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IN THE

Supreme Court of Virginia

RECORD NO. 161180

ABBAS JAVED AHMED,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS AND OF THE FACTS

Mr. Ahmed was an inmate at Greensville Correctional Center ("GCC"). (J.A. 1.) GCC is a Level 3 facility operated by the Virginia Department of Corrections ("VDOC"). On September 10, 2013, at approximately 11:10 p.m., Mr. Ahmed was using a telephone in the facility. The telephone was mounted on a cinder block wall. Suddenly and without warning, the telephone, which weighed approximately 50-pounds, came loose from the wall, striking Mr. Ahmed against the right side of his head. (J.A. 2–3.) Mr. Ahmed was knocked unconscious by the impact. Mr. Ahmed also sustained an injury to his neck and a laceration to the top right side of his head. (J.A. 3.)

On September 30, 2013, Mr. Ahmed filed with the VDOC a Level I "Regular Grievance" form. Mr. Ahmed alleged that the telephone fell from the wall because the VDOC's Buildings and Grounds supervisor failed to "supervise and/or inspect" the mounting of the telephone by a private contractor. (J.A. 17.) On October 22, 2013, the VDOC denied Mr. Ahmed's Level I grievance. (J.A. 14.) Mr. Ahmed appealed the VDOC's initial decision by filing a Level II grievance. On October 30, 2013, the VDOC denied Mr. Ahmed's appeal. (J.A. 13.) The denial stated that "Level II is the

last level of appeal for this grievance. You have exhausted all administrative remedies." (J.A. 13.)

On September 12, 2014, Mr. Ahmed executed his Notice of Claim and mailed it to the Virginia Division of Risk Management ("VDRM"). (J.A. 34.) The VDRM received the Notice of Claim on September 22, 2014. (J.A. 30.) Mr. Ahmed filed his Complaint, *pro se*, in the Circuit Court for the County of Greensville on February 24, 2016. (J.A. 5.) Mr. Ahmed sought recovery under the Virginia Tort Claims Act ("VTCA"). Va. Code § 8.01-195.1 *et seq*.

The Commonwealth filed a Plea of Statute of Limitations, Plea of Sovereign Immunity, and Motion to Dismiss. The Commonwealth argued that Mr. Ahmed failed to comply with the statutory requirements for bringing an action under the VTCA. More specifically, it argued that Mr. Ahmed failed to file his Notice of Claim within the one (1) year statute of limitations period prescribed by § 8.01-195.7 of the Virginia Code. This was because his injury occurred on September 10, 2013, and the VDRM did not receive his Notice of Claim until September 22, 2014. The circuit court granted the Commonwealth's plea and, on June 27, 2016, it entered an order dismissing Mr. Ahmed's case with prejudice. (J.A. 38.) This appeal followed.

ASSIGNMENTS OF ERROR

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. (J.A. 38.)

2. The Petitioner states and assigns error to the trial court of undue prejudice in denying his motion for [rehearing], 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. (J.A. 38.)

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." (J.A. 38.)

STANDARDS OF REVIEW

A trial court's ruling on the statute of limitations where based on the pleadings is a question of law that this Court reviews *de novo*. *Ogunde v. Commonwealth*, 271 Va. 639, 644 (2006).

> While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity. Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.

Barr v. Town & Country Props., 240 Va. 292, 295 (1990) (quoting *Watkins v. Hall*, 161 Va. 924, 930 (1934)).

ARGUMENT

A. The Circuit Court Erred In Finding That Mr. Ahmed's Complaint Was Time-Barred (Assignment of Error 1).

The circuit court ruled that Mr. Ahmed's VTCA claim was time-barred pursuant to Virginia Code § 8.01-195.7. This ruling was erroneous because it failed to recognize the tolling provision provided in Virginia Code § 8.01-195.3(7). Proper application of the statutory scheme reveals that Mr. Ahmed's claim was timely because the statutory period for filing his Notice of Claim was tolled while Mr. Ahmed's grievance was pending.

Under Virginia Code § 8.01-195.7, every claim against the Commonwealth under the VTCA "shall be forever barred, unless within one year after the cause of action accrues" the claimant properly files a notice of claim. Any notice of claim against the Commonwealth "shall be filed with the Director of the Division of Risk Management or the Attorney General." Va. Code § 195.6(B). "The notice is deemed filed when it is received in the office of the official to whom the notice is directed." *Id*. § 195.6(C). With respect to an inmate housed in a state correctional facility, "[t]he time for filing the notice of tort claim shall be tolled during the pendency of the grievance procedure." *Id*. § 8.01-195.3(7).

The facts in the record are as follows: Mr. Ahmed alleged that on September 10, 2013, while using a mounted telephone at GCC, the

telephone fell from the wall and struck his head. (J.A. 2–3.) Mr. Ahmed initiated the administrative grievance procedure by filing a Level I grievance with the VDOC on September 30, 2013. (J.A. 17.) After his Level I grievance was denied as unfounded, Mr. Ahmed on October 24, 2013, appealed the decision to the VDOC. On October 30, 2013, the VDOC denied Mr. Ahmed's appeal. (J.A. 13.) Mr. Ahmed accordingly exhausted all available administrative remedies. On September 12, 2014, Mr. Ahmed executed and mailed his Notice of Claim to the VDRM. (J.A. 34.) The VDRM received the Notice of Claim on September 22, 2014. (J.A. 30.)

Under § 8.01-195.3(7), "[t]he time for filing the notice of tort claim shall be tolled during the pendency of the grievance procedure." So, the one-year limitations period for filing Mr. Ahmed's notice of claim began to run on October 30, 2013, the date the grievance process ended and Mr. Ahmed exhausted all available administrative remedies. Thus, Mr. Ahmed had until October 30, 2014 to file his Notice of Claim. The VDRM received Mr. Ahmed's Notice of Claim on September 22, 2014, 38 days before the limitations period expired. The trial court's ruling was accordingly in error and should be reversed.

The result here is consistent with *Ogunde v. Commonwealth*, 271 Va. at 639. In *Ogunde*, the inmate plaintiff filed an action under the FTCA, but

the Commonwealth argued it was untimely because, in its view, Virginia Code § 8.01-243.2 (the inmate statute) applied, rather than § 8.01-195.7 (the FTCA statute of limitations). Under § 8.01-243.2, a plaintiff inmate may bring an action "within one year after [the] cause of action accrues or within six months after all administrative remedies are exhausted, whichever occurs later." The inmate statute expressly provided that it applied to personal actions "relating to the conditions of . . . confinement." *Id*. § 8.01-243.2. By contrast, the FTCA's statute of limitations provides in relevant part: "Every claim cognizable against the Commonwealth" brought under the Act "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." The statute further provides: "The time for filing the notice of tort claim shall be tolled during the pendency of the grievance procedure." *Id*. § 8.01-195.3(7).

The Court harmonized these provisions by finding that the FTCA's statute of limitations governed because it applied strictly to tort claims brought against the Commonwealth, while the inmate statute applied to any other claim relating to the conditions of the prisoner's confinement. *Ogunde*, 271 Va. at 644–45. To hold otherwise, would be to find that in

enacting the inmate statute the General Assembly impliedly repealed § 8.01-195.3(7) when it enacted the inmate statute. *Id*. at 644.

It is undisputed in this case that the FTCA's statute of limitations applies, not the inmate statute. Thus, in accordance with § 8.01-195.3(7), the period for filing Mr. Ahmed's Notice of Claim was tolled during the grievance procedure. The trial court erred in failing to recognize that the statute of limitations was tolled pursuant to § 8.01-195.3(7). Mr. Ahmed's Notice of Claim was timely filed and the circuit court's judgment should be reversed.

B. Mr. Ahmed Concedes There Was No Due Process Violation In This Case (Assignment of Error 2).

The guarantee of due process enshrined in the Fourteenth Amendment has two components: (1) a guarantee of procedural protections when a state seeks to deprive an individual of protected liberty or property interests, and (2) a substantive protection against conduct that "shocks the conscience." *See County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). The first component of the due process clause requires a two-step analysis: first a court must determine whether the plaintiff has a protected liberty or property interest and then the court must determine whether the state has provided adequate procedures for the vindication of that interest. *Wilkinson v. Austin*, 545 U.S. 209, 213 (2005). The second

component of the due process clause does not rest on state law, but is derived from the United States Constitution. This component provides substantive rather than merely procedural protections and is implicated when "the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" regardless of whether the behavior in question conforms or fails to conform to state laws. *County of Sacramento*, 523 U.S. at 862 n.8.

A state tort cause of action is a property right entitled to protection under the Due Process Clause. *Logan v*. *Zimmerman Brush Co*., 455 U.S. 422, 428. (1982). The Commonwealth through the VDOC's grievance process, the VTCA, and the Rules of the Supreme Court of Virginia has provided adequate procedures for the vindication of Mr. Ahmed's claim. The trial court's misapplication of the statute of limitations does not erase the existence of those procedures and safeguards. Procedural due process does not guarantee that a party will succeed. *Logan*, 455 U.S. at 432. There is also no substantive due process violation here because the trial court's ruling, while wrong, was not so arbitrary and irrational that it shocks the contemporary conscience.

C. Mr. Ahmed Concedes That There Is No Equal Protection Violation In This Case (Assignment of Error 3).

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The equal protection guarantee is "concerned with governmental classifications that 'affect some groups of citizens differently than others.'" *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601 (2008) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)).

This case does not present a viable equal protection claim. Mr. Ahmed claims that in failing to accurately apply the statute of limitations the state court treated him differently than other inmates for some illegitimate or irrational reason. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). There is, however, nothing in the record to demonstrate that Mr. Ahmed was treated differently than other similarly situated persons. Mr. Ahmed's FTCA claim was dismissed improperly but the trial court's commission of error does not establish that it acted for an illegitimate or irrational reason.

CONCLUSION

The circuit court plainly erred in finding that Mr. Ahmed's VTCA claim was time-barred because it failed to apply the tolling provision applicable to

an inmate housed in a state correctional facility, § 8.01-195.3(7) of the Virginia Code. The circuit court's judgment should accordingly be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(e) was complied with and a true and accurate copy of the foregoing was emailed this 14th day of July 2017, to:

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