IN THE SUPREME COURT OF OHIO

CASE NO. 02-1314

ANGEL L. SANTOS, *et al*.
Plaintiff-Appellants,

-vs-

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

ON APPEAL FROM CUYAHOGA COUNTY
COURT OF APPEALS
CASE NO. 80353

BRIEF ON THE MERITS OF PLAINTIFF-APPELLANTS, ANGEL L. SANTOS, *et al*.

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STATEMENT OF CASE AND FACTS

A. NATURE OF THE CASE.

In this class action proceeding, Plaintiff-Appellant, Angel L. Santos, is seeking, on behalf of himself and all other Ohio workers who have paid subrogation claims pursuant to *R.C. §4123.931,* to require Defendant-Appellees, Administrator, Bureau of Workers Compensation and the State of Ohio (hereinafter collectively the "Bureau"), to return the improperly collected funds. Since only injunctive, declaratory, and equitable relief has been sought, the proceedings were commenced in the Cuyahoga County Court of Common Pleas in accordance with *R.C. §2743.03(A)(2).* Apart from mentioning the issue as one of the many affirmative defenses, the Bureau did not raise any objections to jurisdiction for almost two (2) years. After the parties engaged in substantial discovery and motion practice on the merits, Judge Burt W. Griffin eventually granted class certification. In the Bureau's ensuing interlocutory appeal, the Eighth District did not specifically address this ruling but dismissed the equitable claims for disgorgement of the unjustly retained sums on the grounds that only the Court of Claims has the authority to resolve such matters. *Exhibit C.*

B. COURSE OF PROCEEDINGS.

Plaintiffs filed their Class Action Complaint for Declaratory and Injunctive Relief on October 15, 1999 in the Cuyahoga County Court of Common Pleas. Therein, they alleged that the Bureau had misapplied the definition of "third party" set forth in *R.C. §4123.93* to include employers participating in the workers' compensation system. Additionally, Plaintiffs argued that the workers' compensation subrogation statute, *R.C. §4123.931*, violated the Ohio and United States Constitutions. The prayer was limited to the following relief:

> **WHEREFORE**, Santos, both individually and on behalf of the aforementioned Class A and Class B, hereby requests that this

> Court conclusively declare that the Administrator's and employers' attempts to assert subrogation rights as aforementioned are unlawful and/or unconstitutional, impose appropriate injunctive relief, and issue an award of attorney fees, litigation expenses, and court costs in favor of Santos and the proposed classes. ***

The Bureau served its Answer denying these contentions on November 17, 1999. This pleading contained a "cross-claim" against the Named Plaintiff, Angel L. Santos, based upon statutory subrogation rights.[1] The Bureau demanded reimbursement of One Hundred Twenty One Thousand Nine Hundred Forty One Dollars and Three Cents ($121,941.03) for Workers' Compensation Benefits paid plus additional amounts for "medical services and compensation" received while the action is pending and also "future estimated values of compensation and medical benefits". The Named Plaintiff filed his Answer to the "cross-claim" on November 24, 1999.

On May 11, 2000, the Bureau submitted its Motion for Summary Judgment on the merits. Plaintiffs tendered their own Cross-Motion for Summary Judgment on June 9, 2000. Therein, they agreed with the Bureau that the pertinent facts were not in dispute and the merits of the case could be resolved upon issues of law. Plaintiffs maintained that the Bureau had been collecting subrogation claims from the proposed class members under the auspices of the invalid statutes. Return of these funds was requested under the equitable theory of restitution. More specifically the Conclusion to the Motion sought an order for the "return all funds collected as a result of [the Bureaus'] misapplication and improper enforcement of these statutes." Additional briefs were thereafter submitted by the parties.

Plaintiffs moved for class certification on July 17, 2000. The Bureau strenuously opposed this application in a Response served on August 2, 2000. Plaintiff submitted a Reply on August 31, 2000 addressing the Bureau's unfounded concerns.

[1] The "cross-claim" was actually a counterclaim. *Civ. R. 13(A).*

On June 27, 2001, the Ohio Supreme Court issued its ruling in *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 2001-Ohio-109, 748 N.E.2d 1111, and held that the workers' compensation subrogation statute, *R.C. §4123.931*, was unconstitutional in its entirety. Plaintiffs filed their Notice of Supplemental Authority on August 2, 2001 advising the trial court of this decision. Plaintiffs further argued that summary judgment was plainly appropriate in favor of the class members as a result of this binding precedent. They reiterated their request for the imposition of the equitable remedy of restitution.

Suddenly, the Bureau decided that the nearly two (2) year old lawsuit belonged in the Court of Claims. The Bureau served a Motion to Dismiss founded upon doctrine sovereign immunity on August 10, 2001. Plaintiffs tendered their Memorandum in Opposition thereto on August 23, 2001. Citing *R.C. §2743.03(A)(2)* and a plethora of judicial decisions, Plaintiffs argued that the General Assembly had specifically authorized common pleas courts of general jurisdiction to issue equitable, injunctive, and declaratory relief against state agencies.

In its Memorandum in Response to Plaintiff's Notice of Filing of Supplemental Authority of August 10, 2001, the Bureau implored Judge Griffin to refrain from ruling upon the pending class certification and summary judgment motions until the application for reconsideration was addressed by the Ohio Supreme Court in *Holeton*. Meanwhile, the Bureau's counsel voluntarily consented to class certification on August 31, 2001 in an action that had been filed days earlier in the Ohio Court of Claims. *Gabbard vs. Ohio Bureau of Workers' Compensation*, Ohio Court of Claims Case No. 2001-07459. During a pre-trial that was then held by the Court in the instant action on September 5, 2001, the Bureau's counsel argued that class certification was now unnecessary because a class had already been "approved" in the Court of Claims. In response, Judge Griffin disclosed to the parties that a ruling had been prepared resolving the pending

motions but had been put on hold in order to await the outcome of the *Holeton* Motion for Reconsideration as the Bureau had requested. Class certification was then granted in an Order dated September 18, 2001.

On September 26, 2001, the Ohio Supreme Court denied the Motion for Reconsideration that had been filed in *Holeton, supra*. The Bureau served a Notice of Concession two (2) days later in the proceedings below proclaiming that:

> The highest court in Ohio has now definitively determined that *R.C. 4123.931* is unconstitutional. Based on such determination, the Ohio Bureau of Workers' Compensation cannot assert its subrogation rights under that statute in the instant case.

However, the Bureau did not refund any of the subrogation claims collected under the unconstitutional statute. Moreover, the Bureau did not dismiss the "cross-claim" seeking a judgment against the Named Plaintiff, Angel L. Santos, in the amount of One Hundred Twenty-One Thousand Nine Hundred Forty-One Dollars and Three Cents ($121,941.03).

As authorized by *R.C. §2505.02*, the Bureau filed its Notice of Appeal of the Class Certification Order on October 12, 2001. In its Brief, the Bureau argued that not only was the class certification inappropriate, but also that the Court of Claims was the only proper forum for this proceeding. Judge Griffin never had an opportunity to address this latter contention, which had been raised only as a apparent afterthought late in the trial court litigation. In a Journal Entry and Opinion issued on June 17, 2002, the Eighth District initially observed that a common pleas court would have jurisdiction to hear a class action seeking strictly injunctive relief against the State. *Exhibit C, ¶ 17.* The panel held, however, that because the equitable claim of restitution was ultimately "seeking the return of money from the state" only the Court of Claims had sole authority over the matter. *Id., pp. 8-10.* In accordance with *App. R. 25*, Plaintiffs submitted their Motion to Certify Conflict on June 12, 2002 arguing that this ruling could not be

reconciled with *Judy, supra*. Without waiting for a response from the Bureau, the Eighth District summarily denied this request seven (7) days later.

On July 31, 2002, Plaintiffs filed their timely Notice of Appeal in this Court. *See Exhibit A, appended hereto*. Jurisdiction was accepted over their sole proposition of law on November 20, 2002. *See Exhibit B, appended hereto*. Plaintiffs hereby submit their Brief on the Merits.

ARGUMENT

AN ACTION SEEKING DISGORGEMENT OR RETURN OF FUNDS WRONGFULLY COLLECTED OR HELD BY THE STATE PURSUANT TO AN INVALID STATUTE OR ADMINISTRATIVE RULE IS AN EQUITABLE PROCEEDING OVER WHICH THE COURTS OF COMMON PLEAS MAY EXERCISE JURISDICTION CONCURRENTLY WITH THE COURT OF CLAIMS.

A. OVERVIEW.

In light of the language employed in the Court of Claims Act and the prior rulings on the subject, the Eighth District's dismissal of the equitable claims for restitution was surprising. As previously noted, the Bureau did not submit their Motion challenging the Common Pleas Court's exercise of subject matter jurisdiction until the action had been pending for almost two (2) years. At that point in time, the only appellate decision on the subject had upheld the validity of such proceedings. *Henley Health Care v. Ohio Bureau of Workers' Comp.* (February 23, 1995), 10th Dist. No. 94APE08-1216, 1995 W.L. 92101, copy appended hereto as *Exhibit D.* While the instant action was pending in the trial court, the Sixth District issued the decision in *Judy v. Bureau of Motor Vehicles*, 6th Dist. No. L-01-1200, 2001-Ohio-2909, 2001 W.L. 1664295, copy appended hereto as *Exhibit E,* reaching the same result. Although the issue of subject matter jurisdiction had been specifically addressed therein, the State opted against challenging this aspect of the opinion in their ensuing appeal to this Court.[2] It was not until the Eighth District issued its startling ruling in the instant case that any on-point authority existed for the notion that only the Court of Claims has jurisdiction to consider an equitable claim for relief that could result in funds being returned by the State.

[2] This Court accepted the State's Proposition of Law No. I for review, as well as the Plaintiff's cross-appeal, on June 4, 2002 *Judy v. Ohio Bur. of Motor Vehicles*, 95 Ohio St.3d 1478, 2002-Ohio-2496, 769 N.E.2d 395. The only issues that will be addressed are the State's right to collect the fees in question and the Plaintiffs' entitlement to post-judgment interest. The State's remaining propositions of law did not mention subject matter jurisdiction or sovereign immunity.

B. NATURE OF THE COMPLAINT.

As a general rule, the plaintiffs are the masters of their complaints. *The Fair vs. Kohler Die & Specialty Co.* (1913), 228 U.S. 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716; *Merrell Dow Pharmaceuticals Inc. vs. Thompson* (1986), 478 U.S. 804, 809, 106 S. Ct. 3229, 3233, 92 L.Ed.2d 650 fn. 6; *Great Northern Ry Co. vs. Alexander* (1918), 246 U.S. 276, 282, 38 S. Ct. 237, 239-240, 62 L. Ed. 713. In accordance with this authority, Plaintiffs have made a conscious decision to pursue only equitable and declaratory remedies in these proceedings. Previous cases had recognized, in general, that such claims against the State can be adjudicated by any court of common pleas. *Racing Guild of Ohio vs. Ohio State Racing Commn.* (1986), 28 Ohio St.3d 317, 319-320, 503 N.E.2d 1025, 1028; *Ohio Hosp. Assn. vs. Ohio Dept. of Human Services* (1991), 62 Ohio St.3d 97, 103-104, 579 N.E.2d 695, 700.

C. THE LAW/EQUITY DISTINCTION.

The fundamental issue of law presented herein turns upon the historic distinction between actions at law and equity. See generally, *Armstrong School Dist. vs. Armstrong Education Assn.* (1991), 528 Pa. 170, 174, 595 A.2d 1139, 1141 fn. 2, copy appended hereto as *Exhibit F; Barbash vs. Barbash* (Fla. 1952), 58 So.2d 168, 171 (Hobson, J, concurring), copy appended hereto as *Exhibit G.* As in most American jurisdictions, Ohio abolished the division between courts of law and equity upon the adoption of the Code of Civil Procedure in 1853. *In re Estate of Wyckoff* (1957), 166 Ohio St. 354, 357, 142 N.E.2d 660, 663. This does not mean, however, that substantive rights were eliminated. *Grupo Mexicano Desarrollo, S.A. vs. Alliance Bond Fund, Inc.* (1999), 527 U.S. 308, 322, 119 S. Ct. 1961, 1970, 144 L.Ed.2d 319; *Briggs vs. Lincoln Wood Condo. Unit Owners' Assn.* (August 6, 1986), 1st Dist. No. C-850762, 1986 W.L. 8522, p. 2, copy appended hereto as *Exhibit H.* Rather, common pleas courts in Ohio may

exercise general jurisdiction in both law and equity. *Van Stone vs. Van Stone* (1952), 95 Ohio App. 406, 409, 120 N.E.2d 154, 156; *Royal Indemnity Co. vs. McFadden* (1940), 65 Ohio App. 15, 19-20, 29 N.E.2d 181, 183; *General Motors Acceptance Corp. vs. Thomas* (1968), 15 Ohio Misc. 267, 272, 237 N.E.2d 427, 430.

This historical distinction is not merely academic as a result of this merger. Ohio courts are still frequently required to afford different treatment to actions at law and equity. For example, this distinction is critical for determining when and how claims are to be resolved by a jury. *Cross vs. Ledford* (1954), 161 Ohio St. 469, 475, 120 N.E.2d 118; *Sabatio vs. Capello* (January 19, 1989), 8th Dist. No. 54943, 1989 W.L. 4174, p. 1, copy appended hereto as *Exhibit I*; *Crane vs. Cheek* (1970), 27 Ohio App.2d 27, 29, 272 N.E.2d 159, 161. Various remedies might also be available under one form of action, but not the other. *America Rents vs. Crawley* (1991), 77 Ohio App.3d 801, 804, 603 N.E.2d 1079, 1080.

D. THE COURT OF CLAIM'S EXCLUSIVE JURISDICTION.

For purposes of the instant case, the fundamental demarcation that has been drawn between legal and equitable actions lies at the heart of the statute establishing the jurisdiction of the Court of Claims. Generally, "civil actions against the state" can be heard only by this statutorily created tribunal. *R.C. §2743.03(A)(1).* The General Assembly has specifically provided in clear and unmistakable terms, however, that the other courts of Ohio retain the authority to adjudicate lawsuits "in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief." *R.C. §2743.03(A)(2).* The legislature has thus maintained the distinction between legal and equitable remedies for purposes of the exclusive jurisdiction of the Court of Claims.

In the proceedings below, the appellate court departed from this unambiguous legislative

enactment and engaged in its own policy analysis of whether this class action belongs in the Court of Claims. *Exhibit C*, ¶ 15-20. Pursuant to *R.C. §1.42*, words and phrases utilized in Ohio statutes are to be construed "according to the rules of grammar and common usage." Courts may not judicially rewrite legislation under the guise of "statutory construction". *State ex rel. Myers v. Chiaramonte* (1976), 46 Ohio St.2d 230, 238, 348 N.E.2d 323. Regardless of policy implications, plain and unambiguous language may not be ignored. *Board of Edn. v. Fulton County Budget Comm.* (1975), 41 Ohio St.2d 147, 156, 324 N.E.2d 566; *Guear v. Stechschulte* (1928), 119 Ohio St. 1, 7, 162 N.E. 46. The question is "not what the General Assembly intended to enact, but what the meaning is of that which it did enact." *Siegfried v. Everhart* (1936), 55 Ohio App. 351, 354, 9 N.E.2d 891, 892.

In accordance with these sound maxims, this Court should steer clear of the Bureau's inevitable arguments that the legislature really meant to require all actions for "money", both legal and equitable, to be litigated in the Court of Claims. In this regard, *R.C. §2743.03(A)(2)* could not be more clear. Common Pleas Courts have been granted broad authority to resolve actions against the State for "declaratory judgment, injunctive relief, or other equitable relief" without restriction or limitation. Even equitable claims that will force the Treasurer to disgorge "money" (if successful) are thus exempted from the Court of Claims Act. Rather than speculate as to what the legislature actually had in mind, the statute must be enforced in accordance with its plain and ordinary meaning. *Hubbard v. Canton City Schs.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543.

E. RESTITUTION AS AN EQUITABLE REMEDY.

Contrary to the Eighth District's logic, a complaint seeking "restitution" is <u>not</u> the equivalent of an action for money damages. See generally, *Harris Trust & Savings Bank* (2000),

530 U.S. 238, 250-251, 120 S. Ct. 2180, 2189-2190, 147 L.Ed.2d 187; *Schwartz vs. Gregori* (6th Cir. 1995), 45 F.3d 1017, 1021-1023. "Restitution is generally considered an equitable remedy." *Erie County Drug Task Force vs. Cunningham* (May 27, 1994), 6th Dist. No. E-93-74, 1994 W.L. 236216, p. 2, copy appended hereto as *Exhibit J.* Its purpose is to restore the aggrieved party to the *status quo ante*. *Aviation Sales, Inc. vs. Select Mobile Homes* (1988), 48 Ohio App.3d 90, 94, 548 N.E.2d 307, 311. The Cuyahoga County Court of Appeals had previously explained that:

> Restitution is an equitable remedy used to make an injured party whole. At the core of the law of restitution is the principal that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other . . ." Restatement (1937), Restitution, p. 1.

Colangelo vs. Cashelmara Co. (November 21, 1990), 8th Dist. No. 57581, 1990 W.L. 180653, p. 4, copy appended hereto as *Exhibit K.* Conversely, compensatory damages "are, of course, the classic form of *legal relief*." *Mertens vs. Hewitt Assocs.* (1993), 508 U.S. 248, 255, 113 S. Ct. 2063, 2068, 124 L.Ed.2d 161. Indeed, restitution is properly viewed as an alternative to damages. *2044 Euclid Partners vs. Williamson* (April 10, 1986), 8th Dist. No. 49963, 1986 W.L. 4386, copy appended hereto as *Exhibit L; Kalasunas vs. Brydle* (June 18, 1987), 8th Dist. No. 52149, 1987 W.L. 13012, copy appended hereto as *Exhibit M.*

Yet, the Court of Appeals has held in this case that any action that may force a state agency to return funds – even if styled as an equitable or restitutional claim – is really a proceeding at "law" that falls outside the exception for "equitable relief" codified in *R.C. §2743.03(A)(2). Exhibit B, ¶ 18-19.* This overly simplistic standard was recently disapproved by the Supreme Court of the United States in *Great West Life & Annuity Ins. Co. v. Knudson* (2002), 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635. Writing for the majority, Justice Scalia

examined the phrase "equitable relief" as employed in §502(a)(3) of the Employee Retirement Income Security Act (ERISA). A group health insurer was attempting to enforce a plan provision that allegedly required the insured to repay benefits previously issued. The opinion initially observed that "[i]n the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity." *Id.,* 534 U.S. at 714 (citations omitted). Where the plaintiffs sought payment for some benefit that had been provided to the defendant, the action was viewed as a proceeding "at law" akin to a claim for breach of an express or implied contract. *Id.* Since the insurer in *Knudson* had based its theory of relief upon "a contractual obligation to pay money", the claim could not be characterized as "equitable" under the statute. *Id.,* at 719.

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

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

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

This is precisely the type of relief that Plaintiffs are seeking in the instant case. None of the class members are claiming any rights to a contract, either express or implied, that would

somehow entitle them to damages. Rather, they maintain that the Bureau is unjustly withholding approximately Fifty Million Dollars ($50,000,000.00) of subrogation claims that were paid as a result of the unconstitutional statute. Plaintiffs are requesting disgorgement of the funds that rightfully belong to them, and have no interest in imposing personal liability upon the State. The General Assembly has specifically preserved the right of common pleas courts to award such equitable relief. *R.C. §2743.03(A)(2).*

This Court, more than a decade before *Knudson*, 534 U.S. 204, had reached the identical conclusion in *Ohio Hosp. Assn.,* 62 Ohio St.3d at 98, 579 N.E.2d at 696. A lawsuit had been filed by several hospitals in the Court of Claims arguing that the Ohio Department of Human Services had adopted administrative regulations that allowed funds to be withheld in violation of their state and federal constitutional rights. This Court affirmed the trial judge's conclusion that the rules were unenforceable. *Id,* 62 Ohio St.3d at 102, 579 N.E.2d at 699. The State nevertheless argued that it was "immune from money damages for the promulgation of invalid administrative rules." *Id,* 62 Ohio St.3d at 103, 579 N.E.2d at 699. The majority initially observed with interest that *R.C. §2743.03(A)(2)* had been revised to expressly sanction earlier judicial rulings holding that an action against the State seeking only injunctive or declaratory relief could be brought in a Court of Common Pleas. *Id,* 62 Ohio St.3d at 103-104, 579 N.E.2d at 700 (citation omitted). They then reasoned that:

> ***[S]overeign immunity is not applicable to the relief granted in this case. The order to reimburse Medicaid providers for the amounts unlawfully withheld is not an award of money damages, but equitable relief. *** The reimbursement of monies withheld pursuant to an invalid administrative rule is equitable relief, not money damages, and is consequently not barred by sovereign immunity. [emphasis added.]

Id, 62 Ohio St.3d at 104-105, 579 N.E.2d at 700; see also *Keller vs. Dailey* (1997), 124 Ohio

App.3d 298, 304, 706 N.E.2d 28, 31-32. Although the hospitals chose to litigate the equitable issues in the Court of Claims, they could have elected to seek restitution in a Common Pleas Court. *Ohio Academy of Nursing Homes, Inc. vs. Barry* (May 25, 1993), 10th Dist. No. 92AP-1266, 1993 W.L. 186656, copy appended hereto as *Exhibit O*. The Eighth District's holding in the instant proceedings is directly at odds with *Ohio Hosp. Assn., supra.*

The proper approach to this issue is aptly reflected in *Henley Health Care, supra*. In that case, the Tenth District had also recognized that a claim for restitution is equitable when no contractual rights are involved. In that instance, a health care provider was seeking the return of funds that had been withheld by the Bureau pursuant to invalid regulations. The unanimous panel held that under established precedents, the common pleas court could exercise jurisdiction over the dispute. *Exhibit D.*

The same sound result was reached by the Sixth District in *Judy, supra*. A class action had been filed in the Lucas County Court of Common Pleas against the Bureau of Motor Vehicles seeking to recover improperly collected reinstatement fees. After examining the applicable authorities, the unanimous panel had little difficulty disposing of the State's argument that the action could only be heard in the Court of Claims. They explained that:

> In this case, [plaintiffs'] complaint sought injunctive relief and simple reimbursement of the allegedly improperly assessed fees. Contrary to [the State's] argument, these claims were not "money damages," *i.e.* compensation in substitution for other injuries. We agree with the trial court's determination that these claims are within the exceptions provided by *R.C. 2743.03(A)(2)*. Therefore, the common pleas court properly invoked its jurisdiction.

Exhibit E, p. 2. Oddly, the Eighth District's contrary ruling contains no reference to either *Henley Health Care, supra* or *Judy, supra*, even though both opinions had been prominently cited by Plaintiffs.

Perhaps most peculiarly, the appellate decision that was issued below conflicts with at least one prior opinion issued by the same Court. In *Oakar v. Ohio Dept. of Mental Retardation* (1993), 88 Ohio App.3d 332, 623 N.E.2d 1296, an estate administrator was seeking a refund of Sixty-Nine Thousand Three-Hundred Sixty-Eight Dollars and Sixty-Five Cents ($69,368.65) from the State in the Probate Division of the Cuyahoga County Court of Common Pleas. He maintained that the funds had been paid in error. The Eighth District had no problem permitting that action to succeed against the state, even though "money" was collected from the treasury. They initially recognized the sound principle – which is not being challenged in the instant appeal – that the inclusion of a claim for declaratory or injunctive relief cannot serve to permit an action otherwise at law to avoid the Court of Claims in violation of *R.C. §2743.03*. *Id*., 88 Ohio App.3d at 335-336. Where the lawsuit is limited, however, to declaratory, injunctive, or "other equitable relief" as provided in *R.C. §2743.03(A)(2)*, any common pleas court has concurrent jurisdiction over the proceedings. The panel then unanimously held that:

> Remedy for loss suffered is the kind of damages action the Court of Claims Act prohibits filing against the state in any court except in the Court of Claims. An attempt to give plaintiff in equity that which he is entitled and deny the state that to which it is not entitled is "other equitable relief" contemplated by the General Assembly in R.C. 2743(A)(2) and can be granted by the probate court when properly before it.
>
> In the instant case, appellee's action was an equitable action seeking to prevent the state from unjustly enriching itself from the money he believed the state obtained illegally. This is not a civil suit for money damages where ancillary relief of declaratory judgment, injunction or other equitable relief is sought. It is an action solely on declaratory judgment and equitable relief of preventing unjust enrichment. [emphasis added]

Id., 88 Ohio App.3d at 337-338**.**

Quite clearly, the Plaintiffs in the case *sub judice* are seeking a "refund" from the Bureau

of subrogation payments that were improperly collected. Under the compelling rationale of *Oakar*, they should have been permitted to proceed in the Court of Common Pleas. See *Bee v. University of Akron*, 9th Dist. No. 21081, 2002 W.L. 31387127, 2002-Ohio-5776, copy appended hereto as *Exhibit P* (Following and applying *Oakar* to claim that would have allowed a professor to receive retirement funds and benefits from the state.); *Zelenak v. Industrial Commn.*, 148 Ohio App.3d 589, 2002-Ohio-3887, 774 N.E.2d 769 ¶19 (Holding that claim for interest due was "legal relief" but recognizing that the "reimbursement of the overpayments collected from [workers compensation claimants] or payment of the [temporary total disability] 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.")

F. BASIS FOR THE UNDERLYING RULING.

Wanting nothing to do with these compelling opinions, the Bureau has repeatedly cited judicial decisions in these proceedings that were issued before 1988 S.B. 344 revised *R.C. §2743.03* to specifically permit equitable actions against the State to be brought in a court of common pleas. *Friedman vs. Johnson* (1985), 18 Ohio St.3d 85, 480 N.E.2d 82; *Plastic Surgery Assocs. vs. Ratchford* (1982), 7 Ohio App.3d 118, 454 N.E.2d 567; *Collins vs. University of Cincinnati* (1981), 3 Ohio App.3d 183, 444 N.E.2d 459; *Hawley vs. Bowling Green State Univ.* (September 2, 1988), 6th Dist. No. W.D.-87-32, 1988 W.L. 91327, copy appended hereto as *Exhibit Q*. Other rulings cited by the Bureau involved complaints in which the plaintiffs had explicitly raised legal claims for monetary damages. *Manning vs. Ohio State Library Board* (1991), 62 Ohio St.3d 24, 26, 577 N.E.2d 650, 652 fn. 4. Since the immediate Complaint was limited to injunctive, declaratory, and equitable relief as permitted by revised *R.C. §2743.03*,

these authorities are inapposite.

One of these pre-S.B. 344 rulings cited by the Bureau eventually formed the basis of the Eighth District's misguided decision. *Exhibit C, ¶ 15*. In *Friedman*, 18 Ohio St.3d 85, this Court examined *R.C. §2743.03* several years before the General Assembly revised the statute to permit common pleas courts to award equitable relief against the State. While *Friedman* thus reached the correct result at the time, this decision is of little value given the current state of the law. It is thus apparent that the Eighth District premised its ruling on outdated authorities.

In straining to expand the scope of the Court of Claims' exclusive jurisdiction substantially beyond that which was adopted by the General Assembly, the lower court fashioned "a presumption that a claim against the state should be filed in the Court of Claims unless the plaintiff demonstrates otherwise." *Exhibit C, p. 7.* No authorities - statutory, judicial, or even scholarly - were cited in support of this novel proposition. The holding is peculiar, as presumptions exist largely to address absences of evidentiary proof. *In Re Guardianship of Breece* (1962), 173 Ohio St. 542, 553-554, 184 N.E.2d 386, 393; *Ayers v. Woodard* (1957), 166 Ohio St. 138, 144-145, 140 N.E.2d 401, 406. Questions of subject matter jurisdiction are generally issues of law reserved for the courts and not the trier of fact. *Valmac Industs. v. Ecotech Mach.* (2000), 137 Ohio App.3d 408, 411-412, 738 N.E.2d 873, 875. Simply put, either a court has constitutional or statutory authority to resolve a dispute or it does not. Rather than engage in "presumptions", the Eighth District should have resolved this issue of law based solely upon the words and phrases appearing in the Court of Claims Act. At the risk of being repetitive, nothing therein even remotely suggests that common pleas courts can hear equitable claims against the State only if the plaintiffs disavow any intention of collecting a monetary recovery.

G. IMPACT OF REQUEST FOR ATTORNEY FEES.

On a final note, the mere fact that Plaintiffs have requested attorney fees should not serve to convert this proceeding to one at law. Since a class action is being pursued, such an award would not be imposed against the Bureau. The fees, if any, are a percentage of the funds successfully collected by Plaintiffs' counsel. *State ex rel. Montrie Nursing Home v. Creasy* (1983), 5 Ohio St.3d 124, 127, 449 N.E.2d 763, 766; *Hurst v. Cavanaugh* (August 21, 1992), 7th Dist. No. 90-J-7, 1992 W.L. 208918, copy appended hereto as *Exhibit R.* Such recoveries are founded squarely upon principles of equity. *Smith v. Kroeger* (1941), 138 Ohio St. 508, 37 N.E.2d 45, paragraph three of the syllabus. Plaintiffs' request for attorney fees thus falls within the jurisdictional exception established in *R.C. §2743.03(A)(2).*

CONCLUSION

For the foregoing reasons, this Court should afford *R.C. §2743.03(A)(2)* its plain and ordinary meaning, adopt Plaintiffs' proposition of law, and hold that actions against the State of Ohio seeking declaratory, injunctive, or equitable relief may be resolved by a court of common pleas. This action should then be remanded for further proceedings.

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CERTIFICATE OF SERVICE

A copy of the foregoing **Brief** has been sent regular U.S. Mail to James A. Barnes, Esq., Attorney for Defendants, Administrator, Ohio Bureau of Workers' Compensation, at 140 East Town Street, 9th Floor, Columbus, Ohio 43215-6001 on this 14th day of February, 2003.

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