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IN THE

SUPREME COURT OF VIRGINIA

Record No. 161180

ABBAS JAVED AHMED,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLEE

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INTRODUCTION

The Virginia Tort Claims Act ("VTCA") imposes two different notice-filing requirements—one in Code § 8.01-195.6(A)[1] and one in Code § 8.01-195.7.[2] Both Code sections require a claimant's notice of claim to be filed within one year, and both notice-filing periods are tolled in certain circumstances. The question presented in this case is whether the tolling provision in Code § 8.01-195.3(7) tolls both the one-year notice-filing period in Code § 8.01-195.6(A) as well as the one-year notice-filing period in Code § 8.01-195.7 while an inmate exhausts the prison administrative grievance process. Although the Commonwealth agrees that Code § 8.01-195.3(7) tolls the notice-filing period in Code § 8.01-195.6(A), it would be wrong to reflexively assume that that tolling provision also applies to Code § 8.01-195.7. Indeed, applying the tolling provision to Code § 8.01-195.7 would violate two important principles of statutory interpretation.

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[1] Va. Code Ann. § 8.01-195.6(A) (2015) ("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.").

[2] Va. Code Ann. § 8.01-195.7 (2015) ("Every claim cognizable against the Commonwealth or a transportation district under this article shall be forever barred, unless within one year after the cause of action accrues to the claimant the notice of claim required by § 8.01-195.6 is properly filed.").

First, finding that the notice-filing period in Code § 8.01-195.7 is tolled by the tolling provision in Code § 8.01-195.3(7) would render superfluous a timeliness requirement that has been part of the VTCA's statute of limitations for over 30 years. Although the length of the two notice-filing periods currently is the same and the provisions share similar language, the text of the statutes and the history of the VTCA make clear that the two provisions have always imposed distinct requirements and accomplished different purposes.[3] If the tolling provision of Code § 8.01-195.3(7) applies to the notice-filing requirement in Code § 8.01-195.7, then there would be no need for two separate notice-filing requirements. Such a result—rendering the legislatively imposed notice-filing requirement of the VTCA's statute of limitations a nullity—would be inconsistent with numerous decisions of this Court.[4]

Second, the *expressio unius est exclusio alterius* canon of statutory construction—the "mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute"[5]—weighs against applying the tolling provision of Code § 8.01-195.3(7) to the notice-filing

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[3] *See id.* ("The *limitations periods* prescribed by *this section and § 8.01-195.6* shall be subject to the tolling provision of § 8.01-229 and the pleading provision of § 8.01-235.") (emphasis added); *see also infra* Part II.A-B.

[4] *See, e.g.*, *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984) ("The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd.").

[5] *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992).

requirement in Code § 8.01-195.7. That is because Code § 8.01-195.7 contains an enumerated list of circumstances when the statute-of-limitations periods are tolled. And that list does not include the tolling provision in Code § 8.01-195.3(7).

Appellant is wrong that *Ogunde v. Commonwealth* dictates the outcome in this case.[6] *Ogunde* stands for the unremarkable proposition that the VTCA should not be interpreted in a manner that impliedly repeals the tolling provision in Code § 8.01-195.3(7).[7] Nothing of the sort will happen in this case if the Court declines to toll the one-year notice-filing requirement in Code § 8.01-195.7 during the pendency of the grievance process. As shown below, the Commonwealth's proffered interpretation—that the notice of claim serves multiple purposes under the VTCA and that there are different notice-filing requirements depending on whether an inmate desires to pursue a lawsuit—is the only interpretation that gives effect to every relevant VTCA provision in inmate cases.

There also is a plausible explanation for why the General Assembly would have intended the Commonwealth's interpretation: if an inmate complies with the notice-filing period in Code § 8.01-195.6(A), the Attorney General and the Director of the Division of Risk Management have the authority to settle or pay the

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[6] 271 Va. 639, 628 S.E.2d 370 (2006).

[7] *See id*.

claim under Code § 8.01-195.5.[8] Thus, while Code § 8.01-195.7 may bar an inmate from bringing a lawsuit, the inmate may still be able to obtain relief under the VTCA.

Although the Commonwealth's interpretation is less favorable to inmates than the one suggested by Ahmed, this Court's precedent makes clear that the goal in interpreting multiple statutory provisions is to give effect to all of them. That principle holds doubly true when interpreting a statute in derogation of common law like the VTCA. Adopting the Commonwealth's interpretation treats the one-year notice-filing periods in Code § 8.01-195.6(A) and Code § 8.01-195.7 as substantively distinct, consistent with this Court's precedent, and avoids the concerns raised in *Ogunde*. To the extent the General Assembly disagrees with that interpretation, recent history demonstrates the legislature's willingness and ability to amend the VTCA. Rather than render redundant one of the timeliness provisions set forth in the VTCA's statute of limitations—thereby judicially expanding the limited waiver of sovereign immunity embodied in the Act—this Court should allow the General Assembly to make that choice.

[8] Va. Code Ann. § 8.01-195.5 (2015).

ASSIGNMENTS OF ERROR

The Court granted review of the following three assignments of error, but Appellant has conceded in his opening brief that there was no error respecting the second and third assignments.[9]

1. The Petitioner states and assigns error to the trial court for granting the defendant's motion of "Plea of Statute of Limitations, Plea of Sovereign Immunity and Motion to Dismiss," however the statute of limitations was not violated and sovereign immunity wasn't warranted.

2. The Petitioner states and assigns error to the trial court of undue prejudice in denying his motion for, adhering to the requirements of Code § 8.01-195.6 (exhausting administrative remedies) before filing Notice of Claim. In effect denying Petitioner due process, required by the Act.

3. The Petitioner states and assigns error to the trial court for denying his right to Equal Protection(s) under the laws guaranteed by the Fourteenth Amendment to "not be denied the same protections of the law enjoyed by others in like circumstances."

STATEMENT OF THE CASE AND FACTS

A. Ahmed suffers an injury while in the custody of the Virginia Department of Corrections.

Abbas Javed Ahmed—an inmate in the custody of the Virginia Department of Corrections (the "Department")—suffered an injury on September 10, 2013.[10] According to Ahmed, he sustained head and neck injuries when he was struck by a

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[9] *See* Opening Br. of Appellant at 7, 9. By not arguing the issues in his opening brief, Ahmed waived these assignments of error. *See, e.g.*, *Palmer v. Atl. Coast Pipeline, LLC*, No. 160630, 2017 Va. LEXIS 101, at *7-8 (Va. 2017) (citing R. Va. S. Ct. 5:27).

[10] JA 2.

telephone that detached from the wall in his housing unit at the Greensville Correctional Center.[11] Ahmed was immediately treated by Greensville Correctional Center medical staff following the incident.[12]

Two days later, Ahmed initiated the inmate grievance process by filing four Informal Complaint forms alleging that his injuries were the result of: (1) failure to "supervise and/or inspect" a private contractor's installation of the telephone; (2) failure to provide a "permanent/fixed" stool under the telephone; (3) removal of the telephone's privacy screen; and (4) failure to mount the telephone using metal hardware.[13] Ahmed's informal complaints were consolidated and denied on September 27, 2013.[14] On September 30, 2013, he filed four Level I Regular Grievance forms raising the same issues.[15]

After conducting an investigation, the Department denied Ahmed's consolidated Level I grievance on October 22, 2013.[16] Ahmed appealed, filing a Level II grievance on October 24, 2013.[17] Upon further investigation, the Department found that "all phones were properly mounted to the wall" and that

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[11] *Id.*

[12] JA 26.

[13] JA 18, 21, 23, 25.

[14] *Id.*

[15] JA 17, 20, 22, 24.

[16] JA 14.

[17] JA 15.

"[t]his incident was an isolated occurrence."[18] Ahmed's Level II grievance was, accordingly, denied on October 30, 2013.[19] Thus, Ahmed exhausted the grievance procedure less than two months after his injury.

B. Ahmed files a complaint in circuit court, which is dismissed as time-barred under the VTCA.

On September 22, 2014, over ten months after he exhausted the grievance procedure and over a year after his injury occurred, Ahmed filed notice of his claim with the Division of Risk Management.[20] More than another year passed and then, on February 24, 2016, Ahmed filed his VTCA lawsuit in the Circuit Court for the County of Greensville.[21]

In response, the Commonwealth argued that Ahmed had failed to comply with Code § 8.01-195.7's statute-of-limitations period because the Division of Risk Management did not receive his notice before September 10, 2014. The circuit court granted the Commonwealth's Plea of Statute of Limitations and entered an order dismissing the case with prejudice.[22] Ahmed noted an appeal of the circuit court's order on June 29, 2016.[23]

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[18] JA 13.

[19] *Id*.

[20] JA 37. Ahmed executed the notice of claim on September 12, 2014. JA 36.

[21] JA 5.

[22] JA 38.

[23] JA 40.

STANDARD OF REVIEW

This Court reviews issues of statutory interpretation de novo.[24] "When interpreting statutes, courts 'ascertain and give effect to the intention of the legislature.'"[25] And in order "to give effect to [the legislature's] intent without usurping '[its] right to write statutes,'"[26] this Court "must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity."[27]

ARGUMENT

The circuit court correctly dismissed Ahmed's complaint raising a claim under the VTCA because his notice of claim was not filed within one year of when his cause of action accrued as required by Code § 8.01-195.7.[28] As shown below, Ahmed is wrong that the time for filing a notice of claim as a precursor to filing a VTCA lawsuit is tolled while an inmate exhausts the prison administrative

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[24] *Boynton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 925 (2006).

[25] *Id.* (quoting *Chase v. DaimlerChrysler Corp.*, 266 Va. 544, 547, 587 S.E.2d 521, 522 (2003)).

[26] *Blake v. Commonwealth*, 288 Va. 375, 383, 764 S.E.2d 105, 108 (2014) (quoting *Boynton*, 271 Va. at 229-30, 623 S.E.2d at 927).

[27] *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007); *see also Boynton*, 271 Va. at 227, 623 S.E.2d at 925-26 ("[I]ntent is usually self-evident from the words used in the statute. Consequently, courts apply the plain language of a statute unless the terms are ambiguous, or applying the plain language would lead to an absurd result.") (citations omitted).

[28] JA 38.

grievance process. To conclude otherwise would usurp the General Assembly's role in drafting statutes and expand the limited waiver of sovereign immunity embodied in the VTCA. Under ordinary principles of statutory construction, it is plain that the tolling provision of Code § 8.01-195.3(7) does not apply to toll the one-year notice-filing period in Code § 8.01-195.7.

I. Code § 8.01-195.7, the VTCA's statute of limitations provision, is in derogation of common law and is strictly construed.

"[T]he doctrine of sovereign immunity is alive and well in Virginia";[29] the Commonwealth is "immune from liability for the tortious acts or omissions of [its] agents and employees" unless that immunity is waived by "an express statutory or constitutional provision[]."[30] This Court has held that the VTCA constitutes "a limited waiver of governmental immunity from tort claims."[31] Because such a waiver "is in derogation of common law," the VTCA's "limited waiver of immunity must be strictly construed."[32] Consequently, "strict compliance with all of its provisions is required."[33]

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[29] *Phelan v. Commonwealth*, 291 Va. 192, 195, 781 S.E.2d 567, 568 (2016) (citation omitted).

[30] *Baumgardner v. Sw. Va. Mental Health Inst.*, 247 Va. 486, 489, 442 S.E.2d 400, 401 (1994).

[31] *Commonwealth v. Coolidge*, 237 Va. 621, 623, 379 S.E.2d 338, 340 (1989).

[32] *Melanson v. Commonwealth*, 261 Va. 178, 181, 539 S.E.2d 433, 433 (2001).

[33] *Halberstam v. Commonwealth*, 251 Va. 248, 251, 467 S.E.2d 783, 784 (1996).

"Two important rules of construction come into play where a statute is in derogation of the common law."[34] The first is that "[t]he common law is not to be considered altered or changed by a statute unless the legislative intent be plainly manifested."[35] And the second is that statutes in derogation of common law are "not to be enlarged in their operation by construction beyond their express terms."[36] Accordingly, this Court has explained that it may not "place any limitation on the clear comprehensive language of the statute, or . . . create an exception where none exists under the guise of statutory construction."[37] To do so, "would be to defeat the purpose of the enactment and to engage in judicial legislation."[38]

Moreover, the one-year notice-filing requirement in Code § 8.01-195.7 is part of the VTCA's statute of limitations. "Statutes of limitation 'serve an important and salutary purpose.'"[39] And "courts are obligated to enforce statutes

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[34] *Hyman v. Glover*, 232 Va. 140, 143, 348 S.E.2d 269, 271 (1986).

[35] *Id.* (quoting *Hannabass v. Ryan*, 164 Va. 519, 525, 180 S.E. 416, 418 (1935)).

[36] *Id.* (quoting *C. & O. Ry. v. Kinzer*, 206 Va. 175, 181, 142 S.E.2d 514, 518 (1965)).

[37] *Phelan*, 291 Va. at 195, 781 S.E.2d at 568 (quoting *Melanson*, 261 Va. at 184, 539 S.E.2d at 436).

[38] *Id.* (citation omitted).

[39] *Westminster Investing Corp. v. Lamps Unlimited*, 237 Va. 543, 547, 379 S.E.2d 316, 318 (1989) (quoting *Burns v. Stafford Cty.*, 227 Va. 354, 359, 315 S.E.2d 856, 859 (1984)).

of limitation strictly and to construe any exception thereto narrowly."[40] "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."[41]

II. The circuit court properly dismissed Ahmed's complaint as time-barred under Code § 8.01-195.7 because he failed to file his notice of claim within one year after his cause of action accrued.

The circuit court reached the right result in this case by finding that Ahmed's lawsuit was barred by the VTCA's statute of limitations provision because he had not filed his notice of claim within one year of his injury.[42] Ahmed's lawsuit is

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[40] *Id.*; *see also Casey v. Merck & Co.*, 283 Va. 411, 416, 722 S.E.2d 842, 845 (2012) ("[S]tatutes of limitations are strictly enforced and must be applied unless the General Assembly has clearly created an exception to their application.") (citation omitted).

[41] *Westminster Investing Corp.*, 237 Va. at 547, 379 S.E.2d at 318 (citation omitted) (emphasis added).

[42] JA 38. That the circuit court did not explain its reasons is irrelevant. *See Shannon v. Commonwealth*, 289 Va. 203, 206, 768 S.E.2d 433, 436 (2015) (stating that "[t]here is no general requirement that [a] trial court[] must state for the record the reasons underlying [its] decisions" as long as it "articulate[s] the basis of its ruling sufficiently to enable a reviewing court" to determine that it has not abused its discretion). And this Court will affirm on any basis adequately presented in the record. *Perry v. Commonwealth*, 280 Va. 572, 579, 701 S.E.2d 431, 435 (2010); *see also id.* at 579, 701 S.E.2d at 435 ("Under the right result for the wrong reason doctrine, 'it is the settled rule that how[ever] erroneous . . . may be the reasons of the court for its judgment upon the face of the judgment itself, if the judgment be right, it will not be disturbed on account of the reasons.'") (quoting *Schultz v. Schultz*, 51 Va. (10 Gratt.) 358, 384 (1853)).

untimely because the notice-filing provision in Code § 8.01-195.7 is not tolled during the pendency of the grievance procedure. That result is compelled by the statutory text and the history of the VTCA, which make clear that the notice-filing provisions in Code § 8.01-195.6(A) and Code § 8.01-195.7 have always served different purposes and therefore must have independent meanings.

The tolling provision in Code § 8.01-195.3(7) cannot apply to both provisions because it would render them entirely duplicative, and this Court has expressly stated that "[i]t would be absurd to conclude that the legislature would say the same thing twice in one statutory provision."[43] Under this Court's well-settled precedent, "'[e]very part of a statute is presumed to have some effect and no part will be treated as meaningless unless *absolutely* necessary.'"[44] Because the Court does "not assume the [legislature] intends to enact irreconcilable statutory provisions,"[45] when interpreting a statute, the Court strives "to read statutory language so as to give effect to every word."[46] Moreover, Code § 8.01-195.7

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[43] *Jones*, 227 Va. at 180-81, 314 S.E.2d at 64.

[44] *Blake*, 288 Va. at 383, 764 S.E.2d at 108 (citations omitted); *see also Harris v. Commonwealth*, 142 Va. 620, 623, 128 S.E.2d 578, 579 (1925) ("The various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency.").

[45] *Cty. of Greensville v. City of Emporia*, 245 Va. 143, 149, 427 S.E.2d 352, 356 (1993).

[46] *Owens v. DRS Auto. Fantomworks, Inc.*, 288 Va. 489, 497, 764 S.E.2d 256, 260 (2014).

contains an express list of circumstances when the statute-of-limitations periods are tolled, and it does not include the tolling provision in Code § 8.01-195.3(7). Incorporating Code § 8.01-195.3(7)'s tolling provision into Code § 8.01-195.7 therefore would violate the *expressio unius est exclusio alterius* canon of statutory construction.

In short, the Commonwealth's proffered interpretation—that the Code § 8.01-195.3(7) applies only to the notice-filing provision in Code § 8.01-195.6(A)—is the only way to avoid usurping the General Assembly's role in drafting statutes and to avoid expanding the VTCA's limited waiver of sovereign immunity. Adopting the Commonwealth's interpretation also gives meaning to every relevant provision of the VTCA and, as shown below, there is a plausible reason why the General Assembly would have intended the Commonwealth's interpretation. To the extent the General Assembly disagrees, it is the legislature's role to amend the statute.

A. The text of Code § 8.01-195.6(A) and Code § 8.01-195.7 makes clear that the notice-filing period and the statute-of-limitations period are substantively different.

By its express terms, the VTCA contains two limitations periods that expressly reference the notice of claim. The first limitations period, in Code § 8.01-195.6(A), generally governs the filing of the notice of claim and states that a VTCA claim "shall be forever barred unless the claimant . . . has filed a written

statement of the nature of the claim . . . within one year after such cause of action accrued."

Code § 8.01-195.7—the statute-of-limitations section governing the filing of a VTCA lawsuit—contains a second one-year limitations period for filing the notice of claim: "Every claim cognizable against the Commonwealth . . . shall be forever barred, unless within one year after the cause of action accrues to the claimant the notice of claim required by § 8.01-195.6 is properly filed."[47] Although this period and the notice-filing period in Code § 8.01-195.6(A) are very similarly worded, there plainly are two different notice-filing periods in the VTCA; one that addresses the time for filing a notice of claim and its required contents, and another addressing when judicial relief is available.

The text of Code § 8.01-195.7 further makes clear that the two limitations periods are distinct by referring to the "*limitations periods* prescribed *by this section and § 8.01-195.6*."[48] So, because the two limitations periods are substantively different, inmates seeking to file a VTCA lawsuit must comply with both the timeliness and the other requirements in Code § 8.01-195.6 as well as the one-year limitations period in Code § 8.01-195.7.

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[47] Va. Code Ann. § 8.01-195.7.

[48] *Id.* (emphases added).

B. The history of the VTCA confirms that the notice-filing period and the statute-of-limitations period always have imposed separate timeliness requirements.

The history of the VTCA and the General Assembly's amendments to it confirm that the timeliness requirements for filing a notice of claim and for filing a lawsuit have always been separate statutory bars. When the VTCA was enacted in 1981, the notice-filing period in Code § 8.01-195.6 barred all claims against the Commonwealth unless, within "six months after such cause of action shall have accrued," "the claimant or his agent, attorney, or representative has filed a written statement of the nature of the claim and the time and place at which the injury is alleged to have occurred . . . ."[49] And the statute-of-limitations period in Code § 8.01-195.7 originally barred all claims against the Commonwealth unless they were filed within two years regardless of whether a notice of claim had been properly filed.[50] Thus, since the beginning, the two limitations periods have posed independent timeliness requirements.

In 1984, the General Assembly shortened the statute-of limitations period to bar all claims against the Commonwealth "unless within one year after the cause of action accrues to the claimant the notice of claim required by § 8.01-195.6 is properly filed." The amendment further provided that timely noticed claims may

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[49] 1981 Va. Acts ch. 449.

[50] *Id.* (emphasis added).

still be barred "unless such action is commenced within eighteen months of the filing of the notice of claim."[51] The General Assembly, in the same 1984 amendment, also revised the notice-filing provision in Code § 8.01-195.6 to bar all claims against the Commonwealth unless "a written statement of the nature of the claim" is "filed within one year after such cause of action shall have accrued."[52]

Since the 1984 amendment, the two statutory provisions have imposed one-year time periods for perfecting a VTCA claim and lawsuit, respectively. But it would be wrong to conclude that the provisions are merely duplicative. Indeed, if the General Assembly had intended for the notice-filing provision in Code § 8.01-195.6 to control the timeliness question, then there would have been no need to add the one-year notice-filing period to Code § 8.01-195.7. The fact that the General Assembly intentionally imposed a separate one-year requirement in the statute-of-limitations provision shows that it intended for the two periods to operate independently.

In the years since, the General Assembly has revised Code § 8.01-195.6 and Code § 8.01-195.7 such that the two notice-filing periods now contain nearly identical language. But the General Assembly has never seen fit to remove the

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[51] 1984 Va. Acts ch. 638.

[52] *Id.*

one-year limit from the statute-of-limitations provision or otherwise indicate that the notice-filing periods in both statutes are one and the same.

C. Applying Code § 8.01-195.3(7)'s tolling provision to the notice-filing period in Code § 8.01-195.7 would violate principles of statutory construction and render part of the VTCA superfluous.

Because the one-year notice-filing periods are substantively distinct, this Court must construe the provisions in a way that gives them both meaning.[53] It appears beyond debate that the notice-filing period in Code § 8.01-195.6(A) is tolled during the grievance process.[54] So the question to be resolved in this case is whether Code § 8.01-195.3(7) also tolls the notice-filing period in Code § 8.01-195.7. Ahmed appears to make two basic arguments for why the tolling provision applies: (1) that the phrase "properly filed" in Code § 8.01-195.7 incorporates the tolling provision by reference to Code § 8.01-195.6; and (2) that the Court must

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[53] *Boynton*, 271 Va. at 229, 623 S.E.2d at 927 ("[W]henever 'a given controversy involves a number of related statutes, they should be read and construed together in order to give full meaning, force, and effect to each.'") (quoting *Ainslie v. Inman*, 265 Va. 347, 353, 577 S.E.2d 246, 249 (2003)).

[54] *See Ogunde*, 271 Va. at 644, 628 S.E.2d at 373. *Ogunde* did not specify whether it was referring to Code § 8.01-195.6(A) or Code § 8.01-195.7 when discussing the tolling provision in Code § 8.01-195.3(7). Applying the tolling provision exclusively to Code § 8.01-195.7, however, would render the notice-filing period in Code § 8.01-195.6(A) entirely superfluous. As shown *infra* Part III, there is a purpose for the notice of claim independent of filing a lawsuit, so extending the time for filing notice under Code § 8.01-195.6(A) confers a benefit to inmates. Extending solely the time for filing a lawsuit under Code § 8.01-195.7 simply renders Code § 8.01-195.6(A)'s one-year period a nullity.

apply the tolling provision to Code § 8.01-195.7 in order to give Code § 8.01-195.3(7) effect.[55] Neither argument is persuasive.

1. To avoid superfluity, the phrase "properly filed" in Code § 8.01-195.7 must refer only to the notice-filing requirements other than the one-year limitations period.

Ahmed is wrong that the phrase "properly filed" in Code § 8.01-195.7 incorporates Code § 8.01-195.3(7)'s tolling provision. In his view, a notice is "properly filed" under Code § 8.01-195.7 if it is timely filed under Code § 8.01-195.6 and satisfies the other requirements of that Code section.[56] This Court should reject that construction, however, because it would render the one-year notice-filing period provided in Code § 8.01-195.7 superfluous in inmate cases and, by doing so, would judicially expand the VTCA's limited waiver of sovereign immunity.

If Ahmed were right—that all that matters is whether an inmate satisfied the notice-filing period in Code § 8.01-195.6(A)—then no purpose would be served by having a separate statute-of-limitations period that expressly requires that the notice of claim be "properly filed" "within one year after the cause of action accrues."[57] Put simply, if the phrase "properly filed" is construed to include the

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[55] *See* Opening Br. of Appellant at 4-7.

[56] *See id.* at 4-5.

[57] Va. Code Ann. § 8.01-195.7.

one-year notice-filing period in Code § 8.01-195.6(A), then the one-year period in Code § 8.01-195.7 is a nullity. As shown above, such an interpretation is inconsistent with the plain text and history of the VTCA.

In any event, when there is "any ambiguity or inconsistency in the statute," this Court must "give effect to the General Assembly's intent" by seeking to harmonize the statutory provisions.[58] Here, a harmonizing interpretation is plainly available: the "properly filed" phrase refers to the notice-filing requirements in Code § 8.01-195.6 other than the one-year notice-filing period.[59] That interpretation preserves the one-year limitations period in Code § 8.01-195.7, while also giving effect to the phrase "properly filed."

2. Code § 8.01-195.7 contains an exclusive list of the circumstances when the various statute-of-limitations periods are tolled.

With respect to Ahmed's second argument, this Court would need to "rewrite" the express tolling provision in Code § 8.01-195.7 to provide a benefit beyond that "which the General Assembly has . . . seen fit to" confer.[60] Doing so, however, would violate this Court's general rule against rewriting legislative

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[58] *Blake*, 288 Va. at 383, 764 S.E.2d at 108 (citation omitted).

[59] For example, Code § 8.01-195.6(B) specifies who the notice of the claim must be filed with, and Code § 8.01-195.6(C) prescribes the manner in which the notice must be delivered to be deemed filed. Va. Code Ann. § 8.01-195.6(B)-(C).

[60] *Jackson v. Fid. & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005).

enactments and would also violate the *expressio unius est exclusio alterius* canon of statutory construction. As this Court has frequently pointed out, "when a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way."[61] Because the General Assembly did not reference Code § 8.01-195.3(7) when cross-referencing other tolling provisions in Code § 8.01-195.7,[62] the clear implication is that it did not intend for that provision to extend to the statute-of-limitations periods, including the one-year notice-filing period. Given the availability of an interpretation that harmonizes Code § 8.01-195.6(A) and § 8.01-195.7, this Court should decline Ahmed's request to judicially expand the VTCA.[63]

* * *

Ahmed never addresses in his brief the effect his interpretation would have on the VTCA. Instead, he rests his argument entirely on *Ogunde*, a case in which the Court held that the limitations periods in the VTCA—rather than the limitations period for conditions-of-confinement challenges in Code § 8.01-

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[61] *See, e.g.*, *id.* (quoting *Commonwealth v. Brown*, 259 Va. 697, 705, 529 S.E.2d 96, 100 (2000)).

[62] Va. Code Ann. § 8.01-195.7 ("The limitations periods prescribed by this section . . . shall be subject to the tolling provision of § 8.01-229 and the pleading provision of § 8.01-235.").

[63] *See, e.g.*, *Parker v. Warren*, 273 Va. 20, 23, 639 S.E.2d 179, 181 (2007) ("Courts are required to apply the plain language of a statute when possible and may not rewrite it.").

243.2[64]—apply to all inmate tort actions.[65] While the Court noted that applying Code § 8.01-243.2's limitations period would render Code § 8.01-195.3(7) superfluous, that concern is not implicated in this case.[66] Here, it is Ahmed's interpretation that would render a substantive timeliness requirement of the VTCA a nullity; the Commonwealth's proffered interpretation, by contrast, gives effect to each provision of the VTCA.

III. Declining to apply the tolling provision in Code § 8.01-195.3(7) to the one-year notice-filing period in the VTCA's statute of limitations will not significantly impair inmates' abilities to seek compensation for meritorious claims under the VTCA.

Because all of the VTCA provisions at issue in this case can be harmonized, this Court should adhere to ordinary principles of statutory interpretation and avoid an interpretation that renders the one-year notice-filing period in Code § 8.01-195.7 superfluous. Indeed, there is a plausible reason why the General Assembly would have intended to toll the notice-filing period in Code § 8.01-195.6(A) but not the notice-filing period in the VTCA's statute of limitations provision: in recognition of the fact that they must exhaust the prison grievance process, inmates

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[64] Va. Code Ann. § 8.01-243.2 (2007).

[65] *Ogunde*, 271 Va. at 644, 628 S.E.2d at 373.

[66] *See id.* It is irrelevant that the Attorney General may have conceded in *Ogunde* that fixing the time limit for filing suit by applying Code § 8.01-243.2 "would impliedly repeal [the tolling provision in Code § 8.01-195.3(7)]." *Id.* "[A] party cannot concede the law," and a party's concession of law does not "prohibit this Court from establishing how a statutory scheme correctly operates." *CVAS 2 LLC v. City of Fredericksburg*, 289 Va. 100, 117 n.5, 766 S.E.2d 912, 919 n.5 (2015).

are permitted additional time to submit VTCA claims for settlement under Code § 8.01-195.5 but not extra time to file a lawsuit under Code § 8.01-195.7.

Code § 8.01-195.3(7) reduces the statutory period in which "a specific and limited group of plaintiffs"[67]—inmates—may seek relief under the VTCA by requiring them to first exhaust any "remedies under the adult institutional grievance procedures."[68] The tolling provision provided by Code § 8.01-195.3(7) compensates for that reduction by extending the time for inmates to timely file notice of a claim.[69] Critically, the notice of claim serves a purpose other than as a precursor to filing a lawsuit under the VTCA: properly filing a notice under Code § 8.01-195.6(A) provides claimants the opportunity to have the Attorney General or the Division of Risk Management settle or pay meritorious claims even if the time for filing a VTCA lawsuit has passed.[70]

Code § 8.01-195.5 states that:

> The Attorney General shall have authority in accordance with 2.2-514 to compromise and settle claims against the Commonwealth cognizable under this article. . . . The

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[67] *Wertz v. Grubbs*, 245 Va. 67, 71, 425 S.E.2d 500, 502 (1993).

[68] Va. Code Ann. § 8.01-195.3(7).

[69] *Id.*

[70] Va. Code Ann. § 8.01-195.5; *see also* Va. Code Ann. § 2.2-514(A) (Supp. 2016) (stating that when "the settlement amount does not exceed $250,000, the Attorney General or an assistant Attorney General . . . or such other designee of the Attorney General, may compromise and settle or discharge the" VTCA claim, subject to certain approvals).

> Director of the Division of Risk Management may adjust, compromise and settle claims against the Commonwealth cognizable under this article prior to the commencement of suit unless otherwise directed by the Attorney General.

Thus, under the settlement provision, an inmate might be time-barred from bringing a lawsuit, but the opportunity to obtain relief under the VTCA remains available. As a result, the tolling provision of Code § 8.01-195.3(7) provides a substantive benefit to inmates regardless of whether it applies to the statute-of-limitations period in Code § 8.01-195.7.

Moreover, in nearly every instance, settlement under Code § 8.01-195.5 will not be an inmate's only option for relief. Ordinarily, the grievance process will conclude with ample time left to comply with the one-year statute-of-limitations period.[71] For example, the plaintiff in *Ogunde*—an inmate at the same prison where Ahmed is incarcerated[72]—exhausted the grievance process and filed notice of his claim within four months after his cause of action accrued.[73] And Ahmed

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[71] Under the Department's Operating Procedure 866.1, the length of the informal complaint period and grievance procedure cannot exceed 195 days. So even if an inmate's grievance procedure took the entire time, more than five months would still remain to timely file notice in order to preserve the opportunity to seek judicial relief under the VTCA. OP 866.1(V)(B)(2), (VI)(D)(1), *available at* https://vadoc.virginia.gov/about/procedures/documents/800/866-1.pdf.

[72] *See* 271 Va. at 641, 628 S.E.2d at 371; Opening Br. of Appellant at 1.

[73] Br. of Appellant at *2, *Ogunde v. Commonwealth*, 271 Va. 639, 628 S.E.2d 370 (2006) (Record No. 050212), 2006 WL 1992820; *see also Ogunde*, 271 Va. at 642, 628 S.E.2d at 371 ("The plaintiff timely filed the notice of claim required by Code

exhausted the grievance process less than two months after he was injured.[74] Accordingly, he had more than ten months to preserve his right to file a lawsuit by filing notice of his claim before the one-year notice-filing period in Code § 8.01-195.7 elapsed. He simply chose to wait until more than a year after his cause of action accrued.

The Commonwealth recognizes that its interpretation may seem to create a trap for the unwary, but it is the only construction of the VTCA that would give effect to all three provisions implicated by this case. Because the VTCA is in derogation of common law and this Court is obligated to strictly enforce statutes of limitations, the central-most concern for this Court should be to avoid rendering any part of the VTCA a nullity and thereby judicially expand the limited waiver of sovereign immunity. To the extent the General Assembly disagrees, the legislature is able and willing to revise the VTCA. Indeed, that is precisely what happened in response to this Court's decision in *Phelan v. Commonwealth*.[75]

In sum, based on the plain text and history of the VTCA, as well as this Court's precedent on statutes of limitations and statutes in derogation of common

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§ 8.01-195.6 of the [VTCA], and likewise timely filed this action under the [VTCA's] statute of limitations, Code § 8.01-195.7.")

[74] Ahmed's cause of action accrued on September 10, 2013 and he exhausted the grievance procedure on October 30, 2013. JA 1, 13.

[75] *See* 2016 Va. Acts ch. 772.

law, the tolling provision in Code § 8.01-195.3(7) cannot apply to the one-year notice-filing period in Code § 8.01-195.7. Applying that tolling provision in this case would render the notice-filing period in Code § 8.01-195.7 a nullity in inmate cases and that absurd result should be avoided.[76]

CONCLUSION

The circuit court's decision should be affirmed.

Respectfully submitted,

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[76] *Jones*, 227 Va. at 180-81, 314 S.E.2d at 64.

CERTIFICATE OF SERVICE AND FILING

I certify under Rule 5:26(h) that on August 7, 2017, this brief was filed electronically with the Court, in Portable Document Format, and three 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 the portion subject to that rule does not exceed 50 pages. A copy was electronically mailed to:

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