

IN THE SUPREME COURT OF OHIO

State of Ohio : Case No. 2021-0742

Appellee :

Vs : On appeal from the Hamilton County  
Court of Appeals, First Appellate District

(Nominal Defendant Jaquan Jackson) :  
Court of Appeals case No. C-200153

And :  
Allegheny Casualty Company

Appellant :

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BRIEF OF AMICUS CURIAE OHIO BAIL AGENTS ASSOCIATION IN SUPPORT OF  
APPELLANT ALLEGHENY CASUALTY COMPANY

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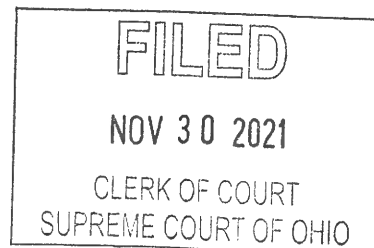
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**BRIEF OF AMICUS OHIO BAIL AGENTS ASSOCIATION  
(IN SUPPORT OF APPELLANT ALLEGHENY CASUALTY COMPANY)**

**INTRODUCTION**

As amicus, the Ohio Bail Agents Association (OBAA) comes to offer some thoughts. The OBAA has statewide members and is a group comprised of surety licensed to post recognizance pursuant to Ohio Revised Code (R.C.) 3905.83 et seq. (hereinafter licensed surety). The OBAA is confident that Appellant Allegheny Casualty Company (Allegheny) will address the facts of this case and the reasons to reverse the Opinion of the First District Court of Appeals (First District). The OBAA will attempt to provide some generalized philosophical or policy reasons why the First Appellate District Opinion should be reversed.

**STATEMENT OF AMICUS'S INTEREST**

The members of OBAA, as with most of the approximately 550 licensed surety in Ohio, routinely get correspondence mailed from courts wherein the court is giving notice of the intent to forfeit bond because the bail (the person for whom the surety has posted bond) has failed to appear. Often, the forfeiture process is commenced long after the bail has failed to appear and this delay gives the absconder a tremendous head start that makes it more difficult for licensed surety to find, arrest the bail and bring it back to the bar of justice. Compounding the problem of giving the bail a 'head start' is the fact that court(s) often do not strictly comply with the statutory notice procedures as to 'forfeiture of bail'. R.C. 2937.35, et seq. It is important to the OBAA membership and all licensed surety that licensed surety can expect strict and timely compliance with the mandates of

the forfeiture statutes and that the impossibility of performance doctrine remain viable as the surety often find the absconder in a different county or state some distance from where the bond was posted and, upon arrest, the absconder is often detained subject to the process of another court, tribunal or government authority such as Immigration and Custom Enforcement [ICE] or the Federal Bureau of Investigation [FBI]. The OBAA membership has a great and direct interest in the outcome of this case.

#### **WHAT IS THE STANDARD OF REVIEW?**

The First Appellate District, in its Opinion at ¶ 6, states that the issues presented to it, a motion to set aside a bond forfeiture judgment and the defense of impossibility of performance, were reviewed under an abuse of discretion standard. As to the motion to set aside the bond forfeiture, the interpretation of a statute, R.C. 2937.36(C), was at issue. The standard of review as to the interpretation of statutes is de novo. *State v. Consilio*, 114 Ohio St.3d 296, 2007-Ohio-4163 (at ¶ 8); *State v. J.M.*, 148 Ohio St.3d 113, 2016-Ohio-2803 (¶ 7) “where the language is clear and definite we apply it as written” and at ¶ 12 “we apply the statute as written”).

Construction of contracts and instruments of conveyance is a matter of law and subject to de novo review. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313 (1996). The impossibility of performance doctrine is well ingrained in our system of law as a defense to contract enforcement. In this case, there is no dispute that Jackson was in Kentucky and being held on Kentucky judicial process. Under the circumstances of this case, whether the impossibility of performance defense applies is subject to de novo

review. The First District wrongfully used an abuse of discretion standard of review. *State v. Today's Bookstore, Inc.*, 86 Ohio App.3d 810, 823 (2<sup>nd</sup> App., 1993).

Very directly, the OBAA suggests that the First Appellate may not have used the correct standard of review in rendering its Opinion.

## **LAW AND ARGUMENT**

How does surety bail work? Licensed surety operate under the auspices of the Ohio Department of Insurance. R.C. 3905.83 et seq. It is important to note that, pursuant to R.C. 3905.85(I), licensed surety are officers of the court. In order to obtain a surety bail bond license, an individual must pass a written test, must have a background check and must show the financial ability and acumen necessary to comply with the funding and accounting of the enterprise including, but not limited to, maintaining a build-up fund (BUF). Licensed surety generally have an agent and principal relationship with an underwriting insurance company. Because the laws are ever changing, in order to retain the license, licensed surety must undertake continuing education. Most licensed surety in Ohio obtain a premium of ten percent (10%) from the bail and then post a bond in the full amount as set by the court. Most importantly, when the bail 'skips' or absconds, licensed surety go on the hunt.

The Propositions before the Court are:

**FIRST PROPOSITION OF LAW:** The violations of the mandate of R.C. 2937.36, et seq., denied due process to surety.

**SECOND PROPOSITION OF LAW:** Impossibility of performance should not be limited to in-state police action; to hold otherwise is discriminatory to businesses writing bonds in the State of Ohio.

## **SALIENT FACTS**

The salient facts appear to be that on March 22, 2019, Jackson entered a plea to one or more felony charges. Jackson was given a sentencing date that was approximately one month away, April 17, 2019. On March 23, 2019, Jackson went into Campbell County, Kentucky where he was arrested and held under Kentucky judicial process. As a result of being detained on Kentucky judicial process, Jackson failed to appear for sentencing. The trial court did not commence the bond forfeiture process until May 21, 2019. However, written notice as required by the forfeiture statutes was not sent until July 3, 2021 and a show cause date of September 4, 2019 was established. Along the way, the agent for Allegheny, one Seifu, became (legally) disabled by his federal detention and notices sent to him were returned to the clerk. It appears that Seifu was never properly given notice of the forfeiture proceedings and, in turn, Allegheny was a ‘Johnny come lately’ to the process. Allegheny will likely note the deficiencies in service of notices and other errors in the clerk’s record. In the trial court, Allegheny was unsuccessful in its attempts to get the forfeiture set aside.

As will be set forth shortly, the OBAA offers some thoughts as to re-structuring the accepted propositions.

The starting point for bail suretyship must be that, with this type of recognizance, contract principles apply. Another basic proposition of bail surety is that the purpose of the contract is not to enrich the state but to bring the bail to the bar of justice. *Bland v. Holden*, 21 Ohio St.2d 238 (1970; action in habeas); *State ex rel., Baker v. Troutman*, 50 Ohio St.3d 270, 272 (1990, action in habeas); *State v. Hughes*, 27 Ohio St.3d 19, 20 (1986);

*State of Ohio v. Smith and White*, Wayne Co. App. No. 1893 (1984); *State v. Hardin*, Lucas App. Nos. 1131, 32, & 33, 2003-Ohio-7263 (at ¶ 10: “The purpose of bail is not punitive but to secure the presence of the defendant.”). Another clear policy of law in Ohio is that forfeitures are not favored in law or equity. *State v. Lilliock*, 70 Ohio St.3d 23, 25-26 (1982)

The Court is well familiar that the current policy in Ohio prefers release of any accused on personal recognizance but some offenders simply aren’t worthy of that level of trust as to re-appearing or pose such a serious threat to victims, the family of victims or society at large that release must be secured. One of the realities of surety bail is the bond company is bonding that higher-level or higher risk detainee. The higher risk bail “knows the ropes” when absconding. The practical reality is that, on the main, professional bondspeople tend to find and return their bail to the bar of justice, the stated goal of bond.

Of Ohio’s 88 counties, three border on Michigan (Williams County borders on Michigan and Indiana, counted twice), nine border on Indiana (Hamilton County borders on Indiana and Kentucky, counted twice), six border on Kentucky (Lawrence borders on Kentucky and West Virginia), nine border on West Virginia (Columbiana borders on West Virginia’s panhandle and Pennsylvania), and three border only Pennsylvania.<sup>1</sup> Indiana, Michigan, Pennsylvania and West Virginia each have some form of licensed bail bondspeople. A licensed surety has a much easier time of capturing the absconder in the states that recognize surety bail. Allegheny’s problem devolves about someone held in

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<sup>1</sup> Seven Counties have Lake Erie as a border: Lucas, Ottawa, Erie, Lorain, Cuyahoga, Lake and Jefferson.



detention under the court process of the Commonwealth of Kentucky, a state that does not recognize licensed bondspeople. The membership of the OBAA know and understand that the Kentucky Revised Statutes provide a statutory procedure for obtaining the right to remove bail from Kentucky without running afoul of an indictment by the Commonwealth Attorney for abducting or kidnapping the bail. And, along the way, many Commonwealth Attorneys and Circuit Courts are more than willing to allow licensed surety get the bail out of Kentucky without legal implications. That having been said, the impossibility of performance doctrine is a basic defense to any contract and, as Allegheny will surely detail, the doctrine applies when an accused is held or detained on another court or government agency's process.

**A. The statutory time limits**

Whether one uses the phrase "violated due process" (Allegheny's proposition) or "failed to adhere to statutory mandates" is, to a certain extent, semantics. The cases or common law that will likely be cited by Allegheny often use a phrase along the line of "to hold otherwise would violate due process". The issue is worth a quick look:

In addressing the issue of the mandates of an earlier version of R.C. 2937.36(C), in *State v. Ramey*, Lucas App. No. L-08-1040, 2008-Ohio-3275, the appellate court stated as follows:

{¶ 12} A trial court abuses its discretion when it does not follow the period required by the statute by giving at least 20 days notice or a show cause hearing to the surety and agent before they must appear in court. *State v. Green*, 9<sup>th</sup> Dist. Nos. 02CA0014/02CA0019, 2002-Ohio-5769, ¶ 16-17.

{¶ 13} The 5<sup>th</sup> District Court of Appeals addressed a similar situation in *State v. Bryson*, 5<sup>th</sup> Dist. No. 2007-CA-00108, 2007-CA-00132,

2008-Ohio-193. In *Bryson*, the defendant failed to appear at a pretrial hearing on October 2. Id. at ¶ 5. A bond forfeiture hearing was scheduled for October 30. On October 23, however, the trial court advanced the hearing on its own motion to October 25 and entered judgment forfeiting bond when the defendant did not appear. Id. There was nothing in the record showing service of the new date upon the defendant. Id.

{¶ 14} The 5<sup>th</sup> District held that a court abuses its discretion when there is nothing in the trial court's record showing that the trial court notified appellant (a corporate surety) of a new forfeiture date as required by R.C. 2937.36(C). Id at ¶ 25.

The OBAA expects that Allegheny will cite many cases reaching a similar result and will leave it to Allegheny to do so. The point is that appellate courts have long held that trial courts must strictly comply with the time period and notice mandates established by R.C. 2937.36(C). As to bond forfeiture, the legislature has not provided for a standard that shifts the burden to any surety (licensed or otherwise) to show prejudice as a result of a court's failure to comply with the statutory mandates. Whether a court phrases the statutory noncompliance as one of 'due process', 'error as a matter of law' or 'abuse of discretion' is a matter of art and depends on the standard of review that is applied.

#### **B. The Impossibility of Performance Doctrine**

The OBAA will leave it to Allegheny to discuss the burgeoning view in other states that the impossibility of performance doctrine is properly asserted when an absconder is detained in a state other than the state from where he or she has 'skipped bail' and is being held on the process of the arresting/detaining state, entity or authority. For instance, members of the OBAA routinely arrest absconders in the states of Florida, Texas and Arizona and get detainers issued by Ohio courts and often arrest an absconder that

is subject to a nationwide pick up radius on the arrest warrant. Most Ohio courts recognize that the goal is to bring the absconder before the court, not collect the penal amount of the bond. The authority upon which the absconder is being held should make no difference as to whether the impossibility of performance doctrine applies. If there is one Ohio case that is instructive on the issue, it is *State v. Scherer*, 108 Ohio App.3d 586 (1995; *Scherer*).

The facts of *Scherer* involve an absconder to Kentucky. As is indicated above, Kentucky causes unique problems for licensed surety. *Scherer* is a bit odd in that the trial court conditioned Scherer's release on residing in Kentucky. Excerpts from *Scherer* are worthy of quoting here:

at page 594:

"Stated otherwise, as the surety has not undertaken the role of the defendant's guardian angel, the defendant's bad acts are not within the business risks the surety assumes when it writes a bail bond."

"Because Scherer's inability to appear does not proximately result from any fault of the sureties, who had no obligation to prevent his travel to Kentucky, and who diligently sought his return from there, the Appellants have demonstrated good cause [595] for being excused from performing on their bond."

"Considerable disagreement exists among the various states concerning the effect on a surety's bail bond of a defendant's incarceration in another jurisdiction. **We believe that the better view on the facts presented in this case is that Anthony Scherer's imprisonment in Kentucky and the refusal of Kentucky authorities to return Anthony Scherer to Ohio at this time constitutes "good cause" for the surety's failure to perform its promise to produce Anthony Scherer to the Greene County Common Pleas Court. (cit.om.)**"

"The surety's liability on Anthony Scherer's bond should be suspended until such time as Scherer is released from his present imprisonment... an Ohio detainer has been lodged against him..."

There can be no doubt that the stated goal of all bond is to have the accused return to court and answer to the charge(s). As a matter of policy, the better reasoned rule is: regardless of what authority's action resulted in the accused being detained and without regard to whether the detention is within or outside of Ohio, licensed surety should be exonerated when licensed surety is unable to perform its obligation because the accused is held on another jurisdiction or authority's (legal) process.

### **CONCLUSION**

This Court should decide that strict compliance with the mandates of R.C. 2937.36(C) and the forfeiture statutes is the rule of law.

This Court should decide that when an accused who is released pursuant to licensed surety bond absconds and forfeiture proceedings are commenced, when that accused is subsequently detained on government or some other authority's process and thereby made unavailable to the licensed surety, the impossibility of performance doctrine applies and the licensed surety and its principal must be exonerated.



s/ Gary A. Rosenhoffer

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CERTIFICATE OF SERVICE

I certify that on November 29, 2021 a copy of this brief was served by ordinary mail postage prepaid as follows: on James Sayre, Assistant to the Hamilton County Prosecutor at 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202; Sandra M. Kelly, 6100 Oak Tree Blvd., Suite 200, Cleveland, Ohio 44131 and Colleen Mountcastle, 1350, Euclid Ave, Suite 1060, Cleveland, Ohio 44115.

  
s/ Gary A. Rosenhoffer  
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