In The

Supreme Court of Virginia

RECORD NO. 130264

ERIC E. HOTUNG,

Appellant,

v.

MICHAEL ERIC A.B. MAK SHUN MING HOTUNG,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In this defamation case, the Plaintiff, Michael Eric A.B. Mak Shun Ming Hotung ("Michael"), a Hong Kong celebrity, sued his father, Eric E. Hotung ("Eric"), for certain statements Eric made to a reporter that were critical of Michael's performance as a husband and father, and which culminated in Eric disavowing Michael as a son.

Until recently, Michael was married to Katie Chan, a popular Chinese actress. (App. 3, 5, 534, 567). His high-profile divorce became fodder for the Hong Kong tabloids. (App. 596). Eric, while dining at a club near his home in Hong Kong, received a call from a reporter seeking comment on the divorce proceedings. (App. 319, 585, 596-600). The senior Hotung took sides with his daughter-in-law, accused Michael of treating his family "badly," and expressed his view that people who behave like Michael "cannot be members of the Hotung family." (App. 9).

Specifically, Michael alleges that Eric made the following statements to the reporter (translated from Chinese into English), in response to being asked about his son's divorce:

> He is not my son!...Go ask his mother whose son he is!...I don't know him!...I supported him...because I took pity on him...Maybe he's crazy...I have never done a DNA test—he could be the President's son for all you know!...I don't know who this Michael Mak is...Judging by his habits, he can't possibly be

> a relative of mine. None of my family members are like this...He has a bad business ethic...No one in my family treats his wife and children so badly...I am a gentleman, so I do not acknowledge him as my son...I don't know who his father is. His mother is an Asian beauty. Who knows who his father is?!...the men in the Hotung family are respectable, and would never leave their wives or children and do disreputable things. These kinds of people cannot be members of the Hotung family...How do I know who his father is?... It has always been other people who said that he's my son.

(App. 8-9).

Eric's comments were published in the Hong Kong tabloids. (App. 591-600). They were not published in any known "western" publication as Michael Hotung is not widely known in the United States.

All facts relevant to this case transpired in Hong Kong.[1] Michael and Eric both live in Hong Kong. (App. 319, 534). The reporter who called Eric in Hong Kong and published his comments in a Hong Kong tabloid is presumably based in Hong Kong, though her identity is unknown. The conversation took place in Hong Kong, and all witnesses to the conversation reside in Hong Kong. (App. 319-20, 585). The person most knowledgeable about who Michael's biological father is (Michael's mother, Winnie Ho) lives in Hong Kong. (App. 319). And the unspecified

[1] The only nexus between the facts of this case and the Commonwealth of Virginia is that Eric once had an ownership interest in a Hong Kong corporation that owned some real estate in Virginia. (App. 84, 91, 271-72).

"disreputable things" that Michael claims Eric accused him of presumably took place in Hong Kong, which is both where Michael lives and where his ex-wife and children live. (App. 319-20). Therefore, witnesses to Michael's "disreputable" behavior would also, presumably, be located in Hong Kong, as well as any individuals who might have knowledge relevant to Michael's claimed emotional distress. (See id.)

Michael was embarrassed and angered by his father's comments and decided to file suit against him. (App. 578-79). His first choice of forum was the District of Columbia, where he filed a complaint in 2010. (App. 24-25, 116, 122-138). Eric moved to dismiss the case on grounds of forum non conveniens, and on March 25, 2011, the court granted the motion, opining that the case belonged in Hong Kong. (App. 243-45).

Rather than re-file the case in Hong Kong, however, Michael brought the instant action here in Virginia. He filed his Complaint in Fairfax County Circuit Court on August 1, 2011, alleging that Eric's statements to the reporter were false and defamatory. (App. 2, 15).

On August 22, 2011, Eric moved to dismiss the case for lack of personal jurisdiction and forum non conveniens. (App. 21). At oral argument on September 30, 2011, the trial court indicated it wanted to hear evidence on the matter of personal jurisdiction, so it deferred ruling on the

motion and instructed the parties to engage in discovery related to jurisdiction. (App. 94-96, 110). The trial court directed the parties to return for an evidentiary hearing on February 14, 2012, nearly five months later. (App. 99, 109).

On December 2, 2011, following a dispute about the permissible scope of discovery, the trial court entered an Order limiting discovery to certain issues relating to personal jurisdiction (residence, employment, etc.). (App. 110-11). Discovery relating to the forum non conveniens issue (e.g., the location of witnesses) was not permitted. (See id.)

On February 17, 2012, over Eric's objection, the trial court granted Michael's motion for a continuance of the hearing on Eric's Motion to Dismiss, moving the hearing to April 30, 2012, over eight months after Eric had filed his objection to venue. (App. 113-14).

On March 14, 2012, Eric, acting without counsel, wrote a personal letter to Judge Dennis J. Smith, explaining that he would concede the matter of personal jurisdiction but that he continued to believe the case should be heard in Hong Kong. (App. 115-20). Just over a week later, at Michael's request and in Eric's absence, the trial court removed Eric's Motion to Dismiss from the docket, apparently believing it to be either moot or withdrawn in light of the letter conceding jurisdiction. (App. 148-51).

Recognizing that Eric had not actually waived or withdrawn his venue objection, Michael filed a motion on May 23, 2012, seeking a ruling on Eric's forum non conveniens argument. (App. 152). Eric, after having retained new counsel, filed a similar motion (seeking a ruling on the Motion to Dismiss) on May 29, 2012, unaware that Michael had filed a similar motion days earlier. (App. 209-10).

The Motion to Dismiss was placed back on the docket, and a hearing was scheduled for June 8, 2012. On that date, the trial court denied the motion, expressing concerns about perceived delays by Eric in bringing his objections to the attention of the court. (App. 273-76, 291).

Days later, Eric demurred to Count V (defamation) and moved for reconsideration of the denial of his Motion to Dismiss. (App. 293, 295-314). On June 29, 2012, the trial court overruled the Demurrer to the defamation claim. (App. 412). On July 3, 2012, the trial court denied the motion to reconsider its denial of the Motion to Dismiss. (App. 413).

The defamation claim was tried to a jury from July 9-11, 2012. At trial, Michael testified that his father's critical statements made him feel "very hurt" and "used." (App. 577-79). He did not, however, offer any evidence of any objective manifestation of his claimed emotional distress, or offer any corroborating evidence that would have enabled the jury to

make a reasonable estimate of his damages. (Id.) Nevertheless, the jury returned a verdict in Michael's favor in the amount of $600,000.00 ($300,000.00 in compensatory damages plus $300,000.00 in punitive damages). On September 30, 2012, the trial court entered judgment in favor of Michael in the amount of $600,000.00 in accordance with the jury's verdict. (App. 604-05).

Eric promptly filed a post-trial Motion to Set Aside Verdict and Order New Trial Or, In the Alternative, Order Remittitur (App. 607), and the trial court suspended the Final Order through November 26, 2012, to allow sufficient time for consideration of the motion. (App. 636-37). On November 9, 2012, the trial court denied Eric's request for a new trial, and on November 27, 2012, the trial court denied Eric's motion for remittitur. (App. 653).

Eric filed his Notice of Appeal on November 29, 2012, and an Amended Notice of Appeal on November 30, 2012.

ASSIGNMENTS OF ERROR

I. The trial court erred by overruling Eric's Demurrer to Count V (Defamation).[2] The trial court should have sustained the Demurrer because the Complaint fails to allege that Eric made a statement capable of supporting a defamation action.

II. The trial court erred by denying Eric's Motion to Dismiss for Forum Non Conveniens.[3] The trial court should have followed the precedent established by Norfolk & Western Railway Co. v. Williams, 239 Va. 390 (1990), and should have dismissed the case in light of the substantial inconvenience to the witnesses, the fact that Virginia has no practical nexus to this action, and the fact that no good cause existed for retaining the action.

IV. The trial court erred by refusing to set aside or reduce the grossly excessive jury verdict.[4] The verdict of $600,000.00 is unsupported by the evidence and is grossly out of proportion to any actual injury sustained. The punitive damages awarded by the jury are oppressive and to allow them to stand would violate the Due Process Clause of the Fourteenth Amendment.

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[2] This assignment of error has been preserved at App. 293, 378-85. It has been further preserved in Defendant's Memorandum of Points and Authorities in Support of His Demurrer to Plaintiff's Complaint (Record at 1970-1978) at 3-4, which has been excluded from the Appendix in accordance with Rule 5:32(a)(2).

[3] This assignment of error has been preserved at App. 212-16, 229-31, 251-63, 292, 295-321.

[4] This assignment of error has been preserved at App. 607, 624-27. It has been further preserved in Defendant's Memorandum of Points and Authorities in Support of His Motion to Set Aside the Verdict (Record at 2643-2688) at 7-10, which has been excluded from the Appendix in accordance with Rule 5:32(a)(2).

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A CLAIM FOR DEFAMATION.

A. Standard of Review (First Assignment of Error)

The trial court should have sustained Eric's Demurrer to the defamation claim, but didn't. The legal question presented by a trial court's failure to sustain a demurrer requires application of a de novo standard of review because it is a pure question of law. Mark Five Const., Inc. ex rel. Am. Econ. Ins. Co. v. Castle Contractors, 274 Va. 283, 287 (2007). A demurrer tests the legal sufficiency of a pleading and should be sustained if the pleading, considered in the light most favorable to the plaintiff, fails to state a valid cause of action. Kitchen v. City of Newport News, 275 Va. 378, 385 (2008).

B. Argument

Unlike many torts, the elements of a cause of action for defamation have not been succinctly expressed by any one particular case. Reading the pertinent Virginia Supreme Court cases together, however, reveals that to state a claim for defamation in Virginia, a plaintiff must allege that a defendant (1) published to a third party (2) a false, (3) factual, (4) and defamatory statement that (5) concerns the plaintiff and (6) harms the plaintiff or the plaintiff's reputation (7) with the requisite intent. Hyland v. Raytheon Tech. Servs. Co., 277 Va. 40, 46 (2009) (citing WJLA–TV v.

Levin, 264 Va. 140, 152-54 (2002); The Gazette, Inc. v. Harris, 229 Va. 1, 15 (1985)); Jackson v. Hartig, 274 Va. 219, 227-28 (2007) (citing Jordan v. Kollman, 269 Va. 569, 575 (2005)).

The trial court should have sustained the Demurrer to Count V in this case because, as a matter of law, the Complaint does not allege that Eric made a statement that could reasonably have been interpreted as a literal assertion of fact. Alternatively, even if the jury could reasonably have found that Eric did make such a statement, the statement would not be defamatory in nature and therefore cannot support a defamation action.

A demurrer is an appropriate vehicle for resolving the question of whether a particular statement will support a defamation action because the issue is a matter of law for the trial judge to determine, not the jury. Yeagle v. Collegiate Times, 255 Va. 293 (1998) (affirming dismissal of defamation action based on statement calling university official "Director of Butt Licking").

1. Eric's Statements Cannot Reasonably Be Interpreted as Factual Assertions.

Defamation liability requires a statement that can be reasonably interpreted as an assertion of fact. Tronfeld v. Nationwide Mut. Ins. Co., 272 Va. 709, 714 (2006). Expressions of opinion are not actionable. Hyland v. Raytheon Tech. Servs. Co., 277 Va. 40, 47 (2009). Similarly,

statements that can only be reasonably understood as rhetorical hyperbole are not actionable. Yeagle v. Collegiate Times, 255 Va. 293 (1998). Michael claims that Eric, his father, told a reporter untruthfully that Michael was not actually his son. What Michael fails to acknowledge, however, and what the trial court apparently failed to appreciate, is that while Eric may have uttered the words "he is not my son," the context and surrounding statements demonstrate that Eric did not intend those words literally, and that no reasonable listener would have interpreted those words literally.

When interpreting a statement claimed to be defamatory, courts look to both the apparent intent of the speaker as well as to how it would presumably be interpreted by a reasonable listener. See, e.g., Carwile v. Richmond Newspapers, 196 Va. 1, 7 (1954) (holding that courts and juries should interpret such statements "as other people would understand them,... according to the sense in which they appear to have been used"); Tronfeld v. Nationwide Mut. Ins. Co., 272 Va. 709, 714 (2006) ("statements which cannot reasonably be interpreted as stating actual facts about a person, are not actionable"); Carolinas Cement Co. v. Riverton Inv. Corp., 53 Va. Cir. 69 (Frederick County 2000) ("Construction will be derived from the expressions used in the whole scope and apparent object of the

writer"). In this case, a reasonable listener would not have interpreted any of the statements Eric is alleged to have made as a literal assertion of fact.

The statements at issue are found in paragraphs 52-57 of the Complaint, which allege that Eric made the following statements in reference to his son Michael:

> He is not my son!...Go ask his mother whose son he is!...I don't know him!...I supported him...because I took pity on him...Maybe he's crazy...I have never done a DNA test—he could be the President's son for all you know!...I don't know who this Michael Mak is...Judging by his habits, he can't possibly be a relative of mine. None of my family members are like this...He has a bad business ethic...No one in my family treats his wife and children so badly...I am a gentleman, so I do not acknowledge him as my son...I don't know who his father is. His mother is an Asian beauty. Who knows who his father is?!...the men in the Hotung family are respectable, and would never leave their wives or children and do disreputable things. These kinds of people cannot be members of the Hotung family...How do I know who his father is?... It has always been other people who said that he's my son.

(App. 8-9).

Reading the words together, the only reasonable interpretation is that Eric was displeased with his son's treatment of his wife and family and, consequently, no longer intended to acknowledge him as a son. Any reasonable person reading these statements would interpret them merely as indicative of a rift between a father and his son, not as asserting actual

facts regarding parentage. Indeed, the Hong Kong press continues to this day to refer to Michael as Eric's son, showing that Eric's statement disavowing parentage was not interpreted literally by the community to which the statement was targeted. See South China Morning Post, Katie Chan Fok-Sang Accused of Stealing Ex-Husband's Letters, Apr. 9, 2013 (available at www.tinyurl.com/oule456).

Had Eric stated, without embellishment or explanation, simply "He is not my son; I don't know him," the interpretation analysis would be different. Those words, had they been uttered alone, could reasonably be interpreted as a communication by Eric that, as a matter of fact, he and Michael were not father and son. But that is not what happened. According to the Complaint, Eric didn't stop with those words; he went on to explain the basis for his statement disavowing any relationship with Michael, and those additional clarifying statements had strictly to do with Eric's disapproval of Michael's behavior and nothing to do with biology.

"Judging by his habits," Eric explained, "he can't possibly be a relative of mine." (App. 9). Obviously, if Eric literally did not know who Michael was, he would not have expressed disapproval of the man's habits, as Eric would not have been familiar with those habits. He also would not have gone on to criticize Michael's treatment of his wife and children by stating

that “no one in my family treats his wife and children so badly.” (App. 9). When all of Eric’s alleged statements are considered as a whole, it becomes clear that Eric was merely expressing his (rather negative) opinions about his son’s behavior, not asserting as a literal fact that Michael was a stranger to him.

Any doubt about Eric’s intentions, or about the meaning of his words, is removed with Eric’s conclusion that ***“I am a gentleman, so I do not acknowledge him as my son.”*** (App. 9) (emphasis added). Here, Eric states expressly that the reason he is not acknowledging Michael as a son is not because of the lack of a blood relationship, but rather because, in Eric’s view, Michael does not behave like a gentleman. See Merriam–Webster Online Dictionary, http://www.merriam-webster.com/dictionary/so (last visited Aug. 1, 2013) (defining “so” as “consequently” or “therefore”). This is far different from saying that Michael is an imposter having no actual family relationship to Eric. The only reasonable interpretation of these words is that Eric is disavowing or disowning Michael as a son, refusing to consider him a son because of his dishonorable behavior. In other words, the reasonable listener is left with the (truthful and accurate) impression that while Michael ***is***, in fact, Eric’s son, Eric does not approve of his behavior and therefore does not intend to treat him as a son. Such a

statement is not actionable, so the trial court should have sustained the Demurrer and dismissed Count V as a matter of law.

2. A False Denial of a Parental Relationship Would Not Be Defamatory in Nature.

To be actionable, a statement must not only be false, but must also be defamatory in nature. Jordan v. Kollman, 269 Va. 569, 575 (2005); see Yeagle v. Collegiate Times, 255 Va. 293, 295 (1998) (noting the requirement of "defamatory meaning"). To have defamatory meaning, a statement must carry a sufficient degree of "sting"; merely offensive or unpleasant statements are not defamatory. Cutaia v. Radius Eng'g Int'l, Inc., 2012 WL 525471 (W.D. Va. Feb. 16, 2012) (applying Virginia law); Dean, Jr. v. Town of Elkton, 54 Va. Cir. 518 (2001), aff'd sub nom. Dean v. Dearing, 263 Va. 485 (2002); see Massey Energy Co. v. United Mine Workers of Am., AFL-CIO, CLC, 72 Va. Cir. 54 (Fairfax 2006) (citing Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092 (4th Cir. 1993) (noting that falsity of statement and defamatory sting must coincide). A communication that is merely unflattering, annoying, irksome, or embarrassing, or that hurts the plaintiff's feelings, without more, is not actionable. Chapin v. Greve, 787 F. Supp. 557, 562 (E.D. Va. 1992) (quoting R. Sack, Libel, Slander and Related Problems 45 (1980)), aff'd sub nom. Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993).

While this Court has not spoken recently on the requisite degree of "sting" required to support a defamation action, federal courts applying Virginia law have held that a statement may be actionable only if it contains a false assertion of fact that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." See, e.g., Wolf v. Fed. Nat. Mortg. Ass'n, 830 F. Supp. 2d 153, 168 (W.D. Va. 2011) (citing Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092 (4th Cir. 1993) (applying Virginia law)). This is also the position taken by the Virginia Model Jury Instructions and the Restatement (Second) of Torts. See Va. Model Jury Instr. 37.010; Restatement (Second) Torts § 559 (1977).

The most recent pronouncement by this Court on the issue appears to be the 1904 case of Moss v. Harwood, in which the Court held that to be actionable as defamation, the words must be such that would tend "to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace" upon the plaintiff, or which would tend "to hold him up to scorn, ridicule, or contempt, or which [are] calculated to render him infamous, odious, or ridiculous." Moss v. Harwood, 102 Va. 386, 46 S.E. 385, 387 (1904).

No known case in Virginia (or, for that matter, any other jurisdiction) has ever found a statement merely disavowing parentage, or falsely claiming not to know someone, as having a sufficient degree of "sting" to support the element of defamatory meaning. Thus, even if the trial court did not err in finding that a reasonable reader might have interpreted Eric's statements as a literal assertion of fact that Michael was not known or related to him, such as assertion would lack defamatory meaning.

Merely disavowing a father-son relationship has no tendency to harm reputation. There is no reason to believe people in the community would be deterred from associating or dealing with Michael merely because his father expressed his view that Michael couldn't possibly be related to him.[5] Whether or not Eric is Michael's father has nothing to do with Michael's honesty, integrity, or virtue. A denial of parentage is simply not the type of statement that would tend to degrade a person in society. Such a statement lacks defamatory meaning and is therefore not actionable.

3. The Analysis Does Not Change for Public Figures.

Michael says he has been defamed because the Hotung family name "carries with it great recognition, prestige and honor," and that Eric falsely

[5] Michael's stature in Hong Kong hasn't in fact diminished, as the press continues to refer to him as a local celebrity. See, e.g., The Standard, Chopsticks Twist in Celeb Tussle (available at http://tinyurl.com/oykzbvv).

stated to a reporter that Michael was not of this prestigious lineage. (App. 1-2, 4, 8). Michael's position appears to be that while a father's statement criticizing or disavowing his son may not harm the reputation of the average person, it was nevertheless defamatory to him because of the fame and notoriety that comes with being a Hotung. In other words, Michael believes that celebrities should be treated differently than the average person when examining a statement's tendency to harm reputation. This is wrong for several reasons.

First, it has been the law of this Commonwealth since 1850 that words which merely impute a "want of...good breeding" are not actionable, as they are not "sufficiently substantial to be treated as injuries calling for redress in damages." See Moseley v. Moss, 47 Va. 534, 538 (1850). Eric's statement disavowing Michael as a member of the Hotung family amounts to exactly the sort of "want of good breeding" accusation that Moseley v. Moss indicated is lacking in defamatory meaning.

Second, whether a plaintiff is a celebrity or public figure is wholly unrelated to the question of whether a particular statement is sufficiently defamatory in nature to be actionable. See, e.g., Beattie v. Fleet Nat'l Bank, 746 A.2d 717, 723 (R.I. 2000) ("the lesser culpability standard applicable when the plaintiff is a private person as opposed to some sort of

a public figure is irrelevant when determining the defamatory character of the communication"); Blake v. Gannett Co., Inc., 529 So. 2d 595, 603 (Miss. 1988) (holding that a plaintiff in a defamation action must establish that the language at issue is defamatory in nature "regardless of his status as a private or public figure").

Third, whether a statement is defamatory in nature is an inquiry that focuses on whether it is the type of statement that has a tendency to degrade a person in society, not on whether the language did, in fact, affect the social standing of a particular plaintiff who claims his situation is special. Restatement (Second) of Torts § 559 cmt. d (1977); see Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092 (4th Cir. 1993). In other words, whether Michael actually suffered a loss of reputational standing as a result of Eric's statements has no bearing on whether the statement is of such character as would support an action for defamation.

Finally, Virginia courts have always focused on the impact an allegedly defamatory statement has on those in the community receiving the communication, rather than on how the statement might affect a specific plaintiff. For example, the various formulas used to define defamation all focus on the effect of the statement on those hearing it. See, e.g., Moss v. Harwood, 102 Va. 386 (1904) (noting that words must

tend "to injure one's reputation in the common estimation of mankind"); Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092 (4th Cir. 1993) (words must tend to so harm the reputation of another as to "lower him in the estimation of the community or to deter third persons from associating or dealing with him") (applying Virginia law). Significantly, the various tests for defamation generally focus on the tendency of the statement—in the abstract—to harm "one's" reputation. Whether a statement is defamatory in nature does not depend on whether it caused harm to a particular plaintiff or on whether the plaintiff is famous in his community.

II. IN ACCORDANCE WITH NORFOLK & WESTERN AND SECTION 8.01-265 OF THE VIRGINIA CODE, THIS CASE SHOULD HAVE BEEN DISMISSED FOR FORUM NON CONVENIENS.

A. Standard of Review (Second Assignment of Error)

Eric's Motion to Dismiss under § 8.01-265, the forum non conveniens statute, was addressed to the sound discretion of the trial court. Norfolk & W. Ry. Co. v. Williams, 239 Va. 390, 392 (1990); Caldwell v. Seaboard Sys. R.R., Inc., 238 Va. 148, 160 (1989). Although the decision whether to dismiss the case was discretionary, a trial court cannot exercise its discretion arbitrarily or capriciously. Lucy v. Zehmer, 196 Va. 493, 504 (1954). A trial court abuses its discretion where it commits a clear error of judgment, where it fails to consider a significant relevant factor, and where

it gives undue weight to an irrelevant factor. Landrum v. Chippenham & Johnston-Willis Hospitals, Inc., 282 Va. 346, 352-53 (2011); see also Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 446 (4th Cir. 2003) ("When a court misapprehends or fails to apply the law with respect to underlying issues, it abuses its discretion"). In the absence of flagrant error or mistake, Virginia Supreme Court precedent may not be treated lightly or ignored. Selected Risks Ins. Co. v. Dean, 233 Va. 260, 265 (1987).

B. Argument

Why this case was brought in Virginia instead of Hong Kong remains a mystery. This case arises out of a conversation that Eric, a resident of Hong Kong, had with a Chinese reporter in Hong Kong, in the Chinese language, about his son Michael, who also resides in Hong Kong. All witnesses to the conversation are in Hong Kong, and because Michael is a public figure only in Hong Kong, any reputational harm would have occurred primarily if not exclusively in Hong Kong. The Commonwealth of Virginia has never had any interest in hearing this dispute, as the facts are not connected to Virginia in any way. Under these circumstances, the trial court should have granted Eric's Motion to Dismiss on grounds of forum non conveniens. Its failure to do so was a clear error of judgment and therefore an abuse of discretion.

1. The Trial Court Had Good Cause to Dismiss the Case.

Under Va. Code § 8.01-265, dismissal is appropriate if "good cause" for dismissal exists and (1) the plaintiff is not a resident of Virginia; (2) the cause of action arose outside of Virginia; and (3) a more convenient forum exists that has jurisdiction over the parties. All of these elements are present in this case.

First, Michael admits he is a resident of Hong Kong. (App. 3). Second, the cause of action arose in Hong Kong, where Eric is alleged to have made defamatory statements to a Chinese reporter. (App. 8-10, 304-06, 319). Finally, Hong Kong would have jurisdiction over both of the parties to hear this case, as both reside in Hong Kong, and as demonstrated by the fact that Michael and Eric, at least as of the time the trial court heard argument on the Motion to Dismiss, were involved in other litigation against each other in Hong Kong. (App. 116, 234, 318). Therefore, the third element of the forum non conveniens test—the availability of a more convenient forum—is also met here. The only issue is whether the trial court had good cause to dismiss this action so that Michael could pursue his claims in Hong Kong, where all the relevant events transpired and where all witnesses would have been located.

"Good cause" is defined expressly in the forum non conveniens statute itself to include (but not be limited to) "the avoidance of substantial inconvenience to the parties or the witnesses." See Va. Code § 8.01-265. To try this case in Virginia, rather than Hong Kong, would have caused (and did, in fact, cause) a substantial hardship not only on Eric, who is 86 years old and in poor health, but also on each and every fact witness having any relevant knowledge about what Eric said, how he said it, how his words were reported in the Hong Kong press, how they were interpreted by the Hong Kong community, whether they were true, how (if at all) Michael's reputation was affected as a result, and the extent to which Michael's alleged emotional distress manifested itself. All of these witnesses would have been located in Hong Kong, outside the subpoena power of the Virginia trial court. The trial court, therefore, had good cause to dismiss the case for forum non conveniens.

At oral argument on his Motion to Dismiss, Eric informed the trial court that he had identified 14 potential witnesses in his discovery responses, 13 of whom resided in Hong Kong, and none of whom resided in Virginia. (App. 253-54, 258-59). While Michael expressed doubt that the identified individuals possessed relevant knowledge, he did not dispute that they resided in Hong Kong, nor did he identify any potential witnesses

himself who might be located in Virginia. (App. 158, 268-69). Despite the lack of any genuine dispute as to the location of the witnesses to Eric's statements or witnesses with knowledge relevant to Michael's alleged emotional distress or reputational harm, the trial court denied the motion, opining that good cause for dismissal had not been demonstrated. (App. 273-76, 291).

In response, Eric moved to reconsider, including as an attachment his sworn interrogatory answers identifying the witnesses. (App. 295-322). This document identified, among other witnesses, two eyewitnesses to the conversation on which the Complaint was based (the conversation with a Hong Kong reporter), the person most knowledgeable about who Michael's biological father is (Michael's mother), and several individuals with knowledge of Michael's bad behavior (relevant to show that Eric's statements about Michael were true and thus non-actionable). All of these witnesses reside in Hong Kong, and none of them should have been required to travel to the United States to testify in this case.

The inconvenience was not limited to fact witnesses; expert witnesses were also inconvenienced by the dispute being tried in Virginia instead of Hong Kong. This is a case that should have been governed by Hong Kong law. Under either the traditional lex loci delicti choice-of-law

test or the "most significant relationship" test, Michael's defamation claim should have been governed by Chinese law, as the claim arose in Hong Kong and involved conduct that took place in Hong Kong. Trying the case in Virginia meant that expert witnesses would have been needed to explain principles of Chinese tort law. No experts in Chinese law made the journey, however, and the trial court was left with no choice but to apply Virginia law. Had the trial court dismissed this case on forum non conveniens grounds, Michael could have brought his claims in Hong Kong, not only saving the expert witnesses the expense of international travel, but dispensing entirely with the requirement of expert witnesses in this field.

Hong Kong is on the other side of the world. A trip to Hong Kong generally requires an entire day and the airfare alone costs thousands of dollars. Dismissing this case, without prejudice to Michael's right to re-file it in Hong Kong, would have served the important purpose of avoiding causing substantial expense and inconvenience to all of the parties and witnesses. The trial court refused to dismiss the case, and the result was a trial based almost entirely on the self-serving testimony of Michael Hotung. Eric, on the advice of his doctor,[6] did not make the journey to the United States for trial, and neither did any other fact or expert witness having any

[6] See App. 236 (note from Eric's doctor declaring him "unfit for travel.")

connection to the case (other than Michael himself). Clearly, there was good cause for dismissal under the forum non conveniens statute, and the trial court abused its discretion by refusing to dismiss the case.

a. The trial court abused its discretion by failing to consider or apply Norfolk & Western.

On the issue of forum non conveniens, the relevant facts of this case are not materially distinguishable from those presented in the earlier Virginia Supreme Court decision of Norfolk & Western Railway Co. v. Williams, 239 Va. 390 (1990). As binding precedent in this Commonwealth, it should have been followed by the trial court. Instead, it was ignored. At oral argument on Eric's Motion to Dismiss, Michael's counsel did not even attempt to rebut or distinguish the Williams case, even after Eric's counsel had pointed out that Williams was directly on point. (App. 261-63). The trial court asked no questions and made no comments about the case, and when it ultimately issued a written opinion explaining its reasons for denying Eric's Motion to Reconsider the denial of his Motion to Dismiss, the court did not even mention Williams. (App. 414-15).

In Williams, this Court found a denial of a motion to dismiss for forum non conveniens to be an abuse of discretion on facts nearly identical to the instant case in all material respects. Specifically, the Court found that the trial court committed reversible error by failing to transfer the case to a

jurisdiction having a more "practical nexus" to the facts of the case. Williams, 239 Va. at 396.

The plaintiff in Williams was injured on the job while working for Norfolk and Western Railroad ("N&W") in Roanoke. He filed a tort action against N&W in Portsmouth, about a 4.5-hour drive away. N&W regularly transacted business in Portsmouth, but there was no connection between the plaintiff's tort claim and N&W's activities in Portsmouth. All potential liability witnesses would have been in Roanoke, where the injury occurred, and all potential damages witnesses would have been in either Roanoke or Richmond. N&W moved to transfer the case to Roanoke on forum non conveniens grounds, pursuant to Va. Code § 8.01-265. A non-evidentiary hearing was held, and upon consideration of N&W's arguments, the trial court denied the motion, reasoning that forum non conveniens "should not be used to defeat plaintiff's choice of forum where the same is proper." Williams, 239 Va. at 396.

This Court reversed, finding that the trial court abused its discretion by refusing to transfer the case. Id. at 392. Notably, the Court held that the case should have been transferred even in the absence of an evidentiary

hearing proving the witness inconvenience.[7] See id. at 393-94 (indicating that the inconvenience to potential witnesses was established solely by the argument of the defendant's counsel, and finding such argument to constitute a sufficient basis for transfer).

Quoting a United States Supreme Court opinion, the Virginia Supreme Court explained that the forum non conveniens doctrine is designed to address the abusive tactic Michael has employed against his father in this case: "[T]he open door [to a plaintiff's choice of forum] may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself." Id. at 392 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947)). The trial court should not have permitted Michael to abuse the system in this manner. As further explained

[7] The trial court in this case was concerned that Eric presented no evidence of witness inconvenience, "other than by proffer." (App. 273-74). As shown by Williams, however, no evidentiary hearing was necessary. Eric did not have a duty to identify specific individuals in Hong Kong who witnessed Eric's statements, or to require those individuals to leave their homes and jobs and travel across the world to testify regarding how inconvenient it would be to travel across the world to testify. Michael has never disputed that his claims arose in Hong Kong. Therefore, it should have been clear to the trial court that the key witnesses in this case—whomever they might be—would have been located in Hong Kong.

by the Williams court, the forum for the litigation should be one "free from any suggestion of abuse of the venue provisions." Id. at 393.

Eric's objection to venue is not fundamentally different from the objection made by the plaintiff in Williams. As in Williams, the alleged tort here occurred in a distant forum. As in Williams, the plaintiff here (Michael) argued that the defendant (Eric) maintained a presence in the forum state, but the cause of action is entirely unrelated to that presence. In Williams, N&W transacted business in the forum jurisdiction, but that presence was deemed an insufficient basis to keep the case there as the claims were unrelated to that presence. Here, Michael claimed that Eric owned (through a company he controlled) a house in Fairfax County, but that house had nothing to do with Michael's defamation claim.

The Williams court noted that when faced with N&W's motion to transfer, the trial court "had basically only two factors before it supporting retention of the cause in Portsmouth": the fact that N&W transacted business in Portsmouth, and the fact that Portsmouth was the plaintiff's original choice of forum. Id. at 395. The court found both factors outweighed by the fact that Portsmouth had "no practical nexus whatsoever" with the cause of action, where the action "had a strong nexus with Roanoke," and where all known potential witnesses (with one

exception) were in Roanoke. Id. at 395-96. The case at bar is exactly the same: the only two factors that supported retention of this case in Fairfax County, Virginia, were that Eric allegedly owned a house in Virginia, and the fact that Michael chose Fairfax County as his forum. The Fairfax Circuit Court had "no practical nexus whatsoever" with the cause of action, while another jurisdiction (Hong Kong), on the other hand, had a strong nexus with the case, and all potential witnesses were located in that other jurisdiction.

Furthermore, the inconvenience to witnesses in this case was far greater than it was in Williams, where the court found the inconvenience of having to travel from Roanoke to Portsmouth sufficient cause for transfer. In the case at bar, the witnesses would have been coming from Hong Kong. It takes approximately 24 hours to travel from Hong Kong to Virginia, and airfare typically costs several thousands of dollars.

The Williams case is directly on point. The trial court's failure to give the opinion proper consideration was an abuse of discretion.

2. The Trial Court Lacked Good Cause to Retain the Case in Virginia.

The trial court apparently based its denial of the Motion to Dismiss primarily on its perception that the motion was presented too late. (See App. 415) ("Plaintiff has shown good cause to retain this case. …

Defendant failed to set a hearing on the timely filed but long pending Motion to Dismiss for *Forum Non Conveniens*.") This was improper for two reasons: first, Eric did not delay in bringing his venue objections to the attention of the court; and second, even if he had, that delay would not constitute good cause for retaining the case when weighed against the substantial inconvenience to the witnesses that keeping the case in Virginia would have caused (and did cause).

Eric objected to venue on forum non conveniens grounds promptly—early, in fact—within 21 days of the filing of the case. (App. 21). He also sought a hearing on his Motion to Dismiss promptly, as it was first heard in September 2011. At the hearing in September 2011, the trial court suspended the hearing for nearly five months, ordering the parties to conduct discovery relating to personal jurisdiction and to return on February 14, 2012. (App. 94-96, 99). This five-month delay is the primary reason Eric's Motion to Dismiss was heard so late, and it was not attributable to any dilatory, negligent, or wrongful conduct on behalf of Eric.

After taking Eric's deposition in Hong Kong, Michael moved for a continuance of the hearing on Eric's Motion to Dismiss, which the Court granted—over Eric's objection—rescheduling it for April 30, 2012, over eight months after Eric had first raised his venue objection. (App. 113-14).

Then on March 23, 2012, again at Michael's request, the Court removed the Motion to Dismiss from the docket altogether, without ruling on Eric's objection to venue. (App. 149). Thus, it was never Eric who sought delay in getting a ruling on his motion, and at no time did he ever waiver from his strong objection to venue.

In short, Eric acted promptly in presenting his forum non conveniens argument to both Michael and the trial court, and the delays in scheduling the oral argument were not attributable to him. Michael never claimed to be unfairly surprised by the late hearing and never claimed that he would suffer any prejudice if the Motion to Dismiss were to be granted.

Finally, even if it could be said that the delay was a factor weighing in favor of keeping the case in Virginia, that factor was substantially outweighed by the inconvenience to the witnesses, all of whom would have been required to travel across the world to Virginia from Hong Kong. Like in Williams, the few factors supporting retaining this case were outweighed by the fact that the plaintiff's choice of forum had "no practical nexus whatsoever" with the cause of action, while the action did have a "strong nexus" with another jurisdiction, where all likely witnesses would be located. See Williams, 239 Va. at 395-96. Therefore, the fact that the trial court did not hear argument on Eric's Motion to Dismiss until several

months after it was filed was not "good cause" for retaining the case in Virginia.

III. THE JURY'S VERDICT IS UNSUPPORTED BY THE EVIDENCE, GROSSLY EXCESSIVE, AND UNCONSTITUTIONAL.

A. Standard of Review (Fourth Assignment of Error)

A dual standard of review applies to the Fourth Assignment of Error. Compensatory damage awards are reviewed utilizing "abuse of discretion" as the standard of review, while punitive damage awards are reviewed de novo upon an independent review of the record. Baldwin v. McConnell, 273 Va. 650, 656 (2007). The standard of review for a damages calculation has been framed as whether there were "sufficient facts" adduced at trial to support the award. Preferred Sys. Solutions, Inc. v. GP Consulting, LLC, 732 S.E.2d 676, 685 (Va. 2012) (citing Nichols Constr. Corp. v. Virginia Machine Tool Co., 276 Va. 81, 89 (2008).

B. Argument

The jury awarded $600,000.00 to Michael in this case for no other reason than that his father criticized his behavior publicly, which hurt Michael's feelings. There is no evidence in the record to support such an exorbitant verdict. Because Michael failed to adduce sufficient facts at trial to support the grossly excessive award, the Court should not permit the verdict to stand.

Courts have a duty to correct a verdict that plainly appears to be unfair or would result in a miscarriage of justice. Poulston v. Rock, 251 Va. 254, 258 (1996). The verdict of a jury cannot be allowed to work injustice and oppression. Stubbs v. Cowden, 179 Va. 190, 199 (1942). When it appears that a verdict is unfair in that it is out of proportion to the actual damages sustained, courts have a duty to "correct the injustice." Gazette, Inc. v. Harris, 229 Va. 1, 48 (1985).

A trial court may set aside a verdict if it shocks the court's conscience, indicating that the jury was likely motivated by passion or prejudice, or that the jury misconceived or misconstrued the facts or law, or because the verdict is so disproportionate to the injuries suffered as to suggest that it is "not the product of a fair and impartial decision." Edmiston v. Kupsenel, 205 Va. 198, 202 (1964); accord Poulston v. Rock, 251 Va. 254, 258 (1996). Whether a jury award is excessive is "a legal question addressed to the sound discretion of the court in the exercise of its supervisory power over verdicts to prevent a miscarriage of justice." Stubbs, 179 Va. at 199.

1. Michael Failed to Prove that He Suffered Any Damages.

Because this is not a case of defamation per se,[8] Michael was not entitled to presumed damages and was required to prove the quantum of his damages for the alleged injury to his reputation. See Poulston v. Rock, 251 Va. 254, 261 (1996) (citing Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 152 (1985)). Michael was required to prove not only that his reputation suffered, but the amount of his damages. Great Coastal Express, 230 Va. at 152. This burden of proof required Michael to not only prove the extent of the alleged injury to his reputation, but also required him to present proof of his alleged humiliation and embarrassment. Id. Michael failed to meet this burden.

Jury verdicts must be based on competent evidence. While there need not be evidence of an actual dollar value of the injury, "all awards

[8] The trial court ruled that Eric's statements did not amount to defamation per se and that finding has not been challenged on appeal. (Trial Tr. 422/3-4). Defamation per se consists of words falling into one of four categories: (1) those which impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished; (2) those which impute that a person is infected with some contagious disease, where if the charge is true, it would exclude the party from society; (3) those which impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment; and (4) those which prejudice such person in his or her profession or trade. Tronfeld v. Nationwide Mut. Ins. Co., 272 Va. 709, 713 (2006) (citing Fleming v. Moore, 221 Va. 884, 889 (1981)).

must be supported by competent evidence concerning the injury." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). "Competent evidence" in this context generally refers to relevant and credible facts by which an issue can be determined by the jury and not be left to "conjecture, guess or random judgment." Dudley v. Guthrie, 192 Va. 1, 6-7 (1951); see Belmont Partners, LLC. v. China YiBai United Guarantee Int'l Holding, Inc., 3:10-CV-00020, 2011 WL 678063 (W.D. Va. Feb. 16, 2011) (finding that plaintiff's failure to prove damages with some degree of certainty beyond mere speculation amounted to a failure to present "competent evidence"). As the jury was properly instructed, Michael was required to present the jury with "sufficient facts and circumstances" to permit the jury to "make a reasonable estimate" of Michael's damages. (App. 601).

The Fourth Circuit has held that emotional distress awards should be set aside when based solely on the plaintiff's own conclusory, unsupported, subjective assertions. See Hetzel v. County of Prince William, 89 F.3d 169, 171-72 (4th Cir. 1996) (setting aside excessive award of emotional distress damages where it was based "almost exclusively" on plaintiff's conclusory testimony). This is due, in part, to the fact that claims for emotional distress are "fraught with vagueness and speculation" and are "easily susceptible to

fictitious and trivial claims." Price v. City of Charlotte, 93 F.3d 1241, 1250 (4th Cir. 1996).

Michael testified vaguely that he suffered some level of emotional distress but offered no evidence of any objective manifestation of the alleged distress and offered no corroborating evidence that would have enabled the jury to make a reasonable estimate of damages. (See App. 577-81). He said that Eric's statements criticizing his behavior and disowning him made him feel "Very hurt. Destroyed. Used." (App. 578). He testified that although Eric's statements were made in 2009, he didn't seek any professional help until right before the trial in 2012. (App. 578, 580). He claimed that he recently visited either a psychologist and psychiatrist and that he intended to see another one the following week. (App. 580). He did not testify that he was ever advised by any doctor to seek treatment in the first place, or that the one doctor he did see on one occasion shortly before trial recommended any follow-up visits.

Conspicuously absent from the trial was any testimony from Michael's friends, family members, business associates, or the one medical provider Michael supposedly visited. Not a single witness from Michael's business or social circles stepped forward to testify regarding Michael's reputation (either before or after the alleged defamation), and not a single friend or

family member appeared in court to testify regarding Michael's supposed mental anguish. No medical records were introduced. No medical opinions were offered. The jury had absolutely nothing upon which to make a reasonable estimate of Michael's damages other than Michael's own assurances that his feelings were hurt.

Michael's testimony was insufficient to establish the quantum of his damages. His purely subjective and unsupported declarations of emotional distress did not give the jury a sufficient basis to make a reasonable estimate of his damages.[9] Due to the complete absence of competent evidence supporting any substantial award of damages, the Court should set the verdict aside. See Bussey v. E.S.C. Restaurants, Inc., 270 Va. 531, 538 (2005) ("A jury's verdict should be set aside [if] there is no credible evidence in the record to support that verdict").

Because Michael failed to demonstrate any entitlement to compensatory damages, punitive damages should not have been awarded,

[9] To allow a plaintiff in a defamation case not involving defamation per se to "prove" his damages simply by declaring that he was offended and hurt by the statements would completely eviscerate the distinction between defamation per se and defamation per quod. It would be the equivalent of permitting presumed damages in every defamation case, per se or not, as proof of actual harm would not be a meaningful barrier to a plaintiff's recovery. The relaxed standard of proof is only meant to apply to cases involving per se defamation. See Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 148 (1985) (recognizing inherent difficulty in proving the quantum of damages for non-pecuniary injuries).

either. Except in cases of per se defamation, actual damages are a prerequisite to an award of punitive damages. Fleming v. Moore, 221 Va. 884, 893-94 (1981); Newspaper Pub. Corp. v. Burke, 216 Va. 800, 805 (1976). This is not a per se case and Michael failed to prove that he was suffered any compensable injury.

2. Alternatively, Even if the Court Finds Michael Presented Some Competent Evidence of Damages, $600,000.00 Is Grossly Excessive.

Damages awards must bear a reasonable relationship to the harm sustained by the plaintiff, whether they are for compensatory or punitive damages. Richmond Newspapers, Inc. v. Lipscomb, 234 Va. 277, 300-01 (1987); Gazette, Inc. v. Harris, 229 Va. 1, 51 (1985). If the damages are out of proportion to the injury actually sustained, the verdict should be set aside. Gazette, 229 Va. at 48. Here, neither the $300,000 in compensatory damages nor the additional $300,000 in punitive damages awarded to Michael can be justified with any reasoned evaluation of the evidence presented at trial. Therefore, the damages are excessive and the verdict should have been set aside.

Fleming v. Moore

Fleming v. Moore is one of four appeals covered by the Gazette opinion. Fleming was a black real estate developer and Moore was a white

professor at the University of Virginia. Fleming placed an advertisement in the school paper accusing the professor of "racism," which he felt was the cause of Moore's opposition to Fleming's efforts to obtain a special permit from county authorities to develop some agriculturally zoned land near Moore's home. See Gazette, 229 Va. at 44-45; Fleming v. Moore, 221 Va. 884, 887 (1981) (an earlier appeal of the same case). The article accused Moore of not wanting "any black people within his sight." Gazette, 229 Va. at 45. Moore sued for defamation.

After the first trial, the jury awarded Moore $10,000 in compensatory damages and $100,000 in punitive damages. Because the punitive award was based on a jury instruction reciting the standard for common-law malice rather than New York Times "actual malice,"[10] the Virginia Supreme Court reversed and remanded for a new trial on all issues. See Fleming, 221 Va. at 892-93.

The case was tried a second time. To prove damage to his reputation, Moore presented evidence that publication of the article adversely affected his relationship with his students of both races. Gazette, 229 Va. at 47. Moore also testified that he was "very keenly" embarrassed and humiliated by the racial attack. Id. His evidence of emotional distress

[10] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

consisted of his own testimony that “I was seriously upset to have a man that I disagreed with in public meetings go around behind me and put into the University student newspaper such a malicious attack on me, my character” and that “I felt that he had put a gap in my honor that could only be restored by vindication of my fellow citizens on this jury.” See id. Summarizing the damage he suffered, Moore testified, “It’s not an experience I would visit on most people. It’s very unhappy.” Id.

Moore presented no evidence of any physical manifestation of his supposed emotional distress. He sought no medical attention. He presented no evidence that his standing with his peers was diminished. And he did not allege or prove that he suffered any monetary loss.

After the re-trial, the jury awarded $100,000 in compensatory damages and $250,000 in punitive damages, plus interest. This Court granted a second appeal, agreeing to review both the sufficiency of the evidence to support the punitive award, and the issue of excessiveness of both awards.

The Court found both the compensatory and punitive awards excessive as a matter of law and held that the trial court erred in refusing the post-trial motion to set the verdict aside. Id. at 48. On the issue of compensatory damages, the Court recognized that although “Moore

suffered damage to his reputation, embarrassment, humiliation, and mental suffering from this defamatory publication," the verdict of $100,000 was so out of proportion to the loss actually sustained by Moore to be "excessive as a matter of law." Id.

Turning to punitive damages, the Court noted that jury verdicts awarding punitive damages cannot be allowed to work an injustice or result in oppression. Id. at 50-51. "Where a punitive award is substantially in excess of what ordinarily might be expected as punishment for the particular conduct, the reviewing court has a duty to anull the award unless the circumstances are so egregious as to constitute a sufficient punishment for the wrongful activity." Id. Ultimately, the Court held that the punitive award was "substantially in excess of adequate punishment" for the accusations of racism and that the trial court should have set it aside. Id. at 51. In so holding, the Court observed that where an award of punitive damages bears no reasonable relationship to the actual damages sustained or to the measure of punishment required, "the award on its face indicates prejudice or partiality." Id. at 51.

Richmond Newspapers v. Lipscomb

In another defamation case in which this Court analyzed the amount of compensatory damages awarded, Richmond Newspapers, Inc. v.

Lipscomb, 234 Va. 277 (1987), the Court affirmed a reduction from $1 million to $100,000.

Vernelle Lipscomb, a public school teacher, sued Richmond Newspapers due to its publication of a front-page story in the Richmond Times-Dispatch in which her teaching style was sharply criticized. The article reported that certain parents and their children described Lipscomb as "disorganized, erratic, forgetful and unfair," and that they accused her of demeaning and humiliating students. Richmond Newspapers, 234 Va. at 282. One student was quoted as describing Lipscomb as consistently late or missing from class. Id. at 283. The jury awarded her $1,000,000 in compensatory damages, which the trial judge remitted to $100,000. This Court affirmed the reduced award. Id. at 277.

Unlike Michael, Lipscomb did not rely solely on her own testimony in attempting to prove emotional distress. Instead, she brought in the minister of her church, who testified that Lipscomb was "totally destroyed and distraught, was withdrawn and afraid...she was not the self-confident and assured...person she had been" and that she stopped participating in church services. Richmond Newspapers, 234 Va. at 300. She also presented the testimony of her supervisor at work, who testified that Lipscomb changed from a "proud, confident person" to one who avoids

crowds, does not mingle with others, and who appeared to have "lost faith in almost anything and everything." Id. Even with this extensive evidence of emotional injury, the Court found that $100,000 in compensatory damages was sufficient and that it bore a "reasonable relationship to the damages disclosed by the evidence." Id. at 301.

In Michael's case, by contrast, $100,000 in compensatory damages would be excessive as it cannot be arrived at by any reasoned evaluation of the evidence. The jury, however, awarded him three times that amount, suggesting their verdict was influenced by passion, prejudice, or a misconception of the law. See Allied Concrete Co. v. Lester, 285 Va. 295, 311 (2013) (noting courts' obligation to "step in and correct the injustice" where these factors appear to have motivated jury) (citing Edmiston v. Kupsenel, 205 Va. 198, 202 (1964)).

Michael's evidence of damages is very similar to the evidence presented by Moore in the Fleming v. Moore case: he relied almost exclusively on his own subjective, self-serving testimony that the defendant's words made him feel upset and humiliated. Completely absent was any evidence of a physical manifestation of the claimed anguish, any evidence of pecuniary loss, and any evidence of a need for medical

treatment. Thus, even if Michael's own testimony was sufficient to establish some level of compensable emotional distress, the jury's award of $300,000 in compensatory damages cannot be justified with any reasoned evaluation of the evidence and should have been set aside.

By the same token, the $300,000 in punitive damages awarded to Michael is far in excess of the measurement of punishment required to deter the behavior Eric is alleged to have engaged in. Eric merely made a statement to a reporter that Michael, in Eric's opinion, did not deserve to be a Hotung. Even if such a statement could be considered defamatory, to assess $300,000 as punishment would work a tremendous injustice and result in oppression.

In addition, to allow such an exorbitant punitive-damages award to stand would result in self-censorship in derogation of the right of free speech. See Gazette, 229 Va. at 50 (explaining that the First Amendment requires consideration of this factor). In the Gazette case, this Court held not only that the $250,000 in punitive damages awarded to Moore was excessive, but also that it constituted "a forbidden intrusion on the exercise of free expression." Id. at 51. In this case, if Michael's $300,000 punitive award is permitted to stand, Virginia citizens would hesitate before uttering a single critical word about their family members, for fear of getting hit with

a lawsuit and a six-figure damages award. They would be fearful of exercising their constitutionally-protected right of free speech.

3. To Allow the $300,000 Punitive-Damages Award to Stand Would Violate the Due Process Clause of the Fourteenth Amendment.

Post-judgment judicial review is a crucial constitutional protection against arbitrary, extreme punitive damage awards. Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 421 (1994). Punitive damage awards that are grossly excessive violate the Due Process Clause of the Fourteenth Amendment. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996). The United States Supreme Court has articulated three guidelines for courts to consider when determining whether a jury's award of punitive damages violates due process: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003).

The first factor is the most important. Gore, 517 U.S. at 575. In analyzing the "reprehensibility" of a defendant's conduct, courts consider whether (1) the harm caused was physical or merely economic; (2) the

tortious conduct evinced disregard of the health or safety of others; (3) the target of the conduct was financially vulnerable; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit. Ebersole v. Kline-Perry, 1:12cv26, 2012 WL 3776489 (E.D. Va. Aug. 29, 2012) (reducing punitive damages from $60,000 to $15,000 in defamation case). "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." State Farm, 538 U.S. at 419.

The jury's award of punitive damages is unconstitutional because all of these factors are absent in this case: Eric's disapproving words did not cause any physical harm; they did not affect Michael's health or safety; Michael is extremely wealthy and thus not "financially vulnerable"; the conduct at issue consisted of a single telephone interview with a reporter and did not involve repeated conduct; and Michael did not suffer any harm as the result of intentional malice,[11] trickery, or deceit. Therefore, Eric's

[11] While Eric was apparently found to have spoken with words with "New York Times malice," this is a far lower threshold then the common-law malice ordinarily required to support an award of punitive damages. See Cantrell v. Forest City Pub. Co., 419 U.S. 245, 252 (1974) (holding that New York Times malice is "quite different from the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages").

brief statements to a reporter are not sufficiently reprehensible to support the jury's massive award of punitive damages.

The second due-process factor also weighs in favor of striking the punitive damages award because there is a huge disparity between the actual harm suffered by Michael and the amount of the award. As discussed above, Michael suffered no actual harm beyond hurt feelings.

The third factor also demonstrates that the award is unconstitutional. The Supreme Court has held that courts may look to criminal penalties that might be imposed when evaluating a punitive damages award for due process violations. See State Farm, 538 U.S. at 428 ("The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action"). Virginia does impose criminal penalties for "insulting words," a subset of defamation, as well as abusive language "reasonably calculated to provoke a breach of the peace." See Va. Code §§ 18.2-416, 18.2-417. A conviction for insulting words (under either § 18.2-416 or § 18.2-417) is treated as a class 3 misdemeanor, which is punishable by a maximum fine of $500. Va. Code § 18.2-11(c).

The jury instructions provided the jury with nine allegedly defamatory statements upon which they might base their verdict. If the jury were to have found that Eric made every one of those statements, and that every

statement amounted to "insulting words," the maximum criminal penalty for a conviction would be $4500. In other words, the punitive award of $300,000 is over 66 times the maximum criminal penalty Eric would have faced had he been convicted of a crime for the conduct at issue. The shocking disparity between these numbers strongly suggests a violation of constitutional due process. See Ebersole v. Kline-Perry, 1:12cv26, 2012 WL 3776489 (E.D. Va. Aug. 29, 2012) (reducing punitive award by 75%, reasoning that "the fact that the jury's award of punitive damages is twenty-four times greater than the maximum criminal penalty Defendant would face for her conduct does indicate that the award is grossly excessive").

CONCLUSION AND RELIEF SOUGHT

Public figures like Michael receive a lot of media attention and should be sufficiently hardy to withstand the occasional disparaging remark. Even private individuals are required by law to tolerate criticism that amounts to nothing more than personal opinion. Michael's Complaint alleges facts that show on their face that Eric was merely expressing his personal views. Eric is entitled to express his opinions and this case should never have been brought.

Having made the decision to sue his father anyway, Michael should have pursued his claims in Hong Kong, not here in Virginia. The case

involves a dispute between two members of a Chinese family, both of whom reside in Hong Kong, about words that were spoken (in Chinese) to a reporter in Hong Kong, who published a story intended for a Hong Kong audience. Virginia has no nexus whatsoever to the facts of this case.

At trial, Michael failed to present any competent evidence of his claimed emotional distress or alleged harm to his reputation, yet the jury awarded him $600,000.00, an amount so grossly out of proportion to the evidence that it violates the United States Constitution.

This Court should vacate the judgment entered against Eric on Count V (Defamation) and award the following additional relief:

1. The Court should reverse the trial court's order overruling the Demurrer with respect to Count V and dismiss Count V with prejudice. The Complaint fails to allege facts sufficient to show a cognizable claim for defamation and the trial court erred in failing to sustain the Demurrer to this count.

2. Alternatively, if the Court does not reverse the trial court's order overruling the Demurrer to Count V, the Court should reverse the trial court's decision to deny Eric's Motion to Dismiss for Forum Non Conveniens, and dismiss the case without prejudice to Michael's ability to bring his defamation claim in Hong Kong should he so desire.

3. Finally (and in the alternative), if the Court declines to reverse the trial court's ruling on either the Demurrer or the Motion to Dismiss for Forum Non Conveniens (finding both that the Complaint states a valid claim for defamation and that the case was properly tried in Virginia), the Court should strike the jury's verdict on Count V and either order a new trial or impose a reasonable remittitur on the verdict, setting damages at an amount that bears a reasonable relation to the damages disclosed by the evidence. Bassett Furniture Indus., Inc. v. McReynolds, 216 Va. 897, 911-12 (1976).

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CERTIFICATE

I hereby certify that in compliance with Rule 5:26, on this 5th day of August, 2013, three bound copies and one electronic copy of the foregoing Brief of Appellant, and one bound copy and one electronic copy of the Appendix, was served via U.S. mail, postage prepaid, upon counsel for the Appellee at the address below.

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I further certify that, on this 5th day of August, 2013, fifteen printed copies of this Brief of Appellant, ten printed copies of the Appendix, and ten electronic copies of each on CD's, were on this day filed by hand with the Court.

I further certify that this Brief of Appellant contains the signature of Appellant's counsel of record, as well as counsel's Virginia State Bar number, address, telephone number, facsimile number, and email address.

Lee E. Berlik