

In the
Supreme Court of Ohio

10-0393

POWELL MEASLES, et al.,

Plaintiffs-Appellees,

v.

INDUSTRIAL COMMISSION OF OHIO,
et al.,

Defendants-Appellants.

Case No. _____

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

Court of Appeals Case
No. CA-09-093071

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANTS-APPELLANTS INDUSTRIAL COMMISSION OF OHIO AND
BUREAU OF WORKERS' COMPENSATION**

PATRICK J. PEROTTI (0005481)
JONATHAN T. STENDER (0070563)
Dworken & Bernstein Co., LPA
60 South Park Place
Painesville, Ohio 44077
440-352-3391
440-352-3469
pperotti@dworkenlaw.com
jstender@dworkenlaw.com

Counsel for Plaintiffs-Appellees
Powell Measles, et al.

RICHARD CORDRAY (0038034)
Attorney General of Ohio

BENJAMIN C. MIZER* (0083089)
Solicitor General
**Counsel of Record*

ELISE PORTER (0055548)
Assistant Solicitor
JEFFERY B. DUBER (0018532)
MARK E. MASTRANGELO (0023603)

Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

Counsel for Defendants-Appellants
Industrial Commission of Ohio and
Bureau of Workers' Compensation

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	2
A. Plaintiffs each signed a contract with the Bureau agreeing to an LSA of part of their PTD awards and a corresponding commutation of part of their bi-weekly PTD payments “for the life of the claim.”.....	3
B. Plaintiffs sued the Bureau and the Industrial Commission in the Cuyahoga County Court of Common Pleas, asserting that because their LSAs had been paid off with interest, the Bureau should repay them the amounts subtracted from their bi-weekly PTD payments following the completion of that repayment.	4
C. After this Court released its decision in <i>Cristino</i> , the Court of Common Pleas granted the Bureau’s motion to dismiss for lack of subject matter jurisdiction.	4
D. The Eighth District Court of Appeals reversed, distinguishing <i>Cristino</i> and holding that Plaintiffs’ claim for “disgorgement” was equitable and therefore properly brought in the Court of Common Pleas.	5
THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST	5
A. The Eighth District’s decision conflicts with this Court’s recent decision in <i>Cristino v. Ohio Bureau of Workers’ Compensation</i> , which held that a claim against the State for money due under a contract is not a claim for equitable restitution and must be brought in the Court of Claims.	6
B. The Eighth District’s misapplication of the proper standard of review for a motion to dismiss for lack of subject matter jurisdiction would allow future plaintiffs to “artfully plead” their way into a court of common pleas, when their claims actually fall within the exclusive, original jurisdiction of the Court of Claims.	9
ARGUMENT	11
<u>The Industrial Commission of Ohio’s Proposition of Law:</u>	
<i>An injured worker who contracted to receive an LSA in lieu of part of his PTD income stream and now seeks to recover funds commuted from that income stream, brings a claim against the State for money due under a contract, which must be pursued in the Court of Claims. Cristino, 118 Ohio St. 3d 151, 2008-Ohio-2013, at ¶ 16, followed.....</i>	11

CONCLUSION.....14
CERTIFICATE OF SERVICEunnumbered

INTRODUCTION

The Eighth District's decision below improperly applied and conflicts with this Court's recent holding in *Cristino v. Ohio Bureau of Workers' Compensation*, 118 Ohio St. 3d 151, 2008-Ohio-2013, that the Court of Claims has exclusive jurisdiction over lawsuits brought under R.C. 4123.64 that seek recovery from the State under contract-related theories. In this action, Plaintiffs-Appellees Powell Measles, Vada Measles, and Ann Pocara (collectively, "Plaintiffs") assert facts functionally indistinguishable from those in *Cristino*. Further, the causes of action at issue arise under the same statute, and implicate identical principles of contract law. Accordingly, jurisdiction resides with the Court of Claims, and the Eighth District erred when it reversed the trial court's determination that it lacked jurisdiction to hear the case.

The issue at the heart of Plaintiffs' case is whether their claims seeking restitution from the Bureau of Workers' Compensation ("Bureau") arise in equity or at law. The distinction is crucial because a claim in equity can proceed in a court of common pleas, while a claim at law must be pursued in the Court of Claims. In *Cristino*, this Court clarified the difference between equitable and legal restitution in the context of a putative class-action suit for damages under R.C. 4123.64(A). *Cristino* explained that the discrepancy depended on "the basis for the plaintiff's claim and the nature of the underlying remedy." *Id.* at ¶ 7. Applying both United States Supreme Court and Ohio precedent, the *Cristino* Court then determined that because plaintiffs had no statutory right to the damages they sought, their claim necessarily arose from the parties' contract and was not a claim for equitable restitution that could proceed in a court of common pleas. *Id.* at ¶ 16. Further, *Cristino* specifically distinguished this Court's decision in *Santos v. Ohio Bureau of Workers' Compensation*, 101 Ohio St. 3d 74, 2004-Ohio-28, which held that a plaintiff's claims for the return of specific funds wrongfully collected by the State arose in equity. *Cristino*, 2008-Ohio-2013, at ¶ 15.

Just as in *Cristino*, Plaintiffs have no statutory right to their alleged damages, and their claims necessarily arise under their individual agreements with the Bureau. But by wholly ignoring *Cristino*'s clear directive as to the scope of the State's waiver of immunity under R.C. Chapter 2743, the Eighth District essentially limited *Cristino* to its facts and once again muddied the jurisdictional waters for workers' compensation litigants seeking to recover money damages. Without further clarification from this Court, such litigants will not know where they should file their claims, and the State will not know whether it can raise a jurisdictional issue to defend from those claims.

Moreover, the Eighth District misapplied the proper standard of review in analyzing the jurisdictional question, looking only at the face of the complaint to determine the Court of Common Pleas' jurisdiction. By focusing only on the complaint, the Eighth District improperly accepted at face value Plaintiffs' unsupported assertions that their claims were "equitable," and never considered the actual substance of those claims. A rule like the Eighth District's, under which a plaintiff can plead himself out of the Court of Claims and into a court of common pleas based solely on self-serving allegations that his claims are "equitable" rather than legal, conflicts with R.C. Chapter 2743's definition of the Court of Claims' jurisdiction, and undermines this Court's interpretations of that statutory authority.

For these reasons and others set forth below, this Court should review and reverse the Eighth District's erroneous decision.

STATEMENT OF THE CASE AND FACTS

This workers' compensation case arises out of the Bureau's grant of lump-sum payments of permanent total disability ("PTD") benefits to Plaintiffs in the late 1980s. An award of PTD benefits under R.C. 4123.58(A) is designed to compensate an injured worker for a complete loss

of earning capacity by guaranteeing him a stream of income for life, usually in the form of bi-weekly payments. See *State ex rel. GMC v. Indus. Comm'n* (1975), 42 Ohio St. 2d 278, 282. Because an injured worker collecting PTD often has few alternate sources of income to pay bills, such as attorney fees and other miscellaneous expenses, he may request his PTD income stream as a lump-sum advancement (“LSA”) under R.C. 4123.64. If the Commission exercises its discretionary authority to grant the injured worker an LSA, part or all of his lifetime benefit is “commuted” into the LSA, and his corresponding bi-weekly PTD payment is reduced. R.C. 4123.64(A).

A. Plaintiffs each signed a contract with the Bureau agreeing to an LSA of part of their PTD awards and a corresponding commutation of part of their bi-weekly PTD payments “for the life of the claim.”

After suffering severe workplace injuries, the Bureau awarded Plaintiffs PTD benefits under R.C. 4123.58. Plaintiffs each later applied for and received one or more LSAs for part of their PTD benefits under R.C. 4123.64. These LSAs were memorialized in the form of a contract between the Bureau and each injured worker entitled “Application for Lump Sum Payment.” At the bottom of each contract, directly above the signature line the following statement appears in bold print: “In the event this Lump Sum Payment is granted it will result in a permanent reduction of weekly benefits *which shall continue for the life of the claim.*” (emphasis added). Each plaintiff initiated and executed his respective LSA agreement with the assistance of counsel.

In accordance with R.C. 4123.64 and the terms of Plaintiffs’ agreements, the Bureau awarded Plaintiffs their agreed-upon LSAs and adjusted the remaining bi-weekly installments of Plaintiffs’ PTD payments according to a mathematical formula actuarially calculated to account for each individual’s likely life span and other factors.

B. Plaintiffs sued the Bureau and the Industrial Commission in the Cuyahoga County Court of Common Pleas, asserting that because their LSAs had been paid off with interest, the Bureau should repay them the amounts subtracted from their bi-weekly PTD payments following the completion of that repayment.

In 2007, Plaintiffs sued the Bureau and the Industrial Commission (collectively, “Defendants”) in the Cuyahoga County Court of Common Pleas, seeking a declaratory judgment, injunctive relief, and “equitable disgorgement” of funds they claimed Defendants had wrongfully withheld from their bi-weekly PTD awards. Specifically, Plaintiffs argued that Defendants “violated the law” by continuing to deduct money from Plaintiffs’ bi-weekly PTD awards when Plaintiffs had already repaid the full amounts of their LSAs with interest. Compl. ¶ 18. Plaintiffs sought to certify a class of all injured workers receiving PTD awards who had applied for and received an LSA, but were subject to deductions of their bi-weekly PTD payments in excess of the amount of that LSA. *Id.* at ¶¶ 4-5. The Bureau moved for summary judgment on the merits, and Plaintiffs opposed the motion, which is still pending in the trial court.

C. After this Court released its decision in *Cristino*, the Court of Common Pleas granted the Bureau’s motion to dismiss for lack of subject matter jurisdiction.

Following the decision in *Cristino v. Ohio Bureau of Workers’ Compensation*, 2008-Ohio-2013, the Bureau moved to dismiss Plaintiffs’ case for lack of subject matter jurisdiction under Civ. R. 12(H)(3). Comparing the case to *Cristino*, the Bureau argued that because Plaintiffs’ claims for “equitable disgorgement” of amounts allegedly wrongfully withheld from their PTD payments arose from their respective LSA agreements, jurisdiction was only proper in the Court of Claims. The trial court agreed and dismissed the case.

D. The Eighth District Court of Appeals reversed, distinguishing *Cristino* and holding that Plaintiffs' claim for "disgorgement" was equitable and therefore properly brought in the Court of Common Pleas.

The Eighth District Court of Appeals reversed, holding that Plaintiffs' claims for relief sounded in equity rather than law and thus could be pursued in the Cuyahoga County Court of Common Pleas. *Measles v. Indus. Comm'n of Ohio* ("App. Op.") (8th Dist.), 2010-Ohio-161, ¶¶ 16-18. The Eighth District based its determination on the plain language of Plaintiffs' complaint, holding that Plaintiffs' suit sounded was equitable rather than legal because Plaintiffs sought "title or a right to possession of particular 'property,' i.e., the funds they were entitled to as permanently injured workers in Ohio that they believe the Bureau has kept from them." *Id.* at ¶ 17. The court also relied on the language in Plaintiffs' complaint to distinguish *Cristino*, explaining that, "[a]t this stage of the proceedings [Plaintiffs] have not exclusively pled claims for money due and owing under a contract, and so have not made what is 'quintessentially an action at law.'" *Id.* at ¶ 16.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This case calls for this Court's review for two main reasons. First, the Eighth District's decision directly conflicts with the rule of law announced in *Cristino*. There, the Court drew a clear line when it held that a plaintiff's claim for restitution under R.C. 4123.64 is not equitable—and is therefore subject to the exclusive, original jurisdiction of the Court of Claims—because it lies in contract. *Cristino*, 2008-Ohio-2013, at ¶¶ 1, 16. In complete disregard of *Cristino*, the Eighth District has again muddied the waters. Without further guidance from this Court on the difference between "equitable" and "legal" restitution claims in the context of PTD awards, future workers' compensation litigants will not know the proper forum in which to bring their claims for relief.

Second, in holding that Plaintiffs' claims arose "in equity," the Eighth District misapplied the standard of review for motions for lack of jurisdiction under Civ. R. 12(H)(3). By improperly limiting its consideration to the plain language of Plaintiffs' complaint, the Eighth District opened the common pleas courts' jurisdiction to any plaintiff who artfully drafts his complaint as sounding "in equity," even though the substance of his claim requires him to proceed in the Court of Claims.

A. The Eighth District's decision conflicts with this Court's recent decision in *Cristino v. Ohio Bureau of Workers' Compensation*, which held that a claim against the State for money due under a contract is not a claim for equitable restitution and must be brought in the Court of Claims.

This case calls for review because the Eighth District's decision, which allows injured workers to bring a claim against the State for money due under a contract in a court of common pleas, directly conflicts with the rule of law announced by this Court. *Cristino* held that a plaintiff's claim for restitution under R.C. 4123.64 lies in contract, making it legal and subject to the exclusive, original jurisdiction of the Court of Claims. 2008-Ohio-2013, at ¶¶ 1, 16.

In *Cristino*, plaintiff Pietro Cristino, an injured worker who had been granted PTD benefits, contractually agreed to relinquish his right to periodic payments in exchange for a single lump-sum settlement from the Bureau at the "present value" of his PTD claim. *Id.* at ¶ 2. Following the payment, Cristino filed a class-action lawsuit against the Bureau and the State in common pleas court, alleging that the Bureau had improperly calculated the present value of his total PTD claim and seeking to collect money allegedly owed in excess of the settlement amount. *Id.* at ¶ 3. This Court held that Cristino sought legal, rather than equitable, restitution, and that his claim therefore fell within the exclusive, original jurisdiction of the Court of Claims under R.C. Chapter 2743. *Id.* at ¶ 16.

The *Cristino* Court based its holding on the rule articulated in *Ohio Hospital Association v. Ohio Department of Human Services* (1991), 62 Ohio St. 3d 97, 104, that a claim against the State for money due under a contract is *legal*, not equitable. *Cristino*, 2008-Ohio-213, at ¶ 11. The “crux” of *Cristino*’s claim was that the Bureau had violated its agreement to provide him and the other putative class members with “a lump sum payment of the ‘present value’ of their claims.” *Id.* at ¶ 12. Accordingly, because *Cristino* had no statutory entitlement to that lump-sum payment under R.C. 4123.64(A) (which gives the administrator discretion to grant or deny such requests), his claim necessarily arose out of his agreement. *Id.*

The Court also specifically distinguished *Cristino* from its previous decision in *Santos v. Ohio Bureau of Workers’ Compensation*, 101 Ohio St. 3d 74, 2004-Ohio-28, which involved a class of plaintiffs’ claims for injunctive relief and the return of funds they alleged were wrongfully collected by the State under the now-unconstitutional subrogation statute, R.C. 4123.931. See *Cristino*, 2008-Ohio-2013, at ¶ 15. Because the *Santos* plaintiffs sought the return of *specific* funds that the State had already improperly collected, their claim was an equitable “action to correct the unjust enrichment of the [Bureau].” *Santos*, 2004-Ohio-28, at ¶ 17. *Cristino* deemed *Santos* inapplicable because the plaintiffs there “sought the return of funds that had once been in their possession and so belonged to them ‘in good conscience,’” *Cristino*, 2008-Ohio-2013, at ¶ 15, whereas the amount of *Cristino*’s claim was wholly dependent “upon the interpretation of the term ‘present value,’” in the context of his agreement, *id.* at ¶ 12.

Plaintiffs argued to the Eighth District, however, that *Santos*, not *Cristino*, controls this case. They asserted that their claims arise not from their LSA agreements but rather from Defendants’ violation of Plaintiffs’ statutory right to receive PTB benefits until death.

Specifically, Plaintiffs posited that Defendants illegally withheld their PTD benefits in violation of their statutory right to collect specific amounts of PTD payments until death under R.C. 4123.58. Thus, Plaintiffs argued that while the *Cristino* plaintiffs specifically relinquished their statutory rights to PTD payments through their settlement agreements, Plaintiffs sought to reinstate benefits that were accorded to them by statute.¹

The underlying factual and legal issues in this case are nearly identical to those considered in *Cristino*. The only distinction is that where the *Cristino* plaintiffs took a reduced one-time lump-sum PTD payment in lieu of their lifetime PTD payments, Plaintiffs received LSAs and continued to collect bi-weekly reduced lifetime PTD payments. Thus, by adopting Plaintiffs' arguments and determining that Plaintiffs' contract-based claims for relief were "equitable" rather than "legal," the Eighth District reopened a door that *Cristino* firmly closed, and allowed plaintiffs with purely legal claims against the State to pursue those claims in a court of common pleas when they belong in the Court of Claims. Because the Eighth District limited *Cristino* to its facts, returning to pre-*Cristino* confusion about the distinction between legal and equitable restitution, future litigants seeking money damages from the State will not know where they should seek relief, and the State will not know whether it should pursue a jurisdictional defense.

This Court should grant review and clarify *Cristino*'s holding that the Court of Claims has exclusive jurisdiction where a plaintiff seeks to recover money damages from the State under

¹ Plaintiffs also argued to the Eighth District that Section 4123-3-37 of the Ohio Administrative Code required the Bureau to cease commutation of their PTD benefits once the LSA had been paid off. Plaintiffs are correct that this section of the code states that, "[u]pon the repayment of the lump sum advancement in accordance with the terms of the order and agreement, the administrator shall remove the rate reduction due to the lump sum advancement and reinstate the injured worker's rate of compensation." Ohio Admin. Code 4123-3-37(C)(3). But that rule was not enacted until December 1, 2004, well after the Plaintiffs requested and received their LSAs, so it does not apply to Plaintiffs or their proposed class. See *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St. 3d 354, 355 (absent a clear indication of legislative intent to the contrary, a statute may only be applied prospectively).

R.C. 4123.64, giving necessary guidance to the lower courts and workers' compensation litigants alike.

B. The Eighth District's misapplication of the proper standard of review for a motion to dismiss for lack of subject matter jurisdiction would allow future plaintiffs to "artfully plead" their way into a court of common pleas, when their claims actually fall within the exclusive, original jurisdiction of the Court of Claims.

Not only did the Eighth District err by determining that Plaintiffs' claims lie in equity, but it also set a dangerous precedent for future cases involving claims for lack of subject matter jurisdiction under Civ. R. 12(B)(1) and (H)(3). The Eighth District misapplied the appropriate standard of review for such cases, basing its determination that Plaintiffs' claims were equitable rather than legal on the plain language of Plaintiffs' complaint, and ignoring the fact that the resolution of Plaintiffs' claims requires a court to interpret the terms of the parties' LSA agreements.

As the Eighth District correctly noted, see App. Op. at ¶ 10, the relevant inquiry on a motion to dismiss for lack of subject matter jurisdiction (under Civ. R. 12(B)(1) and (H)(3)) is "whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St. 3d 77, 80. And where, as here, a defendant challenges the factual basis of the court's jurisdiction, rather than just the facial sufficiency of the complaint, the court "has authority to consider any pertinent evidentiary materials," *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St. 3d 109, 111 n.3, and can "consider outside matter attached to a motion to dismiss for lack of jurisdiction without converting it into a motion for summary judgment if such material is pertinent to that inquiry," *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St. 2d 211, 214.

Although the determination of subject matter jurisdiction depended on whether the Plaintiffs' claims were equitable or legal, and required the consideration of matters outside the

complaint, *Southgate Dev. Corp.*, 48 Ohio St. 2d at 214, the Eighth District, by its own admission, looked no further than Plaintiffs' "Complaint for Equitable Relief Only" to make its decision. The Eighth District explained that Plaintiffs "were careful to word their complaint 'in equity,' expressly avoiding claims for money damages." App. Op. at ¶ 15. Further, the Eighth District determined that although the record demonstrated that Plaintiffs' claims "emanate[d], at least in part, from their LSA claims made with the Bureau pursuant to R.C. 4123.64(A)," *id.*, Plaintiffs' claims sounded in equity because they sought purely "equitable" relief—"declaratory judgment, injunctive relief, and finally, equitable disgorgement of property they believe is rightfully theirs," *id.* at ¶ 18.

Thus, according to the Eighth District, when considering a defendant's motion to dismiss for lack of subject matter jurisdiction, a court need not probe the substance of a plaintiff's suit for jurisdictional purpose and can limit itself to the plain language of a plaintiff's complaint. Under this interpretation, form trumps substance, and any plaintiff who aptly words his claim for relief as one in equity rather than one at law will successfully plead his way into a common pleas court, in contravention of statutory authority and case law.

A rule like the Eighth District's, under which a plaintiff can make what is truly a "legal" claim appear "equitable" through artful drafting, will upend the jurisdictional requirements of R.C. Chapter 2743, under which claims against the State requesting only equitable relief may be heard in the courts of common pleas while all other civil claims against the State fall within the exclusive, original jurisdiction of the Court of Claims. R.C. 2743.03(A)(1); R.C. 2743.03(A)(2). Further, it contravenes this Court's precedent requiring the strict construction of statutory provisions waiving the State's immunity from suit. *Nobles v. Wolf* (1990), 54 Ohio St. 3d 75, 80

(noting that the State’s “immunity is to be narrowly construed by the courts and should be applied only to the class of persons or things which is the object of legislative attention”).

Finally, taken to its logical conclusion, such a rule will lead to forum shopping by any plaintiff who can successfully plead himself into one court over another simply by careful word-choice in his complaint. Just as a plaintiff “may not purposefully frame his action under state law and omit federal questions,” to avoid jurisdiction in the federal courts, see, e.g., *Lingle v. Norge Div. of Magic Chef, Inc.* (7th Cir. 1987), 823 F.2d 1031, 1040, this Court should not countenance a plaintiff’s efforts to structure his “legal” claims as “equitable” to avoid jurisdiction in the Court of Claims.

ARGUMENT

The Industrial Commission of Ohio’s Proposition of Law:

An injured worker who contracted to receive an LSA in lieu of part of his PTD income stream and now seeks to recover funds commuted from that income stream, brings a claim against the State for money due under a contract, which must be pursued in the Court of Claims. Cristino, 118 Ohio St. 3d 151, 2008-Ohio-2013, at ¶ 16, followed.

The Eighth District’s decision should be reversed. The decision directly conflicts with *Cristino*, which held that a plaintiff seeking to recover money allegedly wrongfully withheld by the State in violation of the parties’ lump-sum settlement agreement makes a legal claim that must be pursued in the Court of Claims. 2008-Ohio-2013, at ¶ 16.

The Eighth District determined that because Plaintiffs “asserted title or a right to possession of particular ‘property,’ i.e., the funds they were entitled to as permanently injured workers in Ohio [under R.C. 4123.58] that they believe the Bureau has kept from them,” they made a case in equity. Thus, it held that Plaintiffs could proceed in the Cuyahoga County Court of Common Pleas. But the Eighth District was wrong for several reasons.

First, as explained above, the Eighth District misapplied the proper standard of review for a motion to dismiss for lack of subject matter jurisdiction under Civ. R. 12(B)(1) and (H)(3), and limited its analysis to the plain language of Plaintiffs' complaint. Defendants challenged the factual basis of the trial court's jurisdiction, and it was undisputed that such a determination depended on whether Plaintiffs' claim was equitable or legal. Accordingly, the Eighth District "ha[d] authority to consider any pertinent evidentiary materials," *Nemazee*, 56 Ohio St. 3d at 111 n.3, and it should not have squarely rested its decision finding jurisdiction proper in the Court of Common Pleas on the plain language of Plaintiffs' complaint. The Eighth District considered the form of Plaintiffs' complaint rather than its substance, and its decision can be reversed on that basis alone.

Second, the Eighth District incorrectly distinguished Plaintiffs' claims from those at issue in *Cristino*. See App. Op. at ¶¶ 15, 18. The underlying factual and legal issues in this case are nearly identical to those considered in *Cristino*. In both cases, plaintiffs, recipients of PTD benefits, argued that defendants wrongfully withheld amounts owed to them in distributing a lump-sum agreement. In fact, the only difference between the two cases is that the *Cristino* plaintiffs sought and obtained the commutation of their PTD benefits into a *single* lump-sum settlement, while Plaintiffs here sought and obtained a commutation of a *portion* of their PTD benefits into LSAs. In other words, while the *Cristino* plaintiffs contractually agreed to relinquish their rights to continued bi-weekly PTD payments, Plaintiffs contractually continued to receive those payments, though at a reduced rate. That minor factual distinction should not lead to disparate results.

The *Cristino* Court rejected *Cristino*'s argument that he was statutorily "entitled" to his requested funds and determined that, in the absence of a statutory right, *Cristino*'s claims

necessarily arose under his lump-sum payment contract with the Bureau. 2008-Ohio-2013, at ¶ 12. In contrast, the Eighth District incorrectly determined that Plaintiffs' complaint asserted "title or a right to possession of particular 'property,' i.e., the funds *they were entitled to* as permanently injured workers in Ohio." App. Op. at ¶ 17 (emphasis added). Specifically, the Eighth District erroneously explained that Plaintiffs' claim for "equitable disgorgement of property they believe is rightfully theirs," sounded in equity. *Id.* at ¶ 18.

As in *Cristino*, Plaintiffs are not statutorily "entitled" to the funds commuted from their bi-weekly PTD payments in excess of their LSAs. As a threshold matter, this Court has specifically held that "[t]here is no statutory right to a lump-sum payment" under R.C. 4123.64(A). *Cristino*, 2008-Ohio-2013, at ¶ 13 (citing the discretionary language in R.C. 4123.64(A)). Thus, the Defendants' grant of Plaintiffs' LSAs was governed only by the terms of the parties' LSA contracts. Further, as in *Cristino*, where the Court held that *Cristino's* agreement for a lump-sum settlement relinquished his statutory right to continued PTD payments of a specific amount under R.C. 4123.58(A), Plaintiffs specifically contracted to allow Defendants to reduce their bi-weekly PTD payments "*for the life of the claim.*" (emphasis added). It is undisputed that Plaintiffs each voluntarily executed an application for an LSA, acknowledging, in bold print above their signatures, that by accepting the LSA, their PTD benefits would be reduced permanently. Thus, just as in *Cristino*, Plaintiffs relinquished their statutory rights to the specific payment amounts set forth in the statute by executing their LSA contracts.

Because Plaintiffs have no statutory entitlement to their asserted money damages, their claims necessarily arise from their applications to receive LSAs under R.C. 4123.64, which are inextricably linked to the contracts that they signed—contracts specifically agreeing to the reduction of PTD payments about which they now complain. The contracts are undisputedly at

the heart of both Plaintiffs' LSAs and their PTD reductions, and the Eighth District's contrary determination should not stand.

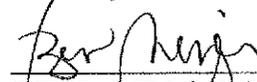
In conclusion, the Eighth District's decision contravenes this Court's clear statement in *Cristino* that a plaintiff's claim for restitution under R.C. 4123.64 lies in contract, and is therefore legal, not equitable, and it should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the Eighth District's decision and affirm the dismissal of this action from the court of common pleas.

Respectfully submitted,

RICHARD CORDRAY (0038034)
Attorney General of Ohio



BENJAMIN C. MIZER* (0083089)
Solicitor General

**Counsel of Record*

ELISE PORTER (0055548)

Assistant Solicitor

JEFFERY B. DUBER (0018532)

MARK E. MASTRANGELO (0023603)

Assistant Attorneys General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

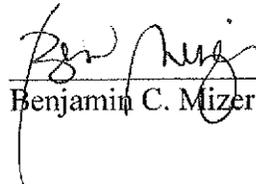
Counsel for Defendants-Appellants
Industrial Commission of Ohio and
Bureau of Workers' Compensation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendants-Appellants Industrial Commission of Ohio and Bureau of Workers' Compensation was served by U.S. mail this 3rd day of March, 2010, upon the following counsel:

Patrick J. Perotti
Jonathan T. Stender
Dworken & Bernstein Co., LPA
60 South Park Place
Painesville, Ohio 44077

Counsel for Plaintiffs-Appellees
Powell Measles, et al.



Benjamin C. Mizer

FEB 0 2010

J.D.

EXHIBIT 1

Court of Appeals of OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

FEB 5 - 2010
ATTORNEY GENERAL
GLE ADRIAN

JOURNAL ENTRY AND OPINION
No. 93071

POWELL MEASLES, ET AL.

PLAINTIFFS-APPELLANTS

vs.

**INDUSTRIAL COMMISSION
OF OHIO, ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-623468

BEFORE: Kilbane, P.J., McMonagle, J., and Boyle, J.

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ATTORNEYS FOR APPELLANTS

Patrick J. Perotti
Jonathan T. Stender
Dworken & Bernstein Co., L.P.A.
60 South Park Place
Painesville, Ohio 44077

ATTORNEYS FOR APPELLEES

Ronald D. Holman, II
Michael C. Cohan
Max E. Dehn
Alexander E. Goetsch
Cavitch Familo & Durkin Co., L.P.A.
1300 East Ninth Street - 20th Floor
Cleveland, Ohio 44114

Richard Cordray
Ohio Attorney General
Mark E. Mastrangelo
Jeffrey B. Duber
Assistant Attorneys General
State Office Building - 11th Floor
615 West Superior Avenue
Cleveland, Ohio 44113-1899

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PER APP.R. 22(C)

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GERALD E. FUEST
CLERK OF THE COURT
BY *[Signature]*

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

JAN 31 2010
GERALD E. FUEST
CLERK OF THE COURT OF APPEALS
BY *[Signature]*

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

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MARY EILEEN KILBANE, P.J.:

Appellants, Powell Measles, Vada Measles, and Ann Pocaro (collectively “appellants”) appeal the trial court’s dismissal of their complaint for lack of subject matter jurisdiction. In May 2007, appellants sued the Ohio Industrial Commission and the Administrator of the Bureau of Workers’ Compensation (collectively “the Bureau”) after a dispute arose regarding a decrease in their permanent total disability (“PTD”) awards as they relate to lump-sum advancements (“LSA”) that each had taken against those awards.

The trial court found that it lacked subject matter jurisdiction to hear the case in light of the Supreme Court’s ruling in *Cristino v. Ohio Bur. of Workers Comp.*, 118 Ohio St.3d 151, 153, 2008-Ohio-2013, 886 N.E.2d 857. *Cristino* held, inter alia, that the Court of Claims has exclusive jurisdiction over cases seeking recovery under contract-related theories. Relying on *Cristino*, the trial court determined that jurisdiction rested with the Ohio Court of Claims because appellants’ claims sounded in contract and not in equity.

After a careful review of the facts and the law, we disagree and reverse.

Statement of Facts and Procedural History

The following facts are undisputed. Appellants have all been permanently and totally disabled as a result of workplace accidents. They are each statutorily entitled to receive lifetime bi-weekly PTD payments from the Bureau.

Appellants have taken LSAs against their PTD awards. Under R.C. 4123.64(A), when LSAs are paid, a portion of a claimant's lifetime benefit is "commuted" or reduced into a lump-sum advance, and their corresponding bi-weekly benefit is reduced.

On May 7, 2007, appellants filed suit against the Ohio Industrial Commission in common pleas court, seeking return of money they allege was wrongfully withheld from their bi-weekly PTD awards. Their three-count complaint demanded a declaratory judgment in their favor, injunctive relief, and sought equitable disgorgement of funds the Bureau allegedly kept from them. Appellants also sought class status.

Measles was initially injured in 1981. He received his first LSA in 1986 in the amount of \$5,000, and applied for his second LSA in 1987 in the amount of \$9,563. The crux of appellants' claims, then and now, is that they have repaid the amount of their respective LSAs with interest, and that the LSAs should not continue to be a set-off against their bi-weekly lifetime PTD awards.

On October 21, 2008, the Bureau filed a motion to dismiss for lack of subject matter jurisdiction based upon the Supreme Court's holding in *Cristino*.

On March 12, 2009, the common pleas court granted the motion to dismiss, stating in part:

"Plaintiffs' claims arise from their agreement with the Bureau of Workers' Compensation to receive a LSA;

however, there is no statutory right to a lump-sum payment. A claim based on a LSA made pursuant to R.C. 4123.64(A) is a claim against the State for money due under a contract, it is not a claim for equitable restitution, and such claims therefore must be brought in the Ohio Court of Claims. * * * As this court lacks subject matter jurisdiction over plaintiffs' claims, the case is dismissed."

Analysis

On May 15, 2009, appellants filed the instant appeal, asserting a single assignment of error:

"The trial court erred in dismissing plaintiffs' action for lack of subject matter jurisdiction."

Civ.R. 12(B)(1) permits dismissal where the trial court lacks jurisdiction over the subject matter of the litigation. The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. *Ferren v. Cuyahoga Cty. Dept. of Children & Family Servs.*, Cuyahoga App. No. 92294, 2009-Ohio-2359, at ¶3. (Internal citations omitted.) We review an appeal of a dismissal for lack of subject matter jurisdiction under Civ.R. 12(B)(1) de novo. *Boutros v. Noffsinger*, Cuyahoga App. No. 91446, 2009-Ohio-740, ¶12. A trial court is not confined to the allegations of the complaint when determining subject matter jurisdiction under Civ.R. 12(B)(1), and it may consider pertinent material without converting the motion into a motion for summary judgment. *Boutros* at ¶13.

On appeal, we are essentially asked to decide whether the appellants have

pled a cause of action asking for equitable relief or money damages. If the essence of appellants' claims is not money damages but equitable relief, then the Court of Claims does not have exclusive jurisdiction over the case. See, e.g., *Ohio Academy of Nursing Homes v. Ohio Dept. of Job and Family Servs.*, 114 Ohio St.3d 14, 17-18, 2007-Ohio-2620, 867 N.E.2d 400, 403-404.

Appellants argue that because their complaint requested equitable relief only, jurisdiction rested with the trial court. Appellants argue that this case is analogous to *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441. In *Santos*, the Supreme Court held, inter alia, 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)." *Id.* at syllabus.

In *Santos*, the class of plaintiffs at issue "sought return of funds already collected by the BWC under the subrogation statute." *Id.* at ¶7. The plaintiffs in *Santos* "thus sought the return of funds that had once been in their possession and so belonged to them 'in good conscience.'" *Cristino*, supra, at 155, citing *Santos* at ¶7. (Internal citations omitted.)

Like the plaintiffs in *Cristino*, appellants received PTD benefits. However, unlike the *Cristino* plaintiffs, who took a reduced one-time lump-sum PTD payment in lieu of lifetime PTD payments, appellants received only LSAs and

continue to receive bi-weekly lifetime PTD payments.

In this case, appellants were careful to word their complaint "in equity," expressly avoiding claims for money damages. The record demonstrates that while appellants' claims emanate, at least in part, from their LSA claims made with the Bureau pursuant to R.C. 4123.64(A), the issues they raise in their complaint go beyond whether the Bureau may commute payments into a lump sum. Appellants raise the question of whether the Bureau is required to return specific funds it has retained over and above that which appellants were required to pay pursuant to their LSA agreement. While the Bureau argues that because appellants seek restitution for an alleged overpayment, their claims sound in breach of contract and so should be decided according to *Cristino*. However, both the *Cristino* court and the *Santos* court recognized that restitution claims could present either equitable or legal relief: "It is well established that restitution can be either a legal or an equitable remedy. * * * In order to determine whether a claim for restitution requests legal or equitable relief, we look to the basis for the plaintiff's claim and the nature of the underlying remedies sought." *Cristino*, supra, at 152, citing *Santos*, supra, at 76.

At this stage of the proceedings, appellants have not exclusively pled claims for money due and owing under a contract, and so have not made what is "quintessentially an action at law." *Cristino* at 153. (Internal citations

omitted.) As such, their claims are not essentially claims for money damages, and they sound in equity. Therefore, we cannot agree with the trial court that the Court of Claims is vested with exclusive jurisdiction in this matter.

“[H]istorically, the distinction between legal and equitable claims for restitution depended on whether the plaintiff could assert ‘title or right to possession’ in particular funds or other property. * * * [A] legal restitution claim [is] a claim in which the plaintiff ‘could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him.’ * * * By contrast, an equitable restitution claim [is] one in which ‘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 152-153. (Internal citations omitted.)

Here, appellants assert title or a right to possession of particular “property,” i.e., the funds they were entitled to as permanently injured workers in Ohio that they believe the Bureau has kept from them. Under Civ.R. 12, they have made a case in equity such that exclusive jurisdiction does not reside with the Court of Claims. The trial court incorrectly decided that it lacked subject matter jurisdiction over appellants’ claims.

While it is true that claims based on a LSA made pursuant to R.C. 4123.64(A) are claims against the State for money due under a contract and not claims for equitable restitution, appellants have made no such claims in their complaint. They seek declaratory judgment, injunctive relief, and finally,

equitable disgorgement of property they believe is rightfully theirs. Appellants' claims sound in equity. The trial court erred in granting the Bureau's motion to dismiss.

Judgment reversed. This matter is remanded to the trial court for further proceedings consistent with the opinion.

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

The court finds there were reasonable grounds for this appeal.

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.


MARY EILEEN KILBANE, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., CONCURS;
MARY J. BOYLE, J., DISSENTS (SEE SEPARATE DISSENTING OPINION)

MARY J. BOYLE, J., DISSENTING:

I respectfully disagree with the majority and would find that appellants' claims herein against the state sound in contract and not equity. Thus, I agree with the trial court in its application of the very recent Ohio Supreme Court case of *Cristino v. Ohio Bur. of Workers Comp.*, 118 Ohio St.3d 151, 2008-Ohio-2013,

886 N.E.2d 857. Appellants' claims, therefore, must be brought in the Ohio Court of Claims. Thus, I would affirm the trial court's decision that it lacks subject matter jurisdiction.