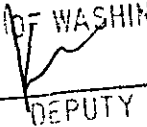


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DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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

Appellant,

v.

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

Respondents.

---

BRIEF OF RESPONDENT JONNIE BARR

---

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ORIGINAL

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## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

C.F. seeks to have this Court reject the reasoned analysis of the trial court and authorize an award of costs and attorney fees under RCW 9.68A.130. This statute explicitly conditions an award of costs and attorney fees in a civil suit on a finding of a violation of RCW 9.68A et seq., the Sexual Exploitation of Children Act (“SECA”). The triggering event necessary to authorize an award never happened as no fact finder has found or ever been asked to determine a violation of SECA.

C.F. requests relief under the provisions of SECA when no SECA violation was argued or in any way contemplated by the trial court’s instructions to the jury or implicated by any question on the special verdict form. C.F.’s invitation to this Court to ignore the failure to plead and prove a SECA violation, to permit the trial court to substitute its own judgment for that of the jury on disputed evidentiary issues, and to allow an inference of a SECA violation based on liability for the civil claims of assault and battery, should be declined.

The trial court determined that C.F. was not entitled to fees under RCW 9.68A.130 because the predicate showing triggering application of the statute was not established. The trial court’s decision was sound and based on well-reasoned legal analysis of the applicable statute and should not be overruled.

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

Where no violation of RCW 9.68A, et seq. was determined or presented, did the trial court properly deny C.F.'s request for costs and attorney fees under RCW 9.68A.130? Answer: Yes.

## III. COUNTERSTATEMENT OF THE CASE

C.F. filed suit against Respondents Jonnie Barr, Sue Barr, and Puyallup Basketball Academy (hereinafter "PBA") alleging civil claims of negligence, invasion of privacy, battery, assault, intentional infliction of emotional distress, and false imprisonment. CP 1-4. Following trial, the jury returned a verdict in favor of C.F. finding Mr. Barr and PBA negligent, finding Mr. Barr liable for intentional infliction of emotional distress, finding Jonnie Barr and Sue Barr liable for false light invasion of privacy, and finding Jonnie Barr liable for assault and battery. CP 322-325. The jury found in favor of Mr. Barr on the false imprisonment claim. *Id.* C.F. asserted no claim under RCW 9.68A and proved no violation of SECA at trial. CP 1-4, 12-15, 322-325, 1207-1238.

Following trial, C.F. moved for attorney's fees. CP 326-378. In addition to a request for prevailing party fees and costs under RCW 4.84.010, C.F.'s motion included a request for attorney's fees pursuant to RCW 9.68A.130, which provides that a minor prevailing in a civil action

arising from violation of the chapter is entitled to recover the costs of the suit, including an award of reasonable attorney's fees. *Id.* C.F. argues entitlement to SECA fees and costs by asserting a violation of RCW 9.68A.090. *Id.* However, neither the trial court nor the criminal court determined that a SECA violation occurred and no fact finder has made any findings of a SECA violation. At no point has any trier of fact been presented with the question of whether RCW 9.68A.090, or any provision of RCW 9.68A et seq., has been violated.

**A. District Court Case**

Mr. Barr was charged with one count of 4<sup>th</sup> degree assault with sexual motivation on May 15, 2012. CP 390-391. On November 4, 2013, Pierce County District Court Judge O'Malley granted Deputy Prosecuting Attorney Grant Blinn's motion to amend the charge to Assault in the Fourth Degree without sexual motivation. CP 771, 1371 – 1372, 1374. Mr. Barr entered a Statement on the Plea of Guilty. CP 393- 398. Absent from this plea agreement was any finding of a violation of SECA, including communication with a minor for an immoral purpose. *Id.* At sentencing, Prosecutor Tim Lewis provided the Court with the history of the case, including reference to the amended charge. CP 1378.

The District Court never found a SECA violation. To the contrary, the District Court explicitly disclaimed any finding of sexual motivation or



communication with a minor for immoral purposes as evidenced by crossing out paragraph q in Defendant's Statement on the Plea of Guilty. CP 396.

[ q ~~If this crime involves sexual misconduct with a minor in the second degree, communication with a minor for immoral purposes, or attempt, solicitation or conspiracy to commit a sex offense, or a kidnapping offense involving a minor, as defined in RCW 9A.44 130, I will be required to register with the county sheriff as described in the "Offender Registration" Attachment.~~

Mr. Barr did not enter a plea to the enhanced charge of sexual motivation. CP 393- 398. The District Court accepted Mr. Barr's plea on the amended charge. This plea specifically excluded any finding of communication with a minor for immoral purposes and contained no findings of a SECA violation. *Id*

#### **B. Superior Court Case**

On April 18, 2014, C.F. filed a lawsuit against Jonnie Barr, Sue Barr, and PBA alleging civil causes of action sounding in negligence, assault, battery, outrage, false imprisonment, and false light invasion of privacy. CP 1-4. On May 4, 2015 C.F. filed her First Amended Complaint for Damages. CP 12-15. Neither Complaint alleged any SECA violation or claimed any right to fees under SECA. CP 1-4, 12-15. Both Complaints contained only general prayers for attorney fees and costs, despite C.F. now seeking fees under a very specific statute. *Id*.

In discovery, Mr. Barr propounded discovery asking if C.F. was

asserting any violation of statute, ordinance, or regulation. CP 671-672.

Interrogatory No. 18 from Mr. Barr read:

Do you or anyone acting on your behalf contend that any person involved in the incident(s) violated any statute, ordinance, or regulation and that the violation was the proximate cause of injury or damages? If so, identify each person in violation and your reasoning for such violation of the statute, ordinance, or regulation.

CP 671-672, 701. It is undisputed that C.F. never identified SECA as a statute that had been violated. *Id.* C.F. responded by referencing the Writ of Attachment, but this Writ made no reference to a SECA violation, nor did the briefing mention or assert a claim for attorneys' fees. CP 701, 704-713. The only statutes cited in C.F.'s Motion for Writ were RCW 6.25.170 and RCW 6.25.030. Neither statute refers or relates to SECA. CP 704-713, 716-739.

On August 27, 2014, C.F. responded to Mr. Barr's Request for Statement of Damages. CP 751-759. C.F. did not refer to or identify any claim for relief under SECA or reference any claim for attorney's fees, let alone a claim for attorney's fees under SECA. *Id.* C.F. never supplemented her discovery responses and at no time was a claim premised on a SECA violation ever asserted, disclosed, or argued to the jury.

At trial the parties presented evidence in support of and in opposition to C.F.'s claims of negligence, false light invasion of privacy, false imprisonment, assault, battery and outrage. At no time was the jury asked to determine whether Mr. Barr violated any provision of SECA nor was the jury instructed on the elements or burden of proof for a SECA violation. CP 1207-1238. Moreover, the special verdict form made no mention of sexual motivation, sexual intent, sexual contact, sexual communication, or improper communication with a minor. CP 322-325. The jury's verdict makes no distinction among defendants with regard to damages. *Id.*

The first mention of SECA was during post-verdict motion practice. CP 326-378. At no time prior to C.F.'s motion for attorney's fees did C.F. make any reference to a claim under SECA. After briefing by all parties and oral argument, the trial court denied those portions of C.F.'s motion that were based on a claim for fees under RCW 9.68A.130. In so ruling, the trial court refused to supplant the jury and act as fact finder on a claim never considered or properly before any trier of fact.

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#### IV. ARGUMENT

##### A. Standard of Review

Attorney fees and costs may be awarded only if authorized by contract, statute, or a recognized ground in equity. *In re Impound of Chevrolet Truck, Wash. Lice No. A00125A*, 148 Wash.2d 145, 160, 60 P.3d 53 (2002). Absent a statute expressly permitting expanded cost recovery, parties are not entitled to costs beyond those enumerated in the statute allowing a trial court to award costs to the prevailing party. *RCW 4.84.010*.

The Court applies a two-part standard of review to a trial court's award or denial of attorney fees. First, this Court should review de novo whether a statute, contract, or equitable theory authorizes the award. *Estep v. Hamilton*, 148 Wash.App. 246, 259, 201 P.3d 331 (2008); *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wash.App. 279, 325, 284 P.3d 749 (2012). Then, if such authority exists, this Court should review the reasonableness of any attorney fee award for an abuse of discretion. *Id.* This second step is unnecessary because the trial court awarded no SECA fees and costs reasoning that no authority existed to do so.

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**B. C.F. did not follow procedural requirements for requesting costs and attorney fees.**

CR 54(c)(2) allows a party to seek attorney's fees and expenses by motion ten days after entry of the judgment "unless otherwise provided by statute." There is no dispute that a party can bring a motion for attorney's fees and expenses, but the party must first establish the authority permitting an award of fees. Here, C.F. sought fees under RCW 9.68A.130 without first establishing a violation of SECA, which the statute requires. Absent a finding of a violation, no basis exists for a claim of fees and costs under RCW 9.68A.130.

**1. Appellant cannot rely on RCW 9.68A.130 as authority for an award of attorney fees because no violation of RCW 9.68A et seq. has been pled.**

C.F. asked the trial court to apply RCW 9.68A.130 and award attorney's fees and costs without pleading or proving a right to relief under RCW 9.68A et seq. Washington is a notice pleading state and C.F.'s request denies Mr. Barr the right to notice and due process. CR 8(a)(1). "A complaint fails to meet this standard if it neglects to give the opposing party 'fair notice.'" *Champagne v. Thurston County*, 163 Wn.2d 69, 178 P.3d 936 (2008). Complaints that "fail to give the opposing party fair notice of the claim asserted" do not give notice. *Pacific Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006).

Rather, pleadings must contain “a demand for judgment for the relief to which the pleader deems the pleader is entitled.” CR 8(a)(2).

C.F. argues that she is not required to specifically plead RCW 9.68A.130 or a violation of SECA in her complaint. She further argues that “there is not civil “claim” to bring under RCW chapter 9.68A because it is a criminal chapter...and does not have a section creating any separate private right of action.” *Appellant Brief* at 23-4. C.F. is incorrect. She is seeking attorney fees under RCW 9.68A.130 which specifically deals with a minor prevailing in a civil action arising from a violation of SECA. It is absurd to think that C.F. can be awarded attorney fees under SECA without either claiming or proving a violation of SECA or even putting Mr. Barr on notice that C.F. asserts a right to fees under SECA.

Courts have long held that parties must be afforded notice of the basis for attorney’s fees, whether in the pleading or otherwise. *Beckman v. Spokane Transit Auth.*, 107 Wn.2d 785, 703 P.2d 960 (1987). C.F. first raised any claim for relief under SECA after the jury reached its verdict. This eleventh hour request failed to provide Mr. Barr with adequate and fair notice of the claim and deprived Mr. Barr the opportunity to defend against this specific claim.

Even if C.F. had not fallen short of Washington’s notice pleading standard, a finding of sexual assault or communication for immoral

purposes under SECA is properly a question for the jury. “It is axiomatic that jury verdicts are invested with a degree of sanctity” and cannot be questioned lightly. *Butler v. State*, 34 Wn.App. 835, 837, 663 P.2d 1390 (1983). The role of a jury in determining attorney fees under SECA is demonstrated by *Kuhn v. Schnall*. In *Kuhn*, plaintiffs brought claims for medical negligence, sexual battery, outrage, and negligent infliction of emotional distress. *Kuhn v. Schnall*, 155 Wash.App 560, 564-5, 228 P.3d. 828 (2010). Plaintiffs amended their complaint to assert a claim for attorney fees under RCW 9.68A.130, alleging Schnall had communicated with minors for an immoral purpose, in violation of RCW 9.68A.090. *Id.* at 565. The court bifurcated the trial and the jury was asked to determine whether a SECA violation had occurred after they had returned a verdict. *Id.* After returning a verdict, the jury was instructed on the SECA violation, the parties argued their positions, and the jury again deliberated. *Id.* at 566. The court instructed the jury it had to find that the communications were “for immoral purposes of a sexual nature.” *Id.* The jury found that Schnall did not communicate with a minor for an immoral purpose. *Id.* at 567.<sup>1</sup>

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<sup>1</sup> The legal issues on appeal dealt with alleged juror misconduct, attorney misconduct, inadequate damages, and a motion for a new trial. These issues have no bearing on the present case.

Unlike in *Kuhn*, C.F. here failed to present the jury the issue of whether Mr. Barr violated SECA despite the jury being the proper avenue for determining whether a SECA violation had occurred. Failure to present this issue to the jury and assert the claim only in her post-verdict motion denied Mr. Barr the opportunity to rebut or otherwise address the claim of a SECA violation.

Instead, C.F. asked the trial court to engage in fact finding after the verdict. Moreover, C.F.'s motion asked the trial court to interpret the thoughts of the 12 jurors and make assumptions accordingly. C.F. should not be permitted to undermine the jury's verdict by asking the Court to interpret into the verdict a finding that was not there.

**2. Appellant cannot rely on RCW 9.68A.130 as authority for an award of attorney fees because no violation of RCW 9.68A et seq. has been found by a trier of fact.**

Assuming arguendo that C.F. was not required to specifically plead RCW 9.68A as a cause of action, she still fails the first step of the two part analysis because she is not authorized to attorney's fees under RCW 9.68A.130. C.F. asserts a right to fees and costs under RCW 9.68A.130 based on her unsupported claim of a violation of RCW 9.68A.090.

SECA is a criminal statute enacted to protect against child pornography and the sexual exploitation of children. The legislative history of SECA emphasizes the importance of creating a statute that not



only criminalizes distribution of child pornography, but also criminalizes the possession of child pornography. In doing so, SECA defines criminal violations in two primary areas: 1) physical depictions (e.g. photographs) of minors engaged in sexually explicit conduct and 2) commercial sexual abuse of minors.

C.F. asserts Mr. Barr violated RCW 9.68A.090 which prohibits communication with a minor for immoral purposes, including communication with children for predatory purpose of promoting their exposure to and involvement in sexual misconduct. *State v. McNallie*, 120 Wn.2d 925, 846 P.2d 1358 (1993).

SECA allows for recovery of attorney fees and costs in civil actions “arising from violation of this chapter.” RCW 9.68A.130. The plain language of this section expressly conditions the right to fees and costs on a finding of a violation of prohibited conduct under RCW 9.68A. Black’s Law Dictionary (10<sup>th</sup> ed. 2014) defines “violation” as 1) an infraction or breach of the law; a transgression; and, 2) as the act of breaking or dishonoring the law: the contravention of a right or duty. Thus, for C.F. to be entitled to costs and attorney fees under RCW 9.68A.130, some trier of fact must have found a “breach,” “break,” or “dishonor” of some provision of SECA. However, no trier of fact has ever

been asked to find a SECA violation and a violation has never been established.

C.F.'s request for prevailing party fees and costs under SECA was properly denied because the statutory requirements were never established. Mr. Barr was not convicted of a SECA violation, he did not plead to a charge including any SECA violation, and the jury was not asked to consider or instructed on whether a SECA violation had occurred.

**a. The condition precedent to claim a right to SECA fees and costs was not established.**

RCW 9.68A.130 states that a "minor prevailing in a civil action arising from violations of [RCW 9.68A]" is entitled to recover the costs of the minor's suit, including an award of reasonable attorney's fees. RCW 9.68A.130. C.F. asserts that prevailing party fees and costs were proper under SECA because "all of the acts constituting assault and battery were of a sexual nature, Barr admitted to his own psychologist that he placed his tongue in C.F.'s mouth and was sexually aroused, there is no explanation other than "immoral purpose" for kissing C.F. and touching her private area, and even his own damages expert, McGovern, concluded Barr's sexual conduct caused C.F.'s injuries."

This position simultaneously ignores the evidence from Defendants that supported Defendants' denial of C.F.'s claims, and seeks

to have the court infer a violation of RCW 9.68A because the jury found Mr. Barr liable for civil assault, civil battery, outrage, and false light invasion of privacy.

The trial court properly denied C.F.'s request because the jury's findings did not establish a SECA violation. SECA does not provide for a violation premised upon civil liability for assault, battery, outrage, or false light invasion of privacy. In denying C.F.'s request, the trial court was consistent with the evidence presented by the parties, Mr. Barr's Statement on Plea of Guilty, and the Court's jury instructions and special verdict form as presented to the jury. To find otherwise would be inconsistent with the evidence presented at trial.

**i. The District Court Case**

RCW 9.94A.835 is a criminal statute which allows a prosecuting attorney to include a special allegation of sexual motivation in a criminal case. During the criminal case, Deputy Prosecuting Attorney Grant Blinn made an oral motion to amend the charges against Mr. Barr to Assault in the Fourth Degree without sexual motivation. Judge O'Malley granted the motion. C.F. asserts that the prosecutor did not give a reason for the amendment and that the district court did not make any factual findings supporting the amendment as required by RCW 9.94A.835(3). C.F.

misinterprets the conditions under which a special allegation of sexual motivation can be withdrawn.

RCW 9.94A.835(3) is clear that the court shall not dismiss the special allegation unless (1) it finds that such an order is necessary to correct an error in the initial charging decision or (2) unless there are evidentiary problems which make proving the special allegation doubtful. Under section (2), the court is not required to make any factual findings as it would be the prosecutor who would make the determination as to any evidentiary problems she may have in proving the special allegation. The prosecutor can then petition the Court to amend the charge, as was the case with Mr. Barr's charge.

The Criminal Complaint charged Mr. Barr with Assault in the Fourth Degree with sexual motivation but did not include a charge of any SECA violation. CP 390-391. At the November 4, 2013, plea hearing, Prosecutor Blinn moved to amend the charges against Mr. Barr to Assault in the Fourth Degree without sexual motivation. CP 1371-1374. Judge O'Malley granted this oral motion and amended the charges. *Id.* Mr. Barr then pled guilty to Assault in the Fourth Degree without sexual motivation. *Id.* This amendment was confirmed at the January 14, 2014 sentencing hearing. Prosecutor Tim Lewis provided the sentencing judge with a procedural history of the case, including the amended charge of

Assault in the Fourth Degree without sexual motivation. This amendment is important as it distinguishes this case from the criminal cases relied upon by C.F..

C.F. relies on cases where criminal convictions under SECA have been established. *State v. Hosier*, 157 Wn.2d 1, 7, 133 P.3d 936 (2006); *State v. Schimmelpfenning*, 92 Wn.2d 95, 97, 594 P.2d 442 (1979). In stark contrast, Mr. Barr was not charged with or found guilty of communication with a minor for immoral purposes, or any other SECA violation. The criminal court never found a violation of SECA.

**ii. Pierce County Superior Court Case No. 14-2-07951-1**

Similarly, there has been no claim for or finding of a SECA violation by the Superior Court. C.F. relies on several cases to support the proposition that a criminal conviction is unnecessary for an award of attorney's fees under SECA. *J.C. v. Society of Jesus*, 457 F.Supp.2d 1201, 1202 (2006); *Boy 1 v. Boy Scouts of America*, 832 F.Supp.2d 1282, 1285 (2011); *Boy 7 v. Boy Scouts of America*, 2001 WL 2415768; *Kuhn v. Schnall*, 155 Wn.App. 560, 565, 228 P.3d 828 (2010); *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 707, 985 P.2d 262 (1999). These cases, however, are all distinguishable from the present case because the plaintiff in each of these cases specifically pled a SECA violation. Further distinguishing these cases from the case at bar, the

underlying conduct in those cases was: 1) clearly established as sexual conduct; and/or, 2) un rebutted or otherwise admitted to eliminating any issue of fact that sexual conduct occurred. Defendants denied all claims and presented evidence sufficient to support the findings in the special verdict form.

C.F. provides no authority that eliminates the need to prove a SECA violation as a condition necessary to trigger a right to attorney's fees and costs under RCW 9.68A.130. In fact, the cases that address attorney's fees under RCW 9.68A.130 consistently demonstrate that plaintiffs regularly and specifically plead and must prove a violation of RCW 9.68A when seeking relief under its terms. C.F. argues that the Court in *J.C. v. Society of Jesus*, 457 F.Supp.2d 1201 (2006) eliminated the requirement of pleading and proving a SECA violation in order to trigger a right to fees under Section 130. It is clear that the *J.C.* Court left intact the necessity of plaintiff to plead and prove some violation of Chapter 9.68A.

Plaintiff in *J.C.* alleged a violation of SECA as a specific theory of liability. *J.C.* at 1202. Further, the Court noted the statutory trigger indicating the statute's conditioning of liability on a "violation" of SECA, when considering whether civil liability arises and thus, attorney fees are permitted. *Id.* at 1204. It is clear the Court did not intend one to read the

statute to permit an inference of a violation without requiring a finding of an actual violation of SECA.

Further, C.F. did not instruct or ask the jury to consider a claim for communication with a minor for immoral purposes, or any other SECA violation. In *State v. Schimmelpfennig*, the court provided instructions defining the terms “communicate” and “immoral purposes” to assist in jury deliberations as to whether the defendant was guilty of communicating with a minor for immoral purposes. *Schimmelpfennig*, 92 Wn.2d at 100. In *Kuhn*, the court instructed the jury that it had to find the communications were “for immoral purposes of a sexual nature.” *Kuhn*, 155 Wn.App. at 566. Here, by contrast, the jury was never instructed on the elements of the claim or asked to find a SECA violation. There was nothing in the special verdict form that asked the jury to consider any SECA claim. Because a violation of SECA has never been established any claim for fees under that statute must fail.

#### **V. ATTORNEY FEES ON APPEAL.**

C.F. requests attorney fees on appeal but fails to provide this Court with argument and authority in support of her request. Instead, she presents a “bald request for attorney fees” on appeal, which is insufficient. *Hudson v. Hapner*, 170 Wn.2d 22, 33, 239 P.3d 579 (2010). RAP 18.1(b) requires C.F. to devote a section of her brief to the request for fees or

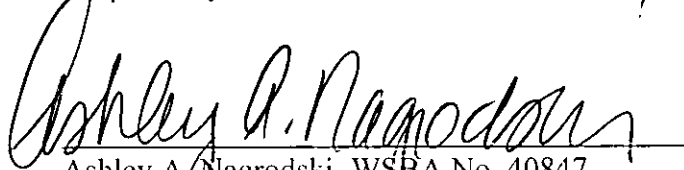
expenses. However, C.F. merely states that “this appeal also arises from Barr’s sexual assault of C.F.” as her basis for justification of attorney’s fees and expenses. C.F.’s request should be denied.

## VI. CONCLUSION

The trial court properly denied C.F.’s request for attorney fees under SECA. C.F. failed to establish entitlement to attorney fees under RCW 9.68A.130 because C.F. failed to plead, prove or present a violation under RCW 9.68A et seq. Further, no trier of fact has ever found Mr. Barr violated any section of SECA. Under these circumstances, this Court should uphold and affirm the trial court’s ruling denying C.F.’s request for attorney fees under RCW 9.68A.130.

DATED THIS 28<sup>th</sup> day of April, 2016.

Respectfully submitted,



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**DECLARATION OF SERVICE**

Pursuant to RCW 9A.72.085, I certify under penalty of perjury and the laws of the State of Washington that the foregoing is true and correct. That on the below date, I caused a true and correct copy of the foregoing document to be delivered via the method indicated below to the following party(ies):

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DATED April 28, 2016.

  
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Susan Eastley