

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.



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

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

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I. ARGUMENT

This case has conflicting evidence regarding where Scott Cable resided and whether he intended to stay there indefinitely prior to his death in Mexico. Probative evidence establishes that Scott Cable did not acquire a domicile in California. Both the Circuit Court and the Response inappropriately weigh the evidence at the summary judgment stage. This error warrants this Court reversing the January 21, 2022 Order.

A. The probate code does not assist Rossana Cable and this dispute is resolved under the law of domicile.

Respondent first points to West Virginia Code § 41-5-4, which concerns the county commissions jurisdiction for probate, for the proposition that Mr. Cable was not a resident of West Virginia at the time of his death. Respondent, however, has made no effort to establish that Mr. Cable's estate could be properly probated in California pursuant to the California Probate Code. "If the decedent was domiciled in [California] at the time of death, the proper county for proceedings concerning administration of the decedent's estate is the county in which the decedent was domiciled, regardless of where the decedent died." Ca. Prob. Code § 7051. As discussed in detail below, Respondent has not established that Mr. Cable was a resident of California at the time of his death. Mr. Cable did not own property in California, he did not lease property in California, and he did not physically reside in California. Thus, pursuant to California Probate Code § 7051, probate is inappropriate in any California county.

If the decedent was *not* domiciled in California at the time of death, as is the case for Mr. Cable, the proper county for proceedings is where the property of the nondomiciliary is located. Ca. Prob. Code § 7052. Mr. Cable did not have any property in California at the time of his death. Therefore, probate in any California county would be inappropriate.

Thus, Petitioners have illustrated that probate in California is not permitted and West Virginia law supports probate in in this State, Mr. Cable's most recent domicile.

B. Under the law of domicile, it is not enough to establish that Scott Cable never intended to return to West Virginia; Respondent must show that Scott Cable established a new domicile in California.

Both the Response and the Circuit Court lean on the lack of evidence that Scott Cable intended to return to West Virginia after he left the State in the spring of 2015. [*See* Resp. at 14-21; App'x at 436-437 ("I've heard no evidence that [Scott Cable] had an ongoing presence in West Virginia.").]

Petitioners do not dispute this. Scott Cable is deceased and there is no evidence he intended to return to West Virginia after he left the State in 2015 and before he passed away in 2017. But that does not mean that Scott Cable surrendered his West Virginia domicile. "Even though a person may be absent from his domicile for many years . . . he nevertheless retains his domicile if he does not acquire a domicile elsewhere." *Lotz v. Atamaniuk*, 172 W. Va. 116, 118 (1983). Scott Cable was not "absent from his domicile for many years"—only two years of his life are in dispute here. There is genuine evidence that Scott Cable never acquired a domicile in California, and by law, his longtime domicile in West Virginia prevails.

C. There is a genuine issue of fact as to whether Scott Cable ever acquired a California domicile.

"Residence is . . . made up of fact and intention, the fact of abode and the intention of remaining There must be a combination and occurrence 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).

The parties agree that Scott Cable was a West Virginia domiciliary until May of 2015, and that after Scott Cable's December 2015 car accident, he elected to live in Mexico and

signed a lease there to facilitate less expensive medical treatment. [See Resp. at 7, 19.] Respondent argues that in this interim period between May and December of 2015, Scott Cable established a domicile in California and never surrendered it despite spending his last few years in Mexico recovering from the accident. [See Resp. at 5-6.] But the essential elements for establishing a new domicile—abode and intent—are both genuinely disputed in this case.

1. *Abode*

There is a notable lack of evidence that Scott Cable established an abode in California. Scott Cable did not sign any leases or buy any real estate in California. The Response repeatedly references Scott Cable’s California mailing address [see Resp. at 9, 15, 17-18, 22]—but this is not a physical address. It is certainly not an “abode” for purposes of domicile. See *Abode*, Black’s Law Dictionary (11th ed. 2019) (“A home; a place of residence.”). This address is a post office box in Chula Vista, California located mere minutes away from the U.S.-Mexico border. [See Resp. at 5.] This is the address Scott Cable used for tax, child support, and business registration purposes. There is no evidence that Scott Cable ever identified a residential address in California on any filing or correspondence.

One would think that if there was no doubt that Scott Cable established a California abode and intended to remain there indefinitely, the record would establish *where* the domicile was and *when* Scott Cable resided there. The only evidence identifying Scott Cable’s alleged California abode is Respondent’s story in written discovery and her affidavit. [See Appx. at 124, 135-139.] Respondent asserts that she and Scott Cable lived in a number of residences owned by family and friends in various parts of California—Chula Vista, Anaheim, and Norco—in the 2015 time period. [See Resp. at 3-4; Appx. at 135-139.]

But Respondent's story in written discovery is inconsistent with the story she told in her affidavit. [*Compare* Appx. at 124 *with* Appx. at 135-139.] On appeal, Respondent concedes as much. [Resp. at 22.] Rossana Cable provides different testimony on objective facts like where she and Scott Cable resided and when they resided there. Respondent did not testify to different dates; Respondent testified to different *sequences of events*. The question of "where was Scott Cable's first California residence?" is answered differently in these sworn statements. [*Compare* Appx. at 124 *with* Appx. at 135-139.] It is difficult to see how this inconsistent story can provide the basis for a summary judgment award—particularly when other evidence (Scott Cable's emails) refute this story in its entirety.

Respondent makes two arguments explaining away her inconsistent testimony. First, Respondent chalks it up to a language barrier. [Resp. at 22.] Rossana Cable is not a native English speaker—but she is fluent one. Rossana Cable fielded hours of deposition questions and provided fluent and articulate answers in English. But the inconsistent testimony at issue here is not a confusing verbal exchange that can be persuasively chalked up to a language barrier. Rossana Cable made these inconsistent statements in writing. [*See* Appx. at 124, 135-139.] The inconsistent facts are straightforward and objective: where Rossana and Scott Cable resided and when they resided there. These are not the kinds of facts that one would expect to be lost in translation.

Second, Respondent argues "[n]one of this testimony has any bearing on Scott M. Cable's California domicile." [Resp. at 21.] That is obviously not true. If, when, and where Scott Cable established a California abode are not just material facts—they are the central facts in dispute. The sole California mailing address on the record is a post office box straddling the U.S.-

Mexico border. There are no leases or physical mailing addresses indicating where Scott Cable resided in California or when he resided there.

The summary judgment order relies on Respondent's story as the undisputed fact. [Appx. at 468.] But Respondent is unable to provide a cohesive story explaining when and where she and Scott Cable resided—and both her affidavit and her discovery responses are contradicted by contemporaneous writings authored by Scott Cable himself.

2. *Intent*

To prove a new domicile, Respondent must show that Scott Cable intended to remain in his California abode indefinitely. Courts must take “special care when considering summary judgment in . . . cases [where] state of mind, intent, and motives may be crucial elements.” *Williams v. Precision Coil, Inc.*, 194 W. Va. 52 at 61, 459 S.E.2d 329 at 338 (1995). There is ample evidence on this record that the intent element is not satisfied.

At the outset, even assuming that Respondent's appellate timeline of events is generally accurate, it would not prove that Scott Cable established a new domicile. Respondent asserts that she and Scott Cable lived in an Anaheim residence and a Chula Vista residence from May 2015 to November 2015. [Resp. at 3-4.] Respondent does not identify a primary residence—and in written discovery, she stated that “[d]uring this time period we sometimes stayed” at both locations. [See Appx. at 135-137.] How someone can establish an abode with an intent to remain indefinitely at two separate locations (situated hours apart and in different metropolitan areas) defies explanation. Several informal and temporary “living-with-friends” arrangements do not tend to show Scott Cable intended to remain in these residences indefinitely. It tends to show the opposite.

There is genuine evidence in this case that speaks *directly* to the element of Scott Cable's intent, and it directly contradicts Respondent's story. In contemporaneous writings to his brother, Scott Cable stated that he originally intended to move to California but moved to Mexico instead. [Appx. at 314-315.]

Respondent makes two arguments to rebut these emails. These resemble trial arguments rather than summary judgment arguments; but they are unpersuasive nonetheless. First, Respondent argues that because Scott Cable's earliest message is dated in *July* 2015, "[t]he emails do not speak to Scott Cable's intent to stay, or not stay, in California when he moved to California in *May* 2015." [Resp. at 20.] While Scott Cable's intent could theoretically have changed over two months, this theory cannot be reconciled with the emails. Scott Cable told his brother in May 2015 that he had moved to Mexico:

[Scott Cable (July 31, 2015):] Did you receive my last email . . . Living about 40 minutes south of San Diego and 20 minutes north of Ensenada, Baja, Ca MEXICO.

[Greg Cable (August 6, 2015):] Yes, I did get your email *in May when you moved to Mexico* . . . Did not know that you were actually moving to Mexico . . . I thought you were just setting up a shop there!

[Scott Cable (August 6, 2015):] 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 . . . but it was so expensive . . . If you have a chance look up bajamar.com Baja CA, MEXICO, really cool.

[Appx. at 314-315 (emphasis added).] One must ignore the evidence to conclude, as Respondent does, that "there is no evidence in the record whatsoever that shows Scott Cable . . . was living in Mexico in May 2015." [Resp. at 20.]

Second, Respondent argues that Scott Cable's "initial intentions . . . to move to San Diego . . . but it was so expensive" does not rule out the possibility he was living elsewhere in California—namely, the Chula Vista, Norco and Anaheim residences. [Resp. at 19-20.] Once

again, Scott Cable’s own words refute this argument. Scott Cable plainly indicates that he is “[l]iving about 40 minutes *south* of San Diego and 20 minutes north of Ensenada, Baja Ca MEXICO.” [Appx. at 315.] Any location south of San Diego would be in Mexico. Scott Cable then provided his brother a link to the Bajamar resort in Baja CA, Mexico—which is south of San Diego and north of Ensenada like his original email indicates. [Appx. at 314.] Scott Cable makes no mention of residing in Chula Vista, Norco, Anaheim, or anywhere else in California. Again, one must ignore the record to conclude, as Respondent does, that these emails support Respondent’s story that she and Scott Cable were residing in California at this time.

Scott Cable’s emails directly contradict Respondent’s story and the Circuit Court’s summary judgment factual findings. Scott Cable is deceased and cannot now speak to where he resided and whether he intended to live there indefinitely. His contemporaneous writings are probative evidence of what his intent was—and it rises above the “mere scintilla” of evidence needed to defeat summary judgment.

D. The evidence in this case is consistent with evidence of actions taken out of expedience and convenience, and Petitioners are at the very least entitled to make that argument to a jury.

The Response attempts characterize Petitioners’ theory of the case as irreconcilable with Scott Cable obtaining a California identification card, paying California taxes, and setting up a California post office box. [See Resp. 18 (“These actions are not things a person would do if he or she was living in a place temporarily.”).]

Petitioners disagree—living at multiple locations at the same time, as Respondent testifies, is exactly the kind of thing a person would do if living in a place temporarily. But at the outset, Petitioners do not need to definitively prove Scott Cable’s abode and state of mind in order to survive summary judgment. In this case, both parties have facts that favor their theory, and

facts that run up against it. Respondent was alleviated her burden to prove her case to a finder of fact despite those factual inconsistencies. Instead, the Circuit Court erroneously weighed the evidence for her at summary judgment stage. All Petitioners need to do to survive summary judgment is identify a genuine issue of fact, and Petitioners have done so.

In any event, each of the facts Respondent relies upon—Scott Cable’s California identification card, his 2016 income tax returns, and the addresses Scott Cable used for business and child support reasons—all lead back to his P.O. Box straddling the U.S.-Mexico border. None of these documents identify a residential address in California. Had Scott Cable established a permanent California residence—particularly, the Norco residence which Respondent claims was her and Scott Cable’s residence from November 2015 until Scott Cable’s death—one would think Scott Cable would use it to receive mail or at least identify it for tax purposes. This was Robert Was’s residence and, incredibly, Respondent married him shortly after Scott Cable’s death. [See Appx. at 139.]

The proximity of the P.O. box to the U.S.-Mexico border could lead a rational factfinder—viewing the *totality* of the evidence including Scott Cable’s own words [Appx. at 314-315], the fact that he requested a divorce from Rossana Cable before he died, [Appx. at 116, 395], and the fact that Rossana Cable married Robert Was, supposedly Rosanna’s and Scott Cable’s housemate, shortly after Scott Cable’s death—to conclude that Scott Cable never intended to move to California, but rather, moved to Mexico instead, and maintained a P.O. Box on the U.S.-Mexico border out of expediency.

In the opening brief, Petitioners cited a number of cases to establish that temporary or expedient measures do not establish domicile. Respondent undertakes great effort to distinguish them, but misses the point. The question of domicile is highly fact dependent—and this case,

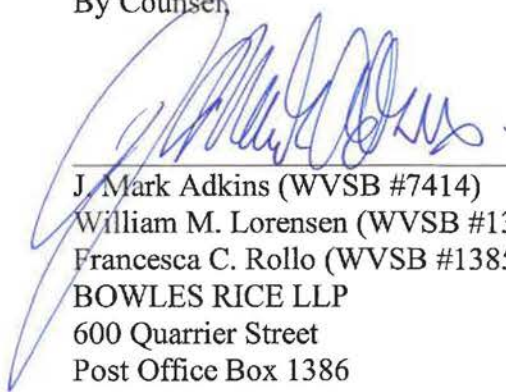
unsurprisingly, does not share the same facts as others. But those cases had undisputed facts and all that was at issue was applying the law to those facts. This case does not have undisputed facts. The facts of this case are for a jury to decide.

II. CONCLUSION

For these reasons, Petitioners respectfully request that the final order be vacated.

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

By Counsel,

A handwritten signature in blue ink, appearing to read "J. Mark Adkins", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, J. Mark Adkins, do hereby certify that on this 27th day of July, 2022, I served the foregoing ***Reply Brief*** on all counsel of record via e-mail:

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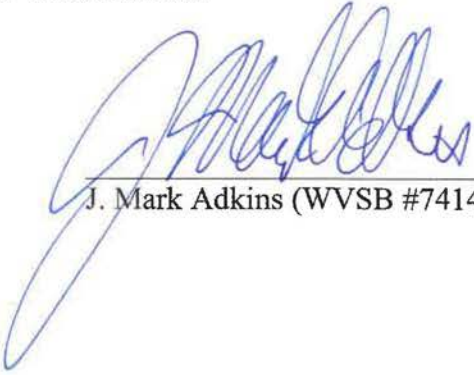
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