No. 48400-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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.

BRIEF OF RESPONDENT SUE BARR AND PUYALLUP BASKETBALL ACADEMY

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I. INTRODUCTION

The plain language of RCW § 9.68A.130 states that a minor is entitled to recover costs and reasonable attorneys' fees if she prevails in a civil action "arising from [a] violation of this chapter." *Id.* Therefore, a violation of Chapter 9.68A, commonly known as the Sexual Exploitation of Children Act (hereinafter "SECA"), is a necessary antecedent to recovery of costs and attorneys' fees. In the present case, plaintiff did not ask the trial court or the jury to find that defendants violated SECA and/or specifically that defendants communicated with a minor for immoral purposes in violation of RCW § 9.68A.090.

Having failed to properly place the issue before the trier of fact, plaintiff now seeks to have this Court make a finding of a SECA violation, so as to trigger a right to recovery of attorneys' fees under RCW § 9.68A.130. Contrary to plaintiff's claim, the issue in this appeal is not who has the authority to award fees after a proper finding of a violation of SECA, but rather who properly makes the underlying finding of a SECA violation necessary to trigger an award of fees. The trial court properly concluded that plaintiff never asked the jury to find that defendants had violated SECA, and that it was improper for her to hazard a guess as to what the jury might have concluded had the issue been properly raised at trial. Plaintiff now asks this Court to reverse the trial

court's reasoned ruling and substitute its own judgment for that of the jury in finding a SECA violation.

II. COUNTERSTATEMENT OF ISSUES RELATING TO APPELLANT'S ASSIGNMENT OF ERROR

1. Where there is insufficient information in the record to conclude that the jury found a violation of RCW § 9.68A, *et seq.*, did the trial court properly deny plaintiff's motion for fees and expenses under RCW § 9.68A.130? (Answer: Yes).

III. COUNTERSTATEMENT OF THE CASE

On April 8, 2014, Shari Furnstahl filed her Complaint for Damages, on behalf of her minor daughter, C.F. In her initial Complaint, Ms. Furnstahl alleged the following causes of action against defendants Jonnie Barr, Sue Barr, and Puyallup Basketball Academy (hereinafter "PBA"): (1) negligence, (2) invasion of privacy, (3) battery, (4) assault, (5) intentional infliction of emotional distress, and (6) false imprisonment. *CP 1-4.* There was no effort in the Complaint to distinguish which claims were being pursued against which defendants. *Id.* Additionally, there was no mention of RCW § 9.68A or any claims of sexual exploitation of a child. *Id.* The same is true of plaintiff's First Amended Complaint. *CP 12-15.*

This matter went to trial on October 15, 2015. On November 9, 2015, the jury was provided with the trial court's instructions on the law.

CP 290-321. The jury was instructed on plaintiff's six theories of legal recovery. Of the theories of recovery, plaintiff's assault, battery and false imprisonment claims were specifically limited to Jonnie Barr. *CP 312-14.* With respect to these claims, the jury was given the standard civil assault, civil battery and false imprisonment instructions, with no reference to either sexual motivation or intent, sexual contact, or communication with a minor for immoral purposes. *Id.*

On November 13, 2015, the jury returned its special verdict. *CP 322-25.* The jury was asked 13 questions related to the conduct and claims against the three defendants. *Id.* Again, there was no mention of any sexual motivation or intent, sexual contact, or communication with a minor for immoral purposes in any of the special verdict questions. *Id.* The jury returned a verdict in favor of the plaintiff as follows:

(1) Jonnie Barr and PBA were found negligent, and that such negligence was a proximate cause of injury to plaintiff. *CP 322.*

(2) Jonnie Barr and Sue Barr committed the tort of false light invasion of privacy, which was a proximate cause of injury to the plaintiff. *CP 323-24.*

(3) Jonnie Barr committed the tort of outrage, which was a proximate cause of injury to the plaintiff. *CP 323.*

(4) Jonnie Barr assaulted plaintiff, which was a proximate cause of injury to the plaintiff. *CP 324.*

(5) Jonnie Barr battered plaintiff, which was a proximate cause of injury to the plaintiff. *CP 325.*

The jury did not find that Jonnie Barr falsely imprisoned the plaintiff. *CP 324.* In total, the jury found in favor of the plaintiff on five of the six theories of liability, including one claim against PBA (negligence) and one claim against Sue Barr (invasion of privacy by false light). *CP 322-325.* Despite the multiple theories of liability and multiple defendants, the jury was only asked one damages questions: "What is the total amount of plaintiff's damages?" *CP 325.* The jury responded with a total damages verdict of $225,000. *Id.* There was no segregation of damages either by claim or by defendant. Therefore, the verdict represents the total damages for all claims.

Following the verdict, plaintiff filed a motion for costs, attorneys' fees and litigation expenses. *CP 326-338.* In the motion, plaintiff sought an award of attorneys' fees and costs under RCW § 4.84.010, 4.84.030, and 4.84.080, as well as an award of attorneys' fees and litigation expenses under RCW § 9.68A.130. *Id.* at 327. At oral argument on December 18, 2015, after extensive briefing, the trial court granted plaintiff's request for statutory attorneys' fees and some claimed costs

under RCW § 4.84, *et seq.*, but declined to grant the request for fees and expenses under RCW § 9.68A.130. *CP 1363-64.* Plaintiff appeals only the trial court's denial of fees and expenses under RCW § 9.68A.130. *Appellant's Brief* at 3. Therefore, the trial court's determination of attorneys' fees and costs under RCW § 4.84, *et seq.* is not the subject of this appeal.

IV. ARGUMENT

A. Standard of Review

Defendants Sue Barr and PBA agree that de novo is the appropriate standard of review for the trial court's ruling that there was no legal basis for plaintiff's claim of attorneys' fees under RCW § 9.68A.130.

> We apply a two-part standard of review to a trial court's award or denial of attorney fees: "(1) we review de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) we review a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion."

In re Wash. Builders Benefit Trust, 173 Wn. App. 34, 83, 293 P.3d 1206 (Div. II 2013) (quoting *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (Div. II 2012)).

Plaintiff here has presented a narrow issue for appeal: whether or not the trial court erred in not awarding attorneys' fees under RCW § 9.68A.130. While this issue is reviewed *de novo*, this Court is not

being asked to consider the second prong of the standard because the trial court's award of statutory attorneys' fees and costs was made pursuant to RCW § 4.84, *et seq.* and is not the subject of this appeal.

B. There can be no award against Sue Barr or PBA for attorneys' fees or costs under RCW § 9.68A.130 because there was no alleged violation of SECA against these two defendants.

With respect to Sue Barr and PBA there can be no claim of a SECA violation. Plaintiff proved only two claims against Ms. Barr and/or PBA, negligence and invasion of privacy through false light. Neither of these claims – or the evidence submitted in support of these claims – involve conduct even arguably approaching the conduct required for a colorable claim of a SECA violation. Indeed, from plaintiff's briefing, it does not appear that plaintiff is making any argument in this appeal that Sue Barr or PBA violated SECA.

SECA is a criminal statute dealing with claims of: (1) sexual exploitation of a minor, (2) all manner of child pornography (dealing in depictions of a minor engaged in sexually explicit conduct; sending, bringing into state depictions of minor engaged in sexually explicit conduct; possession of depictions of minor engaged in sexually explicit conduct; viewing depictions of a minor engaged in sexually explicit conduct); (3) communication with a minor for immoral purposes; (4) all manner of child prostitution (commercial sexual abuse of a minor,

promoting commercial sexual abuse of a minor, promoting travel for commercial sexual abuse of a minor, and permitting commercial sexual abuse of a minor); and (5) allowing a minor on the premises of live erotic performance. *See RCW §§ 9.68A.040-.075; 9.68A.090-.103; 9.68A.150.*

Neither plaintiff's garden variety negligence claim against PBA nor the invasion of privacy by false light claim against Sue Barr involve any allegations of a sexual nature by either of these two defendants. Accordingly, the trial court's denial of an award of fees and costs under RCW § 9.68A.130, as to Sue Barr and PBA, was not in error.

C. For the fees provision of RCW § 9.68A.130 to be triggered, there must first be a finding of a violation of RCW § 9.68A.

Plaintiff can cite to no authority supporting the claim that RCW § 9.68A.130 applies in the absence of a violation of RCW § 9.68A. In fact, the plain language of the statute requires a finding of a violation of RCW § 9.68A before recovery of attorneys' fees and costs is permitted. The statute 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." Here, there has never been a finding of a violation of SECA. *RCW § 9.68A.130.*

Plaintiff wishes to characterize this statute as a "simple, one-sentence provision" which entitles all victims of childhood sexual abuse

who prevail at a civil trial to a recovery of attorneys' fees. *Appellant's Brief* at 18. However, this simplistic reading of RCW § 9.68A.130 is incorrect. SECA does not cover all claims of childhood sexual abuse. *See RCW § 9A.44* (additional sexual offenses against children); *RCW § 26.44.020* (which defines "sexual exploitation"). Rather, SECA focuses on specific sexual misconduct that amounts to sexual *exploitation* of minors. It is not simply enough that there was sexual contact with a minor. Instead, the statute is clearly triggered only by a finding of a violation of SECA. *RCW § 9.68A.130.*

1. Plaintiff cannot argue that there has been a finding of a SECA violation against any defendant because that issue was never raised with either the trial court or the jury prior to verdict.

Plaintiff seems to conflate the issue raised by defendants in opposition to the motion for fees and costs. These defendants do not dispute that had there been a finding of a SECA violation, then a 54(b) motion requesting that the trial court determine the reasonable amount of attorneys' fees would be appropriate. The issue is not who determines the reasonable amount of fees, but who finds the violation which triggers the right to fees: the jury as the finder of fact during deliberations following instructions on proper statements of the law, or a trial court who after the jury's reasoned verdict is asked to conduct additional fact finding.

The Washington case *Kuhn v. Schnall*, 155 Wn. App. 560, 228 P.3d 828 (Div. I 2010) demonstrates the proper role of the jury in claims for attorneys' fees under SECA. In *Kuhn*, plaintiffs brought claims for medical negligence, sexual battery, outrage and negligent infliction of emotional distress (hereinafter "NIED") related to allegations that Dr. Schnall conducted inappropriate and excessive genital exams on minor patients, as well as other violations of "appropriate physician-patient boundaries." *Id.* at 565-66. Prior to trial, the court allowed 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 patient-plaintiffs while they were minors, in violation of RCW § 9.68A.090." *Id.* at 565. The court bifurcated the trial, and the jury was first asked to decide on the negligence, battery, outrage and NIED claims. *Id.* Following a plaintiffs' verdict on negligence and NIED, the jury was then asked to determine whether or not Dr. Schnall communicated with minors for immoral purposes. *Id.* The jury was not informed that "plaintiffs' claim of communication with a minor for immoral purposes was related to attorney fees." *Id.* The jury found that Dr. Schnall did not violate RCW § 9.68A.090. *Id.* at 567.

The legal issues raised in the *Kuhn* appeal are not applicable to the present case and deal with issues of alleged juror misconduct and motions

for a new trial. *Id.* However, the case provides an appropriate roadmap for distinguishing the role of the trial court and the role of the jury in awarding attorneys' fees under RCW § 9.68A.130. In *Kuhn*, it was the jury's role to determine the underlying violation of SECA, namely, whether or not the defendant communicated with minors for immoral purposes under RCW § 9.68A.090. Had the jury so found, then that violation of SECA would have triggered the trial court's authority to determine the amount of reasonable attorneys' fees owed under RCW § 9.68A.130.

Here, there is neither a criminal conviction under SECA, nor a finding of a violation under SECA. Plaintiff attempts to disguise this lack of a finding by discussing that requests for fees and costs under CR 54(b) are always decided after the verdict. However, the trial court had no such authority to determine fees under RCW § 9.68A.130, because the jury was never asked to find that Jonnie Barr communicated with a minor for immoral purposes. *J.C. v. Society of Jesus*, affirmed that a violation of SECA was a necessary predicate for triggering the attorneys' fees provision of RCW § 9.68A.130. *J.C. v. Society of Jesus*, 457 F. Supp. 2d 1201, 1204 (W.D. Wash. 2006). Without such a violation, there can be no entitlement to reasonable attorneys' fees.

In an effort to make an end run around the statute's requirement for an explicit finding, plaintiff attempts to argue that communication with a minor for immoral purposes is so clear cut that this Court can easily make such a finding. *Appellant's Brief* at 12, 29-31. To support such a claim, plaintiff cites to *State v. Hosier*, 157 Wn.2d 1, 133 P.3d 936 (2006), a criminal case where a jury was asked to determine if the defendant communicated with a minor for immoral purposes, and the jury did. *See also, State v. Schimmelpfennig*, 92 Wn.2d 95, 594 P.2d 442 (1979). Again, this illustrates that the proper time to raise this issue was with the jury at the time of trial, not on a post-verdict motion.

2. Plaintiffs never advanced a SECA violation claim.

Plaintiff never pled RCW § 9.68A.130 or – more importantly – a violation of SECA, or a claim related to communication with a minor for immoral purposes. While 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. *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 733 P.2d 960 (1987). *See also, Warren v. Glascam Builders*, 40 Wn. App. 229, 698 P.2d 565 (Div. III 1985) *overruled on other grounds* by *Beckmann*, 107 Wn.2d 785; *State v. Farmers Union Grain Co.*, 80 Wn.

App. 287, 295-96, 908 P.2d 386 (Div. III 1996) ("In Warren . . . the court contrasted the need to plead certain attorney fees statutes (such as RCW 49.48.030, action on an employment agreement, and RCW 4.84.250 fees for pleadings of less than $10,000) with the lack of such need when fees are based on a contractual provision pursuant to RCW 4.84.330."). Here, there has been no notice because there was no allegation of a SECA violation in either pleadings, discovery, or at trial. Again, the SECA statute covers specific conduct, and general allegations of inappropriate contact with a minor are insufficient to alert defendants to a claim under SECA.

Indeed, in the available cases discussing SECA, the plaintiffs specifically plead claims for violations of RCW § 9.68A in their civil complaints. *See J.C. v. Society of Jesus*, 457 F. Supp. 2d, 1201, 1202 (W.D. Wash. 2006) (defendant filed summary judgment on plaintiff's claims for negligent infliction of emotional distress, equitable estoppel and fraudulent conveyance, and Washington's Sexual Exploitation of Children Act, RCW §§ 9.68A.001-9.68A.911); *Boy 1 v. Boy Scouts of America*, 832 F. Supp. 2d 1282, 1285 (W.D. Wash. 2011) (plaintiffs brought claims against Boy Scouts of America for (1) negligence and breach of fiduciary duty; (2) willful misconduct, wanton misconduct and reckless misconduct; (3) intentional infliction of emotional distress; (4) violation of RCW §

9.68A: Sexual Exploitation of Children Act ("SECA"); (5) Estoppel and Fraudulent Concealment; and (6) Civil Conspiracy); *Boy 7 v. Boy Scouts of America*, 2011 U.S. Dist. LEXIS 63212 (E.D. Wash. 2011) (Complaint alleged six causes of action, including violation of Wash. Rev. Code § 9.68A, Sexual Exploitation of Children); *C.J.C. v. Corporation of the Catholic Bishop*, 138 Wn.2d 699, 986 P.2d 262 (1999) (claims for communication with a minor for immoral purposes); *Kuhn v. Schnall*, 155 Wn. App. 560, 565, 228 P.3d 828 (2010) (plaintiffs amended their complaint to add claim for communication with a minor for immoral purposes).

Not only did plaintiff fail to plead RCW § 9.68A.130, the defendants were never notified of plaintiff's intent to raise RCW § 9.68A in any capacity in this case. "Even our liberal rules of pleading require a complaint to contain direct allegations sufficient to give notice to the court and the opponent of the nature of the plaintiff's claim." *Berge v. Gorton*, 88 Wn.2d 756, 762, 567 P.2d 187 (1977). "A complaint should apprise the defendant of what the plaintiff's claim is and the legal grounds upon which it rests . . ." *Christensen v. Swedish Hospital*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962).

None of plaintiff's pled claims: negligence, assault, battery, outrage, false imprisonment or false light, are identified in the statutory

scheme of RCW § 9.68A, so it would be impossible to impute even constructive notice that an award of attorneys' fees would be sought, under RCW § 9.68A.130, pursuant to a violation of SECA. Plaintiff never asked the trial court either (1) to rule, as a matter of law, that defendants violated SECA or (2) for a jury instruction related to claimed violations of SECA. The special verdict form was silent on SECA, both explicitly and implicitly, and the special verdict form did not allocate damages between the multiple defendants, such that a court would have any ability to determine the basis for the jury's award.

D. Because SECA was never raised with the jury in any capacity, plaintiff is essentially requesting that this court act as an additional finder of fact after the verdict.

The notice requirement for attorneys' fees claims based on statutes is necessary to ensure full and complete resolution by the finder of fact. Washington courts are "committed to the rule that, insofar as possible, there shall be one trial on the merits with all issues fully and fairly presented to the trial court at that time so the court may accurately rule on all issues involved and correct errors in time to avoid unnecessary retrials." *Haslund v. Seattle*, 86 Wn.2d 607, 614, 547 P.2d 1221 (1976).

Plaintiff could have, and must have, advanced her claim for a SECA violation, under RCW § 9.68A.090, at the time of trial. The fact remains that plaintiff knew all the operative facts underlying her lawsuit,

she could have plead a violation of SECA, and she could have asked the trial court for an instruction on the claim. All parties to a lawsuit are bound by those legal theories advanced at trial, and cannot raise new claims after the verdict. As the Washington Courts have held:

> The burden is on the parties to a lawsuit to propose jury instructions covering their respective theories. A party is bound by the legal theories pleaded and argued before the jury renders a verdict. The court noted that "[a] lawsuit cannot be tried on one theory and appealed on others."

Browne v. Cassidy, 46 Wn. App. 267, 270, 728 P.2d 1388 (Div. II 1986) (internal citations omitted) (Finding a post-verdict motion under CR 50 was improper because "if a party fails to propose instructions on a particular theory of recovery, that theory is taken out of the case."). *See also, Int'l Raceway, Inc. v. JDFJ Corp.*, 97 Wn. App. 1, 7, 970 P.2d 343 (Div. I 1999) (Finding that the CR 59 post-verdict motion "was in essence an inadequate and untimely attempt to amend its complaint in general, violating equitable rules of estoppel, election of remedies, and the invited error doctrine." In refusing to permit "such a perversion," the court concluded that the Rules do "not permit a plaintiff, finding a judgment unsatisfactory, to suddenly propose a new theory of the case.").

This is precisely what plaintiff is advancing here. Plaintiff seeks to circumvent the rule requiring the presentation of her theories of recovery at the time of trial by now asking, post-verdict, for the courts to speculate

first, about factual basis for the jury's verdict (i.e. what conduct the jury found amounted to negligence, assault, battery, etc.), second, to find that such conduct amounted to their newly raised sexual exploitation of a minor claim, and finally render an award of fees based on this never before presented claim.

A violation of RCW § 9.68A was never raised, argued, or otherwise submitted to the jury for consideration. "Without so pleading, the applicability of the statute to these facts was never raised or tried." *Warren*, 40 Wn. App. at 232. As such it could not have formed the basis for the jury's decision. As in *Warren*, had such a claim been timely raised by the plaintiff, defendants would have offered evidence to rebut such a claim. *See, id.* at 231. Then, with the claim properly before the trier of fact, plaintiff could have requested jury instructions for the purpose of determining whether the facts of the case constituted a violation of SECA. None of this was done because the claim was neither raised nor put to the jury.

V. CONCLUSION

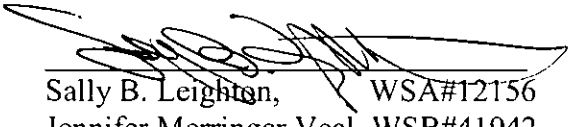
With respect to defendant Sue Barr and PBA, plaintiff made no claim that either of these defendants violated SECA. In fact, the jury only found that PBA was negligent, and that Sue Barr had invaded the plaintiff's privacy through false light. Therefore, under the plain language

of the statute, there is no basis for an award of attorneys' fees under RCW § 9.68A.130, and the trial court's ruling was correct.

With respect to all defendants, there can be no finding of a violation of SECA because that question was never presented to the jury. Instead, plaintiff sought to have the trial court substitute its own judgment in determining the factual basis for the jury's finding of assault and battery and then to further determine whether or not those facts amount to communication with a minor for immoral purposes. This is not a proper post-verdict motion. There can be no award of attorneys' fees unless there is a violation of SECA, and it is simply inappropriate for the trial court to make such a finding post-verdict. The trial court was correct to decline to award fees pursuant to RCW § 9.68A.130, because there was no finding by the jury of a violation of SECA.

DATED this 28th day of April, 2016.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date, I caused a true and correct copy of this document to be served to counsel in the manner indicated below:

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EXECUTED at Tacoma, Washington this 28th day of April, 2016.

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