

Feb 16, 2017, 11:08 am

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

SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Plaintiff-Petitioner

v.

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

Defendants-Respondents.

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ANSWER OF DEFENDANTS/RESPONDENTS SUE BARR  
AND PUYALLUP BASKETBALL ACADEMY TO  
PETITION FOR REVIEW

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Sally B. Leighton, WSB#12156  
Jennifer Merringer Veal, WSB#41942  
Fitzer Fitzer Veal & McAmis, P.S.  
1102 Broadway, Suite 401  
Tacoma, WA, 98402  
(253) 683-4501  
[sally@flfps.com](mailto:sally@flfps.com)  
[jen@flfps.com](mailto:jen@flfps.com)  
Attorney for Respondent Sue Barr and  
Puyallup Basketball Academy

**TABLE OF CONTENTS**

I. Introduction..... 1

II. Counterstatement of the Issues for review..... 1

III. CounterStatement of the Case..... 1

IV. Argument ..... 7

A. There is no conflict between the Court of Appeals decision and other case law, statutes or rules..... 7

1. The plain language of the statute requires a finding of conduct amounting to a violation of RCW 9.68A to trigger applicability of the attorneys’ fees provision... 7

2. In an effort to create a conflict, plaintiff ignores the Court of Appeals discussion of the *Kuhn* opinion, which has direct bearing on the issues here. .... 8

3. Plaintiff can cite to no authority which interprets RCW 9.68A.130 in a manner inconsistent with the Court of Appeals decision in this case. .... 11

B. There is no significant question of law under the State Constitution..... 15

C. There is no substantial public interest which should be determined by this Court..... 16

V. Conclusion ..... 17

## TABLE OF AUTHORITIES

### Cases

<i>C.J.C. v. Corp. of the Catholic Bishop</i> , 138 Wn.2d 699, 985 P.2d 262 (1999).....	11, 12
<i>Erection Co. v. Department Labor &amp; Indus.</i> , 121 Wn.2d 513, 518, 852 P.2d 288 (1993).....	8
<i>Furnstahl v. Barr</i> , 197 Wn. App. 168 (2016) .....	6, 9, 14, 16
<i>Kuhn v. Schnall</i> , 155 Wn. App. 560, 228 P.3d 828 (2010).....	6, 8, 9, 10
<i>MRO Communs., Inc. v. AT&amp;T Co.</i> , 197 F.3d 1276, 1280 (9th Cir. 1999) .....	14
<i>Multicare Med. Ctr. v. Department of Soc. &amp; Health Servs.</i> , 114 Wn.2d 572, 582, 790 P.2d 124 (1990).....	8
<i>State v. Watson</i> , 155 Wn.2d 574, 577, 122 P.3d 903 (2005).....	17

### Statutes

RCW 4.16.340 .....	13
RCW 4.84 .....	6, 13
RCW 4.84.010 .....	4, 13, 14
RCW 4.84.030 .....	4
RCW 4.84.080 .....	4
RCW 9.68A.....	passim
RCW 9.68A.090.....	5

RCW 9.68A.130..... passim

**Rules**

CR 54(d)..... 10, 14, 15

**Other Authorities**

Wash. Const. Art. I, Sect. 21..... 15

## **I. INTRODUCTION**

The absence of a RCW 9.68A (Sexual Exploitation of Children Act, or “SECA”) violation is fatal to plaintiff’s request for review in this case. Instead of addressing this issue head on in her Petition for Review, plaintiff omits facts and obfuscates the legal issues creating a smokescreen over the clear and unmistakable language of RCW 9.68A.130. As the trial court and the Court of Appeals correctly held, the plain language of the statute requires the finder of fact to determine a violation of SECA before an award of attorneys’ fees under RCW 9.68A.130 is authorized. Plaintiff had the opportunity to ask the jury to find such a SECA violation at the time of trial, but failed to do so. She now improperly seeks appellate relief from her tactical error.

## **II. COUNTERSTATEMENT OF THE ISSUES FOR REVIEW**

1. Is an award of attorneys’ fees and costs under RCW 9.68A.130 contingent on a determination by the fact-finder of a SECA violation?

## **III. COUNTERSTATEMENT OF THE CASE**

Plaintiff neglects to identify all the defendants and all of the claims asserted in the underlying litigation. Instead, plaintiff seeks to persuade this Court to accept review on the basis of one course of conduct by one

defendant, by completely ignoring the additional defendants and claims in this case.

Nowhere in her Petition for Review does plaintiff mention Sue Barr or Puyallup Basketball Academy (hereafter "PBA"), the evidence offered against those defendants at trial, or that the jury found against these defendants on some claims at trial. This is significant because plaintiff asked the jury only one interrogatory on damages and did not ask the jury to identify which conduct formed the basis of which claims and/or the damages award. The net result is that determining whether or not the jury found conduct amounting to a SECA violation is pure speculation.

Far from being a case solely about Jonnie Barr's inappropriate and criminal contact with C.F., plaintiff also sued Sue Barr and PBA, a sole proprietorship owned and operated by both Sue and Jonnie Barr, asserting independent claims against each defendant. In addition to claims of (1) civil assault and (2) battery related to Jonnie Barr's conduct, plaintiff also alleged claims of (3) negligence, (4) invasion of privacy by false light, (5) intentional infliction of emotional distress, and (6) false imprisonment against the other defendants. CP 1-4.

There was no mention of RCW 9.68A, sexual exploitation of a child, or communication with a minor for immoral purposes in either plaintiff's original Complaint or First Amended Complaint related to

Jonnie Barr. CP 1-4, 12-15. Additionally, there were no facts alleged that would support any such claims against either Sue Barr or PBA. *Id.*

While plaintiff's Petition for Review discusses the testimony related to inappropriate hugging and kissing admitted to by Jonnie Barr, *Pet. for Review* at pp. 3-4; she failed to mention the evidence offered by a multitude of witnesses related to plaintiff's false light claim against Sue Barr.

On November 9, 2015, after a three week trial, 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. *Id.* 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.* Negligence was asserted against all three defendants, CP 322-23, while false light and outrage were asserted against *both* Sue and Jonnie Barr. *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.*

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 asked only one damages question: “What is the total amount of plaintiff’s damages?” CP 325. The jury awarded \$225,000. *Id.* There was no segregation of damages by either 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. This was the first time that issues related to sexual exploitation of a minor or communication with a minor for immoral purposes were raised by plaintiff.

All defendants opposed plaintiff’s motion for fees and costs on the issue of RCW 9.68A.130. There has never been a finding that any defendant violated RCW 9.68A, as required by RCW 9.68A.130, in either the criminal or civil case. First, Jonnie Barr was never found guilty of any



offense under RCW 9.68A. Plaintiff now appears to suggest that Jonnie Barr plead guilty to a sex offense and that such an offense constitutes communication with a minor for immoral purposes under RCW 9.68A.090.<sup>1</sup> However, in their original motion for fees and costs, plaintiff acknowledged that while Jonnie Barr was charged with Assault in the Fourth Degree, with sexual motivation, that he later pled guilty “to the lesser offense of 4th Degree Assault and was convicted.” CP 328.

Second, the trier of fact never found a violation of RCW 9.68A. The jury was never asked whether or not any conduct that formed the basis of their award of damages constituted a violation of RCW 9.68A. Certainly, none of the conduct which supported plaintiff’s claims against Sue Barr and PBA arose out of violation of RCW 9.68A. Instead, plaintiff asks this court to assume that RCW 9.68A was the basis of the jury’s award, despite the fact that the jury found against multiple defendants and on multiple claims, and despite the fact that the substance of RCW 9.68A had never been presented to the jury.

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<sup>1</sup> The paperwork associated with the guilty plea supports the fact that Jonnie Barr did not plead guilty to a sex offense, and further, the paperwork specifically excludes communication with a minor for immoral purposes. CP 154-59. Significantly, in the section regarding notifications related to specific crimes, lines were drawn through paragraphs (h), (q), (r), and (s) which relate to sex crimes. CP 156-57. Specifically, there was a strike through of the paragraph related to “communication with a minor for immoral purposes,” indicating it did not apply. CP 157.

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. Appeal to the Court of Appeals followed.

The Court of Appeals well-reasoned opinion focused on the plain language of the statute at issue. *Furnstahl v. Barr*, 197 Wn. App. 168, 173-74 (2016). In holding that RCW 9.68A.130 required a fact-finder's determination that the action arose from conduct constituting a violation of RCW 9.68A, the Court focused on the plain language of the statute which expressly references "violations of *this* chapter." *Furnstahl*, 197 Wn. App. at 174 (emphasis in original). In holding that the appropriate fact-finder was the jury, not the trial judge, the Court discussed the inviolate right of trial by jury and *Kuhn v. Schnall*, 155 Wn. App. 560, 228 P.3d 828 (2010). The Court noted that *Kuhn* illustrated the "danger of the fact finding approach advocated" by plaintiff here. Concluding that the trial court's reasoning was sound when it found that: (1) there was no assertion of a claim under RCW 9.68A, (2) there were no specific findings by the jury of the factual basis for their verdict, and (3) the jury instructions were general with no request for inclusion of a RCW 9.68A instruction, the

Court of Appeals denied plaintiff's appeal. This Motion for Discretionary Review followed and should be denied.

#### IV. ARGUMENT

**A. There is no conflict between the Court of Appeals decision and other case law, statutes or rules.**

Plaintiff attempts to raise several conflicts between the Court of Appeals decision and other published opinions and civil rules in an effort to secure review. Her arguments are unpersuasive. The fact remains that if plaintiff would have simply asked the jury the basis for their award, or asked whether the conduct found amounted to a violation of RCW 9.68A, this appeal would have been avoided.

**1. The plain language of the statute requires a finding of conduct amounting to a violation of RCW 9.68A to trigger applicability of the attorneys' fees provision.**

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." RCW 9.68A.130 (emphasis added).

Appellate courts give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute. *See Erection Co. v. Department Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288

(1993). Where the statutory language is clear and unambiguous, the statute's meaning is determined from its language alone. *See Multicare Med. Ctr. v. Department of Soc. & Health Servs.*, 114 Wn.2d 572, 582, 790 P.2d 124 (1990).

Since there were no SECA claims pled or argued to the jury, nor were there any jury instructions regarding SECA claims, nor was the jury asked the basis for their award on the verdict form, nor were they asked to segregate damages based on either defendant and/or claim, there is no record upon which to claim that the jury found a SECA violation. Since it is pure speculation to assume that plaintiff prevailed on a civil action arising from a violation of RCW 9.68A, the plain language of the statute precludes an award of fees.

**2. In an effort to create a conflict, plaintiff ignores the Court of Appeals discussion of the *Kuhn* opinion, which has direct bearing on the issues here.**

Plaintiff completely ignores the Court of Appeals' discussion of *Kuhn v. Schnall*, 155 Wn. App. 560, which highlights the dangers of the position advocated by plaintiff in this case. The *Kuhn* case is unique in that its procedural posture of a bifurcated trial particularly highlights the error in plaintiff's analysis.

Plaintiff argues that the trial court should assume that in finding for the plaintiff, the jury found conduct amounting to a SECA violation absent

any indication that the jury so found. *Kuhn* illustrates how such an assumption may not exist in reality.

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.<sup>2</sup>

The court bifurcated the trial,<sup>3</sup> 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

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<sup>2</sup> Plaintiff here never sought to amend her complaint nor did she attempt to instruct or argue to the jury that Jonnie Barr’s conduct amounted to a violation of RCW 9.68A. Counsel never requested such relief.

<sup>3</sup> It is important to note that neither defendants nor the Court of Appeals advocate that bifurcation is required under RCW 9.68A.130. The statute does not mandate such a procedure. See *Furnstahl v. Barr*, 197 Wn. App. at 176 (“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.”). However, for purposes of this appeal, it was the trial court’s decision to bifurcate in *Kuhn* which brought the issue of how assumption of factual bases for verdicts is dangerous and potentially inaccurate into such stark focus.

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. *Id.* However, the case through its unique procedural posture clearly and articulately distinguished the role of the trial court and the role of the jury in awarding attorneys’ fees under RCW 9.68A.130. It is 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 and CR 54(d).

The Court of Appeals simply reiterated the sound reasoning from *Kuhn*, which recognized that a jury could find for plaintiff on his or her underlying claims of sexual abuse, and still find that those facts did not constitute a violation of SECA. Assumptions to the contrary cannot be presumed.

In order for plaintiff to prevail here, this Court would have to assume that the jury would have found a SECA violation on the facts of

this case, despite a published appellate case that proves the folly in making such an assumption.

**3. Plaintiff can cite to no authority which interprets RCW 9.68A.130 in a manner inconsistent with the Court of Appeals decision in this case.**

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, and therefore there can be no conflict with the Court of Appeals decision.

**a. *C.J.C. v. Corp. of the Catholic Bishop* interpreted a different statute and presented very different facts than those present here.**

First, contrary to plaintiff's claim, the Court's decision in *C.J.C. v. Corp. of the Catholic Bishop*, 138 Wn.2d 699, 985 P.2d 262 (1999) does not address the pertinent issues here and is therefore not in conflict with the Court of Appeals decision. The question presented in *C.J.C.* was a narrow one: "whether negligence claims brought against church entities and individual church officials who did not themselves directly perpetrate intentional acts of childhood sexual abuse, but who allegedly failed to protect the child victims or otherwise prevent the abuse, fall within the broad limitations period allowed under the statute [RCW 4.16.340]." *Id.* at 704-05. In holding that negligence claims were covered by RCW 4.16.340, the court noted that under the particular facts of the case, "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.” *Id.* at 709.

The *C.J.C.* analysis is inapposite to this case. Plaintiff seeks to oversimplify the record that was before the trial court. Contrary to the picture painted by plaintiff, this is not a case against one defendant for one course of conduct that arguably constituted communication with a minor for immoral purposes. If those were the facts of this case, this might be a different appeal. Here, plaintiff prevailed on a claim for false light against Sue Barr as well as garden variety negligence against PBA and Sue Barr. These claims are separate and independent from any claims arising out of RCW 9.68A, and the conduct complained of occurred outside the context of any alleged sexual conduct. The trial court and Court of Appeals correctly recognized that in such a circumstance, where the jury is asked to find against multiple defendants on multiple theories of liability, and there are no questions related to the factual basis for the jury's award, it is pure speculation to assume after the fact that the verdict was based on conduct arising out of a violation of RCW 9.68A. Accordingly, the denial of an award of fees and costs under RCW 9.68A.130 was not in error.



**b. Plaintiff's attempt to analogize other statutory schemes is unpersuasive.**

Plaintiff's attempted analogy between RCW 9.68A and RCW 4.16.340 rests on logical fallacy. Plaintiff suggests that RCW 4.16.340 (a statute of limitation provision), which utilizes the term "childhood sexual abuse" and RCW 9.68A (a specific criminal statute), which utilizes the phrase "sexual exploitation of a minor," are essentially one in the same. Such a view ignores the fact that language matters and words have meaning. While violations of RCW 9.68A may fall under the larger umbrella of "childhood sexual abuse" it is logical fallacy to assume that a provision which, by its plain language, is expressly applicable only to violations of RCW 9.68A is somehow applicable to all claims that involve any allegations of "childhood sexual abuse," given the express limitation in the statute to claims for "sexual exploitation."

The same is true for the cost recovery statute found in RCW 4.84. RCW 9.68A and RCW 4.84 are not analogous statutes. The language of RCW 4.84.010 is much broader than RCW 9.68A. RCW 4.84.010 states in pertinent part that "there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses..." Unlike RCW

9.68A, it does not require a party to have proved violation of a particular statutory scheme before costs will be awarded. It simply states that costs shall be awarded to the prevailing party. The particular basis, either factual or legal, for the jury's award is irrelevant under RCW 4.84.010, so long as plaintiff prevails. However, the particular basis for the jury's award is central to the application of RCW 9.68A.130.

**c. There is no CR 54(d) conflict because there is no factual basis to trigger a CR 54(d) analysis.**

Nor is plaintiff's argument that the Court of Appeals decision stands in conflict with CR 54(d) accurate. Plaintiff spends a great deal of time in her brief discussing an alleged conflict between CR 54(d) and the Court of Appeals decision. There is no such conflict because plaintiff did not meet the factual predicate to trigger CR 54(d). *See Furnstahl*, 197 Wn. App. at 176, n. 9 ("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."). *See also MRO Communs., Inc. v. AT&T Co.*, 197 F.3d 1276, 1280 (9th Cir. 1999) (interpreting FRCP 54(d)) ("Rule 54(d)(2) creates a procedure but not a right to recover attorneys' fees. *See* Advisory Committee Notes to Fed. R. Civ. P. 54(d)(2) (noting that Rule 54(d)(2) "establishes a procedure for presenting claims for attorneys' fees)").

These defendants do not dispute that *if* plaintiff was the prevailing party on a claim arising out of a violation of RCW 9.68A that the subsequent analysis under CR 54(d) would be pertinent. However, this Court need not reach this issue because it is improperly framed. Under the facts of this case, the issue is who properly determines whether plaintiff has proved a violation of RCW 9.68A such that an award of fees is triggered, not the proper procedural mechanism by which fees are awarded after a violation is found. The answer to the former question is not found through a CR 54(d) analysis.

**B. There is no significant question of law under the State Constitution.**

As the Court of Appeals correctly noted, Wash. Const. Art. I, Sect. 21 establishes an inviolate right to a trial by jury. Plaintiff contends that such a right does not apply here because RCW 9.68A deals only with awards of attorneys' fees. Plaintiff misapprehends the Court of Appeals analysis.

Contrary to plaintiff's argument, the right to have a jury decide the facts is a right guaranteed by our State Constitution.

[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.

*Furnstahl*, 197 Wn. App. at 175.

There is no analogy to frivolous claims. Frivolous claims are by their definition claims that have no purpose or value. In such a case, it is understandable that a court, not a jury, has the authority to deal with such claims. However, plaintiff can hardly be arguing that the determination of whether a certain set of facts constitutes a SECA violation is somehow analogous to a finding that the claim has no serious purpose. There can be no doubt that finding a SECA violation is the type of decision clearly within Wash. Const. Art. I, Sect. 21. *See Furnstahl*, 197 Wn. App. at 175 (“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 RCW 9.68A was proved. Therefore, fact-finding is necessary to determine whether such a violation was proved.”)

**C. There is no substantial public interest which should be determined by this Court.**

While society certainly has an interest in protecting victims of sexual exploitation, straightforward application of unambiguous statutory relief is hardly a matter of substantial public interest. The Court of

Appeals did not interpret RCW 9.68A.130. It did not invite “unnecessary litigation” or “create confusion.” *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Rather, the court gave effect to the plain meaning of the statute.

## V. CONCLUSION

At trial, plaintiff made no claim that either Sue Barr or PBA violated SECA, nor were there any facts presented that would raise a colorable claim against these two defendants under SECA. 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.

Plaintiff’s attempted post-verdict motion requesting that the trial judge find a SECA violation is improper because that question was never asked of the jury. Plaintiff seeks to have this Court determine the jury’s factual basis of their verdict and further determine whether or not those facts amount to a SECA violation. This is not a proper function of the trial or appellate courts. There can be no award of attorneys’ fees unless there was a SECA violation, and it is simply inappropriate for judges to speculate as to the reasoning and basis for the jury’s decision when such an issue could have been raised directly with the jury itself. As there is no

record upon which to determine that the jury found a SECA violation, an award of fees under RCW 9.68A.130 is improper.

Respectfully submitted this 16th of February, 2017.



Sally B. Leighton, WSA#12156  
Jennifer Merringer Veal, WSB#41942  
Attorneys for Sue Barr and Puyallup  
Basketball Academy as Respondent

**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:

<p><u>Counsel for Plaintiff</u>                  James W. Beck                  Shelly Marie Andrew                  GORDON THOMAS HONEYWELL LLP                  1201 Pacific Avenue, Suite 2100                  Tacoma, WA 98401-1157  <a href="mailto:jbeck@gth-law.com">jbeck@gth-law.com</a>  <a href="mailto:sandrew@gth-law.com">sandrew@gth-law.com</a>  <a href="mailto:dwilliams@gth-law.com">dwilliams@gth-law.com</a>  <a href="mailto:escheail@gth-law.com">escheail@gth-law.com</a>  <a href="mailto:lhoobert@gth-law.com">lhoobert@gth-law.com</a></p>	<p><input type="checkbox"/> Via First Class Mail  <input type="checkbox"/> Via Hand Delivery  <input type="checkbox"/> Via Facsimile Transmission  <input checked="" type="checkbox"/> Via Electronic Mail</p>
<p><u>Counsel for Defendant Jonnie Barr</u>                  Thomas P. McCurdy                  Kyle D. Riley                  Ashley Nagrodski                  Smith, Freed &amp; Eberhard, PC                  705 2<sup>nd</sup> Ave., Ste. 1700                  Seattle, WA 98104-1795  <a href="mailto:kriley@smithfreed.com">kriley@smithfreed.com</a>  <a href="mailto:anagrodski@smithfreed.com">anagrodski@smithfreed.com</a>  <a href="mailto:JSnead@smithfreed.com">JSnead@smithfreed.com</a>  <a href="mailto:msheward@smithfreed.com">msheward@smithfreed.com</a>  <a href="mailto:tmccurdy@smithfreed.com">tmccurdy@smithfreed.com</a>  <a href="mailto:searstley@smithfreed.com">searstley@smithfreed.com</a></p>	<p><input type="checkbox"/> Via First Class Mail  <input type="checkbox"/> Via Hand Delivery  <input type="checkbox"/> Via Facsimile Transmission  <input checked="" type="checkbox"/> Via Electronic Mail</p>

EXECUTED at Tacoma, Washington this 16<sup>th</sup> day of February, 2017.

  
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 Karen Becker, Legal Assistant  
 Fitzer Fitzer Veal McAmis, P.S.