

IN THE SUPREME COURT OF OHIO

CASE NO. 07-0152

PIETRO CRISTINO, *et al.*
Plaintiff-Appellees

-vs-

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

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

MERIT BRIEF OF PLAINTIFF-APPELLEES,
PIETRO CRISTINO, *et al.*

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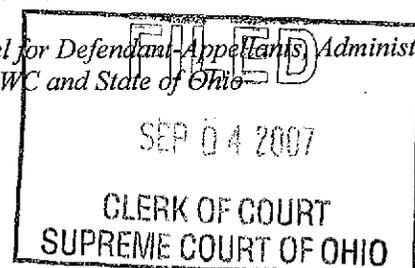
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STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellees filed their Class Action Complaint for Equitable, Declaratory, and Injunctive Relief in the Cuyahoga County Court of Common Pleas on June 22, 2001. Therein, they alleged *inter alia* that the Bureau had failed to pay the full amount due to those Permanent Total Disability (PTD) recipients who had opted to receive a lump-sum payment of the present value of their lifetime benefits. The Bureau had concealed from these injured workers that a thirty percent (30%) deduction had been taken and outdated mortality tables had been utilized. Plaintiffs identified two subclasses that were comprised of those Ohio PTD recipients who were not represented by legal counsel (Class A) and those who were (Class B). Separate claims were raised for breach of fiduciary duty (Count I), fraud (Count II), unjust enrichment (Count III), violation of constitutional and statutory rights (Count IV), declaratory relief (Count V), and injunctive relief (VI). Significantly for purposes of the instant appeal, the prayer sought only injunctive, equitable and declaratory relief against the Bureau. No monetary damages were requested therein.

On July 31, 2001, the Bureau served its Answer denying liability. The Bureau then submitted its First Motion to Dismiss. This relief was sought on the grounds that (1) the trial court lacked subject matter jurisdiction over the dispute, (2) Plaintiffs were attempting to seek review of a settlement agreement in violation of *R. C. §4123.65(F)*, and (3) venue was appropriate strictly in Franklin County. Plaintiffs filed their Memorandum in Opposition to this Motion on December 20, 2001. Defendant's Motion was denied by Judge David T. Matia on January 2, 2002.

On June 6, 2002, the Cuyahoga County Court of Appeals released its ruling in *Santos v. Administrator, Bureau of Workers' Compensation*, 8th Dist. No. 80353, 2002-Ohio-2731, 2002

W.L. 1265568. Therein, it was held that an action seeking strictly injunctive and equitable relief was limited to the exclusive jurisdiction of the Ohio Court of Claims. In an ensuing pre-trial conference, Plaintiffs' counsel advised Judge Matia that this ruling required dismissal of the instant proceedings. Accordingly, an order was issued on July 22, 2002 reconsidering and granting Defendant's Motion to Dismiss.

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

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

No meaningful opportunity was afforded to Plaintiffs to complete their discovery on remand. On July 23, 2004, the Bureau submitted its Motion to Dismiss Based upon Authority of *Santos v. Ohio Bureau of Workers' Comp.* or, Alternatively, To Transfer Based Improper Venue (hereinafter "Defendant's Motion"). Included therewith were many of the same contentions (most notably, subject matter jurisdiction and improper venue) that Judge Matia

had previously rejected on January 2, 2002. Plaintiffs still submitted their Memorandum in Opposition on August 25, 2004. In a ruling dated December 17, 2004, the Motion was overruled.

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

In a decision that was rendered on December 12, 2006, the Eighth District affirmed Judge Matia's ruling. *Cristino v. Ohio Bur. Of Workers' Comp.*, 8th Dist. No. 87567, 2006-Ohio-5921, 2006 W.L. 3234022. Judge Ann Dyke dissented in part only because she would have held that the denial of the motion to dismiss was not a final appealable order. *Id* ¶43. The Bureau's ensuing Motion for Reconsideration and/or Rehearing *en banc* was summarily denied on December 12, 2006.

On January 23, 2007 the Bureau sought further review in this Court. Three (3) propositions of law were fashioned pertaining to whether (1) a claim of restitution requires the payment of money to the defendant, (2) a "rigorous analysis" is required for class certification determinations, and (3) class certification is appropriate when the claims are "inherently individualized". *Bureau's Memorandum in Support of Jurisdiction filed January 28, 2007*. Supreme Court jurisdiction was accepted only over the first proposition of law. *Cristino v. Bur. of Workers' Comp.*, 113 Ohio St.3d 1488, 2007-Ohio-1986, 865 N.E.2d 912.

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ARGUMENT

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

I. INTRODUCTION

This case has been in this Court before on precisely the same jurisdictional issue that the Bureau is continuing to press. The Proposition of Law that has been submitted seeks to establish a purely artificial barrier between equitable claims that may be adjudicated by a common pleas court in an appropriate venue and those legal actions that must be relegated to the Court of Claims. Not a single case from the history of United States (or even Anglo-Saxon) jurisprudence has been cited that actually draws the line at whether the plaintiff "has paid specific funds" to the defendant. This distinction has been devised by the Bureau solely to avoid the implications of *Santos*, 101 Ohio St.3d 74, in this class action proceeding without having to openly request that this landmark ruling be overturned. As will be developed further herein, the contrived legal standards that are being proposed by the Bureau do not advance any conceivable objective (other than forcing this action in to the Court of Claims) and will actually require that this Court reverse *Santos* just four (4) years after its release.

II. LAW OF THE CASE DOCTRINE

The lower court's order should be affirmed on appeal if any valid grounds are found to support it. *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 96, 551 N.E.2d 172, 174;

Taylor v. Yale & Towne Mfg. Co. (9th Dist. 1987), 36 Ohio App.3d 62, 63, 520 N.E.2d 1375, 1376. Although not noted in the Eighth District's most recent decision, the law-of-the-case doctrine precludes the Bureau from re-litigating the same jurisdictional issues that were rejected in the first round of appeals.¹

Over three (3) years ago the Bureau strenuously argued to the Eighth District in the first appeal in this action that the claims for "money damages" could only be adjudicated in the Ohio Court of Claims. *Brief of Appellees Case No. 81619, pp. 2-8.* It was proclaimed at that time that:

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

Id., p. 2. The Court of Appeals agreed in the Opinion that was issued on March 3, 2003. That decision was, of course, reversed by this Court in *Cristino*, 101 Ohio St.3d 97. The one-sentence ruling succinctly directed that:

The judgment of the court of appeals is reversed, and the cause is remanded to the trial court on the authority of *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441.

Cristino, 101 Ohio St.3d 97.

In no sense did this Court suggest that the jurisdictional issue that had been the focus of the appellate proceedings to that point was being remanded for "further consideration" by the lower courts. The Bureau's representation to the contrary simply is not supported by the terms actually employed in the decision. *Bureau's Merit Brief, pp. 5-6.* The Eighth District's first ruling, which the Bureau is basically attempting to resuscitate in the instant appeal, was flatly

¹ Plaintiffs had raised the law-of-the-case issue in the proceedings below. *Brief of Plaintiff-Appellee, 8th Dist. Case No. 87567. Pp. 7 & 17.*

“reversed” in no uncertain terms. This Court was certainly capable at that time of determining whether the Complaint properly alleged a claim that legitimately belonged in the Cuyahoga Court of Common Pleas. Rather obviously, the Eighth District’s decision would have been affirmed if a majority had agreed that “damages” had been sought which could be heard only by the Court of Claims.

Under the “law of the case” doctrine, a decision of a reviewing court is binding in all subsequent proceedings. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410, 412; *Blackwell v. International Union, U.A.W. Local No. 1250* (8th Dist. 1984), 21 Ohio App.3d 110, 112, 487 N.E.2d 334, 338; *Stuller v. Price* (Feb. 6, 2003), 10th Dist. No. 02AP-29, 2003-Ohio-583, 2003 W.L. 257459, p. *12. This prohibition extends to not only those arguments “which were fully pursued,” but also those “available to be pursued, in a first appeal.” *City of Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 1996-Ohio-174, 659 N.E.2d 781, 784. New arguments that could have been raised in the initial appeal may not be interjected during the remanded proceedings. *Beifuss v. Westerville Bd. of Edn.* (1988), 37 Ohio St.3d 187, 190-191, 525 N.E.2d 20, 23-24; *Brooks v. Ohio State Anesthesia Corp.* (Aug. 29, 1996), 10th Dist. No. 96APE05-576, 1996 W.L. 492981, p. *5.

Nothing here has changed since the last time that this case was before this Court that would merit an exception to the law of the case doctrine. Immediately upon remand the Bureau filed a motion again demanding that Judge Matia dismiss the proceedings for lack of jurisdiction. A second appeal was then commenced at the first available opportunity. As a result, Plaintiffs have yet to conduct any meaningful discovery and this six (6) year old lawsuit has barely progressed beyond the class certification stage. Unless a stop is put to these delaying tactics, the Bureau will undoubtedly keep appealing the jurisdictional issue over and

over on the grounds that some new twist can be added to the same tired argument which justifies further review.

The conclusive impact of Supreme Court proceedings upon remand was emphasized in *Sheaffer v. Westfield Ins. Co.*, 110 Ohio St.3d 265, 2006-Ohio-4476, 853 N.E.2d 275. The Fifth District Court of Appeals had found that a commercial insurance carrier was required to cover a *Scott-Pontzer* claim arising from an automobile accident. *Id.*, ¶4-6. The trial judge entered judgment accordingly on October 15, 2003. *Id.*, ¶8. This Court then issued its decision on November 5, 2003 in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, which substantially modified *Scott-Pontzer*. *Sheaffer*, 110 Ohio St.3d 265 ¶9. Not long thereafter, Supreme Court review was denied of the Fifth District's coverage determination. *Id.*, ¶10.

Back on remand, the insurer argued that *Galatis* had to be applied retroactively and the Fifth District's decision should be undone. Both the appellate court and this Court disagreed.

Writing for the majority, Chief Justice Moyer reasoned that:

We are not aware of any issue that was not raised in the first round of appeals that could have been raised in the second. When we declined to accept its appeal of *Sheaffer I*, [the insurer's] case was finally decided.

Under the law-of-the-case doctrine, the denial of jurisdiction over a discretionary appeal by this court settles the issue of law appealed. The judgment of the court of appeals is affirmed.

Sheaffer, 110 Ohio St.3d at 268 ¶15-16. If the denial of Supreme Court review is sufficient to terminate all further debate on the matters appealed and invoke the law-of-the case doctrine, then certainly a flat-out reversal must have at least the same effect. Since this Court's first decision in this protracted litigation did not even remotely suggest that the jurisdictional issue

was still open for "consideration" on remand, this appeal should be dismissed without further delay.

III. COMMON PLEAS COURT JURISDICTION

A. NATURE OF THE RELIEF SOUGHT

Procedural matters aside, the Eighth District's rejection of the Bureau's jurisdictional argument was entirely justified. Initially it must be remembered that, as a general rule, the plaintiffs are the masters of their complaints. *The Fair vs. Kohler Die & Specialty Co.* (1913), 228 U.S. 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716; *Merrell Dow Pharmaceuticals Inc. vs. Thompson* (1986), 478 U.S. 804, 809, 106 S. Ct. 3229, 3233, 92 L.Ed.2d 650 fn. 6; *Great Northern Ry Co. vs. Alexander* (1918), 246 U.S. 276, 282, 38 S. Ct. 237, 239-240, 62 L. Ed. 713. In accordance with this authority, Plaintiffs have made a conscious decision to pursue only equitable and declaratory remedies in these proceedings. Previous cases had recognized, in general, that such claims against the State can be adjudicated by any court of common pleas. *Racing Guild of Ohio vs. Ohio State Racing Commn.* (1986), 28 Ohio St.3d 317, 319-320, 503 N.E.2d 1025, 1028; *Ohio Hosp. Assn. vs. Ohio Dept. of Human Services* (1991), 62 Ohio St.3d 97, 103-104, 579 N.E.2d 695, 700; *Basic Const. Materials Div. v. Selter* (June 6, 1989), 10th Dist. No. 88AP-796, 1989 W.L. 61758 *2.

The Class Action Complaint of June 22, 2001 raises separate claims for breach of fiduciary duty (Count I), fraud (Count II), unjust enrichment (Count III), violation of constitutional and statutory rights (Count IV), declaratory relief (Count V), and injunctive relief (Count VI). No other causes of action have been alleged. These theories of recovery were historically available in courts of equity.² So there would be no confusion, Plaintiffs only

² See e.g., *Judy v. Bureau of Motor Vehicles*, 6th Dist. No. L-01-1200, 2001-Ohio-2909, 2001 W.L. 1664295, *aff'd in part/rev'd in part*, 100 Ohio St.3d 122, 2003-Ohio-5277, 797 N.E.2d 45

requested that the trial court grant “injunctive, equitable, and declaratory relief” in their Prayer. *Class Action Complaint for Equitable, Declaratory and Injunctive Relief*, p. 13. This is precisely the type of action that R.C. §2743.03(A)(1) authorizes a common pleas court to hear. No legal remedies (*i.e.* monetary damages) have been requested in the prayer. *Complaint*, p. 13.

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

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

Santos, 101 Ohio St.3d 74, syllabus. The Opinion specifically states that any wrongful “collection or retention of moneys” by the State is actionable in a common pleas court. *Id.*, ¶ 17. This ruling was founded squarely upon the terms of R.C. §2743.03(A)(2), which specifically authorizes common pleas courts to hear suits against the state for “declaratory judgment, injunctive relief, or other equitable relief.” Notably, no attempt has been made by the General Assembly to either alter this language or otherwise legislatively override *Santos*.

The crux of the instant Complaint is that the Bureau agreed to provide hundreds of recipients of permanent total disability (PTD) benefits with a lump sum payment of the “present value” of their claims. The government’s agents failed to disclose to those injured workers electing for this single immediate payment that a thirty percent (30%) discount had

(injunctive relief and reimbursement); *Manchester v. Cleveland Trust Co.* (8th Dist. 1953), 95 Ohio App. 201, 114 N.E.2d 242, 250 (fiduciary duties); *Grundstein v. Suburban Motor Freight* (10th Dist. 1952), 92 Ohio App.3d 181, 107 N.E.2d 366, 369 (declaration of rights); *McClanahan v. McClanahan* (9th Dist. 1946), 79 Ohio App.231, 72 N.E.2d 798, 800 (unjust enrichment).

been factored into the calculations. Moreover, outdated mortality tables were utilized. The end result was that seriously disabled individuals were misled into believing that the lump sum payments they were receiving were the mathematical equivalent of the benefits that would have been paid over their lifetimes. Since the remaining balance of the true "present value payment" is still being "retained" by the Bureau, Plaintiffs have every right to seek disgorgement through equitable principles. *Santos*, 101 Ohio St.3d 74, syllabus; *Oakar v. Ohio Dept. of Mental Retardation* (8th Dist. 1993), 88 Ohio App.3d 332, 623 N.E.2d 1296 This case is not about holding anyone liable for damages they caused through some tortious act or omission.

B. AVAILABILITY OF RESTITUTION

There is no truth to the Bureau's repeated assertions that the class members are seeking "new money". *Bureau's Merit Brief*, pp. 1-2 & 13. What is being overlooked is that each of them possessed a vested and legally enforceable statutory entitlement to continued PTD payments for the remainder of their lifetimes. There can be no dispute that these guaranteed monthly payments provided a tangible and substantial benefit to the class members. Each of them elected to relinquish these rights to the Bureau in exchange for what was supposed to be a single lump sum payment of the "actual present value". The actual objective of the Complaint was veraciously summarized by the appellate court as follows:

[Plaintiffs] 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, [plaintiffs] 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.
[emphasis added]

Cristino, 2006-Ohio-5921 ¶14-15. By refusing to pay them the full amount of the “actual present value” of their PTD claims, the Bureau has enriched itself in a most inequitable manner. The class members are not prospecting for “new money” but are simply seeking the disgorgement of the funds in the Bureau’s possession which rightfully belongs to them.

In an effort to justify its disreputable practices, it has asserted (with no proof) that “the Bureau acknowledges using a discount rate, as that is standard practice in calculating a present value for future payments.” *Bureau’s Merit Brief*, p.2. This ludicrous statement would be laughable were it not for the hundreds of permanently injured workers who have suffered financial hardship only because they trusted the Bureau’s representatives to accurately determine the present value of their lifetime benefits. One does not need to be a mathematician to know that legitimate present value calculations do not include “discount rates” designed to enrich the payor.

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

Restitution is an equitable remedy used to make an injured party whole. At the core of the law of restitution is the principal that “a person who has been unjustly enriched at the expense of another

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is required to make restitution to the other . . .” Restatement (1937), Restitution, p. 1.

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

As they did in *Santos*, Defendants insist that this action involves “a legal issue for money damages.” *Defendants’ Motion to Dismiss*, p. 5. This overly simplistic logic was disapproved by the Supreme Court of the United States in *Great West Life & Annuity Ins. Co. v. Knudson* (2002), 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635. Writing for the majority, Justice Scalia examined the phrase “equitable relief” as employed in §502(a)(3) of the Employee Retirement Income Security Act (ERISA). A group health insurer was attempting to enforce a plan provision that allegedly required the insured to repay benefits previously issued. The opinion initially observed that “[i]n the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity.” *Id.*, 534 U.S. at 714 (citations omitted). Where the plaintiffs sought payment for some benefit that had been provided to the defendant, the action was viewed as a proceeding “at law” akin to a claim for breach of an express or implied contract. *Id.* Since the insurer in *Knudson* had based its theory of relief upon “a contractual obligation to pay money”, the claim could not be characterized as “equitable” under

the statute. *Id.*, at 719.

The High Court forcefully rejected the notion that a cause of action that can result in a monetary award will never qualify as equitable relief. Justice Scalia carefully noted that, for example, a constructive trust or an equitable lien were available in equity “where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant’s possession.” *Id.*, at 714 (citation omitted). The Court concluded that:

Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore the plaintiff particular funds or property in the defendant’s possession.

Id., at 714-715 (footnote omitted). See also, *Sheet Metal Local #24 v. Newman* (May 21, 2002), 6th Cir. No. 01-3085, 2002 W.L. 1033739, p. 2 (“For example, a plaintiff might seek equitable restitution of particular funds that he owned but that the defendant wrongfully possessed.”).

C. THE SUBSTITUTION TEST

More than a decade before *Knudson*, 534 U.S. 204, this Court had reached the same conclusion in *Ohio Hosp. Assn.*, 62 Ohio St.3d at 98, 579 N.E.2d at 696. A lawsuit had been filed by several hospitals in the Court of Claims arguing that the Ohio Department of Human Services had adopted administrative regulations that allowed funds to be withheld in violation of their state and federal constitutional rights. The Court affirmed the trial judge’s conclusion that the rules were unenforceable. *Id.*, 62 Ohio St.3d at 102, 579 N.E.2d at 699. The State nevertheless argued that it was “immune from money damages for the promulgation of invalid administrative rules.” *Id.*, 62 Ohio St.3d at 103, 579 N.E.2d at 699. The majority initially observed with interest that *R.C. §2743.03(A)(2)* had been revised to expressly sanction earlier

judicial rulings holding that an action against the State seeking only injunctive or declaratory relief could be brought in a Court of Common Pleas. *Id.*, 62 Ohio St.3d at 103-104, 579 N.E.2d at 700 (citation omitted). In distinguishing between legal and equitable remedies, the opinion observed that:

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.” [italics original]

Id., 62 Ohio St.3d at 105, quoting *Bowen v. Massachusetts* (1988), 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749. They then reasoned that:

***[S]overeign immunity is not applicable to the relief granted in this case. The order to reimburse Medicaid providers for the amounts unlawfully withheld is not an award of money damages, but equitable relief. *** 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. [emphasis added.]

Id., 62 Ohio St.3d at 104-105, 579 N.E.2d at 700; see also *Keller vs. Dailey* (1997), 124 Ohio App.3d 298, 304, 706 N.E.2d 28, 31-32. Although the hospitals chose to litigate the equitable issues in the Court of Claims, they could have elected to seek restitution in a Common Pleas Court. *Ohio Academy of Nursing Homes, Inc. vs. Barry* (May 25, 1993), 10th Dist. No. 92AP-1266, 1993 W.L. 186656, *5-6, *aff'd* (1994), 71 Ohio St.3d 5, 640 N.E.2d 1139.

Following the release of *Ohio Hosp. Assn.*, 62 Ohio St.3d 97, numerous courts have simply considered whether the recovery sought is really a “substitute for a suffered loss” in distinguishing damages from equitable relief.

As observed by the Ohio Supreme Court, damages are provided as a substitute for a particular loss. Conversely, specific remedies

represent a particular privilege or entitlement, rather than general substitute compensation. *Ohio Hosp. Assn. v. Ohio Dept. of Human Serv.*, *supra*, 62 Ohio St.3d at 104-105, 579 N.E.2d at 700-701. The distinction between a specific remedy for goods or services and one for an award of money is of no import. *Id.* Thus, a statutory specific remedy is not transformed into a claim for damages simply because the remedy provides for the payment of monies.

Ohio Edison Co. v. Ohio Dept. of Transp. (10th Dist. 1993), 86 Ohio App.3d 189, 194, 620 N.E.2d 217, 221; see also, *Ohio Acad. of Nursing Homes v. Ohio Dept. of Jobs & Family Servs.*, 114 Ohio St.3d 14, 18, 2007-Ohio-2620, 867 N.E.2d 400, 404 ¶18; *Morning View Care Center-Fulton v. Ohio Dept. of Jobs and Family Servs.*, 10th Dist. No. 04AP-57, 2004-Ohio-6073, 2004 W.L. 2591237 ¶ 25; *Zelenak v. Industrial Commn.* (10th Dist. 200), 148 Ohio App.3d 589, 2002-Ohio-3887, 774 N.E.2d 769 ¶18; *Henley Health Care v. Ohio Bureau of Workers' Comp.*, 10th Dist. No. 98AP-92, 1995 W.L. 92101 *3; *Keller*, 124 Ohio App.3d at 303. The Bureau has made no discernable attempt to explain how the relief Plaintiffs are seeking is a "substitute for a suffered loss". The goal of this class action lawsuit is to force the Bureau to finally pay the full actual present value of the PTD claims without bogus discounts and off-sets. This is hardly "substitute compensation" that would belong in the Court of Claims.

There is no merit to the Bureau's complaint that: "Almost any demand for money could be recast as a demand for money that the State is refusing to pay, and thus 'retaining'". *Bureau's Merit Brief*, p. 3. Claims for breach of contract and for damages caused by the State's acts and omissions will still fall within the Court of Claim's exclusive authority since "substitute compensation" is being sought. Where, on the other hand, the State is being forced to disgorge funds "unlawfully withheld", the remedy is equitable. *Ohio Hosp.*, 62 Ohio St.3d at 104-105; *Oakar*, 88 Ohio App.3d at 337-338.

D. THE PURPORTED LEGAL CLAIMS

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Much ado has been made over the fact that the Complaint contains allegations of “fraud”. The Bureau has proclaimed that: “Fraud is, of course, a tort”. *Bureau’s Merit Brief*, p. 15. This statement is only partly correct, as equity also furnishes remedies for those who have been deceived. *See e.g., Hennick v. Hennick* (July 24, 1940), Franklin Co. App. No. 3213, 1940 W.L. 2957 *3; *Bonnell v. B. & T. Metals Co.* (2nd Dist. 1948), 52 Ohio Law. Abs. 1, 81 N.E.2d 730, 731-732.

The rule is universal and well settled that fraud is one of the grounds upon which equity will grant relief and that constructive fraud, or inequitable conduct, is remedial in equity. Cases for relief against a constructive fraud appeal to the jurisdiction of courts of equity and constructive fraud is very properly under its supervision, there being no other adequate remedy. [emphasis added]

Mutual Fin. Co. v. Meade (Cuy. C.P. 1959), 81 Ohio Law Abs. 309, 161 N.E.2d 561, 568; see also, *Discover Bank v. Owens* (Cleve. Mun. 2004), 129 Ohio Misc.2d 71, 822 N.E.2d 869, 874 (“Courts of equity will assist the wronged party on the ground of fraud, imposition, or unconscionable advantage if there has been great inequality in the bargain.”) While no compensatory or punitive damages will be available, the advantage for Plaintiffs will be that they will be entitled to prevail even without showing that the Bureau’s misstatements were “intentionally fraudulent.” *Gaisser v. Hansen* (1st Dist. 1915), 27 Ohio C.D. 430, 1915 W.L. 910 *3.

Nor is it significant that “Cristino demanded a jury”. *Bureau’s Merit Brief*, pp. 2 & 15.

This so-called “demand” actually states:

Trial by jury is hereby requested upon all issues for which such is appropriate. [emphasis added]

Class Action Complaint for Equitable, Declaratory, and Injunctive Relief filed June 22, 2001, p. 13. If no jury trial is “appropriate”, then Plaintiffs have not requested one.

The Bureau is correct that, as a general rule, equitable actions are tried to the bench. In accordance with *Civ. R. 39(C)*, the trial judge may nevertheless submit equitable claims to an advisory jury. *Ashmore vs. Eversole* (November 29, 1996), Montgomery App. No. 15672, 1996 W.L. 685568, p. 14. It should go without saying, moreover, that the parties could stipulate to a jury trial. Plaintiff’s “request” for a jury was included in the complaint only for “appropriate” circumstances such as this.

E. THE “PREVIOUSLY HELD FUNDS” REQUIREMENT

Rather than simply continuing to follow the venerable “substitution” test for distinguishing between actions at law and equity, the Bureau would have this Court be the first to impose a new requirement for recovery. Under this approach, equitable relief would be available to force the return of wrongfully withheld funds only when the monies were first in the plaintiffs possession. *Bureau’s Merit Brief, pp. 1, 2, 4, 8, 10, 12, & 13-14.* The State would be entitled to keep those funds it was otherwise legally required to pay as long as the money was not first in the aggrieved party’s hands.

The Bureau believes *Santos*, 101 Ohio St.3d 74, is distinguishable because the plaintiffs were “getting their own previously-held money back”. *Bureau’s Merit Brief, p. 11.* The agency knows this emphatic statement is untrue. Just last year the Bureau had been arguing, when it suited its interests, that “Santos never paid any subrogation monies to the Bureau ***.” *Reply Brief of Defendants-Appellants, Eighth Dist. Case No. 86389, filed January 13, 2006, p. 4.* The funds were held in his attorney’s trust account after he refused to tender them on the grounds that *R.C. §4123.93* was unconstitutional. *Id.* This Court nevertheless concluded that:

This Court held in *Holeton*, 92 Ohio St.3d 115, 748 N.E.2d 1111, that the workers' compensation subrogation statute was unconstitutional. 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 by the BWC.

Santos, 101 Ohio St.3d at 78 ¶ 17. The mere attempt to collect the funds was sufficient to justify an equitable remedy to prevent unjust enrichment. *Id.* This holding is directly contrary to the Bureau's argument that such relief is available solely to secure "the return of funds that they once held". *Bureau's Merit Brief*, p. 1. Although the Bureau is refusing to say so openly, its real position in this appeal is that *Santos* was incorrectly decided.

The Bureau contends that "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." *Bureau's Merit Brief*, p. 12. The agency apparently has not looked very hard.³ Not only is *Santos*, 101 Ohio St.3d 74, such a case, but also another one that the Bureau has prominently cited. *Bureau's Merit Brief*, p. 11. In *Zelenak*, 148 Ohio App.3d 589, a workers' compensation claimant argued on behalf of himself and his proposed class members that the Bureau had improperly terminated their Temporary Total Disability (TTD) benefits on the date of the state's medical exams instead of the date of the hearings. The payments for many of the workers simply ended while those whose benefits continued temporarily were subject to various efforts to collect the "overpayments". *Id.*, Ohio App.3d at 590 ¶ 1. Except for a small

³ It is not difficult to find cases recognizing that equitable claims were potentially viable even though the plaintiff was not seeking funds he/she had previously possessed. *Ohio Edison*, 86 Ohio App.3d at 194 (recovery of relocation expenses incurred in highway construction project); *Bee v. University of Akron*, 9th Dist. No. 21081, 2002 W.L. 31387127, 2002-Ohio-5776 (Professor seeking retirement funds and benefits from the state.)

fraction of the class that may have returned the “overpayments”, none of the remaining claimants had first paid the money in question (*i.e.*, the TTD benefits) to the Bureau and then demanded its return. *Id.* The Tenth District plainly did not share the Bureau’s view that this was fatal to their equitable claims as it was held that everyone could have pursued equitable relief:

The reimbursement of the overpayments collected from appellants or payment of the TTD compensation withheld from some of them presents a form of relief that merely requires a state agency to pay amounts it should have paid all along, clearly constituting equitable relief and not monetary damages.
[emphasis added]

Id., at 594 ¶ 19. The problem for the plaintiffs was, however, that Bureau had recognized the error and paid the TTD benefits due before the complaint was filed. *Id.* They were thus limited to seeking interest upon the funds, which was found to belong in the Court of Claims as a claim for “monetary damages”. *Id.*, at 594-595 ¶ 24.

Both parties are in agreement in this appeal that *Zelenak*, 148 Ohio App.3d 589, correctly states the law and should be followed. *Bureau’s Merit Brief*, pp. 11-12. Just like the workers whose TTD benefits had been prematurely terminated, the instant Plaintiffs are also seeking to force “a state agency to pay amounts it should have paid all along”. *Id.*, 148 Ohio App.3d at 594 ¶ 19. The actual present value payment that they had elected to receive should not have included an undisclosed thirty percent (30%) discount and should have been calculated with statistically accurate mortality tables. Since the Bureau has yet to tender the remaining balances owed and no interest or other damages have been sought in the Complaint, *Zelenak* instructs that an equitable remedy is available in the court of common pleas even though the plaintiffs are not seeking the return of “previously held” funds. *Id.*

Likewise, in *Keller*, 124 Ohio App.3d 298, , a state employee sought to recover unpaid overtime wages that she alleged were due under the Federal Fair Labor Standards Act. Obviously, the “unpaid” wages had never previously been in her possession. The Tenth District nevertheless reasoned that:

Because appellant seeks the very thing to which she is allegedly entitled under the FLSA, the action is one to enforce a right given by a federal statute. Although the remedy sought by appellant is compensation in the form of overtime wages, it is not in the nature of monetary compensation for an injury to her person, property, or reputation but, rather, in the nature of an equitable action for specific relief for recovery of the actual compensation she was allegedly denied by her employer. [citations omitted]

Id., 124 Ohio App.3d at 304. The employee was still required to proceed in the Court of Claims because her complaint also contained a claim for “liquidated damages”, which was plainly a legal remedy. *Id.*, at 305. That cannot be a concern here.

F. DETERMINATION OF THE FUNDS TO BE DISGORGED

The Bureau’s reliance upon *Morning View*, 2004-Ohio-6073, is misplaced. *Bureau’s Merit Brief*, p. 12. The plaintiff sought to recover damages incurred when the Ohio Department of Jobs and Family Services (ODJFS) allegedly abused its discretion in setting a rate adjustment. In holding that mandamus was the appropriate remedy, the Tenth District certainly did not suggest that equity is available only to secure the return of funds previously held by the plaintiff. Rather the panel reasoned that:

This is 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 for fiscal year 1999 and that awarded to it through an abuse of discretion on the part of ODJFS. However, it cannot assert right or title to possession of any particular property in the possession of ODJFS. Thus, in our view, the monetary relief Morning View seeks is legal-not equitable-in nature ***

Id., ¶ 27. In stark contrast, the instant Plaintiffs can point to discrete and identifiable funds that the Bureau is indeed withholding from what should have been a lump-sum payment of actual present value.

In an effort to squeeze into *Morning View*, the Bureau has theorized that “the sum [Plaintiff] seeks does not even have a fixed amount, but would need to be litigated.” *Bureau’s Merit Brief*, p. 14. What is it about thirty percent (30%) that isn’t “fixed”? The equitable relief warranted in this action will involve nothing more than properly calculating the actual present value of the claim with standard tables (and without any “discounts”) and ordering the Bureau to pay the balance that remains due. The Bureau (and numerous other agencies) conduct present value calculations every day, and had implicitly promised to do so for the PTD beneficiaries who elected for the lump-sum payment. The agency should not be heard to complain that the task is somehow too “difficult” to perform correctly.

The Bureau appears to have abandoned its position that *Santos*, 101 Ohio St.3d 74, only permits recovery of funds that can be specifically “traced” and identified. According to this misguided logic, the agency is entitled to keep misappropriated funds once they have been commingled with other monies in the state treasury. *Motion for Reconsideration and/or Rehearing En Banc, Eighth Dist. Case No. 87567 filed November 20, 2006, p. 8*. It had been proclaimed in the proceedings below that:

The quoted language above (*i.e.*, “clearly be traced to particular funds or properly [sic] in the defendant’s position”) is taken *directly from the Santos* holding. [emphasis original]

Bureau’s Motion for Reconsideration, p. 8. In reality, the “clearly be traced” language is noticeably absent from the *Santos* syllabus (which reflects the Court’s actual holding). The concept of tracing is mentioned only in the midst the Ohio Supreme Court’s discussion of

Knudson, 534 U.S. 20, and Justice Scalia's quotation from *Dobbs*, LAW OF REMEDIES (2d Ed. 1993) with regard to the general concept of restitution. *Santos*, 101 Ohio St.3d at 77 ¶ 13. How the Bureau could twist this passing remark into an Ohio Supreme Court "holding" is mind boggling. *Bureau's Motion*, p. 8.

In apparent recognition that a strict tracing requirement has never been imposed, the Bureau's position now appears to be that the funds to be paid need only be calculable. *Bureau's Merit Brief*, pp. 13-14. No authorities have been cited actually supporting such a view. *Id.* Even if this really is a valid principle of law that no court has yet had an opportunity to recognize, determining the amounts that are owed to the class members will be simple and straightforward. The Bureau undoubtedly possesses detailed records that will permit easy identification of the class members who elected for a lump sum payment, determination of their statistical life expectancy, and reduction of the benefits due by statute to a present value. Each of them will be entitled to recoup the balance that remains unpaid without any deductions being taken to boost the Bureau's coffers.

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CONCLUSION

For all of the forgoing reasons, this Court should reject the Bureau's Proposition of Law and affirm the sound decision of the Eighth Judicial District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Merit Brief** was served by regular U.S. Mail on this

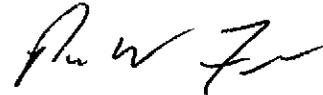
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