

In the
Supreme Court of Ohio

PIETRO CRISTINO, et al., : Case No. 2007-0152
: :
Plaintiffs-Appellees, : :
: : On Appeal from the
v. : : Cuyahoga County
: : Court of Appeals,
ADMINISTRATOR, OHIO BUREAU OF : : Eighth Appellate District
WORKERS' COMPENSATION, et al., : :
: : Court of Appeals Case
Defendants-Appellants. : : No. CA-06-87567
: :

**MERIT BRIEF OF APPELLANTS ADMINISTRATOR,
OHIO BUREAU OF WORKERS' COMPENSATION
AND STATE OF OHIO**

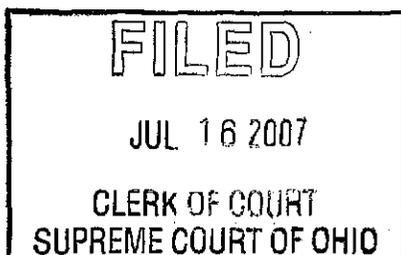
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INTRODUCTION

This case concerns the line between money damages claims against the State, which can be brought only in the Court of Claims, and equitable claims for restitution of funds wrongly collected by the State, which may be brought in the courts of common pleas. This line exists because the Court of Claims, when it was created in 1975, became the exclusive venue for claims that previously were not allowed against the State at all, such as tort claims for damages. But cases that had been allowed in the common pleas courts before 1975, such as claims for declaratory and injunctive relief against the State, remained in the common pleas courts. One type of injunctive claim that remains available in common pleas court is a restitution claim that “seeks the return of specific funds wrongfully collected or held by the state,” as such claims seek restitution as an equitable, not legal, remedy. *Santos v. BWC* (2004), 101 Ohio St. 3d 74, 2004-Ohio-28, ¶ 17. This case asks whether certain claims fall on the legal or equitable side of the line as defined in *Santos*. The answer is that the claims here are *legal* claims, as the Plaintiffs do not seek the return of funds that they once held, but seek damages for the tort of fraud, so the Court should send Plaintiff-Appellee Pietro Cristino and the named class to the Court of Claims.

This case does not require the Court to break new ground, but it instead involves a straightforward application of the *Santos* test for distinguishing equitable claims for restitution from legal claims. In *Santos*, the Court explained that restitution is an equitable remedy when it is sought to “*restore* to the plaintiff particular funds or property in the defendant’s possession,” i.e., for the “*return* of funds wrongfully collected.” *Id.* at ¶¶ 13, 17 (emphases added). Thus, a key element is that the funds sought are not only particular and identifiable, but also that the funds were once in a plaintiff’s hands, so the plaintiff wants her money *back*.

Cristino’s case falls squarely on the legal, not equitable, side of the *Santos* line, as he wants new money; he does not ask to “get back” any money he once had, as no such funds existed.

Specifically, Cristino claims that that Defendant-Appellant the Bureau of Workers' Compensation¹ committed fraud and breached a fiduciary duty to him, and to other claimants, in settling claims for permanent total disability (PTD) benefits. Cristino and the others (referred to collectively here as "Cristino") accepted the Bureau's offer to receive a one-time lump-sum payment, and to forgo their entitlement to a lifetime stream of payments. Cristino claims that the Bureau defrauded him by presenting it as a good deal, because, he says, the Bureau did not fully explain the "discount rate" used in calculating net present value, and the Bureau allegedly used outdated life expectancy tables in calculating present value. In response, the Bureau acknowledges using a discount rate, as that is standard practice in calculating a present value for future payments. But the Bureau disputes that anyone was defrauded, as the Bureau explained the process to each such claimant in individualized settlement discussions. Moreover, even if this fraud claim were valid—and it is not, but the merits are not before the Court now—it seems hard to deny that this is a classic tort claim leading to damages, and indeed, Cristino demanded a jury. But more important, the funds Cristino seeks are not funds that he ever had, so he falls on the legal side of the *Santos* line.

Cristino cannot deny that he wants new money that was never his, as he claims that his lump sum is not as large as it should be, so he wants the Bureau to pay him a larger lump sum. He alleges that he is "entitled to full restitution of the difference between the amounts represented by the Administrator to be the 'actual present value' of [his] PTC claim[] and the true 'actual present value' without discounts and based upon reliable life expectancy tables." Complaint ("Compl.") ¶ 51, Supplement ("Supp.") S-10. An increased lump sum, however, is not similar to a fee wrongly paid. Rather, it is a classic form of damages.

¹ Plaintiffs also named the State of Ohio as a Defendant separate from the Bureau (technically,

The appeals court below mistakenly labeled Cristino's claim equitable, because it misread the meaning of the term "held" in *Santos*, in this Court's reference to funds "collected or held." *Cristino v. BWC* (8th Dist.), 2006-Ohio-5921, ¶¶ 15-17, attached as Exs. 1, 2.² The appeals court reasoned that the funds that the Bureau never paid to Cristino—i.e., the difference between the lump sum he received and the larger lump sum he now seeks—were "held" or "retained" by the Bureau, so that it did not matter that Cristino had never possessed the funds. But such a reading of "held," detached from the requirement that the funds be *collected* and then held, would allow the currently limited exception of *Santos* to swallow the rule; it would allow all manner of claims against the State to be repackaged as equitable. For example, if the State refused to pay a contractor, based on a dispute about performance, the contractor's breach-of-contract claim could be recast as a demand for the unpaid funds that are being "held" by the State. Almost any demand for money could be recast as a demand for money that the State is refusing to pay, and thus "retaining." Thus, the appeals court's view cannot be right, and the Court should clarify that *Santos* is limited to cases involving funds once held by a plaintiff.

Consequently, because Cristino seeks monetary damages from the State for fraud, and not the reimbursement of any funds that he ever possessed, his claim is a legal one, and it belongs in the Court of Claims. Thus, the Court should reverse the decision below.

the Bureau's Administrator), but the addition of the State does not seem to affect any issue.

² The time-stamped copy of the appeals court's opinion, Ex. 2, does not include paragraph numbering, so the Bureau has attached a Lexis copy, with such numbering as Ex. 3.

STATEMENT OF THE CASE AND FACTS

- A. Cristino sued the Bureau in common pleas court, alleging fraud and seeking money damages and a jury trial, but he did not allege that the Bureau ever collected specified funds from him or from any class member.**

In June 2001, Cristino sued the Bureau of Workers' Compensation ("Bureau") in the Cuyahoga County Court of Common Pleas. Compl. ¶¶ 22, 32, Supp. S-5, S-7. He alleged that "the Administrator never disclosed . . . that unreliable and outdated life expectancy tables were being utilized in the calculation of the present value of his PTD claim," and, as a result, Cristino and "many other similarly situated Permanent Total Disability (PTD) recipients have been misled (*sic*) into accepting unfavorable settlements." Compl. ¶¶ 15, 19, Supp. S-4. Cristino further asserted that the "acts and omissions of the Administrator were . . . designed to cajole PTD recipients into releasing their claims in exchange for payment of substantially less than their actual present value." Compl. ¶ 16, Supp. S-4.

He titled his claims as "Breach of Fiduciary Duty" (Count I), "Fraud" (II), "Unjust Enrichment" (III), "Violation of Constitutional and Statutory Rights," (IV), "Declaratory Relief" (V), and "Injunctive Relief" (VI). In his count for fraud, Cristino alleged that the Administrator concealed "critical details" about the calculations of the "actual present value" of his PTD claim and as a result, he, and other members of the purported class, were "denied the full benefits to which they were entitled as a . . . result of these fraudulent representations and concealments." Compl. ¶¶ 45-47, Supp. S-9, S-10. However, in his claims for relief, he did not allege that he, or any other class member, had ever paid money to the Bureau. Instead, he alleged that the Bureau gave him too little money in settling. Nor did he ask, in his count for Injunctive Relief, for any reimbursement or restitution of money. Instead, in that count, he asked that the Administrator be "enjoined and restrained from misleading PTD beneficiaries;" this injunction would presumably prevent future fraud. Compl. ¶¶ 60-63, Supp. S-12, S-13. And in his count for unjust enrichment,

he claimed an entitlement to the difference between the lump sum received and the “true” lump sum that he should have received. Specifically, he alleged that he was “entitled to full restitution of the difference between the amounts represented by the Administrator to be the ‘actual present value’ of [his] PTC claim[] and the true ‘actual present value’ without discounts and based upon reliable life expectancy tables.” Compl. ¶ 51, Supp. S-10.

The prayer for relief sought money damages and declaratory relief, but also asked for a jury trial. Compl. ¶ 64, Supp. S-13. Cristino also sought class certification.

B. The case was initially dismissed for lack of subject matter jurisdiction, but it was remanded for reconsideration after this Court decided *Santos v. BWC*.

The Bureau answered the complaint, denying the allegations and asserting, among other defenses, a lack of subject matter jurisdiction, because tort claims for damages belong in the Court of Claims, and in the Bureau’s view, this case falls in that category. The trial court initially denied the Bureau’s motion to dismiss for lack of jurisdiction, but the trial court granted the motion after the Eighth District Court of Appeals released its initial decision in *Santos v. Ohio Bureau of Workers’ Compensation* (8th Dist.), 2002-Ohio-2731 (in June 2002), in which that appeals court held that the *Santos* case belonged in the Court of Claims. The trial court reconsidered the issue anew after this Court issued its own *Santos* decision in January 2004.

This Court held in *Santos* that the plaintiffs there could remain in common pleas court, because the relief they sought, although monetary, was equitable and not legal. The *Santos* plaintiffs sought reimbursement of specific, identifiable funds that had previously been in their possession; they had paid money to the Bureau under a subrogation system. Thus, the relief, in the form of reimbursement of those funds, was equitable in nature, so the case could remain in the court of common pleas. *Santos*, 101 Ohio St. 3d at 78. After deciding *Santos*, this Court

turned to this case, and it remanded the case for further proceedings “on the authority of *Santos*.” *Cristino v. Ohio Bureau of Workers’ Compensation* (2004), 101 Ohio St. 3d 97.

C. The trial court decided, after *Santos*, that Cristino’s case could also proceed in the common pleas court.

After the remand, the Bureau again moved to dismiss, arguing that the differences between the claims here and the *Santos* claims meant that this case should still be dismissed. But the trial court denied the motion on December 17, 2004. It did so in a one-sentence journal entry with no accompanying opinion or explanation. See Opinion and Journal Entry, Court of Common Pleas, Dec. 17, 2004, Appendix (“Apx.”) Ex. 4.

On September 1, 2004, while the Bureau’s motion to dismiss was pending, Cristino moved for class certification. See Motion for Class Certification. The Bureau opposed class certification, but the court disagreed and granted class certification under Civil Rule 23(B)(2).

D. The Eighth District Court of Appeals affirmed.

In a decision journalized December 12, 2006, the Eighth District affirmed both the trial court’s class certification order and its denial of the Bureau’s motion to dismiss for lack of subject matter jurisdiction. *Cristino v. BWC* (8th Dist.), 2006-Ohio-5921, ¶ 1, Ex. 2.

The appeals court cited a key paragraph from the *Santos* decision, emphasizing that a “suit that seeks the return of specific funds wrongfully collected or held by the state is brought in equity.” *Id.* at ¶ 11, quoting *Santos*, 101 Ohio St. 3d at 78. The appeals court rejected the Bureau’s argument that no “specific funds” were involved here. The court explained that, in its view, “the Bureau’s application of *Santos* would incorrectly limit R.C. 2743.03(A)(2) to only permit claims seeking awards that can ‘clearly be traced to particular funds or properly in the defendants’ possession.’” *Id.* at ¶ 17. In rejecting the Bureau’s argument that Cristino did not previously possess any such funds, i.e., that the Bureau did not collect any funds from Cristino,

the court said *Santos* referred to “specific funds collected *or held* by the State” (emphasis added). *Id.* at ¶ 15. The court said the Bureau, by allegedly underpaying Cristino, had *retained* the money saved: “The funds the Bureau ‘saved’ through its actions are still being ‘retained’ by the Bureau.” *Id.* Thus, the appeals court affirmed that the case could proceed in the common pleas court, and it also affirmed the class certification.

The Bureau appealed to this Court, which granted review on May 2, 2007. The Court denied review of the Bureau’s appeal regarding class certification, but the Court agreed to review the Bureau’s first Proposition of Law, which challenged the jurisdiction of the common pleas court over the case: “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.”

ARGUMENT

Proposition of Law of Defendant-Appellant Administrator, Ohio Bureau of Workers' Compensation:

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 jurisdiction resides only in the Court of Claims.

Cristino's claim belongs in the Court of Claims, not the common pleas court. His claim is not an equitable claim for restitution, as he does not seek the restoration of any specific funds that he once possessed. Instead, his claim is a textbook tort claim for fraud, and he seeks damages in the form of an increased lump sum to bring him up to the amount that he believes he should have received. This result flows naturally from the Court's explanation of legal and equitable claims in *Santos*, and indeed, it flows from the nature of the difference between law and equity, and between the Court of Claims and the common pleas courts.

The baseline rule, established by statute in the Court of Claims Act, is that the Court of Claims has exclusive jurisdiction over all civil actions against the State, based on the State's waiver of sovereign immunity in that Act. R.C. 2743.03(A)(2). That exclusive jurisdiction includes not only cases seeking monetary relief from the State, but also those seeking equitable relief, if that equitable relief is sought along with money damages. *Id.* This exclusivity serves a major purpose of the Court of Claims Act: to centralize the filing and adjudication of all claims against the State. *Friedman v. Johnson* (1985), 18 Ohio St. 3d 85, 87.

The exception to this exclusivity is that a plaintiff may sue in common pleas court if the plaintiff seeks *solely* declaratory or equitable relief, with no damages claim. *Racing Guild of Ohio, Local 304 v. State Racing Comm.* (1986), 28 Ohio St. 3d 317, 320. This exception arises because such purely equitable or declaratory claims could be brought in the common pleas courts

before the Court of Claims was created, and the Court of Claims Act concerned those claims for which the State was previously immune from suit anywhere. See *id.* at 319 (“any type of action against the state which the courts entertained prior to the Act may still be maintained outside the Court of Claims.”). This Court has stressed, however, that courts would look beyond labels to the true nature of a claim for relief. For example, a plaintiff cannot simply add a superficial declaratory claim (e.g., “declare that the State committed this tort”) to escape the Court of Claims and proceed in a common pleas court. See *Friedman*, 18 Ohio St. 3d at 88. (“to permit the court of common pleas to have jurisdiction over claims such as the one herein would contravene this purpose [of the Court of Claims] . . . any party wishing to avoid the Court of Claims . . . would simply have to attach a prayer for declaratory relief onto his request for monetary damages or injunctive relief.”).

Thus, long before *Santos*, the Court had confirmed the importance of keeping monetary claims in the Court of Claims, and it confirmed that a plaintiff’s own labels would not trump the Court’s careful examination of the true nature of a claim. As explained below, *Santos* then established a particular framework for monetary claims that fall under the category of “restitution,” and *Santos* allows *some* such claims to remain in the common pleas courts. But *Santos* set a straightforward rule for when such claims are properly termed equitable, and as also explained below, Cristino’s claims are legal, not equitable, under the *Santos* rule, because Cristino does not seek restoration of specific funds that he once possessed.

A. *Santos* classifies restitution claims as equitable only where a plaintiff seeks the return of specific funds or property that the plaintiff previously possessed.

In *Santos*, the Court established a framework for distinguishing between restitution claims that are equitable from those claims that are legal, and it held that claims are solely equitable—and thus could be brought in a common pleas court—only if the action seeks the “return of specific funds wrongfully collected or held by the State.” *Santos*, 101 Ohio St. 3d at 78. The Court reached this result by looking at broader principles of the difference between legal or equitable claims, looking to federal law and not just Ohio’s Court of Claims jurisprudence. In particular, the Court adopted the U.S. Supreme Court’s description of the difference between legal and equitable claims for restitution. “[R]estitution is available as a *legal* remedy when a plaintiff cannot ‘assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money.’” *Id.* at 77, quoting *Great-West Life & Annuity Ins. Co. v. Knudson* (2002), 534 U.S. 204, 214 (emphasis in original). In contrast with legal restitution claims, equitable claims are aimed at getting back specific property: “for restitution to lie in equity, the action must” seek to “*restore* to the plaintiff *particular* funds or property in the defendant’s possession.” *Id.* (emphasis added). This formula contains two related, yet independent points: the plaintiff must seek to *restore* funds, meaning that the plaintiff held them previously, and the funds or property must be “particular,” i.e., an identifiable amount that the defendant somehow took from that plaintiff. The *Santos* Court’s use of the term “restore” was not accidental, as it reiterated the same concept, using synonyms such as “reimbursement” or “return,” throughout the opinion. See, e.g., *id.* at ¶ 15 (referring to “reimbursement” of fees wrongly charged in another case); ¶ 17 (summarizing holding as relating to “return of specific funds”).

The Court applied the “return of specific funds” test in *Santos*, and explained that the claim there was an equitable one. There, the plaintiffs had already received settlements or judgments from other parties, and the Bureau (also a defendant there) collected those funds from the plaintiffs under a subrogation scheme that was later invalidated (after the collection, but before the *Santos* case). Not only were the plaintiffs getting their own previously-held money back, but the amounts were specifically known, as each plaintiff had paid a specific amount (individualized, but already liquidated) to the Bureau.

Similarly, the *Santos* Court explained how its “return of specific funds” test applied to another case, *Judy v. Ohio Bureau of Motor Vehicles*, that had been to this Court on a different issue, and in which the appeals court had explained the claim’s equitable nature. See *Santos* at ¶ 15, citing *Judy v. Ohio Bureau of Motor Vehicles* (2003), 100 Ohio St. 3d 122, and *Judy v. Ohio Bureau of Motor Vehicles* (6th Dist.), 2001-Ohio-2909. In *Judy*, plaintiffs were drivers who had paid certain fees to have their drivers licenses reinstated, and the State agency there was wrong in collecting those fees. Thus, the plaintiffs sought to get back money paid to the State, and for each plaintiff, the specific funds paid were listed on a spreadsheet. The case was properly viewed as equitable.

Lower courts, too, have followed the same line between cases seeking restoration of funds once held by plaintiffs, and cases in which plaintiffs sought money that they had never held, but which they claimed was rightfully theirs and should be paid to them. See, e.g., *Zelenak v. Industrial Commission* (10th Dist.), 148 Ohio App. 3d 589, 2002-Ohio-3887. In *Zelenak*, a group of claimants had already been repaid certain funds related to Temporary Total Disability compensation; the agency had recovered the money from the plaintiffs as overpayments, but then the agency gave the money back. The *Zelenak* plaintiffs wanted more money, though, to

represent the interest on the funds during the time the agency held them. The appeals court rejected the attempt to classify the interest-only claim as equitable, even though the complaint alleged unjust enrichment and sought declaratory relief. The court looked “to the nature of the relief itself, because how appellants . . . characterize or phrase their claims is not dispositive of where the action is properly commenced.” *Id.* at 593, 595. The court concluded that the claim was legal, and held that jurisdiction was proper only in the Court of Claims.

The Tenth District also rejected an attempt to repackage a claim for money as an equitable claim in *Morning View Care Center v. Ohio Dept. Job and Family Servs.* (10th Dist.), 2004-Ohio-6073. In *Morning View*, a nursing home claimed it was not paid enough in Medicaid funds. The court explained it was not a case where “the state agency wrongfully collected monies,” but instead “a situation in which Morning View may be able to show just grounds for recovering money representing the difference between the rate adjustment to which it was entitled” *Id.* at ¶ 26. Thus, the plaintiff there could not “assert right or title to possession of any particular property in the possession of” the state agency. *Id.* at ¶ 27. Consequently, the monetary relief the plaintiffs sought was legal, not equitable, and the court of common pleas did not have jurisdiction to hear the case. *Id.*

In contrast to these cases, Ohio caselaw does not appear to include any cases from this Court or lower court—other than the decision below—in which claims have been allowed to proceed in the common pleas court under the “equitable restitution” theory without showing that the funds sought were specific funds that had previously been in the plaintiffs’ control.³

³ A third category of cases are those in which mandamus is the appropriate remedy for a party to force the State to pay money, if a clear legal duty requires the State to do so. See, e.g., *Ohio Academy of Nursing Homes v. Ohio Dept. Job and Family Servs.* (2007), 114 Ohio St. 3d 14, 18. Such cases are outside the exclusive jurisdiction of the Court of Claims, but are not part of the *Santos* rule. Such mandamus cases may be brought in the common pleas courts or as original

B. Cristino does not seek the return of any specific funds that he once possessed.

The *Santos* test, applied to Cristino's claim, demonstrates that he belongs in the Court of Claims, as he does not seek the return of any specific funds that he once possessed. Instead, he seeks a larger lump sum than the lump sum that he received, with the money presumably to come from some unspecified source at the Bureau. That new sum would not only be money that he never possessed, but it also would not be specific funds, not only because he did not pay those particular funds to the Bureau, but also because the dollar amount in question is not even clear.

First, Cristino's facts starkly contrast with those in *Santos* regarding "return" of funds, as he cannot dispute that he never possessed the money that he now seeks. The difference between the lump sum that he received, and the lump sum that he wants, is new money. In other words, being allegedly underpaid by the State is simply not the same as having overpaid the State and seeking a return of the particular funds paid.

Indeed, Cristino's facts are similar to those in *Morning View*, above, in which the appeals court found a claim to be legal, not equitable. *Morning View*, 2004-Ohio-6073. In *Morning View*, the plaintiff claimed that the Medicaid payment formula required a State agency to pay the plaintiff more than the agency had paid. That is the same here, as Cristino claims that he should be paid more, not that he needs a refund of money he paid or had collected from him. His demand for the "true 'actual present value' of [his] PTD claim[]" is a legal claim for new money. See Compl. ¶ 51, Supp at S-10. Thus, Cristino fails to satisfy the *Santos* requirement that he seek return/restoration/reimbursement.

Second, Cristino independently fails the requirement that he seek the return of *particular* funds held by the Bureau. That test does not mean that the agency actually have a physical

actions in the appeals court or in this Court. Neither party has ever suggested that this case is a mandamus case, so the Bureau does not here fully explain the characteristics of such cases.

envelope or file labeled “Cristino,” with cash paper-clipped inside. As a practical matter, the agency may commingle the funds. But the test does mean that the funds may be *traced* to a particular amount of a specific payment or collection. For example, in *Judy*, the agency’s records showed all the amounts that the drivers had paid in fines, so the overpayments were listed in the computer database and could be printed on a spreadsheet. Similarly, in *Santos*, the amounts paid by each plaintiff under the subrogation scheme was readily available. In both *Judy* and *Santos*, the parties and the courts could attribute X dollars in the agency’s treasury to the wrongful collection, and the money could be fairly traced as a given plaintiff’s dollars.

Here, by contrast, Cristino cannot point to any specific funds “held” by the Bureau that originated in the Bureau’s “defrauding” him. Indeed, the sum he seeks does not even have a fixed amount, but would need to be litigated. He demands the amount that his lump sum “should have been,” or “true” present value. But even if one accepts, *arguendo*, that the Bureau’s discount calculation or its use of certain life expectancy tables was wrongful, surely no one can deny that *some* formula is needed both to calculate present value and to adjust for life expectancy. And those formulae are not set in stone in some non-debatable source. In order to show “true” value, Cristino would need to show what the real interest rate or inflation rate should be, and what the “fair” life expectancy table would look like, etc. In other words, even after establishing some right to payment, the court would need to hold some type of “damages” phase to the trial. This again establishes that Cristino’s claim is legal, not equitable.

C. Cristino's case has other hallmarks of a standard legal case, such as its tort nature and the jury demand.

Cristino's claim should be sent to the Court of Claims for all the reasons above, regarding the nature of the remedy he seeks. In addition, however, other facets of his case further demonstrate that his claim is legal, not equitable.

First, in addition to seeking a legal remedy—damages, not restoration of funds—Cristino has filed a *legal* cause of action—fraud—to lead to that remedy. Fraud is, of course, a tort. Cristino's complaint alleged claims for “Breach of Fiduciary Duty” (Count I), “Fraud” (II), “Violation of Constitutional and Statutory Rights (Count III), “Declaratory Relief” (Count IV), and “Injunctive Relief (Count V). See Compl., Supp. S-1-S-10. The latter claims are both types of relief, and his “constitutional and statutory” claims are built on the premise that the Bureau used dishonest, i.e., fraudulent, formulae. And as noted above, simply characterizing a claim as equitable does not make it so; a reviewing court must analyze “both the basis for the plaintiff's claims and the nature of the underlying remedies sought.” *Santos*, 2004-Ohio-28, ¶ 13, quoting *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 214. The case boils down to fraud. And in any case, even if his complaint includes a mix of legal and equitable claims, such a case belongs in the Court of Claims. Only a *purely* equitable claim belongs in common pleas court, *Racing Guild of Ohio, Local 304*, 28 Ohio St. 3d at 320, and a tort claim undercuts that.

Second, not only does the nature of Cristino's claim betray its legal nature, but so, too, does Cristino's choice to invoke procedural steps that are appropriate only for legal claims. For example, Cristino demanded a jury, but that does not mesh with a purely equitable claim.

Finally, the nature of these claims shows that any future proceedings in the trial court would proceed like a legal trial, not a hearing for equitable relief. To start with, a claim for fraud means that even “liability” is individualized, as the Bureau had separate settlement talks with

every claimant. Any representations that the Bureau made would need to be separately evaluated for possible fraud. Further, each claimant's reliance, or lack thereof, would be an issue. Then, as to the amount owed, the "true" or "fair" discount rate would need to be established, as well as the "true" or "fair" life expectancy tables. As noted above, those figures are debatable, and thus litigable. Such litigation stands in stark contrast to the procedure in both *Santos* and *Judy*, in which the dollar amounts could be quickly ascertained once the duty-to-pay was established; indeed, the amounts were known long in advance.

All this confirms that Cristino's claim is legal, not equitable.

D. The appeals court's expansion of *Santos*, which would include any cases involving unspecified funds "held" by the State, but never possessed by a plaintiff, is unworkable.

As explained above, Cristino's claim cannot be classified as "equitable" under a straightforward application of the *Santos* formula regarding suits for the "return of specific funds wrongfully collected." The appeals court reached the result it did—finding Cristino's claim equitable—not by finding that he indeed sought return of specific funds, but by misreading *Santos* to eliminate both the "return" aspect and the "specific funds" aspect. The court was wrong to do so, as its expansive rewriting of the test would allow undoubtedly legal cases to evade the Court of Claims and be heard in common pleas courts.

First, the appeals court's view seems to have no stopping point, and that is perhaps the strongest evidence that its view cannot be what *Santos* meant. If this Court were to follow the appeals court and alter *Santos* to weaken or eliminate both the "return" aspect and the "specific funds" aspect, the exception would swallow the rule, and many cases that belong in the Court of Claims could be repackaged to proceed in the common pleas courts instead. For example, if the State refused to pay a contractor in full, citing shoddy or incomplete performance, such a case seems plainly a breach-of-contract case, as the contractor would sue over the breach of promise to pay. But under the appeals court's view of *Santos*, such a claim could be characterized as an equitable demand for the State to release the funds that it is "retaining" rather than paying the plaintiff contractor. Cristino has not yet offered any meaningful distinction between that scenario and his—underpayment of an obligation to pay—and that is yet another reason to reject his and the appeals court's view, and to classify Cristino's claim as legal, not equitable.

Second, the appeals court's rejection of the "specific funds" requirement demonstrates a sharp contrast with the plain language of *Santos*. The appeals court asserted that "we find the Bureau's application of *Santos* would incorrectly limit R.C. 2743.03(A)(2) to only permit claims

seeking awards that can ‘clearly be traced to particular funds or property in the defendants’ possession.’ There is nothing in *Santos* to support the Bureau’s interpretation.” *Cristino* at ¶ 17. That statement is simply puzzling, as *Santos* continually used the phrase “specific funds,” and the words “particular” and “specific” do not seem to have a meaningful distinction. Thus, contrary to the appeals court’s statement that “nothing supports” the Bureau’s view, the reverse is true: nothing supports the appeals court’s view.

Finally, the appeals court’s rejection of the return/restore/reimburse concept from *Santos* is equally mistaken. The appeals court focused on this Court’s use of the phrase “funds wrongfully collected or held,” and the term “retention,” *Santos* at ¶ 17, and it said that the funds *Cristino* seeks—funds he never had, but would like to have—were being “held” or “retained.” This argument suffers at least two major flaws. First, the Court in *Santos* repeatedly used the terms return/restore/reimburse, and it never used the term “held” or “retention,” without joining it to the collection concept. Second, the appeals court’s approach does not seem to have any limit, as all sorts of scenarios involve a defendant’s refusal to pay extra money, yet it seems hard to call *all* such claims equitable.

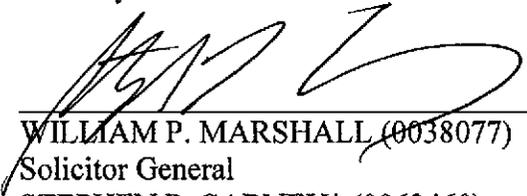
In sum, the appeals court’s reading of *Santos* is, as a practical matter, unworkable, and as a doctrinal matter, inconsistent with what this Court said in *Santos*. And without that mistaken reading of *Santos*, a straightforward application of the true *Santos* standard means that *Cristino*’s claim belongs in the Court of Claims.

CONCLUSION

For the above reasons, the Court should reverse the judgment below and remand the case to the trial court with instructions to dismiss the case for lack of subject matter jurisdiction.

Respectfully submitted,

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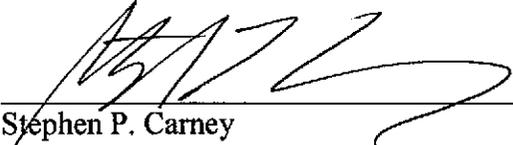
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I certify that a copy of the foregoing Merit Brief of Appellants Administrator, Ohio Bureau of Workers' Compensation and State of Ohio was served by U.S. mail this 16th day of July, 2007, upon the following counsel:

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In the
Supreme Court of Ohio

07-0152

PIETRO CRISTINO, *et al.*,

Case No. 2007-

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the
Cuyahoga County
Court of Appeals,
Eighth Appellate District

Court of Appeals Case
No. CA-06-87567

NOTICE OF APPEAL OF
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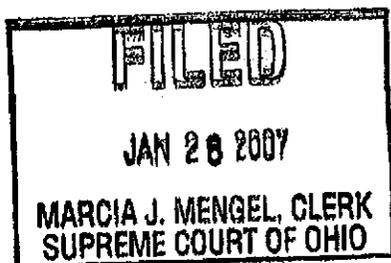
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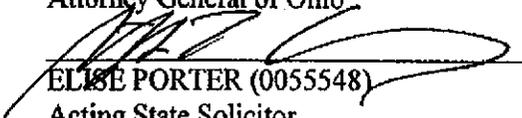
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**NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS, ADMINISTRATOR,
OHIO BUREAU OF WORKERS' COMPENSATION AND STATE OF OHIO**

Defendants-Appellants, Administrator, Ohio Bureau of Workers' Compensation and State of Ohio give notice of their discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II(A)(3), from a Judgment Entry of the Cuyahoga County Court of Appeals, Eighth Appellate District, journalized in Case No. 87567 and filed on December 12, 2006. Reasons for this discretionary appeal, including the great public interest involved in this case, are fully set forth in the accompanying Memorandum in Support of Jurisdiction.

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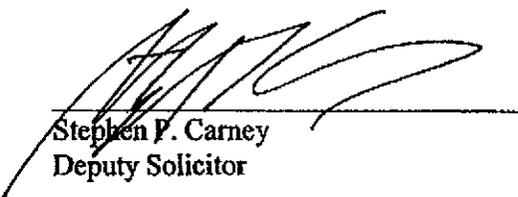
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Defendants-Appellants, Administrator, Ohio Bureau of Workers' Compensation and State of Ohio was served by U.S. mail this 26th day of January, 2007, upon the following counsel:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87567

PIETRO CRISTINO, ET AL.

PLAINTIFFS-APPELLEES

vs.

**ADMINISTRATOR, OHIO BUREAU OF
WORKERS' COMPENSATION, ET AL.**

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-442638

BEFORE: Calabrese, J., Dyke, A.J., and Kilbane, J.

RELEASED: November 9, 2006

JOURNALIZED: DEC 12 2006 CA06087567 42814084


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EXHIBIT
2

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FILED AND JOURNALIZED
PER APP. R. 22(E)

DEC 12 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

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GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

ANTHONY O. CALABRESE, JR., J.:

Defendants-appellants, Administrator, Ohio Bureau of Workers' Compensation and the State of Ohio (collectively "the Bureau"), appeal the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

I.

This case involves workers' compensation permanent total disability (PTD) payments and a class certification issue. Appellee Pietro Cristino ("Cristino") is the lead plaintiff. He took a reduced onetime lump-sum PTD payment of approximately \$115,000 in lieu of smaller PTD payments over his lifetime. According to the case and the facts, plaintiffs-appellees, Pietro Cristino, et al. ("appellees"), filed their class action complaint for equitable, declaratory and injunctive relief in the Cuyahoga County Court of Common Pleas on June 22, 2001. Appellees alleged that the Bureau had been misleading PTD recipients in an effort to terminate the continued payment of benefits through lump-sum distributions. Appellees' claim only sought injunctive, equitable and declaratory relief against the Bureau. No monetary damages were requested in the complaint.

The Bureau served its answer on July 31, 2001. They later filed a motion to dismiss, and appellees filed their memorandum in opposition on December 20,

2001. The Bureau's motion to dismiss was denied on January 2, 2002. On June 6, 2002, this court released its ruling in *Santos v. Administrator, Bureau of Workers' Compensation*, Cuyahoga App. No. 80353, 2002-Ohio-2731, in which this court held that an action seeking strictly injunctive and equitable relief was limited to the exclusive jurisdiction of the Ohio Court of Claims. Appellees' counsel advised the trial judge that this ruling required a dismissal of the instant proceedings. An order was, therefore, issued on July 22, 2002 reconsidering and granting the Bureau's motion to dismiss.

Appellees then filed a notice of appeal on August 5, 2002. On March 3, 2003, this court issued its opinion affirming the dismissal solely on the basis of the precedent that had been established in *Santos. Cristino v. Ohio Bureau of Workers' Comp.*, Cuyahoga App. No. 80619, 2003-Ohio-766. However, on April 17, 2003, appellees appealed to the Ohio Supreme Court, and this court was overruled. *Santos v. Ohio Bureau of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28. Accordingly, this court was reversed, and the case was remanded back to the trial court for further proceedings.

On July 23, 2004, the Bureau submitted its motion to dismiss or, alternatively, to transfer based on improper venue, and appellees submitted their memorandum in opposition. The trial court overruled the Bureau's motion on December 17, 2004. Appellees filed a motion for class certification on

September 1, 2004, and the Bureau filed its brief in opposition on October 29, 2004. The trial court granted appellees' motion and certified two subclasses in its January 3, 2006 entry. The Bureau appealed on January 3, 2006. The Bureau now appeals the December 6, 2005 entry granting class certification and the December 17, 2004 entry denying defendants' motion to dismiss, or alternatively, to transfer.

II.

Appellees' first assignment of error states the following: "The trial court erred by denying the Bureau's motion to dismiss based on subject matter jurisdiction."

Appellees' second assignment of error states the following: "The trial court erred by denying the Bureau's motion to transfer based upon improper venue."

Appellees' third assignment of error states the following: "The trial court erred by certifying this case as a class action pursuant to Civ.R. 23 because plaintiffs failed to satisfy all of the prerequisites for certification."

III.

The Bureau argues that the trial court erred by denying the Bureau's motion to dismiss based upon the authority of *Santos v. Ohio Bureau of Workers' Compensation*, supra. The Bureau argues that the trial court misapplied the Supreme Court's decision in *Santos* and ignored Ohio case law regarding the

jurisdiction of the Court of Claims. They further argue that appellees “seek money damages, disguised as equitable relief, thus triggering the exclusive jurisdiction of the Court of Claims.”¹

We begin our analysis by restating the holding in *Santos*. In *Santos*, the Ohio Supreme Court held 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). See, *Santos*, 101 Ohio St.3d 74, syllabus.

The Supreme Court stated the following in *Santos*:

“Accordingly, any collection or retention of moneys collected under the statute by the BWC was wrongful. The action seeking restitution by Santos and his fellow class members is not a civil suit for money damages but rather an action to correct the unjust enrichment of the BWC. 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).”

Therefore, any wrongful collection or retention of monies by the state is actionable in a common pleas court.

¹See Bureau of Workers’ Compensation’s appellate brief, filed March 10, 2006, p. 5.

An action for injunctive relief may be brought against the state as defined in R.C. 2743.01(A) in a court of common pleas. *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317.

The main issue or allegation made by appellees in their complaint is that the Bureau mislead hundreds of PTD recipients into accepting lump-sum payments that were worth substantially less than their actual value. Appellees allege that the Bureau led PTD recipients to believe that they would be receiving the actual "present value" of their claim. However, the government's agents failed to disclose that a 30 percent discount had been factored into the discounts, thereby causing PTD recipients to incorrectly believe that the lump sum they were receiving was the mathematical equivalent of the benefits they would have received over their lifetimes.

The funds the Bureau "saved" through its actions are still being "retained" by the Bureau. Accordingly, appellees are allowed to seek disgorgement through the principles of equity. The case at bar does not involve one party holding another party liable for damages caused through some tortuous act or omission.

The Bureau argues that the trial court should have dismissed the case at bar on the authority of *Santos*, supra. The Bureau argues that this case is distinguishable from *Santos* "because it involves a claim of a wholly different nature, i.e., that the Bureau unfairly failed to pay large enough settlements to

plaintiffs and, therefore, owes additional money to plaintiffs – a legal claim for money damages.”

We find that the Bureau’s application of *Santos* would incorrectly limit R.C. 2743.03(A)(2) to only permit claims seeking awards that can “clearly be traced to particular funds or properly in the defendants’ possession.”² There is nothing in *Santos* to support the Bureau’s interpretation.

"Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' D. Dobbs, Handbook on the Law of Remedies 135 (1973). Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy. Id. ***

"In the present case, Maryland is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be, that Maryland will suffer or has suffered by virtue of the withholding of those funds. If the program in this case involved in-kind benefits this would be altogether evident. The fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the states (and then, in the form of services, to program beneficiaries) cannot transform the nature of the relief sought – specific relief, not relief in the form of damages. * (Citation omitted; emphasis sic.) *Bowen, supra*, 487 U.S. at 895, 108 S.Ct. at 2732-2733, 101 L.Ed.2d at 764-765.**

"We find this distinction applicable to this suit. *The reimbursement of monies withheld pursuant to an invalid*

²See the Bureau’s appellant brief, p. 8.

administrative rule is equitable relief, not money damages, and is consequently not barred by sovereign immunity.”

(Emphasis added.)

Ohio Hosp. Assn. v. Ohio Dept. of Human Services (1991), 62 Ohio St.3d 97, 105.

The evidence in the record demonstrates that the trial court did not err in denying the Bureau's motion to dismiss. We find the trial court's actions to be proper.

Accordingly, the Bureau's first assignment of error is overruled.

The Bureau argues in its second assignment of error that the trial court erred by denying the Bureau's motion to transfer based upon improper venue. However, the Bureau's second assignment of error is not a final appealable order.

An order upon a motion granting or denying venue is interlocutory and is not subject to immediate appellate review in Ohio. *State ex rel. Allied Chemical Co. v. Aurelius* (1984), 16 Ohio App.3d 69; *Timson v. Young* (1980), 70 Ohio App.2d 239.

Accordingly, appellants' second assignment of error is moot.

The Bureau argues in its third assignment of error that the lower court erred by certifying this case as a class action pursuant to Civ.R. 23.

At the outset, we are mindful that a trial judge is given broad discretion when deciding whether to certify a class action. *In re Consolidated Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, p. 5, citing *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, 31 Ohio B. 398, 509 N.E.2d 1249, syllabus; *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 312-313, 15 Ohio B. 439, 473 N.E.2d 822. "Absent a showing of abuse of discretion; a trial court's determination as to class certification will not be disturbed." *Id.*

The appropriateness of applying the abuse-of-discretion standard in reviewing class action determinations is grounded not in credibility assessment, but in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket. *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 70, 1998-Ohio-365, 694 N.E.2d 442, citing *Marks*, supra; *In re Nlo, Inc.* (C.A.6, 1993), 5 F.3d 154, 157. Nevertheless, the trial court's discretion is not unlimited and must be bound by and exercised within the framework of Civ.R. 23. Thus, "the trial court is required to carefully apply the class action requirements and conduct a vigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied." *Holznagel v. Charter One Bank* (Dec. 14, 2000), Cuyahoga App. No. 76822.

Seven requirements must be satisfied before a court may certify a case as a class action pursuant to 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 impractical; 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. Civ.R. 23(A) and (B); *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, 96-98, 521 N.E.2d 1091.

Appellants argue that appellees failed to satisfy all of the prerequisites for class certification. As previously stated, certification in this case involved two separate classes. Class A consists of all "Ohio residents who were not represented by legal counsel at the time that the administrator's agents and/or employees contacted and convinced them to settle their PTD claims for less than their actual present value ***."³ Class B is comprised of those PTD recipients who were represented by legal counsel.⁴

"The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member."

³Complaint, ¶ 1.

⁴Complaint, ¶ 30.

Hamilton, supra, 82 Ohio St.3d at 72, citing 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure (2 Ed. 1986), 120-121, Section 1760. Thus, the class definition must be precise enough "to permit identification within a reasonable effort." *Warner*, supra, 36 Ohio St.3d at 96.

Identifying the members of Class A and B for purposes of this lawsuit is not onerous. The Bureau can simply reference the records of the PTD beneficiaries who have received lump-sum payments. Determining which of the beneficiaries received less than the actual present values based upon accepted mortality tables is a matter of basic mathematics and time. Accordingly, the class members in the case at bar are identifiable and unambiguously defined.

The Bureau argues that Cristino's claims are not typical of the claims of the class. Civ.R. 23(A) provides that "one or more members of a class may sue or be sued as representative parties on behalf of all only if *** 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class."

The requirement of typicality serves the purpose of protecting absent class members and promotes the economy of class action by ensuring that the interests of the named plaintiffs are substantially aligned with those of the class.

Baughman v. State Farm Mut. Auto Ins. Co., 88 Ohio St.3d 480, 2000-Ohio-397,

727 N.E.2d 1265, citing 5 Moore's Federal Practice (3 Ed. 1977), 23-92 to 23-93, Section 23.24[1].

"Typicality" does not mean, however, that the class representative's claims must be identical to those of all class members. Rather, a representative's claim "is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims." *Baughman*, supra, 88 Ohio St.3d at 485, quoting 1 Newberg on Class Actions (3 Ed. 1992), 3-74 to 3-77, Section 3.13.

Here, it is apparent that appellees' claims arise from the same conduct, and are based on the same legal theories, that underlie the claims of other class members. Similar to Cristino's claims, all of the injured workers are seeking disgorgement of funds owed to them through the same equitable principles. They are also requesting a declaration of their rights and an injunction against the continued retention of the funds that should have been paid to them. None of them possess a theory of recovery, or is subject to a defense, that is

inapplicable to the others. Accordingly, the class certification requirement of typicality is satisfied.

A class representative is considered adequate as long as its interest is not antagonistic to the interest of other class members. *Hamilton*, supra, 82 Ohio St.3d at 77-78. Cristino's interest is not antagonistic to the interests of the other class members. He possesses a substantial stake in the outcome of the litigation. Similar to the other proposed class members, Cristino's lump-sum PTD payment was discounted by 30 percent.

Once it has been ascertained that the threshold requirements of Civ.R. 23(A) have been met, it is necessary to determine if the class action can be maintained under one of the provisions of Civ.R. 23(B).

Civ.R. 23(B) provides:

“(B) Class actions maintainable. – An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the

adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *"**

A class action can be maintained only if one of the three situations described in Civ.R. 23(B) exist. We find all three to be present; however, we find Civ.R. 23(B)(2) to be the most applicable to the case at bar. The Bureau has treated each of the class members the same. None of them were provided with a lump-sum distribution of their PTD benefits that approximated their actual present value.

The trial court specifically noted in its June 23, 2004 order that discovery was ongoing. Before appellees could obtain all of the necessary discovery information from the Bureau, this interlocutory appeal was filed. Accordingly, appellees were unable to obtain all of the evidence they needed to demonstrate the appropriateness of class certification in this instance.

In addition, we find that Civ.R. 23(B)(3) also provides support for certifying a class action in this case. Resolving the numerous class member

claims against the Bureau in one single proceeding is far more expedient and efficient than compelling each individual claimant to pursue his or her own individual case. It would be extremely cumbersome and taxing on our court system to follow such an approach.

Moreover, the legal standards are the same for each class member with respect to their requests for equitable, injunctive and declaratory relief. The fact patterns are for the most part identical, i.e., Ohio residents, approved for PTD benefits, receiving substantially less than actual present value in a lump-sum distribution. Therefore, the class action certification in the case at bar satisfies both Civ.R. 23(B)(2) and (B)(3).

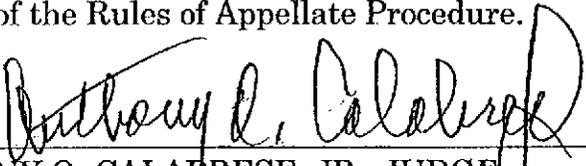
Accordingly, appellants' third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



ANTHONY O. CALABRESE, JR., JUDGE

MARY EILEEN KILBANE, J., CONCURS;
ANN DYKE, A. J., CONCURS IN PART AND DISSENTS IN PART
WITH SEPARATE OPINION

ANN DYKE, A.J., CONCURRING IN PART AND DISSENTING IN PART:

I concur with the majority as to appellants' second and third assignments of error. I, however, dissent with the majority's decision as to appellants' first assignment of error. I would find that the trial court's denial of the Bureau's motion to dismiss is not a final, appealable order. *Polikoff v. Adam* (1993), 67 Ohio St.3d 100, 103, 616 N.E.2d 213. ("Generally, an order denying a motion to dismiss is not a final order.")

LEXSEE 2006 OHIO APP LEXIS 5870

**PIETRO CRISTINO, ET AL., PLAINTIFFS-APPELLEES vs. ADMINISTRATOR,
OHIO BUREAU OF WORKERS' COMPENSATION, ET AL., DEFENDANTS-
APPELLANTS**

No. 87567

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYA-
HOGA COUNTY**

2006 Ohio 5921; 2006 Ohio App. LEXIS 5870

November 9, 2006, Released

SUBSEQUENT HISTORY: Discretionary appeal allowed by *Cristino v. Ohio Bureau of Workers' Comp.*, 2007 Ohio 1986, 2007 Ohio LEXIS 1038 (Ohio, May 2, 2007)

PRIOR HISTORY: [**1] Civil Appeal from the Cuyahoga County Court of Common Pleas. Case No. CV-442638.

Cristino v. Adm'r, Ohio Bureau of Workers' Comp., 2003 Ohio 1002, 2003 Ohio App. LEXIS 965 (Ohio Ct. App., Cuyahoga County, Mar. 4, 2003)

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, the Administrator of the Ohio Bureau of Workers' Compensation and the State of Ohio, sought review of a decision from the Cuyahoga County Court of Common Pleas (Ohio), which granted appellee lump-sum permanent total disability (PTD) payment recipient's request to certify the matter as a class action and which denied the Bureau's motion to dismiss or transfer venue. The action arose out of the lump-sum nature of the payment.

OVERVIEW: The recipient took a reduced one-time lump-sum PTD payment in lieu of smaller PTD payments over his lifetime. He filed a class action for equitable, declaratory, and injunctive relief, alleging that the Bureau's efforts to terminate the continued PTD payments were misleading. An initial dismissal of the action was reversed on appeal. Thereafter, the trial court denied the Bureau's motion to dismiss or alternatively, to transfer the matter due to improper venue, and it granted the recipient's motion to certify a class action. On appeal, the

court held that the trial court properly found that the relief sought was equitable, even if reimbursement of the amounts withheld in the payments was eventually paid to the recipients. As it was not money damages, the matter was properly within the trial court's jurisdiction under *R.C. § 2743.03(A)(2)*. The issue raised regarding the venue determination was not a final appealable order. The requirements for class certification under *Civ. R. 23* were met where the class members were identifiable, the recipient's claims were typical of other class members and he adequately represented their interests, and *Rule 23(B)(2)* and (3) were met.

OUTCOME: The court affirmed the decision of the trial court.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Jurisdiction

Governments > State & Territorial Governments > Claims By & Against

[HN1] In Santos, the Ohio Supreme Court held 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)*.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Jurisdiction

Civil Procedure > Remedies > Injunctions > General Overview

EXHIBIT

3

Governments > State & Territorial Governments > Claims By & Against

[HN2] Any wrongful collection or retention of monies by the State is actionable in a common pleas court. An action for injunctive relief may be brought against the State as defined in *R.C. § 2743.01(A)* in a court of common pleas.

Civil Procedure > Remedies > Damages > General Overview

Governments > State & Territorial Governments > Claims By & Against

[HN3] Damages are given to a plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but an attempt to give the plaintiff the very thing to which he was entitled. Thus, while in many instances an award of money is an award of damages, occasionally a money award is also a specie remedy. The reimbursement of monies withheld pursuant to an invalid administrative rule is equitable relief, not money damages, and is consequently not barred by sovereign immunity.

Civil Procedure > Venue > Motions to Transfer > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

[HN4] An order upon a motion granting or denying venue is interlocutory and is not subject to immediate appellate review in Ohio.

Civil Procedure > Class Actions > Appellate Review

Civil Procedure > Class Actions > Judicial Discretion

Civil Procedure > Class Actions > Prerequisites > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN5] A trial judge is given broad discretion when deciding whether to certify a class action. Absent a showing of abuse of discretion, a trial court's determination as to class certification will not be disturbed. The appropriateness of applying the abuse-of-discretion standard in reviewing class action determinations is grounded not in credibility assessment, but in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket. Nevertheless, the trial court's discretion is not unlimited and must be bound by and exercised within the framework of *Civ. R. 23*. Thus, the trial court is required to carefully apply the class action requirements and conduct a vigorous analysis into whether the prerequisites of *Rule 23* have been satisfied.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN6] Seven requirements must be satisfied before a court may certify a case as a class action pursuant to *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 impractical; 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. *Rule 23(A)* and *(B)*.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN7] The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for a court to determine whether a particular individual is a member. Thus, the class definition must be precise enough to permit identification within a reasonable effort.

Civil Procedure > Class Actions > Prerequisites > Typicality

[HN8] *Civ. R. 23(A)(3)* provides that one or more members of a class may sue or be sued as representative parties on behalf of all only if the claims or defenses of the representative parties are typical of the claims or defenses of the class. The requirement of typicality serves the purpose of protecting absent class members and promotes the economy of class action by ensuring that the interests of the named plaintiffs are substantially aligned with those of the class.

Civil Procedure > Class Actions > Prerequisites > Typicality

[HN9] For purposes of class action certification under *Civ. R. 23*, "typicality" does not mean that a class representative's claims must be identical to those of all class members. Rather, a representative's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality require-

ment is usually met irrespective of varying fact patterns which underlie individual claims.

Civil Procedure > Class Actions > Prerequisites > Adequacy of Representation

[HN10] A class representative is considered adequate as long as its interest is not antagonistic to the interest of other class members.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN11] Once it has been ascertained that the threshold requirements of *Civ. R. 23(A)* have been met for purposes of class certification, it is necessary to determine if the class action can be maintained under one of the provisions of *Rule 23(B)*.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN12] See *Civ. R. 23(B)*.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN13] A class action can be maintained only if one of the three situations described in *Civ. R. 23(B)* exist.

COUNSEL: For Ohio Bureau of Workers' Compensation APPELLANTS: Jim Petro, Attorney General, Mark E. Mastrangelo, Assistant, Jeffrey B. Duber, Assistant, Stuart A. Saferin, Assistant, Cleveland, Ohio.

For Jim Petro, Attorney General APPELLANTS: Michael C. Cohan, Jeffrey W. Gallup, Alexander E. Goetsch, Ronald D. Holman II, Cavitch, Familo, Durkin & Frutkin, Cleveland, Ohio.

FOR APPELLEES: W. Craig Bashein, Bashein & Bashein, Cleveland, Ohio; Paul W. Flowers, Paul W. Flowers Co., LPA, Cleveland, Ohio; Frank Gallucci III, Plevin & Gallucci, Cleveland, Ohio.

JUDGES: BEFORE: Calabrese, J., Dyke, A.J., and Kilbane, J. ANTHONY O. CALABRESE, JR., JUDGE. MARY EILEEN KILBANE, J., CONCURS; ANN DYKE, A. J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE OPINION.

OPINION BY: ANTHONY O. CALABRESE, JR.

OPINION

JOURNAL ENTRY AND OPINION

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, *22(D)* and *26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of **[**2]** the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S.Ct. Prac.R. II, Section 2(A)(1)*.

ANTHONY O. CALABRESE, JR., J.:

[*P1] Defendants-appellants, Administrator, Ohio Bureau of Workers' Compensation and the State of Ohio (collectively "the Bureau"), appeal the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

1

[*P2] This case involves workers' compensation permanent total disability (PTD) payments and a class certification issue. Appellee Pietro Cristino ("Cristino") is the lead plaintiff. He took a reduced onetime lump-sum PTD payment of approximately \$ 115,000 in lieu of smaller PTD payments over his lifetime. According to the case and the facts, plaintiffs-appellees, Pietro Cristino, **[**3]** et al. ("appellees"), filed their class action complaint for equitable, declaratory and injunctive relief in the Cuyahoga County Court of Common Pleas on June 22, 2001. Appellees alleged that the Bureau had been misleading PTD recipients in an effort to terminate the continued payment of benefits through lump-sum distributions. Appellees' claim only sought injunctive, equitable and declaratory relief against the Bureau. No monetary damages were requested in the complaint.

[*P3] The Bureau served its answer on July 31, 2001. They later filed a motion to dismiss, and appellees filed their memorandum in opposition on December 20, 2001. The Bureau's motion to dismiss was denied on January 2, 2002. On June 6, 2002, this court released its ruling in *Santos v. Administrator, Bureau of Workers' Compensation, Cuyahoga App. No. 80353, 2002 Ohio 2731*, in which this court held that an action seeking strictly injunctive and equitable relief was limited to the exclusive jurisdiction of the Ohio Court of Claims. Appellees' counsel advised the trial judge that this ruling required a dismissal of the instant proceedings. An order was, therefore, issued on July 22, 2002 reconsidering **[**4]** and granting the Bureau's motion to dismiss.

[*P4] Appellees then filed a notice of appeal on August 5, 2002. On March 3, 2003, this court issued its opinion affirming the dismissal solely on the basis of the precedent that had been established in *Santos, Cristino v.*

Ohio Bureau of Workers' Comp., Cuyahoga App. No. 80619, 2003 Ohio 766. However, on April 17, 2003, appellees appealed to the Ohio Supreme Court, and this court was overruled. *Santos v. Ohio Bureau of Workers' Comp., 101 Ohio St.3d 74, 2004 Ohio 28, 801 N.E.2d 441.* Accordingly, this court was reversed, and the case was remanded back to the trial court for further proceedings.

[*P5] On July 23, 2004, the Bureau submitted its motion to dismiss or, alternatively, to transfer based on improper venue, and appellees submitted their memorandum in opposition. The trial court overruled the Bureau's motion on December 17, 2004. Appellees filed a motion for class certification on September 1, 2004, and the Bureau filed its brief in opposition on October 29, 2004. The trial court granted appellees' motion and certified two subclasses in its January 3, 2006 entry. The Bureau appealed on January 3, 2006. The [**5] Bureau now appeals the December 6, 2005 entry granting class certification and the December 17, 2004 entry denying defendants' motion to dismiss, or alternatively, to transfer.

II

[*P6] Appellees' first assignment of error states the following: "The trial court erred by denying the Bureau's motion to dismiss based on subject matter jurisdiction."

[*P7] Appellees' second assignment of error states the following: "The trial court erred by denying the Bureau's motion to transfer based upon improper venue."

[*P8] Appellees' third assignment of error states the following: "The trial court erred by certifying this case as a class action pursuant to *Civ.R. 23* because plaintiffs failed to satisfy all of the prerequisites for certification."

III

[*P9] The Bureau argues that the trial court erred by denying the Bureau's motion to dismiss based upon the authority of *Santos v. Ohio Bureau of Workers' Compensation, supra*. The Bureau argues that the trial court misapplied the Supreme Court's decision in *Santos* and ignored Ohio case law regarding the jurisdiction of the Court of Claims. They further argue that appellees "seek money damages, [**6] disguised as equitable relief, thus triggering the exclusive jurisdiction of the Court of Claims."¹

¹ See Bureau of Workers' Compensation's appellate brief, filed March 10, 2006, p. 5.

[*P10] We begin our analysis by restating the holding in *Santos*. [HN1] In *Santos*, the Ohio Supreme Court held 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)*. See, *Santos, 101 Ohio St.3d 74, 2004 Ohio 28, 801 N.E.2d 441, syllabus*.

[*P11] The Supreme Court stated the following in *Santos*:

"Accordingly, any collection or retention of moneys collected under the statute by the BWC was wrongful. The action seeking restitution by Santos and his fellow class members is not a civil suit for money damages but rather an action to correct the unjust enrichment of the BWC. A suit that seeks the return of specific funds wrongfully [**7] 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)*."

[*P12] Therefore, [HN2] any wrongful collection or retention of monies by the state is actionable in a common pleas court.

[*P13] An action for injunctive relief may be brought against the state as defined in *R.C. 2743.01(A)* in a court of common pleas. *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm. (1986), 28 Ohio St.3d 317, 28 Ohio B. 386, 503 N.E.2d 1025.*

[*P14] The main issue or allegation made by appellees in their complaint is that the Bureau misled hundreds of PTD recipients into accepting lump-sum payments that were worth substantially less than their actual value. Appellees allege that the Bureau led PTD recipients to believe that they would be receiving the actual "present value" of their claim. However, the government's agents failed to disclose that a 30 percent discount had been factored into the discounts, thereby causing PTD recipients to incorrectly believe that the lump sum they were receiving was the mathematical equivalent of the [**8] benefits they would have received over their lifetimes.

[*P15] The funds the Bureau "saved" through its actions are still being "retained" by the Bureau. Accordingly, appellees are allowed to seek disgorgement through the principles of equity. The case at bar does not involve one party holding another party liable for damages caused through some tortuous act or omission.

[*P16] The Bureau argues that the trial court should have dismissed the case at bar on the authority of *Santos, supra*. The Bureau argues that this case is distin-

guishable from *Santos* "because it involves a claim of a wholly different nature, i.e., that the Bureau unfairly failed to pay large enough settlements to plaintiffs and, therefore, owes additional money to plaintiffs -- a legal claim for money damages."

[*P17] We find that the Bureau's application of *Santos* would incorrectly limit R.C. 2743.03(A)(2) to only permit claims seeking awards that can "clearly be traced to particular funds or properly in the defendants' possession." ² There is nothing in *Santos* to support the Bureau's interpretation.

[HN3] "Damages are given to the plaintiff [**9] to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' D. Dobbs, Handbook on the Law of Remedies 135 (1973). Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy. Id. ***

"In the present case, Maryland is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be, that Maryland will suffer or has suffered by virtue of the withholding of those funds. If the program in this case involved in-kind benefits this would be altogether evident. The fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the states (and then, in the form of services, to program beneficiaries) cannot transform the nature of the relief sought -- specific relief, not relief in the form of damages. *** (Citation omitted; emphasis sic.) *Bowen, supra*, 487 U.S. at 895, 108 S.Ct. at 2732-2733, 101 L.Ed.2d at 764-765.

"We find this distinction applicable to this suit. *The reimbursement [**10] of monies withheld pursuant to an invalid administrative rule is equitable relief, not money damages, and is consequently not barred by sovereign immunity.*"

(Emphasis added.) *Ohio Hosp. Assn. v. Ohio Dept. of Human Services* (1991), 62 Ohio St.3d 97, 105, 579 N.E.2d 695.

2 See the Bureau's appellant brief, p. 8.

[*P18] The evidence in the record demonstrates that the trial court did not err in denying the Bureau's motion to dismiss. We find the trial court's actions to be proper.

[*P19] Accordingly, the Bureau's first assignment of error is overruled.

[*P20] The Bureau argues in its second assignment of error that the trial court erred by denying the Bureau's motion to transfer based upon improper venue.

[*P21] However, the Bureau's second assignment of error is not a final appealable order.

[*P22] [HN4] An order upon a motion granting or denying venue is interlocutory and is not subject to immediate appellate review in Ohio. *State ex rel. Allied Chemical Co. v. Aurelius* (1984), 16 Ohio App.3d 69, 16 Ohio B. 73, 474 N.E.2d 618; [**11] *Timson v. Young* (1980), 70 Ohio App.2d 239, 436 N.E.2d 538.

[*P23] Accordingly, appellants' second assignment of error is moot.

[*P24] The Bureau argues in its third assignment of error that the lower court erred by certifying this case as a class action pursuant to *Civ.R. 23*.

[*P25] At the outset, we are mindful that [HN5] a trial judge is given broad discretion when deciding whether to certify a class action. *In re Consolidated Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002 Ohio 6720, 780 N.E.2d 556, p. 5, citing *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, 31 Ohio B. 398, 509 N.E.2d 1249, syllabus; *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 312-313, 15 Ohio B. 439, 473 N.E.2d 822. "Absent a showing of abuse of discretion, a trial court's determination as to class certification will not be disturbed." Id.

[*P26] The appropriateness of applying the abuse-of-discretion standard in reviewing class action determinations is grounded not in credibility assessment, but in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own [**12] docket. *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 70, 1998 Ohio 365, 694 N.E.2d 442, citing *Marks, supra*; *In re Nlo, Inc.* (C.A. 6, 1993), 5 F.3d 154, 157. Nevertheless, the trial court's discretion is not unlimited and must be bound by and exercised within the framework of *Civ.R. 23*. Thus, "the trial court is required to carefully apply the class action requirements and conduct a vigorous analysis into whether the prerequisites of *Civ.R. 23* have been satisfied." *Holznel v. Charter One Bank* (Dec. 14, 2000), *Cuyahoga App. No. 76822*, 2000 Ohio App. LEXIS 5877.

[*P27] [HN6] Seven requirements must be satisfied before a court may certify a case as a class action pursuant to *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 impractical; 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 **[**13]** 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. *Civ.R. 23(A)* and *(B)*; *Warner v. Waste Mgt., Inc. (1988)*, 36 Ohio St.3d 91, 96-98, 521 N.E.2d 1091.

[*P28] Appellants argue that appellees failed to satisfy all of the prerequisites for class certification. As previously stated, certification in this case involved two separate classes. Class A consists of all "Ohio residents who were not represented by legal counsel at the time that the administrator's agents and/or employees contacted and convinced them to settle their PTD claims for less than their actual present value ***." ³ Class B is comprised of those PTD recipients who were represented by legal counsel. ⁴

3 Complaint, 1.

4 Complaint, 30.

[*P29] [HN7] "The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently **[**14]** definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Hamilton, supra*, 82 Ohio St.3d at 72, citing 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure (2 Ed. 1986), 120-121, Section 1760. Thus, the class definition must be precise enough "to permit identification within a reasonable effort." *Warner, supra*, 36 Ohio St.3d at 96.

[*P30] Identifying the members of Class A and B for purposes of this lawsuit is not onerous. The Bureau can simply reference the records of the PTD beneficiaries who have received lump-sum payments. Determining which of the beneficiaries received less than the actual present values based upon accepted mortality tables is a matter of basic mathematics and time. Accordingly, the class members in the case at bar are identifiable and unambiguously defined.

[*P31] The Bureau argues that Cristino's claims are not typical of the claims of the class. [HN8] *Civ.R. 23(A)* provides that "one or more members of a class may sue or be sued as representative parties on behalf of all only

if *** 3) the claims or **[**15]** defenses of the representative parties are typical of the claims or defenses of the class."

[*P32] The requirement of typicality serves the purpose of protecting absent class members and promotes the economy of class action by ensuring that the interests of the named plaintiffs are substantially aligned with those of the class. *Baughman v. State Farm Mut. Auto Ins. Co.*, 88 Ohio St.3d 480, 2000 Ohio 397, 727 N.E.2d 1265, citing 5 Moore's Federal Practice (3 Ed. 1977), 23-92 to 23-93, Section 23.24[1].

[*P33] [HN9] "Typicality" does not mean, however, that the class representative's claims must be identical to those of all class members. Rather, a representative's claim "is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims." *Baughman, supra*, 88 Ohio St.3d at 485, **[**16]** quoting 1 Newberg on Class Actions (3 Ed. 1992), 3-74 to 3-77, Section 3.13.

[*P34] Here, it is apparent that appellees' claims arise from the same conduct, and are based on the same legal theories, that underlie the claims of other class members. Similar to Cristino's claims, all of the injured workers are seeking disgorgement of funds owed to them through the same equitable principles. They are also requesting a declaration of their rights and an injunction against the continued retention of the funds that should have been paid to them. None of them possess a theory of recovery, or is subject to a defense, that is inapplicable to the others. Accordingly, the class certification requirement of typicality is satisfied.

[*P35] [HN10] A class representative is considered adequate as long as its interest is not antagonistic to the interest of other class members. *Hamilton, supra*, 82 Ohio St.3d at 77-78. Cristino's interest is not antagonistic to the interests of the other class members. He possesses a substantial stake in the outcome of the litigation. Similar to the other proposed class members, Cristino's lump-sum PTD payment was discounted by 30 percent.

[*P36] **[**17]** [HN11] Once it has been ascertained that the threshold requirements of *Civ.R. 23(A)* have been met, it is necessary to determine if the class action can be maintained under one of the provisions of *Civ.R. 23(B)*.

[*P37] *Civ.R. 23(B)* provides:

[HN12] "(B) Class actions maintainable. -- An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief [**18] or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
****"

[*P38] [HN13] A class action can be maintained only if one of the three situations described in *Civ.R. 23(B)* exist. We find all three to be present; however, we find *Civ.R. 23(B)(2)* to be the most applicable to the case at bar. The Bureau has treated each of the class members the same. None of them were provided with a lump-sum distribution of their PTD benefits that approximated their actual present value.

[*P39] The trial court specifically noted in its June 23, 2004 order that discovery was ongoing. Before appellees could obtain all of the necessary discovery information from the Bureau, this interlocutory appeal was filed. Accordingly, appellees were unable to obtain all of

the evidence they needed to demonstrate the appropriateness of class certification in this instance.

[**19] [*P40] In addition, we find that *Civ.R. 23(B)(3)* also provides support for certifying a class action in this case. Resolving the numerous class member claims against the Bureau in one single proceeding is far more expedient and efficient than compelling each individual claimant to pursue his or her own individual case. It would be extremely cumbersome and taxing on our court system to follow such an approach.

[*P41] Moreover, the legal standards are the same for each class member with respect to their requests for equitable, injunctive and declaratory relief. The fact patterns are for the most part identical, i.e., Ohio residents, approved for PTD benefits, receiving substantially less than actual present value in a lump-sum distribution. Therefore, the class action certification in the case at bar satisfies both *Civ.R. 23(B)(2)* and *(B)(3)*.

[*P42] Accordingly, appellants' third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy [**20] of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. ANTHONY O. CALABRESE, JR., JUDGE

MARY EILEEN KILBANE, J., CONCURS; ANN DYKE, A. J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE OPINION

CONCUR BY: ANN DYKE (In Part)

DISSENT BY: ANN DYKE (In Part)

DISSENT

ANN DYKE, A.J., CONCURRING IN PART AND DISSENTING IN PART:

[*P43] I concur with the majority as to appellants' second and third assignments of error. I, however, dissent with the majority's decision as to appellants' first assignment of error. I would find that the trial court's denial of the Bureau's motion to dismiss is not a final, appealable order. *Polikoff v. Adam (1993), 67 Ohio St.3d 100, 103, 616 N.E.2d 213*. ("Generally, an order denying a motion to dismiss is not a final order.")



31673603

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

PIETRO CRISTINO ON BEHALF OF HIMSELF ETC
AND ALL O
Plaintiff

Case No: CV-01-442638

Judge: DAVID T MATTA

OHIO BUREAU OF WORKERS COMP
ADMINISTRATOR ET AL
Defendant

JOURNAL ENTRY

DEFENDANTS' MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS, FILED 09/23/2004,
IS GRANTED.

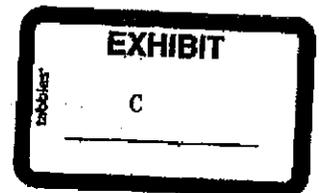
DEFENDANTS' MOTION TO DISMISS BASED UPON AUTHORITY OF SANTOS V. OHIO BUREAU OF WORKERS
COMPENSATION OR ALTERNATIVELY TO TRANSFER BASED UPON IMPROPER VENUE, FILED 07/23/2004, IS
DENIED.

Judge Signature

12/17/2004

12/15/2004

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By: CLKPW
GERALD E. FUERST, CLERK



Page 1 of 1



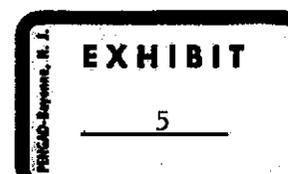
Ohio Revised Code § 2743.03. Court of claims created

(A) (1) There is hereby created a court of claims. The court of claims is a court of record and has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in *section 2743.02 of the Revised Code*, exclusive jurisdiction of the causes of action of all parties in civil actions that are removed to the court of claims, and jurisdiction to hear appeals from the decisions of the court of claims commissioners. The court shall have full equity powers in all actions within its jurisdiction and may entertain and determine all counterclaims, cross-claims, and third-party claims.

(2) If the claimant in a civil action as described in division (A)(1) of this section also files a claim for a declaratory judgment, injunctive relief, or other equitable relief against the state that arises out of the same circumstances that gave rise to the civil action described in division (A)(1) of this section, the court of claims has exclusive, original jurisdiction to hear and determine that claim in that civil action. This division does not affect, and shall not be construed as affecting, the original jurisdiction of another court of this state to hear and determine a civil action in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief.

(3) In addition to its exclusive, original jurisdiction as conferred by divisions (A)(1) and (2) of this section, the court of claims has exclusive, original jurisdiction as described in division (F) of section 2743.02 and division (B) of *section 3335.03 of the Revised Code*.

(B) The court of claims shall sit in Franklin county, its hearings shall be public, and it shall consist of incumbent justices or judges of the supreme court, courts of appeals, or courts of common pleas, or retired justices or judges eligible for active duty pursuant to division (C) of *Section 6 of Article IV, Ohio Constitution*, sitting by temporary assignment of the chief justice of the supreme court.



The chief justice may direct the court to sit in any county for cases on removal upon a showing of substantial hardship and whenever justice dictates.

(C) (1) A civil action against the state shall be heard and determined by a single judge. Upon application by the claimant or the state, the chief justice of the supreme court may assign a panel of three judges to hear and determine a civil action presenting novel or complex issues of law or fact. Concurrence of two members of the panel is necessary for any judgment or order.

(2) Whenever the chief justice of the supreme court believes an equitable resolution of a case will be expedited, he may appoint referees in accordance with *Civil Rule 53* to hear the case.

(3) When any dispute under division (B) of *section 153.12 of the Revised Code* is brought to the court of claims, upon request of either party to the dispute, the chief justice of the supreme court shall appoint a single referee or a panel of three referees. The referees need not be attorneys, but shall be persons knowledgeable about construction contract law, a member of the construction industry panel of the American arbitration association, or an individual or individuals deemed qualified by the chief justice to serve. No person shall serve as a referee if that person has been employed by an affected state agency or a contractor or subcontractor involved in the dispute at any time in the preceding five years. Proceedings governing referees shall be in accordance with *Civil Rule 53*, except as modified by this division. The referee or panel of referees shall submit its report, which shall include a recommendation and finding of fact, to the judge assigned to the case by the chief justice, within thirty days of the conclusion of the hearings. Referees appointed pursuant to this division shall be compensated on a per diem basis at the same rate as is paid to judges of the court and also shall be paid their expenses. If a single referee is appointed or a panel of three referees is appointed, then, with respect to one referee of the panel, the compensation and expenses of the referee shall not be taxed as part of the costs in the case but shall be included in the budget of the court. If a

panel of three referees is appointed, the compensation and expenses of the two remaining referees shall be taxed as costs of the case.

All costs of a case shall be apportioned among the parties. The court may not require that any party deposit with the court cash, bonds, or other security in excess of two hundred dollars to guarantee payment of costs without the prior approval in each case of the chief justice.

(4) An appeal from a decision of the court of claims commissioners shall be heard and determined by one judge of the court of claims.

(D) The Rules of Civil Procedure shall govern practice and procedure in all actions in the court of claims, except insofar as inconsistent with this chapter. The supreme court may promulgate rules governing practice and procedure in actions in the court as provided in *Section 5 of Article IV, Ohio Constitution*.

(E) (1) A party who files a counterclaim against the state or makes the state a third-party defendant in an action commenced in any court, other than the court of claims, shall file a petition for removal in the court of claims. The petition shall state the basis for removal, be accompanied by a copy of all process, pleadings, and other papers served upon the petitioner, and shall be signed in accordance with *Civil Rule 11*. A petition for removal based on a counterclaim shall be filed within twenty-eight days after service of the counterclaim of the petitioner. A petition for removal based on third-party practice shall be filed within twenty-eight days after the filing of the third-party complaint of the petitioner.

(2) Within seven days after filing a petition for removal, the petitioner shall give written notice to the parties, and shall file a copy of the petition with the clerk of the court in which the action was brought originally. The filing effects the removal of the action to the court of claims, and the clerk of the court where the action was brought shall forward all papers in the case to the court of claims.

The court of claims shall adjudicate all civil actions removed. The court may remand a civil action to the court in which it originated upon a finding that the removal petition does not justify removal, or upon a finding that the state is no longer a party.

(3) Bonds, undertakings, or security and injunctions, attachments, sequestrations, or other orders issued prior to removal remain in effect until dissolved or modified by the court of claims.