STATE OF MICHIGAN

IN THE SUPREME COURT

IN RE FORFEITURE OF BAIL BOND:

STATE OF MICHIGAN,	Supreme Court No.: 146033
Plaintiff—Appellee,	Court of Appeals No.: 305004
v.	Wayne County Circuit Court No. 07-020056-01-FC

COREY D. GASTON,

Defendant,

and

YOU WALK BAIL BOND AGENCY, INC.,
A Michigan Corporation,

Surety—Appellant.

/

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BRIEF ON APPEAL--APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Jurisdiction is proper in this court pursuant to MCR 7.302(B)(3) and MCR 7.302(B)(5). The rulings from the bench occurred on June 3, 2011 with a final Order entering Judgment after Bond Forfeiture being issued on that day. The Claim of Appeal was filed timely as required by MCR 7.204 and the Court of Appeals issued its decision on September 13, 2012. This Application for Leave to Appeal was filed timely pursuant to MCR 7.302(C)(2).

STANDARD OF REVIEW

Appellant is seeking appellate review of the Court of Appeals' interpretation of MCL 765.28. Matters of statutory interpretation are questions of law. *In re MCI Telecommunications,* 460 Mich. 396, 413, 596 N.W.2d 164 (1999). This Court reviews questions of law under a de novo standard of review. *DiBenedetto v. West Shore Hospital,* 461 Mich. 394, 401, 605 N.W.2d 300 (2000).

STATEMENT OF QUESTIONS PRESENTED

1. Does MCL 765.28(1), as amended by the Michigan Legislature in 2002 PA 659, effective April 1, 2003, require notice be personally served upon the surety and company posting a bail bond, within 7 days, at their last known business address, upon the Defendant's failure to appear?

   The trial court answers: "No."
   The Court of Appeals answers: "No."
   The Appellant answers: "Yes."
   The Appellee answers: "No."

2. Is the notice requirement of 765.28(1), as amended by the Michigan Legislature in 2002 PA 659, effective April 1, 2003 mandatory prior to forfeiture of a bail bond?

   The trial court answers: "No."
   The Court of Appeals answers: "No."
   The Appellant answers: "Yes."
   The Appellee answers: "No."

3. Does the lower court's interpretation of MCL 765.28 adequately protect the rights of the surety agent, bonding agency or the public at large?

   The trial court answers: "Yes."
   The Court of Appeals answers: "Yes."
   The Appellant answers: "No."
   The Appellee answers: "Yes."

4. Did the trial court err in denying Appellant's Motion to Set Aside the Notice of Intent to Enter Judgment and discharge the bond?

   The trial court answers: "No."
   The Court of Appeals answers: "No."
   The Appellant answers: "Yes."
   The Appellee answers: "No."

5. Does P.A. 218 of 1956 as codified in MCL 500.3008 require that an insurer be given reasonable notice of a pending claim apply to bail bond insurance agents?

The trial court answers: "No."
The Court of Appeals answers: "No."
The Appellant answers: "Yes."
The Appellee answers: "No."

STATEMENT OF FACTS

On or about June 29th 2007, Corey Gaston was arrested on charges of Home Invasion – 1st degree, Kidnapping – Child Enticement, Criminal Sexual Conduct – First Degree, and Criminal Sexual Conduct – Second Degree. Mr. Gaston was arraigned before Judicial Officer Renee McDuffee on July 25th 2007 and a $50,000 ten percent bond was set for his release. On October 19th 2007, Mr. Gaston was in front of the Honorable Deborah A. Thomas for his Arraignment on the Information. On or about November 6th 2007, Defendant's bond was raised to a $200,000 Cash/Surety ten percent bond. On November 7th 2007, Mr. Gaston's bond was posted by Agent Edward Minniweather in the amount of $50,000 in accordance with MCL 765.6(2).

On February 7th 2008, Mr. Gaston failed to appear at his scheduled court date. Exactly three years and one day later, on February 8th 2011, a Notice of Bond Forfeiture Hearing was signed for Appellant Bail Bond Agency (Appellant) to Show Cause why judgment should not enter against them. Although the defendant's failure to appear was properly recorded by the clerk and entered on the register of actions, the Appellant was not notified within 7 days of the defendant's failure to appear. Notice was actually provided approximately 1,095 days after the defendant failed to appear.

Appellant filed a motion to Set Aside the Notice of Intent to Enter Judgment and to have the bond discharged on April 8th, 2011. After the case was reassigned to the Honorable Michael M. Hathaway, the motion was heard on June 3rd, 2011. On that date the court denied Appellant's motion and entered judgment for the full amount of the bond.

ARGUMENT

I. THE WAYNE COUNTY CIRCUIT COURT FAILED TO PROVIDE NOTICE AS REQUIRED BY THE SURETY CONTRACT, STATUTE AND COURT RULE.

"A surety bond is a contract between the government, a principal, and a surety whereby the surety promises that if the principal defaults, the surety will pay the judgment on the bond." *In Re Forfeiture of Surety Bond,* 208 Mich.App. 369, at 371 (1995). As a general rule the terms of a bail contract are to be construed strictly in favor of the surety, who may not be held liable for any greater undertaking than he has agreed to. *United States v. Eisner*, 323 F.2d 38, 43 (6th Cir. 1963). "Like any other contract, a bail bond should be construed to give effect to the reasonable intentions of the parties." *United States v. Gonware*, 415 F.2d 82, 83 (9th Cir. 1969).

First and foremost, Appellant's reason for so diligently pursuing this appeal has very little to do with the pecuniary effect the adverse ruling the Wayne County Circuit Court has with regard to Appellant. It is common knowledge that local law enforcement officials are frequently overworked and attempt to do their jobs with ever dwindling resources. It is further commonly known that bail agents provide a valuable service to the court system. Through the judicial use of bail local jail space is made available for those serving sentences rather than being taken up by those awaiting trial.

When a criminal defendant fails to appear for a scheduled court hearing the court will generally revoke the bond and issue a bench warrant. There are very few resources available to locate and track these fugitives: these people are generally apprehended only after a further violation of the law results in another contact with law enforcement. In contrast, when a bail bond company receives timely notice of a defendant's failure to appear the surety agent will immediately deploy assets to attempt to locate and apprehend fugitives. The whole *raison d'etre* of the notification provisions of MCL 765.28 is to allow this opportunity. Through providing

timely notice to the surety agents the court acts to protect society as a whole by expanding the assets available to take these dangerous criminals off the street. According to a recent study "public police are often strained for resources, and the rearrest of defendants who fail to show up at trial is usually given low precedence. The flow of arrest warrants for FTA has overwhelmed many police departments, so today many counties are faced with a massive stock of unserved arrest warrants." "The Fugitive: Evidence on Public Versus Private Law Enforcement From Bail Jumping," 47 *J. Law & Econ.* 93, 98 (2004). To not utilize this resource effectively equates to a failure to protect the public at large.[1]

The guarantee to produce an absconding defendant can only be reasonably relied upon by the Court when the procedural terms set forth by the Legislature are followed. The Appellant spends a considerable amount of time, expense and effort apprehending defendants who fail to appear. Appellant's ability to apprehend an absconding defendant is directly affected by whether it is promptly and properly notified upon the defendant's failure to appear. Immediate notice of a defendant's default is essential to the contractual undertaking. Prompt notice by the Courts in accordance with the statute ensures that under the surety contract Appellant is afforded a

[1] The higher rate of recapture for those released on surety bond compared with other release types can be well illustrated with a survival function. For a subset of our data, just over 7,000 observations, we have information on the time from the failure to appear until recapture (return to the court). A survival function graphs the percentage of observations that survive at each time period. We estimate a survival function for each release type using the nonparametric Kaplan-Meier estimator. Typically, the Kaplan-Meier estimator is used only for preliminary analysis and is then followed by a parametric or semiparametric model. Although parametric and semiparametric models allow for covariates, they require sometimes tenuous assumptions about functional form. Instead, we follow our earlier approach of creating matched samples. Thus, using the same procedure, we create three matched samples: surety versus own recognizance, surety versus deposit, and surety versus cash. We then compare the survival function across each matched sample. The matching procedure ensures that covariates are balanced across the matched samples, so it is not necessary to include additional controls for covariates. ... In each case, the survival function for those released on surety bond is markedly lower than that for those released on their own recognizance, deposit bond, or cash bond. The ability of bail enforcement agents relative to police to recapture defendants who skip bail is evident within a week of the failure to appear.[53] By 200 days, the surety survival rate is some 20–30 percentage points, or 50 percent, lower than the survival rate for those out on cash bond, deposit bond, or their own recognizance; that is, the probability of being recaptured is some 50 percent higher for those released on surety bond relative to other releases. (Note that there are three surety bond survival functions, one for each comparison group,

meaningful opportunity to apprehend the defendant. Where a court fails to notify the Surety promptly, the Court has breached the underlying surety agreement, and has frustrated the purpose of the contract to the point where production of an absconding defendant may be impossible.

When Appellant entered into the Surety Bond for Mr. Gaston, it reasonably believed that, in the event Mr. Gaston should have failed to appear, it would receive notice in accordance with the statute. No other timeframe for notice had been discussed and no alternative timeframe would have been agreeable. Appellant would not have entered into the Bond contract if it believed that the Court could substitute 1,095 days provided for here in place of the 7 day requirement called for in MCL 765.28.

"[T]he terms of a bail contract are to be construed strictly in favor of the surety...". *US v. Eisner,* at *43.* Construing the terms of the Bond strictly in the favor of Appellant, notice as provided in the present matter was unreasonable and judgment should not be entered.

A. NOTICE UNDER THE COURT RULE

MCR 6.106(I) provides in that:

> (1) If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant ***and*** enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited. (Emphasis Added)
>
> a. The court ***must*** mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bond has been ordered, to anyone who posted the bond. (Emphasis Added)

MCR 6.106(I) does not contemplate nor allow the Court to enter a warrant for the defendants arrest, unless the Court also issues an order revoking release and declaring the

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but these are nearly identical.) 47 *J. Law & Econ.* 93, pp. 112-113.

defendants bond forfeited. This ensures a meaningful opportunity to apprehend an absconding defendant, which forms the basis for the contractual surety undertaking. Based upon a plain reading of MCR 6.106(I), if a court enters a warrant for the defendant's arrest, it must also issue an order revoking release, declaring the surety bond forfeited and provide *immediate* notice to anyone who supplied the bond.

The court failed to comply with the Court Rule in the present matter. The Register of Actions shows that Mr. Gaston's default was properly recorded by the court on February 7th and 11th in 2008. While the defendants default was properly recorded, the Court did not enter an order revoking the release for over three years. As such, no notice was provided to Appellant.

B. NOTICE UNDER THE STATUTE

MCL 765.28 was most recently amended in September of 2004 and provides that:

> (2) If default is made in any recognizance in a court of record, the default shall be entered on the record by the clerk of the court. After the default is entered, ***the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear.*** The notice shall be served upon each surety in person or left at the surety's last known business address. (Emphasis added)

MCL 765.27 states in relevant part that:

> No action brought upon any recognizance entered into in any criminal prosecution... shall be barred or defeated nor shall judgment thereon be arrested, by reason of any neglect or omission *to note or record the default of any principal* or surety at the time when such default shall happen... (Emphasis added)

When interpreting statutory language, the court must ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. *Wickens v Oakwood Healthcare System*, 465 Mich. 53, 60; 631 N.W.2d 686 (2001). Because the proper role of the judiciary is to interpret and not to write the law, courts do not have authority to venture beyond

the unambiguous text of a statute. Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory. *Wickens* at 60. Where the text of a statute is clear, courts must apply it without resorting to judicial construction. *People v McIntire*, 461 Mich. 147, 153, 599 N.W.2d 102 (1999). "When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *Id.* at 153. Further, the "The word 'shall' is unambiguous and is used to denote mandatory rather than discretionary action," *STC, Inc. v. Dep't of Treasury*, 257 Mich. App. 528, 537; 669 NW2d 594 (2003).

MCL 765.27 stands for the proposition that forfeiture may still enter where the Clerk of Court fails to properly record or note the Defendants default. In the present matter, there was no error, omission or failure by the Clerk of the Court to note or record the Mr. Gaston's default. The Register of Actions shows that Mr. Gaston's default was properly recorded by the court on February 7th and February 11th, 2008. MCL 765.27 does not apply to the present matter because the Clerk properly recorded the default.

Appellant was not given *immediate notice* within 7 days of the Defendant's failure to appear as required under MCL 768.25, nor anything approaching immediate notice. Appellant was notified approximately 1,095 days after the defendant failed to appear. The notice provided to Appellant was neither immediate nor within the proscribed period of time called for by the Legislature. In order for the Court to call upon the Surety to produce Mr. Gaston following his failure to appear in February of 2008, the court was required to "give [the] surety immediate notice not to exceed 7 days after the date of the failure to appear". The Court failed to comply

with the provisions of the notice statute by failing to notify Appellant until over 3 years had passed since the defendant's failure to appear.

It should be noted that the Court of Appeals asserted in its unpublished opinion dated September 13, 2012 that Appellant's counsel conceded at oral argument that Appellant had received notice as required under the court rule. In no way does the undersigned counsel concede and it appears that this may be an incident of counsel misunderstanding the question as presented by the panel.

II. THE WAYNE COUNTY CIRCUIT COURT, FAILED TO PROPERLY EVALUATE AND APPLY THE INTENT OF THE LEGISLATURE TO THE PRESENT MATTER AND IMPROPERLY RELIED UPON A COURT OF APPEALS DECISION INTERPRETING THE FORMER NOTICE STATUTE.

In denying Appellants motion to Set Aside the Intent to Enter Judgment and Discharge the Bond, the Circuit Court relied on the Court of Appeals decision in *In Re Forfeiture of Bail Bond, People v. Moore,* 276 Mich.App. 482; 740 NW.2d 734 (2007). Appellant submits that the Circuit Court's and Court of Appeals' reliance on this case is misplaced. The decision in *Moore* was based on a prior version of the operative notice statute, MCL 765.28. The lower courts should have attempted to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute as it has been recently amended. The lower courts insisted that the language requiring notification was directory rather than mandatory and made no attempt to interpret the language of MCL 765.28 in light of the clear legislative intent behind the newly amended MCL 765.28. Instead, the lower courts relied on the decision in *People v. Moore, supra,* in denying appellant's motion. Appellant contends that even if reliance on *People v. Moore* was proper, that the case was wrongly decided and that notice under the current MCL 765.28 is in fact mandatory.

The clear, unambiguous language of MCL 765.28 requires that a surety be given notice within seven days of a defendant's failure to appear. It is inappropriate for the Court to defeat the legislative intent behind the statute and carve out this unintended exception.

A. IN RE FORFEITURE OF BAIL BOND; PEOPLE V. MOORE

The Court of Appeals was asked to interpret whether notice was mandatory under two former versions of MCL 768.28 in, *In Re Forfeiture of Bail Bond, People v. Moore,* 276 Mich.App. 482 (2007). In that case, Bond Bonding Agency (BBA) posted bond for four individuals who all subsequently failed to appear. Gregory Moore obtained a $75,000 surety bond and failed to appear in March of 2001; William Lineman obtained a $5,000 surety bond and failed to appear in October of 2001; Eduardo Velez Jr. obtained a $10,000 surety bond and failed to appear in in September of 2002; Ronald Shepard obtained a $20,000 surety bond and failed to appear in in September of 2003. *Id* at 484-485. In each case, Bond Bonding Agency was not notified of the Defendants' failure to appear until March of 2004.

At the time defendants Moore, Lineman and Velez failed to appear MCL 765.28 provided in relevant part:

> [W]henever default shall be made in any recognizance in any court of record, the same shall be duly entered of record by the clerk of said court and thereafter said court, *upon the motion of the attorney general, prosecuting attorney or city attorney*, ***may*** give the surety or sureties twenty days' notice, which notice shall be served upon said surety or sureties in person or left at his or their last known place of residence.

This Honorable court remarked that, with regards to the first three defendants, "the statute in effect at the time Moore, Lineman and Velez defaulted did not require notice to the surety within a specific number of days, nor did it require notice to the surety at all. Instead, under the relevant statutory language, the trial court had discretion to give BBA 20 days' notice of Moore, Lineman and Velez failures to appear." *Id.* at 493. Based upon the interpretation of

the Statute then in effect, the Court concluded that Judgment was proper for the first three defendants, despite the delay in notice.

By the time Defendant Shepard failed to appear in September of 2003, MCL 765.28 had been amended. See 2002 PA 659. MCL 765.28 as amended provided in part that:

> If default is made in any recognizance in a court of record, the default shall be entered on the record by the clerk of the court. After the default is entered, the court, *upon the motion of the attorney general, prosecuting attorney, or the attorney for the local unit of government,* ***shall*** *give each surety immediate notice not to exceed 7 days after the date of the failure to appear. Id.* at 494. (emphasis added)

The trial court noted that pursuant to MCL 765.28(1) as amended by 2002 PA 659, the court was only required to notify BBA of Shepard's default, "upon the motion of the attorney general, prosecuting attorney, or the attorney for the local unit of government..." *Id.* at 495. The court acknowledged that, in general, the word "shall" carries a mandatory, nondiscretionary connotation and that as amended MCL 765.28(1), provided that the court "shall give each surety immediate notice" within seven days of the defendant's default. *People v. Brown,* 249 Mich App 382, 386 (2002) [holding that 'shall' carries a mandatory connotation]. The court continued that, it would not have been possible to comply with the seven-day notice requirement in Shepard's case because by the time the prosecution had filed its motion in March of 2004, six months had already passed. *Id.* at 494-495.

The Court continued that, "The general rule is that if a provision of a statute states a time for performance of an official duty, without language denying performance after a specified time, it is directory." *People v. Smith,* 200 MichApp 237, 242 (1993) quoting 3 Sutherland, Statutory Construction (5th ed), Section 57.19, pp 47-58.

In entering judgment, the trial court reiterated that MCL 768.25 did not require any notice to BBA at the time of the first three defendant's defaults. The court also repeated that compliance with the 7 day notice provision of the amended MCL 765.28 was impossible as it applied to defendant Shepard. *People v. Moore,* 208 MichApp at 494-495. The Court then acknowledged the difficulty that a surety might face in apprehending a principal when the court fails to provide timely notice of the principal's default. In recognition of this apparent difficulty, the trial court reduced the amount of the judgment in each case.[2] Thus, the judgment amount in each case was actually less than the face amount of the respective surety bond.

Defendant Moore failed to appear in March of 2001. The trial court had not given BBA notice until three years after Moore's failure to appear. The trial court entered judgment against BBA in the amount of $37,500, which equaled 50 percent of the value of the bond. *Id.* at 487.

Defendant Lineman failed to appear in October of 2001. The trial court had not given BBA notice until 2½ years after Lineman's failure to appear. The court entered judgment against BBA in the amount of $2,900, which equaled 58 percent of the value of the bond. *Id.* at 487.

Defendant Velez failed to appear in September of 2002. The trial court had not given BBA notice until 1½ years after Velez's failure to appear. The court entered judgment against BBA in the amount of $7,500, which equaled 75 percent of the value of the bond. *Id.* at 487.

Defendant Shepard failed to appear in September of 2003. The trial court had not given BBA notice until six months after Shepard's failure to appear. The court entered judgment against BBA in the amount of $18,400, which equaled 92 percent of the value of the bond. *Id.* at 487.

B. DISCRETIONARY V MANDATORY NOTICE PROVISIONS

[2] Based upon a 6 year statute of limitations as it applies to Surety Bonds.

This Honorable Court in *People v. Moore* at 495, noted that the fundamental rules of statutory construction *generally* preclude construction of a time limit for performance of an official duty as being mandatory, absent language that expressly precludes performance of such duty after the specified time has elapsed. Such statutes are normally construed as being "directory".

In *People v. Smith*, 200 MichApp 237 (1993) the Court elaborated on when a notice provision is directory as opposed to mandatory. In *Smith*, the defendant challenged a reissued complaint and warrant claiming they were invalid because the fourteen-day statutory time limit for arraignment had elapsed. The District Court ruled that reissued complaint and warrant were invalid and that no new complaint and warrant could ever be issued once the fourteen-day statutory time limit for arraignment, the thirty-five-day time limit for pretrial conferences, or the seventy-seven-day time limit for trial set forth in the Vehicle Code had been exceeded. *People v. Smith,* 241-242. The Circuit Court, summarily affirmed and the prosecutor filed a timely appeal.

The Court of Appeals adopted and quoted §3 Sutherland, Statutory Construction (5th ed) stated:

> A great many cases involve determination of whether time provisions shall have mandatory or directory effects. This includes statutes that limit things to be done within a certain time or prescribe the date on which a thing is to be done. Notwithstanding legislative intent, the determination is based on grounds of policy and equity to avoid harsh, unfair or absurd consequences.
>
> It is difficult to conceive of anything more absolute than a time limitation. And yet, for obvious reasons founded in fairness and justice, time provisions are often found to be directory where a mandatory construction might do great injury to persons not at fault, as in a case where ***slight delay*** on the part of a public officer might prejudice private rights or the public interest. The general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory. ***However, if the time period is***

provided to safeguard someone's rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed.

(Emphasis Added)

In reversing and remanding the case the Court of Appeals noted that the purpose of including the time-limits in legislation related to criminal charges was to remedy delays in restricting, suspending, or revoking the vehicle operating privileges of drunk drivers and to generally assure that drunk driving cases would be moved through the criminal justice system as quickly as possible. More specifically the Court stated that, "time limits were created not to protect the rights of accused drunk drivers, but to prod the judiciary, and prosecutors who handle drunk driving cases, to move such cases with dispatch." *People v. Smith*, at 243. The Court determined that the time limits imposed were directory.

In the present matter the notice provision of MCL 765.28 was created to safeguard the rights of the surety as well as the public. Therefore, the general rule does not apply and the notice provision of MCL 765.28 should be construed as mandatory. The Court in *Smith* determined that the time limits imposed in drunk driving cases were never meant to protect the defendant charged with the crime and were therefore directory.

Contrary to this Honorable Courts opinion in *People v. Moore*, *supra*, the notice provision contained in MCL 765.28 is mandatory as it protects the surety's right to secure the defendant before having their bond forfeited and the right of the public to ensure that every individual charged with a crime, faces those charges in court. The intent of the legislation was to guarantee a surety that in the event a defendant failed to appear, they would be immediately notified and given a meaningful opportunity investigate, mitigate losses and more importantly apprehend the absconding fugitive. The notice provision contained in MCL 765.28 is mandatory and failure to comply with the notice terms requires exoneration and discharge of the bond.

Although the Court of Appeals tried to rationalize this language as being directory rather than mandatory that interpretation simply flied in the face of logic.

Because the lower court failed to properly notify Appellant in a timely manner of Gaston's failure to appear, the trial court waived its right to enforce the bond against the Surety. Notice was mandatory and was a a necessary precondition for filing a claim against the Surety..

C. OTHER NOTICE PROVISIONS

In *Rowland v. Washtenaw County Road Commission,* 477 Mich. 197 (2007) the Michigan Supreme Court recently determined that a notice provision applicable to the defective highway exception to governmental immunity, MCL 691.1404(1), should be enforced literally and as written. The statute provided in pertinent part:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect.

The Supreme Court concluded that the plain language of this statute should be enforced as written and that notice of injuries sustained and of the highway defect must be served on the governmental agency within 120 days of the injury. The Court previously held in *Hobbs v. Michigan State Highway Dep't 398 Mich 90, 96; 247 NW2d 754 (1976),* and *Brown v Manistee Co Rd Comm, 452 Mich 354, 356-357; 550 NW2d 215 (1996),* that absent a showing of actual prejudice to the governmental agency, failure to comply with the notice provision is not a bar to claims filed pursuant to the defective highway exception. Those cases were overturned by the Courts ruling in *Rowland.* The interests in protecting the Government from suits filed after the statutory notice provisions has expired is similar in nature to the matter presently before the court. The Government requires prompt notice of any injury incurred as the result of negligent

repairs or faulty equipment so they can facilitate meaningful investigations regarding the conditions at the time of injury and allow for quick repair so as to preclude other accidents. *Rowland,* 477 Mich 197, at 206. The interests requiring prompt notice to a surety after a defendant's failure to appear are the same. Prompt notice allows the surety to facilitate meaningful investigations, and allows for quick apprehension before the defendant is able to abscond or commit another crime. It is clear from the holding in *Rowland* that the Supreme Court of Michigan currently favors a more literal interpretation of notice provisions.

D. FAILURE TO NOTIFY MERITS DISCHARGE

Other States support the notion that failing to properly and promptly notify a bondsman and his surety require that the surety bond be discharged and exonerated. Louisiana, California and North Carolina, for example, employ strict guidelines outlining the bond forfeiture, and bond collection process. These states, among others, provide for exoneration of a bond when notice has been improperly delayed.

Louisiana, La. C.Cr.P. Art. 349.3 (2011) states in relevant part:

> Notice of judgment:
> (C). Failure to mail notice of the signing of the judgment within 60 days after the defendant fails to appear shall release the sureties of all obligations under the bond.

California, Cal Pen Code §1305 (2011) states in relevant part:

> The surety or depositor shall be released of all obligations under the bond if any of the following conditions apply:
>
> (1) The clerk fails to mail the notice of forfeiture in accordance with this section within 30 days after the entry of the forfeiture.

North Carolina, G.S. §15A-544.4 (Notice of forfeiture), states in relevant part:

> (e) Notice under this section shall be mailed not later than the 30th day after the date on which the defendant fails to appear as

> required and a call and fail is ordered. If notice under this section is not given within the prescribed time, the forfeiture shall not become a final judgment and shall not be enforced or reported to the Department of Insurance.

Exoneration of a bond when a Court has failed to provide notice under the appropriate statute is proper. Other states have recognized that the purpose of a surety bond is to guarantee the appearance of the defendant. If the surety is not notified of the defendant's failure to appear they are not afforded a meaningful opportunity to apprehend the defendant. Compliance with the notice provisions are mandatory because they protect the rights of the surety and the public and give meaning to the agreement and intent of the parties at the time the surety bond was signed. Because of this failure to notify the Court's should at a bare minimum be equitably estopped from enforcing the surety's obligation under this bail bond insurance agreement.

III. THE WAYNE COUNTY CIRCUIT COURT ABUSED ITS DISCRETION BY DENYING APPELLANT MOTION TO SET ASIDE NOTICE OF INTENT TO ENTER JUDGMENT AND DISCHARGE THE BAIL BOND.

A surety bond is an insurance contract between the government, a principal, and a surety. The surety promises that if the principal defaults, they will either produce the defaulting defendant, or they will pay the judgment on the bond. As a general rule the terms of a bail contract are to be construed strictly in favor of the surety, who may not be held liable for any greater undertaking than he has agreed to. *United States v. Eisner*, 323 F.2d 38, 43 (6th Cir. 1963). Like any other contract, a bail bond should be construed to give effect to the reasonable intentions of the parties.

The Circuit Court replied upon this honorable courts holding in *People v. Moore* in denying Appellant's motion. The Circuit Court's reliance on this holding was an abuse of discretion because after *People v. Moore* was decided, the Legislature again revisited and amended MCL 765.28. As amended in September of 2004, the statute governing notice now provides:

> If default is made in any recognizance in a court of record, the default shall be entered on the record by the clerk of the court. After the default is entered, the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear... Each surety shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond. If good cause is not shown for the defendant's failure to appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the bail, or if a surety bond has been posted the full amount of the surety bond.

The Legislature in amending the statute, removed the language the court relied upon in *People v. Moore, supra.* The statute no longer required the motion of the attorney general, prosecuting attorney, or the attorney for the local unit of government, before the court must notify the surety and/or bondsmen. The applicable Court Rule and Statute governing notice of the defendants default must be construed in favor of the surety, and both the court rule and statute governing notice unambiguously require "immediate notice" following a defendant's default.

As previously discussed, the Court must seek to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute and they must not venture beyond that unambiguous text. *Wickens v Oakwood Healthcare System*, 465 Mich. 53, 60; 631 N.W.2d 686 (2001). Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory. *Wickens* at 60. A decision in the present matter entering judgment after the court failed to notify Appellant until over 3 years after the defendant failed to appear, would in effect render MCL 765.28 as being entirely surplusage or nugatory. The Circuit Court abused its discretion by failing to independently evaluate the statute as amended and by failing to apply the plain meaning of the statute to the facts of this case.

The Circuit Court's decision relying upon *People v. Moore,* 276 MichApp 482 (2007) should be closely scrutinized as it was decided under the former MCL 765.28. In amending the statute the legislature clearly intended to provide for even stronger language requiring notice.

Appellant submits that the court erred in *People v. Moore,* holding that the notice provision of MCL 765.28 was directory rather than mandatory. As discussed by the Court in *People v. Smith,* where the time limit on performance is provided to safeguard the rights of a party, the notice provision is mandatory, and the agency cannot perform its official duty after the time requirement has passed. *People v. Smith* at 242. As discussed, the notice provision protects the Bonding Agencies rights as well as the rights of the public. The interpretation of a Court Rule or Statute is a question of law that this court must review de novo. This Court must seek to give intent to each word of the statute and the intent of the parties at the time the bond contract was signed. Notice was not immediate, was not within the proscribed 7 day time period and a delay in notice of over three years was not reasonable and not contemplated by the parties at the time the Surety bond was posted. Appellant's ability to apprehend the absconding defendant has been irreparably harmed if not completely destroyed by the courts failure to properly notify. The Circuit Court failed to properly evaluate the claim as it was raised before them and abused its discretion in denying the Appellant's motion.

IV. THE WAYNE COUNTY CIRCUIT COURT FAILED TO APPLY THE REASONABLE NOTICE REQUIREMENTS OF P.A. 218 OF 1956, THE INSURANCE ACT, TO THE ISSUE IN DISPUTE.

A bail bond agreement is first and foremost an insurance agreement. Bail Bondsmen are licensed insurance agents and as such operate under the aegis of The Insurance Act, P.A. 218 of 1956. A criminal defendant seeking release from incarceration via a bail bondsman enters into an agreement in which the surety agrees to insure the appearance of the defendant in various

proceedings within the criminal justice system. Should the defendant fail to appear the policy becomes operative and the surety must either produce the defendant (i.e. apprehend them) or pay on the insurance policy (i.e. the bond amount). When a court sends out a Show Cause to a surety agent regarding a bond forfeiture it is actually applying for insurance benefits from the surety.

Just as any other party seeking proceeds from an insurance policy, the court was required to serve notice of the claim on the surety in a timely manner. MCL 500.3008 states in relevant part: "failure to give any notice required to be given ....shall not invalidate any claim made by the insured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible." A mere delay in giving the required notice to an insurer under the policy does not work a forfeiture because such provisions are construed to require notice within a reasonable time. *Burgess v. American Fidelity Fire Insurance Co.,* 107 Mich.App. 625, 628 (1981). However, "prejudice to the insurer is a material element in determining whether notice is reasonably given. The question of prejudice is one for the trier of fact. *Burgess, supra* at 629.

Thus the question becomes whether 1,097 days was reasonable or does such a delay unreasonably prejudice the insurer. Studies have shown that longer delays in pursuing a fugitive directly impact a pursuers' ability to effectuate a recapture *"The Fugitive, supra",* Id. at 114. Appellant asks this court to take judicial notice of the fact that time is of the essence when attempting to locate a fugitive from justice and that any delay before a bail agent is notified of a defendant's fugitive increases the difficulty in apprehending that defendant as well as the likelihood that said defendant will commit further crimes while being a fugitive.

The notice provision of MCL 765.28 is analogous to that contained in MCL 500.3008. It is well settled under the latter statute that actual prejudice occurs when an insurer is not given

proper notice to investigate a claim. "A notice provision is designed to provide the insurance company with knowledge of the accident so that it might make a timely investigation to protect its interests; an insurance company that seeks to avoid liability on the grounds that its insured did not comply with a notice provision must establish actual prejudice to its position." *Koski v. Allstate Ins Co,* 456 Mich. 439, 444; 572 NW2d 636 (1998).

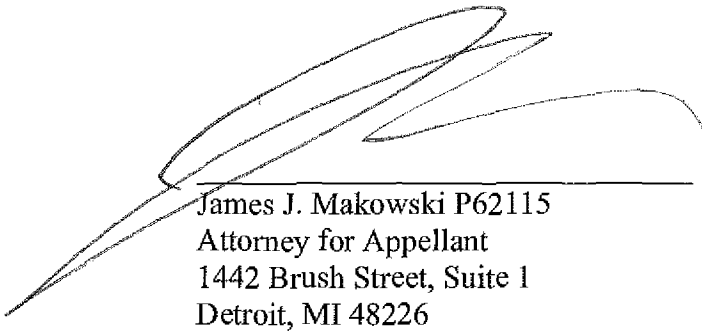
Just as in any other insurance policy and claim, failure to meet the requirements for filing a claim relieves the insurer from its obligation to pay under the policy. Appellant's obligation to pay this bond ceased when the lower court delayed filing its claim more than 1,000 days. Any claim for benefits under the insurance policy should be barred as untimely.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Appellant, You Walk Bail Bond Agency requests this Honorable Court enter an order setting aside the forfeiture and discharging the bond.

Respectfully Submitted

April 30, 2013



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