VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 7th *day of* February, 2014.

Michael Eric A.B. Mak Shun Ming Hotung, Appellant,

against Record No. 122186
Circuit Court No. CL2011-11125

Eric E. Hotung, Appellee.

Eric E. Hotung, Appellant,

against Record No. 130264
Circuit Court No. CL2011-11125

Michael Eric A.B. Mak Shun Ming Hotung, Appellee.

Upon appeals from a judgment rendered by the Circuit Court of Fairfax County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the circuit court.

Michael Eric A.B. Mak Shun Ming Hotung ("Michael") was born in 1959 to Winnie Ho Yuen Ki ("Miss Ho"). Eric E. Hotung ("Eric") first publicly acknowledged that he was Michael's biological father in June 2001. With Eric's encouragement, Michael thereafter adopted the Hotung name in his professional and social life. In June 2007, at Eric's behest, Michael donated $250,000 to Georgetown University to dedicate the "Eric E. Hotung Suite" within the "Eric E. Hotung International Law Building" at the Georgetown University Law Center.

In November 2009, Michael's wife commenced a divorce proceeding after a lengthy separation. After her allegations about Michael became public, Eric made a statement in Hong Kong to a reporter in which Eric repudiated Michael. Versions of the statement were subsequently reported in several Chinese-language publications circulated primarily in Asia.

In August 2011, Michael filed a complaint in the circuit court alleging constructive fraud, detrimental reliance, wrongful interference with contract, intentional infliction of emotional distress, defamation, and insulting words. In his complaint, Michael contended that Eric's statement was capable of being construed as a denial of biological paternity and that such a denial was actionable.

Eric entered a special appearance and filed a motion to dismiss for lack of personal jurisdiction or improper venue. Eric argued, among other things, that the court should dismiss the complaint for forum non conveniens under Code § 8.01-265. Michael responded that the court had personal jurisdiction because Eric maintained a residence in Virginia and that Eric had not proven good cause to dismiss the case under Code § 8.01-265.

At a September 2011 hearing on the question of personal jurisdiction, the circuit court determined that an evidentiary hearing was necessary. The court set the hearing for February 14, 2012 to allow counsel time to travel overseas to depose Eric. The hearing was subsequently continued to April 30.

In March 2012, Eric submitted a pro se letter in which he conceded the issue of personal jurisdiction but reserved the issue of forum non conveniens. The court thereafter entered an order

finding Eric subject to its personal jurisdiction. The order did not rule on the forum non conveniens issue. In May, the parties filed additional briefs and moved for a ruling on that outstanding issue. The court held a hearing on June 8.

At the hearing, Eric argued that he lived in Hong Kong. He averred that he was 86 years old and proffered medical evidence that he was unfit for international travel. He noted that the complaint asserted that Michael also lived in Hong Kong. The parties did not dispute that Eric's statement was made at a Hong Kong club to a reporter employed by a Hong Kong newspaper. Thus, Eric argued, the witnesses to the statement were in Hong Kong. Further, to the extent the statement placed the fact of biological paternity in doubt, Miss Ho was the principal witness as to its truth or falsity and she too was in Hong Kong. Moreover, Eric argued that he made the statement in Chinese and the various versions of it were published in Chinese-language periodicals circulated primarily in Hong Kong and intended for a Hong Kong audience. Accordingly, he concluded, expert witness testimony was necessary to establish how the statement was interpreted by that audience and such expert witnesses also were in Hong Kong. In total, Eric identified 15 witnesses of whom only one was not in Hong Kong; that witness was in New York City.

Michael responded that Eric had adduced no evidence of inconvenience to establish good cause to dismiss the complaint under Code § 8.01-265. He also argued that Eric had waived the issue either by failing to raise it promptly or by conceding it in his pro se letter. He also asserted that the testimony of the witnesses whom Eric identified was irrelevant.

The circuit court ruled that Eric had not proven good cause for dismissal. It found his proffer of witnesses and their testimony insufficient without evidence. It similarly found his proffer of medical unfitness insufficient in view of the court's assessment of Eric's capacity during his videotaped deposition and without evidence of the evaluating doctor's credentials. Citing Code § 8.01-264 and Faison v. Hudson, 243 Va. 413, 417 S.E.2d 302 (1992), the court also ruled in the alternative that Eric had not promptly argued the forum non conveniens issue. It therefore denied Eric's motion to dismiss under Code § 8.01-265.[1]

This Court reviews a ruling under Code § 8.01-265 for abuse of discretion. Virginia Elec. & Power Co. v. Dungee, 258 Va. 235, 245, 520 S.E.2d 164, 170 (1999). A court abuses its discretion "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." Lawlor v. Commonwealth, 285 Va. 187, 213, 738 S.E.2d 847, 861, cert. denied ___ U.S. ___, 134 S. Ct. 427 (2013) (internal citations and quotation marks omitted).

Code § 8.01-265 provides that a court

> may, upon motion by any party and for good cause shown . . . dismiss an action brought by

[1] For the reasons set forth below, this is the dispositive question in these cross-appeals. We therefore do not consider the remaining issues. Deerfield v. City of Hampton, 283 Va. 759, 764, 724 S.E.2d 724, 726 (2012); Cuccinelli v. Rector & Visitors of the Univ. of Va., 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012).

> a person who is not a resident of the Commonwealth without prejudice under such conditions as the court deems appropriate if the cause of action arose outside of the Commonwealth and if the court determines that a more convenient forum which has jurisdiction over all parties is available in a jurisdiction other than the Commonwealth. . . . Good cause shall be deemed to include, but not to be limited to, the agreement of the parties or the avoidance of substantial inconvenience to the parties or the witnesses, or complying with the law of any other state or the United States.

In this case, as the circuit court acknowledged, the nexus between the allegations of the complaint and the Commonwealth of Virginia is tenuous at best. Although Michael challenged the relevance of the testimony of Eric's proffered witnesses, he did not dispute that all but one of them were in Hong Kong and the other was in New York. Similarly, while Michael questioned the validity of Eric's assertion that Eric had no intent to return to Virginia, Michael did not dispute Eric's age or unfitness for international travel. In this case, Eric's averments are corroborated by the facts alleged in the complaint and Michael failed to dispute them: the statement was made in Hong Kong, both parties and all but one of the witnesses were in Hong Kong, and none of the parties or witnesses were in Virginia.

In Norfolk & Western Railway Co. v. Williams, 239 Va. 390, 389 S.E.2d 714 (1990), the Court reversed a circuit court's denial of a motion to transfer under Code § 8.01-265 largely because of the inconvenience to the witnesses in having to travel from Roanoke (where the plaintiff sustained personal injury) to Portsmouth (where he filed his complaint). The Court stated that

> [b]y holding a trial in Portsmouth, the witnesses faced the inconvenience of being away from families, homes, and jobs while traveling to Portsmouth to testify, regardless of who made the arrangements or paid the expenses. Not one potential witness was from Portsmouth and would be spared this imposition. The alternative was the presentation of deposition testimony, a less desirable procedure which deprives the trial judge and jury of the ability to evaluate the witnesses in person.

Id. at 395, 389 S.E.2d at 717.

To testify in person in this case, both the parties and the witnesses would have been required to engage in lengthy, complicated international travel from Hong Kong to Fairfax, Virginia.[2] The expense and inconvenience of appearing at trial would have increased proportionally with distance compared to Williams. Michael offered no countervailing argument to explain why his chosen forum was convenient to anyone. Accordingly, the inconvenience of the forum to the parties and witnesses in this case is manifest from the pleadings and arguments of the parties.

The circuit court also ruled in the alternative that Eric had not promptly argued the forum non conveniens issue. Code § 8.01-264(A) governs the court's consideration of a motion to transfer venue from an improper forum to a proper one. The statute requires both that the transfer motion be filed within 21 days after service

---

[2] Although the parties submitted their testimony by videotaped deposition after the circuit court denied Eric's motion and the case proceeded to trial, depositions are "less desirable" than in-person testimony and "deprive[] the trial judge and jury of the ability to evaluate the witnesses in person." Id. Moreover, none of Eric's defense witnesses testified at all.

of process and that the motion be "promptly heard." Accordingly, this Court determined in Faison that a motion to transfer under that statute was properly denied where the movant had failed to obtain a hearing for six months after it had been filed. 243 Va. at 418, 417 S.E.2d at 304.

However, Code § 8.01-264(A) applies only to motions to transfer venue when the original forum is improper. It does not apply to motions to dismiss for forum non conveniens. To the contrary, "[a]pplication of the doctrine of forum non conveniens presumes that the plaintiff's original choice of forum is proper. . . . [F]orum non conveniens . . . authorizes a transfer from one appropriate or proper forum to another appropriate forum." Williams, 239 Va. at 396 n.*, 389 S.E.2d at 718 n.*. Accordingly, the timeliness factor expressly included by the General Assembly in Code § 8.01-264(A) and considered in Faison does not apply here.

By contrast, Code § 8.01-265 does not expressly include timeliness of a motion to dismiss for forum non conveniens as a factor relevant to the court's consideration of such a motion. The omission of timeliness as an express factor from Code § 8.01-265 does not suggest that it is an improper factor for consideration because the statutory list is not exclusive. Nevertheless, the forum non conveniens issue was raised in Eric's first responsive pleading. The circuit court deferred consideration of the issue while it was occupied with personal jurisdiction, which was a threshold question. The circuit court could not consider whether the forum was inconvenient before it had established that it had jurisdiction over the parties, so long as that question remained in

dispute. Both parties raised forum non conveniens promptly following the circuit court's resolution of personal jurisdiction.

Accordingly, the circuit court gave undue weight to timeliness compared to the statutorily enumerated factor of inconvenience to the parties and witnesses. The circuit court therefore abused its discretion in denying Eric's motion to dismiss pursuant to Code § 8.01-265. Its judgment is therefore vacated, the motion is granted, and the complaint is dismissed without prejudice.

This order shall be certified to the said circuit court.

JUSTICE McCLANAHAN, dissenting.

With regard to dismissal of suits brought by non-residents of Virginia, Virginia's forum non conveniens statute states that

> "the court wherein an action is commenced may, upon motion by any party and for good cause shown . . . dismiss an action brought by a person who is not a resident of the Commonwealth without prejudice under such conditions as the court deems appropriate *if* the cause of action arose outside of the Commonwealth *and if* the court determines that a more convenient forum which has jurisdiction over all parties is available in a jurisdiction other than the Commonwealth."

Code § 8.01-265(i) (emphasis added).

The majority reads the permissive language out of the statute and applies a rule that a circuit court must, under such circumstances this Court deems appropriate, grant a motion to dismiss for forum non conveniens. This interpretation of Code

§ 8.01-265 is inconsistent with the plain language of the statute. Therefore, I dissent.

In reaching its decision, the majority relies heavily on the only case in which this Court has held that a circuit court abused its discretion by failing to grant a defendant's forum non conveniens motion: Norfolk & Western Railway Co. v. Williams, 239 Va. 390, 389 S.E.2d 714 (1990). However, Williams is easily distinguishable from the instant case as it was controlled by Code § 8.01-265(ii), which addresses transfer within the Commonwealth rather than dismissal under Code § 8.01-265(i). In Williams, we held that it was an abuse of discretion for the circuit court to deny a motion to transfer venue within the Commonwealth from Portsmouth to Roanoke when Portsmouth had "no practical nexus" with the action and the plaintiff was a Virginia resident.[3] Id. at 396, 389 S.E.2d at 717. In contrast, because Michael Hotung is not a Virginia resident and the cause of action here arose outside of the Commonwealth, Eric Hotung moved to dismiss the complaint pursuant to Code § 8.01-265(i).

We have recognized that dismissal, in the context of a forum non conveniens motion, is a far harsher remedy than transfer of venue because "[d]ismissal involves a risk that a plaintiff may not be able to assert his right of action in another court." Caldwell v. Seaboard S.R., Inc., 238 Va. 148, 153, 380 S.E.2d 910,912 (1989). The majority ignores this risk and simply compares the level of inconvenience associated with "complicated international travel"

[3] The portion of Code § 8.01-265 at issue in Williams states that a court may "transfer the action to any fair and convenient forum having jurisdiction within the Commonwealth."

between Hong Kong and Virginia with intrastate travel between Roanoke and Portsmouth. Indeed, in the instant case, there was not sufficient evidence presented from which the circuit court could find "that a more convenient forum which has jurisdiction over all parties is available in a jurisdiction other than the Commonwealth," a required finding under Code § 8.01-265.[4] Thus, granting Eric's motion to dismiss without any basis for determining that Michael could have brought his action in Hong Kong (or some other competent jurisdiction) would have been improper.

Furthermore, it is clear from the record that the circuit court properly considered whether keeping Michael's action in Virginia would have resulted in "substantial inconvenience to the parties and

---

[4] The requirement that a defendant establish the availability of an alternative forum to prevail on a motion to dismiss for forum non conveniens dates back to early applications of the doctrine in 19th Century Scotland. Paxton Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Colum. L. Rev. 1, 33 (1929) (citing Clements v. Macaulay, 4 Macpherson (Sess. Cas., 3d Ser.) 583 (1866)).

The United States Supreme Court first recognized the alternative forum requirement in Gulf Oil Corp. v. Gilbert Storage & Transfer Co., 330 U.S. 501, 507 (1947). Likewise, the alternative forum requirement is applied by nearly every state that recognizes the doctrine of forum non conveniens (excepting New York). See generally Martin J. McMahon, Annotation, Forum Non Conveniens Doctrine in State Court as Affected by Availability of Alternative Forum, 57 A.L.R.4th 973 (2013).

Despite the long history, wide acceptance, and clear application of the alternative forum requirement under the language of Code § 8.01-265, the majority does not address it.

witnesses." Id. The circuit court acknowledged that it had concerns about the lack of a nexus between Plaintiff's action and Fairfax County. Nevertheless, it found that Eric's proffers about his medical condition and potential witnesses were insufficient to constitute "good cause" without additional supporting evidence. This finding was well within the circuit court's discretion.

This court should not engage in its own de novo review of the evidence, substitute its discretion for that of the circuit court, and fail to adhere to the plain language and required findings of code section 8.01-265(i) for dismissal. I would affirm the judgment of the trial court.

A Copy,

Teste:

Clerk