IN THE SUPREME COURT OF OHIO

City of Columbus, Income Tax Division,	:	08-1591
Appellee,	:	On appeal from the Franklin County Court of Appeals,
-vs-	:	Tenth Appellate District
Allen Whaley,	:	Court of Appeals Case No. 08AP-25
Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, ALLEN WHALEY

Marcell Rose Anthony, J.D., LL.M. (0026115)
Law Offices of Marcell Rose Anthony, LLC
233 South High Street, Suite 300
Columbus, Ohio 43215
Phone: (614) 220-9081
Fax: (614) 461-0000
E-Mail: Marrose50@aol.com

COUNSEL FOR APPELLANT, ALLEN WHALEY

Paul Khoury, Esq. (0070643)
Assistant City Attorney
City Hall, Room 200
90 West Broad Street
Columbus, Ohio 43215
Phone: (614) 645-8914
Fax: (614) 645-6949
E-Mail: ptkhoury@Columbus.gov

COUNSEL FOR APPELLEE, CITY OF COLUMBUS, DIVISION OF INCOME TAX

FILED
AUG 12 2008
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION..... 1

STATEMENT OF THE CASE AND FACTS..... 5

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW..... 7

Proposition of Law No. I: The Appellant was denied due process and equal protection when the Court of Appeals erred by considering only documents, and then some documents not admitted or not probative, when the trial court found as a finding of fact that the residence of Appellant was South Point, Ohio but concluded that Appellant's domicile was Columbus where his wife lived and therefore, Appellant's Cal Ark International income was taxable by Columbus..... 7

Proposition of Law No. II: The trial court erred as a matter of law when it found that Appellant's domicile was the domicile of his wife who resided in Columbus, Ohio for employment purposes purportedly because the wife conducted the business of Appellant, which was not supported by the record; the Court of Appeals did not address this trial court conclusion..... 8

Proposition of Law No. III: The trial and appellate courts erred by not recognizing that couples reside, are domiciled and have places of abode in different cities due to employment and career objectives, thereby denying due process and equal protection..... 9

Proposition of Law No. IV: The trial and appellate courts erred as a matter of law by concluding that Appellant was a resident of South Point, Ohio only for convenience to his employment at the National Guard when people live, reside and are domiciled as a matter of course for convenience to employment, churches, schools, family and for other convenience reasons..... 9

Proposition of Law No. V: As a matter of law, a person cannot be domiciled in a taxing locale when he/she was never physically present in that locale. Appellant was never physically present in Columbus, Ohio when he worked for Cal-Ark International as a trucker as inferred by the trial and appellate courts..... 10

CONCLUSION..... 11

CERTIFICATE OF SERVICE..... 12

APPENDIX App. Page

Findings of Fact, Conclusions of Law and Judgment Entry of the Municipal Court of Franklin County (December 11, 2007)..... 1

Opinion of Franklin County Court of Appeals (June 30, 2008)..... 11

Judgment Entry of the Franklin County Court of Appeals (June 30, 2008)..... 17

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC INTEREST OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The Appellant is a taxpayer. He and his wife, Janice Clarke, paid their federal income taxes, Ohio taxes, and Janice Clarke paid Columbus, Ohio taxes for the years 1997 through 2000, the years that the City of Columbus filed a complaint against Appellant, Allen Whaley, claiming he owed Columbus, Ohio taxes on income earned as a trucker for Cal-Ark International, Inc.

The couple was married and lived in Hanging Rock, Ohio, until the couple agreed that they would live in separate cities for their careers. The Appellant moved from Hanging Rock, Ohio to South Point, Ohio to reside, be domiciled, with his mother. The wife moved to Columbus, Ohio to work as a nurse. The wife held the power of attorney for her husband, the Appellant. The wife had his mail sent to her from various sources, and prepared and signed his name to their federal tax returns.

The trial court, after trial, entered into Findings of Fact, Conclusions of Law, and entered judgment for Appellee. The thrust of the Findings of Fact and Conclusions of Law by the trial court, attached in the Appendix hereto, was that the trial court believed Allen Whaley, Appellant, his wife and his mother, that when he came home from being a trucker for Cal-Ark, he came home to South Point, and South Point was essentially his residence. However, the trial court concluded that his wife's domicile should be Appellant's domicile because the wife conducted the <u>business</u> of Appellant, citing an unreported 1901 case's dictum

on "domicile" that was neither a taxation nor inheritance case. This was not supported by the record. The Appellant's wife only received his mail, as his power of attorney, and conducted personal and family business, but not the business business of Appellant. Appellant conducted his own business as a trucker for Cal-Ark and National Guard.

There was not a credibility problem with Appellant and his witnesses due to the Findings of Fact that found that Appellant's residence (essentially place of abode) was South Point, Ohio, but that his domicile followed his wife.

The Appellate Court ignored the Findings of Fact and Conclusions of Law and affirmed the trial court based solely on documentary evidence of tax returns, two of the four of which did not reflect Appellant's signature or a Columbus, Ohio address in 1997 and 2000, and the employment records were not admitted into evidence, and the Commercial Driver's License was not admitted into evidence due to the objection of Appellant's counsel which was sustained. The Appellate Court did not address any of the case law cited by the trial court, and distinguished by Appellant in the briefing in the Court of Appeals. Indeed, the Appellate Court cited no cases at all.

In any event, Harland Geiger, from the Division of Taxation for Columbus, who was the only witness for the Appellee, testified that the Columbus address on the tax returns was the mailing address, not the residence, of Appellant. Harland Geiger admitted that people place on their tax returns, addresses of relatives, family members, post office boxes, other mailing addresses, and

not their residences.

This case is one of great public interest because, especially in times of recession, many couples choose to live, reside, be domiciled in different cities for employment purposes. The most famous celebrity case is that of Marlo Thomas and her husband, who lived in New York and Chicago respectively, and commuted to see each other. Couples live and reside, and are domiciled, in separate cities or towns, for employment opportunities. It is incumbent upon this Honorable Court to recognize that when that is done, that the different cities or towns tax only their own residents, or tax people based upon their employment in those towns or cities like Appellant's wife and the City of Columbus.

The general public where more couples are residing in separate cities or towns for employment opportunities need to know whether they will be double taxed.

Moreover, people who are absent from a city or town, are not physically present in that city or town when they earn income, should not be subject to that taxing locale. To do otherwise, goes beyond the reach of the taxing locale. This applies to trucking drivers in particular, who claim another city as their residence, and use a mailing address of a relative for convenience when they are absent in the road for long periods of time, or who have provided powers of attorney to relatives who reside in different cities or towns.

Lastly, when a person is absent for long periods of time, and gives a power of attorney to a relative, and that relative conducts personal and family business for that person, including receiving their mail, then the mailing address should not be reflected as a domicile for the grantor of that power of attorney. This too is of great public interest since powers of attorney are freely given, and mail is redirected to family members living in different locales than the grantor.

This case also presents several substantial constitutional questions, all in violation of the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution. First, a taxing locale cannot tax a person who was never physically present in that taxing locale ever when working for a particular employer. Appellant was never physically present in Columbus, Ohio when he worked for Cal-Ark International, Inc., the subject of the income tax alleged liability by Appellee. While Appellant did take a temporary job with another company during the summer of 1998, and temporarily lived at that time with his wife, this other company job was short-lived, and after the summer of 1998, Appellant returned to South Point, Ohio and to his employment with Cal-Ark International, Inc. as a trucker. The trial court found that when Appellant was home in South Point, Ohio, his wife came to visit him (and enjoy their marriage) in South Point, Ohio.

Second, the Appellate Court ignored the Findings of Fact and Conclusions of Law of the trial court, and the cases cited by the trial court, all of which were distinguished by Appellant, in briefing. The Appellate Court ignored the fact that Appellant was not

provided an opportunity to object to the Assistant City Attorney's proposed Findings of Fact and Conclusions of Law, which cited cases, in violation of due process and equal protection since the Appellate Court stated that Appellant conducted closing argument. However, cases were not cited by the Assistant City Attorney, and the closing argument did not presume domicile followed the wife. The trial court signed the Assistant City Attorney's proposal. If given an opportunity to object to the Assistant City Attorney's proposal, the cases cited by the Court would have been distinguished, and the trial court might have come to a different conclusion. The trial court only mentioned documents in passing, most of which were not probative, or were not admitted into evidence.

STATEMENT OF THE CASE AND FACTS

The Findings of Fact, Conclusions of Law and Judgment Entry of the trial court are appended hereto, as are the Decision and Opinion of the Appellate Court, and Journal Entry of the Appellate Court. As this Court can discern, the trial court entered findings of fact that were favorable to the Appellant's residence in South Point, Ohio, but concluded that his "domicile" followed his wife's in Columbus because his wife conducted the business of Appellant, which was not supported by the record. Appellant conducted his own business as a trucker for Cal-Ark International, Inc. and conducted his own business with the National Guard. Appellant is a veteran of the Vietnam and Iraq wars, an ex-Marine. Employment records were not

admitted into evidence, and the CDL was excluded from evidence due to the objection of Appellant's counsel, which was sustained.

This city income tax case for tax on the Cal-Ark International, Inc. income of Appellant for 1997 through 2000, was not supported by the evidence of the City of Columbus. Harland Geiger, the only witness for the City-Appellee, testified as to federal income tax returns for the four years in question, the 1997 one did not have an Allen Whaley signature, and the 2000 had a Greenup, Kentucky address. That leaves on 1998 and 1999, which Harland Geiger testified to was the "mailing" address of Appellant, not his residence or domicile. Harland Geiger also admitted that people put many kinds of addresses on their tax returns – mailing addresses, post office boxes, addresses of relatives, and the like.

The trial court essentially believed Appellant that his place of abode, his residence, was with his mother in South Point, Ohio when he worked for Cal-Ark International. Inc. as a trucker, and his wife visited him in South Point, Ohio when Appellant was home as a trucker. However, the trial court and the Appellate Court stated that Appellant only resided in South Point, Ohio for "convenience to his National Guard" in Ironton, Ohio. The trial court found that the wife's domicile was the domicile of the Appellant because the wife conducted the business of Appellant, citing an unreported 1901 case, which was not supported by the record, which the Court of Appeals did not address, or cite law.
The wife did not admit that her domicile was Columbus, for she was only there three days a week, then she came to the marital home in South Point, Ohio the

rest of the week.

The facts of the case have been sufficiently set forth hereinabove for purposes of this Memorandum in Support. It is clear that the trial court essentially inferred that the marital home of the couple was South Point, Ohio because it found that Appellant's wife visited him there when Appellant was home in South Point as a trucker.

ARGUMENT ON PROPOSITIONS OF LAW

I. Proposition of Law No. I:

The Appellate Court ignored the Findings of Fact and Conclusions of Law, and the cases cited, by the trial court. What the Court of Appeals did was state that the tax returns, employment records and commercial driver's license reflected a Columbus, Ohio address (wife's address), and therefore Appellant's domicile was Columbus, Ohio. Essentially, the City-Appellee in its briefing and oral argument concentrated only on the documents. Two of the federal tax returns were not probative for 1997 and 2000, no employment records were introduced into evidence, and any evidence of the commercial driver's license was also excluded from evidence due to the objection of Appellant's counsel, which was sustained.

The Court of Appeals essentially denied due process and equal protection guaranteed under the Fourteenth Amendment to the U.S. Constitution, by not reviewing and deciding on the trial court's decision, with cases cited therein Appellant was appealing the trial court's findings of fact and conclusions of

d instead received a trial de novo in the Court of Appeals.

The lack of law, and only documentary evidence, most of which was not the record, was not admitted into evidence, makes the Court of Appeals n bad law. Even the trial court believed Appellant and his witnesses most part, and downplayed the documentary evidence or mentioned in passing. This has a devastating effect on litigants like Appellant sed 1998 and 1999 tax returns to reflect his mailing address as testified to by the City's itness, Harland Geiger, and confirmed by Appellant and his witnesses.

People who travel, and who have powers of attorney with relatives or s, who receive mail, have documents prepared for these travelers, will be sely affected and double taxed.

Proposition of Law No. II:

The Columbus City Code taxes residents of Columbus, Ohio. "Resident" is ed under the Columbus City Income Tax Code, Section 361.11 as "...any individual s domiciled in the city of Columbus or whose usual place of abode is in the city." er term is defined in the Columbus city codes; however, Black's Law Dictionary, d by the trial court, defined both, with "domicile" presuming physical presence.

The trial court essentially deemed Appellant's residence to be South Point, Ohio he worked for Cal-Ark International. Inc., but stated that a person can have residences but only one domicile, and concluded that Appellant's domicile ved his wife's to Columbus and therefore, the wife's domicile of Columbus

was deemed to be Appellant's domicile since the wife conducted the business of Appellant, citing an unreported 1901 case dictum on "domicile." That case was neither a taxation nor inheritance case, and defied current law on "domicile" for taxation purposes, found in Cleveland v. Surella, 61 Ohio App. 3d 302 (1989) to wit: "A taxpayer's domicile is a permanent legal residence that the taxpayer intends to use for an indefinite or unlimited period, and to which, when absent, the taxpayer intends to return. The question of domicile is primarily one of intent ..." By finding that Appellant returned to South Point, Ohio and lived with h is mother, and his wife visited him in South Point, then the trial court essentially was required to likewise find that Appellant's domicile was South Point.

The Court of Appeals once again ignored the findings of fact and conclusions of law of the trial court, and wrote an opinion without case law on "documents" many of which were not part of the record.

The wife did not conduct the business business of Appellant, and there is nothing in the record to reflect that she did, and the trial court's reliance on a 1901 unreported case for a definition of "domicile" is unwarranted.

Proposition of Law No. III:

The trial court and appellate courts erred by not recognizing that people live, reside and are domiciled in different cities for employment purposes. Both courts had to mention, as was the City-Appellee's position, that Appellant only resided in South Point, for convenience to his National Guard drills. Both courts do not recognize that people chose to live, reside and be domiciled

for convenience to employment, schools, churches, family and a host other reasons, and convenience should not be detrimental for taxation purposes or in defining "domicile."

Proposition of Law No. V:

The definition of "domicile" utilized by the trial court, and ignored by the Court of Appeals, essentially required some kind of physical presence in the taxing locale. Except for the summer of 1998 when Appellant came to Columbus to temporarily work for another company in Canal Winchester for three months, Appellant was never present in Columbus, not even to visit his wife. Appellant was not physically present in Columbus when he worked for Cal-Ark International, Inc. as can be inferred from the trial court's findings. Even the Court of Appeals stated that Appellant was probably not even in Ohio much.

The trial court relied heavily on Anderson v. Limbach, (unreported) 1990 O. App. LEXIS 4868, which is distinguishable from the case at bar. In Anderson, the marital home of the couple was Columbus and the parties owned a home in Columbus, Ohio. The husband's employment took him to Tennessee, but the husband returned to Columbus to visit his wife who stayed with the children in the marital home. In that Ohio taxation case, the Tenth Appellate District in Anderson held that the husband's domicile for taxation purposes never left Columbus, the marital home.

In the case at bar, it is clear from the record, that the marital home of the parties was first Hanging Rock, then South Point, but never Columbus. Appellant and his wife enjoyed

their marriage in South Point. There is no testimony from City-Appellee that the wife's domicile was Columbus for she only lived in Columbus three days a week, then returned to South Point.

The Court of Appeals never even addressed the Anderson case which was a controlling case to the trial court. The Court of Appeals indeed cited no law. Unlike the taxpayer in Anderson, Appellant was never physically present in Columbus when he worked for Cal-Ark International as a trucker (and still does).

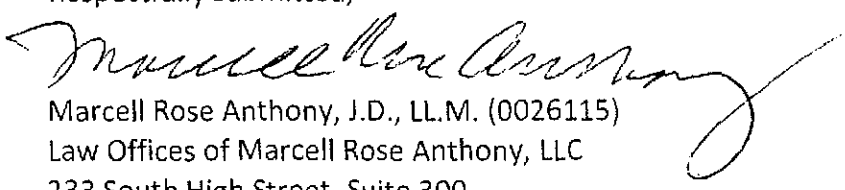
Law is needed at the Ohio Supreme Court level to address the current definition of "domicile" and physical presence requirement.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional law question(s).

The Appellant requests that this Honorable Court grant jurisdiction and allow this case so that the important issues presented in this case will be reviewed on the merits.

Respectfully submitted,

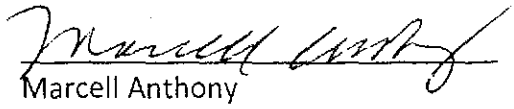


Marcell Rose Anthony, J.D., LL.M. (0026115)
Law Offices of Marcell Rose Anthony, LLC
233 South High Street, Suite 300
Columbus, Ohio 43215
Phone: (614) 220-9081
Fax: (614) 461-0000
E-Mail: Marrose50@aol.com

COUNSEL FOR APPELLANT, ALLEN WHALEY

CERTIFICATE OF SERVICE

I, Marcell Anthony, hereby certify that a copy of the foregoing was sent by regular US mail to Paul Khoury, Esq., Assistant City Attorney, City Hall, Room 200, 90 West Broad Street, Columbus, Ohio 43215 on this 12 day of August 2008.



Marcell Anthony

In the Franklin County Municipal Court
Columbus, Ohio

City of Columbus Division of Income Tax Plaintiff, v. Allen L. Whaley, Defendant.	Case № 2006 CVF 36405 Judge Scott D. VanDerKarr Findings of Fact, Conclusions of Law, and Judgment Entry.

This matter came before this Court at a trial before Judge Scott D. VanDerKarr on November 8, 2007. Both parties were represented by counsel. The plaintiff presented documentary and testimonial evidence with one witness, City of Columbus Income Tax Supervisor Harland Geiger. The defendant presented testimonial evidence with three witnesses; the defendant Allen L. Whaley, his wife Janice Ann Clarke, and his mother Geraldine Louise Whaley.

All parties and witnesses were sworn. At the conclusion of the trial, the defendant requested findings of fact and conclusions of law. Accordingly both parties were instructed to make post-trial submissions of their respective proposed findings and conclusions.

Issue.

On August 23, 2006, the plaintiff City of Columbus Division of Income Tax filed a Complaint in this Court against the defendant Allen L. Whaley alleging that the defendant earned income that was subject to Columbus income tax during tax years 1997 through 2000. The defendant answered, denying Columbus residency during the relevant periods. The disputed issue at the trial was whether the defendant was a resident of

olumbus, Ohio for city income tax purposes during the relevant periods. The Columbus ity Income Tax Code §361.11 defines "resident" as:

> . . . any individual who is domiciled in the city of Columbus or whose usual place of abode is in the city.

The defendant's Columbus city income tax liability depends on where he is deemed to have established his domicile or usual place of abode. Neither term is defined in the Columbus city codes, however, *Black's Law Dictionary* 1073, 795, 337 (Abridged 6th ed. 1991) defines both:

> **Usual place of abode.** Within meaning of statute or rule relating to service of process is place where defendant is actually living at time of service; is place where person would most likely have knowledge of service of process and is generally considered to be place where person is living at time of service. *See* Domicile; Residence; Service.
>
> **Place of Abode.** One's residence or domicile. *(q.v.)*.
>
> **Domicile.** A person's legal home. That place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. Generally, physical presence within a state and the intention to make it one's home are the requisites of establishing a "domicile" therein. The permanent residence of a person or the place to which he intends to return even though he may actually reside elsewhere. A person may have more than one residence but only one domicile. The legal domicile of a person is important since it, rather than the actual residence, often controls the jurisdiction taxing authorities and determines where a person may exercise the privilege of voting and other legal rights and privileges. The established, fixed, permanent, or ordinary dwellingplace or place of residence of a person, as distinguished from his temporary and transient, though actual, place of residence. It is his legal residence, as distinguished from his temporary place of abode; or his home, as distinguished from a place to which business or pleasure may temporarily call him.

Based upon the evidence presented, considering the credibility and demeanor of the witnesses, and having reviewed the post-trial submissions, this Court hereby makes the following findings of fact, conclusions of law, and judgment:

Findings of Fact.

1. The defendant's spouse lived on Hemlock Street in Columbus, Ohio during the relevant periods.
2. The defendant's marriage had remained intact, without separation, during the relevant periods.
3. The defendant's occupation was as a commercial over-the-road truck driver during the relevant periods.
4. The defendant provided his employers with the Hemlock Street Columbus, Ohio address as his address during the relevant periods.
5. The defendant provided the Ohio Bureau of Motor Vehicles with the Hemlock Street Columbus, Ohio address as his address for his commercial driver's license when it was renewed in June 1999.
6. The defendant provided the federal Internal Revenue Service with the Hemlock Street Columbus, Ohio address as his address for his federal tax returns during the relevant periods.
7. However by testimony, the defendant identified 1346 County Road 1 in Southpoint, Ohio as his residence during the relevant periods, even though no contemporaneous public or private record has been submitted to support this address as the defendant's place of domicile.

8. The defendant's mother lived at 1346 County Road 1 in Southpoint, Ohio before, during, and after the relevant periods.

9. The defendant served in the Ohio National Guard during the relevant periods.

10. The defendant's monthly National Guard drills were conducted within a 10-20 minute drive from his mother's address in Southpoint, Ohio during the relevant periods.

11. The Hemlock Street Columbus, Ohio address is approximately a two-hour drive from the defendant's monthly National Guard drill locations.

12. By testimony it was established that the defendant used his mother's home in Southpoint, Ohio from 1997-2000 only during the monthly National Guard drills, and only because of its proximity to the monthly National Guard drill locations.

13. The defendant used his wife's home during the monthly National Guard drills, rather than his mother's home, whenever the spouse's home was within a 10-30 minute drive time from the monthly National Guard drill locations.

14. During the three-month period in 1998 that the defendant acknowledged living in Columbus, he nevertheless kept his national guard uniforms at his mother's house in Southpoint.

15. The defendant's presence at this mother's home amounted to keeping his national guard uniforms there and to using his mother's home as a place to meet his wife during the nearby monthly national guard drills. The defense witnesses all testified that at all other times from 1997 through 2000 (except for three months in 1998), the defendant was on-the-road in his truck, however, the defendant presented no commercial driving records or logs to support this.

16. The defendant testified that he never saw his wife during the relevant periods except at his mother's home during the monthly National Guard drills near Southpoint.

17. The defendant testified that he could not identify whether the signature on his federal tax forms were his own because his signature changes frequently due to a tick in his right index finger which causes him to sign things with his left hand even though he otherwise writes right-handed.

18. The defendant's spouse testified that she signed her husband's signature (the defendant's) under her power of attorney. However, the handwriting of her personal signature was completely different from the handwriting of her alleged power of attorney signature. Her explanation for this discrepancy was that she too has writing that changes frequently due to her occupation as a nurse, which causes her handwriting to change up to four times within a single page.

19. The signature and handwriting associated with the wife's name, signing date, and occupation on the federal tax forms is a tidy flowing cursive **right-leaning** handwriting style.

20. The signature and writing associated with the defendant on the same forms are unsteadily written, and with a **left-leaning** handwriting partly in cursive and partly printed even though the spouse claims to have written the entries and signed both signatures herself, one immediately after the other.

Conclusions of Law.

In a civil action, the plaintiff bears the burden of proving the complaint by a preponderance of the evidence. Burden of proof is the necessity of affirmatively proving

the facts in dispute on an issue raised between the parties in a case. A preponderance of evidence is the greater weight of evidence that is more credible and convincing to the mind or more convincing than the evidence that is offered in opposition to it.

From the testimony and demeanor of the defendant and his witnesses – his wife and his mother, it is clear that Mr. Whaley's personal, business, and legal locus is centered on his wife, Janice Clarke. Mr. Whaley testified that if not for his wife, he would not be able to write a check to pay a bill. His wife runs the household. His residence has consistently been where his wife lives. The mother's role was to keep his National Guard uniforms and to provide a convenient nearby place for Mr. Whaley and his wife to meet during his monthly guard drills in southern Ohio. Whenever his wife lived within a reasonable driving distance of the southern Ohio drill grounds, they would use their own home during drill weekends. When his wife lived in Columbus, over two hours driving distance from the southern Ohio drill grounds, they used the mother's Southpoint, Ohio home during those drill weekends. The mother's Southpoint home is clearly a transient temporary place chosen for its drive-time advantage for Mr. Whaley. This is the only basis upon which the defendant wishes to claim Southpoint as his residence. The defendant presented no evidence, records, or indicia of residency in Southpoint despite his assertion that he lived there for four years.

Domicile is the critical definition for this case. Ohio case law with respect to domicile and municipal income tax lays out a variety of factors to consider and recognizes the circumstantial nature of determining domicile. The circumstances and factors to consider are found in *State ex rel. Kaplan v. Kuhn*, 11 Ohio Dec.321, 332-333 (Ohio Misc. 1901):

> We must look to the acts and declarations, family relations, business pursuit and vocation in life, mode of life, means, fortune, earning capacity, conduct, habits, disposition, age, prospects, residence, lapse of time, voting and payment of taxes, and ***read these in the light of their own declarations***. [emphasis added]

These factors point to his wife's location as his domicile. In the years in question his wife was in Columbus. His commercial driver's license – arguably the most important legal issuance for a career over-the-road truck driver, listed Columbus as his address, as did his own tax forms, and employer records.

The testimonies of the defendant Mr. Whaley, his wife, and his mother were all consistent in a few critical areas: The wife ran the household and Mr. Whaley's business from wherever she lived. The mother kept his uniforms in order and provided a meeting place for Mr. Whaley and his wife during the years when the wife lived too far from the southern Ohio national guard drill grounds where Mr. Whaley had to report to duty each day during the drill weekends.

An Ohio case most on point with respect to the testimony and evidence presented in the instant case is *City of Bedford v. Dalton*, 8th Dist. № 84081, 2004 Ohio 5022 (See also *City of Bedford v. Dalton* 8th Dist. № 85636, 2005 Ohio 4585, ¶¶8-13). In *Bedford* the defendant asserted that he did not live with his girlfriend, but merely used the address of his girlfriend's apartment on his driver's license, on his lottery winnings claim form, and on the W-2g tax form concerning the lottery winnings. The evidence in *Bedford* also established that the girlfriend's apartment was leased in her name only, however, there was no neutral third-party (i.e. landlord) corroborating evidence to support the defendant's assertion that he did not live with his girlfriend even though he used her address on his driver's license and lottery claim form. The court in *Bedford* found that

the driver's license and lottery claim form were sufficient to establish domicile by a preponderance of the evidence. In the case at bar, the defendant, his wife, and mother all assert that the defendant did not live with or stay with his wife when she lived in Columbus. Nevertheless, like *Bedford,* there is no neutral third-party evidence or testimony to support this assertion, and all the hard evidence (i.e. driver's license, W-2 tax forms, tax returns, and employment information) identifies a Columbus address for the defendant. Therefore, the evidence and testimony taken as whole establishes domicile in Columbus.

And finally, the defendant can still be domiciled in Columbus even if he is deemed to be a resident of his mother's house in Southpoint. A person could have many residences but only one domicile. *Cleveland v. Surella* (1989) 61 Ohio App.3d 302, 305; *Anderson v. Limbach* (October 23, 1990), Franklin App. № 90AP-104, 1990 Ohio App. LEXIS 4686 (necessity took husband to Tennessee, domicile remained in Columbus with wife and children). Domicile has both physical and mental dimensions. It is the place where a person has [his] true, fixed home and principal establishment and to which, whenever [he] is absent, he intends to return. Length of time spent in one place does not necessarily distinguish a residence from a domicile. In determining domicile it is necessary to look not only at the acts and declarations of the person but to the surrounding circumstances. *Cleveland v. Surella* (1989) 61 Ohio App.3d 302, 305-306. In the instant case, the acts and declarations (i.e. commercial driver's license, tax returns, and employment records) of the defendant point to Columbus. The surrounding circumstances reveal a mental component that follows the defendant's wife. The wife runs the household for the defendant. The only nexus between the mother and the son

were his National Guard uniforms and his practice of staying at his mother's house during the periods when the travel time between the wife and the National Guard drills was impractical. It was only the necessity caused by lengthy drive times that caused the defendant to use his mother's house in Southpoint during drill weekends. Therefore, in this relationship, the location of the wife's residence determines where the household is domiciled, not the convenience of the mother's house location.

The testimonial evidence of the three defense witnesses is discredited. The defendant and Janice Clarke acknowledge that they have been married to each other since 1995. They acknowledge that they have not been separated. And, they acknowledge that they have lived together as husband and wife since their marriage. Janice Clarke's residence and domicile was in Columbus, Ohio during the relevant periods.

Decision and Judgment.

Considering the evidence and testimony, the acts, declarations, and surrounding circumstances establish by a preponderance of the evidence that the defendant was domiciled in Columbus, Ohio during tax years 1997 through 2000 and was therefore subject to City of Columbus income tax, plus interest and penalties.

This action came on for trial before the Court, and the issues having been duly tried and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff City of Columbus, Ohio recover of the defendant Allen L. Whaley the sum of $4,078.38, with interest thereon as provided by law at the rate of eight percent per annum from the date of judgment, and its costs of action.

This is a final appealable order. The court hereby directs the Municipal Court Clerk to serve upon all parties notice of this judgment and its date of entry upon the journal.

Dated at Columbus, Ohio, this 11TH day of December 2007.

Judge Scott D. VanDerKarr
Franklin County Municipal Court

Copies to:

Paul T. Khoury	Marcell Rose Anthony	Allen L. Whaley
90 W. Broad St, Rm. 200	233 S. High Street, Ste. 300	HC 63 Box 342
Columbus Ohio 43215-9013	Columbus Ohio 43215-4526	Greenup KY 41144-9414
Attorney for Plaintiff	Attorney for Defendant	Defendant

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

2008 JUN 30 PM 2:42
CLERK OF COURTS

City of Columbus, Division of Income Tax,	:	
Plaintiff-Appellee,	:	
v.	:	No. 08AP-25 (M.C. No. 2006 CVF 35405)
Allen L. Whaley,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2008

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, Chief Prosecutor, and *Paul Thomas Khoury*, for appellee.

Law Offices of Marcell Rose Anthony, LLC, and *Marcell Rose Anthony*, for appellant.

APPEAL from the Franklin County Municipal Court.

TYACK, J.

{¶1} Defendant-appellant, Allen Whaley, is appealing the finding of the Franklin County Municipal Court that he was domiciled in Columbus, Ohio for tax years 1997 through 2000 and hence was obligated to pay city income tax for those years. He asserts six assignments of error:

> I. THE TRIAL COURT ERRED WHEN IT FOUND THAT APPELLANT WAS DOMICILED IN COLUMBUS FOR HIS

CAL-ARK TRUCKER INCOME WHEN APPELLANT WAS NEVER PHYSICALLY PRESENT IN COLUMBUS, BUT RATHER WAS PHYSICALLY PRESENT AND DOMICILED IN SOUTH POINT, OHIO FOR THE TAX YEARS HE WORKED FOR CAL-ARK AS A TRUCKER.

II. THE TRIAL COURT ERRED WHEN IT FOUND APPELLANT WAS DOMICILED IN COLUMBUS FOR HIS CAL-ARK TRUCKER INCOME SINCE COLUMBUS WAS THE RESIDENCE OF HIS WIFE WHO HELD APPELLANT'S POWER OF ATTORNEY FOR THE TAX YEARS.

III. THE TRIAL COURT ERRED BY FAILING TO DISTINGUISH BETWEEN MAILING ADDRESS AND RESIDENCE ADDRESS.

IV. THE TRIAL JUDGE WAS PREJUDICED AGAINST THE APPELLANT DURING AND AFTER TRIAL.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE JUDGMENT ENTRY WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND WERE ERRONEOUS, DENIED DUE PROCESS AND EQUAL PROTECTION GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND THE TRIAL COURT SHOULD HAVE ENTERED THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND THE JUDGMENT ENTRY PROPOSED BY APPELLANT.

VI. THE TRIAL COURT ERRED BY NOT GRANTING A NEW TRIAL, OR CHANGING OR ENTERING THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT ENTRY PROPOSED BY APPELLANT, OR OTHERWISE HEARING ADDITIONAL TESTIMONY, THEREBY VIOLATING DUE PROCESS AND EQUAL PROTECTION GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

{¶2} The first three assigned errors all address the same issue and hence will be addressed together. Allen Whaley was married to Janice Clarke during the years in question. Ms. Clarke admittedly lived on Hemlock Street in the city of Columbus. No

divorce or dissolution proceedings were pending, but Whaley denied living with his wife. Instead, he asserted that he lived in South Point, Ohio with his mother. Because he worked as an over-the-road trucker, he was not in Ohio much of the time. He was a member of the Ohio National Guard and attended drills each month. He slept at the home closest to the site of his drills, usually at his mother's house but at his wife's home in Columbus for three months in 1998.

{¶3} Whaley listed his wife's Hemlock Street address as his residence with all his employers, Cal-Ark International, Waste Management of Ohio and the Ohio National Guard. His commercial driver's license listed the Hemlock Street address as his place of residence. His federal tax returns listed Hemlock Street as his place of residence, which corresponded with his W-2 forms. Two of the years in question, he filed individual returns which listed Hemlock in the box labeled "Home address." Based upon these facts, the trial court found that Whaley was domiciled in Columbus, Ohio, despite the testimony of Whaley, his wife and his mother that he lived with his mother on those occasions when he was in Ohio, except for a three-month period when he acknowledged living with his wife in Columbus.

{¶4} Decisions in civil cases which are supported by competent, credible evidence will not be overturned on appellate review to determine the weight of the evidence. See *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279. All reasonable presumptions must be made in favor of the civil judgment and its findings of fact. See *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77.

{¶5} The trial court was in the best position to assess the credibility of the witnesses and was clearly critical of some of the testimony presented, especially with respect to the signature on Whaley's federal income tax forms.

{¶6} The evidence with respect to Whaley's commercial driver's license, his tax returns, and his listing his residence as being with his wife with Whaley's employers, constituted competent, credible evidence of Whaley's domicile. We cannot overturn that factual finding on appeal.

{¶7} The first, second, and third assignments of error are overruled.

{¶8} The fifth assignment of error presents the same issues in different words. For the reasons set forth above, that assignment of error is also overruled.

{¶9} The fourth assignment of error asserts that the trial court judge who heard the case was prejudiced against Whaley and that this prejudice impacted the trial court's judgment. In her brief, on behalf of Whaley, counsel sets forth three events which occurred during the trial which counsel asserts is a demonstration of prejudice.

{¶10} In the first event, the city of Columbus had presented the testimony of Harland Geiger who was the supervisor of the delinquent accounts section of the City of Columbus Income Tax Division. Geiger had provided copies of what purported to be Whaley's federal income tax returns and attached W-2 forms. When counsel for the city of Columbus offered these documents into evidence, counsel for Whaley objected, alleging the documents were not relevant. When this was overruled, counsel for Whaley objected on hearsay grounds. The trial judge, sitting as the trier of fact, allowed additional testimony about the hearsay question regarding the documents being business records kept by the city of Columbus. The judge expressed a preference for deciding the case on

the facts, when no serious debate existed that these were Whaley's W-2 forms and his tax returns. We cannot say the judge's ruling indicated bias or prejudice, especially since the requirements for admissibility of the documents had been met by earlier testimony.

{¶11} The second event involves the late filing of proposed findings of fact and conclusions of law by the city of Columbus. Proposed findings of fact and conclusions of law are a convenience for the trial court judge. In a court as busy as the Franklin County Municipal Court, the convenience assists the trial judge in handling the incredible volume of cases in the court. The drafts are not binding on the trial court and allowing additional time to provide the drafts is not an indication of bias or prejudice.

{¶12} The third event involved the trial judge expressing concerns that Whaley might be creating legal problems for himself, by planning on testifying that he did not live at the Hemlock Street address after apparently signing a series of federal income tax returns "under penalties of perjury" which stated that he resided at Hemlock Street. The trial court's concerns were legitimate concerns on Whaley's behalf. The concerns were not an indication of prejudice.

{¶13} We find no basis in the record for a finding of bias or prejudice. The fourth assignment of error is overruled.

{¶14} In the sixth assignment of error, counsel first alleges error in the failure of the trial court to recognize the Clarke-Whaley marriage as a modern marriage in which the spouses have separate domiciles. The trial court seemed to understand this argument, but was not persuaded by it—most importantly because Whaley listed his residential address as Hemlock Street with the Ohio Bureau of Motor Vehicles for his commercial driver's license, a fact Whaley acknowledged repeatedly when he testified.

The commercial driver's license was an extremely important document for an over-the-road trucker and needed to accurately reflect Whaley's residence.

{¶15} Under this assignment of error, counsel for Whaley also alleges that the trial judge should have provided her time to object to the proposed findings of fact and conclusions of law filed on behalf of the city of Columbus. The trial judge knew that counsel for Whaley disagreed with the position of the city of Columbus on several factual and legal issues. Each side had presented a closing argument at the conclusion of the court trial. Objection to the proposed findings of fact and conclusions of law could not have changed the outcome of the trial since they could only have paralleled the arguments presented in open court.

{¶16} The sixth assignment of error is overruled.

{¶17} All six assignments of error having been overruled, the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

PETREE and SADLER, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus, Division of Income Tax, Plaintiff-Appellee, v. Allen L. Whaley, Defendant-Appellant.	: : : : : : : : :	No. 08AP-25 (M.C. No. 2006 CVF 35405) (REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on June 30, 2008, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed.

TYACK, PETREE & SADLER, JJ.

By: _____
Judge G. Gary Tyack