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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 150591

Cheryl Ann Phelan,

Appellant,

v.

Commonwealth of Virginia,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This case tests the limits of the Virginia Tort Claims Act (VTCA), which created a limited exception to the Commonwealth's sovereign immunity under the common law. Because the VTCA is in derogation of common law, this Court has repeatedly ruled that its limited waiver of immunity must be strictly construed; exact compliance with the VTCA is required.

This appeal arises from a Cheryl Ann Phelan's failure to comply with the VTCA's requirement that she include in her written notice "the agency or agencies alleged to be liable." Va. Code Ann. § 8.01-195.6(A). Phelan's notice stated that she was "mak[ing a] claim against Lakeyta Lee, Williette [sic] S. Copeland, and the Commonwealth of Virginia, its agents, officers or employees." (A. 19). The notice did not name any agency or allege that any agency was liable. Only later, during a hearing in the trial court, did Phelan assert that the Virginia Department of Corrections (hereinafter, "Department of Corrections") was liable for her alleged injury. In light of the VTCA's strict requirements, Phelan's clarification was too little, too late. The trial court recognized that and dismissed her claim.

Unable to point to the phrase "Department of Corrections" anywhere in her notice, Phelan asserts on appeal that, nonetheless, her notice gave other contextual clues that indicated the Department of Corrections was the agency she intended to hold liable. But that is not sufficient. The VTCA provides a plain rule that a claimant name "the agency or agencies alleged to be liable," and Phelan simply failed to follow it. The Court should reject her attempt to replace that straightforward rule—which is not difficult to comply with—with a standard of "reasonable identification." As this Court has previously held, even actual notice of a claim cannot save it when the claimant has failed to satisfy every provision of the VTCA. So even if the Commonwealth had correctly guessed that the Department of Corrections was the agency Phelan intended to hold liable, her failure to identify the Department of Corrections in the notice is fatal to her claim.

For those reasons and the reasons that follow, this Court should affirm the Circuit Court's ruling sustaining the Commonwealth's Special Plea of Sovereign Immunity.

STATEMENT OF THE FACTS

The Commonwealth submits the following statement of facts to correct and amplify the statement of facts in Phelan's opening brief, which includes certain facts not contained in her complaint or notice of claim.

On March 28, 2014, the Commonwealth's Division of Risk Management received Phelan's notice of claim, which her attorney submitted on her behalf. (A. 18-19). Her notice of claim stated the following:

> Cheryl Ann Phelan (DOC # 1051479) of Deerfield Correctional Center, Women's Work Center, 21360 Deerfield Drive, Capron, Virginia 23829 hereby gives notice of her claim against the Commonwealth of Virginia for personal injuries sustained by reason of the negligence of Lakeyta Lee, Williette [sic] S. Copeland, Assistant Warden, and the Commonwealth of Virginia, its agents, officers or employees.
>
> (A. 18).

The notice alleged that Phelan had severely injured her knee when she "fell at the canning department at the Southampton complex," and cited her unsuccessful efforts to obtain certain footwear:

> [T]he agents, officers and/or employees of the Commonwealth of Virginia and, in particular Lakeyta Lee, repeatedly refused to issue her boots with sufficient traction, and Assistant Warden Williette [sic] S. Copeland continually ratified, confirmed and authorized the actions of Lakeyta Lee.
>
> (A. 18).

The notice of claim later repeated, "Claimaint hereby makes claim against Lakeyta Lee, Williette [sic] S. Copeland, and the Commonwealth of Virginia, its agents, officers or employees." (A. 19).

Nowhere did the notice allege that the Department of Corrections was liable for Phelan's injury. Her opening brief on appeal states that Copeland and Lee were "employees and agents of the Department of Corrections, an agency of the defendant." Opening Br. at 2. But her notice did not identify Lee and Copeland as employees of the Department of Corrections or any particular agency of the Commonwealth. (A. 18-19). The notice also did not identify "the canning department on the Southampton complex" as a Department of Corrections or Commonwealth facility. (A. 18). Although her opening brief states that it was "agents, officers, and employees of the Department of Corrections, an agency of the Commonwealth of Virginia" who allegedly refused to issue her proper footwear, Opening Br. at 2, her notice actually states that it was "agents, officers and/or employees of the *Commonwealth of Virginia*." (A. 18). Phelan never mentioned the Department of Corrections.

Phelan filed a Complaint in the Circuit Court of Southampton County alleging that she was injured due to the negligence of the Commonwealth. (A. 1-3). In response to the Complaint, the Commonwealth filed a Special Plea of Sovereign Immunity, attaching Phelan's notice and pointing out her failure to comply with the VTCA's strict requirements. (A. 9-19). On February 24, 2015, the Circuit Court entered an order sustaining the

Commonwealth's Special Plea of Sovereign Immunity on the following grounds:

> [Phelan] did not comply with the notice requirements of the Virginia Tort Claims Act, Va. Code § 8.01-195.1, *et seq.* in that [Phelan] failed to state in her Notice of Claim the agency or agencies alleged to be liable – as required by Va. Code § 8.01-195.6(A) – and that this failure forever bars her claim in this action against the Commonwealth of Virginia.
>
> (A. 24-25).

Phelan appealed the Circuit Court's ruling to this Court. (A. 28-30). This Court granted the following assignment of error:

> The trial court erred in ruling that the plaintiff's Notice of Claim was not in compliance with § 8.01-195.6A of the 1950 Code of Virginia, as amended, in that the notice clearly indicates the agency alleged to be liable and thereby in sustaining the Commonwealth of Virginia's special plea of sovereign immunity.
>
> (A. 31).

STANDARD OF REVIEW

The assignment of error is subject to *de novo* review as a matter of law. *PMA Capital Ins. Co. v. US Airways, Inc.*, 271 Va. 352, 357-58, 626 S.E.2d 369, 372 (2006).

ARGUMENT

Phelan's notice of claim did not include a statement of the agency or agencies alleged to be liable for her injuries. Accordingly, the trial court did not err in ruling that Phelan's notice of claim did not comply with the notice

requirements of the VTCA and in sustaining the Commonwealth's Special Plea of Sovereign Immunity.

A. The VTCA is strictly construed, and its provisions must be strictly followed.

The doctrine of sovereign immunity gives the Commonwealth absolute immunity unless waived. *Messina v. Burden*, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984). The VTCA waives that immunity, but only for specific types of claims against the Commonwealth when the notice requirements of the VTCA are satisfied. Va. Code Ann. § 8.01-195.1 *et seq*. This Court has held that because "[t]he Act is in derogation of common law . . . , its limited waiver of immunity must be strictly construed." *Melanson v. Commonwealth*, 261 Va. 178, 181, 539 S.E.2d 433, 434 (2001).

The notice requirements of the VTCA are very specific but straightforward:

> Every claim cognizable against the Commonwealth or a transportation district shall be forever barred unless the claimant or his agent, attorney or representative has filed a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred and the agency or agencies alleged to be liable, within one year after such cause of action accrued.

Va. Code Ann. § 8.01-195.6(A).

There is no prescribed form that the claimant's written statement needs to take, but at the least it *must* recite three pieces of information: time of injury, place of injury, and "the agency or agencies alleged to be liable." *Id.*

This Court has repeatedly upheld the strict enforcement of the notice-of-claim requirements. In *Melanson*, this Court applied Virginia Code § 8.01-195.6 to bar a personal injury action against the Commonwealth. The plaintiff there had been injured on September 6, 1996, as a result of a falling traffic sign maintained by the Commonwealth. *Melanson*, 261 Va. at 180, 539 S.E.2d at 433. Prior to filing her personal injury action, the plaintiff sent, via certified mail, a notice of claim to the Commonwealth on September 4, 1997. *Id.*, 539 S.E.2d at 434. The plaintiff also hand-delivered the same notice to the Commonwealth, which it received on September 5, 1997. *Id.* at 180-81, 539 S.E.2d at 434. The Commonwealth did not receive the *mailed* notice of claim, however, until September 16, 1997—after the statutory one-year period had elapsed. *Id.* at 180, 539 S.E.2d at 434. Despite that the Commonwealth timely received the hand-delivered notice, the trial court granted the Commonwealth's plea of sovereign immunity. *Id.* at 181, 539 S.E.2d at 434.

This Court affirmed the trial court's dismissal, rejecting the plaintiff's argument that the receipt of the timely hand-delivered letter was a sufficient

substitute for the express mailing requirement. *Id.* at 183-84, 539 S.E.2d at 435-36. The Court reasoned that the VTCA "must be strictly construed," and that "'[f]or this Court to place any limitation on the clear and comprehensive language of the statute, or to create an exception where none exists under the guise of statutory construction, would be to defeat the purpose of the enactment and to engage in judicial legislation.'" *Id.* at 184, 539 S.E.2d at 435-36. (quoting *Crewe v. Marler*, 228 Va. 109, 114, 319 S.E.2d 748, 750 (1984) (analyzing a similar notice-of-claim statute, Va. Code Ann. § 15.2-209 [formerly Va. Code Ann. § 8.01-222])).

Strict construction is the rule not only with the VTCA's timeliness requirement but also with informational elements of the notice of claim. *See Halberstam v. Commonwealth*, 251 Va. 248, 251-52, 467 S.E.2d 783, 785 (1996) (finding notice did "not meet the statutory requirements because it [did] not specify the location of the injury"). Failure to provide one of the required elements renders the notice ineffective. And if a corrected notice is not sent within a timely manner, the claim is forever barred regardless of whether other correspondence or documents provide the missing information. *See id.*; *Melanson*, 261 Va. at 181-82, 539 S.E.2d at 434. Those provisions may be "'arbitrary and peremptory,'" but they are "'necessary to accomplish the purposes of the enactment.'" *Halberstam*,

251 Va. at 252, 467 S.E.2d at 785 (quoting *Crewe*, 228 Va. at 113, 319 S.E.2d at 750 and recognizing that the rationale in *Crewe* "applies with no less force to the notice provisions of the [VTCA]").

Here, Phelan failed to comply with the VTCA's express requirements because she did not identify in her notice of claim "the agency or agencies alleged to be liable." Va. Code Ann. § 8.01-195.6(A). Nowhere does her notice contain the phrase "Department of Corrections" or allege an intention to hold the Department of Corrections liable. That information would have been simple for Phelan or her counsel to determine and include in the notice. *See Truelove v. Commonwealth*, 85 Va. Cir. 282, 283 (Surry Cty. Cir. Ct. 2012) ("The task of determining which agency is liable is usually easy; … [h]ence, most cases alleging defective notice focus on the requirement of showing the time and place of injury."). But under this Court's reasoning in *Melanson* and *Halberstam*, that omission—that failure to strictly abide by the VTCA—is fatal to her claim.

B. Even if the Commonwealth could determine the agency Phelan intended to hold liable, actual notice is insufficient to comply with the VTCA.

Phelan's claim fails because she failed to strictly comply with the VTCA's notice requirement. On appeal, Phelan chiefly argues that, her notice *reasonably* identified the Department of Corrections through other

contextual information. But substantial compliance is not the rule: even actual knowledge of the elements missing from a claimant's notice is insufficient to satisfy the requirements in the VTCA. *Melanson*, 261 Va. at 184, 539 S.E.2d at 435; *Truelove*, 85 Va. Cir. at 284.

Halberstam makes clear that "actual notice does not obviate [the] duty to strictly comply with the Act's notice provisions." 251 Va. at 252, 467 S.E.2d at 785. *See also Crewe*, 228 Va. at 113-14, 319 S.E.2d at 750 (even if "everyone" knew the time and place of the accident, the notice requirement had to be met); *Boyce v. City of Winchester*, 39 Va. Cir. 21 (Winchester Cir. Ct. 1995) (analogous notice requirement, noting that investigations and reports indicating actual knowledge are irrelevant and do not dispense with the plaintiff's duty to comply with the notice requirements).

Relying on *Halberstam* and *Melanson*, courts consistently dismiss civil actions even where agencies may have actual notice. In *Ahari v. Fairfax County*, 71 Va. Cir. 268 (Fairfax Cty. Cir. Ct. 2006), the plaintiff filed a wrongful death action against the Commonwealth, alleging negligent highway maintenance. In the notice of claim, the plaintiff had alleged only that the Commonwealth was liable; no agency was alleged to be liable. The circuit court granted the Commonwealth's plea of sovereign immunity

and dismissed the action, reasoning that strict construction of the VTCA required the identification of an agency. *Ahari*, 71 Va. Cir. at 271. In doing so, the court rejected the plaintiff's argument that she need not state an agency because "there is only one appropriate agency within the Commonwealth that is responsible for the maintenance of the roads." *Ahari*, 71 Va. Cir. at 271. Similarly, in *Truelove*, a case where the claim arose from a fall off a bunk bed in Chippokes Plantation State Park, the court ruled that the claimant's failure to name the allegedly liable agency was fatal to her claim. 85 Va. Cir. At 285. The court dismissed the case despite the fact that the Department of Conservation and Recreation was the agency that administers all state parks, "probably was the only agency [that] could be responsible," and received actual notice of the claim. *Id.* at 283.

The argument Phelan raises here is the same one rejected by this Court and numerous circuit courts applying this Court's precedents. She argues that "[a]nyone reading her notice would unquestionably conclude that the agency involved was the Department of Corrections." Opening Br. at 5. According to Phelan, the Department of Corrections was the only possible agency that could have been liable based on the information in her notice, which identified Phelan as an inmate, alleged an "Assistant Warden"

was liable, and stated that the place of her injury was the canning department located in the "Southampton complex." Id. But the notice does *not* state that Lee or Copeland were employees of the Department of Corrections, nor that the canning department of the Southampton Complex was a Department of Corrections facility. (A. 18). And it is not up to the Commonwealth to assume or guess which agency or agencies Phelan alleges to be liable.

And even if Phelan were right that the Commonwealth should have guessed that the Department of Corrections was the agency she intended to allege as liable, her claim still fails. At the end of the day, it is irrelevant whether or not the Commonwealth knew which "agency or agencies" Phelan neglected to name. As this Court's precedents make clear, actual knowledge of the elements of the claim does not obviate the requisite strict compliance with the VTCA. And by not providing an express statement in her notice of the agency or agencies she intended to allege as liable, Phelan failed to comply with the VTCA's express notice requirement.

C. *Bates* is inapposite.

Phelan places heavy emphasis on *Bates v. Commonwealth*, 267 Va. 387, 593 S.E.2d 250 (2004), in which this Court clarified that a claimant's identification of the place of injury need only be reasonably specific to satisfy

the VTCA. Her reliance is misplaced. Unlike the claimant in *Bates*—who inarguably named the "place at which the injury is alleged to have occurred," as required by the VTCA—Phelan failed to name any agency at all. Moreover, the Court's reasoning in *Bates* regarding the purpose of the VTCA's notice requirements does not apply here.

In *Bates*, Fannie Mae Banks was admitted to the University of Virginia Medical Center (hereinafter, "hospital") in Charlottesville on July 21, 2000. *Bates*, 267 Va. at 389, 593 S.E.2d at 252. Three months later Banks "was found asystolic and unresponsive by hospital personnel," and she died shortly thereafter. *Id.* at 390, 593 S.E.2d at 252. *Id.* Bates submitted a timely notice of claim, which "identified the 'PLACE OF INJURY' as 'University of Virginia Health Sciences Center, Charlottesville, Virginia.'" *Id.* The Commonwealth argued that Bates's identification only of the medical center was insufficiently specific to satisfy the VTCA, because the center consisted of numerous buildings containing multiple floors and rooms. *Id.*

This Court disagreed. It held that "there is only one University of Virginia Medical Center in Charlottesville. Bates'[s] notice of claim identified that place . . . ." *Id.* at 394, 593 S.E.2d at 255. It explained that "mandat[ing] that Bates . . . identify the floor or room within the hospital at which the alleged injury occurred" would be "unnecessary." *Id.* at 395, 593 S.E.2d at

255. Because the notice of claim stated the name of the hospital—the place of the injury—the Court concluded that the requirements of the VTCA were satisfied.

Thus, in *Bates*, the Court was concerned with the degree of specificity with which the claimant provided the requisite information. Here, by contrast, Phelan's failure to name the allegedly liable agency as required is not a matter of degree—it is a matter of non-compliance altogether. Her notice is impermissibly vague about the source of any agency liability for her claim. Nowhere does she state that the Department of Corrections is the agency she intends to allege as liable; instead she asserts it against two individuals and "the Commonwealth of Virginia, its agents, officers or employees." (A. 19). That vagueness is exactly what the VTCA's notice requirements are intended to prevent.

Moreover, the reasoning of *Bates* is also inapplicable here. There the Court considered that "one obvious purpose of the requirements of [the VTCA] is to provide notice to the Commonwealth of a facially cognizable claim so that the Commonwealth is in a position to investigate and evaluate that claim." *Id.* at 394, 593 S.E.2d at 254. And it found that the information provided in Bates's notice about the place of injury accomplished that purpose.

But providing the Commonwealth sufficient information to investigate the facts underlying the claim is one thing; alleging which agency is liable is another. The facts are the facts, and the Commonwealth can investigate them itself. But it cannot determine for the claimant which agency the claimant intends to allege as liable. Thus, the VTCA expressly requires that the *claimant* identify the allegedly liable agency, rather than force the Commonwealth to guess or figure that out. Indeed, given that a claimant may seek to hold *multiple* agencies liable, an interpretation of the VTCA that put the burden on the Commonwealth to guess the "agency or agencies alleged to be liable" would leave the Commonwealth continually uncertain—even if the claimant identified one agency—whether it had all the requisite information. The notice-of-claim requirements under the VTCA are intended to prevent that uncertainty.

CONCLUSION

Phelan failed to comply with the express requirement of Virginia Code § 8.01-195.6(A) that she state in her notice of claim the agency or agencies of the Commonwealth she alleges to be liable. Because the VTCA is strictly construed, the Commonwealth retains its absolute sovereign immunity because of her failure to do so. The trial court properly concluded that Phelan's notice of claim did not comply with the notice requirements of

the VTCA. Accordingly, this Court should affirm the Circuit Court's ruling sustaining the Commonwealth's Special Plea of Sovereign Immunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under Rule 5:26(h) that on November 23, 2015, this brief was filed electronically with the Court, in Portable Document Format, and ten printed copies were hand-delivered to the Clerk's Office, in compliance with Rule 5:26(e). This brief complies with Rule 5:26(b) because it does not exceed 50 pages as measured by that rule. A copy also was electronically mailed to

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