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IN THE

Supreme Court of Virginia

RECORD NO. 150591

CHERYL ANN PHELAN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Cheryl Ann Phelan instituted this suit in the Circuit Court of Southampton County, seeking compensatory damages against the defendant, in the amount of **ONE MILLION DOLLARS ($1,000,000.00)** for personal injuries. (A. 1).

The Commonwealth of Virginia filed a special plea of sovereign immunity and on February 3, 2015 this plea was heard by the Court. (A. 9). The Court ruled that the plaintiff did not comply with the notice requirements of the Virginia Tort Claims Act in that the plaintiff failed to state in her notice of claim the agency or agencies alleged to be liable as required by §8.01-195.6 A of the Code. (A. 24). The Court's order reflecting its ruling as to the Commonwealth of Virginia was entered on February 24, 2015 (A. 24), and, thereafter on March 5, 2015 the plaintiff noted her appeal to the Court's ruling. (A. 28).

As a matter of information, the Court also on February 24, 2015, entered a dismissal order as to defendants, Assistant Warden Willette S. Copeland, and Lakeyta Lee, but the dismissal of the action as to these defendants was not appealed and is not the subject of this appeal. (A. 26).

STATEMENT OF FACTS

Cheryl Ann Phelan, on April 26, 2013, was an inmate and incarcerated at Deerfield Correctional Center, Women's Work Center, 15080 Old Belfield Road, Capron, VA 23829. She was released from confinement on or about September 15, 2014. (A. 1).

On April 26, 2013, Cheryl Ann Phelan severely injured her knee when she fell in the canning department of the Southampton Complex. She fell when she came in contact with zucchini on the floor of the canning department. (A. 1).

Notwithstanding her efforts to obtain footwear with sufficient tread, the agents, officers and employees of the Department of Corrections, an agency of the Commonwealth of Virginia, and, in particular, Lakeyta Lee and Assistant Warden Willette S. Copeland repeatedly refused to issue her boots with sufficient tread to work safely in the canning department where she was assigned. Assistant Warden Willette S. Copeland continually ratified, confirmed and authorized the actions of Lakeyta Lee in refusing to issue boots to the plaintiff with sufficient tread to work safely. (A. 1).

Assistant Warden Willette S. Copeland and Lakeyta Lee were at all times relevant and material to these proceedings, employees and agents of the Department of Corrections, an agency of the defendant,

Commonwealth of Virginia, and at all times relevant and material to these proceedings were acting in the course of their employment and on behalf of defendant, Commonwealth of Virginia. (A. 1)

The Commonwealth of Virginia was negligent in failing to provide Cheryl Ann Phelan with the proper equipment and, in particular, footwear with sufficient tread for her to safely perform her assigned duties in the cannery and, in the absence of proper equipment, Cheryl Ann Phelan, the injured party, was forced and compelled by the negligence of the Commonwealth of Virginia, acting by and through its agents and employees, to perform her assigned duties under hazardous and dangerous circumstances. (A. 1).

ASSIGNMENT OF ERROR

The trial court erred in ruling that the plaintiff's Notice of Claim was not in compliance with §8.01-195.6 A 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. 9, 24).

ARGUMENT, STANDARD OF REVIEW AND AUTHORITIES

THE NOTICE OF CLAIM WAS IN COMPLIANCE WITH §8.01-195.6 A OF THE 1950 CODE OF VIRGINIA, AS AMENDED IN THAT THE NOTICE CLEARLY INDICATES THE AGENCY ALLEGED TO BE LIABLE.

The trial court's interpretation and legal conclusions as to the mandate of §8.01-195.6 A of said Code are reviewed de novo. PMA Capital Ins. Co., v. U.S. Airways, Inc., 271 Va. 352, 357-58, 626 S.E.2d 369, 372 (2006); Sink v. Commonwealth, 28 Va. App. 655, 507 S.E.2d, 670 (1998).

The appellant respectfully submits that even the most casual and superficial reading of the notice that she filed on March 26, 2014 identifies the Department of Corrections as the agency involved. Section 8.01-195.6 A of the Code reads as follows:

> "Every claim cognizable against the Commonwealth or a transportation district shall be forever barred unless the claimant or its 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 (1) year after such cause of action accrued."

Cheryl Ann Phelan, respectfully asserts that her notice does clearly and inescapably identify the nature of her claim and does include the time and place at which the alleged injuries occurred and the agency or agencies alleged to be liable. (A. 18).

In the trial court, the Commonwealth asserted the notice was fatally defective relying exclusively on its claim that Cheryl Ann Phelan, the injured party, had neglected to identify the agency alleged to be liable. To reach this conclusion is to ignore the clear wording of her notice which identified an Assistant Warden at Deerfield Correctional Center, Women's Work Center, 21360 Deerfield Drive, Capron, Virginia, identified her as an inmate, and identified the place of her injury as the canning department located in the Southampton Complex, a facility of the Department of Corrections. Anyone reading her notice would unquestionably conclude that the agency involved was the Department of Corrections. Her notice is a written statement of the nature of her claim, including the time and place, when and where the injury occurred, and the agency of agencies alleged to be liable. (A. 1,9,18).

The Commonwealth relies heavily upon this Court's decision in Melanson v. Virginia, 261 Va. 178, 539 S.E.2d 433 (2001), where this Court considered a notice that was not received within one (1) year from the date of the plaintiff's injuries, as required by §8.01-195.6 A. Unlike the present case, however, the facts that the Court addressed in Melanson, reveal a clear and inescapable violation of the notice requirements. (A. 9, 18).

The Commonwealth also relies upon Halberstam v. Commonwealth, 251 Va. 248, 467 S.E.2d 783 (1986). In this case, the letter providing notice read in pertinent part, as follows:

> "On October 5, 1993, Ms. Halberstam, a student at George Mason University, was parking her vehicle in the school parking lot at approximately 7:45. She parallel parked alongside the curb and began to exit her vehicle. Due to the fact that the area she parked was unlit, she did not notice a pothole or an eroded area in the asphalt of the parking lot. Upon exiting her vehicle she stepped into this eroded area/pothole, which caused her to lose her balance, fall and injure herself. George Mason University was responsible for maintaining the parking lot where the injuries occurred."

This court, in Halberstam, noted that George Mason University has a number of parking lots and more than one campus. Halberstam did not specify in which parking lot or which George Mason University campus she was injured and such lack of detail is, in essence, no notice at all. Halberstam at 467 S.E.2d at 785.

Unlike Halberstam, in this case, Phelan clearly and unequivocally identified the place of her injury – the canning department on the Southampton Complex. Because the source of plaintiff's injury in Halberstam was a pothole, the location of the injury was crucially important.

The Commonwealth also relies upon Crewe v. Marler, 228 Va. 109, 319 S.E.2d 748 (1984), even though this decision involved municipal negligence and the notice provisions as set out in §8.01-222 of the Code.

In that case, the plaintiff failed to identify the location of the alleged defective sidewalk conditions which allegedly caused the plaintiff's injuries.

In addition, the Commonwealth relies upon Marissa Ahari v. Fairfax County, et al, 19 Cir. CL20060002553, 71 Va. Cir. 268 (2006), wherein the notice failed to set out the agency or agencies alleged to be liable. I In Ahari, it was unclear what entity or agency – Fairfax County or an agency of the Commonwealth – was responsible for negligently maintaining the road in question. Indeed, the suit was filed against Fairfax County, Virginia and the Commonwealth. Certainly, some roads are maintained by the Virginia Department of Transportation and some roads are maintained by counties or cities. From the notice it is impossible to determine the responsible agency. In the present case, the designation of the responsible party is both implicit and explicit and beyond question.

Significantly, Bates v. Commonwealth of Virginia, 267 Va. 387, 593 S.E.2d 250 (2004), is very supportive of the injured party's notice. In Bates, the issue to be resolved was whether Bates had filed a notice of claim sufficient to comply with the requirements of §8.01-195.6 with regard to the identification of the "place" where the decedent, Fannie Mae Banks was injured.

In Bates there was no dispute that the University of Virginia Medical Center is a state supported hospital and, while located in Charlottesville, Virginia, is composed of multiple buildings, which contain multiple floors and multiple rooms. The Commonwealth relied principally upon Halberstam v. Commonwealth, 251 Va. 248, 252, 467 S.E.2d 783, 785 (1986) in maintaining that the notice of claim filed by Bates, the injured party's administrator, did not sufficiently identify the place where the decedent's injuries occurred at the hospital to satisfy the requirements of §8.01-195.6 of the Code. Consequently, the Commonwealth asserted that its plea of sovereign immunity was well taken and its motion to dismiss should be granted. The trial court agreed with the Commonwealth's position.

In Bates, the parties agreed that in the absence of compliance with the mandate of §8.01-195.6 of the Code, the trial court would lack jurisdiction to consider the merits of the claim against the Commonwealth because in such circumstances the Commonwealth's sovereign immunity is not waived. The issue was simply the sufficiency of the notice of claim to identify the place where the decedent's injuries occurred as required by §8.01-195.6 of the Code.

In Bates, the Commonwealth relied on Halberstam, id., and argued that the failure to identify the parking lot was equivalent to the failure to identify where the alleged injury occurred in Bates.

In sustaining the injured party's position, the Court pointed out that Halberstam, id., was a premises liability case in which the claimant asserted injuries due to a defect in one of the number of parking lots at a multi-campus state university. In a premises liability case, the "precise location" of the alleged defect is vital in the determination of the owners actual or constructive notice of the defect. In contrast, in a medical malpractice case such as Bates, the focus is upon the actions of the people and the specific location of the negligent conduct occurs is irrelevant.

In Bates, the Court opined that, under the circumstances the notice of claim filed by Bates sufficiently complied with the requirements of §8.01-195.6 of the Code, regarding the identification of the place at which the injury to the injured party, Banks, was alleged to have occurred.

Significantly, in Bates, the Court reasoned

> "The statute's mandate that the notice of claim include the 'place at which the injury is alleged to have occurred' contemplates the reasonable identification of that place so that the purpose of the notice to the Commonwealth is accomplished in a particular case.
>
> The concept of reasonableness does not lend itself to a bright line test or dictate separate and distinct tests based on

> the nature of the asserted claim. Rather, its proper analysis and application is directed to specific allegations of a notice of claim in a particular case. Thus in Halberstam, the failure to identify the parking lot in which the claimant's injury was alleged to have occurred was not reasonably calculated to give the Commonwealth notice of that place because the university had a number of parking lots on more than one campus where the claimant's injury might have occurred.
>
> In the present case, there is only one University of Virginia Medical Center in Charlottesville. Bates' notice of claim identified that place and also stated that Banks was admitted to that hospital and 'while a patient' there was injured by the alleged medical negligence of the employees of that hospital. In combination, these assertions reasonably identified the place at which Bates alleged Banks was injured so that the Commonwealth could investigate and evaluate the claim. Under these circumstances, Code 8.01-195.6 does not mandate that Bates was required to identify the floor or room within the hospital in which the alleged injury to Banks occurred because that degree of specificity was unnecessary to accomplish the purpose of the statute." 267 Va. at _____, 593 S.E.2d at 255.

As stated above, one obvious purpose of the requirements of §8.01-195.6 of the Code, is to provide notice to the Commonwealth of a facially cognizable claim so that the Commonwealth is in position to investigate and evaluate that claim. The statute mandates and contemplates reasonable identification of the agency so that the purpose of the notice to the Commonwealth is accomplished in a particular case.

In the case at bar, unquestionably Phelan's identification of the agency alleged to be liable, constitutes reasonable identification of that

agency so that the purpose of the notice to the Commonwealth is accomplished in her case. There is or can be no question as to the responsible agency.

CONCLUSION

Cheryl Ann Phelan gave legal notice as required by §8.01-195.6 of the 1950 Code of Virginia, as amended, by filing a written statement of the nature of her claim, the time and place, when and where the injuries occurred, with the persons specified by statute. The notice of claim, *inter alia*, states and asserts that Phelan at the time of her injuries was an inmate at Deerfield Correctional Center, Women's Workforce Center, 21360 Deerfield Drive, Capron, Virginia 23829, and alleges that she was injured by reason of the negligence of Lakeyta Lee, an employee of the Department of Corrections, an agency of the Commonwealth of Virginia, and Assistant Warden Willette S. Copeland, an employee of the Department of Corrections, an agency of the Commonwealth of Virginia,. Concedely, the notice does not state that Copeland and Lee were employees of the Department of Corrections but does assert that they are employees of the Commonwealth of Virginia and by the identification of Willette S. Copeland, as Assistant Warden, as an agent, officer and

employee of the Commonwealth of Virginia, one can only conclude that the agency involved is the Department of Corrections.

Moreover, the notice asserts that the injured party, an inmate subject to confinement by the Department of Corrections, injured her knee when she fell in the canning department of Southampton Complex, which is certainly a part of a physical facility of the Department of Corrections. She submits that even the most casual and superficial reading of the notice she filed on March 26, 2014 identifies the Department of Corrections as the agency involved.

Cheryl Ann Phelan prays that the order of the Circuit Court of Southampton County be reversed and that this matter be remanded for trial on its merits.

Respectfully submitted

Cheryl Ann Phelan

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CERTIFICATE

In accordance with Rule 5:26 (e) and (h) of the Rules of the Supreme Court of Virginia, I hereby certify that I have this 23rd day of October, 2015, filed the required 10 copies of this Opening Brief of Appellant in the Clerk's Office, together with an electronic version of this Brief and Appendix filed through VACES in Adobe Acrobat portable document format (PDF) and mailed the required three copies of this Brief and emailed an electronic version of this Brief in Adobe Acrobat to opposing counsel, The Honorable Mark Herring, Attorney General, and to The Honorable J. Michael Parsons, Assistant Attorney General, Public Safety and Enforcement Division, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219.

Given under my hand this 23rd day of October, 2015.

Richard E. Railey, Jr.
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