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.

OPENING BRIEF OF APPELLANTS

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OPENING BRIEF OF APPELLANTS

This Court has agreed to decide two certified questions from the United States Court of Appeals for the Second Circuit. The principal question before the Court is whether the pendency of a class action in Tennessee federal court tolls Virginia's statute of limitations.

The Plaintiffs were part of the putative nationwide class action against Merck relating to injuries allegedly caused by its product Fosamax. The class action, which was filed in Tennessee, involved substantially identical claims to individual actions the Plaintiffs filed in federal court in New York while the class action was pending. When class certification was denied and the class action was dismissed, Merck moved to dismiss the individual actions as time-barred under Virginia's two year statute of limitations.

Virginia Code § 8.01-229(E)(1) tolled the statute of limitations for Plaintiffs' claims during the pendency of the class action. Under this statute, a timely-filed federal action filed outside of Virginia tolls the statute of limitations, and permits a second action raising a similar cause of action to be brought when the first action concludes without an adjudication on the merits. *Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 224 (2001). This tolling statute, which evinces the General Assembly's intent that actions be tried on their merits, plainly applies here.

The statute of limitations was also tolled during the pendency of the class action under the authority of *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974). The equitable tolling rule adopted by the United States Supreme Court in *American Pipe* recognizes that class actions are representative actions, and the limitations period for putative class members should be tolled during pendency of the class action whether the class is certified or not. By maintaining the status quo during the pendency of another action, *American Pipe* advances the same goal that the General Assembly achieved in enacting subsection 229(E)(1) – ensuring that plaintiffs receive an adjudication on the merits. Therefore, equitable tolling of the statute of limitations is also available under Virginia law.

ASSIGNMENTS OF ERROR

There are no assignments of error. Rather, this Court has agreed to accept two certified questions from the Second Circuit.

CERTIFIED 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 Ann. § 8.01-229(E)(1) permit tolling of a state statute of limitations due to the pendency of a putative class action in another jurisdiction?

STATEMENT OF THE CASE

On September 15, 2005, a class action was filed in the United States District Court for the Middle District of Tennessee. That action, *Wolfe v. Merck & Co.*,[1] was filed for "[a]ll persons who consume or have consumed FOSAMAX, whether intravenously or by mouth." (JA 118). There was no geographic limitation on the putative class members. (JA 115-116, 118). On behalf of this nationwide class, *Wolfe* raised claims of strict liability, negligence and medical monitoring against Merck. (JA 119-123).

Fosamax is a bisphosphonate used to treat osteoporosis. (JA 117). The class action alleged that Fosamax caused osteonecrosis of the jaw (bone death), and each of the named potential class representatives and putative class members suffered osteonecrosis of the jaw. (JA 115-116, 118, 153). Merck manufactured, marketed, and distributed Fosamax. (JA 116).

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[1] The Second Circuit refers to *Wolfe* as the "putative class action." (JA 154).

The *Wolfe* action was transferred to the United States District Court for the Southern District of New York as part of Fosamax multi-district litigation. (JA 129, 154). On January 28, 2008, after having denied class certification, the United States District Court for the Southern District of New York dismissed the *Wolfe* class. (JA 126).

Prior to dismissal of the *Wolfe* class action, four individual actions were filed against Merck in the Southern District of New York on behalf of plaintiffs alleging Fosamax injuries: Rebecca Quarles, Dorothy Deloriea, Ora Casey, and Roberta Brodin (collectively, "the Plaintiffs").[2] (JA 151, 153). The Plaintiffs are Virginia residents who took Fosamax and were diagnosed with osteonecrosis of the jaw. (JA 153). They raised claims of strict liability, failure to warn, breach of express and implied warranty, and negligence. (JA 153).

All four Plaintiffs filed suit in federal court more than two years after they were injured by Fosamax. (JA 153). However, the Plaintiffs were putative members of the *Wolfe* class action, (JA 154), which was filed

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[2] *John Casey, Individually and as Administrator of the Estate of Ora Casey v. Merck & Co., Inc.*, Case No. 1:08-cv- 00896-JFK (JA 8); *Rebecca Quarles and Robert Schnurr, her husband v. Merck & Co., Inc.*, Case No. 1:07-cv-11334-JFK (JA 88); *Dorothy C. DeLoriea v. Merck & Co., Inc.*, Case No. 1:08-cv-09728-JFK (JA 64); *Roberta and Thomas Brodin v. Merck & Co., Inc.*, Case No. 1:07-cv-03466-JFK (JA 16) .

within two years of the date of injury of each of the Plaintiffs.[3] The Plaintiffs would have been members of the *Wolfe* class if the district court had certified that class. (JA 154).

Merck moved for summary judgment against the Plaintiffs alleging that their actions were untimely under Virginia's two-year statute of limitations. (JA 154). The district court granted Merck's motion, finding that the pendency of the *Wolfe* class action did not toll the Virginia limitations period for the Plaintiffs' state law claims. (JA 155). It also specifically rejected the Plaintiffs' argument that the statute of limitations was tolled by the pendency of the *Wolfe* class action under the authority of *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974). (JA 151, 155). Instead, the district court based its opinion upon an outdated Fourth Circuit opinion, *Wade v. Danek Medical Inc.* 182 F.3d 281 (4th Cir. 1999), which attempted to predict how this Court would answer the tolling

[3] The Casey action was filed on January 25, 2008, one month after Ora Casey's death. She had been diagnosed with osteonecrosis of the jaw in 2004. The Quarles action was filed on December 17, 2007; Rebecca Quarles was diagnosed with osteonecrosis of the jaw and failure of dental implants on October 31, 2003. The Deloriea action was filed on November 12, 2008; Dorothy Deloriea was diagnosed with osteonecrosis of the jaw and osteomyelitis in 2004. The Brodin action was filed on May 1, 2007; Roberta Brodin was diagnosed with osteonecrosis of the jaw in 2005. (JA 153).

question. (JA 156). *Wade* concluded that this Court would not adopt cross-jurisdictional tolling under *American Pipe*. *Wade*, 182 F.3d at 290.

The Plaintiffs appealed to the United States Court of Appeals for the Second Circuit. That Court held that the claims raised in the class action and in the Plaintiffs' individual cases were "substantially identical." (JA 154). It further held that, pursuant to Merck's agreement, the Plaintiffs would have been members of the *Wolfe* class had the certification motion been granted by the district court. (JA 154).

Faced with a choice of law question, the Second Circuit decided that Virginia law governs the question of whether Plaintiffs' claims were tolled by the *Wolfe* class action. (JA 152). However, the Court found that there was no controlling or definitive statement of Virginia law on this question. Although in 1999 the Fourth Circuit in *Wade* had forecast that Virginia would not adopt cross-jurisdictional tolling, this Court did just that two years later in *Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 224 (2001). (JA 161-163). The Second Circuit also noted that *Wade* did not address Code § 8.01-229(E)(1), referring to it "obliquely" in a footnote as applicable in "certain <u>other</u> situations" which were neither identified nor discussed. (JA 161). Further, the Second Circuit recognized two recent opinions from the Eastern District of Virginia that called *Wade's* prediction wrong, and

expressly held that Virginia had permitted cross-jurisdictional tolling in *Welding*. (JA 162-164).

Welding and the Eastern District cases gave the Second Circuit "reason to believe that *Wade* may not be a correct statement of Virginia law." (JA 164). Questioning the accuracy of *Wade's* prediction that Virginia would not permit tolling of a federal class action outside of Virginia, the Second Circuit asked this Court to state "whether *Wade* accurately predicted Virginia law." (JA 164).

Accordingly, the Second Circuit certified two questions of law to this Court. (JA 164-165). On September 21, 2011, this Court accepted the certified questions of law. (JA 167).

STATEMENT OF MATERIAL FACTS

The facts giving rise to this appeal are set forth in the Second Circuit's certification opinion and in the Statement of the Case above.

STANDARD OF REVIEW

There is no standard of review that governs this appeal. Rather, the Court has agreed to answer certified questions from another court which ask the Court to state what Virginia law is. Thus, this appeal presents pure questions of law for the Court.

ARGUMENT

1. THE PENDENCY OF A PUTATIVE CLASS ACTION IN ANOTHER JURISDICTION TOLLS VIRGINIA'S STATUTE OF LIMITATIONS UNDER CODE § 8.01-229(E)(1).

A. Under established Virginia law, Code § 8.01-229(E)(1) tolls the statute of limitations in federal cases outside Virginia.

This Court has already held that Virginia law permits tolling of an action filed in federal court. *Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 224 (2001). In *Welding*, this Court found 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.

Welding involved a breach of contract claim arising out of the construction of a piping system in a highway tunnel. The plaintiff filed suit against Bland County in the United States District Court for the Southern District of West Virginia. *Id.* at 222. The federal court dismissed the suit because it was not filed in a forum permitted by the contract's forum selection clause. *Id.* The plaintiff then filed an action against Bland County in the Circuit Court of Bland County. *Id.*

Bland County argued that the suit must be dismissed because the plaintiff failed to timely institute the action under the 6 month window prescribed by the Procurement Act. *Id.* The trial court found that filing the

action in a forum outside the Commonwealth did not toll the action under Code § 8.01-229(E)(1), and dismissed it. *Id.*

The Supreme Court reversed. It held that Code § 8.01-229(E)(1) applies to "civil litigation in both the state and federal courts." *Id.* at 224. It further held that subsection (E)(1)'s tolling provision "applies to 'any action' which abates or is dismissed without determining the merits." *Id.* The 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.* Thus, *Welding* illustrates the broad application of Code § 8.01-229(E)(1)'s tolling provision.

Welding has been the law for a decade, and the legislature has not amended Code § 8.01-229(E)(1) to alter *Welding*'s holding. Thus, the legislature has tacitly approved of this Court's interpretation of section 8.01-229(E)(1). *See, e.g.*, *Waterman v. Halverson*, 261 Va. 203, 207 (2001) (legislature presumed to be familiar with Supreme Court's decisions, and failure to alter those decisions indicates agreement with them); *Weathers v. Commonwealth*, 262 Va. 803, 805 (2001) ("When the General Assembly acts in an area in which one of its appellate courts already has spoken, it is presumed to know the law as the court has stated it and to acquiesce therein, and if the legislature intends to countermand such appellate

decision it must do so explicitly.") Thus, the General Assembly agrees that section 8.01-229(E)(1) applies to federal actions, even those not filed in Virginia.

B. Code § 8.01-229(E)(1) tolling extends to federal class actions filed outside Virginia.

Although *Welding* did not involve a class action filed in a federal court outside of Virginia, this Court made it clear that its holding would apply to that type of action: "There is 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 federal court." *Welding*, 261 Va. at 224. Thus, this Court has already held that this subsection applies to cases filed in federal court outside of Virginia *and* applies to any type of action. *Id.* It is a foregone conclusion, then, that a putative class action filed in federal court falls within the ambit of the statute.

But the conclusion that this tolling provision applies to putative class actions is not compelled solely by the Court's holding in *Welding*. It also is supported by the purpose of the statute, its plain language, and the interpretation of other courts which have examined the issue.

1. Code § 8.01-229(E)(1) is a remedial statute that must be liberally construed.

Tolling statutes like subsection 229(E)(1) are highly remedial statutes that must be liberally construed, and must not be "frittered away by any narrow construction." *See Woodson v. Commonwealth Utility, Inc.*, 209 Va. 72, 74 (1968) (tolling provision in former Code § 8-34)[4]; *Baker v. Zirkle*, 226 Va. 7, 13 (1983) (medical malpractice tolling provision). The purpose of this statute, like other tolling provisions, is to grant an extended period during which a claim might be prosecuted to afford litigants a hearing on the merits. *See Strickland*, 221 Va. at 735 (Code § 8.01-229(E)(1)). Its goal is to save the right of action for plaintiffs who, without fault, have been unable to obtain an adjudication of the merits. *Atkins v. Schmutz Mfg. Co.*, 435 F.2d 527, 530 (4th Cir. 1970).

Considering its remedial purpose, Code § 8.01-229(E)(1) may not be narrowly construed. In fact, a broad and liberal construction is necessary to effectuate the legislature's intent that the filing of any action toll the statute of limitations to afford a plaintiff an adjudication on the merits.

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[4] In 1977, the legislature enacted Code § 8.01-229 to bring together various tolling statutes, including section 8-34. *Strickland v. Simpkins*, 221 Va. 730, 733 (1981); Revisors' Note to Code § 8.01-229 (1977) ("Section 8.01-229 consolidates in one section various situations which have the general effect of tolling or suspending the running of statutes of limitation . . ."). Subsection 229(E)(1) "significantly expanded" the tolling that was available under former section 8-34. *Prohm v. Anderson* , 220 Va. 74, 78 (1979).

2. *The plain and unambiguous language of Code § 8.01-229(E)(1) applies the remedial tolling provision to class actions.*

Denying application of this tolling provision to putative class actions is contrary to the purpose of the statute, as expressed in the plain language of the statute itself.

The plain language of Code § 8.01-229(E)(1) tolls the statute of limitations for putative federal class actions. "A primary rule of statutory construction is that courts must look first to the language of the statute. If a statute is clear and unambiguous, a court will give the statute its plain meaning." *Loudoun County Dep't of Social Servs. v. Etzold*, 245 Va. 80, 85 (1993); *see also Davenport v. Little-Bowser*, 269 Va. 546, 555 (2005); *Vaughn, Inc. v. Beck*, 262 Va. 673, 677 (2001). Under the plain meaning rule, the meaning of a statute is determined from the words the legislature actually used. *Jackson v. Fid. & Deposit Co.*, 269 Va. 303, 313 (2005); *HCA Health Servs. of Va., Inc. v. Levin*, 260 Va. 215, 220 (2000) ("Courts must give effect to legislative intent, which must be gathered from the words used, unless a literal construction would involve a manifest absurdity.")

The language of subsection 229(E)(1) is clear and unambiguous. Therefore, it must be given its plain meaning. It provides that the statute of

limitations is tolled for "any action" that is timely filed but is dismissed or abates without a determination on the merits, and "another action" may be brought within the remaining period. This language is broad and sweeping.

The conclusion that subsection 229(E)(1) applies to class actions is inescapable from the plain meaning of the statute. As this Court held in *Welding*, nothing in that provision restricts its application to a particular *type of action*. 261 Va. at 224. To the contrary, it covers "any action" that is timely filed that later concludes on a non-merits basis. It 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.

The term "any action" is expansive, and extends application of this statute to any type of action regardless of where it is filed or how it is brought. In short, this language evinces the legislature's intent that "any action" get the benefit of the tolling provision if it concludes without an adjudication on the merits.

i. An "action" under Code § 8.01-229(E)(1) refers to a cause of action.

When the statute speaks of "action," it refers to a cause of action. *See McDaniel v. North Carolina Pulp Co.*, 198 Va. 612, 614 (1956).[5] In *McDaniel*, this Court construed an old wrongful death tolling statute, Code § 8-634, which has almost identical tolling language to subsection 229(E)(1). Code § 8-634 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.*

Id. at 614 (emphasis added). First noting that the tolling statute was highly remedial and must be broadly construed, this Court then held that the term "action" meant a substantially similar cause of action, and was not limited to an identical one. *Id.* at 616. The Court reasoned:

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[5] This Court has overruled *McDaniel* on standing grounds which are not at issue here. *Harmon v. Sadjadi*, 273 Va. 184, 193 (2007). *McDaniel* is cited solely for its discussion of virtually identical statutory language to that contained in Code § 8.01-229(E)(1), and not for its holding, which no longer has precedential value.

> "This does not mean that the second suit must be a literal copy of the first, or that the same form of action should be adopted; nor is it essential that the legal theory or ultimate remedy of the two actions be identical. However the subject matter or the gist thereof, must be the same in both actions."

Id. at 616-617 (quoting 54 C.J.S. §289).

ii. The class action and individual actions involved the same or substantially identical cause of action.

The same reasoning applies here. As the Second Circuit has held, the putative class action filed in *Wolfe* is "substantially identical" to the actions filed by the Plaintiffs in New York federal court. (JA 154). Thus, the two actions easily satisfy, and in fact exceed, the "substantially similar" test for comparing causes of actions.

The *Wolfe* class action and the Plaintiffs' individual actions raise the same cause of action – bone death to the jaw caused by Fosamax. *See Roller v. Basic Constr. Co.*, 238 Va. 321, 327 (1989) (a cause of action is broadly construed to mean the set of operative facts which, under substantive law, give rise to a right of action). The basic elements of a cause of action are a legal obligation of the defendant to the plaintiff, a violation or breach of that duty, and a consequential injury or damage to the plaintiff. *Caudill v. Wise Rambler, Inc.*, 210 Va. 11, 13 (1969). These elements are the same in both the class action and the individual actions.

The *Wolfe* action plainly put Merck on notice that the Plaintiffs were claiming personal injuries relating to their use of Fosamax. Therefore, the statutory tolling provision should have preserved their claims.

iii. Under the plain language of the tolling statute, the term "another action" does not mean an identical cause of action.

Subsection 229(E)(1) treats as timely filed "another action" brought when the first action concludes without reaching the merits. The term "another action" means another cause of action similar to the first action. As used in this subsection, "another" is an adjective defining "action." When used as an adjective, "another" means:

> **1:** different or distinct from the one first considered <the same scene viewed from *another* angle>
>
> **2:** some other <do it *another* time>
>
> **3:** being one more in addition to one or more of the same kind <have *another* piece of pie>

www.merriam-webster.com/dictionary/another. These definitions establish that the common meaning of "another" does not mean identical, and provides room for actions which are similar, but different or distinct from the previous action. Such an interpretation is consistent with the common meaning of the term, the purpose of the statute, and its liberal construction.

Other language used in subsection 229(E)(1) indicates that it does not limit tolling to actions that are identical. First, the legislature used the term "such action" when describing the action which tolls the statute of limitations, but used the term "another action" when referring to the second action that may be brought. The use of different terms means that the legislature intended the terms to mean something different. *Forst v. Rockingham Poultry Mktg. Coop., Inc.*, 222 Va. 270, 278 (1981) ("When the General Assembly uses two different terms in the same act, it is presumed to mean two different things.")

Second, the legislature did not use the word "refile" to explain what could be done when the first action concludes. Instead, it specifically stated that "another action could be *brought*." If the legislature had intended to limit the tolling effect to identical actions, then it would have used the word "refiled" instead of "brought."

In short, if "another action" meant an action identical to the first, the legislature would have said so. Thus, if only identical actions were tolled under subsection 229(E)(1), the legislature would have used language to signal that result. It didn't.

Therefore, the term "another action" plainly does not refer to the identical action that abated or was dismissed, and the term "another action" includes the action the Plaintiffs filed in federal court in New York.

iv. Section 8.01-229(E)(1) would have to be rewritten to exclude class actions.

To exclude class actions from the scope of the tolling provision requires the Court to do what established principles prohibit – add language to the statute (e.g., " . . . except for class actions"). This Court has consistently refused to add language to a statute that the General Assembly declined to employ. *E.g.*, *Virginian-Pilot Media Cos., LLC v. Dow Jones & Co.*, 280 Va. 464, 468 (2010); *Vaughn, Inc.*, 262 Va. at 678-9 (a court "may not construe the statutes plain language in a manner that amounts to holding that the General Assembly meant to add a requirement to the statute that it did not actually express"). To find that the legislature did not intend to include putative class actions under the remedial provisions of subsection 229(E)(1), this Court would have to say that the subsection does not mean what it says. It can't.

3. Policy considerations support application of Code § 8.01-229(E)(1) to putative class actions.

As a matter of policy, it is clear why the General Assembly choose not to treat class actions differently from any other type of action. If the

federal court had certified the class action, the Plaintiffs could have prosecuted their claims in that action and would have been entitled to an adjudication of their claims on the merits. Their claims would not have been time-barred, and Merck could not claim that it lacked notice of their claims. This is because a class action – even before certification – puts a defendant on notice of the claims. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983) ("Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification."); *American Pipe*, 414 U.S. at 554-555 (within the limitations period, the defendant has notice of the substantive claims and number and generic identities of the potential class plaintiffs). Statutes of limitation are primarily designed to assure fairness to defendants, and that purpose has been satisfied here. *See Crown, Cork & Seal Co.*, 462 U.S. at 353; *American Pipe*, 414 U.S. at 554-555.

The plain language of subsection 229(E)(1) includes federal actions, and is not limited to any specific type of action. *Welding*, 261 Va. at 224. Nothing in that subsection excludes putative class actions. As they are simply one type of federal action, (*see* Fed. R. Civ. P. 23), there is no sound rationale for treating them differently. *Torkie-Tork v.* Wyeth, 739 F.

Supp. 2d 887, 894 (E.D. Va. 2010) ("[I]t 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 federal civil suits that federal law itself does not recognize."). In short, "it is clear . . . from the language of subsection (E)(1) itself, that there is no coherent basis to distinguish the tolling statute's application to a standard federal civil – to which, after *Welding*, statutory tolling clearly applies – from its application to a federal class action suit." *Id.*

There is no public policy that requires Virginia to ignore the federal judicial system or its class-action procedures. The federal court system is "'one great system for the administration of justice' with a singularity and a unity which encourages and requires conformity in the functioning of each of the parts to the purposes and objectives of a highly cohesive whole." *Atkins*, 435 F.2d at 531 (quoting *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514, 517 (4th Cir. 1955)). Federal class actions do not offend Virginia policy. If fact, they can be, and routinely are, filed in Virginia's federal courts. That Virginia does not have its own class action statute does not mean that Virginia cannot recognize the purpose and importance of class actions. Thus, Virginia will not violate any state policy by

acknowledging the class-action procedures established by Congress for resolution of such matters in the federal court system.

4. Other courts have held that Code § 8.01-229(E)(1) applies to putative class actions outside of Virginia.

The Eastern District of Virginia has twice held that Code § 8.01-229(E)(1) tolls the statute of limitations during the pendency of a federal class action filed outside of Virginia. *Torkie-Tork v.* Wyeth, 739 F. Supp. 2d 887 (E.D. Va. 2010) (Judge T.S. Ellis, III); *Shimari v. CACI International, Inc.*, 2008 U.S. Dist. LEXIS 112067, 2008 WL 7348184 (E.D. Va. 2008) (Judge Gerald Bruce Lee).

i. Shimari v. CACI International, Inc.

Shimari arose out of torture allegations at Abu Ghraib prison in Iraq. A class action was filed on behalf of a class of Iraqis against several defendants. Class certification was later denied. Several plaintiffs with common law tort claims against the defendants were putative members of the class. In a short opinion, the district court found that *Welding* expressly recognized cross-jurisdictional tolling, and held that the class action tolled the statute of limitations on the plaintiffs' torture claims. *Shimari*, *4-5.

ii. Torkie-Tork v. Wyeth

Two years later, the district court revisited the issue in *Torkie-Tork*, a products liability case against the maker of Prempro, a prescription

hormone therapy drug. 739 F. Supp. 2d at 888-889. In June 2002, the plaintiff was diagnosed with breast cancer. *Id.* at 889. She discovered at that time that her cancer was caused by hormones such as those contained in the Prempro she had taken. *Id.* She filed a personal injury suit against the Prempro manufacturer in Virginia state court in July 2004, more than two years after she was injured. *Id.* Her case was transferred to an Arkansas federal court for participation in Prempro multi-district litigation. *Id.*

At the conclusion of multi-district proceedings, the plaintiff's case was returned to the Eastern District of Virginia for further case-specific proceedings, and the defendant argued that the action was time-barred under Virginia's two-year statute of limitations. *Id.* However, before the plaintiff filed her action in state court, a federal class action suit had been filed in the Northern District of Illinois on behalf of all persons injured by Prempro. *Id.* at 892, 895.

Relying upon *Welding* and the plain language of Code § 8.01-229(E)(1), the district court held that the pendency of the federal class action suit tolled the statute of limitations. In so holding, the district court rejected the Fourth Circuit's "speculative inquiry" in *Wade*: "it strains credulity to suggest that *Welding's* broad holding – that the tolling statute is

in no way limited to state court or to 'a specific type of action' – can be reconciled with *Wade's* prediction of how the Supreme Court of Virginia would rule on this issue." *Id.* at 894. Grounding its analysis in the language of the statute, the district court found no basis to exclude from the scope of the tolling statute federal class action suits when the General Assembly chose not to. *Id.*

The Eastern District of Virginia is correct. The plain language of the tolling statute, together with *Welding's* broad construction of the provision, lead to the inescapable conclusion that the pendency of a federal class action tolls the statute of limitations.

C. The Fourth Circuit's predictive analysis in *Wade* was wrong.

Wade v. Danek Medical, Inc. 182 F.3d 281 (4th Cir. 1999) was wrongly decided. It failed to correctly predict whether this Court would recognize cross-jurisdictional tolling, as the Court in fact did only two years later in *Welding*. *Welding*, 261 Va. at 224. Equally important, *Wade* did not even address the tolling provision contained in Code § 8.01-229(E)(1), finding without any discussion that it applied in "certain other situations." *Wade*, 182 F.3d at 286,n.4. Nevertheless, as this Court is the final arbiter of Virginia law, the Fourth Circuit's predictions in *Wade* do not control or

guide this Court's determination of the certified questions presented here. Only this Court definitively determines what Virginia law is.

First, this Court need look no further than *Welding* to conclude that *Wade* incorrectly predicted that Virginia would not permit cross-jurisdictional tolling. *Welding* clearly stands for the proposition that the pendency of a federal action in another jurisdiction tolls the statute of limitations under subsection 229(E)(1). 261 Va. at 224. As *Welding* established, the tolling statute itself answers the question about cross-jurisdictional tolling.

Second, the Fourth Circuit did not even analyze subsection 229(E)(1) or its tolling effect on a class action filed in another jurisdiction. Rather, it dismissed the tolling statute in a footnote deciding, without any discussion, that it applied in "other" situations. *Wade*, 182 F.3d at 286,n.4; *Torkie-Tork*, 739 F. Supp. 2d at 893 (nothing that the court in *Wade* mentions the tolling statute "as an aside" without explaining why it does or does not apply). As *Welding* focused exclusively on subsection 229(E)(1), the Fourth Circuit's failure to include that provision in its analysis of the availability of cross-jurisdictional tolling for class actions completely undermines its conclusion. Had the Fourth Circuit had the benefit of *Welding* and its analysis of subsection 229(E)(1), it would have reached a different conclusion. *See*

Torkie-Tork, 739 F. Supp. 2d at 893 (when *Wade* was decided, there was "no case law on point," forcing the court to engage in a "somewhat speculative inquiry").

Finally, the plain language of the statutory tolling provision is dispositive. As discussed, the broad and inclusive language in subsection 229(E)(1) does not differentiate between types of actions. *Welding*, 261 Va. at 224. Rather, it includes "any action" within its coverage. The clear, unambiguous and broad language of the tolling statute forecloses the Fourth Circuit's policy rationales against cross-jurisdictional tolling. With such clear statutory language, the legislature has already set that policy, and no court may change it.

2. THE *AMERICAN PIPE* RULE EFFECTUATES THE GENERAL ASSEMBLY'S INTENT THAT TIMELY-FILED CLAIMS BE ADJUDICATED ON THE MERITS.

The United States Supreme Court has held that the timely commencement of the class action suit tolls the running of the statute of limitations for all purported members of the class. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).[6] Once the limitations period is

[6] The Supreme Court later affirmed and expanded the *American Pipe* rule in *Crown, Cork & Seal, Co, Inc. v. Parker*, 462 U.S. 345 (1983).

tolled, it remains tolled for all members of the putative class until class certification is denied. *Crown, Cork & Seal, Co, Inc.*, 462 U.S. at 353-354.

Known as the *American Pipe* rule, this equitable tolling principle serves the important function of avoiding multiple suits and putting potential class members on equal footing whether class certification is granted or denied. Under this rule, the filing of a class action preserves the claims of all class members so they may have their day in court – whether the action is permitted to continue as a class action or class certification is denied and individual claims must be pursued. Thus, the *American Pipe* rule is entirely in accord with the General Assembly's intent that timely filed claims be adjudicated on the merits. *See Strickland v. Simpkins*, 221 Va. 730, 733 (1981) (purpose of 8.01-229(E)(1) is to afford litigants a hearing on the merits); *Atkins v. Schmutz Mfg. Co.*, 435 F.2d 527, 530 (4th Cir. 1970) (same).

A. The *American Pipe* rule preserves timely-filed class claims for adjudication on the merits.

In *American Pipe*, the United States Supreme Court held that the filing of a class action suit tolls the statute of limitation for all putative class members, even when class certification is denied. 414 U.S. at 553. This holding advances the purpose and function of Federal Rule of Civil Procedure 23, the class action rule, because a federal class action is "a

truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* at 550. As a representative suit, a class action satisfies "the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs." *Id.* at 551. To hold otherwise would frustrate the purpose of class actions by encouraging protective filings and multiple suits, something Rule 23 was intended to avoid. *Id.* Accordingly, the filing of a timely class action complaint commences the action for all members of the class. *Id.* at 550.

The *American Pipe* Court concluded that such a rule was consistent with the purpose of the statute of limitations. *Id.* at 554. Limitation periods ensure fairness to defendants "by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* The class action puts the defendant on notice of the class, thereby avoiding surprise and unfairness:

> The policies of ensuring essential fairness to defendants and of barring a plaintiff who "has slept on his rights" . . . . are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and

> generic identities of the potential plaintiffs who may participate in the judgment.

Id. (quoting *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965)). Because a class action defendant is on notice of the representative claims, tolling under these circumstances does not undermine the purpose or operation of the statute of limitations. *Crown, Cork & Seal Co, Inc.*, 462 U.S. at 352 (the class complaint notifies the defendant not only of the substantive claims, but also of the number and generic identities of the potential plaintiffs). And, because Rule 23 "both permits and encourages class members to rely on the named plaintiffs to press their claims," those class members cannot be accused of "sleeping on their rights." *Id.* at 352-353.

Further, the filing of the class action does not unnecessarily delay an adjudication on the merits because "determination whether an action shall be maintained as a class action is made by the court 'as soon as practicable after the commencement of an action brought as a class action.'" *American Pipe*, 414 U.S. at 547. Nevertheless, preventing delay after an action is filed is not one of the purposes of statutes of limitation.

The rule also advances the purpose of Rule 23 by eliminating the need for protective filings to toll the limitations period. *Id.* at 551. If tolling were not allowed, "[p]otential class members would be induced to file

protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.* at 553. The Court explained:

> To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties – precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found "superior to other available methods for the fair and efficient adjudication of the controversy."

Id. at 551 (citing Fed. R. Civ. P. 23(b)(3)). Thus, the *American Pipe* tolling rule is consistent with Rule 23, and advances its purpose of preventing multiple suits.

B. The *American Pipe* rule advances important policies that the General Assembly has already recognized.

This Court has yet to decide whether it will follow the *American Pipe* rule. However, because statutory tolling is already available for class actions under Code § 8.01-229(E)(1), recognition of an equitable tolling rule for those actions is simply a natural step in effectuating the legislature's manifest intent that litigants receive a hearing on the merits on a timely filed cause of action.

Adoption of this rule is consistent with the remedial purpose underlying Code § 8.01-229(E)(1) and the other tolling provisions codified in that statute. *See Strickland v. Simpkins*, 221 Va. 730, 735 (1981) (the purpose of subsection 229(E)(1) is to grant an extended period during which a claim might be brought or prosecuted to afford litigants a hearing on the merits); *Atkins v. Schmutz Mfg. Co.*, 435 F.2d 527, 530 (4th Cir. 1970) (purpose of the tolling statute is to save the right of action for plaintiffs who, without fault, have been unable to obtain an adjudication of the merits). It permits a plaintiff whose claims are covered by a class action from losing the right to be heard pending resolution of the class certification determination.

Here, if the *Wolfe* class had been certified, then the Plaintiffs would have been included in the action and entitled to an adjudication of their claims. To hold that the limitations period has run on their claims simply because the class was not certified is a harsh and unjust result that undermines the important function of the class-action process under Rule 23 and, more importantly, the General Assembly's intent that limitation periods be tolled by the filing of an earlier suit to preserve a plaintiff's right to an adjudication on the merits. *See Strickland*, 221 Va. at 735; *Atkins*, 435 F.2d at 530.

This tolling rule does not offend the purpose or operation of statutes of limitations. Limitation periods are arbitrary devices that protect defendants from litigating stale claims:

> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay."

Page v. Shenandoah Life Ins. Co., 185 Va. 919, 924-925 (1947) (quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)). They arise out of concerns for fairness, and put a defendant on notice of claims within a specific period of time. That purpose is achieved under the *American Pipe* rule because defendants get notice of claims in the class action. 414 U.S. at 554-555. Therefore, that rule does not undercut the purpose or function of statutes of limitation.

CONCLUSION

This Court should answer both certified questions in the affirmative.

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CERTIFICATE OF SERVICE

I certify that on this 31st day of October 2011, the correct number of true and accurate copies of this Opening Brief have been hand-filed with the Supreme Court of Virginia, and the correct number of copies have been served, by first class mail, upon counsel for the appellee:

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