ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio *ex rel.*
Woodrow L. Fox
Woodrow L. Fox, Sr., LLC
289 South Third Street
Columbus, Ohio 43215,

and,

Woody Fox Bail Bonds, LLC
289 South Third Street
Columbus, Ohio 43215,

Relators,

v.

Gary Walters
Clerk of Court for the Court of Common Pleas, Licking County, Ohio
1 Courthouse Square
Newark, Ohio 43055,

and,

Clerk of Court for the Court of Common Pleas, Licking County, Ohio
1 Courthouse Square
Newark, Ohio 43055,

and,

Judge David Branstool
Court of Common Pleas,
Licking County, Ohio
1 Courthouse Square
Newark, Ohio 43055,

and,

Judge Thomas Marcelain
Court of Common Pleas,
Licking County, Ohio
1 Courthouse Square

Case No. 13-0364

Original Action in Mandamus

FILED
MAR 04 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Newark, Ohio 43055,

and,

Court of Common Pleas,
Licking County, Ohio
1 Courthouse Square
Newark, Ohio 43055,

Respondents.

COMPLAINT FOR MANDAMUS

Kendra L. Carpenter (0074219)
Sprankle Carpenter, LLC
P.O. Box 14293 | Columbus, Ohio 43214
Voice and Fax: 614.310.4135
KCarpenter@SprankleCarpenter.com

Counsel for Relators,
Woodrow L. Fox and
Woodrow L. Fox, Sr., LLC

PARTIES

1. Relator Woodrow L. Fox is licensed by the Ohio Department of Insurance to issue surety bail bonds, and is the owner of Relator Woodrow L. Fox, Sr., LLC, which maintains its principle place of business in Franklin County, Ohio, (collectively, Relators Fox).

2. Respondent Gary Walters is an elected official who serves as the Clerk of Court for the Court of Common Pleas, Licking County, Ohio and regularly processes and accepts payments of bail ordered by Respondents Branstool, Marcelain and the Court of Common Pleas, Licking County, Ohio. Mr. Walters is a party to this action pursuant to his official capacity.

3. Respondent Clerk of Court for the Court of Common Pleas, Licking County, Ohio is exercises the powers conferred by and performs the duties enjoined upon it by statute and by the common law; and in the performance of its duties it follows the direction of Respondents Branstool, Marcelain and the Court of Common Pleas, Licking County, Ohio. *See* O.R.C. § 2303.26.

4. Respondent Judge David Branstool is an elected official who serves as judge of the Licking County, Ohio Court of Common Pleas and regularly sets bail pursuant to Rule 46 of the Ohio Rules of Criminal Procedure. Judge Branstool is a party to this action pursuant to his official capacity.

5. Respondent Judge Thomas Marcelain is an elected official who serves as judge of the Licking County, Ohio Court of Common Pleas and regularly sets bail pursuant to Rule 46 of the Ohio Rules of Criminal Procedure. Judge Marcelain is a party to this action pursuant to his official capacity.

6. Respondent the Court of Common Pleas, Licking County, Ohio is a trial court of general jurisdiction created by Article IV, Section 1 of the Ohio Constitution and regularly sets bail pursuant to Rule 46 of the Ohio Rules of Criminal Procedure.

JURISDICTION

7. This is an original action for a writ of mandamus, as well as ancillary relief, to compel Respondent to comply with Article I, §9 of the Ohio Constitution.

8. The Court has jurisdiction of this action under Article IV, §§ 2(B)(1)(b), (d) of the Ohio Constitution, and O.R.C. § 2731.01, *et seq.*

9. Relators have standing to bring this action pursuant to *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967), and *State ex rel. Jones, et al. v. Hendon*, 66 Ohio St.3d 115 (1993).

STATEMENT OF THE FACTS

10. This case arises out of Respondents' refusal to accept a surety bond from Relators in violation of Article I, Section 9 of the Ohio Constitution, which in pertinent part states:

> All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community.

11. In Ohio, when a court has issued a bail order, the refusal to accept a surety bond constitutes unlawful excessive bail and an unlawful detainment in violation

of Article I, Section 9 of the Ohio Constitution. *See Smith v. Leis*, 106 Ohio St. 3d 309 (2005).

12. Where a judge imposes a monetary bond as a condition of release under Rule 46 of the Ohio Rules of Criminal Procedure, and the accused exercises his or her constitutional right to enlist a surety to post bail on his or her behalf, the clerk of courts must accept a surety bond to secure the defendant's release, provided the sureties thereon are otherwise sufficient and solvent. *See Id.*

13. Rule 46 of the Ohio Rules of Criminal Procedure imparts discretionary authority to a court as to the type of bail it can set. However, if a monetary bond is set, every defendant maintains an inalienable right under the Ohio Constitution to post a surety bond.

14. Consistent with the Ohio Constitution, under Rule 46 of the Ohio Rules of Criminal Procedure, the Licking County, Ohio Court of Common Pleas regularly sets monetary bail as a condition of release from jail pursuant to Rule 46(A)(2) of the Ohio Rules of Criminal Procedure, which requires a defendant to pay in cash (as opposed to collateral) ten percent of the set bail amount. This is commonly referred to as a "10% Bond."

15. Despite the surety bond provision in the Ohio Constitution, Respondents have continuously refused to accept a surety bond from Realtors on behalf of certain defendants who have been issued a 10% Bond under Rule 46(A)(2).

16. To wit, Relators Fox reference the following Licking County, Ohio cases: 2012 CR 00358, 2012 CR 00396, 2012 CR 00106, 2012 CR 00404, 2011 CR 00073, 2012 CR 00439. In these cases, the Court of Common Pleas set a 10% bond, and

Respondent Walters refused to accept a surety bond from Relators. (Exhibit A.) Instead, Respondent Walters required the 10% Bond be paid in cash only. (*Id.*)

17. On or about August 28, 2012, Relators Fox, through counsel, advised the Licking County Prosecutor, Kenneth W. Oswalt, that when a 10% Bond is set, Respondents refused to accept a surety bond. (Exhibit B.) In response, the Prosecutor erroneously relied upon *State ex rel. Williams v. Fankhauser,* 11th Dist. No. 2006-P-0006, 2006 Ohio 1170 and *Smith v. Leis*, 165 Ohio App.3d 581, 2006-Ohio-450 (1st Dist.) and opined that Respondent was not obligated to accept a surety bond. (*Id.*) Specifically, the Prosecutor advised Relators Fox that, "the Judge who sets [a 10% Bond] will expect the Clerk of Courts to accept only the type(s) of bond(s) specifically approved by the assigned Judge." The Prosecutor purportedly failed to give any consideration to Article I, Section 9 of the Ohio Constitution.

18. Since 2010, it has been Relators standard practice to refuse a surety bond when a 10% Bond is set. (Exhibit C.)

19. It is the duty of Respondents Clerk of Courts and Walters to receive and to issue receipt for the bail posted by the accused in a criminal case. *See* O.R.C. § 2937.22.

20. Respondents Court of Common Pleas, Branstool, and/or Marcelain are improperly directing Respondents Clerk of Courts and Walters to refuse the issuance of a surety bond when a 10% Bond has been set, and, as a result, the rights afforded to Ohio citizens under Article I, Section 9 of the Ohio Constitution are being violated.

COUNT I - MANDAMUS

21. Relators have no legal authority to prohibit the posting of a surety bond in cases where a monetary bond is set.

22. Respondents' actions have resulted in a mandatory "cash only" bond that is prohibited by Article 1, Section 9 of the Ohio Constitution.

23. Respondents' actions constitute an unlawful attempt under Article 16 of the Ohio Constitution to amend Article 1, Section 9 of the Ohio Constitution.

24. Respondents' actions discriminate against those defendants whose circumstances do not permit them to secure their release from jail by any other means than by posting a surety bond.

25. Relators have a sufficient beneficial interest in having the Court issue a writ of mandamus ordering the Respondents to accept a surety bond when any court orders any monetary bail, as Respondents' actions have effectively deprived Relators of their livelihood and, if continued, will result in further irreparable harm to Relators.

26. Relators have no other adequate remedy in the ordinary course of law.

27. As a result of Respondents' unlawful actions, Relators have sustained monetary damages and are entitled to recovery pursuant to O.R.C. § 2731.11.

WHEREFORE, Relators respectfully demand that the Court issue a peremptory writ of mandamus directing Respondents to comply with Article I, Section 9 of the Ohio Constitution by accepting a surety bond when the Licking County, Ohio Court of Common Pleas issues a monetary bond. In the alternative, Relators request that the Court issue an alternative writ requiring Respondents to show cause why the requested

peremptory writ should not be issued, or that pursuant to S.Ct.Prac.R. 12.10, refer this matter to a master commissioner for an oral argument. Further, Relators request that the Court order Respondents to pay the costs of this action pursuant to O.R.C. § 2731.12, Relators' damages pursuant to O.R.C. § 2731.11, and all other such relief to which Relators may be entitled, including attorney fees.

Respectfully submitted,

Sprankle Carpenter, LLC

Kendra L. Carpenter (0074219)
P.O. Box 14293 | Columbus, Ohio 43214
Voice + Fax: 614.310.4135
KCarpenter@SprankleCarpenter.com
Attorney for Relators
Woodrow L. Fox and
Woodrow L. Fox, Sr., LLC

AFFIDAVIT OF NEVIN P. KEIM

STATE OF OHIO :
: ss
COUNTY OF FRANKLIN :

Nevin P. Keim, being first duly cautioned and sworn, states as follows:

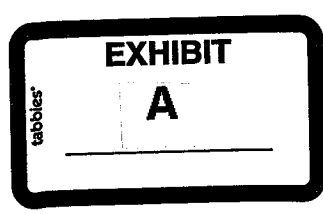
1. I make this Affidavit pursuant to my personal knowledge.

2. I am licensed by the Ohio Department of Insurance to issue surety bail bonds, and I work with Woodrow L. Fox, Sr., LLC.

3. On July 17, 2012, the Licking County Court of Common Pleas in case number 2012 CR 00358, styled State of Ohio v. Ralph Laywer, issued a "$10,000 appearance" bond.

4. On or about July 17, 2012, Kathy Spires contacted me to post a surety bond to secure the release of Mr. Lawyer from the Licking County, Ohio jail. Immediately thereafter, I contacted the Licking County Clerk of Courts to post a surety bond on behalf of Mr. Lawyer. The deputy clerk to whom I spoke told me that the Clerk would not accept a surety bond.

5. In addition to the Lawyer case, the Licking County Clerk of Courts has denied me the opportunity to post a surety bond in numerous cases before the Licking County Court of Common Pleas where a 10% appearance bond has been set, including, but not limited to: State of Ohio v. Abigain S. Hunt, case number 2012 CR 00396; State of Ohio v. Sara L. Caw, case number 2012 CR 00106; State of Ohio v. Jenny L. Markle, case number 2012 CR 00404; State of Ohio v. Melissa C. Canterburry, case number 2011 CR 00093; and State of Ohio v. Brittani B. Hill, case number 2012 CR 00439.



6. My impression is that the standard practice of the Licking County Clerk of Courts to require a payment of cash only when the Licking County Court of Common Pleas issues a 10% appearance bond.

FURTHER AFFIANT SAYETH NAUGHT.

Nevin P. Keim

Sworn to before me and subscribed in my presence this 2nd day of March, 2013.

Notary Public, State of Ohio

NOTARIAL SEAL STATE OF OHIO

KAREN HELD PHIPPS
Attorney at Law
Notary Public, State of Ohio
My Commission Has No Expiration
Section 147.03 R.C.

FROM THE OFFICE OF
KENNETH W. OSWALT
PROSECUTING ATTORNEY
OF
LICKING COUNTY

20 SOUTH SECOND STREET
NEWARK, OHIO 43055

FELONY AND CIVIL DIVISIONS
(740) 670-5255

JUVENILE COURT DIVISION
(740) 670-5204

TAX FORECLOSURES
(740) 670-5021

FAX
(740) 670-5241

EXHIBIT
B

September 6, 2012

Mr. Gary A. Rosenhoffer
Attorney at Law
313 E. Main Street
Batavia, Ohio 45103

VIA FACSIMILE ONLY: (513) 732-0648

Re: 10% Bonds

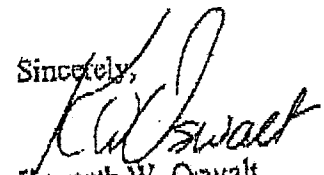
Dear Mr. Rosenhoffer:

I am receipt of your letter dated August 28, 2012, regarding your concerns with respect to the Licking County Common Pleas Court setting "10 % bonds" and thereafter, the Clerk of Court's Office declining to accept a surety bond in their place. In response to your letter, I contacted the Judges of the Court. Please be advised that the Court is not inclined to change its current practice. Thus, when a Judge sets a 10% bond (and does not also specifically authorize another form of bond as an alternative) the Judge who sets that bond will expect the Clerk of Courts to accept only the type(s) of bond(s) specifically approved by the assigned Judge.

I would note that the practice the Court currently follows in setting 10% bonds and thereafter not permitting this to be covered by a surety bond has been specifically approved by at least one Court of Appeals. See, *State ex rel. v. Fankhauser*, 2006-Ohio-1170 (11th Dist.). Essentially, the *Fankhauser* court concluded that since a 10% bond is authorized by a different section of Crim.R. 46, a court is authorized to insist upon a 10% bond and that such insistence does not effectively amount to a "cash only" bond of the type that the Ohio Supreme Court has found objectionable in *State ex rel. Baker v. Troutman*, 50 Ohio St.3d 270 (1990). Although perhaps not stated as clearly as it was in *Fankhauser*, it would appear that another court agrees with such a reading of Crim.R. 46. See, *Smith v. Leis*, 165 Ohio App.3d 581, 2006-Ohio-450 (1st Dist.), ¶¶ 20-23, (on reconsideration of prior opinion in 2005-Ohio-6090.) Conversely, I can find no cases that address this specific issue that favor your client's position.

As a result, please be advised that the Court is not of a mind to change its current practice. Feel free to contact me should you have any questions.

Sincerely,



Kenneth W. Oswalt
Licking County Prosecuting Attorney

KWO/ma

cc: The Honorable Thomas M. Marcelain
The Honorable W. David Branstool
Gary A. Walters, Clerk of Courts
Olivia Thorp, Chief Deputy, Clerk of Courts

AFFIDAVIT OF WOODROW L. FOX

STATE OF OHIO :
: ss
COUNTY OF FRANKLIN :

Woodrow L. Fox, being first duly cautioned and sworn, states as follows:

1. I make this Affidavit pursuant to my personal knowledge.

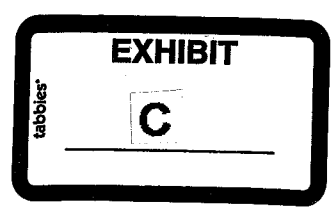
2. I am licensed by the Ohio Department of Insurance to issue surety bail bonds, and I own Woodrow L. Fox, Sr., LLC.

3. Nevin P. Keim works with Woodrow L. Fox, Sr., LLC as a bail bondsman. Mr. Keim's primary territory is Licking County, Ohio.

4. Sometime after Judge David Branstool commenced his elected term as judge to the Licking County Court of Common Pleas in 2010, I spoke to Olivia Thorpe, who is the assistant to the Licking County Clerk of Court. Ms. Thorpe advised me that the Court of Common Please would not permit a defendant to post a surety bond when a 10% appearance bond was issued. Rather, the defendant was required to make a cash only bond.

5. Since 2010, neither I nor my agents have been permitted to issue a surety bond on behalf of a defendant who was issued a 10% appearance bond by the Licking County Court of Common Pleas.

6. In August 2012, I retained attorney Gary A. Rosenhoffer to inquire about this matter. On or about August 28, 2012, Mr. Rosenhoffer advised the Licking County Prosecutor, Kenneth W. Oswalt, that when the Court of Common Pleas issued a 10% Bond, the Licking County Clerk of Court refused to accept a surety bond.



7. On September 6, 2012, the Prosecutor stated that he had contacted the "Judges of the Court" (not the Clerk itself) and that the "Court" was not inclined to change its current practice. (Exhibit C to the Complaint for Mandamus.) In addition, the Prosecutor advised me that, "the Judge who sets [a 10% Bond] will expect the Clerk of Courts to accept only the type(s) of bond(s) specifically approved by the assigned Judge."

FURTHER AFFIANT SAYETH NAUGHT.

Woodrow L. Fox

Sworn to before me and subscribed in my presence this 2nd day of March, 2013.

Notary Public, State of Ohio

KAREN HELD PHIPPS
Attorney at Law
Notary Public, State of Ohio
My Commission Has No Expiration
Section 147.03 R.C.