IN THE

Supreme Court of Virginia

RECORD NO. 161180

ABBAS JAVED AHMED,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT

Two legal maxims resolves this case. First, "every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." *Hubbard v. Henrico Ltd. P'shp.*, 255 Va. 335, 340 (1998). Second, "a statute should never be construed in a way that leads to absurd results." *Meeks v. Commonwealth*, 274 Va. 798, 802 (2007). Yet, the Commonwealth advances an interpretation of the VTCA's timing provisions that would render part of the VTCA meaningless and create an absurd (and unjust) result.

The Commonwealth asserts that while the tolling provision set out in Virginia Code § 8.01-195.3(7) applies to the one-year notice of claim provision set out in § 8.01-195.6(A) it does not apply to the very same provision when restated in § 8.01-195.7. The Commonwealth's reading would render § 8.01-195.3(7) meaningless because the Commonwealth could always assert § 8.01-195.7 as a bar to an inmate's recovery when the grievance process prevents him from timely filing a notice of claim. What is more, it would lead to an absurd result because inmates who complete the grievance process within one year will be allowed to advance their claims while those who do not will have their claims barred.

There is also no merit to the Commonwealth's claim that the maxim *expressio unius est exclusio alterius* applies here. Section 8.01-195.7 does not express a series or grouping of events justifying an inference that the legislature intended that § 8.01-195.3(7) would not toll the notice-filing requirement as restated in § 8.01-195.7. The Commonwealth's construction should be rejected and this Court should reverse the judgment below.

A. The Commonwealth's Reading Of The VTCA Would Render The Tolling Provision In § 8.01-195.3(7) Meaningless.

The Commonwealth argues that the circuit court's decision should be affirmed because "the notice-filing provision in Code § 8.01-195.7 is not tolled during the pendency of the grievance procedure." (Appellee's Br. at 12.) It claims this outcome is compelled by the "statutory text and history of the VTCA" and contends that even though the notice of claim provisions in both § 8.01-195.6(A) and § 8.01-195.7 are identical the provisions have "always served different purposes and therefore must have independent meanings." (Appellee's Br. at 12.) The Commonwealth's argument is untenable because it would render § 8.01-195.3(7) ineffectual.

The Virginia Tort Claims Act (the "VTCA" or the "Act") is a self-contained enactment that waives the Commonwealth's sovereign immunity from certain damages claims. Va. Code §§ 8.01-195.1 through 8.01-195.9. It expressly retains the Commonwealth's sovereign immunity, however, for

claims brought by inmates unless "the claimant verifies under oath, by affidavit, that he has exhausted his remedies under the adult institutional inmate grievance procedures promulgated by the Department of Corrections." *Id*. § 8.01-195.3(7). The statute provides that "[t]he time for filing the notice of tort claim shall be tolled during the pendency of the grievance procedure." *Id*.

Virginia Code § 8.01-195.6, which is entitled "Notice of Claim," sets out what the notice of tort claim must contain, to whom it must be sent, and the timing for its filing. It states that the notice of claim must describe the "nature of the claim" by detailing "the time and place at which the injury is alleged to have occurred and the agency or agencies alleged to be liable . . . ." *Id*. § 8.01-195.6(A). To be timely under the statute, a notice of claim must be filed "within one year after such cause of action accrued." *Id*. § 8.01-195.6(A).

Virginia Code § 8.01-195.7 is entitled "Statute of Limitations" and it provides that a cause of action arising under the Act is time-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." It further provides that a claim under the Act is "forever barred unless such action is commenced within 18 months of the filing of the notice of claim . . . ." *Id*. § 8.01-195.7.

To limit Mr. Ahmed's ability to recover, the Commonwealth asserts that because § 195.7 and § 195.6(A) contain overlapping one year notice-filing requirements, the tolling provision found in § 8.01-195.3(7) for inmate claims can apply to only § 195.6(A). But this reading would effectively nullify § 8.01-195.3(7) because the Commonwealth could always assert the one-year notice of filing requirement found in § 195.7 as a bar to any lawsuit filed by an inmate whose grievance period last more than one year, even though the timing provisions found in §§ 195.6(A) and 195.7 are virtually identical in language and precisely identical in effect.

The Commonwealth claims this construction is necessary because the legislature would not say the same thing twice in one statutory provision. (Appellee's Br. at 12) (citing *Jones v. Conwell*, 227 Va. 176 (1984).) But the legislature did not state the same thing "twice in one statutory provision." There is merely partial overlap between two separate provisions, §§ 8.01-195.6(A) and 8.01-195.7, and this overlap does not violate any statutory maxim. In fact, "[r]edundancies across statutes are not unusual events in drafting, and so long as there is no positive repugnancy between two laws a court must give effect to both." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992) (internal citation and quotation marks omitted).

This case is not like *Jones*. There, this Court rejected a reading that would have created a redundancy within a single statutory provision, Virginia Code § 8.01-81. Here, there is merely an overlap between § 8.01-195.6(A) and 8.01-195.7, in that both state that an inmate must file a notice of claim within one year of the events giving rise to the cause of action. S*ee Witcher v*. *Early* (*In re Witcher*), 702 F.3d 619, 621–22 (11th Cir. 2012) (holding no superfluity results from considering "debtors' ability to pay their debts under" two different provisions of § 707(b)). This overlap does not render either provision entirely inoperative. But to conclude that the tolling provision of § 8.01-195.3(7) does not apply to toll the notice of claim period stated in both § 8.01-195.6(A) and § 8.01-195.7 would render § 8.01-195.3(7) a dead letter.

Indeed, this Court faced a similar issue in *Ogunde v*. *Commonwealth*, 271 Va. 639 (2206). There, this Court considered whether "an action filed by a prisoner under the [VTCA] is governed by the statute of limitations applicable to persons confined in state correctional facilities, as set forth in Code § 8.01-243.2, and not by the statute of limitations prescribed by Code § 8.01-195.7 for actions brought under the Act." *Id*. at 641. If the limitations period in § 8.01-243.2 applied, the inmates action was time barred whereas his action would be timely under § 8.01-195.7. The Court compared the two

statutes and noted that under § 8.01-243.2, an inmate was required to file "any personal action relating to the conditions of his confinement . . . within one year after [the] cause of action accrues or within six months after all his administrative remedies are exhausted, whichever occurs later." *Ogunde*, 271 Va. at 642. By contrast, under § 8.01-195.7, an inmate's claim is barred unless within one year after the cause of action accrues the claimant properly files a notice of claim. The Court then expressly referenced § 8.01-195.3(7), and noted that it tolled the time for filing the notice of claim during the pendency of the administrative grievance process as stated in § 8.01-195.7. *Id*. at 642. Because the Court found that § 8.01-195.7 applied, along with the tolling provision in § 8.01-195.3(7), the inmate's claim was timely filed.

Notably, in *Ogunde*, the Commonwealth conceded that if § 8.01-243.2 applied and fixed the time for filing the inmate's cause of action, this would "impliedly repeal the second sentence of [§ 8.01-195.3(7)] by potentially eliminating the tolling provision . . . ." *Id*. at 644. Now the Commonwealth essentially argues that § 8.01-195.3(7) applies only to § 195.6(A). This reading would also "impliedly repeal" the tolling provision of § 8.01-195.3(7).

B. The Commonwealth's Construction Conflicts With *Ogunde* And Would Lead To An Absurd Result.

As explained *supra*, this Court in *Ogunde* construed the VTCA and specifically the operation of §§ 8.01-195.3(7) and 8.01-195.7. The Court found that because § 8.01-195.3(7) operated to toll the limitations period of § 8.01-195.7, the inmate plaintiff's filing was timely. *Id*. at 644–45. The Commonwealth now states that it "agrees that Code § 8.01-195.3(7) tolls the notice-filing period in Code § 8.01-195.6(A)" but argues it would be wrong to apply "the tolling provision to . . . § 8.01-195.7." (Appellee's Br. at 1.) This Court's ruling in *Ogunde* forecloses the Commonwealth's argument because the Court applied § 8.01-195.3(7) to § 8.01-195.7 to reach its holding.

Moreover, should this Court accept the Commonwealth's construction it would lead to an absurd result. Specifically, the inmate plaintiff in *Ogunde* obtained the benefit of the application of § 8.01-195.3(7), and was allowed to pursue his cause of action. By contrast, Ahmed, a similarly situated inmate, will be denied the benefit of § 8.01-195.3(7) and have his claim time-barred. "Statutes are to be construed so as to avoid an absurd result." *Eastlack v*. *Commonwealth*, 282 Va. 120, 126 (2011). To avoid an absurd result in this case, the Court should conclude that § 8.01-195.3(7) tolls the

notice of claim period stated in § 8.01-195.6(A) and restated in § 8.01-195.7.

C. The Negative-Implication Canon Does Not Apply Here.

The Commonwealth contends that § 8.01-195.3(7) does not apply to § 8.01-195.7 because § 8.01-195.7 provides that "[t]he limitations periods prescribed by this section and § 8.01-195.6 shall be subject to the tolling provisions of § 8.01-229 . . . ." According to the Commonwealth, because § 8.01-195.7 cross-references § 8.01-229 and does not reference § 8.01-195.3(7), the *expressio unius est exclusio alterius* canon (or negative-implication canon) mandates that § 8.01-195.3(7) does not apply. But the canon does not apply here.

The *expressio unius* canon does not apply unless it can be fairly read from context that the legislature "considered the unnamed possibility and meant to say no to it." *Marx v. General Revenue Corp.*, 568 U.S. 371, 381 (2013) (quotation marks and citation omitted). "[T]he canon can be overcome by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion." *Id.* (quotation marks and citation omitted). Indeed, the canon has force only when the "items expressed are members of an associated group or series, justifying the inference that the items not mentioned were excluded by deliberate choice,

not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). "'The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded.'" *Id.* (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)).

The canon does not apply in this case because it cannot be fairly derived from the text that the legislature intended that § 8.01-195.3(7) not apply to § 195.7. In fact, under the Commonwealth's reasoning because § 8.01-195.7 provides that "[t]he limitations periods prescribed by this section *and* § 8.01-195.6" are subject to the tolling provision of § 8.01-229, § 8.01-195.3(7) would not apply to either § 8.01-195.7 or § 8.01-195.6.

Section 8.01-195.7 also does not identify a series of statutory provisions that bear on the tolling issue, instead it references only the general tolling statute. This is insufficient to show that the legislature intended to exclude § 8.01-195.3(7) from tolling the notice of claim provision in § 8.01-195.7.

D. The Commonwealth's Reading Will Impair The Ability Of Inmates To Recover In Contravention Of The General Assembly's Intention.

The Commonwealth asserts that its construction of the statute will have little impact on the ability of inmates to recover against the Commonwealth for legitimate tort claims. According to the Commonwealth, even if an inmate is unable to satisfy § 8.01-195.7's one-year notice filing period because of a protracted grievance process all is not lost. The inmate may still submit claims to the Attorney General for settlement under § 8.01-195.5. The Commonwealth's assertion however defies logic and common sense.

A "claim" for purposes of the VTCA is an action for damages that a litigant may assert in a court. Section 8.01-195.5 grants the Attorney General the authority to compromise such claims. But if a claimant is time-barred by § 8.01-195.7 from asserting a claim, the claim is essentially not viable because a court must dismiss it if it is filed. It is hard to imagine a circumstance where the Attorney General would choose to compromise a claim that a litigant cannot bring in a court of law. Inmates whose claims are timely under § 8.01-195.6(A) by operation of the tolling provision of § 8.01-195.3(7) will be unable to obtain any relief if they are time-barred by §

8.01-195.7. Contrary to the Commonwealth's claims, its reading will deprive inmates of the substantive benefit of § 8.01-195.3(7).

CONCLUSION

For the reasons stated herein, this Court should reverse the judgment below.

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