad words, and kiss my lips. I have heard Jon moan as he uses adult words and say he loved me and wanted to marry me.” CP 706.
- “Jon started to putting his toung [*sic*] in my mouth. He would put his toung [*sic*] in my mouth and it made me want to cry. I would try to wiggle out of his arms. He would apologize and say it wouldn’t happen again. The next time he would call me behind the cabinet I said, ‘No.’ At first he would plead with me. ‘Please...come on,’ he would say. If I didn’t go with him, he would be mean to me. I was seven and afraid of Jon as he grabbed at me, touched me in private areas and put his tounge [*sic*] in my mouth.” CP 706.
- “A few times he took me away from the academy and molested me in his home on his couch.” CP 706.
- “I was molested by Jon for a year. From the time I was seven until I was eight I was molested at Puyallup Basketball Academy, in Jon’s home and behind a slide at a hotel after we won Hoopfest in Spokane.” CP 707.

Jonnie Barr filed his Answer over a month later on July 11, 2014.

CP 7. It was over another month before Sue Barr answered on August 21, 2014. CP 1381. The Barrs knew that C.F.’s case arose from his sexualized misconduct from the outset.<sup>5</sup>

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<sup>5</sup> C.F. answered Jonnie Barr’s discovery, further emphasizing from the outset of the case that the sexual conduct was the basis for her claims. *See* CP 409-10 (responding to Interrogatory Nos. 18 and 19). While Jonnie Barr claims C.F.’s response to Interrogatory

**D. RCW 9.68A.10 Is A Broadly Construed Remedial Statute.**

In her opening brief, C.F. established that the underlying cost statute, RCW 9.68A.130, is a remedial statute that this court should broadly construe to make victims of childhood sexual abuse whole. Appellant's Br. at 14. The Barrs' responsive briefing passively concedes that RCW 9.68A.130 is to be interpreted broadly.

**E. The Facts Of C.F.'s Case Even Satisfy Barr's Proposed Test.**

In the process of attempting to distinguish the multiple federal decisions concerning RCW 9.68A.130 as well as the Washington Supreme Court's decision in *C.J.C. v. Corp of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999), Jonnie Barr argues that those cases are different because the sexualized misconduct was either admitted or clear. J. Barr Br. at 17. Specifically, Jonnie Barr writes "the underlying conduct in those cases was: 1) clearly established as sexual conduct; and/or, 2) un rebutted or otherwise admitted to eliminating any issue of fact that sexual conduct occurred." *Id* Thus, Jonnie Barr proposes that the test is either clearly established or admitted conduct. In applying his proposed test, Jonnie Barr simply makes the conclusory statement that C.F.'s

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18 should have listed RCW 9.68A.090 as a statute he violated, his interrogatory did not request a specific citation to any statute, instead asking a "yes" or "no" question about whether violations have occurred and then asks for the basis. *Id* In response, C.F. answered "Yes" and referred him to the evidence supporting her writ of attachment, which is outlined above. *Id*.

situation is different because Jonnie Barr denied liability. Jonnie Barr makes no effort to cite the record or point this Court to any evidence that explains his conduct.<sup>6</sup> J. Barr Br. at 17. To the contrary, when the record is actually reviewed, it becomes plain that even Barr's proposed test is satisfied as his conduct was both admitted and clearly sexual.

First, in the underlying criminal case, Jonnie Barr admitted to assaulting C.F. based on the same articulation of what was described in the criminal complaint. CP 390-91, 397.

Second, during the trial, Jonnie Barr admitted under questioning by his own counsel that he assaulted C.F. by kissing and hugging her. RP 925-26 ("The conduct I was admitting to was hugging and kissing").

Third, Jonnie Barr's own psychologist testified Barr admitted placing his tongue in C.F.'s mouth and becoming sexually aroused from kissing her while he had her on his lap. RP 236-37. Instead of explaining this conduct, in his deposition used to impeach him during the trial, Barr took the position that he could not determine fiction from reality and was unable to accurately testify as to his interactions with C.F. RP 131-32 ("Q. Two months ago, I asked you the following question: "Understanding that you have testified that you have some issues that don't allow you at

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<sup>6</sup> Even if there was some evidence supporting Barr's claim that he did nothing wrong (and pled guilty despite doing nothing wrong), it was rejected by the jury.

times to recall events accurately, do you feel like you're in a position to really testify as to factually accurate what happened between you and C.F.? And your answer two months ago was, "No." A. That's what it says."). *See also*, RP 935; CP 29-30. The record also included Barr's psychologist's notes, explaining: "During the course of treatment the client [Jonnie Barr] acknowledged that while the minor child was on his lap he placed his tongue in the minor's mouth briefly saying his defenses were down and such is what he and his wife did when kissing." CP 166.

Fourth, Jonnie Barr underwent two polygraph examinations by his own hired examiner during which he admitted to having sexualized conduct with C.F. CP 150. During the initial polygraph, "there was significant reactions when the client [Jonnie Barr] answered 'NO' to the following relevant questions: 1. Did you have inappropriate sexual contact with [C.F.]." CP 149. "In response to the above there was a post test interview conducted by Mr. Killian [the polygraph examiner] and the client acknowledged French kissing [C.F.]. . . ." CP 150. Barr was then given a second polygraph where he was asked "have you had any other inappropriate sexual conduct with [C.F.]." *Id.* The polygraph examiner testified that Barr told him that C.F. "also sits on his lap and he became sexually excited and aroused." RP 382. The examiner also testified that Barr "admitted French kissing [C.F.]." *Id.*

Fifth, former Puyallup Basketball Academy customer Patricia Hay testified that she observed Jonnie Barr kiss C.F. on the mouth. RP 54.

Sixth, C.F. testified directly how Jonnie Barr touched her on her private parts of her crotch area, put his tongue in her mouth, used sexualized language with her, called her his girlfriend and spoke about how he wanted to marry her. RP 676-77.

Jonnie Barr's assertion that there was no evidence of any sexual motivation on his part is resoundingly refuted by the record, which he ignores. Tellingly, his briefing fails to discuss any details of his conduct with C.F. Jonnie Barr provides no explanation of what the conduct was, other than his sexual misconduct, which gave rise to his criminal or civil liability. In other words, if Jonnie Barr did not have sexually inappropriate conduct with C.F., then what was the basis for the jury's determination and award, or his plea of guilty to a criminal offense?

Sue Barr's briefing seems to acknowledge that "there was sexual conduct with a minor" in this case, S. Barr Br. at 8, but goes on to incorrectly suggest that RCW 9.68A does not cover all claims of childhood sexual abuse. Sue Barr's argument is inconsistent with the Supreme Court's decision in *C.J.C.* where the court determined that similar conduct, a priest's sexualized touching of a child, easily met the definition of communication for immoral purpose. *C.J.C. v. Corp. of*

*Catholic Bishop of Yakima*, 138 Wn.2d 699, 707, 985 P.2d 262 (1999). In *C.J.C.*, the Court also explained that even an attempt to lure a child into a van would meet the definition of communications for immoral purposes. *Id.* Following Sue Barr's argument, sexualized verbal communication would be covered, but a child who was raped or molested would not be covered. This was rejected in *C.J.C.* Here, all of the conduct underlying C.F.'s tort claims arose from Jonnie Barr's sexual misconduct with C.F. and, therefore, she is entitled to her costs.

**F. This Court Should Apply The Test Used To Determine If A Cause Of Action Based On Childhood Sexual Abuse Is Tolloed.**

Instead of the Barrs' proposed test, this Court should utilize the same "gravamen" standard applied in *C.J.C.* to determine whether the statute of limitations on a cause of action is tolled because it is based on conduct that constitutes communications with a minor for immoral purposes. As C.F. previously explained, "[w]ithout [Jonnie Barr's] sexualized words and conduct, there would be no evidence to support the verdict." Appellant Br. at 12. The Washington Supreme Court applied a similar test identifying the "gravamen" of the dispute in order to decide whether a particular lawsuit is based on childhood sexual abuse. *C.J.C.*, 138 Wn.2d at 710. If a case is subject to tolling under RCW 4.16.340, then the same factual basis should trigger costs under RCW 9.68A.130.



In *C.J.C.*, the Court was called upon to interpret RCW 4.16.340, which is the statute that tolls causes of action for “childhood sexual abuse” a phrase defined in the statute as “an 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 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 alleged in the complaint was based on “childhood sexual abuse.” First, the Supreme Court held that if the “*gravamen*” of the dispute is childhood sexual abuse, then the tolling statute applies:

We have already reached a similar conclusion regarding the meaning and effect of RCW 4.16.340. See *DeYoung v Providence Med. Ctr.*, 136 Wn.2d 136, 960 P.2d 919 (1998). In *DeYoung*, although not engaging in statutory construction *per se*, we recognized the statute contemplates professional negligence causes of action where “the *gravamen* of the action is [childhood sexual] abuse...” *DeYoung*, 136 Wn.2d at 147, 960 P.2d 919 (emphasis added). We noted the statute applies to medical malpractice actions where the underlying “child sexual abuse forms the grounds for the action...” *DeYoung*, 136 Wn.2d at 147, 960 P.2d 919 (emphasis added).

Similarly, under 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. C.J.C. argued that “the Priests communicated with him for an immoral purpose as proscribed under former RCW 9A.44.110 (1981) (“Any person who communicates with a child under the age of seventeen years of age for immoral purposes shall be guilty of a gross misdemeanor.”). *Id.* The Court agreed, reasoning that 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.

Because both statutes are triggered by underlying conduct that constitutes communications with a minor for immoral purposes, the only distinction between RCW 4.16.340 and RCW 9.68A.130 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: FOUNDATION . . . the point or line from which a start is made in an action or undertaking . . . .” *Id.* 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 as communications with a minor for an immoral purpose, now codified at 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. Here, the trial court erred in failing to reach this conclusion. This Court should reverse and remand to the trial court for a determination of the amount of fees and costs.

**G. The Barrs Ignore The Plain Language Of RCW 9.94A.835.**

In their briefing, the Barrs cite to the prosecutor’s oral request to amend the charge of Fourth Degree Assault With Sexual Motivation without any supporting reason, which was granted by the district court. Yet, neither of the Barrs address the impact of the amendment that was undeniably contrary to the commands of RCW 9.94A.835(3), which restricts the authority of both the prosecutor and the court to remove a sexual motivation component unless very specific and limited

circumstances are present and the court finds either that there was an error in the charge or evidentiary problems. Neither was found by the district court.<sup>7</sup> In C.F.'s opening brief, she addressed RCW 9.94A.835. Appellant's Br. at 5 and 33. While it was obviously a tactical decision for Respondents to basically ignore RCW 9.94A.835, this Court should not hold that C.F.'s remedies are limited merely because the mandates of RCW 9.94A.835 were not followed.

**H. Should This Court Determine That A Cause Of Action Exists For A Violation Of RCW Chapter 9.68A, C.F. Should Now Be Allowed To Pursue That Claim.**

C.F.'s right to costs under RCW 9.68A.130 did not arise until she prevailed against Jonnie Barr. Once she accomplished this task, she timely moved for costs. If this Court determines that a jury has some role in this process and holds that a private cause of action exists, then C.F. should be allowed to move forward with an action to have those issues determined by a jury. While this is not the method advocated by C.F., the Supreme

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<sup>7</sup> By manipulating the statute's text, Jonnie Barr manufactures an argument that the court need not make any finding if there are evidentiary problems which make proving the special allegation doubtful. J. Barr Br. at 15. To do this, Jonnie Barr breaks RCW 9.94A.835(3) into two subsections that do not actually exist. Jonnie Barr goes so far as to cite "section (2)" of a subsection where there are no further subsections. The text of the statute plainly states that the court's authority to dismiss is restricted and a finding is required regardless as to whether it is an error or unforeseen evidentiary issue that leads to the amendment. RCW 9.94A.835(3) states, in its entirety, as follows:

The prosecuting attorney shall not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.

Court's May 5, 2016 decision in *Arnold v City of Seattle* supports C.F.'s ability to file a separate action for fees and costs. \_\_\_ Wn.2d \_\_\_, 2016 WL 2586691 (May 5, 2016).

In *Arnold*, the plaintiff recovered wages through a Seattle Civil Service Commission hearing and requested attorneys' fees from that body, but was denied based on procedural rules. *Id.* at \*2. There, the employee appealed and filed a separate lawsuit seeking fees and costs for having prevailed in the commission hearing. *Id.* The Court of Appeals held that Arnold had a right to recover her attorneys' fees through a separate action. C.F. cited the Division I decision. Appellant's Br. at 24. However, within the last few weeks, the Supreme Court issued its decision, affirming that Arnold was allowed to recover her attorneys' fees through a separate action filed after her underlying award. If necessary, C.F. should be afforded the same opportunity.

**I. Jonnie Barr's Criticism Of C.F.'s Request For Costs and Attorneys' Fees On Appeal Is Without Merit.**

In his brief, Jonnie Barr argues that C.F. should not receive attorneys' fees on appeal, claiming that she failed to comply with RAP 18.1. J. Barr Br. at 18. Jonnie Barr's argument in this regard is meritless, as C.F.'s opening brief complied with RAP 18.1 by dedicating a section to requesting attorneys' fees on appeal and explained with

specificity that the basis for that request was RCW 9.68A.130.  
Appellant's Br. at 34.

### III. CONCLUSION

C.F. respectfully requests that this Court reverse the decision below, hold as a matter of law that C.F. is entitled to her costs, including attorney's fees, for both the trial and this appeal, and remand to the trial court for a determination of the amount of those costs and fees.

Dated this 24<sup>th</sup> day of May, 2016.

Respectfully submitted,

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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 May 24, 2016, I caused the **Reply Brief of Appellant** to be served via email, pursuant to the parties' mutual consent for service by email:

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