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NO. 36805-0

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

DORIS MARIE GREEN and MERIDITH GENE TOWN,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

ROBERT W. FERGUSON
Attorney General



KENT LIU
Assistant Attorney General
WSBA #21599
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
206-464-7352
OID #91093

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I. INTRODUCTION

In 2003, Doris Green and Meridith Town (“Plaintiffs”) received compensation from Chelan County for their alleged wrongful convictions in the “Wenatchee Sex Abuse” cases.¹ Green received \$162,500 and Town received \$200,000 in settlement. Despite having already received compensation, Plaintiffs sought to obtain a second recovery for the same underlying convictions under the Wrongly Convicted Persons Act (WCPA), chapter 4.100 RCW.

The trial court properly dismissed Plaintiffs’ WCPA claims after finding that the plaintiffs had “not submitted any documentary evidence to establish that [they have] an actionable claim for compensation under the Wrongfully Convicted Persons Act.” DG CP 169 at 2.2; MET CP 110 at 2.2.² Plaintiffs do not challenge this finding of fact, and thus, it is a verity on appeal. Moreover, as the trial court correctly recognized, the verified claim itself does not qualify as the requisite documentary evidence. DG CP 169 at 2.3; MET CP 110 at 2.3.

¹ These cases involved allegations of widespread sex abuse of children in Wenatchee, Washington, in 1994. A number of individuals were arrested and subsequently convicted at trial or plead guilty. However, most of the convictions were later overturned or charges reduced.

² There are separate clerk’s papers for each Plaintiff, and citations to the clerk’s papers in Doris Green’s case are indicated by “DG CP” and citations to the clerk’s papers in Meridith Town’s case are indicated by “MET CP.”

The trial court's decision is also proper on two additional grounds. First, as this Court recently made clear in *Larson et al. v. State*, 9 Wn. App. 2d 730, 744, 447 P.3d 168 (2019), *review denied*, 194 Wn.2d 1019 (2020), the WCPA prohibits multiple recovery. Plaintiffs had previously conceded in their own motion for a stay of this appeal that their claims "would be separately barred" under *Larson* because they have already received a recovery for their wrongful conviction claims.³ Inexplicably, Plaintiffs now ignore that dispositive case, which provides an independent ground for affirming the trial court's decision. Second, the trial court's decision is also proper because Plaintiffs failed to timely perfect service of their claims, and their claims are now time-barred.

Each of these three grounds independently support the trial court's dismissal of Plaintiffs' claims. For all of these reasons, this Court should affirm.

II. ISSUES PRESENTED

1. Does WCPA's prohibition on double recoveries bar Plaintiffs' claims when Plaintiffs had already received a monetary recovery under 42 U.S.C. § 1983 arising out of their convictions?

³ Appendix A (Appellants' Motion to Stay Briefing).

2. Did the trial court properly dismiss Plaintiffs' WCPA claims for failure to submit the documentary evidence required under RCW 4.100.040(1)?

3. Are Plaintiffs claims time-barred for failure to perfect service before the claim filing deadline expired?

III. STATEMENT OF THE CASE

A. Green and Town's Convictions

In 1995, a Chelan County jury convicted Green of three counts of Rape of a Child in the First Degree and one count of Child Molestation in the First Degree. DG CP 162. Green was subsequently sentenced to serve 23.5 years in prison. *Id.* In 2000, the Superior Court vacated and dismissed Green's convictions based on alleged violations of her state and federal constitutional rights and she was released from custody. *Id.*

In 1994, Town plead guilty to four counts of felony sex offense against children. MET CP 103. Town was subsequently sentenced to serve 20 years in prison. *Id.* In 2000, the Superior Court vacated and dismissed Town's convictions based upon alleged violations of his state and federal constitutional rights and he was released from custody. *Id.*

B. Green and Town's 42 U.S.C. § 1983 Lawsuits

In 2001, Green and Town filed suit in federal district court against Chelan County, the City of Wenatchee and numerous other defendants

alleging civil rights violations under 42 U.S.C. § 1983. DG CP 162; MET CP 103. These federal claims were related to Green’s 1995 conviction and Town’s 1994 conviction in Chelan County. *Id.* In 2003, Green settled her civil rights tort claim for \$162,500 and Town settled his civil rights tort claim for \$200,000. *Id.* They collected the settlement from Chelan County in 2003. DG CP 104; MET CP 58.

C. The Wrongly Convicted Persons Act

In 2013, the legislature enacted the Wrongly Convicted Persons Act, chapter 4.100 RCW. The Act includes a statement of intent, which provides:

A majority of those wrongly convicted in Washington have no remedy available under the law for the destruction of their personal lives resulting from errors in the criminal justice system.” The Act was intended “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.

Not all overturned convictions result in actionable WCPA claims. A claimant seeking compensation under the Act must meet the requirements of RCW 4.100.040(1), which outlines facts that must be established with documentary evidence. A claimant must also establish the existence of significant new exculpatory information that establishes by clear and convincing evidence that the claimant is actually innocent.

RCW 4.100.020(2)(a); RCW 4.100.040(1); RCW 4.100.060(c)(ii). If the Attorney General's Office concedes the claim as permitted by RCW 4.100.040(5), or if a claimant shows that all requirements of the Act can be met, then the amount of compensation is based on a mathematical formula set forth in the Act. RCW 4.100.040(5); RCW 4.100.060. Claimants who choose to pursue a remedy under the WCPA must abide by its statutory mandate that "the remedies and compensation provided under this chapter shall be exclusive[.]" RCW 4.100.080(1).

D. Plaintiffs' WCPA Claims

After receiving their settlements from Chelan County, Plaintiffs filed suits against the State of Washington for compensation under the WCPA. Town filed his complaint on July 25, 2016, three days before the filing deadline. MET CP 104. However, he failed to perfect service by serving the State within 90 days of filing. MET CP 104-105. Green filed her complaint on July 27, 2016, one day before the filing deadline. DG CP 163. She, too, failed to perfect service within 90 days of filing. DG CP 163-164.

On May 1, 2017, almost ten months after service, Plaintiffs finally served the Office of the Attorney General with a copy of their summonses and complaints. DG CP 163; MET CP 104. Under RCW 4.100.090, the deadline for filing their claims expired on July 28, 2016. DG CP 164; MET CP 105. On that date, both Plaintiffs' claims were extinguished.

E. The Proceedings Below

On October 16, 2017, the State filed a motion to dismiss Plaintiffs' WCPA claims. DG CP 16; MET CP 16. The State argued three separate grounds for dismissal. First, that the WCPA bars double recovery and Plaintiffs have already been compensated under their 42 U.S.C. § 1983 claims. Second, that Plaintiffs' claims lacked the documentary evidence required by RCW 4.100.040(1). Third, that Plaintiffs' claims are time-barred. DG CP 16-23; MET CP 16-23.

A hearing on the State's motion to dismiss was held on March 23, 2018, before Chelan County Superior Court Judge Kristin Ferrera. DG CP 161; MET CP 102. After argument of the parties concluded, Plaintiffs requested additional time to supplement the record with documents to support their claims. VRP 22.⁴ Plaintiffs also requested more time to present additional documents regarding an alleged "disability" that prevented both plaintiffs from perfecting service of their WCPA claims. VRP 20-21. Notably, Plaintiffs never attempted to supplement or amend their complaint at any time before the March 23, 2018 hearing. DG CP 163 at 1.9; MET CP 104 at 1.10.

⁴ VRP refers to the Verbatim Report of Proceedings of the May 13, 2018 hearing.

At the conclusion of the hearing, Judge Ferrera took the matter under advisement, including Plaintiffs' request for additional time. VRP 28. By written ruling dated July 9, 2018, Judge Ferrera granted the State's motion and dismissed Plaintiffs' claims. DG CP 110. Judge Ferrera noted that although the State's motion to dismiss is based on three procedural deficiencies, "the court need only address Plaintiffs' failure to comply with the documentary evidence requirement of RCW 4.100.040(1), as it alone is a basis for dismissal." DG CP 111. Judge Ferrera granted the State's motion to dismiss based on Plaintiffs' failure to provide sufficient documentary evidence as required under RCW 4.100.040(1). DG CP 113.

Judge Ferrera also concluded that Plaintiffs failed to timely file the documentary evidence required by RCW 4.100.040(1) before the time to do so expired on July 28, 2016. DG CP 169 at 2.7; MET CP 105 at 2.7.

In April 2019, the trial court entered findings of fact, conclusions of law, and an order of dismissal. The court found that the plaintiffs' complaint did not include any documents (DG CP 169 at 1.8; MET CP 105 at 1.8); that as of March 13, 2018, Plaintiffs have not submitted any documentary evidence to establish that they have an actionable claim for compensation under the WCPA. DG CP 169 at 1.9; MET CP 105 at 1.9. The trial court concluded that a "verified claim does not qualify as the requisite

documentary evidence required in RCW 4.100.040(1);”⁵ that Plaintiffs have not met the documentary evidence requirement in RCW 4.100.040(1), therefore, they have not filed an actionable claim;⁶ and that Plaintiffs failed to timely file the documentary evidence, and the time to do so expired on July 28, 2016.⁷

Plaintiffs filed their notice of appeal on May 9, 2019. DG CP 165; MET CP 106. During this same time, *Larson* was pending before this Court.⁸ Plaintiffs filed a “Motion to Stay Briefing” in this appeal pending the final resolution of *Larson*.⁹ In support of their motion to stay, Plaintiffs conceded that if the State prevailed in *Larson*, the case would control the outcome of this case, rendering their case “moot” because their claims “would be separately barred” under that decision.¹⁰ This Court granted Plaintiffs’ motion to stay pending the petition for review in *Larson*.¹¹ The Supreme Court ultimately denied the petition for review in that case,¹² and thereafter, this Court lifted the stay.¹³

⁵ DG CP 169 at 2.3; MET CP 105 at 2.3.

⁶ DG CP 169 at 2.6; MET CP 105 at 2.6.

⁷ DG CP 169 at 2.7; MET CP 105 at 2.7.

⁸ Appendix A.

⁹ Appendix A.

¹⁰ Appendix A.

¹¹ Appendix B (Notation ruling granting motion to stay).

¹² *Larson et al. v. State*, 194 Wn.2d 1019, 455 P.3d 125 (2020).

¹³ Appendix C (Notation ruling lifting stay).

Plaintiffs thereafter proceeded with this appeal. They filed their opening brief on June 12, 2020. On appeal, Plaintiffs argue the trial court erred in dismissing their WCPA claims for lack of documentary evidence and erred in failing to grant Plaintiffs leave to amend their complaint. Br. of Appellants at 4. Plaintiffs do not mention their prior concessions in their motion to stay briefing in this case or their prior recovery under 42 U.S.C. § 1983.

IV. ARGUMENT

A. **The Trial Court Properly Granted the State’s Motion to Dismiss Plaintiffs’ WCPA Claims**

1. **This Court may affirm the trial court decision on any basis supported by the record**

This Court applies the de novo standard of review to a trial court’s decision to dismiss pursuant to CR 12(b)(6). *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 634, 128 P.3d 627 (2006). Dismissal under CR 12(b)(6) is proper where the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986).

On de novo review, an appellate court may affirm a trial court on any theory supported by the pleadings and the record even if the trial court did not consider that theory. *Piper v. Dep’t of Labor & Indus.*, 120 Wn. App. 886, 890, 86 P.3d 1231 (2004), (citing *LaMon v. Butler*,

112 Wn.2d 193, 200–01, 770 P.2d 1027 (1989)); *see also Larson*, 9 Wn. App. 2d at 744-45 (citing *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986)).

This Court should affirm the trial court’s dismissal of Plaintiffs’ claims on three separate grounds. First, Plaintiffs have already been compensated for claims related to their alleged wrongful convictions, and RCW 4.100.080 plainly prohibits double recovery. Second, as the trial court correctly recognized, Plaintiffs have failed to establish by documentary evidence that they meet the requirements of RCW 4.100.040(1) for Plaintiffs’ WCPA claims to be “actionable.” Third, Plaintiffs tentatively commenced their actions by filing their complaint, but failed to serve the State within 90 days as required by RCW 4.16.170. Thus, they failed to timely perfect service, and the trial court never acquired jurisdiction. Each of these reasons support the trial court’s dismissal of Plaintiffs’ claims.

B. Plaintiffs Are Not Eligible For Compensation Under the WCPA Because They Have Already Received a Recovery Under 42 U.S.C. § 1983 and the WCPA Bars Double Recovery

1. Plaintiffs’ claims are barred because the WCPA forbids double recoveries

Plaintiffs’ claims are legally barred because the WCPA forbids double recoveries arising from an allegedly wrongful conviction. This Court

recently addressed this precise issue in *Larson*, 9 Wn. App. at 744. Like the Plaintiffs here, the plaintiffs in *Larson* had obtained settlement recoveries under 42 U.S.C. § 1983 for their wrongful convictions. This Court affirmed the trial court’s determination that such settlements barred their WCPA claims, holding that under the WCPA, claimants are not entitled to collect under the statute when they have already obtained a remedy under a different suit. *Id.* at 741-43. This Court noted that the plain language of RCW 4.100.080(1) states, in part: “It is the intent of the legislature that the remedies and compensation provided under this chapter shall be exclusive to all other remedies at law and in equity” *Id.* at 738 (*quoting* RCW 4.100.080(1)). As *Larson* properly recognized, “the stated intent of the WCPA is not to add one more remedy to others that might be available. It is addressed to the ‘majority of those wrongly convicted in Washington State [who] have no remedy available under the law...’” *Id.* at 743. This Court also cited the requirement in WCPA that conditions compensation on a wrongly convicted person’s ability to provide an effective waiver and legal release of claims. *Id.* at 743. Because the plaintiffs in *Larson* were unable to satisfy these statutory conditions due to their prior settlement, this Court held they were ineligible to receive payment under the WCPA. *Id.*

Here, Plaintiffs have also already received compensation from their 42 U.S.C. § 1983 actions. Green filed suit against the City of Wenatchee,

Chelan County, and other defendants under 42 U.S.C. § 1983. In September 2003, Green settled her lawsuit and received \$165,500. DG CP 104. Likewise, Town filed suit under 42 U.S.C. § 1983 against the same parties. He received \$200,000 in July 2003. MET CP 58. Plaintiffs had a remedy available to them and both have received compensation for their alleged wrongful convictions. Thus, compensation under the WCPA is not available to Plaintiffs. *Larson* at 741-43.

2. Plaintiffs Previously Conceded *Larson* Bars Their Claims

Plaintiffs conceded in their “Motion to Stay Briefing” that if this Court decided the issues in *Larson* in favor of the State, their claims would be independently barred from the same reasons presented in that case.¹⁴ Indeed, Plaintiffs’ concession that their claims would be controlled by this Court’s decision in *Larson* formed the entire basis for their stay motion. They explicitly argued that *Larson* “may render the instant appeals moot” and that their claims “would be separately barred on unrelated grounds under the recent appellate decision in *Larson*.”¹⁵ This Court granted Plaintiffs’ motion and stayed this case pending the petition for review in *Larson*.

¹⁴ Appendix A at 1-2.

¹⁵ Appendix A at 1-2.

Although a party's concession or admission concerning a question of law as opposed to a statement of fact is not binding on the court, *see State v. Knighten*, 109 Wn. 2d 896, 902, 748 P.2d 1118 (1988), Plaintiffs' concession is a significant acknowledgment that their WCPA claims are untenable. In the interests of justice and expedition in litigation, Plaintiffs should not now be permitted to take an inconsistent position in this appeal.¹⁶

C. The Trial Court Properly Concluded that Plaintiffs' Complaint Failed to Meet the Documentary Requirements of RCW 4.100.040

The trial court properly concluded that Plaintiffs' complaint failed to meet the requirements of RCW 4.100.040. Plaintiffs' complaint lacked the required documentary evidence under RCW 4.100.040(1) for filing an actionable claim. Additionally, the trial court properly declined to take judicial notice of documents filed in Plaintiffs' criminal cases and PRP proceedings because a trial court may not take judicial notice of documents from an independent and separate proceeding.

1. Plaintiffs' claims lack the required documentary evidence

¹⁶ *See, e.g., Mueller v. Garske*, 1 Wn. App. 406, 409, 461 P.2d 886 (1969) (citing 28 Am.Jur.2d Estoppel and Waiver § 69, at 696 (1966)) ("A party is not permitted to maintain inconsistent positions in judicial proceedings. It is not as strictly a question of estoppel as it is a rule of procedure based on manifest justice and on a consideration of orderliness, regularity and expedition in litigation.").

RCW 4.100.040(1) requires that in order to file an actionable claim, claimants must establish certain prerequisites through documentary evidence and demonstrate that their claim is not time-barred. Plaintiffs failed to provide any documentary evidence whatsoever and therefore did not file an actionable claim.

RCW 4.100.040(1)'s requirements are mandatory. The statute requires claimants to present documentary evidence of several prerequisites in order to establish an actionable claim. Specifically, it states as follows:

(1) In order to *file a claim* for compensation under this chapter, the claimant must establish by documentary evidence that:

(a) The claimant has been convicted of one or more felonies in superior court and subsequently sentenced to a term of imprisonment, and has served all or part of the sentence;

(b)(i) The claimant is not currently incarcerated for any offense; and

(ii) During the period of confinement for which the claimant is seeking compensation, the claimant was not serving a term of imprisonment or a concurrent sentence for any crime other than the felony or felonies that are the basis for the claim;

(c)(i) The claimant has been pardoned on grounds consistent with innocence for the felony or felonies that are the basis for the claim; or

(ii) The claimant's judgment of conviction was reversed or vacated and the charging document dismissed on the basis of significant new exculpatory information or, if a new trial was ordered pursuant to the presentation of significant new exculpatory information, either the claimant was found not guilty at the new trial or the claimant was not retried and the charging document dismissed; and

(d) The claim is not time barred by RCW 4.100.090.

RCW 4.100.040(1) (emphasis added).

Plaintiffs failed to meet these mandatory requirements in the nearly two years their claims were pending. As the trial court found, Green's complaint, filed July 27, 2016, "did not include any documents," and "[a]s of the hearing on March 13, 2018, [Green] has not submitted any documentary evidence to establish that she has an actionable claim for compensation under the Wrongfully Convicted Persons Act." DG CP 168 (FF 1.8, 1.9). Likewise, Town's complaint, filed July 25, 2016, "did not include any documents," and "[a]s of the hearing on March 13, 2018, [Town] has not submitted any documentary evidence to establish that he has an actionable claim for compensation under the Wrongfully Convicted Persons Act." MET CP 104 (FF 1.8, 1.9). These findings of fact are unchallenged on appeal and are thus verities. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

Plaintiffs argue that the verified claim itself fulfills the “documentary evidence” requirement. Br. of Appellants 20-21. Their argument fails because it requires a reading of the statute in which “claim” and “documentary evidence” mean the same thing. When the legislature uses two different terms in the same statute, however, courts presume the legislature intends the terms to have different meanings. *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (“When the legislature uses different words within the same statute, we recognize that a different meaning is intended.”); *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (It is “well established that when ‘different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.’” (*quoting State ex rel. Pub. Disclosure Comm’n v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976))).

The plain language of RCW 4.100.040(1) states that “[I] order to file **a claim** for compensation under this chapter, the claimant must establish by **documentary evidence** that . . .” (Emphasis added). This sentence clearly treats “the claim” and the “documentary evidence” as two different things. Under Plaintiffs’ interpretation, RCW 4.100.040(1) would read “[I]n order to file a claim for compensation under this chapter, the claimant must

establish ~~by documentary evidence~~ by a claim that ...” Plaintiffs’ arguments conflict with the statute’s plain terms.¹⁷

Plaintiffs further argue that “the plain language of the WCPA does not require a claimant to *attach* documents to a complaint,” but simply requires the claimant to “plead that he or she *can* establish the claim by documentary evidence (RCW 4.100.040)...”¹⁸ (Emphasis added).

This Court should reject Plaintiffs’ attempt to read the word “can” into the statute. A court interpreting a statute is not permitted to “read additional words into a statute.” *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). The WCPA does not contain any language providing for a claimant to simply plead that he or she “can” establish the claim by documentary evidence. No rule of statutory construction supports Plaintiffs’ strained interpretation of the WCPA and such interpretation is contrary to the plain language of the statute.

Relying on *State v. Abd-Rahmaan*, 154 Wn.2d 280, 289, 111 P.3d 1157 (2005), and *Hoffman v. Kittitas Cty.*, 194 Wn.2d 217, 222,

¹⁷ “Documentary evidence” which establishes an actionable claim includes things like pleadings showing that charges were filed, a guilty plea form, verdict form, or criminal history document showing a conviction occurred, a judgement and sentence form showing that a claimant was sentenced, a pleading or other document showing a conviction was subsequently vacated and dismissed, and Department of Correction documents showing the amount of time a person spent incarcerated. Plaintiffs have not only failed to provide any such documents, they have failed to provide any documents whatsoever.

¹⁸ Br. of Appellants at 23.

449 P.3d 277, 280 (2019), Plaintiffs argue that verifications are routinely treated by courts as “documentary evidence.”¹⁹ Plaintiffs’ reliance on *Abd-Rahmaan* and *Hoffman* is misplaced. The issue in *Abd-Rahmaan* centered on the use of hearsay evidence such as affidavits or documentary evidence during sentence modification hearings and whether the use of such evidence implicates the right of confrontation and due process. *Abd-Rahmaan* at 289.

In *Hoffman*, the parties agreed to a bench trial “based on stipulated and conceded facts, with affidavits, declarations, and other documentary evidence submitted to litigate contested facts.” *Hoffman* at 222. Both cases simply mention the use of documentary evidence alongside affidavits and declarations in the context of court proceedings, but neither case support Plaintiffs’ position that “verifications are routinely treated by courts as documentary evidence.”²⁰ Indeed, the treatment of affidavits and declarations as separate and apart from “documentary evidence” in *Abd-Rahmaan* and *Hoffman* only adds further support to the State’s position that “the claim” and “documentary evidence” are two separate things under the WCPA.

¹⁹ Br. of Appellants at 20-21.

²⁰ Br. of Appellants at 20-21.

The WCPA plainly requires documentary evidence as a prerequisite to “file a claim” under the statute and neither *Abd-Rahmann* nor *Hoffman* conflicts with the trial court’s correct finding that Plaintiffs failed to file the documentary evidence required by RCW 4.100.040 to make their claims actionable. Thus, the trial court correctly dismissed their claims.

2. The trial court properly declined to take judicial notice of documents filed in separate judicial proceedings

Plaintiffs argue the trial court erred in failing to take judicial notice of documents filed in separate judicial proceedings, such as documents filed in their criminal cases and their Personal Restraint Petition (PRP) proceedings. Br. of Appellants at 20-22. This argument fails because the trial court cannot take judicial notice of documents filed in separate proceedings.

In general, courts may take judicial notice of the record of a case presently before it or “in proceedings engrafted, ancillary, or supplementary to it.” *Swak v. Dep’t of Labor & Indus.*, 40 Wn.2d 51, 53, 240 P. 2d 560 (1952). However, courts may not, while trying one cause, “take judicial notice of records of other independent and separate judicial proceedings” even if they are between the same parties. *Id.* at 54. This is because the decision of a case must depend on the evidence introduced in that case. *Id.*

In *In re Adoption of B. T.*, 150 Wn.2d 409, 78 P. 3d 634 (2003), the Department of Social and Health Services (DSHS) appealed the reinstatement of an adoption petition brought by the grandparents of B.T., a child whose parental rights had been terminated. *Id.* at 413. DSHS requested that judicial notice be taken of the superior court’s order in the dependency action pursuant to ER 201, but the Supreme Court declined to do so. The Court held that, although the dependency action and the adoption proceedings concerned the same child, judicial notice of the dependency action was not warranted because the two actions constituted separate judicial proceedings. *Id.* at 415.

In the proceedings below, Plaintiffs asked the trial court to take judicial notice of documents filed in their criminal cases.²¹ These documents from Plaintiffs’ criminal cases are from an “independent and separate proceeding” to the current WCPA civil action, however, and are precisely the kind of documents that our courts have deemed not subject to judicial notice. Thus, the trial court did not err in declining to take judicial notice of these documents.

²¹ VRP 22.

D. Plaintiffs' Claims Are Time-Barred

Although the trial court did not reach the question of whether the Plaintiffs' claims are time-barred, this is an additional basis supporting the trial court's dismissal of Plaintiffs' claims.

Claims under the WCPA are subject to a three-year statute of limitations. Specifically, RCW 4.100.090 provides:

Except as provided in RCW 4.100.070, an action for compensation under this chapter must be commenced within three years after the grant of a pardon, the grant of judicial relief and satisfaction of other conditions described in RCW 4.100.020, or release from custody, whichever is later. However, any action by the state challenging or appealing the grant of judicial relief or release from custody tolls the three-year period. **Any persons meeting the criteria set forth in RCW 4.100.020 who was wrongly convicted before July 28, 2013, may commence action under this chapter within three years after July 28, 2013.**

RCW 4.100.090 (emphasis added).

“A civil action is commenced by service of summons and complaint or by filing a complaint. . . An action shall not be deemed commenced for the purpose of tolling any statute of limitations except as provided in RCW 4.16.170.” CR 3(a); *Derendy v. Kumbera*, 45 Wn. App. 485, 726 P.2d 34 (1986). RCW 4.16.170 sets forth the tolling provisions as applied to actions that have or have not been commenced. The statute provides:

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. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. **If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.**

RCW 4.16.170 (emphasis added).

Here, Green's convictions were vacated on January 6, 2000. Town's convictions were vacated on June 8, 2000, *i.e.*, before July 28, 2013. Thus, their deadline for commencing an actionable claim under RCW 4.100.090 was July 28, 2016. But Plaintiffs failed to commence their actions in time. Plaintiffs tentatively commenced the action when they filed their WCPA complaints on July 25, 2016 (Town) and July 27, 2016 (Green). Pursuant to the same statute, however, Plaintiffs were mandated to serve the state of Washington within 90 days of that filing. "[A]n action tentatively commenced by filing a complaint must be perfected within 90 days from the date of filing by personal service..." *Derendy*, 45 Wn. App. at 487; *Citizens Interested in the Transfusion of Yesteryear v. Board of Regents*, 86 Wn.2d 323, 329, 544 P.2d 740 (1976). Plaintiffs failed to perfect their

claims within the statutorily mandated 90 days and instead waited until May 1, 2017 to serve the State; almost 10 months after they filed their claim and long after the filing deadline had expired. When Plaintiffs failed to serve the State, “the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.” RCW 4.16.170. Because Plaintiffs failed to commence the action, the tolling provisions of RCW 4.16.170 and .190 are not available to them. Plaintiffs’ claims are thus time-barred as a matter of law.

The trial court never acquired jurisdiction and correctly dismissed Plaintiffs’ complaints.

E. The WCPA is Not a Special Proceeding

On appeal, Plaintiffs argue that the WCPA is a “special proceeding” under CR 81. This argument was not raised in the proceedings below and is now raised for the first time on appeal. Generally, the appellate court will not consider issues raised for the first time on appeal. *In re Marriage of Knutson*, 114 Wn. App. 866, 870–71, 60 P.3d 681 (2003); RAP 2.5(a). Under RAP 2.5(a), the appellate court will only consider issues raised for the first time on appeal if it is a “manifest error affecting a constitutional right.” Because Plaintiffs make no argument, nor present any facts suggesting any manifest error occurred, this court should decline to address their arguments raised for the first time on appeal.

Even if the Court considers Plaintiffs' new argument, it fails. Plaintiffs suggest that by interpreting the WCPA as a special proceeding under CR 81, it would allow a "loosening" of the pleading requirements,²² thereby allowing Plaintiffs to proceed with their claims despite their failure to comply with the statute of limitations and service of process requirements. Plaintiffs provide no authority for such an expansive reading of the WCPA or the civil rules, and their interpretation would render statutes of limitations and service of process requirements meaningless. This would be an absurd construction that should be rejected. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005) (a fundamental tenant of statutory construction requires that courts avoid interpreting a statute in a manner that leads to unlikely, strained, or absurd results).

Moreover, CR 81 provides that, generally, the civil rules govern all civil proceedings, except where inconsistent with rules or statutes applicable to special proceedings. *Burt v. Dept. of Corrections*, 168 Wn.2d 828, 837, 231 P. 3d 191 (2009), *In re Detention of Young*, 163 Wn.2d 684, 689, 185 P. 3d 1180 (2008), *In re Detention of Williams*, 147 Wn.2d 476, 489, 55 P. 3d 597 (2002).

²² Br. of Appellants at 15.

Plaintiffs have not demonstrated that any of the provisions of the WCPA are inconsistent with the civil rules. Therefore, the civil rules govern this proceeding.

F. The Trial Court Properly Exercised its Discretion When it Denied Plaintiffs' Request For Leave To Amend Their Complaints Because Amendment Is Untimely And Futile

The trial court properly exercised its discretion when it denied Plaintiffs' request for leave to amend their complaints. As the court recognized, the amendment would be untimely and futile. Moreover, Plaintiffs' argument that their motion to amend "relates back" to the date of the original pleading fails because service of their complaint was never perfected and their lawsuit never commenced.

1. The standard of review is abuse of discretion

CR 15(a) governs amendments to pleadings and specifically provides that "a party may amend [their] pleading only by leave of court . . . and leave shall be freely given when justice so requires."

To amend a pleading after the opposing party has responded, the party seeking to amend must obtain the trial court's leave or the opposing party's consent. CR 15(a). A trial court must grant leave freely "when justice so requires." CR 15(a). However, a trial court may refuse to grant leave when the amendment would be futile. *Ino Ino, Inc., v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997).

A trial court's ruling on a motion to amend the complaint is reviewed for abuse of discretion. *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 351, 670 P.2d 240 (1983). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

2. Plaintiffs' Motion to Amend is Untimely and Futile

A trial court may deny a motion to amend a complaint if the amendment would be untimely or futile. *Doyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wn. App. 126, 130-31, 639 P.2d 240 (1982).

The State filed its motion to dismiss on October 12, 2017. The State's motion explicitly set forth the lack of documentary evidence as a basis for dismissal. Argument on the State's motion to dismiss was held on March 23, 2018, over five months after the motion was filed. At no time after the State filed its motion to dismiss did Plaintiffs note a motion to amend their complaint, produce a proposed amended complaint, or make any effort to attach documentation to their complaint. Plaintiffs waited until after argument concluded at the motion hearing before requesting leave to amend their complaint.²³

²³ VRP 22.

Because Plaintiffs' motion to amend was untimely, the trial court properly denied their motion to amend. *See Wallace v. Lewis County*, 134 Wn. App. 1, 25-26, 137 P.3d 101 (2006) (trial court properly denied a motion to amend where a party waited to file an amended complaint until shortly before a dispositive summary judgment hearing, despite previously having had over a year to seek such an amendment); *Trust Fund Services v. Glasscar, Inc.*, 19 Wn. App. 736, 745, 577 P.2d 980 (1978) (a motion to amend a pleading is not incidental to a motion for summary judgment and, when made in the course of summary judgment consideration, is an untimely attempt to insert a new circumstance into the proceedings too late in the game).

Moreover, because Plaintiffs failed to timely file the documentary evidence to make their claim actionable, or to serve the complaint within the mandated timeframe,²⁴ their request for leave to amend their complaint would be futile. The trial court's decision was proper, because the law does not require the performance of futile acts. *Music v. United Ins. Co. of Am.*, 59 Wn.2d 765, 768-69, 370 P.2d 603 (1962); *Ancheta v. Daly*, 77 Wn.2d 255, 263, 461 P.2d 531 (1969); *State v. Beadle*, 173 Wn.2d at 113, 116, 265 P. 3d 863 (2011) (citations omitted).

²⁴ MET CP 104.

3. Plaintiffs' Argument That Their Motion to Amend "Relates Back" to the Complaint Fails

Relying on *Prosser Hill Coal. v. Cty. of Spokane*, 176 Wn. App. 280, 287-88, 309 P.3d 1202, 1206 (2013), Plaintiffs argue that their motion to amend "relates back to the date of the original pleading." Br. of Appellants at 32. Plaintiffs argue that because their complaints were timely filed, their motion to amend "would relate back to the date of filing and likewise be timely." *Id.*

The fatal flaw in Plaintiffs' "relation back" argument is their incorrect assertion that their complaints were timely filed. As discussed above, Plaintiffs failed to perfect service of their complaint as required by RCW 4.16.170. Thus, "the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations." RCW 4.16.170.

The trial court did not abuse its discretion in denying Plaintiffs' untimely and futile request for leave to amend their complaint.

V. CONCLUSION

Three separate grounds support the trial court's decision to dismiss Plaintiffs' claims: 1) the WCPA's prohibition against multiple recovery; 2) Plaintiffs' failure to provide documentary evidence to establish their claim; and 3) the untimeliness of their claims. Each ground, standing alone,

results in dismissal of Plaintiffs' claims. The trial court's dismissal of the claims should be affirmed.

RESPECTFULLY SUBMITTED this 12th day of August, 2020.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read 'Kent Y. Liu', written over a horizontal line.

KENT Y. LIU
WSBA#21599, OID #91093
Assistant Attorney General

Appendix A

in connection with wrongful conviction are not eligible for compensation under the WCPA. We understand that Mr. Larson and his co-appellants plan to petition the Washington Supreme Court for certiorari.

Accordingly, in the interest of judicial economy, we ask that the Green and Town appeals be stayed pending the final outcome in *Larson*, either through the Supreme Court's denial of the appellants' certiorari petition, or a ruling on the merits.

June 13, 2019

A handwritten signature in cursive script, appearing to read "M G Martin".

Michael G. Martin, WSBA #11508
500 Union Street, Ste 847
Seattle, WA 98101
(206) 624-2800

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Seattle, WA, 98101
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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,)
v.)
DORIS MARIE GREEN a/k/a Lopez,)
Appellant,)
and)
MERIDITH GENE TOWN,)
Appellant.)
_____)

No. COA # **368050**

CERTIFICATE OF MAILING

I, Michael G. Martin, certify that on September 13, 2019, I mailed a copy of Appellants' Motion to Stay Briefing to Melanie Tratnik and Richard L. Weber, Assistants Attorney General for the State of Washington, 800 5th Avenue, Suite 2000, Seattle, WA 98104-3188.

June 13, 2019



Michael G. Martin, WSBA #11508
500 Union Street, Ste 847
Seattle, WA 98101
(206) 624-2800

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Comments:

Sender Name: Valerie Loxtercamp - Email: valeriel@sidlon.com

Filing on Behalf of: Michael Gregory Martin - Email: michaelm@sidlon.com (Alternate Email:)

Address:
500 Union Street, Suite 847
Seattle, WA, 98101
Phone: (206) 624-2800

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Appendix B

Renee S. Townsley
Clerk/Administrator

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TDD #1-800-833-6388

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500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
<http://www.courts.wa.gov/courts>

September 23, 2019

Michael Gregory Martin
Siderius Lonergan & Martin LLP
500 Union St Ste 847
Seattle, WA 98101-2394
Email: michaelm@sidlon.com

Melanie Tratnik
Attorney Generals Office/CJ Division
800 5th Ave Ste 2000
Seattle, WA 98104-3188
Email: melaniet@atg.wa.gov

Richard L. Weber
Attorney General of Washington
800 Fifth Ave Ste 2000
Seattle, WA 98104-3188
Email: RickW2@atg.wa.gov

CASE # 368050
Doris Marie Green, a/k/a Lopez v. State of Washington
CHELAN COUNTY SUPERIOR COURT No. 162006609

Counsel:

Pursuant to the motion to stay the above appeal, the following notation ruling was entered:

September 20, 2019

Given there is no objection, the Motion to Stay Briefing is granted in part. The matter is hereby stayed pending the Washington State Supreme Court decision and mandate in Robert E. Larson, et al v. State of Washington, case #97665-1.

**Renee S. Townsley
Clerk**

Please note, all due dates are suspended until the stay is lifted in the above appeal.

Sincerely,

RENEE S. TOWNSLEY
Clerk/Administrator

A handwritten signature in cursive script, appearing to read "Janet L. Dalton".

Janet L. Dalton, Case Manager

RST:jld

Appendix C

*Renee S. Townsley
Clerk/Administrator*

*(509) 456-3082
TDD #1-800-833-6388*

*The Court of Appeals
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State of Washington*



*500 N Cedar ST
Spokane, WA 99201-1905*

*Fax (509) 456-4288
<http://www.courts.wa.gov/courts>*

February 14, 2020

Richard L. Weber
Richard L. Weber - Attorney at Law
736 8th Ave NE Unit 408
Issaquah, WA 98029-5454
Email webrick55@outlook.com

Melanie Tratnik
Attorney Generals Office/CJ Division
800 5th Ave Ste 2000
Seattle, WA 98104-3188
Email melaniet@atg.wa.gov

Michael Gregory Martin
Siderius Lonergan & Martin LLP
500 Union St Ste 847
Seattle, WA 98101-2394
Email michaelm@sidlon.com

CASE # 368050
Doris Marie Green, a/k/a Lopez v. State of Washington
CHELAN COUNTY SUPERIOR COURT No. 162006609

Counsel:

The following notation ruling was entered:

February 11, 2020
The Washington State Supreme Court has decided and mandated in Robert E. Larson, et al v. State of Washington, case #97665-1. Therefore, the stay of these proceedings is lifted.

**Renee S. Townsley
Clerk**

The brief of appellants is now due March 16, 2020.

Sincerely,

RENEE S. TOWNSLEY
Clerk/Administrator

A handwritten signature in cursive script, appearing to read "Janet L. Dalton".

Janet L. Dalton, Case Manager

RST:jld

NO. 36805-0

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

DORIS MARIE GREEN, and
MEREDITH GENE TOWN,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

DECLARATION
OF SERVICE

I, Freyja Vining, declare as follows:

On August 12, 2020, I sent via electronic mail, per service agreement, a true and correct copy of Respondent's Brief with appendices and Declaration of Service, addressed as follows:

David B. Owens
david@loevy.com
Michael G. Martin
Michaelm@sidlon

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of August, 2020, at Seattle, Washington.


FREYJA VINING

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

August 12, 2020 - 2:36 PM

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Address:
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Suite 2000
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