

IN THE SUPREME COURT OF OHIO

CASE NO. 07-0152

PIETRO CRISTINO, *et al.*
Plaintiff-Appellees

-vs-

ADMINISTRATOR, OHIO BUREAU OF WORKERS' COMPENSATION, *et al.*
Defendant-Appellants.

ON APPEAL FROM CUYAHOGA COUNTY COURT OF APPEALS
CASE NO. 87567

MEMORANDUM OPPOSING JURISDICTION OF PLAINTIFF-APPELLEES,
PIETRO CRISTINO, *et al.*

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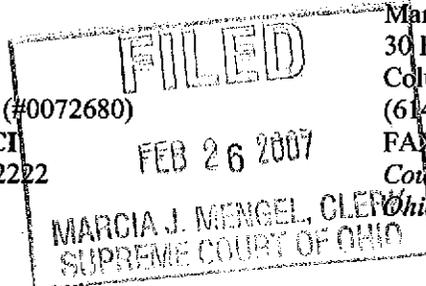
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STATEMENT OF WHY JURISDICTION SHOULD NOT BE GRANTED

This Court should decline to exercise jurisdiction over these proceedings for several reasons. First and foremost, the jurisdictional issues that have been raised by Defendant-Appellants, Administrator, Ohio Bureau of Workers' Compensation (hereinafter the "Bureau"), have already been here. Although scarcely noted in their Memorandum in Support of Jurisdiction of January 28, 2007 (hereinafter "Bureau's Memorandum"), an earlier appeal had been perfected to this Court by Plaintiff-Appellees, Pietro Cristino, *et al.* *Sup. Ct. Case No. 2003-0680*. In an Entry dated February 4, 2004, the Eighth District's holding that the action belonged in the Court of Claims was reversed and remanded. It is safe to assume that if jurisdiction was truly lacking as the Bureau continues to maintain, the appellate court would have been affirmed.

In direct contravention of this Court's holding in *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, the Bureau continues to insist that it is entitled to keep funds that rightfully belong to workers' compensation claimants. This time around, the Bureau's justification for retaining the money is pinned on the notion that: "Being allegedly *underpaid* by the State is simply not the same as having *overpaid* the State and seeking a refund." *Bureau's Memorandum*, p. 9. This purely semantical distinction was rejected three (3) years ago when this Court held in the syllabus of *Santos*, 101 Ohio St.3d 74, that:

A suit that seeks the return of specific funds wrongfully collected or held by the State is brought in equity. Thus, a court of common pleas may properly exercise jurisdiction over the matter as provided in R.C. 2743.03(A)(2). [emphasis added]

Regardless of whether the funds are misappropriated by wrongfully collecting them or refusing to return them, the result is the same. Notably, Justice O'Connor's opinion in *Santos* was

joined by every member of this Court and no discernable attempt has been made by the General Assembly to revise R.C. §2743.03(A)(2) to alter this holding. There is thus no reason whatsoever for this Court to revisit the issue again.

The Bureau has also taken great umbrage with the Eighth District's unanimous affirmance of Judge David T. Matia's grant of class certification. There is no support for the Bureau's view, however, that such an order may only be issued after a federal hearing has been held during which the requirements of class certification are definitively established with hard evidence. Such a burden could be met in only the rarest of cases, as Civ.R. 23(C)(1) requires class certification to be sought at the outset of the proceedings before discovery has been completed. That is exactly what occurred here. In the unlikely event that it develops that there is no evidentiary support for the request for class certification, the Bureau can certainly request that Judge Matia reconsider his decision pursuant to Civ.R. 54(B). Further delaying this already protracted litigation with yet another review by the Supreme Court will thus accomplish nothing.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellees filed their Class Action Complaint for Equitable, Declaratory, and Injunctive Relief in the Cuyahoga County Court of Common Pleas on June 22, 2001. Therein, they alleged *inter alia* that the Bureau had been misleading permanent total disability (PTD) recipients in an effort to terminate the continued payment of benefits through lump-sum distributions. Plaintiffs identified two subclasses that were comprised of those Ohio PTD recipients who were not represented by legal counsel (Class A) and those who were (Class B). Separate claims were raised for breach of fiduciary duty (Count I), fraud (Count II), unjust enrichment (Count III), violation of constitutional and statutory rights (Count IV), declaratory

relief (Count V), and injunctive relief (VI). Significantly for purposes of the instant appeal, the prayer sought only injunctive, equitable and declaratory relief against the Bureau. No monetary damages were requested therein.

On July 31, 2001, the Bureau served its Answer denying liability. The Bureau then submitted its First Motion to Dismiss. This relief was sought on the grounds that (1) the trial court lacked subject matter jurisdiction over the dispute, (2) Plaintiffs were attempting to seek review of a settlement agreement in violation of *R. C. §4123.65(F)*, and (3) venue was appropriate strictly in Franklin County. Plaintiffs filed their Memorandum in Opposition to this Motion on December 20, 2001. Defendant's Motion was denied on January 2, 2002.

On June 6, 2002, the Cuyahoga County Court of Appeals released its ruling in *Santos v. Administrator, Bureau of Workers' Compensation*, 8th Dist. No. 80353, 2002-Ohio-2731, 2002 W.L. 1265568. Therein, it was held that an action seeking strictly injunctive and equitable relief was limited to the exclusive jurisdiction of the Ohio Court of Claims. In an ensuing pre-trial conference, Plaintiffs' counsel advised Judge David T. Matia that this ruling required dismissal of the instant proceedings. Accordingly, an order was issued on July 22, 2002 reconsidering and granting Defendant's Motion to Dismiss.

In order to preserve the action, Plaintiffs' timely Notice of Appeal was submitted on August 5, 2002. On March 3, 2003, the Cuyahoga County Court of Appeals issued its final Journal Entry and Opinion affirming the dismissal solely on the basis of the precedent that had been established in *Santos. Cristino v. Ohio Bur. of Workers' Comp.*, 8th Dist. No. 80619, 2003-Ohio-766, 2003 W.L. 361283. The panel specifically observed that "*Santos* is considered persuasive authority in this appellate district 'unless and until' it is reversed or modified by the Ohio Supreme Court." *Id.*, p. 6 (*citation omitted*).

That is precisely what occurred. On April 17, 2003, Plaintiffs filed their Notice of Appeal with the Supreme Court of Ohio. Jurisdiction was granted over the dispute on July 17, 2003. A unanimous Supreme Court then overruled the Eighth District in *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441. Likewise, the appellate court was reversed in the instant action and the case was remanded for further proceedings. *Cristino v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 97, 2004-Ohio-201, 802 N.E.2d 147.

No meaningful opportunity was afforded to Plaintiffs to complete their discovery on remand. On July 23, 2004, the Bureau submitted its Motion to Dismiss Based upon Authority of *Santos v. Ohio Bureau of Workers' Comp.* or, Alternatively, To Transfer Based Improper Venue (hereinafter "Defendant's Motion"). Included therewith were many of the same contentions (most notably, subject matter jurisdiction and improper venue) that Judge Matia had previously rejected on January 2, 2002. Plaintiffs still submitted their Memorandum in Opposition on August 25, 2004. In a ruling dated December 17, 2004, the Motion was overruled.

Plaintiffs filed their Motion for Class Certification on September 1, 2004. The Bureau opposed this request in a Brief in Opposition that was submitted on October 29, 2004. In a detailed Opinion and Journal Entry dated December 6, 2005, Judge Matia granted Plaintiffs Motion and certified two (2) subclasses. The Bureau hurriedly commenced this second appeal on January 3, 2006 before Plaintiffs' pre-trial investigations could be completed.

In a decision that was rendered on December 12, 2006, the Eighth District affirmed Judge Matia's ruling. Judge Ann Dyke dissented in part only because she would have held that the denial of the motion to dismiss was not a final appealable order. *Id.*, p. 15. The Bureau's

ensuing Motion for Reconsideration and/or Rehearing *en banc* was summarily denied on December 12, 2006. The Bureau is now seeking further review in this Court.

ARGUMENT

PROPOSITION OF LAW NO. 1: CLAIMS FOR RESTITUTION FROM A STATE AGENCY MAY BE BROUGHT IN COMMON PLEAS COURT ONLY WHEN A PLAINTIFF HAS PAID SPECIFIC FUNDS TO THE STATE AGENCY; A CLAIM CANNOT BE BROUGHT AS AN EQUITABLE CLAIM FOR REIMBURSEMENT WHEN THE CLAIM IS A TORT CLAIM OR WHEN THE PLAINTIFF HAS NEVER PAID ANY MONEY TO A STATE AGENCY. SUCH CLAIMS ARE LEGAL, NOT EQUITABLE, AND THEY BELONG IN THE COURT OF CLAIMS.

A. SUPREME COURT PRECEDENT.

The Bureau contends that Judge Matia erred by failing to recognize that he lacks jurisdiction over Plaintiffs' so-called claims for "money damages". Actually, the trial judge was merely following the dictates of the Ohio Supreme Court. Over three (3) years ago the Bureau strenuously argued to the Eighth District in the first appeal that the claims for "money damages" could only be adjudicated in the Ohio Court of Claims. *Brief of Appellees Case No. 81619, pp. 2-8*. It was proclaimed at that time that:

The trial court correctly ruled that it lacks subject matter jurisdiction to hear [Plaintiffs'] action against the Bureau, finding that the Court of Claims had exclusive original jurisdiction in all civil suits for money damages against the State of Ohio.

Id., p. 2. The Court of Appeals agreed in the Opinion that was issued on March 3, 2003. That decision was, of course, reversed by this Court in *Cristino*, 101 Ohio St.3d 97. In no sense does the opinion suggest that the jurisdictional issue was being remanded for "further consideration" by the lower courts. The Supreme Court was certainly capable of determining whether the Complaint properly alleged a claim that legitimately belonged in the Cuyahoga

Court of Common Pleas. Rather obviously, the Eighth District's decision would have been affirmed if a majority had agreed that the action belonged solely in the Court of Claims.

B. APPROPRIATENESS OF COMMON PLEAS JURISDICTION.

1. Nature of the Complaint.

The Supreme Court's rejection of the Bureau's jurisdictional argument was entirely justified. As a general rule, the plaintiffs are the masters of their complaints. *The Fair vs. Kohler Die & Specialty Co.* (1913), 228 U.S. 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716; *Merrell Dow Pharmaceuticals Inc. vs. Thompson* (1986), 478 U.S. 804, 809, 106 S. Ct. 3229, 3233, 92 L.Ed.2d 650 fn. 6; *Great Northern Ry Co. vs. Alexander* (1918), 246 U.S. 276, 282, 38 S. Ct. 237, 239-240, 62 L. Ed. 713. In accordance with this authority, Plaintiffs have made a conscious decision to pursue only equitable and declaratory remedies in these proceedings. Previous cases had recognized, in general, that such claims against the State can be adjudicated by any court of common pleas. *Racing Guild of Ohio vs. Ohio State Racing Commn.* (1986), 28 Ohio St.3d 317, 319-320, 503 N.E.2d 1025, 1028; *Ohio Hosp. Assn. vs. Ohio Dept. of Human Services* (1991), 62 Ohio St.3d 97, 103-104, 579 N.E.2d 695, 700.

2. Impact of Santos.

Even if the Supreme Court's ruling in the first appeal had left the jurisdictional argument open for more debate (which it did not), the Bureau's position is just as flawed now as it was then. In *Santos*, the unanimous Court flatly declared, in no uncertain terms, that:

A suit that seeks the return of specific funds wrongfully collected or held by the state is brought in equity. Thus, a court of common pleas may properly exercise jurisdiction over the matter as provided in R.C. 2743.03(A)(2).

Santos, 101 Ohio St.3d 74, syllabus. The Opinion specifically states that any wrongful “collection or retention of moneys” by the State is actionable in a common pleas court. *Id.*, ¶ 17.

The crux of the instant Complaint is that the Bureau duped hundreds of recipients of permanent total disability (PTD) benefits into accepting lump sum payments that were worth substantially less than the actual mathematical value of their claims. While representing that the beneficiaries were receiving the actual “present value” of the claim, the government’s agents failed to disclose that a thirty percent (30%) discount had been factored into the calculations. Moreover, outdated mortality tables were utilized. The end result is that seriously disabled individuals were misled into believing that the lump sum payments they were receiving were the mathematical equivalent of the benefits that would have been paid over their lifetimes. Since the funds that the Bureau was able to save through their wrongdoing are still being “retained” by them, Plaintiffs have every right to seek their disgorgement through equitable principles. *Santos*, 101 Ohio St.3d 74, syllabus. This case is not about holding anyone liable for damages they caused through some tortious act or omission.

Not surprisingly, the Bureau would have *Santos* limited to a microscopic range of circumstances that are almost certain to never arise. They believe that *R.C. §2743.03(A)(2)* only permits claims seeking awards that can “clearly be traced to particular funds or property in the Defendants’ possession.” *Defendants’ Second Motion to Dismiss*, p. 5. They can only be held accountable in this regard when they have specifically “segregated” the money at issue. *Id.* Under this reasoning, the State will never be subject to equitable remedies as long as all its funds are commingled together in the treasury. It is hard to believe that the Supreme Court

would bother to accept, review, and decide a case that is limited to such a strikingly peculiar set of facts.

In *Santos*, the Bureau was unable to convince a single Justice to accept the same flawed arguments that they are continuing to champion in the instant case. It is now well-settled that a complaint seeking "restitution" is not the equivalent of an action for money damages. See generally, *Harris Trust & Savings Bank* (2000), 530 U.S. 238, 250-251, 120 S. Ct. 2180, 2189-2190, 147 L.Ed.2d 187; *Schwartz vs. Gregori* (6th Cir. 1995), 45 F.3d 1017, 1021-1023. "Restitution is generally considered an equitable remedy." *Erie County Drug Task Force vs. Cunningham* (May 27, 1994), 6th Dist. No. E-93-74, 1994 W.L. 236216, p. 2. Its purpose is to restore the aggrieved party to the *status quo ante*. *Aviation Sales, Inc. vs. Select Mobile Homes* (1988), 48 Ohio App.3d 90, 94, 548 N.E.2d 307, 311. The Cuyahoga County Court of Appeals had previously explained that:

Restitution is an equitable remedy used to make an injured party whole. At the core of the law of restitution is the principal that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other . . ." Restatement (1937), Restitution, p. 1.

Colangelo vs. Cashelmara Co. (November 21, 1990), 8th Dist. No. 57581, 1990 W.L. 180653, p. 4. Conversely, compensatory damages "are, of course, the classic form of *legal relief*." *Mertens vs. Hewitt Assocs.* (1993), 508 U.S. 248, 255, 113 S. Ct. 2063, 2068, 124 L.Ed.2d 161. Restitution is properly viewed as an alternative to damages. *2044 Euclid Partners vs. Williamson* (April 10, 1986), 8th Dist. No. 49963, 1986 W.L. 4386; *Kalasunas vs. Brydle* (June 18, 1987), 8th Dist. No. 52149, 1987 W.L. 13012. In this action Plaintiffs are seeking to force the Bureau to release the additional funds that should have been paid when the permanent total disability benefits were supposedly reduced to a lump sum distribution, nothing more and

nothing less.

PROPOSITION OF LAW NO. 2: A TRIAL COURT'S DUTY TO PERFORM "RIGOROUS ANALYSIS" OF A CLASS CERTIFICATION REQUEST IS NOT SATISFIED WHEN THE COURT CERTIFIES A CLASS WITHOUT ANY HEARINGS AND WITHOUT REVIEWING ANY RECORD EVIDENCE REGARDING THE CLASS CERTIFICATION FACTORS.

PROPOSITION OF LAW NO. 3: CLASS CERTIFICATION IS NOT APPROPRIATE WHEN THE CLAIMS INVOLVE FRAUD ALLEGATIONS AND EACH PURPORTED CLASS MEMBER INDEPENDENTLY NEGOTIATED HER TRANSACTION WITH A DEFENDANT, SO THAT QUESTIONS OF FRAUD, INDUCEMENT, AND RELIANCE ARE INHERENTLY INDIVIDUALIZED.

The Bureau further posits that Judge Matia "erred" by granting class certification. Such matters are actually reviewed under an abuse of discretion standard. *Baughman v. State Farm Mut. Ins. Co.*, 88 Ohio St.3d 480, 487, 2000-Ohio-397, 727 N.E.2d 1265; *Lowe v. Sun Refining & Marketing Co.* (6th Dist. 1992), 73 Ohio App.3d 563, 568, 597 N.E.2d 1189, 1192. "A trial court which routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in a litigation of class actions." *North Shore Auto Fin., Inc. v. Block* (July 24, 2003), 8th Dist. No. 82226, 2003-Ohio-3964, 2003 W.L. 21714583, p. *3.

The Bureau's argumentation is dependent upon a mischaracterization of the nature of the claims being pursued. The Bureau would have this Court believe that the Named Plaintiff filed this action because he "decided he wanted more money" and his attorneys "hoped that class certification will afford the needed leverage to extract a generous settlement from the Bureau." *Court of Appeals Brief of Defendant-Appellants*, pp. 4-37. Once these petty insults are set aside and the actual Complaint is examined thoroughly and dispassionately, it becomes

apparent that the Bureau's disturbing pattern of dishonesty is ripe for class certification. Each of the class members was led to believe that he/she would be receiving a lump-sum payment that represented the actual present value of the Permanent Total Disability benefits that they were entitled to receive over the remainder of their lives. None of them were told that a thirty percent (30%) discount had been surreptitiously factored in and outdated mortality tables were being utilized. Since each of the class members was misled in precisely the same manner, Judge Matia's ruling was entirely appropriate.

This Court has recognized that class actions are "an invention of equity, designed to facilitate adjudication of disputes involving common issues between multiple parties in a single action." *Beder vs. Cleveland Browns, Inc.* (8th Dist. 1998), 129 Ohio App.3d 188, 199, 717 N.E.2d 716, 723. *Civ. R. 23* enhances judicial administration by eliminating duplicative litigation and promoting uniformity of decision as to persons similarly situated, without sacrificing procedural fairness. *Cope vs. Metropolitan Life Ins. Co.* (1998), 82 Ohio St.3d 426, 430, 696 N.E.2d 1001, 1004. It is well settled that class actions are particularly appropriate for challenges to a defendant's discriminatory or unconstitutional practices. *Manning vs. International Union* (6th Cir. 1972), 466 F.2d 812, 813.

With respect to the factors to be considered in determining whether a class action is appropriate, the Ohio Supreme Court has held that:

The following seven requirements must be satisfied before an action may be maintained as a class action under *Civ. R. 23*: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately

protect the interests of the class; and (7) one of the three *Civ. R. 23(B)* requirements must be met. [citations omitted].

Hamilton vs. Ohio Savings Bank (1998), 82 Ohio St.3d 67, 71, 694 N.E.2d 442, 448; see also *Blumenthal vs. Medina Supply Co.* (May 4, 2000), 8th Dist. No. 75768, 2000 W.L. 546019, p.

6. In light of the many advantages offered by class action litigation, the Court has further explained that:

***[A]ny doubts about adequate representation, potential conflicts, or class affiliation should be resolved in favor of upholding the class, subject to the trial court's authority to amend or adjust its certification order as developing circumstances demand, including the augmentation or substitution of representative parties. [citations omitted].

Baughman, 88 Ohio St.3d at 487.

Further review of the appellate court's affirmance of the trial judge's ruling is now being demanded because Plaintiffs supposedly never "proved" during a "hearing" that class certification was appropriate. No provision of law has been cited, however, requiring the elements of class certification to be demonstrated absolutely with infallible evidence. This is typically impossible as *Civ.R. 23(C)(1)* requires the Motion to be filed "as soon as practicable" in the litigation. It should be noted that the Bureau commenced this interlocutory appeal before Plaintiffs' pre-trial investigations were finished. If it turns out after discovery is completed that only a handful of PTD recipients were duped in the same manner as the Named Plaintiff, the Bureau can certainly request that Judge Matia reconsider his certification order at that time.

Baughman, 88 Ohio St.3d at 487.

CONCLUSION

For all of the forgoing reasons, this Court should decline to extend jurisdiction over these proceedings due to the absence of any unresolved issues of public and great general importance.

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