

ORIGINAL

IN THE SUPREME COURT OF OHIO

POWELL MEASLES, et al.,

CASE NO. 2010-0393

Plaintiffs-Respondents,

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

vs.

INDUSTRIAL COMMISSION OF
OHIO., et al.

Court of Appeals Case
No. CA-09-093071

Defendants-Petitioners.

PLAINTIFFS-RESPONDENTS' MEMORANDUM OPPOSING JURISDICTION

Patrick J. Perotti, Esq. (#0005481)
Jonathan T. Stender, Esq. (0070563)
DWORKEN & BERNSTEIN CO, LPA
60 South Park Place
Painesville, Ohio 44077
(440) 352-3391 (440) 352-3469 fax
pperotti@dworkenlaw.com
jstender@dworkenlaw.com

Counsel for Plaintiffs-Respondents
Powell Measles, et al.

RICHARD CORDRAY (0038034)
Attorney General of Ohio

BENJAMIN C. MIZER (0083089)
Solicitor General
ELISE PORTER (0055548)
Assistant Solicitor
JEFFERY B. DUBER (0018532)
MARK E. MASTRANGELO (0023603)

Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, OH 43215
(614)-466-8980 (614)466-5807 fax
benjamin.mizer@ohioattorneygeneral.gov

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

FILED
APR 02 2010
CLERK OF COURT
SUPREME COURT OF OHIO

This case does not present issues of public or great general interest.

Does this court need to again explain the difference between legal claims brought against the state under a contract, compared to equitable claims brought under a statute, despite two plainly worded and recent opinions of this court in *Cristino* and *Santos*¹? Or does the government simply dislike the outcome of those rules in this case? The court of appeals decision shows it is unhappiness with the result, and not any confusion about the rules, that brings the BWC here. This court does not certify cases on that basis.

The BWC asks this court to “explain” the jurisdiction of the Court of Claims versus the Court of Common Pleas in suits against the state seeking legal relief under a contract versus those seeking equitable relief for a violation of a statute. But that dichotomy was covered in detail by *Cristino* and *Santos*. The BWC knows those rules since it was the defendant in each of those cases. Cases seeking equitable relief for violation of a statute may be heard in the courts of common pleas, *Santos*; all other claims against the state including ones for relief under a contract are within the exclusive jurisdiction of the Court of Claims, *Cristino*.

The government does not argue that the Eighth District was unclear about the rules in *Cristino* and *Santos*. Rather, the Eighth District clearly stated at ¶¶ 2 and 12

“*Cristino* held, inter alia, that the Court of Claims has exclusive jurisdiction over cases seeking recovery under contract-related theories.”

“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.”

The Eighth District was clear on this court’s rulings in each of those cases. Rather, the BWC disagrees with the result reached by the Eighth District in the present case. But this Court

¹ *Cristino v. Ohio Bureau of Workers’ Compensation*, 118 Ohio St.3d 151, 2008 Ohio 2013; *Santos v. Ohio Bureau of Workers’ Comp.*, 101 Ohio St.3d 74, 2004 Ohio 28

does not sit as an additional layer of appellate review. It is a court of last resort constitutionally charged with considering questions of public or great general interest.

The appellate court here was dealing with the holdings in *Cristino* and *Santos* which are clear. The plaintiff in *Cristino* alleged a contract with the state and sued “the state for money due under a contract.” *Cristino* at ¶16. That is not within the jurisdiction of the Common Pleas court. The plaintiff in *Santos* alleged violation of a statute and sued for “specific funds wrongfully collected or held by the state.” *Santos* at ¶17. The plaintiffs in this case alleged violation of a statute and sued for “return of money they allege [is being] wrongfully withheld from their bi-weekly PTD awards.” C.A. Opinion at ¶15. That is within the jurisdiction of the Common Pleas court. There are *dozens* of variations of claims that have been and will be brought against the BWC. But this court is not obligated to weigh-in on each when the parties don’t like the outcome. This case does not present any novel variations on this Court’s recent and direct pronouncements on these issues to require more clarification or refinement.

In addition, although not set forth as a proposition of law, the government criticizes the Eighth District’s application of the standard for dismissal under Civ. R. 12(B)(1). That is not properly before the court since it was not presented as a proposition of law. Also, the law on the standard of review under Civ. R. 12(B)(1) is already set forth by this Court in well established decisions, and it is the standard applied by the Eighth District in this case. That would not present any issue of public or great general interest.

For both these reasons, certification is not warranted in this matter.

Statement of the Case

Plaintiffs Powell Measles, Vada Measles and Ann Pocaro brought this class action in common pleas court to challenge a practice of the Industrial Commission of Ohio and the Ohio

Bureau of Workers' Compensation relating to payment of PTD in cases where the claimant has a prior lump sum advancement. This lawsuit sought a declaration that the defendants are violating R.C. 4123.58, the PTD statute, by wrongfully withholding a portion of plaintiffs' Permanent Total Disability benefits; injunctive relief to prevent defendants from continuing to do so; and disgorgement of funds wrongfully withheld.

Defendants moved to dismiss on the basis that the common pleas court was without jurisdiction. Defendant said that plaintiffs' claims were "legal" and not equitable, arguing that the claims were for breach of contract.

Plaintiffs responded that there is no contract which provides for PTD payments and the only claim made here is for a violation of the PTD statute by illegally withholding PTD payments.

In its Journal Entry, dated March 13, 2009, the trial court concluded that

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, is not a claim for equitable restitution, and such claims therefore must be brought in the Ohio Court of Claims. *Cristino v. Ohio Bureau of Workers' Compensation*, 118 Ohio St.3d 151, 2008-Ohio-2013.

The trial court dismissed plaintiffs' action.

The problem with this conclusion is that plaintiffs already received their LSA and were not suing for that. There is no contract for which plaintiffs here could sue for breach, unlike *Cristino* which argued that plaintiff entered into a contract with the BWC to settle his PTD award and the BWC breached the contract by not calculating the present value correctly. Plaintiffs here sued for a determination whether the government violates the PTD statute (which provides for payments at a specified rate "until the employee's death") when the government refuses to pay

the amount directed by the statute. In *Santos* this Court found jurisdiction was properly in the common pleas court where a party sues the BWC for violating a statute and thereby withholds money claimed to be due under the statute.

Because the trial court in the instant matter missed that point, plaintiffs timely appealed the trial court's dismissal to the Eighth District Court of Appeals.

The Eighth District reversed. *Measles v. Indus. Comm'n of Ohio*, 8th Dist. No. 93071, 2010 Ohio 161. It first looked at *Santos* and *Cristino*. It noted that plaintiffs here had not sued "for money due and owing under a contract" and rather were suing for "return of money they allege [is being] wrongfully withheld from their bi-weekly PTD awards." The law provides that claims for breach of contract are legal (*Cristino*) while claims for violation of a statute and disgorgement of wrongfully withheld money are equitable (*Santos*). The Eighth District therefore unremarkably held that the claims of the plaintiffs in this matter are not "claims for money damages [but] they sound in equity" and the Eighth District held "we cannot agree with the trial court that the Court of Claims is vested with exclusive jurisdiction in this matter." *Measles*, ¶16.

The Eighth District applied the current pronouncements of this Court to the facts and pleadings of this case. This case does not present any novel variations on those propositions of law which require clarification or refinement. This Court should decline to certify the record in this case.

Statement of Facts

Plaintiffs each are permanently and totally disabled as the result of a work-related injury. Each obtained a permanent total disability (PTD) award. (Complaint ¶ 2.) This Honorable Court

described them as “Ohio’s most seriously injured workers.” *Cristino v. Ohio Bureau of Workers’ Comp.*, 118 Ohio St.3d at 155, 2008 Ohio 2013 ¶ 18, Pfeifer concurring.

A PTD award is not based on a contract or agreement. The amount and duration of this award is established by Ohio statute, R.C. 4123.58 (“[i]n cases of permanent total disability, the employee shall receive an award to continue until the employee's death in the amount of sixty-six and two-thirds per cent of the employee's average weekly wage...”). This statute uses the mandatory “shall.”

The plaintiffs in this action are PTD workers who at some time in the past received a Lump Sum Advancement (LSA). An LSA is an advance by the BWC to the worker to pay immediate debts (such as medical bills, attorney fees, etc) which is taken against future PTD payments.

After the plaintiffs paid back the entire LSA amount back plus interest, the BWC did not stop reducing their PTD checks. In the case of Mr. Measles (who is now 81 years old) the government to-date has taken from his checks over **\$19,000 more than he was advanced**. This suit was brought to order the BWC to immediately start again to pay the statutory amount required by the PTD statute and to disgorge the amounts unlawfully withheld.

The BWC sought to equate the Plaintiffs’ claims in this case to *Cristino*. But in *Cristino* the plaintiffs were not receiving on-going PTD payments. They had no statutory right to any future permanent total disability payments. *Cristino* at ¶13. They had settled their claims under a contract with the BWC and were suing for alleged breach of that contract. *Cristino* at ¶12. Plaintiffs in this case have a statutory right to ongoing PTD payments and are suing for a violation of the provisions of that statute.

PTD payments are not made pursuant to a contract but are provided by statute, R.C. 4123.58. This suit asserts that defendants are failing to pay those monies in the amount required by the statute, in violation of R.C. 4123.58. The remedy sought (and plainly the only one possible, if one is granted) is for equitable disgorgement, not for money due under any contract.

Plaintiff's Proposition of Law No. 1

Claims against the state or its agencies for money due from breach of contract are equitable and may be brought only in the Court of Claims, while claims against the state or its agencies for money wrongfully taken or withheld contrary to statute, rule, or constitutional provision are equitable and may be brought in the Common Pleas Court of the Court of Claims.

The government's proposition of law (that claims for PTD in the case of an LSA are legal not equitable) does not seek a statement of broad principal which can be applied in myriad situations. It seeks a particular result in a single lawsuit. This court has already announced the statement of broad application in its two recent decisions (*Cristino* and *Santos*) related to Court of Claims/Common Pleas Court jurisdiction with regard to Workers' Compensation claims.

This Court explained in *Wilson v. Brush Wellman, Inc.*, 103 Ohio St. 3d 538, 541, 2004-Ohio-5847 ¶ 12 that "this court is charged with considering issues of 'public or great general interest,' we do not reverse this case solely on the appellate court's error..." As Justice O'Donnell noted in his dissent in *State v. Bartrum*, 121 Ohio St. 3d 148, 153 2009 Ohio 355 ¶ 31 "our role as a court of last resort is not to serve as an additional court of appeals on review, but rather to clarify rules of law arising in courts of appeals that are matters of public or great general interest." And writing in dissent Justice Pfeifer observed in *State Auto. Ins. Co. v. Pasquale*, 113 Ohio St. 3d 11, 17-18, 2007-Ohio-970 ¶ 46 "[b]ecause this appeal involves nothing more than error correction, it should be dismissed as having been improvidently allowed."

The BWC's argument is that a plaintiff seeking recovery for PTD payments under R.C. 4123.58 in cases involving an LSA is really seeking recovery for a breach of contract. The argument is wrong but more important, is that a question of great general interest? How many other times will that particular question arise, other than in the context of *Cristino* and *Santos* which are already the law? Certification is therefore not appropriate.

Next, as is clear from defendants' Memorandum in Support, defendants' dispute is with the Eighth District's **application** of the standard for dismissing an action for want of jurisdiction under Civ. R. 12(B)(1). But that standard, itself, is not in dispute, nor do defendants argue that the Eighth District applied a wrong standard. The standard is established and well-known. *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St. 3d 77, 80 ("whether any cause of action cognizable by the forum has been raised in the complaint.") And that is the standard applied by the Eighth District. See, C.A. Opinion at ¶ 10 ("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.")

Finally, the BWC argues that the Eighth District should have delved "more deeply" into the complaint. But how is that? *Santos and Cristino* instruct the court to look into "the basis for the plaintiff's claim and the nature of the underlying remedies sought." The Eighth District did that. Plaintiffs alleged no breach of contract for LSA's since they could not. They already collected and paid back their LSA loan. Their claim was for unlawfully withholding PTD payment amounts in violation of the statutory provisions of R.C. 4123.58.

What will be the outcome on the merits? The record at this point is contrary to the BWC's position. But as to the final outcome, we don't know and neither did the Court of Appeals. When the case moves forward on the merits, the BWC say the plaintiffs will rely on a

contract to prove their claim. Will the BWC be able to muster discovery or evidence to show that is the case? It is highly unlikely, but again, no one knows. And that is why the Eighth District concluded, at least “at this stage of the proceedings,” that the motion to dismiss was not well taken. In that context, the BWC’s effort to bring these matters to this court now for a final decision on the same question is premature and improper. As the court in *Bank One, N.A. v. Johnson*, 2d Dist. No. 03CA0039, 2003 Ohio 6906, ¶ 14 noted, “a challenge to a court’s subject matter jurisdiction may be raised at any time.” The Eighth District’s ruling as to the propriety of dismissal “[a]t this stage of the proceedings” does not foreclose a challenge by the BWC when the merits are appropriately considered. What the BWC is really asking this Court to do is render an advisory opinion. To tell the trial court and the Eighth District what to do in the future. That is inappropriate and, itself, is specifically a unique demand pertinent to this case only, not an issue of public or great general interest.

Conclusion

This court has already explained the distinction in suits against the BWC between a claim for “specific performance of a *contractual* obligation to pay past due sums” contrasted with a claim “that the...Government failed to reimburse...for past expenses pursuant to a statutory obligation.” “This court has distinguished between statutory and contractual entitlement to past due funds.” *Cristino at* ¶11.

Thus, the law related to the issue defendants seek to have this Court certify in this case was already articulated by this Court in two recent opinions. The Eighth District recognized the principles articulated by this Court as the controlling precedent, and applied them. The government wishes the ruling had gone the other way. That is not the basis for certification of

any lawsuit as a case of public or great general interest. That is particularly true “at this stage of the proceedings.” This Court should decline to certify the record.

Respectfully submitted,



Patrick J. Perotti, Esq. (#0005481)
Jonathan T. Stender, Esq. (0070563)
DWORKEN & BERNSTEIN CO, LPA
60 South Park Place
Painesville, Ohio 44077
(440) 352-3391 (440) 352-3469 fax
pperotti@dworkenlaw.com
jstender@dworkenlaw.com

Attorneys for Plaintiffs-Respondents

CERTIFICATE OF SERVICE

This is to certify that a copy of Plaintiffs-Respondents' Memorandum in Opposition of Jurisdiction was sent via email and by regular U.S. Mail on April 1, 2010 addressed as follows:

RICHARD CORDRAY (0038034)
Attorney General of Ohio

BENJAMIN C. MIZER (0083089)
Solicitor General

ELISE PORTER (0055548)
Assistant Solicitor

JEFFERY B. DUBER (0018532)

MARK E. MASTRANGELO (0023603)

Assistant Attorneys General

30 East Broad Street, 17th Floor

Columbus, OH 43215

(614)-466-8980 (614)466-5807 fax

benjamin.mizer@ohioattorneygeneral.gov

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



Patrick J. Perotti, Esq.

DWORKEN & BERNSTEIN CO., L.P.A.

One of the Attorneys for Plaintiffs-Respondents