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COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

#368050

STATE OF WASHINGTON, Respondent,

v.

DORIS MARIE GREEN a/k/a Lopez, Appellant

and

MERIDITH EUGENE TOWN, Appellant.

REPLY BRIEF AND ARGUMENT OF PETITIONER-APPELLANTS

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TABLE OF CONTENTS

INTRODUCTION.....	1
I. Proceedings Under the WCPA are Not Standard Civil Cases, They Are “Special Proceedings” Under CR81.....	2
II. Claimants’ Complaints Are Sufficient, and the Court’s Dismissal Was Erroneous.....	4
A. The State’s Proposed Alternate Grounds for Dismissal Fail.....	4
1. Claimants’ 2003 Settlement Does Not Bar WCPA Relief.....	4
a. Double Recovery Is Not Applicable to Wrongful Conviction Claims.....	4
b. Claimants Did Not “Waive” Their Entitlement to Relief Under the WCPA More than a Decade Before the Statute Was Passed.....	7
c. Claimants Did Not Concede <i>Larson II</i> Applies to Their Claims.....	10
2. The Claims Are Not Time Barred.....	13
B. The Court Erred in Dismissing Claimants’ Complaints With Prejudice.....	18
1. The Court Erred in Finding that Claimants’ Complaints Were Not Sufficiently Pled Under the WCPA.....	18
2. Alternatively, at Minimum, the Lower Courts Should Have Granted Claimants Leave to Amend the Complaints.....	22

TABLE OF AUTHORITIES

Table of Cases

Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851 (2012).....2

Bostain v. Food Exp., Inc., 159 Wash.2d 700 (2007).....12

Brady v. United States, 397 U.S. 742 (1970).....8

Brown v. Snohomish Cty. Physicians Corp., 120 Wn.2d 747 (1993).....5

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801 (1992).....15

First Fed. Sav. & Loan Ass’n of Walla Walla v. Ekanger, 93 Wash.2d 777 (1980).....16

Fray v. Spokane Cty., 134 Wn.2d 637(1998).....19

Go2net, Inc. v. FreeYellow.com, Inc., 158 Wn.2d 247 (2006).....10

Hoffman v. Kittitas Cty., 194 Wn.2d 217 (2019).....21

In re Adoption of B.T., 150 Wn. 2d 409 (2003).....22

In re Dunn’s Estate, 31 Wash.2d 512 (1948)11, 12

Faciszewski v. Brown, 187 Wash.2d 308 (2016).....12

Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29 (2002).....10

Johnson v. Zerbst, 304 U.S. 458 (1938)8

Kinney v. Cook, 159 Wn.2d 837 (2007).....4

Larson v. State, 194 Wn. App. 722 (2016) (*Larson I*).....*passim*

Larson v. State, 9 Wn. App. 2d 730 (3d Div. 2019) (*Larson II*).....*passim*

McAfee v. Select Portfolio Servicing, Inc., 193 Wn. App. 220 (1st Div. 2016)21

Miller v. Dalton, No. 35163-7-III, 2018 WL 4488317 (2018).....19

<i>Mohandessi v. Urban Venture LLC</i> , 468 (Wash. Ct. App. 1st Div. 2020).....	23
<i>Mueller v. Garske</i> , 1 Wash. App. 406 (1st Div. 1969).....	13
<i>Nat’l Parks Conservation Ass’n v. Washington Dep’t of Ecology</i> , 12 Wash. App. 2d 977 (2d Div. 2020).....	16
<i>Nat’l Sur. Corp. v. Immunex Corp.</i> , 176 Wn.2d 872 (2013).....	19
<i>Peet v. Mills</i> , 76 Wn. 437 (1913).....	16
<i>Putman v. Wenatchee Valley Med. Ctr., P.S.</i> , 166 Wn.2d 974 (2009).....	3
<i>Rivas v. Overlake Hosp. Med. Ctr.</i> , 164 Wn.2d 261 (2008).....	14
<i>Sherry v. Fin. Indem. Co.</i> , 160 Wn.2d 611 (2007).....	5
<i>State v. Abd-Rahmaan</i> , 154 Wn.2d 280 (2005).....	21
<i>State v. Alexis</i> , 21 Wn. App. 161 (2d Div. 1978).....	8
<i>State v. Bacon</i> , 190 Wn.2d 458 (2018).....	11, 12
<i>State v. Chapman</i> , 140 Wn.2d 436 (2000).....	20
<i>State v. Douty</i> , 92 Wn.2d 930 (1979).....	16
<i>State v. James</i> , 48 Wn. App. 353 (3d Div. 1987).....	8, 10
<i>State v. Knighten</i> , 109 Wn.2d 896 (1988)	11, 12
<i>State v. Strode</i> , 167 Wn.2d 222 (2009).....	8, 10
<i>State v. Sweet</i> , 90 Wn.2d 282 (1978).....	8
<i>State v. Villanueva</i> , 177 Wn. App. 251 (3d Div. 2013).....	16
<i>Swak v. Dep’t of Labor & Indus.</i> , 40 Wn.2d 51 (1952)	21
<i>Trust Fund Servs. v. Glasscar, Inc.</i> , 19 Wn. App. 736 (1st Div. 1978).....	24
<i>Wallace v. Lewis Cty.</i> , 134 Wn. App. 1 (2d. 2006).....	23
<i>Wilson v. Horsley</i> , 137 Wn.2d 500 (1999).....	23

Statutes

RCW 4.100.010.....1, 5, 17

RCW 4.100.020.....2, 13

RCW 4.100.040.....*passim*

RCW 4.100.060.....*passim*

RCW 4.100.070.....2

RCW 4.100.080.....4, 7, 9

RCW 4.100.090.....2, 13

RCW 4.16.170.....14

RCW 4.16.190.....14, 15

RCW 11.88.010.....14, 15

42 U.S.C. § 1983.....7, 8, 9

Regulations and Rules

Washington Superior Court Civil Rules

CR 3.....14

CR 8.....2, 3, 22

CR 12.....4

CR 81.....3, 22

Other Authorities

2013 Washington House Bill No. 1341, Washington Sixty-Third
Legislature - 2013 Regular Session (Staff Summary of Public
Testimony before the Judiciary Committee) (Mar. 8, 2013).....17

Governor’s Statement Upon Partial Veto, May 08, 2013, 2013
WA H.B. 1341.....18

Kyle C. Scherr, Chirstopher J. Normile *et. Al.*, *False Admissions of
Guilt Associated with Wrongful Convictions Undermine People’s
Perceptions of Exonerees*, 26 Psychol. Pub. Pol’y & L. 233
(2020.....18

Washington Final Bill Report, 2013 Reg. Sess. H.B. 1341.....17

Introduction

Washington's Wrongly Convicted Person's Act was passed in 2013, and was meant to provide new remedies for those uniquely harmed by the scourge of wrongful conviction. RCW 4.100.010. To seek relief, the Legislature set forth a number of requirements the wrongfully convicted must satisfy. In so doing, however, the Legislature specifically recognized that these proceedings should be treated differently than "standard" civil litigation, both given the evil they seek to rectify and the unique harms that such an evil can pose when seeking compensation (*e.g.*, difficulties due to the passage of time). The State's position in this case, then, is fundamentally disappointing. Tasked with ensuring the WCPA is enforced consistent with the purposes of the statute, the State instead seeks to subvert its remedial reach in situations the Legislature certainly did not contemplate and in a manner unfaithful to the purposes of the Act. Green and Town are innocent, and they deserve at least the chance to illustrate their entitlement to relief. Moreover, the concept of "double recovery"—advanced by the State—has absolutely no place in these proceedings. Green and Town have never been made whole from their years of wrongful conviction and neither a small settlement nor compensation under the WCPA would come close to making up for their years of wrongful conviction by the State of Washington. Moreover, as a new statute with no clear guidance about what, when, where and how "documentary evidence" must be "established" under RCW 4.100.040, Green and Town should not be subject to the harsh dismissal of their claims *with* prejudice

while seeking to figure out issues of first impression below. Dismissal was error and reversal is warranted.

I. Proceedings Under the WCPA are Not Standard Civil Cases, They Are “Special Proceedings” Under CR 81.

It is a simple fact that the WCPA was enacted in 2013, and that it created an entirely new remedy and cause of action against the State (for both financial and non-monetary compensation) for a certain class of people—the wrongfully convicted. RCW 4.100.020. It is also a simple fact that the WCPA, like all remedial legislation, is to be interpreted in light of its purposes. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870 (2012); *Larson v. State*, 194 Wn. App. 722, 725 (2016) (*Larson I*). The Act specifically provides accrual rules for people exonerated before the WCPA existed, RCW 4.100.090, and the Act further provides special notice requirements for the wrongfully convicted requiring the State to provide them notice of the WCPA, RCW 4.100.070(3). No such rules apply to normal tort actions. The Legislature has also required that courts construe the requirements of the WCPA in light of the “difficulties of proof” due to things like the passage of time, destruction of evidence, or other problems not “caused by the parties.” RCW 4.100.060. No such statutory requirement exists for typical civil suits.

Moreover, the principle dispute in this appeal—whether Green and Town met the “documentary evidence” standard at the pleading phase—involves an inquiry not required in typical civil litigation. There, a plaintiff need only provide a short, plain statement illustrating entitlement to relief. CR8(a). Obviously it

would be inconsistent with CR8 to require a plaintiff to attach “documentary evidence” to a complaint.

The State offers no *substantive* reason for rejecting the obvious—based upon its unique nature, legislative history, and the manner in which it proceeds—the WCPA created a special proceeding under CR 81. The State should *concede* that these are special proceedings, extremely special in fact because they seek to remedy a harm that only the State of Washington can lawfully cause; namely, imprisonment for crimes people did not commit. The State’s failure to discuss the requirements for finding a special proceeding is telling, as the law is clear that a unique statutory regime like the one created by the WCPA is a “special proceeding,” because it was created completely by the Legislature and was not known at common law.

In the same way the Court must interpret this appeal and the WCPA in light of its remedial purposes, *Larson I*, 194 Wn. App. at 725, this Court must take into account the unique nature of the WCPA and the dearth of controlling law both now and at the time the parties were litigating issues related to “documentary evidence” or other claims requirements under the WCPA.¹ Of all people, the wrongfully convicted should not be faulted, in the first instance, for navigating these new waters in a way that, as a matter of first impression, a court might determine should have been done differently.

¹ Contrary to the State’s argument, pointing out the jurisdiction and scope of these proceedings, and the applicable rules, does not constitute a “new” argument made for the first time on appeal. Instead, it merely reflects the proper framework for addressing the parties’ arguments about how a statute should be interpreted, particularly on the several issues of first impression raised here.

II. Claimants' Complaints Are Sufficient, and the Court's Dismissal Was Erroneous

A. The State's Proposed Alternate Grounds for Dismissal Fail

The State agrees that this Court may seek guidance from CR 12(b)(6) standards to assess whether the complaints are properly pled and that the Court therefore should presume all well-pled facts alleged in the complaints are true. *Kinney v. Cook*, 159 Wn.2d 837, 842 (2007); St. Br. at 9. However, likely recognizing the tenuous basis for the lower court's ruling, the State begins its brief by asking the Court to affirm the court's decision on alternate grounds. St. Br. at 9-10. The proposed alternate grounds are unavailing.

1. Claimants' 2003 Settlement Does Not Bar WCPA Relief

There are at least three problems with the State's reliance on RCW 4.100.080: (1) the notion of double recovery is offensive to Claimants, is not in the statute, and cannot be shown; (2) the State's proposed extension of *Larson v. State*, 9 Wn. App. 2d 730, 744 (3d Div. 2019) (*Larson II*), contradicts basic premises of waiver; and (3) Green and Town never "conceded" applicability of *Larson II* to their distinct claims.

a. Double Recovery Is Not Applicable to Wrongful Conviction Claims.

Reading the State's brief, one might think the phrase "double recovery" appears in the WCPA. It does not. And, the notion that nearly eleven collective years of wrongful conviction could be fully redressed by a few hundred thousand dollars is offensive. There is no claim that the limited settlements "fully redressed" Green or Town, nor can there be a claim that a separate payment under the WCPA would do so either. A "double recovery" occurs when the injured party has been

fully compensated, and, in typical cases, the party seeking to show double recovery bears the burden of so showing. *See Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 621-22, 160 P.3d 31, 36 (2007) (double recovery cannot occur unless injured party is already fully compensated); *Brown v. Snohomish Cty. Physicians Corp.*, 120 Wn.2d 747, 759, 845 P.2d 334, 340 (1993) (party raising issue bears burden of showing “injured party was fully compensated”).

Moreover, and by definition, the financial component of WCPA itself provides only a limited form of compensation, based upon a mathematical formula, that cannot—and does not—purport to fully address all the harms that the wrongfully convicted have suffered after having been “uniquely victimized” and suffering the “tremendous injustice of being stripped of their lives and liberty.” RCW 4.100.010; *see* RCW 4.100.060(5) (setting forth the mathematical formula). In the end, the wrongfully convicted will never be made whole by a mathematical formula and some non-economic benefits, like free schooling and referral to the state department of corrections or department of social and health services for counseling or other support. RCW 4.100.060(10).

Nonetheless, the State argues that allowing Claimants to collect under the WCPA would allow for a “double recovery” under *Larson II* because of their § 1983 settlements. St. Br. at 10-12. But *Larson II* never adopted this language, even though the State specifically argued that the Court should adopt that framework in deciding the matter. Instead, there should be no notion, suggestion, or hint of a reference to “double recovery” in this matter.

On that score, *Larson II* is readily distinguishable from the case at hand. In *Larson*, the claimants had received a \$2.25 million—for three people for 12 years of incarceration, much more than a few hundred thousand dollars for two people for over a decade—while pursuing the appeal and entry of judgment on their WCPA claim. 9 Wn. App. 2d at 732. Even assuming the statutory amounts were relevant or a form of “full” compensation (though they are not), the amount recovered by the claimants in *Larson II* was greater than the potential \$200,000 claim plus benefits that the *Larson* claimants would have received under the WCPA for their years of incarceration. RCW § 4.100.060(5).

Here, however, Claimants received far less monetarily than they would have been entitled to under the WCPA, and they are also denied the important other benefits provided by the law. With WCPA relief, Claimants would be entitled to significantly more money than they received and also to: sealing of their record of conviction (RCW § 4.100.060(9)(a)); expungement (RCW § 4.100.060(9)(b)); and a referral for reentry services, including “community-based transition programs and long-term support programs for education, mentoring, life skills training, assessment, job skills development, mental health and substance abuse treatment.” RCW § 4.100.060(10). Thus, the State’s interpretation profoundly short-changes Claimants of the relief and assistance that the Legislature intended for them to receive after their wrongful conviction and years of incarceration.²

² At the very worst, then, one might expect the State to argue that Green and Town can only receive a limited amount of compensation, possibly reduced by the prior settlement, as an interpretation of .080. But, the State has taken the far

b. Claimants Did Not “Waive” Their Entitlement to Relief Under the WCPA More than a Decade Before the Statute Was Passed. Relying on *Larson II*, the State erroneously contends that by obtaining settlement recoveries under 42 U.S.C. § 1983 in 2003, Claimants waived their right to recovery under the 2013 Wrongfully Convicted Persons Act. St. Br. at 10-13. But *Larson II* does not support this argument and is instead readily distinguishable from the present case. In *Larson II*, the claimants obtained a § 1983 settlement in 2017, long after the WCPA’s 2013 enactment. 9 Wn. App. 2d at 733-34. Moreover, the procedural history in *Larson II* was a mess, as the § 1983 suit was filed after the trial court had erroneously dismissed the WCPA claim but before this Court reversed that decision in *Larson I*. Thus, the *Larson* claimants were aware of the WCPA’s exclusive remedy provision but had already been kicked from court when they elected to pursue § 1983 relief, despite knowing it might jeopardize their WCPA claim (which had already been dismissed). Indeed, at the time, there was substantial uncertainty as to whether WCPA claimants could pursue both a WCPA claim and another suit at the same time, which this Court addressed in *Larson II* as well.

Here, the State seeks to drastically extend *Larson II* to circumstances that are entirely beyond what happened in that unique case, including to people who never even had the chance to avail themselves of the remedies (both financial and

more extreme position here—that settlement of any amount whatsoever demands dismissal *entirely* of a WCPA claim, including for compensation and non-financial relief as well. This is anathema to the purposes of the Act.

non-financial) within the WCPA. This Court should reject that drastic over-reading of the statute for several reasons.

First, here Claimants settled their § 1983 claims in 2003, a full decade before the WCPA was even enacted. Under those circumstances, their settlement cannot be considered a knowing relinquishment of WCPA benefits. *See State v. Strode*, 167 Wn.2d 222, 234 (2009) (citing *State v. Sweet*, 90 Wn.2d 282, 286 (1978), and *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (“A waiver is an intentional relinquishment or abandonment of a known right or privilege.”). Waivers, by definition, involve “intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970). *See also State v. James*, 48 Wn. App. 353, 364 (3d Div. 1987) (citing *Johnson*, 304 U.S. 458, and *State v. Alexis*, 21 Wn. App. 161, 168 (2d Div. 1978)) (“waiver must be evidenced by an intentional relinquishment of a known right and be knowing and intelligent”).

Obviously, in 2003 Claimants could not possibly have anticipated their entitlement ten years later to all the remedial services provided by the WCPA, along with the statutory monetary compensation, which far exceeds their already-lower § 1983 settlements (\$162,500 for Green and \$200,000 for Town). Under the WCPA, Green would receive \$250,000 for her five years of incarceration, and Town would receive \$300,000 for his six years, without the reduction for the costs, attorneys’ fees, and possible income taxes that might be deducted from their § 1983 settlements. *See RCW § 4.100.060(5)(a)* (claimants entitled to \$50,000 for each year of confinement); *RCW § 4.100.060(5)(e)* (WCPA covers the attorneys’

fees and costs associated with pursuing the claim); RCW § 4.100.060(8) (WCPA award is not taxed as income).³

Additionally, *Larson II* cannot be read to require draconian application of the exclusive-remedy provision to deny unknowing claimants the right to the various forms of relief provided by the WCPA. Here, Claimants were wrongfully convicted and incarcerated for years for crimes that the State acknowledges never occurred, and they pursued the only remedy available to them at the time of their release—one that provided them with far less benefit than the now-statutorily available one. Neither the WCPA nor *Larson* addresses instances where, as here, the claimants received other remedies for wrongful conviction long before the enactment of the statute. Instead, the WCPA uses prospective language: “As a requirement to making a request for relief under this chapter, the claimant *waives* any and all other remedies....” RCW § 4.100.080 (emphasis added). And *Larson II* addresses “concurrent [§ 1983 and WCPA] actions,” not lawsuits from a decade prior. 9 Wn. App. 2d at 738.

The State’s proposed extension of *Larson II* to claimants who settled § 1983 cases years before enactment of the WCPA would create a harsh new rule under which a claimant who received *any* amount of money through a previous action—even a lawsuit settled for \$1—would have knowingly and intentionally waived the right to seek a remedy that did not exist at the time of the settlement. That outcome plainly violates the law surrounding waiver. *See Strode*, 167 Wn.2d

³ Subsequent to the passage of the WCPA in 2013, the Protecting Americans from Tax Hikes Act of 2015 also created an income tax exclusion for the wrongfully convicted for monies received related to that wrongful conviction.

at 234; *James*, 48 Wn. App. at 364. Moreover, nothing in the statute supports this severe interpretation, and it would contravene the liberal construction required when courts interpret remedial statutes such as the WCPA. See *Go2Net, Inc. v FreeYellow.com, Inc.*, 158 Wn.2d 247, 253 (2006); *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34 (2002) (“‘liberal construction’ of a remedial statute requires that the coverage of the statute’s provisions be liberally construed in favor of [claimants] and that its exceptions be narrowly confined”) (internal marks and citations omitted).

c. Claimants Did Not Concede *Larson II* Applies to Their Claims. Finally, notwithstanding the differences between this case and *Larson II*, the State argues that Claimants prospectively conceded the applicability of *Larson II* to bar their claims. St. Br. at 8-9, 12-13. This argument is frivolous. Claimants asked the lower court to await the Washington Supreme Court’s final adjudication of *Larson II* before interpreting and applying the case. In doing so, their attorney at the time arguably painted in too broad of strokes in contemplating the applicability of *Larson II*. Without wading into the fray of what that statement meant or how it should be interpreted, there was no doubt at the time that *Larson II* was going to possibly shed light on this appeal. And, now the parties are left briefing those issues (which were not, and could not have been, addressed below). To provide summary adjudication of an issue based upon one vague sentence before the Supreme Court’s determination of whether to review *Larson II* would be improper.

Indeed, even if one were to assume that the motion misstated the applicable law while not even briefing or discussing the case, that would not undermine the obvious and legally pertinent distinctions between *Larson II* and this case. Importantly, as the State concedes (St. Br. at 13), the Washington Supreme Court is resolute that a misstatement such as counsel's below is not binding on the Court. *See State v. Knighten*, 109 Wn.2d 896, 902 (1988) (collecting cases as far back as 1875 for the proposition that a party's misstatement of legal conclusions is not binding on the courts); *see also State v. Bacon*, 190 Wn.2d 458, 463 n.4 (2018) ("it is well established that a party concession or admission concerning a question of law or the legal effect of a statute as opposed to a statement of fact is not binding on the court") (citations omitted); *In re Dunn's Estate*, 31 Wash.2d 512, 528 (1948) ("Whether or not such a concession was made is unimportant, and, of course, this court is nowise bound thereby, the question being one of law to be determined from admitted facts.").

The State baldly asserts two reasons for the Court to nevertheless rely on Claimants' counsel's arguably overly broad summary of *Larson II*'s potential reach: the interests of justice and expedition in litigation. But, assuming for the sake of the argument that the vague statement had any value, both factors militate against holding Claimants to their prior counsel's erroneous "concession." St. Br. at 13. The interests of justice, of course, clearly support recognizing that the motion to stay was merely an inartfully crafted motion, not an intention to concede that Claimants' appeals are baseless. As the Washington courts have recognized time and again, it is more just to apply the actual law than to hold

parties to unintended legal concessions. *See Knighten*, 109 Wn.2d at 902; *Bacon*, 190 Wn.2d at 463 n.4; *In re Dunn's Estate*, 31 Wash.2d at 528. This is particularly true when dealing with a remedial statute. *See, e.g., Faciszewski v. Brown*, 187 Wash.2d 308, 320-25 (2016) (to comport with remedial nature of the statute, meaningful opportunity to present entitlement to relief was required); *Bostain v. Food Exp., Inc.*, 159 Wash.2d 700, 712 (2007) (exemptions to remedial statutes must be “narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.”) (citation omitted). This is also particularly true when the position advocated on appeal—that Claimants could not have waived a 2013 remedy in 2003—is identical to the one forcefully argued below. *See, e.g.,* DG CP at 123 (“The WCPA simply does not speak to instances where, as here, the claimant sought other remedies for wrongful conviction prior to the enactment of the statute, at which time Washington offered no statutory compensation to the wrongfully convicted.”). Moreover, the State has not articulated—nor could it—how it possibly furthers justice to force the Court to misinterpret or misapply *Larson II*.

Additionally, the State offers no support for its baseless contention that this appeal would terminate more expeditiously under its interpretation. Under either interpretation, the briefing schedule on appeal remains the same, and this Court is tasked with adjudicating the issues and interpreting the WCPA. If anything, using the State’s proposed technicality to avoid interpreting the WCPA under these unique circumstances could lead to further litigation in the

(admittedly, unlikely) event that there are any other claimants out there in a similar situation.⁴

* * *

This Court should reject, directly, as contrary to the purposes of the Act any notion of “double recovery,” as it is harmful to the wrongful convicted and minimizes their trauma, particularly given the paltry settlements here. Claimants could not have waived their WCPA rights ten years before the statute was enacted, and nothing in *Larson II* requires such a harsh and unjust result. The present case is obviously distinguishable from *Larson II*. The claims here have not been “waived” in any sense of the word.

2. The Claims Are Not Time Barred

As a separate alternate ground for affirming the court below, the State argues that the WCPA claims are time barred, but this argument is likewise unavailing. The State concedes that both Claimants’ WCPA complaints were filed before the July 28, 2016, statutory deadline. RCW § 4.100.090 (“Any persons meeting the criteria set forth in RCW 4.100.020 who was wrongly convicted before July 28, 2013, may commence an action under this chapter within three years after July 28, 2013.”); St. Br. at 22 (admitting Town filed on July 25, 2016, and Green filed on July 27, 2016). The State further concedes that the filing of the complaints constituted commencement of an action. St. Br. at 21, citing RCW §

⁴ The State’s citation to *Mueller v. Garske*, 1 Wash. App. 406, 408 (1st Div. 1969), St. Br. at 13 n.16, is inapposite. In that case, the court addressed a default judgment that was void because it exceeded the relief claimed in the complaint. Here, Claimants’ position on appeal is consistent with the argument below and does not exceed the relief sought below.

4.16.170 (“For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first...”); CR 3(a) (“a civil action is commenced by... filing a complaint.”). Nevertheless, the State argues that because Claimants failed to perfect their service within 90 days, their claims must be barred under RCW § 4.16.170. St. Br. at 22-23.

Below, Claimants presented evidence demonstrating their individual incapacitation and disability, which tolled the statute of limitations for the period between filing and service. *See* RCW § 4.16.190. The Washington Supreme Court maintains that “[t]olling provisions, by nature, exist to assure all persons subject to a particular statute of limitations enjoy the full benefit of the limitation period.” *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267 (2008). When a person entitled to bring an action is “at the time the cause of action accrued... incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW..., the time of such disability shall not be a part of the time limited for the commencement of action.” RCW § 4.16.190. The terms “incompetent” and “disabled” mean persons who are “incapacitated” as defined by RCW § 11.88.010. *See* RCW § 11.88.010(1)(f). Finally, the determination of incapacity “is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate.” RCW § 11.88.010(1)(c).

Claimants presented unrefuted evidence below demonstrating their incapacitation, but the court did not consider the evidence because it did not address the issue of timeliness. Notably, the State fails here to even acknowledge Claimants' evidence of incapacitation presented below. Accordingly, any objection to the sufficiency of that evidence has been waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992) (failure to present an argument in an appellate brief waives the argument).

Even were objection not waived, Claimants' evidence of incapacitation suffices to toll the service deadline. Specifically, Claimant Green submitted an affidavit discussing how she needed in-home care and was on medications diminishing her medical capacity, due to an accident followed by an assault. DG CP 131-32. She also suffered from PTSD and was unable to understand or manage her financial or legal affairs. DG CP 132. Claimant Town submitted a declaration from his primary care physician stating that Town suffered from dementia during the relevant time period and would have lacked the capacity to understand the nature of the legal proceedings or what they required of him. MET CP 75. This evidence clearly meets the RCW § 11.88.010(1)(c) definition of incapacitation, tolling the statute of limitations, should the Court find that the statute strictly applies. RCW § 4.16.190. The claims are timely.

Additionally, even if Claimants had not presented ample evidence supporting tolling, as argued above (*see* Argument I), the WCPA is a "special proceeding" under CR 81, which provides that the Civil Rules do not apply where they would be "inconsistent with rules or statutes applicable to special

proceedings.” Here, where Claimants filed their complaints on time, the Court should not bar them from the relief the Legislature seeks to give them because service of the timely-filed complaints exceeded 90 days. *See State v. Villanueva*, 177 Wn. App. 251, 257 (3d Div. 2013) (“We construe a remedial statute liberally when necessary to effectuate its purpose.”) (citing *Peet v. Mills*, 76 Wn. 437, 439 (1913); *State v. Douty*, 92 Wn.2d 930, 936 (1979)). *See also Nat’l Parks Conservation Ass’n v. Washington Dep’t of Ecology*, 12 Wash. App. 2d 977, 984 (2d Div. 2020) (“we are mindful that we should be careful of relying on form over substance to deny a litigant his or her day in court) (citing *First Fed. Sav. & Loan Ass’n of Walla Walla v. Ekanger*, 93 Wash.2d 777, 781 (1980) (“[W]henver possible, the rules of civil procedure should be applied in such a way that substance will prevail over form.”)).

The purpose of the WCPA is clearly set forth:

The legislature recognizes that persons convicted and imprisoned for crimes they did not commit have been uniquely victimized. Having suffered tremendous injustice by being stripped of their lives and liberty, they are forced to endure imprisonment and are later stigmatized as felons. A majority of those wrongly convicted in Washington state have no remedy available under the law for the destruction of their personal lives resulting from errors in our criminal justice system. The legislature intends to provide an avenue for those who have been wrongly convicted in Washington state to redress the lost years of their lives, and help to address the unique challenges faced by the wrongly convicted after exoneration.

RCW § 4.100.010. Presumably, people like Claimants who have been wrongly convicted of sex crimes against children are among the most stigmatized and challenged upon exoneration.

The law's legislative history is also informative. The WCPA was unanimously passed by the Washington State Legislature. *See* Washington Final Bill Report, 2013 Reg. Sess. H.B. 1341. Hearings during legislative proceedings clarified the Legislature's unanimous intention of making reparations to those who were "victims of a system that did not work for them, and the horrific circumstance [that do] not end when they are released." 2013 Washington House Bill No. 1341, Washington Sixty-Third Legislature - 2013 Regular Session (Staff Summary of Public Testimony before the Judiciary Committee) (Mar. 8, 2013). The hearings acknowledged that for the wrongfully convicted, "[s]ome lost up to 17 years while incarcerated, and lost their businesses and the opportunity to earn money for retirement. They have had trouble securing housing and work. They need financial help and medical care. They cannot be given the years back or have the chance to watch their children grow up, but they can be given a package to rebuild their lives." *Id.* The hearings also recognized that "Washington is a national leader in equality and justice," and the WCPA was intended to further that leadership. *Id.* In signing the Act into law, the Governor declared:

I am pleased to join 27 states and the District of Columbia to provide compensation to individuals who have been wrongly convicted in Washington state of a felony offense and imprisoned as a result. While the impact on the person and his or her family cannot be quantified, some measure of compensation will help those wrongly convicted get back on their feet.

Governor's Statement Upon Partial Veto, May 08, 2013, 2013 WA H.B. 1341.
Rigidly applying service requirements to timely filed complaints defies the Legislature and Governor's goals.

Instead, relaxing the service requirements of a timely filed complaint is wholly consistent with the Legislature’s recognition of “the unique challenges faced by the wrongly convicted after exoneration.” RCW § 4.100.010. *See, e.g.,* Kyle C. Scherr, Christopher J. Normile *et. al., False Admissions of Guilt Associated with Wrongful Convictions Undermine People’s Perceptions of Exonerees*, 26 Psychol. Pub. Pol’y & L. 233 (2020) (“Once exonerated, the wrongly convicted encounter a multitude of postexoneration challenges. The wrongly convicted frequently struggle to find immediate housing, transportation, employment, and means to expunge their false criminal record. Many exonerees tend to isolate themselves, suffer from mental health issues (e.g., posttraumatic stress disorder), face financial difficulties, and often struggle to rebuild relationships with family and friends.”) (internal citations omitted). This Court should not find Claimants’ complaints time barred.

B. The Court Erred in Dismissing Claimants’ Complaints With Prejudice

1. The Court Erred in Finding that Claimants’ Complaints Were Not Sufficiently Pled Under the WCPA

There is no dispute that Claimants’ complaints were sufficiently pled. Rather, the State argues that the complaints are insufficient for failure to attach documents beyond Claimants’ attestations and their references to judicially noticeable court orders in corollary proceedings.

In their opening brief, Claimants note that the plain language of the WCPA does not require a claimant to *attach* additional documents to a complaint; rather the claimant need only *establish* by documentary evidence that the statutory

pleading requirements are met. RCW § 4.100.040. *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 890, 297 P.3d 688, 696 (2013) (treating requirement that party “establish” element as synonymous with “prove”); *Miller v. Dalton*, No. 35163-7-III, 2018 WL 4488317, at *28 (Wash. Ct. App. Sept. 18, 2018) (same). Significantly, the absence of an evidentiary proof standard in RCW § 4.100.040 (to file the claim), and the presence of an evidentiary proof standard in RCW § 4.100.060 (to prove the claim) **for the exact same elements**, demonstrates that the Legislature intended for the adjudication of the sufficiency of that documentary evidence to happen later in the proceeding (under .060), not at the initial pleading stage (under .040). Moreover, to interpret the statute as requiring a sufficiency of the proof determination at the initial filing stage would render Section .060 redundant or obsolete. *See Fray v. Spokane Cty.*, 134 Wn.2d 637, 648, 952 P.2d 601, 606 (1998) (“Courts should interpret statutes to avoid absurd or strained results so as not to render any language superfluous.”) (cited omitted).

The State fails to address this argument that its interpretation of RCW § 4.100.040—as requiring establishment by sufficient proof in order to even file a claim—would render RCW § 4.100.060 obsolete. Instead, the State contends that Claimants’ interpretation would violate Section .040’s plain meaning or require the Court to read additional words into Section .040. St. Br. at 16-17. But the Court may not wholly ignore Section .060, as the State did. Instead, the Court should read the entire statute harmoniously, reconciling and giving meaning to both Sections’ requirements:

Under rules of statutory construction each provision of a statute should be read together (in para material) with other provisions in order to determine the legislative intent underlying the entire statutory scheme. The purpose of interpreting statutory provisions together with related provisions is to achieve a harmonious and unified statutory scheme that maintains the integrity of the respective statutes. Statutes relating to the same subject will be read as complementary, instead of in conflict with each other.

State v. Chapman, 140 Wn.2d 436, 448 (2000) (footnote citations omitted).

It is absurd to read the statute as requiring sufficiency of the evidence adjudications at both the filing and the evidentiary hearing stage (especially since the Legislature specified the burden of proof for the .060 adjudication, but not the State's proposed .040 adjudication). Accordingly, this Court should reject the State's interpretation. A sufficiency of the documentary proof adjudication should not be a prerequisite for filing a claim. Such a requirement would make it far harder to file a WCPA claim than an ordinary tort, which obviously conflicts with the stated intent of the statute. Here, Claimants' complaints sufficiently indicate the viability of a claim. Interpreting the WCPA as a whole, that is all that should be required at the pleading stage.

But should the Court require further proof at the pleading stage, the State's concession that Claimants were wrongfully convicted, the Claimants' verifications, and judicial notice of court orders more than suffice. The State attempts to distinguish on the facts *State v. Abd-Rahmaan*, 154 Wn.2d 280, 289 (2005), and *Hoffman v. Kittitas Cty.*, 194 Wn.2d 217, 222 (2019), as proof that attestations are routinely treated by the courts as "documentary evidence." St. Br. at 17-18. The State, however, notably fails to produce any case law supporting the contrary position, that affidavits and attestations are not documentary evidence,

presumably because none exists. There have been very few cases interpreting the WCPA, so Claimants had to look to other contexts for authority, but the cited cases are good law standing for the basic proposition that Claimants' attestations should be considered documentary evidence.

The State also futilely attempts to refute the readily available use of judicial notice in this case to notice the orders from the collateral personal restraint proceedings establishing their claims. *See McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 226 (1st Div. 2016) ("in a motion to dismiss, the trial court may take judicial notice of public documents if their authenticity cannot reasonably be contested, and the court may also consider documents whose contents are alleged in a complaint but not physically attached to the pleadings.") (citation omitted). To do so, the State relies on a misleading presentation of *Swak v. Dep't of Labor & Indus.*, 40 Wn.2d 51, 54 (1952). St. Br. at 19. At a jury trial in *Swak*, the court refused to take judicial notice of judgments from unrelated cases. *Id.* But the court listed a dozen situations when courts routinely take judicial notice, making it clear that notice is appropriate where, as here, the prior court rulings are in collateral or supplementary proceedings. 40 Wn.2d at 54-55.

The State also cites *In re Adoption of B.T.*, 150 Wn. 2d 409, 415 (2003), which has no bearing on the issue before this Court. St. Br. at 20. In *In re Adoption of B.T.*, the issue was application of appellate procedure rules for new evidence presented on appeal, an issue not present here. *Id.* Moreover, the court denied the request for judicial notice because the court concluded that the prior

court rulings had no direct bearing on the issue before it. *Id.* Here, in contrast, the prior court rulings fully prove the claims alleged in the complaints. Indeed, although the State contests application of judicial notice, the State does not refute that notice of the orders from the personal restraint proceedings would suffice to establish the pleading requirements for Claimants’ complaints.

Thus, even if the Court finds that it must adjudicate the sufficiency of the documentary proof at the filing stage, Claimants’ attestations and judicial notice of the court orders from the personal restraint proceedings provide sufficient support for the allegations in the complaints. The lower court’s dismissal was erroneous.⁵

2. Alternatively, at Minimum, the Lower Court Should Have Granted Claimants Leave to Amend the Complaints

The WCPA is a remedial statute that the Legislature implemented to help people who wrongfully suffered at the hands of the State. If there is any deficiency in the complaints, there is no reason not to allow amendment under CR 15, which imposes “‘a mandatory duty’ to freely and liberally allow

⁵ There is a further fundamental problem with the State’s view. The State attempts to argue that Claimants are mis-reading the statute, but it is the State that seeks to excise and ignore not only .060, but the language in .040 itself, that a claimant must *establish* their claim with documentary evidence. The redundancy in elements between .060 and .040 should confirm that “establishing” a claim is something that happens after it is filed. Moreover, the significance of this particular issue—when, where, and how documentary evidence must be established—confirms that proceedings under the WCPA are unique “special proceedings” under CR81 where the courts should consider the purposes of the act and determine, for these proceedings alone, how adjudication should proceed. There is no “documentary evidence” rule at the pleading stage under CR 8. If a claim need not attached documentary evidence, then Rule 8 (and Rule 12) may be apt fits. But, the State’s own argument that more is needed to be “established” (at some point unknown and without clear guidance), belies its claim that this is not a special proceeding.

amendments.” *Wilson v. Horsley*, 137 Wn.2d 500, 513 (1999) (*en banc*). At the time of the proceedings below—and still to this day—there is no clear guidance about what the “documentary evidence” rule means; what it means to “establish” something by documentary evidence under .040, and how that requirement differs (if at all) from the standard of proof set forth for final adjudication in .060. Amendment *with prejudice* in that circumstance would obviously be patently unfair and contrary to the goal of the statute.

Nonetheless, the State argues that allowing amendment of the complaints after their motion to dismiss would have been untimely. This contention is baseless for two reasons. St. Br. at 26-27. First, there is absolutely no authority for calling a request to amend the complaint in response to a motion to dismiss untimely. Such ruling would be contrary to CR 15. *See Wilson*, 137 Wn.2d at 513 (“This ideal of ‘freely’ granting the right to amend is well integrated into our jurisprudence, and, as we have articulated amendments ‘have *always been* ... liberally allowed.’”) (internal citations omitted; emphasis added by the Court). The State’s cited authority *Wallace v. Lewis Cty.*, 134 Wn. App. 1, 26 (2d. 2006), St. Br. at 27, involved a party that waited well past the motion to dismiss phase and sought amendment after summary judgment had been briefed. Similarly, the plaintiff in *Trust Fund Servs. v. Glasscar, Inc.*, 19 Wn. App. 736, 744 (1st Div. 1978), St. Br. at 27, did not seek amendment until after summary judgment was briefed and argued. Both cases merely underscore how early the amendment was sought in this case—at the motion to dismiss stage, well before the underlying merits of the claim should have been addressed by the court. *See also Mohandessi*

v. Urban Venture LLC, 468 P.3d 622, 628 (Wash. Ct. App. 1st Div. 2020) (plaintiffs granted leave to amend three times after summary judgment was adjudicated).

Second, the State has failed to acknowledge the evidence of Claimants' incapacitation. As discussed above, Green was severely limited after an accident, an assault, and PTSD, and Town suffered dementia. Those impairments justify any delay in failing to seek leave to amend the complaints preemptively, before the hearing on the motions to dismiss, particularly given the liberal allowances under CR 15 and the remedial nature of the WCPA. Moreover, it is not as if the State is prejudiced by the delay in amendment—rather it is Plaintiffs, who are denied their relief, that suffer due to any delay.

Finally, the State argues that any amendment would be futile because it would relate back to the complaints, which the State contends should be dismissed as untimely. St. Br. at 27-28. As argued above, the complaints are not untimely, so allowing leave to amend would cure any defects this Court believes need addressing. Claimants respectfully ask that, at minimum, they be allowed to amend their complaints as the Court deems necessary.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, David B. Owens, an attorney, certify that on September 11, 2020 I caused the foregoing **Reply Brief and Argument of Petitioner-Appellants** to be delivered upon all counsel of record via the Court's electronic filing system.

/s/David B. Owens

LOEVY AND LOEVY

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