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 APPELLANT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Although RCW 9.68A.130 was enacted in 1984, no Washington court has interpreted the statute. Read in the context of other provisions in its chapter, this law provides that when a minor prevails in a civil suit arising from communication, either by words or conduct, for the purpose of sexual misconduct, then the minor is entitled to recover costs, including reasonable attorney fees. Here, Appellant, C.F., is entitled to an award of costs under RCW 9.68A.130 because she successfully brought suit against her former basketball coach for his sexual assault and battery which started when she was seven years old. The evidence supporting C.F.'s verdict included Jonnie Barr's grooming and sexual acts, which began by telling C.F. that he loved her, wanted to marry her, and transitioned into French kissing C.F. while sexually aroused, and touching her private areas.

RCW 9.68A.130 is entitled "Recovery of costs of suit by minor" and states that "[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." (Emphasis added). Underpinning why the court should interpret the statute broadly, the legislature recognized that "the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." RCW 9.68A.001. Relevant to this case, the chapter is violated when a defendant "communicates with a minor for immoral purposes." RCW 9.68A.090. Communication is broadly

defined as "conduct as well as words" and "immoral purpose" as used in the statute referrers to "sexual misconduct." *State v. Hosier*, 157 Wn.2d 1, 11, 133 P.3d 936 (2006). Conduct falling within the statute includes sexualized actions. For example, in *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 714-16, 985 P.2d 262 (1999), the Court determined that fondling and masturbating a child would constitute "communication for an immoral purpose" as matter of law – as would "merely attempt[ing] to entice young girls into the back of [a] van for sexual purposes."

In this case, C.F., after prevailing at trial, timely filed a motion for costs pursuant to CR 54, which sets forth the procedural mechanism for requesting costs. However, the trial court denied C.F.'s motion, reasoning that the court could not make the determination as to whether C.F. was entitled to costs when there was no specific finding made by the jury as to what conduct was the basis for C.F.'s assault and battery claims. Report of Proceedings ("RP') at 16. Concluding that only the jury could make this determination, the trial court denied C.F.'s motion for costs. CP 1363. This court should reverse that decision, because under CR 54(d) the court *always* determines a party's entitlement to costs except in the rare case where the fees are an element of damages, which was not the case in this circumstance.

II. ASSIGNMENT OF ERROR

Whether the trial court erred in denying C.F. costs under RCW 9.68A.130 when she was the prevailing party in a civil case arising from the sexual assault of a minor child. Answer: Yes.

III. STATEMENT OF THE CASE

C.F. was a student at Puyallup Basketball Academy ("PBA"), a private business owned and operated by Jonnie and Sue Barr. RP 67, 106. PBA offered year-round basketball to children and Jonnie Barr is the primary coach at PBA. RP 67, 910-11.

Before C.F. was assaulted by Barr, she was sexually molested by an older boy at a dance academy. RP 683. After learning about C.F's molestation, Jonnie Barr started grooming her with both words and conduct by telling her he loved her, that he wanted to marry her, and giving her special candy other children did not receive and generally favoring C.F. over the other children at PBA.[1] RP 324-25, 676-77. His conduct progressed into kissing C.F. on the mouth, kissing her with his tongue in her mouth, kissing her while sexually aroused, and touching her private area (described as "her upper thigh private parts" RP 607) while at the Barr's home. CP 414-439. The conduct continued until C.F.'s mother,

[1] His wife, Sue Barr, concurs that Jonnie Barr began to favor C.F. shortly after learning about C.F.'s molestation. RP 273.

Shari Furnstahl, saw Barr squeeze C.F.'s buttocks while he was picking her up in a bear hug at the PBA gym. RP 720-23. After this incident, C.F. disclosed the extent of Barr's inappropriate conduct and C.F.'s family notified the police. RP 720-26.

On February 8, 2012, the Pierce County Sheriff served a warrant at PBA and also interviewed witnesses. RP 116, 268. When asked about C.F.'s allegations, Barr told the police that he had been worried that "maybe a boy had touched her." RP 119.[2]

On May 15, 2012, Jonnie Barr was charged with fourth degree assault with sexual motivation. CP 390-91. The declaration of probable cause set forth the allegations against Barr, in relevant part, as follows:

> The victim [C.F.] said the kiss with tongue happened more than 10 times. . . . The victim said that when the defendant wanted a kiss he would tell her to give him the "good stuff." That "good stuff" meant the kissing. The defendant would constantly tell the victim that he loved her and that he wanted to marry her. The victim said the kissing happened at the PBA, at the defendant's house and during a basketball trip to Spokane.

CP 387-88. On November 4, 2013, the district court entered a finding of guilt. CP 393-398. In his plea statement Barr stated: "I plead guilty to the crime(s) of Assault 4 as charged in the complaint(s) or citation(s) and

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[2] When asked during trial to explain his statement to the police, and after listening to the audio recording in open court, Barr first claimed that he learned this from another parent, and then changed his testimony to: "I don't remember that." RP 117-119.

notice." CP 397. That criminal complaint charged that Jonnie Barr, between February 2 and December 6, 2011, "did unlawfully, intentionally assault CNF, contrary to RCW 9A.36.041(1),(2) with sexual motivation as defined in RCW 9.94A.030". CP 390-91. Barr went on to state in his guilty plea that "[o]n 2/2/11 – 12/6/11 in Pierce County, Wa I assaulted another person (CNF) [birthdate] intentionally by having unpermitted and/or offensive conduct with that person." CP 397.

As an apparent part of the plea agreement, during this hearing, the prosecutor made an oral motion to remove the sexual motivation component, which the court granted without any written memorization. CP 1371-79. The prosecutor did not give a reason for the amendment. *Id.* The district court did not make any factual findings supporting the alteration of the charges as required by RCW 9.94A.835(3).[3] The court set over sentencing until January 14, 2014 and ordered Jonnie Barr to complete a psycho-sexual evaluation. CP 394.

At the sentencing hearing on January 14, 2014, C.F. submitted a written statement. CP 705. This statement explained, in part, as follows:

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[3] RCW 9.94A.835 requires a filing of special allegations of sexual motivation in "every criminal case, felony, gross misdemeanor, or misdemeanor, other than sex offenses as defined in RCW 9.94A.030" where "sufficient admissible evidence exists" to support the finding. Once filed, "[t]he 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." RCW 9.94A.835(3).

> I was 7 when things changed. 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.
>
> 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 732-734.

On April 18, 2014, C.F., through her mother and guardian *ad litem* Shari Furnstahl, filed a lawsuit in Pierce County Superior Court. CP 1. Her lawsuit alleged various causes of action, including assault, battery, invasion of privacy, negligence and outrage and requested an award of attorney fees and costs as allowed by Washington law. *Id.*

On June 4, 2014, C.F. filed a motion seeking a writ of attachment. CP 704-713. In this motion, C.F. cited all of the evidence contained in the district court file, quoting specifically C.F.'s statement during sentencing.

CP 705-08. On July 11, 2014, Jonnie Barr filed his Answer. CP 7.[4] On August 18, 2014, C.F. responded to Barr's first discovery requests, which at Interrogatory No. 19 asked the basis for how the injuries occurred. CP 409-10. Again, C.F. relayed the same information from her statement at sentencing. *Id.* ("C.F. previously explained the details of her injuries in her statement provided to the court at Jon Barr's sentencing hearing. The following outlines the information provided. . . ."). C.F. was also asked in this discovery whether Barr's conduct violated any statute and if so to describe the factual basis. CP 409. Again, C.F. answered this question "yes" and pointed to the same material provided during the writ of attachment hearing. *Id.* On May 4, 2015, Plaintiff filed an Amended Complaint maintaining her request for attorneys' fees and costs. CP 15 ("Plaintiff prays that this Court enter a judgment . . . For attorneys' fees, . . ., costs . . . as may be provided by law").

Opening statements in C.F.'s civil trial against Barr occurred on October 15, 2015. C.F.'s lawyer made it clear that this was a case about sexual assault: "Coach Barr tells her that he loves her, that she's beautiful, that he wants to marry her. Coach Barr tells the girl these things, and he kisses her. He puts his tongue in her mouth. . . . Coach Barr takes the girl in his car. Coach Barr has her in his home. Coach Barr touches her in her

[4] Sue Barr did not file her Answer until August 21,2014. CP 1381-84.

private area on his couch in his house." RP 2-3. Counsel for Barr framed the case for the jury as whether Barr was a "predator" of young children or an "educator." RP at 31 ("you just heard Mr. Beck tell you that he's going to present all this evidence that Mr. Barr is a monster, that he is a predator. . . . Rather, he is an educator, and he and his wife have dedicated their lives to the Puyallup Basketball Academy.")

During the presentation of evidence, Barr admitted his "hugging and kissing" was "intentional offensive unpermitted contact." RP 925-26 ("The conduct I was admitting to was hugging and kissing"). However, when pressed for additional details about his conduct, Barr testified that a fog came over him and he could not testify accurately as to his interactions with C.F. RP 931-37. Barr testified during his deposition that he will say things that are not based in factual reality CP 30 (14:4-7), that he experiences sporadic lapses in memory or understanding. CP 32-33. Barr attributes these memory deficits to an undiagnosed learning disability and a concussion that occurred 15-20 years ago for which he has had no further medical care. CP 27-29. Barr testified at trial that he could not recall events accurately, and, therefore, he was not in a position to testify in a factually accurate fashion about what happened with C.F.:

> 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 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.

RP 131-32.

Barr testified he would say things that are not based in reality:

> Q. I believe you testified a moment ago that at times you will say things that are not based in factual reality; is that correct?
>
> A. Yes. But it all depends on what your word of "factual" is.

RP 935.[5]

Dr. Larry Arnholt, a phycologist, conducted multiple counseling sessions with Barr. RP 235. During their first session, Barr told Arnholt that "*his tongue went on her lips and went into her mouth as it did with his wife and referred to it as a Freudian slip.*" RP 236 (emphasis added). Barr further told Arnholt that "*he was aroused because the French kiss, as it was called, or Freudian slip, reminded him of how he and his wife kissed.*" RP 237 (emphasis added). Barr told Arnholt that this conduct occurred while C.F was "on his lap." *Id.*

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[5] During his deposition, Barr testified: "Q. . . . Are you telling me that you have a difficult time comprehending questions, or are you telling me that you have a situation where you'll just start saying things that are totally factually not based in reality? A. Yes to the first one. And to your second question, sometimes. . . . Q. (By Mr. Beck) Sure. I believe you testified a moment ago that at times you will say things that are not based in factual reality; is that correct? A. Yes." CP 29-30.

Two of Barr's former PBA customers testified that they witnessed Barr's inappropriate touching of C.F. or of their own children. Patricia Hay testified she heard Barr ask C.F. "go give him a kiss." RP 54. She then saw Barr and C.F. kiss "on the lips" in a manner that she described as "it wasn't like a peck." RP. 54. Another parent, Laura Bowerman testified that while in his car, Barr would put his fingers underneath her child's shirt. RP 399. Bowerman submitted a Declaration with the same information. CP 287.

During the trial, C.F. also testified about what had happened. She explained that "he started saying that, 'I love you. I can't live without you. I love you so much.' And he kept on saying that countless times. And he hugged me and kissed me on the cheek. And he said, 'This will be our little secret.'" RP 676-77. C.F. testified that "he started to pick me up and kissing me on the lips. And then he started putting his tongue in my mouth and started touching my private parts." RP 677. Trial Exhibit 57 was admitted into evidence and further explained Barr's sexual motivation:

> He moved from kind words to very mature sexual language. . . . He seemed to be viewing her as a girlfriend and spoke of marrying her. He spoke of being "in love". . . . She has said, "He grabbed my bottom when he was holding me." Other statements about what he did revealed that he stuck his tongue in her mouth on several occasions.

CP 436-439.

After hearing from 32 witnesses, the jury found for C.F. on all of her claims against Jonnie Barr, with the exception of false imprisonment. CP 322-325. Determining that Jonnie Barr assaulted, battered, invaded the privacy of C.F., committed the tort of outrage, and acted negligently, the jury awarded C.F. $225,000 in damages. CP 325.

On November 24, 2015, C.F. filed a motion for costs, including reasonable attorney fees, under both RCW chapter 4.84 and RCW 9.68A.130. CP 326. Jonnie Barr, Sue Barr and PBA opposed C.F.'s motion arguing that without pleading RCW 9.68A.130 with specificity or having a jury determine whether Barr's conduct violated RCW 9.68A.090, the Court was without authority to enter an award of costs. CP 611, 670. C.F. responded that the determination of whether a party is entitled to costs is a determination made by the trial court unless attorney fees are an element of damages. CP 1310. C.F. also directed the court to three decisions by federal courts interpreting RCW 9.68A.130 as requiring a determination by motion only after resolution of the underlying case. CP 310-11. Concluding that it could not make the determination on a motion, the trial court denied C.F.'s request for costs under RCW 9.68A.130. The trial court stated "there were no specific findings by the jury as to the factual basis for the jury's verdict. What conduct the jury found as the basis for civil assault? I don't know. What conduct the jury found as the

basis for civil battery? Again, I don't know." RP 16. C.F. timely appealed. CP 1365.

IV. ARGUMENT

This Court must decide whether the evidence supports application of RCW 9.68A.130. The answer to this determination must be "yes" because all of the alleged acts constituting assault and battery were of a sexual nature. These were the acts from which all the torts at issue arose. Barr admitted to his own psychologist that he placed his tongue in C.F.'s mouth and was sexually aroused, RP 235-37, there is no explanation other than "immoral purpose" for 54-year-old Jonnie Barr French kissing seven-year-old C.F. and touching her private areas. Even his own damage expert, Dr. McGovern, concluded Barr's "inappropriate touching" caused C.F.'s injuries. RP 1365.[6] Both Barr's words and his conduct are considered communication under RCW 9.68A.090. Without his sexualized words and conduct, there would be no evidence to support the verdict. Because the conduct that supports the verdict is prohibited by RCW 9.68A.090, C.F. is entitled to fees under RCW 9.68A.130.

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[6] Dr. Jill McGovern, Barr's expert, testified: "Q. . . . So the first section of this requires that there be some type of traumatic event that a person experienced. A. Yes. Q. And you would agree that that's satisfied for [C.F.]? A. Yes. Q. That would be the inappropriate touching and other interactions with Jon Barr, correct? A. Correct." RP 1365.

A. Review Of The Trial Court's Decision Denying An Award of Costs As Provided By Statute And Properly Requested Under Rule 54 Is *De Novo.*

"The standard of review for an award of costs involves a two-step process. First, we review *de novo* whether a statute, contract, or equitable theory authorizes the award. Second, if such authority exists, we review for abuse of discretion the amount of the award." *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn. App. 279, 325, 284 P.3d 749 (2012). *See also*, *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 277, 215 P.3d 990 (2009) ("Whether a specific statute, contract provision, or recognized ground in equity authorizes an award of fees is a question of law"); *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 648, 20 P.3d 946 (2001) ("The trial court determined that he was not entitled to attorney fees under this statute. We hold that this statute is applicable and that Yarbrough is entitled to attorney fees").

Here, the trial court concluded that it could not determine whether or not C.F. was entitled to costs, including reasonable attorney's fees, and therefore denied C.F.'s motion. "The application of a court rule is a question of law subject to *de novo* review. Whether a statute authorizes an award of attorney fees is likewise a question of law reviewed *de novo*." *Niccum v. Enquist*, 175 Wn.2d 441, 446, 286 P.3d 966 (2012). Thus, review is *de novo.*

B. RCW 9.68A.130 Is A Remedial Statute Entitled To Liberal Interpretation By Washington's Courts.

Washington Courts liberally interpret remedial statutes, like RCW 9.68A.130. "Chapter 9.68A RCW broadly deals with the sexual exploitation of children." *Schoening v. McKenna*, 636 F. Supp. 2d 1154, 1156 (W.D. Wash. 2009). The legislative purpose of the Chapter provides: "The legislature finds that *the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.*" (emphasis added). The chapter includes a statutory provision that *entitles* a minor child to recover attorney fees and costs once prevailing in a civil case. RCW 9.68A.130 states that "[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." (emphasis added).

RCW 9.68A.130 is a remedial statute because it does not create a new substantive right, but instead affords a better remedy for the redress of injury. "Remedial statutes, in general, afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries." *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976). Although there are no Washington state decisions interpreting the statute,[7] Courts interpret

[7] "Although 22 years have passed since the legislature enacted SECA, no court has construed the act's attorneys' fees provision." *J.C. v. Soc'y of Jesus*, 457 F. Supp. 2d 1201, 1205 (W.D. Wash. 2006). While no published Washington decisions address RCW 9.68A.130, several federal decisions provide guidance. In each case, the court has

remedial statutes, like RCW 9.68A.130, broadly. *Nelson v. Dep't of Labor & Indus.*, 9 Wn.2d 621, 628, 115 P.2d 1014 (1941) (worker's compensation is "remedial in character, the provisions of which should be construed broadly and liberally"); *Fraser v. Edmonds Cmty. Coll.*, 136 Wn. App. 51, 56, 147 P.3d 631 (2006) (RCW 49.48.030 "is a remedial statute that should be construed liberally to effect its purpose."); *Helenius v. Chelius*, 131 Wn. App. 421, 432, 120 P.3d 954 (2005) ("The WSSA is a remedial statute . . . . Our courts construe the WSSA broadly to effectuate its intent."); *State v. Villanueva*, 177 Wn. App. 251, 257, 311 P.3d 79 (2013) (broadly interpreting self-defense remedies statute). The interest in providing a make-whole remedy to abused children, described in the text of RCW 9.68A.001 itself as a "governmental objective of surpassing importance," is equal, if not more important, than these other interests protected by statute.

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deferred determining the applicability of the statute until after verdict, but in each case, the litigation was resolved without a verdict being entered. *Boy 1 v. Boy Scouts of Am.*, 832 F. Supp. 2d 1282, 1292 (W.D. Wash. 2011) ("Plaintiffs must prevail on the underlying action in order to claim attorneys' fees. Should Plaintiffs prevail, the Court will request further briefing on the issue of attorneys fees under SECA at that time."); *Boy 7 v. Boy Scouts of Am.*, No. CV-10-449-RHW, 2011 WL 2415768, at *4 (E.D. Wash. 2011) ("Plaintiff must prevail on the underlying action in order to claim attorneys' fees. The Court will revisit the issue should Plaintiff prevail at some point in this litigation."). While *Kuhn v. Schnall*, 155 Wn. App. 560, 563, 228 P.3d 828 (2010), discusses RCW 9.68A.130, the decision did not analyze the statute in any way, as the case was limited to determining whether juror and counsel misconduct justified a new trial.

C. C.F. Followed All Procedural Requirements For Requesting Costs and Fees.

1. Under Washington Law, Costs And Fees Are Determined By Motion, Not Pleadings.

Under Washington law, a party's entitlement to costs and fees is addressed by filing a motion within ten days following entry of judgment. CR 54(d). "Although it is customary to include a claim for costs in the complaint, such a claim is not mandatory. Costs will be allowed in accordance with applicable statutes regardless of whether costs are claimed in the complaint." Tegland, 14A *Wash. Prac., Civil Procedure* § 36:1 (2d ed.). Indeed, since at least 1953, Washington has recognized that costs are decided by post-trial filings rather than pleadings. *Lujan v. Santoya*, 41 Wn.2d 499, 501, 250 P.2d 543 (1953). In *Lujan*, the defendants "contend[ed] that the judgment should not have included plaintiffs' costs, because they were not prayed for in the complaint . . . ." *Id.* Rejecting this argument, the Washington Supreme Court reasoned: "The allowance of costs, on the other hand, is governed by statute. A prayer for them is unnecessary." *Id.*

RCW 9.68A.130 defines attorney's fees as an element of costs. Notwithstanding this express categorization as a cost, Washington law does *not* require a litigant to specifically plead the statute justifying an award of attorney's fees either. As explained by Washington Practice, "[a]

general request for attorney's fees in the pleadings is sufficient to invoke the statute; the pleading need not specify the statute." Tegland, 14A *Wash. Prac., Civil Procedure* § 37:6 (2d ed.). *See also W. Coast Stationary Engineers Welfare Fund v. City of Kennewick*, 39 Wn. App. 466, 475, 694 P.2d 1101 (1985) ("The City's failure to expressly plead RCW 4.84.330 is not fatal to its claim. In its answer, the City explicitly requested an award of reasonable attorney's fees. This request was sufficient to notify the Fund that the City was seeking attorney's fees pursuant to its contract with the Union."). While Barr argued that C.F.'s failure to cite RCW 9.68A.130 prior to judgment waived her right to request costs and fees, there is absolutely no legal support for this argument.

Washington's Civil Rules outline the procedural mechanism for requesting costs and attorney's fees. On this point, CR 54(d) provides:

> (d) Costs, Disbursements, Attorneys' Fees, and Expenses.
>
> > (1) Costs and Disbursements. Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).
> >
> > (2) Attorneys' Fees and Expenses. Claims for attorneys' fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

Here, RCW 9.68A.130 is a cost statute that defines "costs" to include "reasonable attorneys' fees." The legislature was aware that courts determine costs as well as attorneys' fees and there was no procedural mechanism stated in RCW 9.68A.130 that would change this typical procedure. Indeed, the legislature's enactment of RCW 9.68A.130 did not – and could not as a matter of separation of powers – change the procedural mechanism of CR 54(d)(2).[8] Barr did not provide the trial court with any statute where the jury would determine factual information beyond what is required to prevail in the underlying cause of action in order to invoke a statute that authorized the award of costs or fees. Certainly, had the legislature envisioned a process where, in order to claim costs, the party would need to prove to the jury information beyond that required for the underlying cause of action, it would have stated this explicitly or at minimum there would be discussion in the legislative history. Here, the statute is a simple, one-sentence provision ensuring those who are subjected to childhood sexual abuse and who later prevail at trial on civil claims for such misconduct, are entitled to recover associated costs.

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[8] RCW 2.04.200; *Marine Power & Equip. Co., Inc. v. Indus. Indemnity Co.*, 102 Wn. 2d 457, 461, 687 P.2d 202 (1984) ("It is within the power of this court to dictate, under the constitutional separation of powers, its own court rules, even if they contradict rules established by the Legislature.")(citing *State v. Fields*, 85 Wn. 2d 126, 530 P.2d 284 (1975)).

Washington law supports the procedural mechanism C.F. used to request costs. The analogous federal rule also supports the manner in which C.F. requested costs. The only courts to date that have ruled upon a request for costs under RCW 9.68A.130 have uniformly held that it is a matter for post-trial motion practice, not a question for the jury in the underlying case.

2. Under The Analogous Federal Rule, Costs And Fees Are Determined By Motion, Not Pleadings.

The Federal Court's interpretation of analogous Federal Rule of Civil Procedure 54 is highly persuasive. This Court has held that "[w]here a state rule has the same language as a federal rule, we may look for guidance to courts applying the federal rule." *In re Marriage of Swaka*, 179 Wn. App. 549, 555, 319 P.3d 69 (2014). Interpreting the analogous federal rule, the Ninth Circuit has held that requests for fees are made by motion, not pleadings, and any evidentiary issues are determined by a post-trial hearing. *Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1004 (9th Cir. 2009).

In *Riordan*, State Farm Insurance Company paid the disputed amount of the plaintiff's UIM policy on the eve of trial and then objected when plaintiff brought a motion for attorneys' fees. State Farm argued that the plaintiff did not properly raise his request for attorney's fees asserting

"that Riordan was required to specifically request attorney fees in his complaint, and that it suffered prejudice because Riordan 'surprised' it on the eve of trial with the claim for attorney fees, depriving State Farm of adequate notice." *Id.* at 1004. In rejecting this argument, the Ninth Circuit carefully analyzed whether there is any requirement to plead an entitlement to fees or instead whether the right to fees is exclusively determined through motion practice following trial. On these points, the Ninth Circuit held:

> State Farm relies on the notice and pleading requirements of Rule 8(a) (requiring the pleader to make a demand for judgment for the relief the pleader seeks) and Rule 9(g) (requiring special damages to be specifically pleaded in the complaint) to argue that Riordan was required to specifically request attorney fees in his complaint. State Farm contends that it suffered prejudice because Riordan "surprised" it on the eve of trial with the claim for attorney fees, rendering State Farm unable to conduct discovery on the fees claim, challenge the claim through summary judgment, or conduct a complete evaluation of Riordan's claim. These arguments fail. Riordan was not required to raise his claim in his complaint. Under Federal Rule of Civil Procedure 54(d)(2), Riordan properly raised his claim by motion.

Id. at 1004-05. Citing the language of Federal Rule 54(d)(2), which is the same as Washington's Civil Rule 54(d)(2), the court reasoned that "[t]he text of Rule 54(d)(2) lays out a general rule that a claim for attorney fees must be made by motion, with the exception that when the substantive law requires those fees to be proved at trial as an element of damages." *Id.* The

Riordan court relied on the decision in *Port of Stockton v. W. Bulk Carrier KS*, 371 F.3d 1119, 1120–21 (9th Cir. 2004), where the court "specifically rejected the argument that such a claim must be raised in the pleadings:"

> [T]he Federal Rules of Civil Procedure . . . establish the method by which a federal litigant must obtain attorneys' fees. . . . Each party [in this case] has assumed that some form of initial pleading—either a complaint or a counterclaim—is the appropriate manner by which the [party seeking attorneys' fees] should seek its costs. Yet, such is not generally the case in our federal system. Federal Rule of Civil Procedure 54(d)(2)(A) establishes that "[c]laims for attorneys' fees and related nontaxable expenses *shall be made by motion* unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial." (emphasis added). And the Rules make clear that pleadings and motions are distinct. *Compare* Fed. R. Civ. P. 7(a) (defining "Pleadings," including counterclaims), *with* Fed. R. Civ. P. 7(b) (defining "Motions and Other Papers").

Riordan v. State Farm Mut. Auto. Ins. Co., 589 F.3d at 1004-1005 (quoting *Port of Stockton*, 371 F.3d at 1120–21) (alteration and emphasis original). Ultimately, the Ninth Circuit explained "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.

The *Riordan* court also dispensed of State Farm's objection regarding lack of notice and the process to follow in determining whether fees are available because Rule 54(d)(2) allows the parties "to submit evidence and arguments regarding attorney fees, and provides that the motion may be referred to a magistrate judge for disposition." *Id.* at 1006.

In fact, at State Farm's request, the trial court held an evidentiary hearing on the fee motion, where live witnesses were called. *Id.*

The federal courts have interpreted Federal Rule 54 the same as Washington courts have interpreted Civil Rule 54. *See Lujan v. Santoya*, 41 Wn.2d 499, 501, 250 P.2d 543 (1953). Here, to the extent the trial court believed that C.F. was required to plead a request for costs, including reasonable attorney's fees, this decision was in error. The trial court should have, but did not, reach the merits of C.F.'s motion.

3. All Federal Decisions Interpreting RCW 9.68A.130 Have Determined That The Entitlement To Costs Is Decided By Post-Trial Motion.

Every federal judge considering RCW 9.68A.130 has determined the applicability of the statute and recovery of costs and fees is an issue for the trial court to determine only after the plaintiff has won his or her underlying civil cause of action. The Honorable James L. Robart concluded that "[t]here is no question that Plaintiff must prevail in this action before he can claim attorneys' fees. *Should he prevail, the court will require the parties to submit more detailed briefing on the applicability of RCW § 9.68A.130.*" *J.C. v. Soc'y of Jesus*, 457 F. Supp. 2d 1201, 1205 (W.D. Wash. 2006) (emphasis added). The Honorable Robert H. Whaley held that "Plaintiff must prevail on the underlying action in order to claim attorneys' fees. *The Court will revisit the issue should Plaintiff prevail at some point in this litigation.*" *Boy 7 v.*

Boy Scouts of Am., No. CV-10-449-RHW, 2011 WL 2415768, at *4 (E.D. Wash. June 13, 2011) (emphasis added). The Honorable Ricardo S. Martinez ruled that "Plaintiffs must prevail on the underlying action in order to claim attorneys' fees. *Should Plaintiffs prevail, the Court will request further briefing on the issue of attorneys fees under SECA at that time.*" *Boy I v. Boy Scouts of Am.*, 832 F. Supp. 2d 1282, 1292 (W.D. Wash. 2011) (emphasis added). The Barrs argue that, contrary to these federal decisions, a jury, not the Court should decide the applicability of RCW 9.68A.130. Adopting the Barrs' procedural requirements would be contrary to, and in conflict with, the procedure accepted and referenced by each of these judges applying the federal procedural framework, which is identical to Washington's.

4. RCW 9.68A.130 Does Not Create An Independent Cause Of Action.

Below, Barr provided a number of complaints filed by various lawyers in different cases listing RCW Chapter 9.68A as a separate cause of action and argued as a result, C.F. should have also plead RCW 9.68A.130 as a separate cause of action. CP 677-78. Apparently, the trial court agreed with this argument stating "there was no assertion of a claim under 9.68A." RP 16. However, Barr's argument was incorrect because RCW 9.68A.130 provides solely for the recovery of *costs* flowing from success in an independent cause of action. There is no civil "claim" to bring under RCW chapter 9.68A

because it is a criminal chapter – with the exception of the costs statute RCW 9.68A.130 – and does not have a section creating any separate private right of action under the statute.

Moreover, the only condition precedent to requesting costs under RCW 9.68A.130 is that the party be "[a] minor prevailing in a civil action". RCW 9.68A.130. The condition precedent to requesting costs, "prevailing in a civil action," does not occur until after verdict. The result of Barr's argument would be that a separate second lawsuit would be required to determine whether C.F.'s is entitled to costs, which is exactly what CR 54(d) was enacted to avoid.[9]

RCW 9.68A.130 does not create a cause of action. The plain language of the statute shows it only creates a right to recover "costs." The Honorable James L. Robart observed this same point noting in a published federal decision "*there seems no reason to assert this attorneys' fees provision as a separate cause of action. . . .*" *J.C. v. Soc'y of Jesus*, 457 F. Supp. 2d 1201, 1204 (W.D. Wash. 2006) (emphasis added). If Barr maintains the argument that C.F. must plead a cause of action, or claim, for violation of RCW chapter

[9] C.F.'s entitlement to costs and fees under RCW 9.68 did not arise until after the trial, when she prevailed on a civil cause of action. If a jury must decide some issue, or if this statute is deemed to create a separate cause of action, then the result would be to have C.F. file a lawsuit to receive this determination. *Arnold v. City of Seattle*, 186 Wn. App. 653, 656, 345 P.3d 1285, *review granted*, 184 Wn.2d 1001 (2015) (determining Plaintiff was entitled to attorney's fees under RCW 49.48.030 when she prevailed before a City of Seattle hearing examiner and then filed a separate lawsuit seeking an award of fees for recovering a judgment for wages or salary). As a minor, C.F. has until age 21 to file such a claim. RCW 4.16.190.

9.68A, this Court should reject such a suggestion. The result of this argument is that all requests for costs or attorney's fees must be specifically plead, which runs counter to all state and federal law cited above.

5. Jonnie Barr Was On Notice That C.F. Claimed Costs And Attorneys' Fees.

While C.F. requested costs and fees in her Complaint, the Barrs' response dismissively calls this notice pleading "boilerplate." In support of his argument, Barr incorrectly interprets and wrongly relies upon Washington's small claims statute RCW 4.84.250. However, even under RCW 4.84.250, which contains special procedural requirements, Washington law recognizes that pleading a request for attorneys' fees and costs is sufficient, provided that the underlying facts that would lead to application of the fee statute are disclosed.

In focusing by analogy on the small claims statute, RCW 4.84.250, Barr ignores the most recent case holding there is *no* requirement to plead the small claims statute; even under that statute, a general request for fees is sufficient, provided the parties have access to the necessary factual information to support the statute's application. *Target Nat. Bank v. Higgins*, 180 Wn. App. 165, 169, 321 P.3d 1215 (2014). In *Target*, the Court of Appeals framed the question before it as: "whether Higgins needed to provide notice under the statute and, if so, whether she gave sufficient notice. Higgins

otherwise qualifies for fees under RCW 4.84.250." *Id.* at 172. There, Higgins requested "reasonable attorney's fees and costs for the defense of such action." *Id.* at 169. However, her pleading "did not specify any basis upon which attorney's fees were sought." *Id.* "A memorandum in support of her application for fees was the first mention of either RCW 4.84.250 or RCW 4.84.330 being the basis for the request." *Id.* While the trial court ruled that Higgins failed to adequately plead the statutory basis for fees, the Court of Appeal's reversed. *Id.* at 175. On appeal, the court reasoned that, provided there is a pleading for fees and the disclosed facts of the case support application of the statute, then notice is sufficient: the parties are "considered automatically on notice that they are subject to an award of fees if the amount in issue is less than $10,000. The defendant giving notice serves little, if any, purpose under such circumstances." *Id.*

This was the result even under the small claims statute which serves a very specific purpose: to deter lengthy and costly litigation of small claims and to promote settlement. *See, e.g.*, *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 788, 733 P.2d 960 (1987). By contrast, RCW 9.68A.130 is a remedial statute aimed at providing redress for minor victims of sexual misconduct. Where one statute is intended as a deterrent and to "penalize parties who unjustifiably bring or resist small claims," *id.*, the other is clearly intended to create broader access for victims. With this fundamental

difference in policy behind each statute, it would be wholly inconsistent with the remedial nature of RCW 9.68A.130 to require a plaintiff to plead this statute with specificity, when Washington courts do not require parties to explicitly plead even the small claims statute.

Here, C.F. clearly pled a request for costs including attorney fees, in her complaint. CP 3, 15. C.F. also made clear that the case arose from acts of sexual misconduct. CP 409-10. Barr's complaints about notice pleadings do not authorize a procedural denial. In fact, the Barrs knew that Jonnie Barr's sexual misconduct was the basis of this case well before their Answer was filed. Jonnie Barr's Answer was filed July 11, 2014, PBA's Answer was filed August 21, 2014. Over a month before either of these Answers were filed, C.F. moved for a writ of attachment, which set forth the following evidence from the criminal proceedings against Barr:

- "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."
- "Jon started to putting his toung [sic] in my mouth."
- "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."
- "A few times he took me away from the academy and molested me in his home on his couch."
- "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. I was molested

> for a year and it has taken two more years to get to this day."

CP 705-08.

Courts make the legal determination of whether a fee statute applies. In *Hough v. Stockbridge*, 152 Wn. App. 328, 347, 216 P.3d 1077 (2009), this Court held: "Whether a party is entitled to an award of attorney fees is a question of law that we review de novo." (quoting *Bloor v. Fritz*, 143 Wn. App. 718, 747, 180 P.3d 805 (2008)). *Hough* involved attorneys' fees awarded under the frivolous claims statute RCW 4.84.185. There, the opposing party argued that there was no legal basis for an award of attorney fees "that the jury, and not the judge, should have determined the amount of damages, including attorney fees." *Id.* In rejecting this argument, the Court reasoned that "[a]ttorney fees must be determined by the trier of fact only when the measure of the recovery of attorney fees is an element of damages." *Id.* at 347-48. *See also Reid v. Dalton*, 124 Wn. App. 113, 124, 100 P.3d 349 (2004) (holding "the court can and does award statutory attorney fees without a jury."). Here, RCW 9.68A.130 is a "costs" awarding statute. It defines "reasonable attorney's fees" as an awardable element of "costs." Because the fees are not an element of damages and they are statutory, the determination of entitlement to fees and the amount of fees is for the Court, not the jury.

D. Appellant Is Entitled To Costs Because She Prevailed In A Case Arising From Sexual Assault Against A Minor.

RCW 9.68A.130 allows recovery of costs to a minor prevailing in a civil action arising from a violation of RCW 9.68A. Relevant to this case, RCW 9.68A.090 provides that "a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor." "Washington courts have interpreted communications with a minor incident to sexual abuse as criminal communications for an immoral purpose." *J.C. v. Soc'y of Jesus*, 457 F. Supp. 2d 1201, 1204 (W.D. Wash. 2006). In *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 715-16, the Court explained "communication with a minor for immoral purposes" has a "commonsense understanding" and covers both words and a course of conduct:

> In 1979, we construed the very statute at issue here and concluded it applied to misconduct of a sexual nature whether or not precisely defined within the statute itself. *See State v. Schimmelpfennig*, 92 Wn.2d 95, 101–04, 594 P.2d 442 (1979) (construing RCW 9A.88.020). We gave the phrase "communication with a minor for immoral purposes" a "commonsense understanding," holding that "any spoken word or course of conduct with a minor for purpose of sexual misconduct is prohibited." *Schimmelpfennig*, 92 Wn.2d at 103–04, 594 P.2d 442 (emphasis added). We upheld the conviction of a man who had merely attempted to entice young girls into the back of his van for sexual purposes. Here, defendants allegedly engaged in actual sexual misconduct.

In *C.J.C.*, the Catholic Church was sued because its priests had touched a

child in a sexual manner. The Washington Supreme Court determined, as a matter of law, that the conduct at issue (fondling C.J.C.), even if it was not a crime at the time it occurred, was communication with a minor for immoral purpose, and therefore, the tolling statute for minor victims of sexual abuse applied. The court made clear that the underlying conduct did not have to be criminal itself, but would fall under RCW 9.68A if it involved some communication "for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." *Id.* at 715 (quoting *State* v. *McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993)).

Similarly, in *State v. Hosier*, 157 Wn.2d 1, 11, 133 P.3d 936 (2006), the Court explained communication is defined as "conduct as well as words." There, the Court affirmed a conviction when the defendant wrote a sexually suggestive statement on underwear and placed them for the public to view. *Id.* The conduct and words by Jonnie Barr are equally prohibited by RCW 9.68A.090 and it was this evidence that supported C.F.'s verdict.

In this case, all of the conduct at issue arises from Jonnie Barr's communications for immoral purposes. Jonnie Barr told C.F. he loved her. CP 414-439. Jonnie Barr told C.F. he wanted to marry her. *Id.* Jonnie Barr kissed C.F. on the mouth and French kissed C.F. during which time he was sexually aroused. *Id.* Jonnie Barr also touched C.F. on her private areas between her upper thighs. RP 607. This is the evidence that supports C.F.'s

claims and is clearly conduct prohibited by RCW 9.68A.090. Indeed, Jonnie Barr's conduct exceeds the writing on underwear determined to be a violation in *Hosier* or in *Schimmelpfennig*, where the Washington Supreme Court "upheld the conviction of a man who had merely attempted to entice young girls into the back of his van for sexual purposes." It is more analogous to the conduct of fondling and masturbating a child found to be a violation in *C.J.C.* Here, the Court should likewise hold that the conduct violated RCW 9.68A.090 and that this cost statue applies, just as the tolling statute applied.

Should Barr argue that RCW 9.68A.130 only applies when the defendant was convicted of a crime included in the chapter, the Court should quickly reject it as did our Supreme Court in *C.J.C.* and the Federal Court for the Western District of Washington did in *J.C. v. Soc'y of Jesus*, 457 F. Supp. 2d at 1204. In *J.C.*, the Court stated that it is "obvious" that criminal liability is unnecessary for the award of attorney fees: "the Province's position that civil liability can arise only after a conviction under SECA is inconsistent with the statute's conditioning of liability on a "*violation*" of SECA. RCW 9.68A.130 (emphasis added)." *Id.* There, as in this case, the court determined that consideration of RCW 9.68A.130 was only appropriate once, and if, the plaintiff prevailed at trial on his tort claims. *Id.* at 1205 ("There is no question that Plaintiff must prevail in this action before he can claim attorneys' fees. Should he prevail, the court will require the parties to submit more detailed

briefing on the applicability of RCW 9.68A.130.").[10]

At the trial court level, Barr did not argue that RCW 9.68A.130 only applied when there is a conviction for a crime under RCW chapter 9.68A. Instead, Barr asserted that RCW 9.68A.130 can only apply when a defendant admits to sexually motivated communications. CP 678. This is not true, but even if it were, in this case, Barr did admit to the conduct both in his plea of guilty and to his own psychologist.

First, Barr's plea agreement confirms that he committed the acts against C.F. as described in the criminal complaint. Barr's opposition below focused only on paragraph 11 of the plea, which required Barr to describe his conduct. However, the plea agreement, at paragraph 7 states: "*I plead guilty to the crime(s) of Assault 4° as charged in the complaint(s)* or citation(s) and notice." CP 397 (emphasis added). The Criminal Complaint sets forth the charge, in relevant part, as follows:

> That Jonnie R Barr, in Pierce County during the period between the 1st day of February, 2001 and the 16th day of December, 2011, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, did unlawfully, intentionally assault C.N.F., contrary to RCW 9A.36.041(1),(2), *with sexual motivation as defined in RCW 9.94A.030. . . .*

CP 390-91 (emphasis added). RCW 9.94A.030(48) defines "Sexual

[10] In *J.C. v. Soc'y of Jesus*, 457 F. Supp. 2d at 1204, the Plaintiff listed RCW 9.68A.130 as a cause of action, however, the Federal District Court noted that the statute only provides for an award of attorney's fees, and therefore "there seems no reason to assert this attorneys' fees provision as a separate cause of action."

motivation" as "that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification."

While the prosecutor made an oral motion to amend the criminal complaint to remove sexual motivation, this was legally insufficient. Under RCW 9.94A.835(3), the prosecuting attorney could "not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation." This did not occur. Even if there was an appropriate request by the prosecutor, "[t]he 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." *Id.* Again, there was never any finding that there was an error in the initial charging decision or that evidentiary problems made proving the allegation doubtful. In summary, when Barr pled guiltily to Fourth Degree Assault, he also admitted that he acted with "sexual motivation," as charged in the Criminal Complaint; the result was that he received a negotiated sentence and negotiated terms of supervision.[11]

Beyond the criminal case, Barr admitted to his own psychologist that he French kissed C.F. with his tongue in her mouth while sexually aroused and

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[11] Having relied on this admission in a prior judicial proceeding to gain a benefit, Barr is now judicially estopped from denying the conduct in the present action. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007).

admitted during the trial that he assaulted C.F. through his kissing. This is conduct prohibited by RCW 9.68A.090, it was the basis of C.F.'s civil tort claims, and having prevailed on those claims, C.F. is entitled to recover her costs under RCW 9.68A.130.

E. C.F. Is Entitled To Costs, Including Reasonable Fees, On Appeal.

Pursuant to RAP 18.1, C.F. also requests an award of costs, including reasonable attorney fees pursuant to RCW 9.68A.130. Just as with her trial, this appeal also arises from Barr's sexual assault of C.F. Prevailing upon this appeal will justify an award of costs on appeal, including fees, to C.F.

V. CONCLUSION

For the reasons stated above, C.F. requests that this Court reverse the decision below and hold that C.F. is entitled to costs, including reasonable attorney's fees under RCW 9.68A.130.

Dated this 29th day of March, 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 March 29, 2016, I caused the **Brief of Appellant** to be served via email, pursuant to the parties' mutual consent for service by email:

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