IN THE

Supreme Court of Virginia

RECORD NO. 111438

JOHN CASEY,
Individually and as Administrator of the
Estate of Ora Casey, et al.,

Appellants,

v.

MERCK & CO., INC.,

Appellee.

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

The Plaintiffs reply to Merck's Brief of Appellee.

1. The tolling statute must be liberally construed to carry out its remedial purpose.

Merck gives no credit to the established principle that tolling provisions like Code § 8.01-229(E)(1) are remedial provisions that must be liberally construed. *Woodson v. Commonwealth Utility, Inc.*, 209 Va. 72, 74 (1968). Instead, Merck repeatedly states that Virginia Code § 8.01-229(E)(1) does not toll the statute of limitations because exceptions to limitations periods must be unmistakably clear. (Br. of Appellee, pp. 2, 8-9, 21-22). The four cases on which Merck relies for this proposition do not involve section 8.01-229(E)(1). *Rivera v. Witt*, 257 Va. 280, 283 (1999) (refusing to "engage in considerations of prejudice to determine whether a statute of limitations should be applied"); *Arrington v. Peoples Security Life Ins. Co.*, 250 Va. 52 (1995) (refusing to create an exception to running of statute of limitations in breach of contract action against life insurance company); *Westminster Investing Corp. v. Lamps Unlimited, Inc.*, 237 Va. 543 (1989) (refusing to apply a non-statutory "continuous breach" exception to the five year statute of limitations for breach of contract); *Burns v. Board of Supervisors of Stafford County*, 227 Va. 354 (1984) (applying statute of

limitations for governing body of a sanitation district). In fact, these cases do not involve consideration of any statutory tolling provision. Therefore, these cases have no place in this appeal.

Here, one of the questions before the Court is whether the Plaintiffs are entitled to statutory tolling under section 8.01-229(E)(1). Under established law, the tolling provision must be given a liberal construction to carry out its remedial purpose. *E.g.*, *Woodson*, 209 Va. at 74 (addressing former Code § 8-34). The General Assembly has plainly enacted this statute to toll the statute of limitations where any action that is timely filed later abates or is dismissed without a determination on the merits, and this Court should apply the tolling provision as written.

2. <u>The tolling statute applies to any action which abates or is dismissed.</u>

Merck contends, without explanation, that the tolling provision does not apply here because the *Wolfe* class action did not abate and was not dismissed. (Br. of Appellee, p.27). Section 8.01-229(E)(1) applies to any action that is timely-commenced "and for any cause abates or is dismissed without determining the merits." Merck's interpretation is inconsistent with the plain language of the statute.

The term "abate" means "to put an end to" or "nullify." www.merriam-webster.com/dictionary/abate. The term "dismiss" means to "put out of judicial consideration." www.merriam-webster.com/dictionary/dismiss. There is no question that the *Wolfe* class action was dismissed or abated. On January 28, 2008, the federal court denied class certification and dismissed the class claims. (JA 126). The denial of class certification operates as a dismissal of the class action. Even so, the district court dismissed the class action. The District Court's January 28, 2008 order is the order which dismissed the national *Wolfe* class. As Merck does not dispute that the action ended without an adjudication of the merits, even under the strictest reading of the statutory terms the class action abated and was dismissed.

Merck cites no authority for the proposition that the *Wolfe* action did not abate or was not dismissed. Instead, it argues that the opinion of the federal court that has found otherwise "makes no sense." (Br. of Appellees, p.27, citing *Shimari v. CACI Int'l., Inc.*, 2008 U.S. Dist. LEXIS 112067, 2008 WL 7348184 (E.D. Va. 2008)). Considering the plain meaning of the terms used by the legislature, Merck is wrong. *Barr v. Town & Country Properties, Inc.*, 240 Va. 292, 295 (1990) (the "legislature chose, with care, the words it used when it enacted the relevant statute,

and we are bound by those words"); *Hampton Roads Sanitation Dist. Comm'n v. Chesapeake*, 218 Va. 696, 702 (1978) (this Court construes "the law as it is written").

3. Putative class action members are treated like actual plaintiffs.

Merck also argues that the Plaintiffs were not parties to the putative class action because there was no statute authorizing suit in a representative capacity. (Br. of Appellee, p.32). Merck states, without citing any authority, that "[w]here a class is not certified, the plaintiff bringing the class action of course lacks standing to assert the rights of others." (*Id.* at 33). Merck's unsupported assertions miss the point.

Rule 23 of the Federal Rules of Civil Procedure expressly recognizes and authorizes class actions and the ability of a named party to sue on behalf of putative class members. "Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork & Seal, Co, Inc. v. Parker*, 462 U.S. 345, 352-353 (1983) (holding that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action"). Further, the United States Supreme Court has admonished that "a

putative, unnamed class member in a federal class action suit should receive treatment no different from the treatment accorded a plaintiff in a traditional non-class action federal civil suit." *Torkie-Tork v.* Wyeth, 739 F. Supp. 2d 887 (E.D. Va. 2010) (citing *Crown, Cork & Seal, Co, Inc.*, 462 U.S. at 353-354 and *American Pipe & Construction Company v. Utah*, 414 U.S. 538, 550-551 (1974)). Indeed, if a class is certified, a class member who is not a named party can be bound by the judgment. *E.g., American Pipe,* 414 U.S. at 550-551.

Consequently, Merck's unsupported assertion fails under the weight of established law. There is simply no basis to claim that a putative class member is not a plaintiff.

4. <u>The untouched analysis of the statutory language in *McDaniel v. North Carolina Pulp Co.*, 198 Va. 612 (1956) cuts against Merck.</u>

In the Opening Brief, Plaintiffs cited the Court's decision in *McDaniel v. North Carolina Pulp Company*, 198 Va. 612 (1956) because it involved a Virginia tolling statute with virtually identical language to that in Section 8.01-229(E)(1). In *McDaniel*, this Court stated that the term "action" used in the statute meant a substantially similar cause of action, not an identical cause of action. *Id.* at 616. Plaintiffs relied upon that portion of the opinion

discussing the remedial purpose of the statute and the meaning of the statutory language, and openly advised the Court that the case had later been overruled on different grounds. (Opening Br. at 14-15).

This Court's underlying discussion of the almost identical statute, which Plaintiffs cited as helpful to understanding what the language in section 8.01-229(E)(1) means, was not altered. Even today, this Court would hold that the term "action" in 8.01-229(E)(1) refers to a substantially similar cause of action. Merck does not suggest otherwise. In fact, Merck does not challenge the Plaintiffs' contention that the term "action" in section 8.01-229(E)(1) refers to a substantially similar action, rather than an identical action. This point has enormous significance because the Second Circuit has held that the putative class action and the individual suits later filed by the Plaintiffs are "substantially identical." (JA 154).

Contrary to Merck's suggestion, this Court's later decision to overrule the holding in *McDaniel* has no impact on the outcome of the certified questions presented in this appeal. A brief discussion of the case explains why. In *McDaniel*, this Court held that the filing of a wrongful death action by a personal representative who was qualified in Nevada, but not in Virginia, tolled the limitations period when a later suit was filed by an individual who qualified as the personal representative in Virginia. The

Court based its decision on Code § 8-634, which dealt with bringing wrongful death actions, and is now codified as Code § 8.01-229(B)(1). Code § 8-634 contains some similar language to what now appears in Code § 8.01-229(E)(1).

Harmon v. Sadjadi, which overruled *McDaniel* on standing grounds, is a medical malpractice case where the patient (Harmon) died of causes unrelated to the alleged malpractice. 273 Va. 184, 188,n.2 (2007). Harmon's surviving spouse qualified as his personal representative in West Virginia, and filed suit in Virginia. That action was non-suited. When Harmon's spouse later qualified as the personal representative in Virginia, another suit was filed. The Court revisited its ruling in *McDaniel*, holding that the first suit was a legal nullity because an individual who is qualified in another state as a personal representative of an estate lacks standing to bring a legal action. 273 Va. at 193. Accordingly, under the facts in *Harmon*, the first action was a legal nullity because the personal representative was not qualified in Virginia. *Id.* at 198.

The decision in *McDaniel* was reversed because the personal representative of the deceased was not qualified in Virginia. Any suit brought by that personal representative, then, was a legal nullity. There is no question raised in the present case about out-of-state qualification of a

personal representative. Under federal class action rules, the named class members in *Wolfe* had standing to bring the putative class action on behalf of the Plaintiffs. Fed. R. Civ. Pro. 23. Equally important, *Harmon* did not even involve Code § 8.01-229(E)(1), the tolling statute applicable here. *Harmon*, 273 Va. at 188, n.2 (the tolling provisions of 8.01-229 are inapplicable in wrongful death cases). Merck cites no authority for the proposition that a putative member of a federal class action is not within the ambit of section 8.01-229(E)(1) or otherwise lacks standing. Therefore, *McDaniel* supports the Plaintiffs' interpretation of the tolling statute.

5. <u>The plain language of section 8.01-229(E)(1) and this Court's holding in *Welding, Inc. v. Bland County Service Authority* answer the second certified question.</u>

In *Welding, Inc. v. Bland County Service Authority*, 261 Va. 218, 224 (2001), this Court held that Code § 8.01-229(E)(1) tolls the statute of limitations during the pendency of an action filed in a federal court outside of Virginia. Merck tries to avoid this clear and crucial holding by arguing that *Welding* does not apply to federal class actions. Merck's position is inconsistent with *Welding* and would require a wholesale rewriting of the tolling statute.

First, *Welding* forecloses Merck's arguments. This Court held that the statute applies to "any action," including civil litigation in both the state and federal courts. 261 Va. at 224. Further, this Court found "no language in Code § 8.01-229(E)(1) which limits or restricts its application to a specific type of action or precludes its applicability to actions filed in a federal court." *Id.* In short, the Court found that the statutory language was expansive and purposefully encompassed a broad range of cases, a result the General Assembly has not altered in the decade since *Welding* was decided. This holding is consistent with the remedial purpose of the statute.

Second, Merck's reading of the statute ignores the words the General Assembly actually used. The statute tolls "any action" that is timely filed and later abates or is dismissed without an adjudication on the merits. Va. Code § 8.01-229(E)(1). When the General Assembly referred to "any action," we must presume that it meant what it said. *Barr*, 240 Va. at 295 (the "legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words"). Because the statute is unambiguous, we must apply the language the legislature actually used. *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 76, 104 (2007).

To achieve the reading of the statute that Merck advances, then, would effectively write the term "any action" out of the statute or necessitate an impermissible rewriting of the statute to expressly exclude federal class actions. Well-established law prohibits such a rewriting. *Id.* ("we are bound by the plain meaning of the statute").

Merck cites no Virginia public policy requiring this Court to treat federal class actions as different from other federal actions. Class actions serve an important function in the federal court system as they advance the "the efficiency and economy of litigation." *American Pipe & Constr. Co.*, 414 U.S. at 553. Had the General Assembly sought to exclude a particular type of action from the scope of Code § 8.01-229(E)(1), it would have done so.

CONCLUSION

This Court should answer both certified questions in the affirmative.

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[1] *Pro Hac Vice* application pending.

CERTIFICATE OF SERVICE

I certify that on this 12th day of December 2011, the correct number of true and accurate copies of this Reply Brief and an electronic copy on a CD have been sent by certified mail, return receipt requested to the Clerk of this Court, and an electronic copy on a CD of the Reply Brief with the correct number of hard copies of the Reply Brief have been served, by first class mail, upon counsel for the appellee:

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