No. 32751 – *Jeremiah "Bart" Morris v. Crown Equipment Corporation, a foreign corporation; and Jefferds Corporation, dba Homestead Materials Handling Company, a West Virginia corporation*

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OF WEST VIRGINIA

Albright, J., concurring:

I concur with the reasoning and conclusions in this Court's majority opinion in the instant case. I write separately to amplify several of the points made in that opinion.

A.

The venue provisions of *W.Va. Code*, 56-1-1(c)[2003] that are at issue in the instant case address the ability of a court that has jurisdiction over the person(s) and subject matter of a case to nevertheless abstain from the exercise of that jurisdiction, on venue grounds, when another court is available and more appropriate. The doctrine that permits such an abstention – which can apply in both intrastate and interstate contexts – is known as *forum non conveniens.*[1]

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[1]In their briefs, the parties to the instant case agree that *W.Va. Code*, 56-1-1(c) [2003] addresses *forum non conveniens* principles and procedures in an interstate context, just as earlier parts of the statute address these principles and procedures in an intrastate context. *See State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995). In Syllabus Point 1 of *Cannelton Industries, Inc. v. Aetna Casualty & Surety Co.* 194 W.Va. 203, 460 S.E. 2d 18 (1954) we stated:

> The common law doctrine of forum non conveniens is simply that a court may, in its sound discretion, decline to exercise jurisdiction to promote the convenience of witnesses and the ends of justice, even when jurisdiction and venue are authorized by the letter of a statute.

In the interstate application of the *forum non conveniens* doctrine, "the state announcing such a policy disclaims any interest in providing a forum for litigation within the scope of the policy, *i. e.*, litigation between foreigners on causes of action predicated on the laws of another state." Carrie and Schechter, "Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities," 69 Yale Law Journal 1323, 1383 (1960).

A number of courts and commentators have discussed the effect of the Privileges and Immunities Clause of the *United States Constitution* on the exercise of the doctrine of *forum non conveniens*:

> . . . [w]e perceive no reason why the doctrine [*forum non conveniens*] should not be available in this State, upon a proper showing and *without discrimination against either noncitizens of California* or against FELA cases.

Price v. Atchison, T. & S. F. Ry. Co., 42 Cal.2d 577, 581, 583, 268 P.2d 457, 460 (1954) (emphasis added).

> . . . [t]he application of the doctrine [*forum non conveniens*] so as to refuse jurisdiction in an action brought by a citizen of another state will not violate Article 4 *if jurisdiction would also have been refused had the plaintiff been a citizen of the forum state.*

Zurick v. Inman, 221 Tenn. 393, 399, 426 S.W.2d 767, 770 (1968) (emphasis added).

> . . . [M]any courts have followed the general rule that applying the doctrine of forum non conveniens to refuse jurisdiction in an action brought by a citizen of a foreign state does not violate the Privileges and Immunities Clause if jurisdiction would be refused in an action brought by a citizen of the forum state in the same circumstances. A particular state may apply the doctrine of *forum non conveniens, as long as it is applied to citizens and noncitizens alike.*

Owens Corning v. Carter, 997 S.W.2d 560, 569 (Tex. 1999) (footnote omitted) (emphasis added).

> However, the doctrine [of *forum non conveniens*], as we construe it, is *non-discriminatory* and does not turn on considerations of domestic residence or citizenship as against foreign residence or citizenship. It turns, rather, on considerations of convenience and justice and it may, therefore, be applied for and against domestic residents and citizens as well as for and against foreign residents and citizens.

Gore v. U. S. Steel Corp., 15 N.J. 301, 311, 104 A.2d 670, 675-676 (1954) (emphasis added).

> A state that restricts forum non conveniens to cases involving plaintiffs from other states may run afoul of the Privileges and Immunities Clause of the U.S. Constitution.

Note, "Georgia On the Nonresident Plaintiff's Mind," 36 Ga. L. Rev. 1109, 1142 n.243, (2002).[2]

In *Norfolk and Western Ry. Co. v. Tsapis*, 184 W.Va. 231, 234-235, 400 S.E.2d 239, 242-243 (1990), this Court stated:

> A number of other courts have reached the same conclusion that the common law doctrine of *forum non conveniens* can be utilized to deny access to courts to nonresident plaintiffs in FELA cases *in appropriate circumstances* without running afoul of the Privileges and Immunities Clause.
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> . . . no one factor [is] necessarily dispositive in a *forum non conveniens* analysis and . . . the doctrine [has] to be applied

[2]*See also Adkins v. Underwood*, 520 F.2d 890 (7th Cir. 1975) (Illinois Supreme Court did not violate the privileges and immunities clause in view of apparent well-established policy of Illinois courts of allowing nonresident access to Illinois courts and of evenhanded application of *forum non conveniens* doctrine).

> flexibly on a case-by-case basis [citing *Piper Aircraft v. Reyno*, 454 U.S. 235, 102, S.Ct. 252, 70 L. Ed. 2d 419 (1991).]

(Emphasis added.)[3]

Based on the foregoing authority (and the authority cited in the majority opinion), it appears that in applying a *forum non conveniens* venue statute like *W.Va. Code*, 56-1-1(c) [2002], it is constitutionally permissible to *take into account* the residency or citizenship of the plaintiff, along with other appropriate factors. However, it is constitutionally impermissible to treat nonresidency in or noncitizenship of West Virginia as a *categorical* ground requiring the courts of West Virginia to dismiss a case on the basis of *forum non conveniens*, without regard to other factors that may be relevant. And of course, the *forum non conveniens* principles simply do not apply where the defendant is a West Virginia entity or the cause of action arose in West Virginia.

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[3]Am.Jur.2d, Constitutional Law, Sec. 769 [2006] states:

> Insofar as such is not prohibited by the Privileges and Immunities Clause, the fact that the parties to an action are noncitizens or nonresidents of the state *may be taken into consideration* by a court in determining whether to apply the doctrine of forum non conveniens, and the application of such doctrine so as to refuse to exercise jurisdiction in an action brought by a citizen of an American sister state is not repugnant to the Privileges and Immunities Clause if, under the particular circumstances, the exercise of jurisdiction would have been refused had the plaintiff been a citizen of the forum state . . . [emphasis added].

"The Supreme Court has permitted nonresidence *to be taken into account* in granting forum non conveniens dismissals[,]" Michael Hoffheimer, "Mississippi Conflicts of Law," 67 Miss. L.J. 175, 321 (1997) (emphasis added).

B.

This Court's opinion in the instant case correctly concludes that our decision in *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995) cannot and does not diminish this Court's duty to assure that all venue-related statutory language is read and applied in a constitutional fashion.

Notably, the *Riffle* opinion did not mention *State ex rel. Kenamond v. Warmuth*, 179 W.Va. 230, 232, 366 S.E.2d 738, 740 (1988), which states:

> Procedural statutes relating to venue, like West Virginia Code § 56-1-1, are effective only as rules of court and are subject to modification, suspension or annulment by rules of procedure promulgated by this Court. *W.Va. Const.* art. 8, § 3; *W.Va. Code* § 51-1-4 (1981 Replacement Vol.); *W.Va. Code* § 51-1-4a (1981 Replacement Vol.). Ultimately, civil venue questions are governed by the procedural rules promulgated by this Court, the procedural statutes that are not inconsistent with those procedural rules, and the opinions issued by this Court interpreting those procedural rules and statutes. [Footnote omitted].[4]

Applying this settled principle, this Court recently held that statutory "provisions . . . [were] enacted in violation of the Separation of Powers Clause, Article V, § 1 of the West Virginia Constitution, insofar as they address procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia Constitution." Syllabus Point 3, in part, *Louk v. Cormier*, 218

[4]*See also Hinchman v. Gillette*, 217 W.Va. 378, 391, 618 S.E.2d 387, 400 (2005) (Davis, J., concurring) (procedural statutes are effective only as rules of court and are subject to modification, suspension, or annulment by rules of procedure promulgated by this Court).

W.Va. 81, 622 S.E.2d 788 (2005).

In *Louk*, we stated:

> This Court has made clear that "[t]he legislative, executive, and judicial powers . . . are each in its own sphere of duty, independent of and exclusive of the other; so that, whenever a subject is committed to the discretion of the [judicial], legislative or executive department, the lawful exercise of that discretion cannot be controlled by the [others]." *Danielley v. City of Princeton,* 113 W.Va. 252, 255, 167 S.E. 620, 622 (1933). Promulgation of rules governing litigation in the courts of this State rests exclusively with this Court.

Id., 218 W.Va. at ___, 622 S.E.2d at 800.[5]

Therefore, it is clear that the Separation of Powers Clause, Art. V, Sec. 1 of the *West Virginia Constitution*, authorizes the substantive review and limitation of statutes in the areas of venue and *forum non conveniens* by the supreme court of appeals insofar as the statutes (1) address procedural litigation matters that are regulated exclusively by the supreme court of appeals pursuant to the Rule-Making Clause, Article VIII, Sec. 3 of the West Virginia Constitution; or (2) present other constitutional concerns.

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[5]*See also* Syllabus Point 1, *Stern Bros., Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977) ("Under Article VIII, Section 8 of the Constitution of West Virginia . . . administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them."); *Williams v. Cummings*, 191 W.Va. 370, 372, 445 S.E.2d 757, 759 (1994) ("This statute . . . is in conflict with and superseded by T.C.R. XVII, which addresses the disqualification and temporary assignment of judges, and thereby dispenses with [the statute] . . .;" *Meadows on Behalf of Professional Employees of West Virginia Educ. Ass'n v. Hey*, 184 W.Va. 75, 79 n.4, 399 S.E.2d 657 n.4 (1990) ("We note that the procedural statutes relating to venue are effective only as rules of court and subject to modification, suspension, or annulment by rules of procedure promulgated by the Supreme Court.") (citation omitted).

C.

Finally, it should be noted that the result in each of the cases relied upon by the dissenting opinion in the instant case turns and relies on a purported distinction between non-residents and non-citizens, in applying the Privileges and Immunities Clause. The dissent replicates that distinction by finding that the application of *W.Va. Code*, 56-1-1(c) [2002] in the instant case to dismiss Mr. Morris' case is constitutionally permissible, because this West Virginia statute facially applies to both citizen and non-citizen "nonresidents."[6]

As this Court's opinion makes clear at note 2, the notion that there is a substantial and dispositive constitutional distinction between discrimination on the basis of residency and discrimination on the basis of citizenship has been set aside by a series of decisions by the United States Supreme Court. Authority grounded in this obsolete distinction is therefore fairly unpersuasive; and it seems that any discriminatory scheme, whether against non-residents or non-citizens, is of constitutional dimension and must be measured against a standard higher than a "rational basis." A court's ability to "take into account" the residency of a plaintiff in a true *forum non conveniens* situation, which I believe is permissible, is more respecting of the constitutional values at stake than any categorical discrimination.

Accordingly, I concur with this Court's opinion and judgment.

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[6]The thoughtful concurrence by Justice Benjamin also cites to *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 3-4, 71 S.Ct. 1, 95 L.Ed. 3 (1950), a case that turns on a distinction between discrimination against "citizens" of other states and discrimination against "residents" of other states.