

ORIGINAL

In the
Supreme Court of Ohio

POWELL MEASLES, et al.,	:	Case No. 2010-0393
	:	
Plaintiffs-Appellees,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
INDUSTRIAL COMMISSION, et al.,	:	
	:	Court of Appeals Case
Defendants-Appellants.	:	No. CA-09-093071
	:	

**REPLY BRIEF OF DEFENDANTS-APPELLANTS INDUSTRIAL
COMMISSION AND BUREAU OF WORKERS' COMPENSATION**

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
ARGUMENT.....	3
A. <i>Cristino</i> controls because Plaintiffs' claims are based on the Lump Sum Advancement agreements they executed with the Commission over fifteen years ago, not on R.C. 4123.58.....	4
B. Plaintiffs' claims are not equitable because Plaintiffs do not seek to restore an identifiable amount of money that Defendants wrongfully withheld from them.	5
C. O.A.C. 4123-3-37 does not affect the narrow jurisdictional question before this Court.	10
CONCLUSION.....	11
CERTIFICATE OF SERVICE.....	unnumbered

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Cristino v. Ohio Bureau of Workers' Compensation</i> , 118 Ohio St. 3d 151, 2008-Ohio-2013	<i>passim</i>
<i>Great-West Life & Annuity Ins. Co v. Knudson</i> (2002), 534 U.S. 204	3, 4, 5, 10
<i>Henley Health Care v. Ohio Bureau of Workers' Compensation</i> (10th Dist. Feb. 23, 1995), No. 94APE08-1216, 1995 Ohio App. Lexis 715	9
<i>Ohio Hospital Association v. Ohio Department of Human Services</i> (1991), 62 Ohio St. 3d 97	9
<i>Santos v. Ohio Bureau of Workers' Compensation</i> , 101 Ohio St. 3d 74, 2004-Ohio-28	3, 6
<i>State ex rel. Funtash v. Indus. Comm'n</i> (1951), 154 Ohio St. 497	<i>passim</i>
<i>State ex rel. Shively v. Murphy Motor Freight</i> , 71 Ohio St. 3d 114, 1994-Ohio-124	<i>passim</i>
Statutes, Rules and Constitutional Provisions	
O.A.C. 4123-3-37	2, 10, 11
O.A.C. 4123-3-37(B)(3)	2, 10
O.A.C. 4123-3-37(C)(3)	10
R.C. 4123.58	<i>passim</i>
R.C. 4123.59	7
R.C. 4123.64	2, 4
R.C. 4123.64(C)	1

INTRODUCTION

The question in this case is not how to resolve the merits of Plaintiffs' claims against the Industrial Commission ("Commission") and the Bureau of Workers' Compensation ("Bureau") (collectively, "Defendants"). Nor is it whether a court should hear the merits of Plaintiffs' claims. Rather, the question is *which* court should hear Plaintiffs' claims. And that question is squarely controlled by *Cristino v. Ohio Bureau of Workers' Compensation*, 118 Ohio St. 3d 151, 2008-Ohio-2013.

Plaintiffs' attempts to distinguish *Cristino* fall short because their demand for money they allege Defendants "wrongfully withheld" from their permanent total disability ("PTD") payments arises from their lump-sum advancement ("LSA") agreements, not from statute. Plaintiffs argue that, unlike the plaintiff in *Cristino*, whose claim was tied directly to his written one-time lump-sum settlement agreement with the Bureau, their claims are rooted in R.C. 4123.58, which affords them a statutory right to a set amount of lifetime PTD payments. But Plaintiffs overrode the terms of their PTD benefits when they signed their LSA agreements over fifteen years ago. With the advice and assistance of counsel, Plaintiffs signed LSA agreements expressly allowing permanent reductions of their PTD benefits to "**continue for the life of the claim.**" Defs.' Supp. to Merit Br. S-1, S-2, S-8. In exchange, Plaintiffs received advances of their benefits in the form of ready cash. And at no time did they exercise their statutory right to object to the amounts awarded by the Commission. See R.C. 4123.64(C).

Moreover, the fact that Plaintiffs seek money they assert Defendants "wrongfully withheld" from them does not make their claim equitable. This Court rejected an identical claim in *Cristino*. 2008-Ohio-2013, at ¶ 15. As in *Cristino*, because Plaintiffs relinquished their statutory PTD payments in exchange for an LSA and commuted lifetime payments, their claims for

restitution are based on a court's interpretation of the terms of their LSA applications, not on R.C. 4123.58.

Plaintiffs also argue that Defendants' policies of over-commuting injured workers' PTD payments are unlawful because the policies inequitably reduce those payments long after Defendants recover the costs of previously granted LSAs. Not only is Plaintiffs' merits argument irrelevant to the narrow jurisdictional issue at hand, but it is also wrong. This Court has consistently affirmed the legality of the Commission's practice of commuting amounts from an injured worker's PTD payments after his LSA is repaid in full. See *State ex rel. Funtash v. Indus. Comm'n* (1951), 154 Ohio St. 497, 500 (holding that the Commission is not required to restore the amount of weekly compensation to its previous level); *State ex rel. Shively v. Murphy Motor Freight*, 71 Ohio St. 3d 114, 116, 1994-Ohio-124 (per curiam) (unanimously reaffirming *Funtash*). Moreover, because Defendants' actions under their LSA policies were legal, Plaintiffs cannot establish that they seek money that was "wrongfully withheld" from them.

Finally, O.A.C. 4123-3-37 does not change the above analysis. Plaintiffs argue that O.A.C. 4123-3-37 supports their position that Defendants' practice of "over-commuting" amounts from Plaintiffs' PTD payments is illegal. Pls.' Opp. Br. 22-23. Promulgated on December 1, 2004, O.A.C. 4123-3-37 allows an injured worker who is granted an LSA under R.C. 4123.64 to choose a set time period over which to repay the funds he is awarded. See O.A.C. 4123-3-37(B)(3). Once the LSA is paid in full, the Bureau restores the worker's PTD payments to the original—pre-LSA—amount. Even if O.A.C. 4123-3-37 were relevant to the narrow jurisdictional question before the Court—and it is not—the regulation does not apply retroactively. See Defs.' Merits Br. 17. And although the rule changed the Defendants' practices for awarding LSAs under R.C. 4123.64, its 2004 implementation does not

automatically make Defendants' previous practices illegal. This is especially true given this Court's decisions approving the Commission's actions, see *Funtash*, 154 Ohio St. at 500; *Shively*, 71 Ohio St. 3d at 116, both of which remain good law.

For all of these reasons, the Eighth District's decision deeming Plaintiffs' claims equitable rather than legal must be reversed, and Plaintiffs must proceed (if at all) in the Court of Claims.

ARGUMENT

The parties agree that the key to this case is whether Plaintiffs' claims for disgorgement are "legal" or "equitable." Defs.' Merits Br. 10-11; Pls.' Opp. Br. 10. This Court has twice applied the *Great-West Life & Annuity Insurance Company v. Knudson* (2002), 534 U.S. 204, 214, analysis to resolve similar jurisdictional disputes in the workers' compensation context. See *Santos v. Ohio Bureau of Workers' Compensation*, 101 Ohio St. 3d 74, 2004-Ohio-28, ¶ 17 (holding that a plaintiff's claim for the return of specific amounts of his own previously held money liquidated under an invalid statutory scheme is equitable); *Cristino*, 2008-Ohio-2013, at syl. & ¶ 16 (holding that a claim for money due under a contract is legal, not equitable).

Great-West states that whether restitution is "legal or equitable depends on the basis for the plaintiff's claims and the nature of the underlying remedy sought." 534 U.S. at 213 (internal citations omitted). And "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214. Thus, an equitable claim includes three distinct, but related components: (1) the plaintiff must seek to restore funds that he held previously; (2) the funds must be an identifiable amount that the defendant allegedly took from the plaintiff; and (3) the plaintiff's requested relief must be based on a rule or a statute. See Defs.' Merits Br. 11. Plaintiffs' claims are legal because, like the plaintiff in *Cristino*, they can establish none of the above elements.

A. *Cristino* controls because Plaintiffs' claims are based on the Lump Sum Advancement agreements they executed with the Commission over fifteen years ago, not on R.C. 4123.58.

As a threshold matter, Plaintiffs' claims arise from contract, not from a rule or statute. Plaintiffs contend that because Defendants' actions violated their right to set amounts of PTD payments under R.C. 4123.58, their claim is equitable. But this Court unanimously rejected these exact arguments in *Cristino*.

In *Cristino*, plaintiff *Cristino*, an injured worker and a recipient of PTD benefits, sued the Bureau for money he alleged was wrongfully withheld from his contract relinquishing his PTD payments for a single lump-sum settlement awarded at the "present value" of his PTD claim. 2008-Ohio-2013, at ¶ 2. This Court, applying the *Great-West* analysis, held that the court of common pleas lacked jurisdiction over *Cristino*'s claim because he could not establish that a *statute* entitled him to the money that defendants had wrongfully taken from him. *Id.* at ¶¶ 14, 16. In short, because *Cristino* had no statutory right to a lump-sum payment and his argument centered on the meaning of the term "present value" in his settlement agreement, his claim was contractual, and he had to pursue it in the Court of Claims. *Id.* at ¶ 16.

Plaintiffs' attempts to distinguish *Cristino* overlook a critical fact: They signed contracts explicitly agreeing to the terms they now seek to reject. Over fifteen years ago, Plaintiffs, with the advice and assistance of counsel, signed applications for LSAs under R.C. 4123.64. Under the terms of these applications, the Commission awarded Plaintiffs an LSA of a portion of their PTD payment, and reduced the Plaintiffs' regular PTD payments accordingly. The agreements provided, in bold print: "**In the event this Lump Sum Payment is granted it will result in a permanent reduction of the weekly benefits which shall continue for the life of the claim.**" Defs.' Supp. to Merit Br. S-1, S-2, S-8. Moreover, although the Commission at all times complied with its statutory obligation to apprise each Plaintiff of the amount of his reduced

weekly rate, Plaintiffs never exercised their statutory right to object to the Commission's terms. See Defs.' Merits Br. 5 n.1 (noting that the Bureau sent each Plaintiff a copy of an order setting forth the specific amount of the agreed-upon commutation, from which the worker had fourteen days to appeal to the Commission); see, e.g., Defs.' Supp. to Merit Br. S-3, S-6, S-7. In short, Plaintiffs voluntarily modified their lifetime benefits in order to receive cash immediately.

Moreover, Plaintiffs' agreements are identical to the agreement in *Cristino* in all material respects. In arguing otherwise, Plaintiffs point out that unlike *Cristino*, who agreed to abandon all remaining PTD payments, their rights to PTD payments under R.C. 4123.58 remain intact. See Pls.' Opp. Br. at 12-13. They contend that because their LSAs called for the continued receipt of PTD payments, their requests for restitution arise from R.C. 4123.58. *Id.* at 13.

But in fact, Plaintiffs struck the very same bargain as *Cristino*. Just as *Cristino* gave up his right to continued PTD payments to receive a one-time payment of the "present value" of his PTD benefits, Plaintiffs relinquished the full statutory amount of their PTD payments "**for the life of the claim,**" so they could collect an LSA when they needed it. Thus, in both cases, it is the contract—not R.C. 4123.58—that controls.

B. Plaintiffs' claims are not equitable because Plaintiffs do not seek to restore an identifiable amount of money that Defendants wrongfully withheld from them.

Even if this Court finds that Plaintiffs' claims arise from statute (which it should not), they are still legal rather than equitable because Plaintiffs cannot establish the other two prongs of *Great-West*: (1) that they seek to restore an identifiable amount of money; and (2) that Defendants wrongfully took that money from them. 534 U.S. at 214. Plaintiffs combine the remaining elements into one argument and assert that under *Great-West*, a claim is equitable where a plaintiff seeks money "wrongfully collected" or "wrongfully withheld" from him "in violation of the law," so that it "belong[s] in good conscience" to him. Pls.' Opp. Br. at 12.

They purportedly meet these requirements because they seek to recover years of unpaid PTD benefits that Defendants “wrongfully withheld” from them in violation of R.C. 4123.58. Pls.’ Opp. Br. 7, 13-14.

This Court rejected the same argument in *Cristino*. There, *Cristino* characterized his claim that the Bureau had failed to award him the full amount due under his contract as equitable under *Santos*, which held that “[a] suit that seeks the return of specific funds wrongfully collected or held by the state is brought in equity.” 101 Ohio St. 3d 74, 2004-Ohio-28, syl. But this Court deemed *Santos* “inapplicable.” *Cristino*, 2008-Ohio-2013, at ¶ 15. Unlike *Santos*, where the plaintiffs sought the return of funds “already collected by the BWC” under a subrogation statute that was later deemed unlawful, *Cristino* sought money allegedly “wrongfully withheld” under the terms of his settlement contract. *Id.* Similarly, in this case, Plaintiffs’ claims for amounts “wrongfully withheld” center squarely on a court’s interpretation of their LSA agreements.

Moreover, Plaintiffs’ position that Defendants’ continued commutation of their PTD payments amounted to “wrongful withholding” relies on their flawed assumption that Defendants cannot *legally* continue to commute injured workers’ PTD payments after recovering an LSA. Plaintiffs assert that Defendants’ actions were “carried out unlawfully pursuant to an internal and non-fulfilled policy—which takes thousands of dollars from workers after they have fully paid-off their LSA and applicable interest,” in order to compensate for injured workers who do not reach their calculated life expectancy. Pls.’ Opp. Br. 1.

To begin with, the question whether Defendants’ actions were lawful goes to the merits of Plaintiffs’ claims and is irrelevant to the jurisdictional dispute before this Court. Regardless, Plaintiffs’ arguments are undercut by this Court’s precedent affirming the legality of such policies. See *Funtash*, 154 Ohio St. at 500; *Shively*, 71 Ohio St. 3d at 116. Both cases are

unambiguous: LSAs are properly commutations of an injured worker's PTD award that result in a permanent reduction of his weekly payments even if the aggregate reductions eventually exceed the amount he received through his LSA. *Id.*

Though it was decided over fifty years ago, *Funtash* is nearly identical to this case. There, an injured worker who contracted for an LSA sued the Commission seeking money damages for the amounts allegedly over-commuted from his PTD payments after the full amount of his LSA was accounted for. *Funtash*, 154 Ohio St. at 498. The worker contended that his LSA was "merely a loan" that he had repaid in full through the commutations from his weekly PTD installments. *Id.* The Court rejected his theory and held that because the Commission's statutory authority does not include the power to grant a "loan," and the evidence showed that the worker was granted a partial lump-sum payment under the applicable statute, the Commission's continued commutation of amounts from installments over and above the LSA was not an abuse of discretion. *Id.* at 499-500. Thus, *Funtash* established the legality of the Commission's practice of continuing to commute amounts from a plaintiff's PTD payments following the repayment of the full amount of the LSA. *Id.* at syl. ¶ 4.

Despite Plaintiffs' pronouncements, *Funtash's* holding has not been diminished over the past fifty-odd years, nor has there been a change to the statutory provisions upon which *Funtash* was based. To the contrary, this Court expressly reaffirmed *Funtash's* vitality in 1994, when it decided *Shively*, 71 Ohio St. 3d at 116. In *Shively*, a widow brought a writ of mandamus seeking to compel the Commission to cease commuting amounts from the death benefits she received from her deceased husband's former employer under R.C. 4123.59. *Id.* at 114. Both the widow and her minor stepchildren collected benefits under the statute, but the children, acting independently of their stepmother, sought and received an LSA to pay their attorney fees. *Id.*

The widow successfully reapportioned her stepchildren's benefits to her when they came of age, but the Bureau continued to pay her the reduced amounts of weekly disbursements that it had imposed on the stepchildren following the grant of their LSA. *Id.* at 116. The Court stated that "the commission is not required to restore the amount of weekly compensation to its previous level." *Id.* (citing *Funtash*, 154 Ohio St. at 497). Nonetheless, this Court unanimously ordered the Commission to stop commuting the widow's payments because she had neither requested her stepchildren's LSA, nor benefited from it. *Id.*

Plaintiffs argue that under *Shively*, "the Bureau is not allowed to use LSA collections from one worker, to pay off the debts of a different worker." Pls.' Opp. Br. 2; see *id.* at 14. Plaintiffs cite several statements made by Defendants' employees during discovery, stating that the continued rate reductions of injured workers are intended to subsidize the money the Bureau loses when workers fail to meet their calculated life expectancies. See *id.* at 15-18.

Plaintiffs misstate *Shively*. First, as noted above, *Shively* actually confirms that Defendants may continue to commute an injured worker's PTD payments after recovering the full amount of his LSA. 71 Ohio St. 3d at 116 (citing *Funtash*, 154 Ohio St. at 497). Moreover, the widow in *Shively* did not sign a contract with the Bureau agreeing to an LSA for her stepchildren, nor did she ever benefit from that advancement. And she had no reason to know the terms to which the parties to the LSA actually agreed. Plaintiffs here, by contrast, sought the LSAs and enjoyed the benefits of their respective bargains. Distributing the cost of LSAs across a class of recipients, under contractual terms that each recipient explicitly accepts, is neither unlawful nor unfair. Thus, Plaintiffs have no right to recover more than what they agreed to over fifteen years ago.

Moreover, based on their flawed interpretations of *Funtash* and *Shively*, Plaintiffs mistakenly rely on cases in which plaintiffs sought restitution of amounts that were withheld

under laws that a court has already deemed illegal. Specifically, Plaintiffs' arguments center on two decisions in which courts determined that a plaintiff's claim for money withheld by the State under an invalid administrative rule was equitable, not legal, in nature. See Pls.' Opp. Br. 7-9 (discussing *Ohio Hosp. Ass'n v. Ohio Dep't of Human Servs.* (1991), 62 Ohio St. 3d 97, 103-04; *Henley Health Care v. Ohio Bureau of Workers' Comp.* (10th Dist. Feb. 23, 1995), No. 94APE08-1216, 1995 Ohio App. Lexis 715). Both are inapposite.

In *Ohio Hospital Association*, plaintiff's claim for the reimbursement of monies stemming from the defendant's adoption of an administrative rule, which this Court held invalid, was one for equitable rather than legal relief. 62 Ohio St. 3d at 99, 103. This Court explained that "[d]amages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." *Id.* at 105 (internal citations omitted). Similarly, in *Henley Health Care*, this Court declared plaintiff's suit to recover money withheld by the Bureau under a rule later deemed invalid to be equitable: "If the rules are invalid and if the [money] was withheld pursuant to these 'rules,' then appellant would be entitled to the specific performance of reimbursement of that sum." 1995 Ohio App. Lexis 715, at *9.

Unlike the plaintiffs in the above cases, who were entitled to the remedies they sought upon the invalidation of the relevant rules, Plaintiffs have no right to the funds they seek. Plaintiffs altered the form and the nature of their statutory PTD payments when they applied for and were granted LSA agreements, and they have already received the benefit of their bargains under the terms of those contracts. Thus, as in *Cristino*, where the plaintiff sought to recover *more* than the "present value" amount for which he had previously contracted, Plaintiffs here seek *more* money than what they were bound to receive under their LSA agreements. See Defs.' Merits Br. 15.

Plaintiffs cannot have their cake and eat it too—they have already reaped the benefits of their LSAs, and they are bound to the terms of their agreements.

C. O.A.C. 4123-3-37 does not affect the narrow jurisdictional question before this Court.

Finally, Plaintiffs' reliance on O.A.C. 4123-3-37 is misplaced. In December 2004, the Bureau rewrote its LSA policies and promulgated O.A.C. 4123-3-37. See Defs.' Merits Br. 6. Under O.A.C. 4123-3-37, when the administrator grants an LSA, she fixes a "specific time" for the reduction of the biweekly PTD payments, and when the full LSA is repaid, she restores the injured worker's PTD payments to their original amount. O.A.C. 4123-3-37(B)(3), (C)(3). Thus, under the new policies, once the Bureau recovers the full amount of an injured worker's previously granted LSA, it stops commuting that worker's regular PTD payments and restores them to the original amount mandated by R.C. 4123.58.

The Bureau specifically stated that the provision is *not* retroactive. See Defs.' Merits Br. 17. Nonetheless, Plaintiffs assert that this Court must consider O.A.C. 4123-3-37 because it "represents the Bureau's first formal interpretation of the applicable statutes, an interpretation which supports plaintiffs' position. . . as to the illegality of the bureau's conduct under those statutes." Pls.' Opp. Br. 23.

Plaintiffs are mistaken. Although O.A.C. 4123-3-37 changed the Bureau's methods for granting LSAs *after* December 1, 2004, it has no bearing on the contracts entered into by Plaintiffs more than fifteen years prior.

Regardless, the rule is immaterial to the simple issue before this Court—whether Plaintiffs' claims are legal or equitable. The fact that the Bureau revised its administrative rules several years after Plaintiffs contractually altered the terms of their PTD payments is immaterial to the Court's evaluation of "the basis for [their] claims and the nature of the underlying remedies sought." *Great-West*, 534 U.S. at 213. In fact, Plaintiffs concede as much when they state that

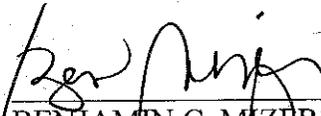
“[t]he specific applicability of O.A.C. 4123-3-37 to this case is a matter for the merits and *not before this Court when considering whether dismissal is appropriate.*” Pls.’ Opp. Br. 22-23 (emphasis added).

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.

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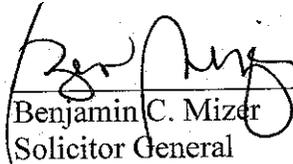
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Defendants-Appellants Industrial Commission and Bureau of Workers' Compensation was served by U.S. mail this 7th day of October, 2010, upon the following counsel:

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