IN THE COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2021

MISC. No. 5

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Suzanne C. Johnson, Clerk
Court of Appeals
of Maryland

JESSE J. MURPHY, et al.

Appellants

v.

LIBERTY MUTUAL INSURANCE CO.

Appellee

Certified Question from the United States District Court for the District of Maryland (The Honorable Stephanie A. Gallagher)

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

I. Governor Hogan's Executive Order did not Authorize Statewide Tolling of Limitations by Judicial Administrative Order.

Seemingly, Appellee does not dispute that the statewide tolling of statutes of limitations by judicial administrative order is constitutionally infirm, as it raises no argument in contravention of Appellant's brief in that regard. Rather, it contends for the first time that the authority of Judge Barbera's Administrative Order tolling limitations arose from Governor Hogan's April 12, 2020 Order Extending Certain Licenses, Permits, Registrations, and other Governmental Authorizations, and Authorizing Suspension of Legal Time Requirements (hereinafter the "Executive Order").

The Governor's Executive Order, however, did not authorize the Judiciary's tolling of statutes of limitations statewide. The Executive Order was limited to authorizing the head of a unit of government – after a specific finding that it would not endanger the public health welfare or safety and upon notification to the Governor – to "suspend the ***effect*** of any legal or procedural deadlines, due date, time of default, time expiration, period of time, or other time of an actor event described within any State or local statute, rule or regulation ***it administers***." Apx. 35 (emphasis supplied).

A. Judge Barbera plainly acted under the Constitution alone, and not Governor Hogan's Executive Order.

Indeed, by its plain language, Judge Barbera's Order stemmed from the Maryland Constitution alone: "NOW THEREFORE: I, Mary Ellen Barbera, Chief Judge of the Court of Apppeals and administrative head of the Judicial Branch, pursuant to the authority conferred by Article IV, § 18 of the Maryland Constitution, do hereby order….." App.

018. Indeed, there is no record of the finding necessitated by the Governor as a condition precedent within the Executive Order, nor is there a record of any prior notice of Judge Barbera's intent to toll statutes of limitations having been provided to the Governor. As such, it cannot be reasonably debated that Judge Barbera did not act upon any apparent, perceived or actual authority of the Executive Order. This Court ought not rewrite the Administrative Order during this certified question proceeding.

B. The Administrative Order did not suspend the effect of limitations, but the limitations itself.

Second, the Administrative Order did not purport to suspend the *effect* of the statutes of limitations in this State, but actually suspended and tolled those very statutes. See, App. 018, ¶ (a) ("....all statutory and rules deadlines related to the initiation of matters required to be filed in a Maryland state trial or appellate court, including statutes of limitations, ***shall be tolled and suspended*****.....**") (emphasis supplied).

The distinction is critical. For example, Maryland Rule 1-203, on its face, tolls the effect of a statute of limitations, but not the limitations itself. It provides that "[i]n computing any period of time prescribed by these rules, by rule or order of court, or by any applicable statute......the last day of the period so computed is included unless (1) it is a Saturday, Sunday, or holiday or (2) the act to be done is the filing of a paper in court and the office of the clerk of that court on the last day of the period is not open, or is closed for part of the day, in which case the period runs until the end of the next day that is not a Saturday, Sunday, holiday or a day on which the office is not open during its regular hours." Md. Rule 1-203; also see Md. Ann. Code, General Provisions, § 1-302 (same). So while

the effect of Rule 1-203 is to provide, for example, 3 years and one day, the statute of limitations itself is unaltered.

Importantly, with the state courts closed to the public in any event for the duration of the Governor's emergency declaration, the *effect* of the statute of limitations was tolled statewide in any event pursuant to Maryland Rule 1-203, above. In the undersigned's view, the Administrative Order became constitutionally infirm once it sought to codify its suspension of limitations by official declaration. In doing so, per the certifying United States District Court, the Administrative Order changed the substantive law of Maryland, rather than just the procedural functioning of the state judiciary. See App. 010 ("[t]he Emergency Order explicitly seeks to toll or suspend 'all statutory and rules deadlines .....including statutes of limitations,' and thus would appear, on its face, to be substantive state law applicable in this diversity suit.")

C. <u>The Court of Appeals does not administer statutes of limitations.</u>

Third, the Court of Appeals does not "administer" statutes of limitation. By its most applicable dictionary definition, "administer" means "to manage or supervise the execution, use or conduct of" See https://www.merriam-webster.com/dictionary/administer (last accessed November 23, 2021). While courts have administrative components, ruling upon statutes of limitations is not one of them. It simply cannot be argued that the judiciary is the administrator of the statutes of limitations. And indeed, Appellee does not make that argument.[1]

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[1] It seems logical that just as an agency prepares regulations within Code of Maryland Regulations for its own conduct, it would be deemed to "administer" those enabling

For all of these reasons, the Executive Order plainly does not apply to the Court's Administrative Order.

II. The Laws and Actions of Other States do not Answer the Certified Question.

As its second argument, Appellee asks that this Court look to the law of New York, Delaware and Georgia, to answer the certified question before it. But because the certified question concerns Maryland law, it is only appropriate to look at Maryland law. Indeed, it is likely every state of the union took some action on account of COVID-19, but none of those states can answer whether Maryland's conduct was in accord with Maryland's constitution. Notably, many states did not toll or suspend statutes of limitations. Moreover,

Moreover, as noted *infra*, "under the Certification statute, the answering court is bound by the facts as agreed by the parties or stated in the Certification Order." *See, e.g., Piselli v. 75th St. Med.*, 371 Md. 188, 202, 808 A.2d 508, 516 (2002). The parties have not stipulated as to what Governor Cuomo of New York did or did not do, the certifying court did not reference Governor Cuomo's conduct, and his orders, in any event, are applicable

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statutes. For example, the Department of Motor Vehicles would administer the vehicle laws, the Department of Labor the employment laws, etc. But applying this logic to the Judiciary would mean the Judiciary administers *all* laws, only because it ultimately decides them. Of course, this is not constitutionally sound. As further anecdotal evidence that the court does not administer the statute of limitations, the court clerk is obligated to accept all filings presented to it, and does not review the contents thereof to check whether it is timely filed within an applicable statute of limitations. In other words, limitations is a question of law, not an administrative function.

only to the State of New York. This Court should not concern itself with questions of New York law.

III. Doctrines of Judicial or Equitable Tolling do not Assist in Answering the Certified Question.

The Court has been furnished with an *amicus curiae* brief of the Maryland Association for Justice, Inc. The *amicus*, a personal injury lawyers association, urge variations of "judicial tolling" or "equitable tolling," and apparently argue that estoppel bars the Court from "revoking" the toll.

Respectfully, however, the position of the *amicus* is inapposite to the certified question before this Court. The United States District Court asked whether the Administrative Order's tolling of statutes of limitations was constitutionally sound, in an effort to inform the District Court's action on the matter before it. The District Court did not certify matters of equity, or whether the Administrative Order is valid through other mechanisms than those provided within the Order itself. Moreover, if an action is constitutionally infirm, it is of no effect – this Court does not "revoke" *ultra vires* conduct. Indeed, the United States District Court did not ask what the impact of the Administrative Order's potentially invalidity would be, and as such, that question is not before the Court.

Moreover, the *amicus* ignores the fundamental difference between case-by-case equitable tolling versus sweeping, statewide tolling of limitations. Analyzing the facts and applying the law to a specific case before it is precisely the role of trial courts, as is the judicial review that follows in an appellate forum. However, an Administrative Order that

purports to toll *future* limitations is a legislative function altering the substantive law of the State, a function reserved for the Legislature.

Specifically, *Bertonazzi v. Hillman*, 241 Md. 361, 216, A.2d 723 (1966) involved a timely filed case, but in the wrong forum and at a time before the Maryland Rules authorized transfer of venue. *Philip Morris v. Christensen,* 394 Md. 227, 905 A.2d 340 (2006) concerned the tolling of an individual cause of action while a putative class action was pending certification. And in *Swam v. Upper Chesapeake Medical Center, Inc.*, 397 Md. 528, 919 A.2d 33 (2007), this Court held a case filed in the circuit court after the statute of limitations had ran nevertheless related back to an earlier claim filed, erroneously, within the Health Care Alternative Dispute Resolution Office.

Lastly, in arguing for equity, the *amicus* references, *inter alia*, the impact of COVID-19, its "administrative hurdles," "unobtainable government records," and even the *amicus* counsel's own testimony of delayed Public Information Act requests. However, no such facts are contained within the certification order and as such, not reviewable on this certified question record. *See, e.g., Piselli v. 75th St. Med.*, 371 Md. 188, 202, 808 A.2d 508, 516 (2002) ("under the Certification statute, the answering court is bound by the facts as agreed by the parties or stated in the Certification Order."); *Guttman v. Wells Fargo Bank*, 421 Md. 227, 230, 26 A.3d 856, 858 (2011) (same).

CONCLUSION

In conclusion, Appellant respectfully requests that the Court of Appeals answer the certified question in the negative, thereby abrogating that part of the Administrative Order that purported to toll or suspend statutes of limitations.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

This Brief contains **1834** words, excluding the parts of the Brief exempted from the word count by Maryland Rule 8-503 (tables of contents and authorities) and the citation and text required by Rule 8-504(a)(8).

This Brief complies with the font, spacing, and type size requirements stated in Rule 8-112. It was printed using *Times New Roman,* size 13 font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2021, twenty (20) copies of this brief were hand-delivered to this Court, and two copies were served via electronic mail and by first class mail, postage pre-paid US mail to counsel for Appellee.

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