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.

BRIEF OF APPELLEE

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This certification proceeding presents the question of whether the Court should recognize a broad exception to Virginia's statute of limitations. The exception would apply when a litigant fits within the definition of a putative class as set forth in a previously filed class action complaint filed by a different party in another jurisdiction, but the class ultimately does not get certified. The exception, which would apply no matter how broadly the putative class was defined and no matter how remote the prospects of class certification had been from the start, would suspend the running of the statute of limitations from the time the class action complaint was filed until the time that class certification was denied. The United States Court of Appeals for the Second Circuit has asked two questions: whether such an exception exists in Virginia as judge-made law and whether such an exception can be extracted from Va. Code § 8.01-229(E)(1). The answer to both questions should be "no."

First, as for a judge-made rule, the creation of exceptions to the statute of limitations is for the General Assembly, not the courts. Because the proposed tolling rule creates a giant limitations loophole for parties who sit on their rights, encourages the filing of sprawling class actions that stand no chance of certification and promotes forum-shopping, and **because the Commonwealth has never adopted a class action procedure**, the

instant case would be an especially inappropriate occasion for this Court to depart from its rule against judicially fashioned limitations exceptions. Plaintiffs do not appear seriously to contend otherwise.

Second, support for the exception also cannot be found in Va. Code § 8.01-229(E)(1). The legislative intent to create an exception to the statute of limitations must be "unmistakably clear"; "[w]here there exists any doubt, it should be resolved in favor of the operation of the statute of limitations." E.g., Burns v. Bd. of Supervisors of Stafford City, 227 Va. 354, 359, 315 S.E.2d 856, 859 (1984). Here, the statute does not say one word about class actions. As is plain from its text, § 8.01-229(E)(1) merely provides that if a party files an action that abates or is dismissed without a determination of the merits, the time during which that action was pending is not counted for purposes of determining timeliness of a subsequent suit by the same plaintiff. It certainly does not suggest that a plaintiff can obtain tolling benefits if he or she was not a real party to the prior suit or sat on his or her rights. The notion that the General Assembly intended for this statute to apply to class actions -- **when Virginia does not recognize class actions in the first place** -- is fanciful. And reading the statute in this broad manner would be directly counter to Virginia's longstanding policy that limitations exceptions must be "unmistakably clear."

In short, there is no basis in law or policy to adopt the type of tolling sought by plaintiffs. Accordingly, the two questions certified by the Second Circuit should be answered in the negative.

STATEMENT OF THE CASE

This appeal arises out of four individual lawsuits filed by plaintiffs who alleged that they were injured by ingesting Merck's prescription drug Fosamax. Although each plaintiff resides in Virginia, the lawsuits were filed in the United States District Court for the Southern District of New York, which is currently presiding over a multidistrict litigation ("MDL") proceeding involving Fosamax product liability litigation.

On June 23, 2009, Merck filed a motion for summary judgment in the MDL court on the claims of all four plaintiffs whose cases are the subject of this appeal. Merck argued that plaintiffs' claims were time-barred because they are governed by Virginia law, which requires that a claim be brought within two years of injury.

Plaintiffs' principal response was to argue that the statute of limitations was tolled because of the filing of Wolfe v. Merck & Co., Inc., No. 3:05-cv-0717, on September 15, 2005. Wolfe was a putative nationwide product liability class action regarding Fosamax that was originally filed in the United States District Court for the Middle District of

Tennessee and was then transferred to the MDL proceeding. At no time were plaintiffs parties to Wolfe. Although they fell within the proposed, sprawling class defined in the Wolfe complaint, that class was never certified and the MDL court denied class certification on January 3, 2008. See In re Fosamax Prod. Liab. Litig., 248 F.R.D. 389 (S.D.N.Y. 2008).

Plaintiffs argued, however, that under the U.S. Supreme Court's ruling in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), they were entitled to tolling for the 28-month period between the filing of the Wolfe complaint and the denial of class certification in Wolfe. American Pipe, and cases that followed it, provided that for class actions filed pursuant to federal statutes in which class certification is ultimately denied, the limitations period is tolled up to the date of denial of certification for anyone who would have been a member of the class had certification been granted. Despite the overwhelming authority holding that federal American Pipe principles do not apply to cases governed by state law, plaintiffs argued that it should apply here. Plaintiffs did not rely upon any Virginia law, statutory or otherwise, arguing instead that the federal American Pipe rule should govern. In response, Merck argued that American Pipe did not apply to matters governed by state law, that Virginia law applied to

plaintiffs' claims, and that Virginia law does not recognize tolling under the circumstances presented.

On March 15, 2010, the district court granted Merck's summary judgment motion. See In re Fosamax Prods. Liab. Litig., 694 F. Supp. 2d 253 (S.D.N.Y. 2010). The court held that "a federal diversity court applies state law in determining whether a statute of limitations has been tolled." Id. at 257. Consequently, the court concluded, "the applicable state statute of limitations -- here, that of Virginia -- was tolled during the pendency of the Wolfe class action only if the American Pipe rule also applies under the laws of that state." Id.

The district court went on to hold that the Virginia Supreme Court has not created a tolling principle analogous to American Pipe as a matter of Virginia law. 694 F. Supp. 2d at 258. Moreover, the court noted that plaintiffs sought to rely on an extension of the American Pipe rule, namely "cross-jurisdictional" tolling -- i.e., to obtain tolling based on the pendency of a class action lawsuit in another jurisdiction. As the district court noted, even states that have adopted American Pipe-like principles (in contrast to Virginia) have generally rejected tolling based on class actions in other jurisdictions. Id. at 257-58. For this reason, federal courts "have been disinclined to import cross-jurisdictional tolling into the law of a state that

has not ruled on the issue." Id. at 258. The district court also noted that the United States Court of Appeals for the Fourth Circuit considered this very issue -- and held that Virginia would not recognize cross-jurisdictional class action tolling. Id. (citing Wade v. Danek Med., Inc., 182 F.3d 281, 287 and n.7 (4th Cir. 1999)). Based on the foregoing, the district court granted Merck's motion for summary judgment. 694 F. Supp. 2d at 259.

Plaintiffs appealed the district court's ruling to the United States Court of Appeals for the Second Circuit (the "Second Circuit"). In their opening brief, plaintiffs conceded that their claims were not tolled under Virginia law and that they would accordingly be time-barred if Virginia law were to apply. Plaintiffs again argued that, as a matter of federal law, the limitations period on their claims was tolled under the American Pipe doctrine. Plaintiffs did not argue that their claims were tolled under Virginia law until the Second Circuit asked the parties to file supplemental briefing to address the issue.

On August 5, 2011, the Second Circuit issued an order certifying two questions to this Court. (Joint Appendix ("J.A.") at 150.) The Second Circuit agreed with Merck that the availability of tolling was governed by state law, not by American Pipe. (J.A. at 158.) The court recognized, however, that "'there is no controlling precedent on point in the decisions of

[the Supreme Court of Virginia] or the Court of Appeals of Virginia.'" (J.A. at 159, citing Va. Sup. Ct. R. 5:40(a) and 2d Cir. Local R. 27.2.) The Second Circuit applied its three-factor test to determine whether to certify the questions presented to this Court. That test requires consideration of "'(1) the absence of authoritative state court decisions; (2) the importance of the issue to the state; and (3) the capacity of certification to resolve the litigation.'" (J.A. at 159-60, citing O'Mara v. Town of Wappinger, 485 F.3d 693, 698 (2d Cir. 2007).) The court "conclude[d] that certification to the Supreme Court of Virginia is appropriate on these facts." (J.A. at 164.) The court stated:

> In particular, we are satisfied that there is a lack of authoritative state court decisions on point, that the issue is one of considerable importance to the state, and that these issues arise with some frequency. Finally, we are confident that certification can and will resolve this litigation as the issues to be certified are determinative of this appeal.

Id.

Accordingly, the Second Circuit certified the following two questions:

(1) Does Virginia law permit equitable tolling of a state statute of limitations due to the pendency of a putative class action in another jurisdiction?

(2) Does Va. Code § 8.01-229(E)(1) permit tolling of a statute of limitations due to the pendency of a putative class action in another jurisdiction?

(J.A. at 165.)

STANDARD OF REVIEW

The Court should apply de novo review to its consideration of the issues presented on these certified questions. Conger v. Barrett, 280 Va. 627, 630, 702 S.E.2d 117, 118 (2010).

ARGUMENT

I. Virginia law does not permit equitable tolling of the statute of limitations due to the pendency of a putative class action in another jurisdiction.

The first certified question asks whether this Court will create a broad exception to the statute of limitations by tolling limitations periods for a plaintiff who would have been a member of a class in a class action in another jurisdiction had class certification not been denied. Such an exception would usurp the legislature's prerogative to determine statutes of limitations and would be contrary to the Commonwealth's policy interests. The Court should answer the first certified question in the negative.

A. Only the General Assembly may create exceptions to application of statutes of limitations.

Time and again, this Court has held that exceptions to the statute of limitations must be created by the General Assembly, not the courts. In Rivera v. Witt, for example, the Court reaffirmed "the established principle that statutes of limitations are strictly enforced and must be applied unless the General Assembly has clearly created an exception to their

application." 257 Va. 280, 283, 512 S.E.2d 558, 559 (1999); see, e.g., Arrington v. Peoples Sec. Life Ins. Co., 250 Va. 52, 55, 458 S.E.2d 289, 290-91 (1995) (same); Westminster Investing Corp. v. Lamps Unlimited, Inc., 237 Va. 543, 547, 379 S.E.2d 316, 318 (1989) (same); see also Barley v. Duncan, 177 Va. 192, 201, 13 S.E.2d 294, 297 (1941) ("The tendency of recent decisions of this court, certainly since the Steffey Case [Steffey v. King, 126 Va. 120, 101 S.E. 62 (1919)], is to restrict the exceptions to the operation of the statute of limitations to those found in the statute itself and cognate sections.").

This principle has been applied in ways of particular importance here. For example, plaintiffs seem to argue that Merck would suffer no prejudice if an equitable tolling rule was created. (App. Br. at 27-28.) Yet, Rivera flatly rejected absence of prejudice as a basis for judicial creation of an exception to the statute of limitations:

> Indeed, such an analysis, as described by [plaintiff], would effectively create an exception to the statute of limitations whenever a plaintiff could show that a defendant is not prejudiced by permitting suit against him after the limitations period has expired. . . . [A] court is not free to generally engage in considerations of prejudice to determine whether a statute of limitations should be applied.

257 Va. at 283; 512 S.E.2d at 559-60.

In Arrington, the plaintiff argued that limitations should have been tolled during the pendency of a prior lawsuit despite the absence of a statute authorizing such tolling. 250 Va. at 55; 458 S.E.2d at 290. This Court refused, holding:

> [N]or do we agree that the running of the statute [of limitations] may be tolled, or an exception applied, in the absence of a clear statutory enactment to such effect.

250 Va. at 55-56; 458 S.E.2d at 291.

The Court's jurisprudence thus makes clear that only the General Assembly -- and not the courts -- should create limitations exceptions. For this reason alone, the first question should be answered in the negative.

B. Even if it were ever proper for the courts to create exceptions to the statute of limitations, an exception should not be created for cross-jurisdictional class action tolling.

Tolling based on the pendency of a class action filed by another party in another jurisdiction provides an especially unwarranted occasion for this Court to fashion a judicial exception to the statute of limitations.

In American Pipe, the United States Supreme Court held 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." 414 U.S. at 554; see also Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 353-

54 (1983). As the Second Circuit recognized in its certification order to this Court, the American Pipe ruling applies only to matters pending in federal court for causes of action based on a federal statute. (J.A. at 158.) For all other matters, including the instant case, the availability of tolling of the statute of limitations based on the pendency of a previous class action is governed by state law. (Id.)

Since the American Pipe decision, some states have held that the pendency of a class action in their own judicial system tolls limitations periods for anyone who would have been a member of the class had it been certified. See Wade, 182 F.3d at 286 (collecting cases). As the United States Court of Appeals for the Fourth Circuit has observed:

> It is not particularly surprising that so many states have adopted such a rule, for a state has a similar interest in applying equitable tolling during the pendency of a class action in its own courts as does the federal government in applying equitable tolling during the pendency of a class action in federal court: namely, serving the purpose of the state's class action rule (many of which are identical, or virtually identical, to Federal Rule 23) by deterring "protective" filings of potentially redundant individual suits during the pendency of a class action that may ultimately resolve those suits, and thereby promoting the efficiency and economy of the state's class action procedures.

Id. at 287.

The judicial treatment of the issue has been different, however, when the class action serving as the basis for tolling was filed in another

jurisdiction. Very few states have held that tolling should occur in that circumstance. Recognizing that a different policy analysis should apply, many states have refused to extend tolling principles in this manner.

In Wade, supra, the Fourth Circuit predicted that this Court would not recognize cross-jurisdictional class action tolling. Wade involved plaintiffs who alleged that they were injured as a result of implantation of a medical device. The plaintiffs were encompassed within two product-liability class actions pending in the federal district courts for the Eastern District of Pennsylvania and the Eastern District of Louisiana. After both of those courts ultimately denied class certification, the Wade plaintiffs filed an independent action in the Eastern District of Virginia. The district court granted defendants' motion for summary judgment, refusing to toll the two-year Virginia statute of limitations for the period prior to the class certification denials.

In upholding summary judgment, the Fourth Circuit began by clarifying that its role in construing Virginia law was not to "create or expand that State's public policy," id. at 286, and it cautioned that this Court disfavors adoption of judicial tolling doctrines, id. at 286 n.4 (limitations bars "should not be lifted unless the legislature makes unmistakably clear that such is to occur in a given case") (quoting Burns, 227 Va. 354, 315 S.E.2d

856 (emphasis added)). As further background, the court looked at the practices of other states. It noted that while several states had adopted some form of American Pipe tolling for class actions that were pending in-state, very few had adopted cross-jurisdictional class action tolling, and several had expressly rejected it. Id. at 286-87 (collecting several cases); see also, e.g., Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1025 (9th Cir. 2008) ("The California Supreme Court has not adopted such cross-jurisdictional tolling, however, and few states do.").

The court then concluded that Virginia would not adopt cross-jurisdictional class action tolling, for three reasons. First, it found that Virginia "simply has no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another jurisdiction" -- the typical policy justification for American Pipe tolling. Wade, 182 F.3d at 287. This was particularly so because Virginia itself does not permit class actions. Id. at 287 & n.7; see also Boone v. Citigroup, Inc., 416 F.3d 382, 393 (5th Cir. 2005) (refusing to find cross-jurisdictional tolling based on previous class action filed in Arizona, noting, in part, that "Mississippi does not have class actions"). Second, the court worried that Virginia would be faced with a "flood" of new filings by "forum shopping plaintiffs from across the country" if it adopted a cross-

jurisdictional tolling rule. Wade, 182 F.3d at 287. Third, the court pointed out that Virginia has "historically resisted" making its limitations periods dependent on the "efficiency (or inefficiency) of courts" in other jurisdictions in resolving claims. Id. at 288.

State appellate courts have applied similar reasoning in refusing to recognize cross-jurisdictional class action tolling. In Maestas v. Sofamor Danek Group, Inc., 33 S.W.3d 805 (Tenn. 2000), the Supreme Court of Tennessee rejected the doctrine on multiple grounds. Echoing Wade, the court found that "Tennessee 'simply has no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another jurisdiction, whether those of the federal courts or those of another state.'" Id. at 808 (quoting Wade). In addition, the court was concerned that "[a]doption of the doctrine would run the risk that Tennessee courts would become a clearinghouse for cases that are barred in the jurisdictions in which they otherwise would have been brought." Id. According to the court, "[l]itigants who ordinarily would have filed in other states' courts would file in Tennessee solely because our cross-jurisdictional tolling doctrine would have effectively created an overly generous statute of limitations." Id. The court feared a "mass exodus of rejected putative class members from federal court to Tennessee." Id. at

809. The court also did not want to "make the commencement of the Tennessee statute of limitations contingent on the outcome of class certification as to any litigant who is part of a putative class action filed in any federal court in the United States," because that "would essentially grant to federal courts the power to decide when Tennessee's statute of limitations begins to run." Id. According to the court, "[s]uch an outcome is contrary to our legislature's power to adopt statutes of limitations and the exceptions to those statutes." Id.

The Illinois Supreme Court has applied a similar rationale in rejecting cross-jurisdictional class action tolling. See Portwood v. Ford Motor Co., 701 N.E.2d 1102 (Ill. 1998). As that court explained, such tolling "may actually increase the burden on [a] state's court system," contrary to the purpose of American Pipe. Id. at 1104. This is so because "plaintiffs from across the country may elect to file a subsequent suit in that state solely to take advantage of the generous tolling rule." Id. Thus, "[u]nless all states simultaneously adopt the rule of cross-jurisdictional class action tolling, any state which independently does so will invite into its courts a disproportionate share of suits which the federal courts have refused to certify as class actions after the statute of limitations has run." Id. The court "refuse[d] to expose the Illinois court system to such forum shopping."

Id. The court was similarly unwilling to cede control of the Illinois limitations period to the outcome of federal class action practice:

> Furthermore, because state courts have no control over the work of the federal judiciary, we believe it would be unwise to adopt a policy basing the length of Illinois limitation periods on the federal courts' disposition of suits seeking class certification. State courts should not be required to entertain stale claims simply because the controlling statute of limitations expired while a federal court considered whether to certify a class action.

Id.; see also Bell v. Showa Denko K.K., 899 S.W.2d 749, 757-58 (Tex. App. 1995) (refusing to apply American Pipe as a matter of state law where the previous class action was filed in a different state).

Federal courts applying state law have reached the same result. Confronting the class action tolling issue under California law, the court in Clemens, supra, held that "the weight of authority and California's interest in managing its own judicial system counsel us not to import the doctrine of cross-jurisdictional tolling into California law." 534 F.3d at 1025. Other courts are in accord. See In re Urethane Antitrust Litig., 663 F. Supp. 2d 1067, 1082-83 (D. Kan. 2009) (finding that "only a couple of states appear to have adopted cross-jurisdictional tolling . . . and the Court is not persuaded that Indiana would necessarily follow such a small minority"); In re Vioxx Prod. Liab. Litig., 522 F. Supp. 2d 799, 811 (E.D. La. 2007) ("Absent clear guidance, the Court will not expand Puerto Rico's class

action tolling doctrine."); In re Vioxx Prod. Liab. Litig., 2007 WL 3334339, at *5, *6 (E.D. La. Nov. 8, 2007) (finding that California and Indiana would reject cross-jurisdictional class action tolling); In re Vioxx Prod. Liab. Litig., 2007 WL 3353404, at *3 (E.D. La. Nov. 8, 2007) ("Absent clear guidance, the Court will not adopt a cross-jurisdictional class action tolling doctrine on Kentucky's behalf."); Bozeman v. Lucent Techs. Inc., 2005 WL 2145911, at *3 (M.D. Ala. Aug. 31, 2005) (refusing to recognize cross-jurisdictional class action tolling under Alabama law); Thelen v. Mass. Mut. Life Ins. Co., 111 F. Supp. 2d 688, 694 (D. Md. 2000) (refusing to recognize cross-jurisdictional class action tolling under Maryland law); Barela v. Denko K.K., 1996 WL 316544, at *4 (D.N.M. Feb. 28, 1996) (finding that New Mexico would not recognize cross-jurisdictional class action tolling because "any interest by the New Mexico courts in furthering the economy and efficiency afforded by the New Mexico class action procedure is absent. This Court has been presented no reason to believe that New Mexico would or should toll the statutory period under these circumstances.").

The cases that led to this appeal highlight why class action tolling offers dubious benefits -- at best -- in the product-liability context, and further demonstrate why cross-jurisdictional tolling is all the more ill-advised. Plaintiffs here allege that they suffered injuries from taking a

prescription drug. There has been substantial media coverage about the alleged link between Fosamax and certain jaw injuries -- and numerous individuals filed suits around the country in a timely manner, enough to cause the establishment of a large MDL proceeding. In addition, some class actions -- like Wolfe -- were filed. The Wolfe complaint alleged a class of every single American who ever took Fosamax, whether he or she sought refunds, medical monitoring or an award for personal injury. In other words, the class action was wildly overbroad, the kind of case that did not stand a chance of being certified and thus had no legitimate purpose. See, e.g., In re Rhone-Poulenc Rohrer Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) (granting mandamus to vacate nationwide class certification because, inter alia, variations in negligence law from state to state preclude class certification; the "law of negligence, including subsidiary concepts such as duty of care, foreseeability, and proximate cause" differs among states); In re Rezulin Prods. Liab. Litig., 210 F.R.D. 61, 65-66 (S.D.N.Y. 2002) ("all relevant Court of Appeals and the bulk of relevant district court decisions have rejected class certification in products liability cases"); In re Baycol Prods. Liab. Litig., 218 F.R.D. 197, 204 (D. Minn. 2003) ("[N]o

[federal] Court of Appeals decision has approved class certification of an action involving prescription drugs.”).[1]

In light of these considerations, establishing cross-jurisdictional class action tolling here simply makes no sense. If this Court is ever to disregard its long-standing rule against judicial creation of exceptions to the statute of limitations, it should not do so in the context of a doctrine that furthers interests of no relevance to the Virginia justice system and that risks encouraging out-of-state plaintiffs to forum shop by suing in Virginia, all in ostensible support of the functioning of a procedural mechanism -- the class action -- that Virginia does not even recognize. Although it would be an ill-advised decision no matter what governmental body made it, this addition to Virginia law should be for the General Assembly to consider, not this Court.

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[1] Notably, several courts have refused to apply American Pipe tolling to putative personal-injury class actions, for precisely this reason, recognizing that because such actions are inherently uncertifiable, no reasonable plaintiff would await an inevitable denial of class treatment before filing an individual action. See, e.g., Jolly v. Eli Lilly & Co., 751 P.2d 923, 937 (Cal. 1988) (“[B]ecause personal-injury mass-tort class-action claims can rarely meet” class-certification requirements, “putative class members would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations.”); Barela, 1996 WL 316544 at *4 (American Pipe tolling in personal-injury context is inappropriate); Bell, 899 S.W.2d at 757-58 (refusing to extend American Pipe principles to mass personal-injury suit).

II. Va. Code § 8.01-229(E)(1) does not permit tolling of the statute of limitations due to the pendency of a putative class action in another jurisdiction.

The second certified question asks whether Va. Code § 8.01-229(E)(1) authorizes cross-jurisdictional class action tolling. The statute provides:

> E. Dismissal, abatement or nonsuit
>
> 1. Except as provided in subdivision 3 of this subsection, if any action is commenced within the prescribed limitation period and for any cause abates or is dismissed without determining the merits, the time such action is pending shall not be computed as part of the period within which such action may be brought, and another action may be brought within the remaining period.

This provision does not supply the requisite unmistakably clear legislative statement to support cross-jurisdictional class action tolling. In fact, common sense and this Court's precedents preclude such an interpretation.

A. Plaintiffs must show that the General Assembly has made it "unmistakably clear" and that there does not "exist any doubt" that § 8.01-229(E)(1) creates the exception that they advocate.

"When the language of a statute is unambiguous, [this Court is] bound by the plain meaning of that language." Evans v. Evans, 280 Va. 76, 82, 695 S.E.2d 173, 176 (2010) (citation and quotations omitted). "When interpreting statutes, [this Court] must ascertain and give effect to

the General Assembly's intention, which is to be ascertained from the plain meaning of the words used, unless a literal interpretation would result in a manifest absurdity." Hollingsworth v. Norfolk Southern Ry. Co., 279 Va. 360, 366, 689 S.E.2d 651, 654 (2010).

As noted above, when the legislation at issue pertains to an exception to the statute of limitations, its application to a given set of circumstances must be unmistakably clear. This Court has held:

> In light of the policy that surrounds statutes of limitation, the bar of such statutes should not be lifted unless the legislature makes unmistakably clear that such is to occur in a given case. Where there exists any doubt, it should be resolved in favor of the operation of the statute of limitations.

Burns, 227 Va. at 359, 315 S.E.2d at 859 (emphasis added); accord Rivera, 257 Va. at 283, 512 S.E.2d at 559 (statutes of limitations are to be "strictly enforced and must be applied unless the General Assembly has clearly created an exception to their application") (emphasis added); Arrington, 250 Va. at 55, 458 S.E.2d at 290-91 (statute of limitations applied "unless the General Assembly clearly creates an exception, and any doubt must be resolved in favor of the enforcement of the statute") (emphasis added). "Thus, courts are obligated to enforce statutes of limitations strictly and to construe any exception thereto narrowly."

Westminster Investing, 237 Va. at 547, 379 S.E.2d at 318 (emphasis added).

The interpretation plaintiffs now advocate cannot come close to meeting this standard. Even setting these hurdles aside, however, § 8.01-229(E)(1) simply cannot reasonably be read to authorize cross-jurisdictional class action tolling.

B. Section 8.01-229(E)(1) does not save plaintiffs' claims.

1. The plain language of § 8.01-229(E)(1) refutes the construction advanced by plaintiffs.

Plaintiffs' proposed reading depends on the dubious proposition that when the General Assembly enacted the statute, it meant for it to apply even when the first action was filed by someone other than the plaintiff and even when the plaintiff was not a party to the first action and even when the plaintiff's claims were not at issue in the first action. The Wolfe Fosamax class action on which plaintiffs now seek to rely was filed by people other than plaintiffs; plaintiffs were never parties to Wolfe; and claims for plaintiffs' injuries were never presented in Wolfe.

Plaintiffs are therefore forced to argue that, when the General Assembly used "any action," it meant to include the circumstance in which the plaintiff was not a party to, and was not having his or her claims adjudicated in, the first action. There is no language in the statute to

support this tortured reading. See Armstead v. Com., 55 Va. App. 354, 360, 685 S.E.2d 876, 879 (Va. App. 2009) (citation and internal quotation marks omitted) (refusing to apply a "strained meaning to the plain language of the statute" and noting that "[w]hen interpreting a statute, courts are required to ascertain and give effect to the intention of the legislature, which is usually self-evident from the statutory language"); B.P. v. Com., 38 Va. App. 735, 739, 568 S.E.2d 412, 413-14 (Va. App. 2002) ("[we] will not place a construction upon a statute which leads to an absurd result"). Plaintiffs' proposed reading certainly is not "unmistakably clear" and free from "any doubt," as required by Virginia law.

Moreover, it seems especially unlikely that the General Assembly would have silently harbored the intent to apply the statute to the circumstance of a putative member of a class, in light of the fact that Virginia does not even recognize class actions. Finally, a decision not to certify a class is not an "abatement" or "dismissal" of an action, which are the triggers for invocation of the statute.

The reasonable interpretation is that "any action" refers to a prior lawsuit filed by the plaintiff asserting the claims that are asserted in the second action. If the plaintiff diligently pursued his or her claims by filing a timely lawsuit, § 8.01-229(E)(1) permits disregarding the time during which

that lawsuit was pending if the plaintiff files a subsequent lawsuit after abatement or non-merits dismissal.

2. Plaintiffs' efforts to avoid straightforward application of § 8.01-229(E)(1) are unavailing.

Plaintiffs devise a number of arguments to muster some support for their counterintuitive position. None are persuasive.

a. The routine facts of Welding render it inapposite to the class action issue presented here.

Plaintiffs place heavy reliance on Welding, Inc. v. Bland County Serv. Auth., 261 Va. 218, 541 S.E.2d 909 (2001). That case, however, was not a class action. It does nothing more than clarify that 8.01-229(E)(1) applies even if the plaintiff filed his or her first lawsuit in another jurisdiction. It does not address application of the statute to a plaintiff who was not a party to the prior lawsuit; nor does it consider any of the special class action implications of interpreting the statute to apply to cross-jurisdictional class action tolling. (See J.A. at 164 (Certification Order notes "important factual and procedural differences" in that "Welding did not involve a class action or implicate the policy interests discussed in Wade as reasons to reject cross-jurisdictional tolling in the class action context.").)

In Welding, the plaintiff construction company sued a county service authority in connection with the construction of a piping system for a tunnel

on the border between Virginia and West Virginia. The plaintiff originally filed suit in the United States District Court for the Southern District of West Virginia, but that court found that it lacked jurisdiction because of a forum-selection clause in the contract between the parties. 261 Va. at 222, 541 S.E.2d at 911. The same plaintiff then filed suit on the same cause of action in state court in Virginia. Id. On appeal, this Court held that, under a straightforward reading of the statute, the filing of the suit in federal court in West Virginia tolled limitations for purposes of determining the timeliness of the subsequent suit pursuant to § 8.01-229(E)(1), reversing the trial court's finding that the statute did not apply because the prior action was filed in federal court. 261 Va. at 223-24, 541 S.E.2d at 911-13.[2]

Because Welding did not concern a class action, it did not address applicability of the statutory language where the plaintiff was not an actual party to the prior suit. Nor did it address any of the policy concerns underlying the decision whether to recognize cross-jurisdictional class action tolling, discussed supra. Stretching Welding to reach prior class actions is even more suspect in light of the fact that Welding makes no mention of Wade. That silence would be surprising if Welding meant to

[2] The trial court had based its erroneous view largely on a theory of statutory construction, inferring this restrictive reading from different language in another part of the statute. 261 Va. at 223-24, 541 S.E.2d at 911-13.

reject an important premise of Wade -- that Va. Code § 8.01-229(E)(1) does not endorse cross-jurisdictional tolling for a former putative class member filing suit in Virginia.[3] Thus, Welding cannot reasonably be interpreted as having recognized cross-jurisdictional class action tolling in Virginia.[4]

Although two federal district courts disagree -- and have read Welding to conflict with the Fourth Circuit's holding in Wade, see Torkie-Tork v. Wyeth, 739 F. Supp. 2d 887 (E.D. Va. 2010); Shimari v. CACI Int'l, Inc., 2008 WL 7348184 (E.D. Va. Nov. 25, 2008) -- those two decisions should not guide this Court's analysis.

In Shimari, the court reasoned that § 8.01-229(E)(1) applies to "any action," and since Welding held that it applies to out-of-state actions, it therefore must apply to class actions pending outside the state. 2008 WL

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[3] It is noteworthy that neither party in Welding mentioned Wade in their briefing before this Court. See 2000 WL 34613041, 2000 WL 34613042, 2000 WL 34613043. The parties apparently recognized that Wade, which addressed head-on the issue of cross-jurisdictional class action tolling under Virginia law, had nothing to do with the issue presented in Welding.

[4] Because Welding is not on point, plaintiffs' observation that the General Assembly has not revised § 8.01-229(E)(1) since the decision in Welding is of no significance. (App. Br. at 9.) In any event, the General Assembly has not responded to Wade either, despite the fact that the decision in that case binds federal courts applying Virginia law in Virginia and four other states. See 28 U.S.C. § 41.

7348184, at *2. This reading of the statute makes no sense. Although the statute indeed offers the possibility of tolling for "any action," the trigger for tolling is dismissal or abatement -- not denial of class certification. Moreover, as described above, properly read, the language of the statute indicates that tolling is available for the same action to be refiled in Virginia -- not for a putative member of an uncertified class in a class action brought by somebody else.

Torkie-Tork followed essentially the same analysis, but with the additional observation that it is "implausible to suggest that the General Assembly, in enacting § 8.01-229(E)(1), intended to draw a distinction between class action and non-class action" suits. 739 F. Supp. 2d at 894. As noted above, however, there are significant differences between a plaintiff filing two successive lawsuits on his or her cause action and a plaintiff merely coming within the definition of a class in a prior lawsuit in which a class is never even certified. That, along with the focus of the statute on "abatement" and "dismissal," suggests that such a distinction is quite plausible -- particularly in light of the fact that Virginia itself does not authorize class actions.

Welding simply did not address the question currently before the Court and accordingly does not support plaintiffs' position.[5]

b. Plaintiffs' wrongful death analogy improperly invokes overruled precedent and defeats the argument they seek to make.

Other than Welding, plaintiffs' primary case authority is the overruled decision of McDaniel v. North Carolina Pulp Co., 198 Va. 612, 5 S.E.2d 201 (1956). (App. Br. 14-15.) McDaniel would actually hurt plaintiffs' case even if it were still good law. And, though plaintiffs attempt to brush aside the glaring fact that McDaniel has been overruled (App. Br. at 14 n.5), the grounds that led this Court to label McDaniel "flagrant error" illustrate why plaintiffs' position is ultimately untenable. See Harmon v. Sadjadi, 273 Va. 184, 639 S.E.2d 294 (2007).

In McDaniel, the Court applied a wrongful death statute that plaintiffs say "has almost identical tolling language to subsection 229(E)(1)." (App.

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[5] Plaintiffs attempt to make hay of the fact that the Wade court did not focus on § 8.01-229(E)(1). But it is clear from the ruling that the court simply recognized the inapplicability of that provision and therefore did not dwell on it. See 182 F.3d at 286 n.4 (explaining that the statute "provid[es] for tolling of the limitations period in certain other situations") (emphasis added). Similarly, the parties in Wade did not mention § 8.01-229(E)(1) in their briefing. See 1999 WL 33645090, 1998 WL 34098272, 1998 WL 34098271. As noted above, plaintiffs herein made no mention of § 8.01-229(E)(1), or any other provision of Virginia law, in their initial briefing before the Second Circuit or in their briefing of the issue before the MDL court.

Br. at 14.)[6] Suit was initially brought within the prescribed time period, but the party who filed that lawsuit (Mr. McDaniel) was qualified as decedent's representative only in Nevada. 198 Va. at 613, 95 S.E.2d at 202. That case was dismissed because Virginia law required that the representative be qualified in Virginia. Id. Within one month after dismissal, a new lawsuit was filed, this time brought by Mr. McDaniel and a party who had been qualified as a personal representative in Virginia (Ms. Persinger). Id. The second lawsuit was timely only if limitations was tolled during the pendency of the first lawsuit.

On appeal of the entry of judgment for the defendants in the second case, this Court applied the relevant tolling statute. The Court acknowledged that Mr. McDaniel lacked standing to bring the first lawsuit. The Court, however, disregarded that fact and instead focused on "the question of whether the plaintiffs in the two actions are substantially the

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[6] The statute at issue in McDaniel provided:

> Every such action shall be brought by and in the name of the personal representative of such deceased person, and within one year after his or her death, but if any such action is brought within such period of one year after such person's death, and for any cause abates or is dismissed without determining the merits of such action, the time such action is pending shall not be counted as any part of such period of one year and another suit may be brought within the remaining period of such one year as if such former suit had not been instituted.

Va. Code § 8-634.

same parties." 198 Va. at 619, 95 S.E.2d at 206. The Court found that, in the first case, Mr. McDaniel was "a real party in interest, not a mere figurehead or simply a formal party," and that "[w]hatever the name of the plaintiff, the real party in interest remained the same; the suit was instituted in the same right; and the cause of action was the same." Id. The Court therefore concluded that the filing of the first lawsuit tolled limitations for the second lawsuit.

Even if McDaniel were still good law, its holding would undermine plaintiffs' position, not support it. Contrary to plaintiffs' suggestion, the Court's analysis was not simply an impressionistic assessment of similarities in two lawsuits. Rather, the Court inquired into "whether the plaintiffs in the two actions are substantially the same parties." 198 Va. at 619, 95 S.E.2d at 206 (emphasis added). That analysis offers no help to plaintiffs here. They do not contend -- nor could they -- that they and the parties who filed Wolfe are substantially the same. Indeed, as the California Supreme Court has explained, the very problem with personal-injury actions is that the plaintiffs and the class members they would represent are not substantially the same:

> The major elements in tort actions for personal injury – liability, causation, and damages – may vary widely from claim to claim, creating a wide disparity in claimants' damages and issues of defendant liability, proximate cause, liability of skilled

> intermediaries, comparative fault, informed consent, assumption of the risk and periods of limitation. . . .Because of [these] . . . differences. . . the . . . class suit . . . could not have apprised defendants of plaintiff's substantive claims.

Jolly, 751 P.2d at 936. Here, the MDL court denied certification in Wolfe on this basis, finding that "class-treatment of these claims is inappropriate because they present too many individual questions of fact particular to each class member's claim." In re Fosamax, 248 F.R.D. at 391. Ms. Wolfe is also not "the real party in interest" for the attempt by plaintiffs herein to recover for the injuries, personal to them, that they attribute to Fosamax. In McDaniel, the two suits involved the very same injury for the very same occurrence, the only difference being the addition of another representative for the decedent. That is a far cry from the cases before this Court.

More importantly, however, this Court has overruled McDaniel because it was too lenient in its comparison of the first and second lawsuits. In Harmon, the Court noted that "[o]ur jurisprudence is clear that when a party without standing brings a legal action, the action so instituted is, in effect, a legal nullity," and thus cannot toll limitations. 273 Va. at 193, 639 S.E.2d at 299. In other words, McDaniel was wrongly decided because the Court failed to demand that the plaintiff in the first suit satisfy the additional requirement of having standing to assert the rights that were at issue. The Court accordingly stated that "the rule set forth in McDaniel is

clearly a mistake and a flagrant error that we will not perpetuate." Harmon, 273 Va. at 197, 639 S.E.2d at 301. The Court could "discern no basis to carve out an exception to our otherwise clear precedent that lack of standing causes a party's legal proceeding to be of no legal effect." Id. Because "Harmon, as a foreign personal representative not qualified in Virginia, had no legal standing to file the October 2003 motion for judgment," his "motion for judgment had no legal effect and, as a nullity, could not act to toll the running of the statutory period applicable under Code § 8.01-243." Id. at 198, 639 S.E.2d at 301-02. (emphasis added).

Harmon shows that application of the Virginia tolling statutes requires careful inspection of the particulars of any claim that the plaintiff's rights were asserted in the first lawsuit. As noted above, plaintiffs herein could not even come close to meeting the requirements as applied in McDaniel. They clearly cannot meet the requirement added by Harmon that the plaintiff in the first action (Ms. Wolfe) have standing to litigate the rights of those who sue in the second action (plaintiffs herein). "An individual or entity does not acquire standing to sue in a representative capacity by asserting the rights of another, unless authorized by statute to do so." W.S. Carnes, Inc. v. Bd. of Supervisors of Chesterfield Cty, 252 Va. 377, 478 S.E.2d 295, 300 (1996). There was no authorizing statute here, and, in

fact, class certification was denied. Where a class is not certified, the plaintiff bringing the class action of course lacks standing to assert the rights of others. Accordingly, plaintiffs' argument for statutory cross-jurisdictional class action tolling cannot stand under Harmon.

c. Plaintiffs' plea for liberal construction stretches § 8.01-229(E)(1) far beyond any reading supported by the statutory language or precedent.

Plaintiffs also argue that § 8.01-229(E)(1) must be read to permit cross-jurisdictional class action tolling because it is a remedial statute that should not "be frittered away by any narrow construction" (App. Br. at 11) (citing Woodson v. Commonwealth Util., Inc., 209 Va. 72, 74, 161 S.E.2d 669, 670 (1968)).

In Woodson, unlike here, the plaintiff in the second lawsuit was the same as the plaintiff in the first lawsuit.[7] The debt sued on was identical. The Court noted that the relevant statute applied "in certain specific instances," 209 Va. at 74, 161 S.E.2d at 670-71 (emphasis added), and found that the first lawsuit was "clearly within the letter of the saving provision" of the tolling statute. 209 Va. at 75, 161 S.E.2d at 671. In the other case from this Court cited by plaintiffs in support of liberal

[7] The plaintiff in the second lawsuit was the substitute trustee for the plaintiff in the first lawsuit.

construction, it was again clear that the plaintiff and claims in the earlier proceeding were exactly the same as those in the subsequent proceeding. See Baker v. Zirkle, 226 Va. 7, 307 S.E.2d 234 (1983). This Court even noted that "[a]ctually [the relevant code section] does not require a liberal construction. In furtherance of the legislative goal, we need give the word 'toll' only the meaning it is usually accorded in the statute-of-limitations context." 226 Va. at 13, 307 S.E.2d at 237.

As is well evidenced by Harmon, this Court has not interpreted the tolling statutes to find timeliness not authorized by the pertinent statutory language. Plaintiffs' burden is to show that the General Assembly has made it unmistakably clear that an exception to the statute of limitations applies here. They are not able to do so.

CONCLUSION

For the foregoing reasons, this Court should answer both certified questions in the negative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of November, 2011, fifteen bound copies with one electronic copy on CD of this Brief of Appellee have been hand-filed with the Supreme Court of Virginia, and three bound copies and one electronic copy on CD of this Brief of Appellee have been served, by first-class postage prepaid mail, upon counsel for the Appellant:

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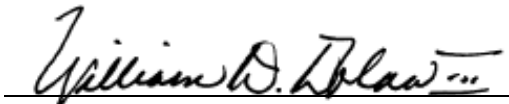
I FURTHER CERTIFY that pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, the foregoing Brief of Appellee does not exceed 50 pages or 8,750 words.



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