

In the
Supreme Court of Ohio

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

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

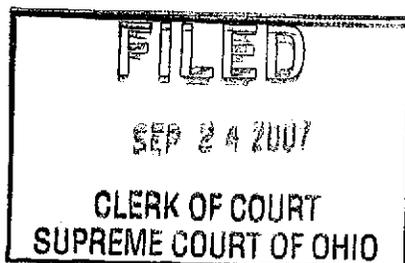
MARC DANN (0039425)
Attorney General of Ohio

RONALD D. HOLMAN, II (0036776)
MICHAEL C. COHAN (0013542)
ALEXANDER E. GOETSCH (0065026)
JEFFREY W. GALLUP (0076506)
Cavitch, Familo, Durkin & Frutkin
1717 East Ninth Street, 14th Floor
Cleveland, Ohio 44114
216-621-7680
216-621-6415 fax

Special Counsel for Defendants-Appellants,
Administrator, Ohio Bureau of Workers'
Compensation and State of Ohio

WILLIAM P. MARSHALL (0038077)
Solicitor General
STEPHEN P. CARNEY* (0063460)
Deputy Solicitor
**Counsel of Record*
JASON PATRICK SMALL (0080151)
Assistant Solicitor
MARK E. MASTRANGELO (0023603)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
scarney@ag.state.oh.us

Counsel for Defendants-Appellants,
Administrator, Ohio Bureau of Workers'
Compensation and State of Ohio



W. CRAIG BASHEIN (0034591)
Bashein & Bashein Co., L.P.A.
50 Public Square, 35th Floor
Cleveland, Ohio 44113
216-771-3239
216-781-5876 fax

PAUL W. FLOWERS (0046625)
Paul W. Flowers Co., L.P.A.
50 Public Square, 35th Floor
Cleveland, Ohio 44113
216-344-9393
216-344-9395 fax

FRANK GALLUCCI, III (0072680)
Gallucci Law Firm
55 Public Square, Suite 2222
Cleveland, Ohio 44113
216-861-0804
216-861-5322 fax

Counsel for Plaintiffs-Appellees,
Pietro Cristino, et al.

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
ARGUMENT.....	3
A. Cristino’s claim is legal because it is based on the tort of fraud and on contract, not on money taken from him or owed to him under a statute or regulation.....	3
B. Cristino seeks new money that he never had, not a restoration of specific funds, and the amount he seeks is debatable.....	7
C. The law of the case doctrine does not prevent this Court from considering the lower courts’ application of <i>Santos</i>	10
CONCLUSION.....	13
CERTIFICATE OF SERVICE.....	unnumbered

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Bee v. Univ. of Akron</i> , 2002-Ohio-5776.....	6
<i>Bowen v. Massachusetts</i> (1988), 487 U.S. 879	3, 5
<i>Cristino v. Ohio Bureau of Workers' Compensation</i> (2004), 101 Ohio St. 3d 97	10
<i>Cristino v. Ohio Bureau of Workers' Compensation</i> (8th Dist.), 2006-Ohio-5921	11
<i>Cty. of Hubbard ex rel. Creed v. Sauline</i> (1996), 74 Ohio St. 3d 402, 404, 1996-Ohio-174	11
<i>Great-West Life & Annuity Ins. Co. v. Knudson</i> (2002), 534 U.S. 204	5, 7
<i>Hennick v. Hennick</i> (2d Dist. 1940), 32 Ohio L. Abs. 339, 1940 Ohio. App. Lexis 1035.....	3
<i>Hopkins v. Dyer</i> (2004), 104 Ohio St. 3d 461, 2004-Ohio-6769	11, 12
<i>Ohio Edison Co. v. Ohio Dep't of Transp.</i> (1993), 86 Ohio App. 3d 189.....	6
<i>Ohio Hosp. Assn. v. Ohio Dep't of Human Services</i> (1991), 62 Ohio St. 3d 97	2, 5, 6
<i>Picklesimer v. The Baltimore and Ohio Rd. Co.</i> (1949), 151 Ohio St. 1	3
<i>Santos v. Ohio Bureau of Workers' Compensation</i> (2004), 101 Ohio St. 3d 74, 2004-Ohio-28	<i>passim</i>
<i>Sheaffer v. Westfield Ins. Co.</i> (2006), 110 Ohio St. 3d 265, 2006-Ohio-4476	12
<i>Zelenak v. Industrial Commission of Ohio</i> (10th Dist.), 148 Ohio App. 3d 589, 2002-Ohio-3887.....	6

Statutes and Rules

Page(s)

R.C. 4123.644

R.C. 4123.65(F)4

INTRODUCTION

The Court has already explained that a restitution claim that “seeks the return of specific funds wrongfully collected or held by the state is brought in equity” and remains available in common pleas courts, as opposed to legal claims against the State, which belong in the Court of Claims. See *Santos v. Ohio Bureau of Workers’ Comp.*, (2004), 101 Ohio St. 3d 74, 2004-Ohio-28, ¶ 17. Thus, the sole dispute here concerns the nature of the claims raised by, and relief sought by, Plaintiffs-Appellees Pietro Cristino et al. (“Cristino”). The Bureau does not at all argue that “*Santos* was incorrectly decided,” which Cristino insists is the Bureau’s “real position,” Cristino Brief (“Br.”) at 18, nor does the Bureau seek “to avoid the implications of *Santos*,” *id.* at 4. Instead, the Bureau welcomes a straightforward application of the *Santos* test, as that test shows that Cristino’s claims are legal, not equitable, so he belongs in the Court of Claims.

Every aspect of Cristino’s claim—from its basis in fraud or contract to the damages he seeks as relief—shows that his claim is legal, not equitable. Cristino had been entitled, statutorily, to a lifetime stream of payments for permanent, total disability (“PTD”). But he signed a *contract* with the Bureau to forgo that stream of payments and to instead receive a one-time, lump-sum payment. He claims that the Bureau fraudulently induced him to agree to the settlement, using unfair life-expectancy tables and allegedly concealing the “discount rate” used in calculating the settlement offer. So he now wants a common pleas court to order the Bureau to pay him more money—not to switch back to his stream of payments—thus resulting in a higher lump-sum payment than the one he agreed to accept.

First, the cause of action itself is legal, as Cristino’s basis for recovery is partly fraud—in its legal, not equitable version—and partly contract. Fraud, as a basis for seeking more money, is legal. A fraud claim may be equitable when a plaintiff seeks merely rescission, to undo a contract and restore a status quo, but that is not what Cristino seeks. He wants more money as a

supplement to his “unfair” or “fraudulent” lump sum. Equally important, his right to have any lump sum at all is rooted in the settlement *contract*, not in any statute or regulation, and that contractual basis confirms the legal nature of his claim. Indeed, the Court’s cases—including cases that Cristino purports to rely on, such as *Ohio Hospital Association. v. Ohio Department of Human Services* (1991), 62 Ohio St. 3d 97—have repeatedly confirmed that contract-based claims remain legal, even when accompanying claims based on statutes or regulations.

Second, the relief Cristino seeks confirms that his claim is legal, not equitable, as he does not seek to restore possession of funds he once held, and even the amount he seeks is unclear. *Santos* held that a claim is equitable when a plaintiff seeks “the return of specific funds wrongfully collected or held by the state, *id.* at syllabus. Cristino fails both the “return” part and the “specific” part of that standard. Again, he does not wish to get his money back, as the *Santos* plaintiffs did, but to gain new funds. And even the amount of his sought-after supplement is unclear. He claims that the Bureau’s life expectancy tables were unfair, but even if he were right (and he is not), he would have to show what “fair” tables should be used instead, leading to debate about recalculating his amount. And if the Bureau’s discount rate is “unfair,” Cristino would have to show what a “fair” discount would be, and just as the interest rate used in calculating net present value is debatable, so, too, is the amount of discount that is legitimately charged for the right to receive money upfront, which eliminates the uncertainty inherent in a lifetime stream of payments.

Finally, Cristino’s insistence that this case was already decided, and that “law of the case” applies, is misguided, as that doctrine governs only lower courts on remand, and further, would not apply here based on the nature of the rulings at issue.

For all these reasons, Cristino’s claim belongs in the Court of Claims.

ARGUMENT

A. Cristino's claim is legal because it is based on the tort of fraud and on contract, not on money taken from him or owed to him under a statute or regulation.

Cristino is wrong when he insists that all he wants is money already owed to him, so that he fits under the *Santos* standard of seeking funds improperly “retained” by the State. His claim relies on two overlapping theories of fraud and contract, and both are legal claims. Cristino claims that several cases, beyond *Santos*, support his cause, but those cases actually confirm why Cristino is wrong. Those cases specifically explain that contract-based claims are legal, and that equitable claims, if they do not involve money once held by a plaintiff, involve claims to funds owed under a statute or regulation, not under a contract.

First, Cristino's fraud claim is legal, not equitable. Fraud can be raised as an equitable claim, as Cristino says, Cristino Br. at 16, but an equitable claim of fraudulent-inducement-to-contract can be used only to have the contract set aside, i.e., for rescission. See, e.g., *Hennick v. Hennick* (2d Dist. 1940), 32 Ohio L. Abs. 339, 1940 Ohio. App. Lexis 1035, *7 (“action seeking to set aside the contract and be restored to all rights inuring to her had the contract not been executed.”). Further, if a plaintiff seeks the equitable remedy of rescission, she must, as part of restoring the status quo ante—i.e., to put things as if the contract never existed—tender for return any benefits received under the contract. *Id.* (“she alleges she is ready to render an account for the proceeds . . . received by her . . . under the contract”); *Picklesimer v. Baltimore and Ohio Rd. Co.* (1949), 151 Ohio St. 1, 5 (plaintiff seeking to set aside settlement induced by fraud “must first restore the status quo by restoring, tendering, or offering to restore what he has received” under the settlement). But Cristino presumably does not want to return the lump sum and restore his stream of payments; instead, as he puts it, he is “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.” Cristino Br. at 12. But those “additional funds” he seeks are indeed something more than the status quo ante.

Second, Cristino’s claim is legal because is it ultimately a *contract* claim, even if he wants the terms of the contract altered, as it is only the settlement contract itself—not any statute or regulation—that even gives him a right to a lump sum at all, of any amount, as opposed to a lifetime stream of payments. That is, Cristino cannot point to any statute or rule that grants him a right to convert his stream of PTD payments—a stream that he is entitled to by law—into any lump sum at all, regardless of the amount. While R.C. 4123.64 authorizes the Administrator to convert to lump sums, nothing in that statute creates rights in the claimants to seek conversion, let alone to obtain it through a settlement. Settlements are authorized by R.C. 4123.65, and R.C. 4123.65(F) expressly provides that settlements are not appealable, which makes sense, as the normal remedy for any breach of a settlement is a breach-of-contract claim. Thus, Cristino needs to rely on the settlement contract itself to first establish a right to any lump sum at all from the Bureau—i.e., a contract claim—and then he needs to blend in some other theory, whether fraud, unjust enrichment, etc., to change the amount of money owed on what is at root a breach-of-contract claim. Cristino insists that “he possessed a vested and legally enforceable statutory entitlement to continued PTD payments for the remainder of [his] lifetime[s],” Cristino Br. at 10, and he is right. But that right to future payments cannot, under any theory, be converted to a present claim for a larger lump sum, without relying on the *contract* with the Bureau as part of the theory of the case.

Indeed, the contractual basis of Cristino’s claims shows why the cases Cristino cites support the Bureau, not Cristino. For example, Cristino properly acknowledges that the U.S. Supreme Court, in *Great-West Life & Annuity Ins. Co. v. Knudson* (2002), 534 U.S. 204, 221,

found that a claim was legal, not equitable, when the claim was based on “a contractual obligation to pay money.” *Id.* at 221, quoted in *Cristino Br.* at 12. But *Cristino* fails to recognize that his claim, too, must rely on a contract.

Further, the Court in *Great-West Life* expressly distinguished contractual claims from those seeking money from the government based upon a statutory right to payment. *Id.* at 212. In distinguishing an earlier case, *Bowen v. Massachusetts* (1988), 487 U.S. 879, the Court in *Great-West Life* explained that “*Bowen*, unlike petitioners’ claim, did not deal with specific performance of a contractual obligation to pay past due sums. Rather, *Massachusetts* claimed that the Federal Government . . . failed to reimburse it for past expenses pursuant to a statutory obligation.” *Great-West Life*, 534 U.S. at 212. Thus, “*Bowen* has no bearing on the unavailability of an injunction to enforce a contractual obligation to pay money past due.” *Id.*

This Court, too, has explained that contract-based claims against the State are legal—meaning, in Ohio, that such claims belong in the Court of Claims—even if a party has a separate equitable claim based on a statute or regulation. See *Ohio Hosp. Assn. v. Ohio Dep’t of Human Services* (1991), 62 Ohio St. 3d 97, 104. *Cristino* insists that *Ohio Hospital Association* supports him, and he quotes that case’s holding that “[t]he reimbursement of monies withheld pursuant to an invalid administrative rule is equitable relief, not money damages.” *Id.* at 105, cited in *Cristino Br.* at 14. But *Cristino*’s claim does not fall under that part of *Ohio Hospital Association*, as he cannot point to an administrative rule or statute, or to the invalidation of such a law, as the source of his right to a bigger lump sum. Equally important, *Cristino* ignores the part of *Ohio Hospital Association* in which this Court expressly addressed the Ohio Hospital Association’s other claims, which were based on contracts, not on statutes or regulations: “The claims for violation of the provider agreements and an earlier settlement agreement are within

the exclusive jurisdiction of the Court of Claims to the extent that the hospitals allege that their contractual rights have been violated and seek monetary relief.” *Id.* at 104. Thus, *Ohio Hosp. Assn.* is firmly on the Bureau’s side here.

Other cases, too, fall in the same pattern of allowing equitable claims for certain claims based on statute or rule, while categorizing other claims as legal. For example, Cristino claims support from *Ohio Edison Co. v. Ohio Dep’t of Transp.* (1993), 86 Ohio App. 3d 189, but that case, too, focused on “a statutory specific remedy.” *Id.* at 194, cited in Cristino Br. at 15. And *Zelenak v. Industrial Commission* (10th Dist.), 148 Ohio App. 3d 589, 2002-Ohio-3887, demonstrates both sides of the line between law and equity. The court there noted that a claim for interest was a damages claim belonging in the Court of Claims, *id.* at ¶ 24, but it also noted that a statutory-based claim not at issue (as the agency had paid it pre-lawsuit) would have been equitable: “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.” *Id.* at ¶ 19. Those equitable would-be claims in *Zelenak* were based on a statutory entitlement (for funds withheld) or on the *Santos* theory of funds that plaintiffs once held and that the agency took from them (the overpayments collected). In sum, none of the cases that Cristino cites involve claims such as his. And some, such as *Bee v. Univ. of Akron*, 2002-Ohio-5776, involve plaintiffs who did not even seek monetary restitution or damages, only declaratory and injunctive relief. *Id.* at ¶ 11.

In sum, the nature of Cristino’s claim is a legal one, because the type of fraud he asserts is legal, and because his claim is ultimately rooted in the settlement contract that he and the Bureau signed. Just as he did not previously possess the money that he now seeks, he did not previously

possess any right to the sum he seeks, either. That alone dooms his claim to equitable jurisdiction here. And as explained below, the remedy he seeks, in addition to the nature of his claim, independently dooms his claim as well.

B. Cristino seeks new money that he never had, not a restoration of specific funds, and the amount he seeks is debatable.

As explained above, Cristino’s claim is legal because it arises from legal theory, not from equitable jurisdiction. Further, Cristino’s claim fails because the relief he seeks is legal, not equitable. He does not seek the restoration of specific funds that he once possessed, but instead seeks new money to supplement his lump sum and turn it into a bigger lump sum. Nor does he seek to restore the status quo ante of his lifetime stream of PTD payments. Moreover, the amount he seeks is not even fixed, as the amount of a “fair” lump sum—even if one accepts *arguendo* that it is something other than the sum that Cristino settled for—is a debatable matter.

First, contrary to Cristino’s insistence otherwise, *Santos* did focus on the return or restoration of funds once held by the plaintiff. Cristino says strongly that “[n]ot 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.” Cristino Br. at 4. But the *Santos* syllabus specifically refers to the “return of specific funds,” 101 Ohio St. 3d at syllabus, and the decision also refers to the “return of specific funds wrongfully collected,” *id.* at ¶ 17, and it approvingly cites language from *Great-West Life* speaking of a suit to “restore to the plaintiff particular funds or property in the defendant’s possession,” *id.* at ¶ 13, quoting *Great-West Life*, 534 U.S. at 214 (emphasis added). True, these quotes do not use the term “paid,” but it is hard to see how “restore” or “return” could apply unless the plaintiff once held the money.

Second, the specific idea of “getting money back” is merely a version of the general principle of equitably restoring a status quo ante, and the remedy Cristino seeks—new money to enhance his lump sum—was never part of any status quo ante. As noted above in Part A, he does not seek rescission of the contract, and restoration of the stream of payments that existed pre-contract; rather, he wants to keep the main benefit of the contract—having more money now—while enhancing that benefit with extra funds. That feature not only affects the nature-of-the-claim analysis, as explained above, but it also affects the nature-of-the-remedy analysis, and it defeats Cristino’s claim. Cristino’s Scenario 1 was that he was receiving his stream of payments. His Scenario 2 was that he accepted a specific lump sum to replace those payments. What he now wants a court to order—an enhanced lump sum—in undeniably a Scenario 3, which never existed; it is not a return to Scenario 1. Indeed, if the only relief that Cristino sought were true restoration of the status quo—namely, undoing the settlement and restoring his previous stream of payments instead of keeping the lump-sum payment that he now finds too low—then jurisdiction in the common pleas court could be proper, and the Bureau almost certainly would not object (barring the addition of fees or other aspects that would violate the true restoration principle).

Finally, Cristino seeks funds that not only were never his, but he does not even seek a fixed amount of money, so he would need to persuade a court what a “fair” amount would be—yet another hallmark of a legal claim, not an equitable restitution claim. Cristino suggest that he wants an easy-to-calculate amount, asking rhetorically, “[w]hat is it about thirty percent (30%) that isn’t fixed?” Cristino Br. at 21. But his demand is not that simple. The first step in calculating the value of his lifetime stream of payment is to use life expectancy tables to estimate how long he would likely live, and thus the total amount of his likely future payments. Cristino

insists that the Bureau used outdated and unfair tables. Even if he were right (and he is not), he cannot point to any one master table that is universally accepted as the “right” one. So the parties would have to litigate which alternate table is the “best” one. Second, the discounting that the Bureau employs includes two stages: using an interest rate to determine net present value, and then applying a discount rate to account for the fact that someone is getting paid up front, rather than an uncertain stream. The interest rate is, of course, debatable, just like the expectancy tables.

The additional discounting built in, which Cristino strongly attacks, is also a debatable amount. It is standard practice for someone taking a lump sum to accept a discount to represent the idea that the lump sum will be a sure thing, while the stream of payments might end tomorrow. That is, while the expectancy tables work on *averages*, the reality is that any given claimant might be a month or a year away from death, and thus from the end of payments, leaving nothing for his family. But if he receives, say, \$150,000, and gives up \$600/month and dies six months later, that sum remains for his heirs. That risk factor, and others not detailed here, account for the discount rate that the Bureau uses.¹

¹ Discount rates are not only part of normal finance, but they raise additional issues in public finance, such as here, where the Bureau is obliged to protect the balance of the workers’ compensation fund for the good of all workers. Standard texts explain that in evaluating the present value of future revenue streams, or annuity-type payments such as Cristino’s PTD benefits, future revenue streams must be discounted to allow for the fact that benefits may be less valuable in the future than today. Musgrave Richard A. & Peggy B. Musgrave, *Public Finance in Theory and Practice* 150 (5th ed. 1989). In short, “[a] dollar received or spent in the future is not equivalent to a dollar received or spent today.” Lynch Thomas D., *Public Budgeting in America* 137 (3rd ed. 1990). “In choosing the discount rate, government may proceed on the premise that it is desirable to use a rate equal to . . . [that used by] private consumers[] or it may substitute a social discount rate *of its own*.” Musgrave, *supra*, at 152. The goals a governmental entity may have in mind for choosing its own discount rate may include: preventing private individuals from prioritizing consumption over savings, saving for future generations, increasing public investment, and ensuring future capital is available for investment. *Id.* at 154.

The point is not whether the Bureau's rate is a fair one (though of course the Bureau believes it is), but that it is not realistic to argue that the discount rate should be *zero*, rather than 30%, and that opens the door to yet another litigable legal issue. Even if Cristino could persuade a court that the "best" discount rate is somehow just 20%, or 5%, or 1%, that is something to litigate, just like the expectancy tables, and is not a matter of just looking up a number in a preset table of what claimants paid in (as in *Santos*), nor is it a matter of applying a statutory formula.

Thus, determining the amount of money Cristino demands will not be "simple and straightforward" as he suggests, but would involve several layers of debate. Proving the amount that his lump sum "should have been," or its "true" present value—even if the Bureau's original calculation was improper—would require some type of "damages" phase to the trial.

In sum, the remedy that Cristino seeks shows that his claim is legal, not equitable, as he does not seek the return of funds he once possessed, nor does he even seek a specific, fixed amount to which he is allegedly entitled.

C. The law-of-the-case doctrine does not prevent this Court from considering the lower courts' application of *Santos*.

As noted above, the Bureau does not dispute that *Santos* is the law of the case and that the lower courts are bound to apply it. Rather, the Bureau asserts *Santos* was applied incorrectly by the lower courts, and it is this Court's job to now address that—and it is not bound by what lower courts did.

After deciding *Santos*, this Court remanded this case to the trial court for further proceedings "on the authority of *Santos*." *Cristino v. Ohio Bureau of Workers' Compensation* (2004), 101 Ohio St. 3d 97. Upon remand, on July 23, 2004, the Bureau moved to dismiss this case on the authority of *Santos*, arguing that the trial court lacked subject matter jurisdiction to consider the Cristino's claims. The trial court denied that motion and the Eighth District affirmed

on the basis of *Santos. Cristino v. BWC* (8th Dist.), 2006-Ohio-5921, ¶ 1. This Court has now 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."

The doctrine of the law of the case "functions to compel *trial courts* to following the mandates of *reviewing courts*." *Cty. of Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St. 3d 402, 404, 1996-Ohio-174 (emphasis added) The doctrine "is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results." *Id.* This Court, upon accepting jurisdiction to review the decision of an appellate court, "may review and affirm, modify, or reverse the judgment of the court of appeals." OH Const. art. IV, § 2(B)(2)(e). Additionally, "absent extraordinary circumstances, such as an *intervening decision by the Supreme Court*, an *inferior court* has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Hopkins v. Dyer* (2004), 104 Ohio St. 3d 461, 2004-Ohio-6769, ¶ 1 (quoting *Nolan v. Nolan* (1984), 11 Ohio St. 3d 1) (emphasis added).

The Supreme Court is not bound by the doctrine of the law of the case, as it of course is not an "inferior court" in these proceedings, and that alone makes Cristino's law-of-the-case argument mistaken.

Further, the issue here is a new one, for this Court; it is not the issue that went to this Court before. The Bureau's challenge to the jurisdiction of the common pleas court over this case on the authority of *Santos* is before this Court for the first time. Neither the trial court nor the Eighth

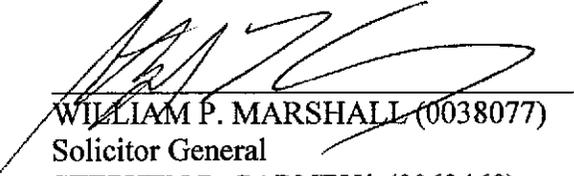
District had considered this case in light of this Court's decision in *Santos* before remand. Moreover, the Court did not deny jurisdiction of the Bureau's first appeal in this case, it reversed the Eighth District (which is a form of granting jurisdiction) and remanded the case to the trial court. The application of *Santos* to the Bureau's motion to dismiss has not been settled. See *Sheaffer v. Westfield Ins. Co.* (2006), 110 Ohio St. 3d 265, 2006-Ohio-4476, ¶ 16. *Santos* was an "intervening decision by a superior court that was inconsistent with the law of the case" in these proceedings. See *Hopkins* at ¶ 19. Thus, the doctrine does not preclude this Court from considering this case in light of *Santos*.

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,

MARC DANN (0039425)
Attorney General of Ohio



WILLIAM P. MARSHALL (0038077)
Solicitor General

STEPHEN P. CARNEY* (0063460)
Deputy Solicitor

**Counsel of Record*

JASON PATRICK SMALL (0080151)
Assistant Solicitor

MARK E. MASTRANGELO (0023603)
Assistant Attorney General

30 East Broad Street, 17th Floor
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

scarney@ag.state.oh.us

RONALD D. HOLMAN, II (0036776)

MICHAEL C. COHAN (0013542)

ALEXANDER E. GOETSCH (0065026)

JEFFREY W. GALLUP (0076506)

Cavitch, Familo, Durkin & Frutkin

1717 East Ninth Street, 14th Floor

Cleveland, Ohio 44114

216-621-7680

216-621-6415 fax

Counsel for Defendants-Appellants,
Administrator, Ohio Bureau of Workers'
Compensation and State of Ohio

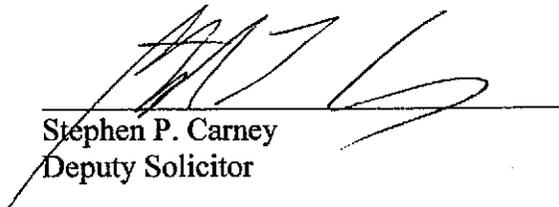
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Appellants Administrator, Ohio Bureau of Workers' Compensation and State of Ohio was served by U.S. mail this 24th day of September, 2007, upon the following counsel:

W. Craig Bashein
Bashein & Bashein Co., L.P.A.
50 Public Square, 35th Floor
Cleveland, Ohio 44113

Paul W. Flowers
Paul W. Flowers Co., L.P.A.
50 Public Square, 35th Floor
Cleveland, Ohio 44113

Frank Gallucci, III
Gallucci Law Firm
55 Public Square, Suite 2222
Cleveland, Ohio 44113



Stephen P. Carney
Deputy Solicitor