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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JEAN SHANNON LANE, ALEC J. CABLE
and NOAH D. CABLE,

Respondents Below, Petitioners

v.

ROSSANA CABLE,

Respondent Below, Respondent.

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ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY
(CIVIL ACTION NO. 18-C-424)

**OPENING BRIEF OF PETITIONERS JEAN SHANNON LANE,
ALEC J. CABLE AND NOAH D. CABLE**

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I. ASSIGNMENTS OF ERROR

- A. The Circuit Court erred by granting summary judgment notwithstanding genuine issues of material fact regarding decedent Scott Cable's residency prior to his death in Mexico on June 21, 2017.**

II. STATEMENT OF THE CASE

This case involves the administration of the Estate of Scott M. Cable, a longtime West Virginian with business and property interests in the state, who passed away in Mexico. The parties below—the administratrix of the Estate, claimants against the Estate, and surviving family—disputed whether the Estate should be administered here in West Virginia or in California, based where Mr. Cable resided prior to his untimely death in Mexico on June 21, 2017.

For much of his lifetime, Scott Cable was a prominent West Virginia businessman residing in Kanawha County, West Virginia. His business holdings included Loco Swagg LLC and S & E Properties, LLC, both West Virginia limited liability companies. [Appx. at 166.] Scott Cable’s S & E Properties, LLC owned a commercial building in Nitro, West Virginia, until its April 16, 2015 sale. [Appx. at 310-12.] The sale was partially financed with a promissory note from buyer, Providence Holdings, LLC, payable to S & E Properties, LLC—and after S & E Properties, LLC was administratively dissolved, the note became payable to Scott Cable. Scott Cable’s Loco Swagg, LLC also secured a loan from Diamond Ventures Limited Partnership. [See *id.*]

Below, the Circuit Court appointed a Special Commissioner to accept payments from the note and to use a portion of the payment to discharge the Diamond Ventures Limited Partnership debt. [Appx. 127-32.] The Circuit Court later dismissed Diamond Ventures Limited Partnership after its claim against the Estate was resolved. [Appx. 364-67.] All entities relevant to this series of business transactions—the Nitro property seller, S & E Properties, LLC; the Nitro property buyer, Providence Holdings, LLC; the debtor, Loco Swagg, LLC; and the creditor, Diamond Ventures Limited Partnership—are West Virginia entities. [Appx. at 74, 112, 166, 310.] Indeed, even after his death and in the pendency of this lawsuit, Scott Cable’s business dealings were still being addressed here in West Virginia.

Scott Cable likewise had family in West Virginia. The administratrix of his Estate, Julia Barnhart-Cable, is a former spouse of Scott Cable residing in Kanawha County, West Virginia. [Appx. at 2.] Petitioner Jean Shannon Lane is also a former spouse of Scott Cable residing in Kanawha County. [Appx. at 3.] Scott Cable’s surviving children—Alec J. Cable, Noah D. Cable, Kenzie Cable and Quin Cable— were residents of Kanawha County.¹ [*Id.*] Mr. Cable and his last spouse, Respondent Rossana Cable,² were married in 2011 in Kanawha County and resided there together for at least four years. [Appx. at 123-24.]

However, in the spring of 2015, Rossana Cable asserts that she and Scott Cable “moved away from [their] home in West Virginia to family and friends in the county of Riverside, state of California, with the intention of living in California permanently.” [Appx. at 124.] Scott and Rossana Cable never purchased any real property or entered into any leases in California. Rossana Cable asserted that she and Scott Cable temporarily lived in several California residences the spring, summer, and fall of 2015—but her testimony was self-contradictory. For instance, in her affidavit, Rossana Cable asserted that she and Scott Cable moved to a residence in Norco, California (Riverside County), in the spring of 2015. [Appx. at 124.] However, in her verified responses to interrogatories, Rossana Cable indicated that she and Scott Cable lived in Chula Vista, California (San Diego County), in the spring of 2015. [Appx. at 342.] The discovery responses asserted that she and Scott Cable did not reside in Norco until November of 2015. [*See id.*] These locations are two hours away. The Norco, California, residence was owned by Robert Was—who Rossana Cable ultimately married a short time after Scott Cable’s death.

¹ Since June 21, 2017, Respondents Alec J. Cable and Noah D. Cable have moved out of state.

² Respondent is named Rossana Cable in the pleadings but has since re-married. She now goes by Rossana McClean. However, given that she has gone by Rossana Cable throughout these proceedings, Petitioners will use that name in this brief.

Importantly, in May of 2015—precisely in the time period in which the parties dispute Scott Cable’s residence—Scott Cable sent his brother an email indicating Scott had “moved to Mexico.” [Appx. at 314-15.] In July of 2015, Scott told his brother he was “[l]iving about 40 minutes south of San Diego and 20 minutes north of Ensenada, Baja CA, Mexico.” [Appx. at 315.] A few weeks later, in August of 2015, Scott Cable emailed his brother with a full explanation of his residence and his state of mind:

After [my son] Noah went to college last August and the [Nitro] building was 90% occupied with tenants Rossana had felt it was time to go We had been flying to San Diego and going to Mexico about 4-5 times. **Our initial intentions were to move to San Diego** with our 4 dogs and cat, **but it was so expensive**. While driving the coast I kept seeing this neighborhood—gated beautiful community If you have a chance look up Bajamar.com Baja CA, Mexico.

[Appx. at 311.]

Unfortunately, in late 2015, Scott Cable was involved in a serious motor vehicle accident. [Appx. at 125.] Consistent with Scott Cable’s representations to his brother, the accident took place in Mexico. [See *id.*] With his mobility seriously compromised, Scott Cable was hospitalized and received treatment in Bajamar, Mexico. Mr. Cable signed a twelve-month lease in Bajamar, Mexico, in March of 2016 during his recovery. [Appx. at 327-29.] By all indications, Mr. Cable never fully recovered from his injuries and “remained in Bajamar, Mexico for regularly scheduled medical treatment.” [Appx. at 124.] In her affidavit, Rosanna Cable suggests that following the accident, Scott Cable “never changed his residence from California,” and that “once or twice a week,” Rossana Cable would “drive approximately 90 minutes back and forth between Bajamar and our home in California to pick up bills and attend to family matters.” [*Id.*] However, her discovery responses indicate that she resided in Norco, California, at this time—which is over three hours away from Bajamar. [Appx. at 342.]

In June of 2017, Scott Cable passed away in Mexico, in route to a hospital. At the time, Rossana Cable was in Norco, California, at Robert Was's residence. Scott Cable requested a divorce before his death. [Appx. 116; 395.] Upon Scott Cable's death, the United States Department of States issued a *Report of Death of a U.S. Citizen of U.S. Non-Citizen National Abroad*, which listed a permanent address of Nitro, West Virginia, and a temporary address in Bajamar, Mexico. [Appx. at 220.] His West Virginia Voter Registration and Passport Application likewise indicate that Scott Cable was a West Virginia resident. [Appx. at 307, 308]. Scott Cable died without ever having owned property in California or signing a lease in California—having only, in his own words, considered moving there but in fact moved to Mexico instead.

III. PROCEDURAL HISTORY AND CIRCUIT COURT DECISION

On September 28, 2017, Petitioner Julia Barnhart-Cable was appointed administratrix of Scott Cable's Estate in Kanawha County, West Virginia. [Appx. at 40.] On November 17, 2017, Respondent Rosanna Cable was appointed Executrix of Mr. Cable's Estate in Riverside County, California. [Appx. at 25.] On March 26, 2018, Petitioner Julia Barnhart-Cable filed a Petition for Declaratory Judgment and Associated Relief, declaring that Mr. Cable was a resident of Kanawha County at the time of his death and that is where his estate should be administered. [Appx. at 1-11.] On August 6, 2018, Respondent Rossana Cable filed a Motion to Dismiss, Motion for Judgment on the Pleadings, or in the Alternative Appointment of a Curator [Appx. at 21], which the Circuit Court held in abeyance pending discovery.

After the close of discovery, Rossana Cable served the subject Motion for Summary Judgment and Memorandum of Law in Support, to which Respondents Jean Shannon Lane, Alec J. Cable, and Noah D. Cable responded in opposition. The Circuit Court held a hearing on the pending motion on October 14, 2021. At the hearing, the Circuit Court acknowledged that there was "disputed" evidence that would "rebut" Rossana Cable's summary judgment theory. [Appx.

at 441.] But the Circuit Court granted summary judgment anyway, indicating a concern of “home cooking” and the resources of the parties. [Appx. at 440-41.] On January 21, 2022, the Circuit Court entered its final order, and Petitioners timely filed their appeal on February 2, 2022. [Appx. at 460-73.]

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners respectfully request oral argument pursuant to West Virginia Rule of Appellate Procedure 19, as the errors claimed herein rest on the application of settled law regarding the summary judgment standards. Petitioners submit that the criteria in Rule 18 favor oral argument, as Petitioners have not waived it, the appeal is not frivolous, and this appeal does not rest on a dispositive legal issue which has been authoritatively decided.

V. SUMMARY OF THE ARGUMENT

The key factual dispute is whether Mr. Cable established a permanent residence in California before his death sufficient to probate his estate there. Petitioners Jean Shannon Lane, Alec J. Cable, and Noah D. Cable presented ample evidence that Mr. Cable never established a residence in California. Mr. Cable himself indicated in a 2015 email to his brother, Greg Cable, that he had originally intended to move to California, but instead moved directly to Mexico because California was too “expensive.” Very shortly thereafter, in December of 2015, Mr. Cable suffered a serious car accident in Mexico and received medical treatment in Mexico. He leased a residence in Mexico in March of 2016 and passed away in Mexico in June of 2017. This evidence paints a compelling portrait that Mr. Cable lived in Mexico, but maintained a permanent residence in West Virginia until his death, despite the fact that he, at one point, visited and perhaps intended to move to California with Respondent Rossana Cable. But the evidence does not establish, beyond a genuine dispute, that he actually resided in California.

“A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances.” *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 171 (1963). Considering the “room for controversy” that Respondents’ evidence provides—including Mr. Cable’s own words, the most probative evidence of his state of mind—the summary judgment entered below was improper. The Circuit Court erred and Petitioners request that the judgment below be reversed.

VI. ARGUMENT

A. STANDARD OF REVIEW

“A circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189 (1994). To prevail on a motion for summary judgment, the moving party must prove “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706 (1992). “A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment.” Syl. Pt. 2, *Justus v. Dotson*, 161 W. Va. 443, (1978) (citing Syl. Pt. 1, *Johnson v. Junior Pocahontas Coal Co., Inc.*, 160 W. Va. 261 (1977) (internal citation omitted)). “A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances.” *Aetna Cas. & Sur. Co.*, 148 W. Va. at 171.

“In determining on review whether there is a genuine issue of material fact between the parties, the supreme court will construe the facts in a light most favorable to the losing party.” *Alpine Property Owners Ass’n v. Mountaintop Dev. Co.*, 179 W. Va. 12, 17 (1987). A genuine

issue or dispute is simply one “about which reasonable minds could differ.” *Dent v. Fruth*, 192 W. Va. 506, 510, 453 S.E.2d 340, 344 (1994). “A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.” Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705 (1995).

B. The Circuit Court erred by granting summary judgment notwithstanding genuine issues of material fact regarding decedent Scott Cable’s residency prior to his death in Mexico on June 21, 2017.

The decedent’s “domicile when she died, controls which state law applies to her will of her personal property.” *Lotz v. Atamaniuk*, 172 W. Va. 116, 118 (1983). “Residence is . . . made up of fact and intention, the fact of abode and the intention of remaining There must be a combination and concurrence of these elements and when they occur, and the very moment they occur, a residence is created.” *State ex rel. Linger v. County Court of Upshur County*, 150 W. Va. 207 (1965). “Even though a person may be absent from his domicile for many years . . . nevertheless he retains his domicile if he does not acquire a domicile elsewhere.” *Lotz*, 172 W. Va. at 120 (quoting *Shenton v. Abbott*, 15 A.2d 906, 908 (Md. 1940)).

1. There is probative evidence that Scott Cable never established a California residence or domicile.

There is no dispute that Scott Cable was a longtime West Virginia resident. Mr. Cable was born in West Virginia, grew up in West Virginia, went to West Virginia University, reared his children in West Virginia, established his business in West Virginia, had properties, residences and business dealings in Kanawha County, at least until the spring of 2015—and even during the proceedings below, West Virginia entities were sorting through his interests in a promissory note arising from a sale of West Virginia business property. But in the spring of 2015, Scott Cable left the state. Where Mr. Cable resided for the next several months—and whether he intended to stay there indefinitely—is disputed. While Mr. Cable set up a post office box in Chula

Vista, California, opened a bank account in California, and paid income taxes in California in 2016, he never signed any leases, owned any real property, or used any residential mailing addresses in California. And after his car accident in Mexico in late 2015, there is no dispute that Mr. Cable received medical treatment, entered into a twelve-month lease, and “remained” in Mexico until his death in June of 2017.

Instructive here is *In re Glassford's Estate*, 249 P.2d 908 (Cal. App. 1952), relied upon in this Court’s decision in *Lotz v. Atamaniuk*, 172 W. Va. 116 (1983). In *Glassford*, the decedent—a long-time New York resident—traveled west to California, where she learned that she was dying of cancer. She had opened up bank accounts in California for convenience, yet the California Court determined she remained a domiciliary of New York:

Under these circumstances the trial court could reasonably conclude that a decedent’s determination to remain here until she died was not a free choice on her part but compelled by circumstances over which she had no control; that her stay in California was not for an indefinite period, being originally limited to one year, and later, when advised of her mortal illness, limited by an unexpected event (her death) which although in certain in time was controlled by existing facts which she had knowledge. It is apparent that her stay here was dictated by expediency, for a temporary and limited purpose, and with no thought, purpose or intent of establishing a home here.

Glassford, 249 P.2d at 912.

The record evidence of Scott Cable’s “thought, purpose or intent of establishing a home” in California is slim. The evidence in support of Scott Cable’s ties to California—income taxes, a post office box, and a bank account—does not speak to Scott Cable’s intent. This evidence is entirely consistent with acts taken out of “expediency,” given his living arrangements in Mexico as a United States Citizen.³ His living arrangements in Mexico were solidified by the “unexpected

³ The Chula Vista post office box is immediately adjacent to the United States / Mexico border.

event” of his late 2015 car accident and the long recovery and medical treatments he received in Mexico. Rossana Cable’s own affidavit suggests his living arrangements in Mexico were out of expediency. [Appx. at 124 (“Because of his need for continuous therapy and treatment, and because the medical services and medications were so much more affordable than those as compared to the costs and fees . . . [of medical services] rendered by American doctors . . . Scott remained in Bajamar, Mexico . . .”).]

There are only two pieces of evidence in this record of Scott Cable’s intent after he left West Virginia. The first is Rossana Cable’s testimony—which, as explained below, is facially inconsistent and poses credibility concerns—and the second is a series of emails from Scott Cable himself. Throughout 2015, Scott Cable explained to his brother—on multiple occasions—that he *visited* California several times, but decided to move to Mexico, instead, because California was too expensive:

Did you receive my last email [in May, 2015 indicating he had “moved to Mexico”] . . . Living about 40 minutes south of San Diego and 20 minutes north of Ensenada, Baja Ca Mexico . . . After Noah went to college last August . . . Rossana had felt it was time to go . . . We had been flying to San Diego and going to Mexico about 4-5 times. Our initial intentions were to move to San Diego with our 4 dogs and cat, but it was so expensive. While driving the coast I kept seeing this neighborhood – gated beautiful community . . . If you have a chance look up bajamar.com Baja CA, Mexico.

[Appx. at 312.]

The emails establish that Scott Cable had moved to Mexico by May of 2015, and he offered periodic updates throughout the summer, continuing to explain to his brother that he lived in Bajamar, Mexico. [See Appx. at 314-15.] Scott Cable’s own words are consistent with the hard evidence in this case—his post office box, temporary living arrangements, and even income tax returns in California—given that he was a U.S. Citizen residing in Mexico near the

U.S.-Mexico border. But Scott Cable's own words suggest he never established a domicile in California. He had "initial[ly] inten[ded]" to move to San Diego, but was staying in Mexico because California was "so expensive." While in Mexico, he unfortunately suffered a serious car accident and spent the remainder of his life recovering from it.

Given that the element of intent is critical in determining a decedent's residence or domicile, Scott Cable's own words are the most probative evidence in this case. Rossana Cable's summary judgment briefing acknowledged the competing evidence—but simply argued that it "pales in comparison" to the evidence she favors (California tax returns, post office box, and bank accounts). [Appx. at 104.]⁴ But, axiomatically, the "circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter." Syl. Pt. 3, *Painter v. Peavy*, 192 W. Va. 189 (1994). By favoring one side's evidence over the other's, the Circuit Court erred at the summary judgment stage.

The Circuit Court made only one mention of Scott Cable's emails in its summary judgment order—reasoning that the emails did not constitute "evidence of [Scott Cable's] West Virginia residency." [Appx. at 469.] True, the emails do not establish that Scott Cable lived in West Virginia in the summer of 2015—but they were not offered for that purpose. A prior domicile is not relinquished until a new domicile is established. *See Lotz*, 172 W. Va. at 120 ("Even though a person may be absent from his domicil for many years and may return only at long intervals, nevertheless he retains his domicil if he does not acquire a domicil elsewhere.") (quoting *Shenton*, 15 A.2d at 908). The emails show that Scott Cable never established a domicile in California—and that his prior domicile, West Virginia, prevails.

⁴ Again, Rossana Cable's evidence of Scott Cable's connections with California is consistent with Petitioners' argument that Scott Cable had these connections to California out of "expediency" given his living arrangements in Mexico.

Indeed, *all* record evidence indicates that Scott Cable was a West Virginia resident, at least prior to the spring of 2015. The State Department Report of Death of a U.S. Citizen, his 2013 passport application, his voter's registration card, and a 2014 letter agreement with Providence Holdings all establish that Scott Cable was a longtime West Virginia resident and domiciliary. This is why the contested timeline of events *after* the spring of 2015 is so important—and the factual dispute there is certainly “genuine” enough to defeat summary judgment. Mr. Cable's own words establish the opposite of the Circuit Court's summary judgment findings.

2. Rossana Cable's timeline is disputed and self-contradictory.

The Circuit Court “f[ound] it compelling that Scott and Rossana Cable moved from West Virginia to California in 2015, albeit in different residences.” [Appx. at 468.] As established above, Scott Cable's emails from this time period directly contradict this factual finding. And because Scott Cable did not enter into any leases or purchase any property in California, this factual finding is bolstered only by Rossana Cable's testimony. Rossana Cable's testimony is contradictory and, respectfully, not credible.

In her April 13, 2021 affidavit, Rossana Cable states that she and Mr. Cable moved to “the county of Riverside, state of California” in the “Spring of 2015.” [Appx. at 124]. In her verified responses to interrogatories, however, Rossana Cable indicated that their first residence in California were residences in Orange and San Diego Counties, and that they did not move to Riverside County until November. [Appx. at 139.] These residences are hours away, and this sworn testimony is facially inconsistent. Likewise, following Scott Cable's accident, Rossana Cable indicated he “remained in Mexico” while she resided in Riverside County, California (at Robert Was's residence). [*Id.*] She also testified that she would travel “90 minutes” from her California residence to Scott Cable's living arrangements in Bajamar, Mexico. It is an approximately 3.5 hour drive between the two locations.

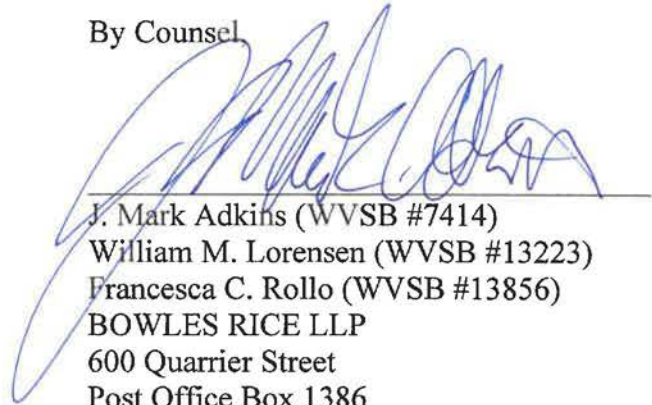
Whether or not to credit this evidence on the basis of Rossana Cable's contested timeline is a question for trial, rather than for summary judgment. See Syl. Pt. 1, *Andrick*, 187 W. Va. 706. Mr. Cable's own words are likely the most probative evidence in this case, and they negate the summary judgment order's factual theory. Summary judgment is therefore inappropriate, as there exists a genuine issue of material fact for a factfinder to decide.

VII. CONCLUSION

For all the reasons set forth in this brief, and such other reasons as may appear in the record, Petitioners Jean Shannon Lane, Alec J. Cable, and Noah D. Cable respectfully request that this Court REVERSE the Circuit Court's decision.

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ROSSANA CABLE,

Respondent Below, Respondent.

CERTIFICATE OF SERVICE

I, J. Mark Adkins, do hereby certify that on this 23rd day of May, 2022, I served the foregoing *Petitioner's Opening Brief* on all counsel of record via e-mail:

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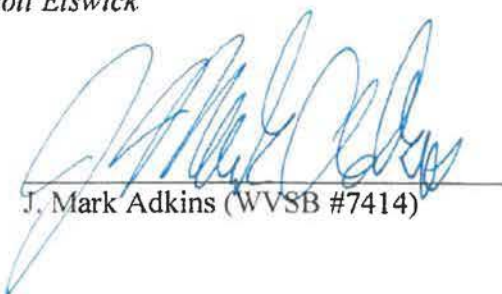
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